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*.

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

NEW YORK STATE PUBLIC EMPLOYEES FEDERATION, AFL-CIO,

Charging Party, **CASE NO. U-33126**

- and -

STATE OF NEW YORK (STATE INSURANCE FUND),

Respondent.

BRADLEY KOLB, for Charging Party

MICHAEL N. VOLFORTE, ACTING GENERAL COUNSEL (TERESA A. NEWCOMB of counsel), for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the State of New York (State Insurance Fund) (State or SIF) to a decision of an Administrative Law Judge (ALJ) finding that the State violated § 209-a.1 (d) of the Public Employees' Fair Employment Act (Act). The ALJ found that the State violated the Act when it discontinued the practice of assigning a State-owned vehicle to SIF Department of Confidential Investigations (DCI) Insurance Field Investigators which Field Investigators could use to commute to and from work.[1] The DCI Insurance Field Investigators at issue are represented by the New York State Public Employees Federation, AFL-CIO (PEF).

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[1] 52 PERB ¶ 4547 (2019).

EXCEPTIONS

The State filed 12 exceptions to the ALJ's decision, which articulate three grounds for reversal of the ALJ's decision. The State argues that provision of take-home vehicles to DCI Insurance Field Investigators is not a mandatory subject of bargaining because such vehicles are equipment or because provision of vehicles is a prohibited subject of bargaining.[2] The State further contends that it reserved the right to revoke take-home vehicles through its Procedure Manual and Vehicle Use Policies and legitimately found that there was no longer a business need to assign such vehicles.[3]

Finally, the State excepts to the ALJ's remedy ordering the State to restore the practice of providing DCI Insurance Field Investigators with take-home vehicles and to make DCI Insurance Field Investigators whole for any economic losses suffered.[4] The State argues that this remedy is too broad and includes DCI Insurance Field Investigators who are not represented by PEF.

PEF filed a response supporting the ALJ's decision and contending that no basis has been demonstrated for reversal.

For the reasons given below, we affirm as modified the decision of the ALJ.

FACTS

The facts are set forth fully in the ALJ's decision and are repeated here only as necessary to decide the exceptions. The SIF is a self-supporting New York State agency, which sells Workers' Compensation and disability insurance to New York

[2] Exception Nos. 2, 3-4.
[3] Exception Nos. 5-11.
[4] Exception No. 1.

employers and administers the State employees' Workers' Compensation program.[5] The SIF employs approximately 2,400 people, in 10 separate locations.[6] The SIF DCI employs approximately 35 people, including incumbents in the titles of Senior Insurance Field Investigator and Customer Service Program Specialist (collectively, "Field Investigators").[7] These employees investigate Workers' Compensation claimant fraud, employer premium fraud, and provider fraud by performing surveillance, creating reports, and building cases with various law enforcement agencies.[8] They have been represented by PEF since 2007.[9]

The SIF promulgated a DCI Procedure Manual dated April 1, 2001.[10] That manual states, as relevant here:

> By the very nature of their work, Investigators are often called upon to conduct surveillance and other field investigative activities outside normal working hours.
>
> Vehicles are assigned to individual investigators solely in furtherance of DCI's mission. Use of vehicles for non-business purposes is prohibited, except to the extent that such use is incidental to a legitimate business purpose. For example, an Investigator may use the vehicle to drive from home to the office so that the vehicle will be available for use as needed during the course of the business day.

The SIF also promulgated a Vehicle Use Policy, dated October 2009 and revised, with no substantial changes, in August of 2012.[11] That policy states, in relevant part:

> Executive and the Department of Administration approval are

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[5] Tr, at 301.
[6] Tr, at 302-304; Respondent's Ex 1.
[7] Tr, at 305; Respondent's Answer, Ex A.
[8] Tr, at 70-71, 116, 150, 190, 211; Joint Exs 2, 3.
[9] Tr, at 310; Respondent's Ex 3.
[10] Charging Party's Ex 16.
[11] Tr, at 331-332; Respondent's Exs 6, 7.

> required for assignment of any New York State Insurance Fund (NYSIF) owned or operated vehicles. A Vehicle Assignment Form must be completed . . . . All operators of NYSIF vehicles are responsible to file the Taxable Value of Personal Use of Employer-Provided Vehicles form, if applicable…Records documenting NYSIF vehicle use and cost associated with this usage will be maintained by the Department of Administration.
>
> Any employee operating a NYSIF owned or rented vehicle must possess an appropriate, valid license to operate such vehicle in New York State. Operation of a NYSIF vehicle is to be solely used for business purposes, except to the extent that such usage is incidental to a legitimate business purpose. An operator may use the vehicle to drive to and from the office so that the vehicle will be available for use as needed during the course of the business day.

For many years prior to September of 2013, the SIF assigned State vehicles to Field Investigators for both work and personal use. The Field Investigators utilized their assigned State vehicle daily, to perform field work and to commute to and from their offices. They completed and submitted forms annually, documenting their personal use of the vehicles for tax purposes.[12]

On or about July 1, 2013, the SIF notified PEF that, pursuant to a revised Vehicle Policy, the vehicles assigned to the investigators would be rescinded, and would instead become fleet vehicles, or "pool cars."[13] The "pool car" policy states, in relevant part:

> All travel must be essential to NYSIF's mission and consistent with insurance business purposes…The New York State Insurance Fund abides by the Office of the State Comptroller's (OSC) Travel Manual. In the instance that NYSIF's internal policy conflicts with OSC policy, the OSC policy will override NYSIF's policy, unless expressly stated otherwise.
>
> Mass transit must be the first choice of transportation, if available… If a common carrier is not available an employee must request the use of a NYSIF "Pool" vehicle. The pool cars are the responsibility of the Pool Car Manager designated at each NYSIF location. All requests

[12] Charging Party's Exs 8-14.
[13] Charging Party's Ex 1.

> for the use of the pool car must be made to the Pool Car Manager via the NYSIF Vehicle Request Form. The Pool Car Managers will prioritize the need for vehicle use with first consideration given to the Department of Confidential Investigations (DCI). An e-mail confirmation will be issued from the Pool Car Manager indicating the vehicle's availability. **This e-mail confirmation/rejection is required and should be submitted with the traveler's expense report…DCI Investigators are required to use NYSIF Pool Vehicles when available while traveling on NYSIF business. Any exception to this requires written approval from the Executive to whom DCI reports.** (Emphasis and underlining in original).[14]

At PEF's request, the implementation date of the new "pool car" policy was postponed to September 16, 2013.[15] The SIF did not negotiate the change in policy with PEF prior to its implementation.[16]

DISCUSSION

We have long held that the provision of employer-owned vehicles to employees for personal use is an economic benefit and, therefore, a mandatory subject of negotiation.[17] Our holdings have been affirmed by the Court of Appeals.[18] Thus, a public employer may not unilaterally discontinue a past practice of providing its employees with a vehicle that can be used for personal purposes such as commuting. In order to establish an enforceable past practice, a charging party must demonstrate

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[14] Charging Party's Ex 6.
[15] Charging Party's Ex 4.
[16] Charging Party's Ex 5.
[17] *See, eg, State of New York (Dept of Transportation),* 50 PERB ¶ 3004, 3020 (2017), *confd sub nom, Spence v NYS Dept of Transportation*, 167 AD3d 1188, 51 PERB ¶ 7012 (3d Dept, 2018); *County of Nassau*, 38 PERB ¶3005, 3014 (2005), *citing County of Nassau*, 35 PERB ¶ 3036 (2002), *County of Monroe and Sheriff*, 33 PERB ¶ 3044, 3118 (2000), and *County of Nassau*, 26 PERB ¶ 3040, 3068 (1993), *confd sub nom County of Nassau v PERB*, 215 AD2d 381, 28 PERB ¶ 7011 (2d Dep't 1995).
[18] *Town of Islip v NYS Pub Empl Relations Bd*, 23 NY3d 482, 491, 47 PERB ¶ 7002 (2014), *confg as mod*, *Town of Islip*, 44 PERB ¶ 3013 (2011), *confd sub nom*, *Town of Islip v NYS Pub Empl Relations Bd*, 104 AD3d 778, 46 PERB ¶ 7004 (2d Dept 2013).

that the practice at issue 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.[19]

There is no dispute here that, for at least 20 years, Field Investigators were assigned SIF-owned vehicles on a full-time basis that were used for business purposes and for commuting to and from the employees' homes. The ALJ found, and we affirm, that this constitutes a practice that cannot be unilaterally changed. The State changed this practice without bargaining with PEF.

The State argues that provision of take-home vehicles is not a mandatory subject of bargaining because such vehicles are equipment.[20] We rejected this precise argument in *Town of Islip*, finding that comparing the benefit of commuting in employer-owned vehicles to the provision of equipment to be "a faulty analogy."[21] As we explained, the basis for our decisions finding that equipment is nonmandatory is that "such equipment relates directly to the manner and means by which [] services are provided to [the public employer's] constituency. The allocation of vehicles for employees' personal use does not."[22] Here, the provision of such vehicles was in significant part for personal use, and thus our holding in *Town of Islip* applies.

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[19] *Central NY Regional Transp Auth*, 52 PERB ¶ 3008, 3037 (2019); *see generally Chenango Forks Cent School Dist*, 40 PERB ¶ 3012, 3046-3047 (2007), *confd sub nom, Chenango Forks Cent Sch Dist v NYS Pub Empl Relations Bd*, 95 AD3d 1479, 45 PERB ¶ 7006 (3d Dept 2012), *affd*, 21 NY3d 255, 46 PERB ¶ 7008 (2013).
[20] Because it relates to the manner and means by which an employer renders its services to the public, the determination of the equipment which will be used by employees is non-mandatory. *See, eg, State of New York (Office of Medicaid Inspector General*, 50 PERB ¶ 3025 (2017); *County of Nassau*, 38 PERB ¶ 3030, 3101 (2005); *City of Albany*, 7 PERB ¶ 3078 (1974).
[21] 44 PERB ¶ 3014, at 3052.
[22] *Id*.

We also reject the State's argument that provision of take-home vehicles is a prohibited subject of bargaining under Civil Service Law (CSL) § 135. CSL § 135 provides that

> No person holding a position or employment in any department, bureau, commission or office to which this article applies and for which a definite salary or compensation has been appropriated or designated, shall receive any extra salary or compensation in addition to that so fixed except overtime compensation . . . .

The use of State-owned vehicles for commuting purposes, in addition to business purposes, is a fringe benefit, not additional salary or compensation. The State cites no precedent finding that such fringe economic benefits are prohibited by CSL § 135.

We have held that when a benefit is granted under an express reservation of right, which remains unchanged by subsequent negotiations, the modification or cessation of the benefit in accordance with the retained right cannot be considered an impermissible unilateral change.[23] The State argues that it reserved the right to revoke take-home vehicles. In support, it points to the testimony of Joseph Mullen, SIF's Director of Administration, that vehicles were assigned to Field Investigators because "we felt there was a business operational need that they have them;"[24] to the general rules on vehicle use contained in SIF's Procedure Manuals, issued April 1, 2001,[25] October 2009,[26] and August 2012;[27] and to the Vehicle Acknowledgement forms signed

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[23] *State of New York (Dept of Transportation),* 50 PERB ¶ 3004, at 3020; *County of Nassau*, 38 PERB ¶ 3030, 3101 (2005); *State of New York (Department of Health)*, 25 PERB ¶ 3005, 3018 (1992), *confd sub nom, Pub Employees Fedn v NYS Pub Empl Relations Bd*, 195 AD2d 930, 26 PERB ¶ 7008 (3d Dept 1993).
[24] Tr, at 327.
[25] CP Exh 16, at 8.
[26] R Exh 6, at 2.
[27] R Exh 7, at 2.

by Field Investigators.

We affirm the ALJ's rejection of this argument. It is undisputed that commuting to and from the office in the State-owned vehicles was allowed from the time employees were issued the vehicles. The language in SIF's manuals does not contradict this policy. The 2001 policy states that

> [u]se of vehicles for non-business purposes is prohibited, except to the extent that such use is incidental to a legitimate business purpose. For example, an Investigator may use the vehicle to drive from home to the office so that the vehicle will be available for use as needed during the course of the business day.[28]

The 2009 manual contains language stating that the

> [o]peration of a NYSIF vehicle is to be solely used for business purposes, except to the extent that such usage is incidental to a legitimate business purpose. An operator may use the vehicle to drive to and from the office so that the vehicle will be available for use as needed during the course of the business day.[29]

The 2012 manual contains identical language.[30] Thus, rather than prohibiting the use of State-owned vehicles for commuting purposes, the policies explicitly envision and allow for the use of SIF vehicles for commuting purposes. Even assuming that the State's initial reasons for assigning take-home vehicles was because "there was a business operational need that [Field Investigators] have them," as asserted by Mullen, allowing employees to use the vehicles to commute was part of that assignment and was condoned by SIF's policies.

The State asserts that the current case resembles *State of New York (Office of*

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[28] CP Exh 16, at 8.
[29] R Exh 6, at 2.
[30] R Exh 7, at 2.

State Comptroller) (hereinafter *OSC*).[31] In *OSC*, we dismissed a union's claim that the state employer violated its bargaining obligation when it unilaterally reduced the hourly pay rate of student assistants temporarily employed at the Office of the State Comptroller. We affirmed the ALJ's finding that the state employer established an enforceable past practice of annually determining the appropriate pay rate based on a consistent set of criteria. Because an annual determination was made, employees could not form a reasonable expectation of continued raises. We explained that "where the evidence of a practice to extend a benefit to employees establishes that a decision is made annually, and it is not automatic . . . the practice at issue is one which vests discretion in the employer."[32]

The current case is easily distinguishable from *OSC*. There is simply no record evidence that SIF engaged in any annual determinations about the assignment of take-home vehicles. Rather, the assignments here *were* automatic, and SIF did not retain discretion to change the practice. Thus, as we found above, employees had a reasonable expectation of continuing to receive take-home vehicles.

The State also argues that the effect of the change is *de minimis* because of the State's efforts to have vehicles parked near Field Investigators' homes. We find the change here to be more than *de minimis*. Not all vehicles were parked near the Field Investigators' homes, and all employees incurred an increase in commuting time as well as the loss of the convenience of having a vehicle parked at their homes overnight.

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[31] 48 PERB ¶ 3009 (2015).

[32] *OSC*, 48 PERB ¶ 3009, at 3030 (internal citations and editing marks omitted). *See also State of New York (Dept of Transportation)*, 50 PERB ¶ 3004, 3020 (2017); *State of New York (Dept of Health)*, 29 PERB ¶ 3005, 3018 (1992), *confd sub nom, PEF v NYS Pub Empl Relations Bd*, 195 AD2d 930, 26 PERB ¶ 7008 (3d Dept 1993).

Employees also incurred more wear and tear on their personal vehicles. All of this adds up to more than a *de minimis* change.[33]

Finally, the State argues that any remedy imposed should not apply at SIF's White Plains location. Because no Field Investigator from White Plains testified, the State argues that there is no evidence that take-home vehicles were rescinded from Field Investigators at that location. We find the evidence sufficient that the unilateral change also took place at the White Plains location. Charging Party Exhibit 2 is an email that demonstrates that the change in policy was communicated to all SIF branches, including the White Plains branch, and that a Pool Car Manager was appointed for White Plains. Mullen testified that the new Pool Car Policy was intended to be applied in the same manner across all locations and that he was not aware of any instances where the Pool Car Policy was not applied "in the same manner."[34] There is no evidence that the Pool Car Policy was not implemented in White Plains. We find the totality of the evidence sufficient to demonstrate that the Pool Car Policy was implemented at all ten of the SIF's physical locations.

By its terms, our decision applies only to Field Investigators represented by PEF. Nevertheless, to eliminate any confusion, we have modified the ALJ's remedy to explicitly make this clear.

Accordingly, we deny the State's exceptions and affirm the ALJ's finding that the State violated § 209-a.1 (d) of the Act when it discontinued the practice of assigning a

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[33] *See Central New York Regional Transportation Auth*, 52 PERB ¶ 3008, 3037 (2019); *NYS Thruway Auth*, 47 PERB ¶ 3032, 3099 (2014).
[34] Tr, at 355-356.

State-owned vehicle to SIF Field Investigators which Field Investigators could use to commute to and from work.

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

1. Restore the practice of providing DCI Insurance Field Investigators represented by PEF with take-home vehicles;
2. Make whole any DCI Insurance Field Investigators represented by PEF for the loss of wages and benefits, if any, sustained as a result of the SIF's September 16, 2013 directive removing access to take-home vehicles, with interest at the maximum legal rate; and
3. Sign and post the attached notice at all physical and electronic locations customarily used to post notices to unit employees.

DATED: April 28, 2020
Albany, New York

John F. Wirenius, Chairperson

Anthony Zumbolo, Member

Monte A. Klein, Member

NOTICE TO ALL EMPLOYEES

PURSUANT TO

THE DECISION AND ORDER OF THE

NEW YORK STATE
PUBLIC EMPLOYMENT RELATIONS BOARD

and in order to effectuate the policies of the

NEW YORK STATE
PUBLIC EMPLOYEES' FAIR EMPLOYMENT ACT

We hereby notify all employees of the State of New York (State Insurance Fund) (State or SIF) in the bargaining unit represented by the New York State Public Employees Federation, AFL-CIO, that the State will:

1. Restore the practice of providing DCI Insurance Field Investigators represented by PEF with take-home vehicles; and

2. Make whole any DCI Insurance Field Investigators represented by PEF for the loss of wages and benefits, if any, sustained as a result of the SIF's September 16, 2013 directive removing access to take-home vehicles, with interest at the maximum legal rate.

Dated . . . . . .

By . . . . . .
on behalf of the State of New York
(State Insurance Fund)

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

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

AMADOU KONTEYE,

Charging Party,

-and-

CASE NO. U-35095

UNITED FEDERATION OF TEACHERS, LOCAL 2, AFT, AFL-CIO and BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK,

Respondents.

AMADOU KONTEYE, pro se

ROBERT T. REILLY, GENERAL COUNSEL (CHUMI R. DIAMOND of counsel), for Respondent UNITED FEDERATION OF TEACHERS, LOCAL 2, AFT, AFL-CIO

KAREN SOLIMANDO, EXECUTIVE DIRECTOR OF LABOR RELATIONS (TODD DRANTCH & ANJANETTE PIERRE of counsel), for Respondent BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by Amadou Konteye to a decision of an Administrative Law Judge (ALJ) dismissing his amended improper practice charge against the Board of Education of the City School District of the City of New York (District) and the United Federation of Teachers, Local 2, AFL-CIO (UFT).[1] In his amended charge, Konteye asserted that the District violated §§ 209-a.1 (a) and (c) of the Public Employees' Fair Employment Act (Act) when a principal terminated his employment because he filed a grievance. The amended charge also alleged that the

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[1] 52 PERB ¶ 4553 (2019).

UFT violated §§ 209-a.2 (a) and (c) of the Act by refusing to assist Konteye in filing a grievance and in refusing to proceed to Step II of the grievance procedure contained in the parties' collective bargaining agreement (CBA).

EXCEPTIONS

Konteye filed 26 exceptions to the ALJ's decision. Of these, several exceptions contest the accuracy of factual statements in the ALJ's decision that in no way bear upon the ALJ's findings or analysis.[2] A second group of exceptions dispute the ALJ's credibility determinations.[3] A third group of exceptions claim bias on the part of the UFT based on individuals being friends of the principal, Joseph D. Gates, and on the part of the ALJ.[4] Konteye, at least implicitly, asserts that the ALJ erred in finding that he did not establish that the UFT's conduct toward him was not arbitrary, discriminatory, or founded in bad faith. Konteye asserts, in fact, that he had established just that.[5] Finally, Konteye objects to the ALJ's decision to not allow him to call a witness, Thomas Ajibola, to provide testimony via telephone.[6]

FACTS

The germane facts in this matter are fully stated in the decision of the ALJ and are only summarized here to the extent necessary to inform the discussion. In April 2012, Konteye received his New York City Substitute Teacher License, and shortly thereafter was hired as a *per diem* substitute teacher at the Frederick Douglass

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[2] Exceptions Nos. 1, 2, 3 (in part), 4 (in part), 5, 6 (in part), 7, 8, 15, 18, and 24 (in part).
[3] Exceptions Nos. 4 (in part), 21, 22, 24, 25, and 26.
[4] Exceptions Nos. 3, 6, 7, and 16.
[5] Exception No. 23.
[6] Exceptions Nos. 19 and 20.

Academy (FDA). He worked in that capacity until the termination of his employment on February 12, 2016. Konteye received his license as a French teacher on March 18, 2015.[7] Principal Gates testified that Konteye continued to work as a *per diem* substitute for the remainder of the 2014-2015 school year because Konteye had not received the license by September 2014, the start of the school year.

The ALJ found that Gates sought to have an additional French Language teaching position added to the FDA's budget, so that he could offer the position to Konteye for the 2015-2016 school year.[8] However, the Budget Office in the District's Manhattan Support Center informed Gates that although it could fund a Social Studies teaching position, there was "no certainty as far as a French position."[9] Gates explained that the number of teaching positions allotted to the FDA is based on the Budget Office's projections regarding the number of students expected to register at the FDA for the following fall, and that funding is removed if the actual number of registered students is lower than projected.[10]

On September 4, 2015, Gates met with Konteye and offered him a regular teaching position, although the parties dispute in what discipline. Gates unequivocally testified that the only position he offered Konteye was the funded social studies position, for which Konteye was licensed, while Konteye testified, equally unequivocally, that he was offered, and accepted, a French position. Konteye never received a regular

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[7] Tr, at 15.
[8] 52 PERB ¶ 4553, at 4751.
[9] *Id*, quoting Tr, at 143.
[10] *Id*., citing Tr, at 144.

teaching position at FDA.

On October 30, 2015, Konteye went to the UFT Headquarters to obtain the UFT's assistance in grieving his not obtaining a position as a regular French Language teacher, despite working as a French Language teacher at FDA for several years and having received his teaching license.[11] Konteye met with and discussed his situation with Dwayne Clark, a UFT Borough Representative; Zena Burton-Myrick and Pernice Richardson, other UFT representatives. Konteye testified that a grievance was drafted on his behalf during that meeting, but was not filed.[12] Konteye testified that he was told that Burton-Myrick would follow up on his case and would meet with Gates regarding the matter.[13]

Konteye called Burton-Myrick on November 9, 2015 to inquire about her progress with his case, and she told him that she had met with Gates, who told her that he had offered Konteye a Social Studies teaching position that he had declined.[14] According to Konteye, he told Burton-Myrick that there was "no proof" that Gates offered him the Social Studies position, but that he had proof that Gates had nominated him for a French Language position in June of 2014.[15]

Konteye met with Clark and Burton-Myrick again on November 13, 2015.[16] According to Konteye, he asked them to file a grievance on his behalf that would make

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[11] 52 PERB ¶ 4553 (2019), citing Offer of Proof, Ex L 1.
[12] *Id*.
[13] *Id*.
[14] *Id*.
[15] 52 PERB ¶ 4553, citing Offer of Proof, Ex L 1.
[16] *Id*; see also Konteye's June 22, 2017 Response to UFT's Motion to Dismiss, at ¶ 9.

him "whole in the French vacancy position," but they refused.[17] On December 15, 2015, after consulting higher level UFT representatives, Konteye met again with Clark and Burton-Myrick, who ultimately filed a salary grievance on his behalf seeking to have Konteye paid as a long-term substitute teacher and not as a lower-paid *per diem* substitute teacher.[18] The grievance did not seek to have Konteye's position converted from a substitute to a permanent French teacher.[19]

On February 3, 2016, Konteye did not receive a paycheck. Konteye sent an email about the matter to Margarita Zapata, the school's payroll secretary; the assistant principal in charge of the budget; and Gates. Konteye testified that he had not received a check on two prior occasions. The next day, Zapata responded to Konteye in an email, citing computer network problems delaying approval of his time cards. Konteye testified that Zapata blamed Gates for not processing the time cards in a timely fashion, and Konteye then requested the issuance of an emergency paycheck to replace his regular paycheck, which he received.[20] Gates denied having any involvement with Konteye's not having received a pay check on February 3, 2016, or on any prior date, testifying that his involvement with timekeeping is approving the issuance of an emergency check when needed, and that he did so for Konteye.[21]

On February 4, 2016, Konteye faxed to Clark a copy of the email he sent to Zapata, complaining of his failure to receive his paycheck on February 3, 2016, and

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[17] *Id*.
[18] 52 PERB ¶ 4553, at 4752, citing Charging Party's Ex 1; Offer of Proof, Ex L 1.
[19] *Id*.
[20] *Id*, citing Exhibits.
[21] *Id*.

Zapata's email response to him. In the cover memorandum he sent to Clark, Konteye requested the UFT's assistance in resolving the matter. Konteye maintains that he was asking Clark for assistance with both the non-received paycheck issue and his prior request to have his "position status" changed from substitute teacher to regular teacher.[22] Clark called Konteye on February 4, 2016 and told him he would refer the matter to Burton-Myrick, who contacted Konteye on February 9, 2016 and told him that she would speak with Gates about his missing check and his position.[23]

Konteye testified that on February 9, 2016, Gates called him into his office and yelled at him, stating, "Why did you get the UFT involved? It's not like I'm not going to pay you. I want nothing to do with you. Just get out."[24] Konteye testified that Assistant Principal Thomas Ajibola was present during that meeting. Gates denied that he had such a conversation with Konteye.[25]

On February 4, 2016, Gates received an email from Sharon Boonshoft, Budget Director of the Manhattan Field Support Center, advising him that FDA's funding to pay substitute teachers was exhausted, and directing him to stop using substitute teachers.[26]

Gates testified that, although he was required by the Budget Director's February 4, 2016 directive to stop using funds to pay for substitute teachers, he was unable to do

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[22] 52 PERB ¶ 4553, at 4752, citing Offer of Proof, at 2, and Ex C.
[23] *Id*.
[24] 52 PERB ¶ 4553, at 4752-4753, quoting Tr, at 59.
[25] 52 PERB ¶ 4553, at 4753, quoting Tr, at 166.
[26] Respondent's Ex 3.

so immediately because he would have been unable to cover teacher absences.[27] Working on an emergency basis, Gates and his staff were able to create a new class schedule by February 9, 2016.

On February 12, 2016, Gates told each of the 12 substitute teachers working at the FDA, including Konteye, that their services at the FDA would no longer be continued. Also, on February 12, 2016, Gates received an email from the District's Office of Labor Relations, scheduling Konteye's pay grievance for a Step II appeal on March 1, 2016. Gates testified that he could not recall when he read the email that scheduled Konteye's pay grievance for a Step II appeal, that it had not bothered him that Konteye filed a grievance, and that he wanted Konteye to be paid what was due to him. Rather than contest the grievance, Gates testified that he sent the hearing officer a written confirmation of the hours that Konteye claimed to have worked.[28]

On February 22, 2016, Konteye met with Clark. Konteye alleges in the charge that "nothing was done" during that meeting, and that Burton-Myrick's inaction led to the wrongful termination of his employment by Gates.[29]

Konteye further alleges that on February 22, 2016, he provided Clark with information that supports his position, i.e., that he should be retroactively placed in a regular teaching position as a French teacher.

Konteye further alleges that, during their February 22, 2016 meeting, he gave Clark a copy of the June 2014 letter in which Gates nominated Konteye for a French

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[27] Tr, at 157.
[28] 52 PERB ¶ 4553, at 4753-4754.
[29] ALJ Ex 3, at 4.

teaching position; a copy of his teaching license; his teacher evaluations for school years 2012-2013 through 2015-2016; his program schedules for the four and one-half years that Konteye taught at the FDA; and a print-out of his *per diem* service history.[30] According to Konteye, Clark told him during that meeting: "But in the system Principal Gates had you as occasional Per Diem, which is wrong because you are working as a full time [sic]."[31] According to Konteye, Clark also said, "I know what Principal Gates did to manipulate that system is wrong, and all I can do is bring it up to the attention of District 5 Superintendent Gale Reeves."[32]

On March 1, 2016, a Step II conference was held regarding Konteye's pay grievance. Konteye was represented by the UFT. The grievance was sustained for the period of September 8, 2015 through February 12, 2016.[33] The grievance decision states that Gates "confirmed that the grievant worked in the vacancy during this time."[34]

On March 28, 2016, Konteye met with UFT Manhattan District 2 Representative Alfred Gonzales, and asked to file a grievance seeking reinstatement to the position that he was terminated from on February 12, 2016.[35] When a grievance was not immediately filed, Konteye reached out to higher level UFT officers. A grievance was filed on April 1, 2016.[36] That grievance alleges that Konteye was terminated from his

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[30] *Id*.
[31] Tr, at 171.
[32] *Id*.
[33] *See* Ex A, annexed to Konteye's March 15, 2017 Clarification.
[34] *Id*.
[35] Offer of Proof, at 3; Ex F, annexed to the Offer of Proof.
[36] Offer of Proof, at 3-4; Ex F, annexed to the Offer of Proof.

position due to his filing a salary grievance and due to his protected union activity.[37] On April 20, 2016, Gates issued a Step I decision denying the grievance on the ground that Konteye did not demonstrate that his being excessed was in violation of the CBA, and finding that he was excessed due to budgetary issues.[38] Konteye then contacted Burton-Myrick and told her that he wanted his grievance to proceed to Step II because he was wrongfully terminated, and Burton-Myrick told him that she would raise the issue with Clark.[39]

On March 31, 2016, Konteye received an email from the District's human resources office stating that Konteye was nominated to work as a teacher at the FDA.[40] The human resources office also copied that email to Gates. Konteye then sent an email to Gates, asking him when he should report to the FDA and return to work.[41] Gates never responded to Konteye's email.

Gates testified that, when he received the letter nominating Konteye to a position at his school, he contacted the District's legal department and was told by an attorney in that department that the letter was issued because Konteye's pay grievance was granted, and the letter was necessary to allow the District to pay Konteye retroactively the difference in the pay he would have received as a regular substitute teacher. Upon the advice of counsel from the legal department, Gates did not respond to Konteye's email.

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[37] Offer of Proof, Ex F.
[38] *Id*.
[39] Offer of Proof, at 4.
[40] Charging Party's Ex 6.
[41] *Id*, at 3.

When Konteye did not receive a response from Gates regarding his start date at the FDA, he asked the UFT to file a grievance on his behalf. The UFT filed a third grievance on Konteye's behalf on May 5, 2016. That grievance alleges that Konteye was assigned to work at the FDA, and that Gates did not respond to Konteye's request for a start date.[42]

Konteye alleges that he went to the UFT's office on May 16, 2016, to inquire whether the UFT had determined whether it would process his grievances to Step II of the grievance procedure, and that he was handed two letters denying his requests to proceed to Step II in two of his pending grievances.[43] Specifically, he was given a May 6, 2016 letter from Clark, which declined to process Konteye's termination grievance on the ground that "[w]e did not find sufficient substance to continue your grievance."[44] The letter also provides Konteye with information regarding how to appeal the UFT's decision not to advance his grievance to Step II.

The second letter that Konteye received was also from Clark and was dated May 16, 2016. That letter denies Konteye's request to proceed to Step II in the third grievance in similar terms to that in Clark's May 6, 2016 letter.[45] Thereafter, on May 31, 2016, Konteye filed the charge in this matter.

As to his termination grievance, Konteye alleges that the UFT issued a letter dated August 2, 2016, stating that the grievance would proceed to the next step and

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[42] Offer of Proof, Ex H.
[43] Offer of Proof, at 5.
[44] Offer of Proof, Ex F.
[45] Offer of Proof, Ex H.

that a representative from the Borough of Manhattan Office would soon contact him; however, he was not subsequently contacted by the UFT regarding that grievance.[46]

As for Konteye's third grievance, Konteye appealed the decision not to proceed to Step II, to the UFT's "Ad Com" Grievance Committee. That committee met with Konteye on June 20, 2016. The Ad Com Grievance Committee issued a letter to Konteye dated September 8, 2016, signed by LeRoy Barr, UFT Director of Staff. That letter denies Konteye's request to proceed to the next step of the grievance procedure and states, as here relevant:

> After careful consideration of all the facts presented, the Committee has determined that your grievance cannot be successfully pursued at the Chancellor's level. The emails you received from the DoE were sent after you were terminated from Frederick Douglass Academy. The DoE notices you received do not require the Principal to hire you back to the school as a Regular Substitute. Therefore, the Committee concluded that the Union cannot overcome the Department of Education's argument that no contractual provisions were violated.[47]

DISCUSSION

The first group of exceptions do not address the substance of Konteye's claims, and we can address them summarily. Exception No 1 asserts that the ALJ erred in finding that the original charge was filed on May 31, 2016, claiming that it was filed on May 27, 2016. The original charge and the envelope in which it was mailed belie this exception.[48] Although the document was dated and notarized on May 27, 2016, the Priority Mail envelope in which the charge was filed by mail, pursuant to § 200.11 of our

[46] Offer of Proof, at 6.
[47] Offer of Proof, Ex K.
[48] ALJ Ex. 1.

Rules of Procedure (Rules) which defines "filing" as, in pertinent part, "the act of mailing to the board," is postmarked May 31, 2016.[49]

Likewise, Exception No. 2 objects to the ALJ's statement that the "District also raised as a defense the failure to raise a notice of claim."[50] The District's Answer to the Amended Charge in fact asserts such a defense.[51] Notably, the ALJ did not address this defense in her decision, and thus no adverse determination can be gleaned from the record to support this exception.

Exception No. 3 disputes the ALJ's recitation of Konteye's educational and teaching background, and asserts additional facts outside of the four-month limitations period provided by § 204.1 (a) (1) of our Rules. Again, this exception does not in any way bear on the legal issues actually decided by the ALJ.

Likewise, Exception No. 4 asserts that Gates lied in his testimony about going to the Manhattan Field Office, and used inaccurate codes on Konteye's file, as well as intentionally firing him in February 2016. These allegations do not assign any error to the ALJ, other than not addressing claims that are outside of the four-month limitations period provided by § 204.1 (a) (1) of our Rules. Again, this exception does not in any way bear on the legal issues actually decided by the ALJ. Exception No. 5 contends that Gates had offered Konteye a position teaching French, and that Konteye taught French full time from September 2012 until his termination on February 12, 2016. Again, the legal issues decided by the ALJ are not impacted by this purported error.

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[49] *Id*.
[50] 52 PERB ¶ 4553, at 4750.
[51] ALJ Ex 4 at ¶¶ 9-13.

Exception No. 6 does not allege any error on the part of the ALJ, but articulates his disagreement with testimony presented by the District. Likewise, Exception No. 7 disputes the ALJ's finding that on October 30, 2015, "Konteye went to the UFT office," and that "a grievance was drafted on his behalf during that meeting but not filed."[52] Konteye excepts to this finding on the ground that he "went to the UFT Headquarters . . . on October 30, 2015 to file grievances regarding my French teaching position and my salary against Principal Gates."[53] The distinction between the UFT "office" and "Headquarters" is at best not relevant, and in both recountings, the UFT did not file the requested grievance at the time Konteye requested it. No error on the part of the ALJ is articulated in this exception, and thus there is no material issue of law or fact for us to rule on in addressing this exception.

Exception No. 8 asserts that the ALJ mischaracterized the grievance as "not seek[ing] to have Konteye's position converted from, a substitute to a permanent French teacher."[54] In fact, in his offer of proof to the ALJ, Konteye states that "After I explained my situation, Mr. Clark and Ms. Myrick called the UFT grievance inscriber [sic] to file a salary grievance and did not include the position grievance I was seeking."[55]

Exception No. 15 contends that Konteye did not provide Clark with a print-out of his *per diem* service history, but rather "a copy of UFT Per Diem Service giving [the ALJ] information about occasional per diem service and long-term per diem service." A

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[52] 52 PERB ¶ 4553, at 4752.
[53] Konteye Exceptions, at 8.
[54] *Id*.
[55] Offer of Proof, Ex. L1 at p 2.

review of the cited portion of the offer of proof confirms that the ALJ erred in this regard, and Konteye's exception is meritorious.[56] However, the ALJ's error in this factual matter does not infect her analysis of either the claim against the District or against the UFT. The presence or absence of evidence concerning Konteye's *per diem* service history neither strengthens nor diminishes his evidence in support of his claim against the District for violating the Act by retaliating against Konteye for protected activity or against the UFT for breaching its duty of fair representation.

Similarly, Exception No. 18 asserts that the UFT's August 2, 2016 letter was intended to mislead the ALJ and that the ALJ gave an incorrect grievance number for the third (post-termination) grievance. Nothing in either document suggests that the grievance number or the UFT letter in any way impacted the ALJ's analysis or findings. Finally, in Exception No. 24, Konteye claims that the ALJ's recitation of the documents he provided to Clark is incomplete, in that it does not specify that the license provided was his "NYS French Teaching License" and that he also provided Clark with his teacher evaluations from 2012 through 2016. Again, this purported error neither strengthens nor diminishes the evidence in support of Konteye's claim against the District for violating the Act by retaliating against Konteye for protected activity or against the UFT for breaching its duty of fair representation.

The second group of exceptions is comprised of challenges to the credibility determinations of the ALJ. As we have long held, "[c]redibility determinations by an ALJ are generally entitled to "great weight unless there is objective evidence in the record

[56] Offer of Proof at p. 2; *see also Id,* at Ex B.

compelling a conclusion that the credibility finding is manifestly incorrect."[57] This rule is particularly applicable "where, as here, the credibility determination rests in part on the witness' demeanor."[58] In the instant case, Konteye has contradicted the testimony of multiple witnesses, and assigned motives of bias and friendship as the reason UFT representatives would testify in support of Gates, but has done so in wholly conclusory terms. He "has not presented any such objective evidence compelling a finding that the ALJ's credibility finding[s] constituted manifest error, and therefore we will not disturb [them]."[59] Accordingly, we deny these exceptions.[60]

As to the claim that the ALJ was biased against him, Konteye "has not adduced any evidence of personal animosity or bias on the part of the ALJ against him."[61] Moreover, an ALJ's bias toward a party "is not established by the mere fact that the ALJ had previously ruled or decided against that party in any given proceeding or in any previous matter."[62] Here, of course, the claim of bias comes not from any prior

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[57] *Town of Tuxedo*, 53 PERB ¶ 3003, ____ (2020), quoting *Bd of Educ of the City Sch Dist of the City of New York (Elgalad),* 52 PERB ¶ 3001, 3005 (2019), *see also Bellmore-Merrick Cent Sch Dist,* 48 PERB ¶ 3022, at 3077; *see also Village of Scarsdale,* 50 PERB ¶ 3007, 3037, n 51 (2017); *County of Clinton,* 47 PERB ¶ 3026, 3079 (2014); *Village of Endicott,* 47 PERB ¶ 3017, 3051 (2014); *City of Rochester,* 23 PERB ¶ 3049 (1990); *Hempstead Housing Auth,* 12 PERB ¶ 3054 (1979).
[58] *Bd of Educ, City Sch Bd of the City of New York (Smith)*, 51 PERB ¶ 3035, 3152 (2018) (citing *Bellmore-Merrick Cent Sch Dist*, 48 PERB ¶ 3022, at 3077; *UFT (Cruz),* 48 PERB ¶ 3004 (2015); *Mt Pleasant Cottage Union Free Sch Dist,* 50 PERB ¶ 3002, 3008 (2017); *see also Fashion Institute of Technology v Helsby*, 44 AD2d 550, 7 PERB ¶ 7005, 7009 (1st Dept 1974) (deference due credibility determinations based on observation of witness's demeanor).
[59] *Id; see also Central New York Regional Transp Auth,* 52 PERB ¶ 3008, 3037 (2019).
[60] Specifically, we deny Exceptions Nos. 3, 4 (in pertinent part), 6, 7, 21, 22, 24, 25, and 26 on these grounds.
[61] *Utica City School District*, 48 PERB ¶ 3008, 3025 (2015).
[62] *UFT (Gray)*, 47 PERB ¶ 3011, 3035 (2014).

matter but from the very matter before us. Absent any non-conclusory allegations or evidence to support the claim of bias, we are simply presented with a claim of bias coming from the ALJ's reaching factual findings that are adverse to the charging party's position. That alone is simply insufficient to provide a basis upon which it can be found that the ALJ "was disqualified or should have recused herself from the hearing."[63] We therefore deny Exception No. 16 to the extent it contends that the ALJ's decision was the product of any bias on her part.

Konteye has, at least implicitly, challenged the ALJ's findings that he had not carried his burden of proof as to his claim that his termination constituted retaliation by the District for the protected activity of filing the pay grievance.

We have long held that:

> When an improper practice charge alleges retaliation in violation of §§ 209-a.1 (a) and (c) of the Act, the charging party has the burden of demonstrating three elements by a preponderance of the credible evidence. : a) that the affected individual engaged in protected activity under the Act; b) that such activity was known to the person or persons taking the employment action; and c) that the employment action would not have been taken "but for" the protected activity. [64]

These elements establish a *prima facie* case and give rise to an inference of

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[63] *Id*.

[64] *New York City Transit Auth*, 52 PERB ¶ 3017, 3072 (2019); *Mt Pleasant Cottage Union Free Sch Dist*, 50 PERB ¶ 3002, 3008 (2017); *Bellmore-Merrick High Cent Sch Dist*, 48 PERB ¶ 3022, 3976 (2015); *Village of Endicott*, 47 PERB ¶ 3017, 3050 (2014); *UFT, Local 2, AFL-CIO (Jenkins)*, 41 PERB ¶ 3007 (2008), *confd sub nom Jenkins v NYS Pub Empl Relations Bd*, 41 PERB ¶ 7007 (Sup Ct NY Co 2008), *affd*, 67 AD3d 567, 42 PERB ¶ 7008 (1st Dept 2009); *State of New York (SUNY Buffalo)*, 46 PERB ¶ 3021 (2013); *see also City of Salamanca*, 18 PERB ¶ 3012 (1985).

improper motivation.[65] The initial burden of proof to establish a *prima facie* case is relatively low; the ALJ is required to accept the charging party's evidence as true and give it the benefit of every inference that can reasonably be drawn from that evidence.[66] Only "if the charging party can establish such an inference, does the burden of production shift to the respondent to present evidence demonstrating that its conduct was not improperly motivated."[67] The employer "can dispel the *prima facie* case, and defeat the charge, by rebutting any of the three prongs of the *prima facie* case or through the presentation of evidence demonstrating that the employment action or conduct was motivated by a legitimate non-discriminatory business reason."[68] 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."[69] When a charging party "fails to meet its burden, a charge of improper motivation must be rejected and the charge dismissed."[70]

Here the ALJ found that Konteye established his *prima facie* case. She then went on to find that the District had established a legitimate business reason for its action, relying not just on her evaluation of Gates's demeanor, but on the documentary evidence, the February 4, 2016 email from Sharon Boonshoft informing Gates that he

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[65] *Id*.
[66] *Id*.
[67] *Town of Tuscarora*, 48 PERB ¶ 3011, 3037 (2015).
[68] *Bd of Educ of the City Sch Dist of the City of New York (Bagarozzi)*, 51 PERB ¶ 3032, 3140 (2018); *Mt Pleasant Cent Sch Dist (Hall)*, 50 PERB ¶ 3019, 3079 (2017); *Town of Tuscarora*, 48 PERB ¶ 3011, at 3037; *Dutchess Community College*, 47 PERB ¶ 3018, 3056 (2014).
[69] *Id*.
[70] *Id*., citing *Catskill Housing Auth (Biegel)*, 49 PERB ¶ 3025, 3081 (2016).

"must not call in any more Subs—there is no funding to pay for this," and that "teachers need to be able to cover classes where teacher absences occur."[71] Konteye in his exceptions suggests that the February 4, 2016 email is "fabricated"[72]; however no grounds for this claim were presented before the ALJ, nor was this argument made at any time before her. Because our review is limited to the record before the ALJ, "we do not address issues that are impermissibly raised for the first time on exceptions," and therefore decline to entertain the claim that the email is spurious.[73] For similar reasons, we decline to review the additional documents submitted to us after the filing of exceptions in this matter.[74]

Accordingly, we affirm the ALJ's finding that the District met its burden of establishing a legitimate business reason for its termination of Konteye and thereby dispelled his *prima facie* case. Therefore, we dismiss the exceptions contending that Konteye had carried his burden of proof and established that the termination of his employment was in retaliation for his filing of his payroll grievance.

Exception Nos. 10, 19, and 20 objects to the ALJ's denial of permission for Konteye's counsel at the hearing to call Assistant Principal, Thomas Ajibola, to testify as a rebuttal witness to corroborate Konteye's testimony that Gates had, on February 9, 2016, called Konteye into his office and, according to the ALJ, "yelled at him, stating

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[71] Respondent Ex 3.
[72] Exception No. 21.
[73] *NYCTA (Burke)*, 52 PERB ¶ 3017, at 3072; *Board of Educ, City Sch Dist of the City of New York (Bagarozzi),* 51 PERB ¶3032, at 3139; *CUNY (Javed),* 50 PERB ¶ 3028, 3106 (2017); *NYS Thruway Assn,* 47 PERB ¶ 3032, 3100, n 25 (2014).
[74] *Id*.

'why did you get the UFT involved? It's not like I'm not going to pay you. I want nothing to do with you. Just get out.'" [75] Gates squarely denied having such a conversation with Konteye.

The ALJ denied the request to call Ajibola on several grounds. First, the ALJ noted that the allegations in the charge did not include the language Konteye testified that Gates had used, but had merely alleged that "[o]n February 9, 2016, Mr. Gates called me to his office then Mr. Gates was yelling and screaming at me with the presence of the Assistant Principal, Mr. Thomas Ajibola."[76] The ALJ found that Konteye's charge did not put the District on notice that it would have to defend a claim of anti-union animus based on express speech by Gates. Additionally, the ALJ supported her decision by noting that Konteye could have called Ajibola in his direct case, since the denial of the allegation in the Answer put Konteye on notice that the allegation was denied. We find that this was an abuse of discretion, in that Ajibola's testimony could have shed light on whether or not Gates bore anti-union animus toward Konteye. Notably, no prejudice to the respondents need have eventuated in view of the need to call Ajibola on a separate day of hearing. This would have permitted the District to prepare, and a sharply limited second day of hearing hardly constitutes prejudice. In view of the establishment by the District of a legitimate business reason for the termination of all substitute teachers at FDA, the ALJ's error falls into the category of harmless error, as Konteye's termination was mandated not by Gates but by those to

[75] 52 PERB ¶ 4553, at 4752-4753.
[76] Amended Charge, Attachment p 1; Tr, at 224-225.

whom he reported, and was based on budgetary shortfalls, the existence of which have not been refuted.

We likewise affirm the ALJ's finding that Konteye has not established a breach of the duty of fair representation on the part of the UFT. We have often reaffirmed that "to establish a breach of the duty of fair representation under the Act, a charging party has the burden of proof to demonstrate that an employee organization's conduct or actions are arbitrary, discriminatory or founded in bad faith."[77]

As we have previously explained, the courts have:

> reject[ed] the standard . . . that "irresponsible or grossly negligent" conduct may form the basis for a union's breach of the duty of fair representation as not within the meaning of improper employee organization practices set forth in Civil Service Law § 209-a. An honest mistake resulting from misunderstanding or lack of familiarity with matters of procedure does not rise to the level of the requisite arbitrary, discriminatory or bad-faith conduct required to establish an improper practice by the union.[78]

Moreover, it is "well-settled that an employee organization is entitled to a wide range of reasonable discretion in the processing of grievances under the Act."[79] In particular, "an employee's mere disagreement with the tactics utilized or dissatisfaction

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[77] *UFT (Spaulding),* 51 PERB ¶ 3022, 3091 (2018), citing *District Council 37 (Fonseca),*50 PERB ¶ 3038, 3161 (2017).
[78] *Id*, citing *District Council 37 (Calendario)*, 49 PERB ¶ 3038, 3161 (2016); *see also Cairo-Durham Teachers Assn (DeOliveira)*, 47 PERB ¶ 3008, 3026 (2014) (quoting *CSEA, L 1000 v NYS Pub Empl Relations Bd (Diaz)*, 132 AD2d 430, 432, 20 PERB ¶ 7024, 7039 (3d Dept 1987), *affd on other grounds*, 73 NY2d 796, 21 PERB ¶ 7017 (1988)), *confd sub nom DeOliveira v NYS Pub Empl Relations Bd*, 133 AD3d 1010, 48 PERB ¶ 7006 (3d Dept 2015).
[79] *Niagara Falls Police Club, Inc (Drinks-Bruder)*, 52 PERB ¶ 3002, 3009 (2019), citing *UFT (Spaulding),* 51 PERB ¶ 3022, at 3091; *District Council 37 (Calendario)*, 49 PERB ¶ 3038, at 3161.

with the quality or extent of representation does not constitute a breach of the duty of fair representation."[80] Moreover, an employee organization is "not obligated to pursue a claim that it believes, in good faith, to lack merit."[81]

In the instant case, the UFT provided representation to Knonteye in three separate grievances, the December 2015 Salary Grievance, in which it was partially successful; the April 2016 Termination Grievance claiming that Konteye's termination was in retaliation for his union activities, including his Salary Grievance; and the May 2016 Regular Substitute Grievance. The UFT declined to pursue the latter two grievances beyond Step I and notified Konteye of its decisions to not proceed further. Konteye appealed the Regular Substitute Grievance to the UFT's Administrative Committee, which reviewed the grievance, and determined not to pursue the grievance on the ground that the notices received by Konteye were sent after his termination, and did not require Gates to rehire him, thus preventing Konteye from establishing a breach of the CBA.

Konteye has asserted that UFT representatives Clark and Burton-Myrick sought to avoid assisting Konteye, based on their friendship with Gates. These assertions are wholly conclusory in nature, and ""such conclusory allegations are insufficient to plead, let alone prove, a violation of the duty of fair representation."[82] No other evidence even tends to suggest that the UFT treated Konteye differently from any similarly situated unit

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[80] *Id*.
[81] *UFT (Spaulding)*, 51 PERB ¶ 3022, at 3091; *CSEA (Trowbridge)*, 48 PERB ¶ 3024, 3093 (2015).
[82] *CSEA (Metzger)*, 50 PERB ¶ 3026, 3100 (2017).

employee, or did not consider his requests to pursue grievances in good faith. As the ALJ correctly noted, "there is no record evidence that Konteye was treated differently from other unit employees, or that Clark or Burton-Myrick were motivated by bad faith when they advised Konteye that he did not have a viable grievance regarding his failure to be placed in the French teaching vacancy."[83] In particular, the fact that the UFT on review to the Administrative Committee reversed Clark's determination as to one of Konteye's grievances does not establish bad faith on its or Clark's part, but rather a willingness to reconsider its position upon request, and to re-evaluate the merits of a grievance. We therefore affirm the ALJ's finding that the evidence supports at most a difference of opinion regarding the viability of Konteye's grievances which the UFT did not advance, and that this does not support a violation of the Act.

Based on the foregoing, the exceptions are denied, the ALJ's decision is affirmed for the reasons set out herein, 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

[83] 52 PERB 4553, at 4758-4759.

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

PETER COHN,

Charging Party,

CASE NO. U-35948

-and-

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

Respondent.

GLASS & HOGROGIAN LLP (BRYAN D. GLASS of counsel), for Charging Party

KAREN SOLIMANDO, EXECUTIVE DIRECTOR OF LABOR RELATIONS (ALLISON BILLER of counsel), for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions to a decision of an Administrative Law Judge (ALJ) dismissing an improper practice charge claiming that the Board of Education of the City School District of the City of New York (District) violated §§ 209-a.1 (a) and (c) of the Public Employees' Fair Employment Act (Act) by retaliating against Peter Cohn for protected activity under the Act.[1] The ALJ held that Cohn failed to establish a *prima facie* case that the District's issuance of two ratings reports and a summary "Measures of Teacher Practice" (MOTP) rating to Cohn in 2017 would not have taken place "but for" Cohn's protected activity.

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[1] 52 PERB ¶ 4566 (2018).

EXCEPTIONS

Cohn filed four exceptions to the ALJ's decision. Cohn's first exception contends that the ALJ failed to view Cohn's MOTP rating in context with the background events that demonstrate that Principal Manuel Urena, was retaliating against Cohn. Cohn's second and third exceptions assert that Urena's ineffective rating of Cohn in 2016 demonstrate hostile treatment of Cohn based on union activity and that such treatment should not go without redress because of PERB's timeliness rules. Finally, Cohn's fourth exception contends that the ALJ should have drawn a negative inference against the District based on its failure to call Assistant Principal Theresa Budney to testify.

The District supports the ALJ's decision and argues that the exceptions should not be reviewed on the merits due to their failure to comply with § 213.2 (b) of our Rules of Procedure (Rules).

For the reasons that follow, we affirm the ALJ's decision.

FACTS

The facts are set forth fully in the ALJ's decision and are repeated here only as necessary to decide the exceptions.

Cohn retired from teaching for the District on January 1, 2018, after having worked at its Art and Design High School (ADHS) for 15 years. As a teacher, Cohn received performance evaluations under a system known as the Annual Professional Performance Review (APPR) throughout each school year, as well as cumulatively at the end of each school year. Since at least the 2014-2015 school year, Cohn's year-end APPR has consisted of two parts: a cumulative "Measures of Teacher Practice" (MOTP) performance rating, and a "Measures of Student Learning" (MOSL) rating. The

MOTP rating reflects the quality of a teacher's pedagogy, and the MOSL rating is a combination of the state and local grades that the students receive in standardized testing.[2] The individual MOTP ratings issued after each of a pre-determined number of formal and/or informal observations of a teacher's classroom throughout the year are combined, according to a specific calculus, to comprise the final year-end MOTP rating.[3]

Cohn testified that then-Principal Frances DeSanctis, Assistant Principal (AP) Mikalikic, and AP Terri Budney contributed to his overall "effective" MOTP rating for the 2014-2015 school year.[4] Budney conducted at least two informal observations of Cohn during that school year. On March 11, 2015, she observed Cohn and rated him as "developing" in five of the seven scored components, and "effective" in only two.[5] Budney also conducted an informal observation on May 28, 2015, rating Cohn as "effective" in seven of eight scored components; he was rated "developing" in using questioning and discussion techniques.[6] During the prior school year, Budney conducted an informal observation of Cohn on October 29, 2013 and rated him "effective" in seven of the ten scored components, and "developing" in three components.[7]

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[2] *See Bd of Educ of the City School Dist of the City of New York (Smith)*, 51 PERB ¶ 3035, 3151 (2018).
[3] Charging Party's Ex 1.
[4] Cohn testified that Mikalikic left during the 2014-2015 school year and was replaced by Budney. However, the record shows that Budney was an AP at ADHS during the 2013-2014 school year as well, as evidenced by an informal observation that Budney conducted on October 29, 2013. Charging Party's Ex 28.
[5] Charging Party's Ex 28. Possible ratings in the APPR system, from highest to lowest, are "highly effective," "effective," "developing," and "ineffective."
[6] *Id.*
[7] *Id.*

In January of 2016, Urena became the principal of ADHS. Cohn testified that his overall MOTP rating for the 2015-2016 school year was "developing," and was signed by Principal Urena; Urena and Budney were the administrators who contributed to this rating. Budney informally observed Cohn on November 6, 2015, and rated him as "effective" in two of seven scored components, and "developing" in five of seven components.[8] Cohn stated that Budney told him that his scores dropped because he was not "following the precepts that Mr. Urena wanted" him to follow.[9]

Urena testified that he is familiar with Cohn as having been an Earth Science teacher with whom he had a cordial, professional relationship. At the time that Urena started at ADHS, he had no awareness of Cohn's performance in the years prior. Urena also testified that he did not know Budney prior to his start at ADHS, and that they had not discussed how she had previously rated Cohn. Urena testified that he did not instruct Budney to deviate from whatever her prior methods of evaluating Cohn were before he arrived at the school. He further stated that he would only have reviewed Budney's informal observations of Cohn if Cohn filed an APPR complaint. Through various "activities" and oversight, Budney's ratings were calibrated "to ensure that her ratings are on par with what the rubric calls for."[10] Urena asserted that he did not review Budney's 2016-2017 observations of Cohn.

Cohn testified that at the beginning of the 2016-2017 school year, he was put on a "TIP" program, which he identified as a "teacher in need of improvement" program for teachers who have been rated as "developing" or "ineffective." Cohn testified that this

[8] Charging Party's Ex 28.
[9] Tr, at 27.
[10] Tr, at 412-413.

was not the first time that he had been put on an improvement plan. For the 2012-2013 and 2013-2014 school years, Cohn was in the "PIP Plus" program, which was another program for teachers who did not perform well in methods of instruction.

As a result of the 2016-2017 TIP, Cohn was obligated to meet with Budney every Friday. At the meetings, Cohn and Budney reviewed Cohn's lessons, discussed classroom management techniques and, according to Cohn, "debated…whether her techniques or [Cohn's] techniques were best."[11]

On September 23, 2016, Cohn informed Budney that he "objected" to being required to use Urena's printed lesson plan template, a requirement for all TIP teachers at the school, rather than Cohn's preferred method of displaying the lessons for Budney's review on a computer using a "thumb drive."[12] Cohn testified that Budney told him that he had to use the printed template.

Budney conducted an informal observation of Cohn's teaching on September 28, 2016, his first for the 2016-2017 school year, rating him as "developing" or "ineffective" in each of the scored components. Cohn disagreed with her assessment and submitted a rebuttal.

By letter dated October 5, 2016, Urena informed Cohn that he would need to meet with him on October 11, 2016, to discuss "unprofessional conduct," and that he had the right to bring a union representative because the meeting could lead to disciplinary action.[13] Cohn testified that the meeting concerned his responses to a quality review school assessment questionnaire, completed during a professional

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[11] Tr, at 43-44.
[12] Tr, at 45-48; Charging Party's Ex 4.
[13] Charging Party's Ex 5.

development (PD) session.[14] The quality review school assessment questionnaire, according to Urena, was a survey intended to evaluate the school on its competencies.[15]

Cohn brought his UFT chapter leader, Jason Agosto, with him to the meeting with Urena, during which Urena told Cohn that he should not have written on the questionnaire that he was "being punished for presenting [his] rational commonsense ideas."[16] Cohn testified that the phrase referred to his belief that he should not have been required to print out his lesson plans for the weekly TIP meetings with Budney.[17] According to Cohn, Urena told him that this and Cohn's other questionnaire responses made the school look bad.

On October 17, 2016, Cohn filed an APPR Resolution Request form, claiming that he had not been informed of his right to a union representative during the initial TIP conference, and seeking to renegotiate his TIP at a new conference in order to "have a UFT officer attend."[18] Urena attempted to meet with Cohn on October 18, 2016, about the request, but Cohn left the meeting because Urena told him that his UFT representative would not be allowed to attend.[19] Cohn testified that on October 18, 2016, he conceded to Urena that at the Initial Planning Conference (IPC) for the TIP, Urena had asked him three times if he wanted a union representative, and each time

[14] Tr, at 58-59; Charging Party's Ex 6.
[15] Tr, at 314-315.
[16] Charging Party's Exs 6, 7.
[17] Tr, at 58-66, 370-371; Charging Party's Ex 6.
[18] Tr, at 73; Charging Party's Ex 8.
[19] Charging Party's Ex 9.

Cohn declined.[20] Subsequently, Urena denied the APPR Resolution Request, finding that there were no procedural violations in the TIP.[21]

On November 2, 2016, Urena met with Cohn and Agosto, and informed them that a student had complained that Cohn was not grading work on a regular basis and, as a result, she did not know whether she was passing or failing Cohn's class.[22] Urena memorialized the meeting in a letter titled "Disciplinary Meeting," dated November 13, 2016.[23] Urena testified that the letter was a counseling memo, as it contained a statement at the bottom that it would not be placed in Cohn's file.[24] On cross-examination, when confronted with language from the collective bargaining agreement (CBA), Urena conceded that the letter did not appear to conform to the CBA's requirements concerning the form that a counseling memo must take.[25]

Urena conducted an informal observation on November 15, 2016, rating Cohn "ineffective" in all scored components, to which Cohn submitted a rebuttal.[26] Cohn signed the observation on January 10, 2017, and on January 17th, he filed a second APPR Resolution Request. In his meeting with Urena on the subject, Cohn stated that he was not alleging any procedural deficiencies in the conduct of the observation, just that it was "unfair" because of student disciplinary issues that occurred in the classroom that day.[27]

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[20] Tr, at 83; Charging Party's Ex 9.
[21] Charging Party's Ex 9.
[22] Charging Party's Ex 16.
[23] *Id*.
[24] Tr, at 326-327.
[25] Tr, at 342-343.
[26] Charging Party's Exs 13, 13A, 17.
[27] Charging Party's Exs 18, 19.

Urena issued a January 18, 2017 letter denying the APPR request, concluding that, as Cohn had already stated, there were no procedural errors in the conduct of the observation.[28] Urena testified that Cohn's teaching during the observation was "ineffective" because of issues with Cohn's classroom discussion techniques, student engagement in learning, and use of assessment in instruction, as well as classroom management problems.[29]

Cohn testified that a mid-term exam was to be given on January 19, 2017, and that, approximately one month prior, Budney had offered him the option of giving students a one-day or two-day exam.[30] He told Budney that he would give a one-day exam.[31] According to Cohn, on January 12, 2017, Budney came to him and said, "[H]here's the first half of the mid-term, give it today."[32] Cohn testified:

> I said I'm sorry, Ms. Budney, I told my students that we were having a one-day mid-term on January 19th, next week. So I couldn't in good faith give the students the mid-term. She said if you don't give that mid-term it's insubordination. I said Ms. Budney, I told my students the test will be next week. That's my final answer.[33]

Budney convened a disciplinary meeting with Cohn on January 19, 2017 to discuss the January 12th incident; Urena was present and Agosto attended as Cohn's UFT representative.[34] Budney's letter to Cohn's file notes that she hand-delivered to him a printed version of an email, and also verbally directed him, that all Earth Science teachers were to administer the second part of the uniform mid-term exam, to which

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[28] Charging Party's Ex 19.
[29] Tr, at 322.
[30] Tr, at 131.
[31] *Id*.
[32] Tr, at 131-132.
[33] Tr, at 132.
[34] Charging Party's Exs 4, 20.

Cohn responded that he was going to teach a new lesson instead and would not administer the exam.[35] Further, on the 12th, Budney had warned Cohn that failure to administer the exam would be deemed insubordination, and he replied that he was aware of that and would accept the consequences.[36]

Cohn testified that on or about February 1, 2017, his two Earth Science classes were reassigned to another teacher and he was assigned to teach two Forensics classes in their place, which he had never taught before.[37] Cohn filed a contractual grievance concerning the assignments, which was denied at steps 1 and 2.[38]

Budney conducted a formal observation on March 30, 2017, rating Cohn "developing" in every scored component.[39] Cohn received the observation report on May 23, 2017 and submitted a rebuttal thereafter.[40]

On May 10, 2017, Urena met with Cohn and Agosto concerning an incident in which Urena, while passing by Cohn's classroom, observed a student in Cohn's class wearing headphones and that Cohn took no action to stop the behavior.[41] Cohn told Urena that the guidance counselor told him to "be easy" on the student, and that he had proof of her request. However, the email that Cohn presented to Urena from the counselor read:

> Please be advised that [the] above named student has been experiencing emotional issues which has impacted his academics.

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[35] *Id*.
[36] *Id*.
[37] Tr, at 138-139.
[38] Tr, at 140; Charging Party's Exs 22, 23.
[39] Charging Party's Exs 14, 14A.
[40] Charging Party's Ex 14.
[41] Tr, at 150-151; Charging Party's Exs 24, 25.

> Please allow him the opportunity to make up work missed and/or "extra credit" work in order to raise his grades.[42]

Budney conducted an informal observation on May 26, 2017, rating Cohn "developing" or "ineffective" in all scored components.[43] Cohn received the observation report on June 5, 2017, and submitted a rebuttal.[44]

According to the "Measures of Teacher Practice (MOTP) Score Tracker," Cohn's overall MOTP rating for the 2016-2017 school year was calculated by Urena, utilizing the following "Scoring Steps":

1. For each component, average all ratings for that component from all recorded observations to produce 8 overall component averages.

2. Average the 8 overall component averages using the weights below to produce MOTP score: (1a × .05) + (1e × .05) + (2a × .17) + (2d × .17) + (3b × .17) + (3c × .17) + (3d × .17) + (4e × .05)

3. Convert the MOTP score into an MOTP HEDI Rating.[45]

The MOTP rating reflects the quality of a teacher's pedagogy. The overall MOTP score listed on Cohn's "Measures of Teacher Practice (MOTP) Score Tracker" and "Summary Report of MOTP Score and Rating" is 1.58, which corresponds to a rating of "ineffective." The "Summary Report of MOTP Score and Rating" was signed by Cohn and Urena on June 28, 2017.[46] According to the "Summary Report of MOTP Score and

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[42] Tr, at 151; Charging Party's Exs 24, 25.
[43] Charging Party's Exs 15, 15A.
[44] Charging Party's Ex 15.
[45] Charging Party's Ex 26.
[46] *Id*. Both Cohn and Urena, apparently erroneously, dated their signatures "6/28/2019," though the document's creation is time-stamped at 10:27 a.m. on June 28, 2017.

Rating," it "provides summary information about [Cohn's] Measures of Teacher Practice (MOTP) subcomponent only, and **is not a final rating**." [47]

Cohn received his finalized "Annual Professional Performance Review, Advance Overall Rating" on September 20, 2017.[48] According to the Overall Rating form, Cohn's final overall APPR rating for the 2016-2017 school year was "developing," based upon the combination of his final year-end MOTP rating of "ineffective" and final MOSL rating of "effective."[49] Urena testified that it is his belief that "sixty percent of the [overall] score is MOTP."[50] Cohn returned to ADHS in September of 2017, but was taken off of the teaching roster and given no classes; according to Cohn, he was "just there to help."[51] Cohn went on terminal leave on September 26, 2017 and retired on January 1, 2018.

DISCUSSION

We begin with the threshold matter of the District's objection to the exceptions as procedurally deficient. We have often found exceptions to be "deficient because they fail to comply with the requirements of § 213.2 (b) of our Rules" where the "exceptions do not set forth specifically the questions or policy to which exceptions are taken, identify that part of the decision to which exceptions are taken, or state the grounds for exceptions."[52] Where, as here, exceptions do not comply with § 213.2 (b) of the Rules through overbroad statements absent specificity, "[w]e have often held that such blunderbuss exceptions do

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[47] *Id* (emphasis in original).
[48] *Id*.
[49] Charging Party's Ex 26; Tr, at 394.
[50] Tr, at 394.
[51] Tr, at 162.
[52] *District Council 37*, 50 PERB ¶ 3038, 3161 (2017), quoting Rules § 213.2 (b) (internal quotation and editing marks omitted).

not comport with the Rules, and do not preserve arguments not expressly made in the exceptions."[53]

In our recent decision in *Churchville-Chili Central School District*, we declined to review exceptions where the party appealing "has not, however, stated the grounds for its exception or presented any arguments for finding the ALJ's analysis to be incorrect," and thus "[w]e are simply unable to discern any arguably meritorious basis asserted to support the [appellant's] challenge to the ALJ's decision."[54] As in these prior decisions, we limit our review of the exceptions here to those arguments expressly made, and thus properly before us.

Section 204.1 (a) of our Rules requires an improper practice charge to be filed within four months of when the charging party had actual or constructive knowledge of the conduct that forms the basis for the alleged improper practice.[55] Cohn's improper practice charge was filed on September 11, 2017, and we therefore only consider adverse employment actions that occurred between May 11 and September 11, 2017. Facts about events that occurred prior to May 11, 2017 are relevant only to establish the background

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[53] *Village of Saranac Lake*, 51 PERB ¶ 3034, text at n 5 (2018), citing *NYCTA*, 47 PERB ¶ 3032, 3009 (2014), quoting *UFT (Pinkard)*, 47 PERB ¶ 3020, 3061 (2014); *see also 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)). In *Saranac Lake*, where the appellant filed exceptions that did not comply with the Rule, but also filed an accompanying brief that fulfilled the Rule's requirements, and the adverse party did not object, we reviewed all the arguments. Here, Cohn has not filed a brief that addresses the deficiencies in the exceptions, and the District has properly objected.

[54] *Churchville-Chili Cent Sch Dist*, 51 PERB ¶ 3003, 3010 (2018).

[55] Civil Service Employees Assn, Inc., Local 1000, AFSCME, AFL-CIO, 28 PERB ¶ 3072, 3168, n. 4 (1995). See also New York State Thruway Auth, 40 PERB ¶ 4533, 4595 (2007).

and context of timely allegations[56]. The ALJ found that the only timely adverse employment actions pled in the charge are the ratings report for the observations conducted by Budney on March 30 and May 26, 2017, which Cohn received on May 23 and June 5, 2017, respectively, and the summary MOTP "ineffective" rating for the year, which Cohn received on June 28, 2017.

We affirm this finding. In particular, we note that the November 15, 2016 observation rating issued by Urena to Cohn, received by Cohn on January 7, 2017, falls outside the limitations period imposed by our Rules. While this observation rating can be considered as background material, we cannot find a violation of the Act based solely on it.

As we have often held, and recently reaffirmed,

> When an improper practice charge alleges retaliation in violation of §§ 209-a.1 (a) and (c) of the Act, the charging party has the burden of demonstrating three elements by a preponderance of the credible evidence: a) that the affected individual engaged in protected activity under the Act; b) such activity was known to the person or persons taking the employment action; and c) the employment action would not have been taken "but for" the protected activity. As we have often reaffirmed, the ultimate burden of proof always remains with the charging party.
>
> However, the initial burden of proof to establish a *prima facie* case (an inference of improper motivation) is relatively low. The ALJ is required to accept the charging party's evidence as true, and give it the benefit of every reasonable inference that can reasonably be drawn from that evidence. Moreover, a charging party can establish the existence of anti-union animus by statements or by circumstantial evidence . . . .[57]

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[56] *PSC (Giammarella),* 51 PERB ¶ 3010, 3047 (2018), citing *Town of Henrietta*, 28 PERB ¶ 3079, 3180 (1995).

[57] *Board of Educ, City Sch Dist City of New York (Elgalad)*, 52 PERB ¶ 3001, 3004-3005 (2019); see also *Board of Educ, City Sch Dist City of New York (Bagarozzi)*, 51 PERB ¶ 3032, 3140 (2018); *State of New York (Dept of Transportation)*, 50 PERB ¶ 3004, 3021 (2017), citing *State of New York (SUNY)*, 38 PERB ¶ 3019 (2005), *confd sub nom CSEA v NYS Pub Empl Relations Bd*, 35 AD3d 1005, 39 PERB ¶ 7012 (3d Dept 2006).

These elements establish a *prima facie* case and give rise to an inference of improper motivation. If the charging party can establish such an inference, the burden of production shifts to the respondent to present evidence demonstrating that its conduct was not improperly motivated.

The ALJ found that Cohn established the first two elements of a *prima face* case by showing that he engaged in protected activity, that Urena had knowledge of all of his protected activity, and that Budney knew of one instance of protected activity—the January 19, 2017 disciplinary meeting that Budney convened for Cohn. There are no exceptions to these findings, and any exceptions are therefore waived.[58]

The ALJ went on to find that Cohn failed to establish a *prima facie* case because he did not demonstrate that Budney's ratings for observations conducted on March 30 and May 26, 2017 or that Cohn's summary MOTP "ineffective" rating for the 2016-2017 academic year would have been any different had Cohn not engaged in protected activity.

We affirm the ALJ's findings. While the facts show a general decline in Cohn's ratings under Urena's administration, there is simply no evidence, beyond Cohn's conclusory, unsupported allegations, that Cohn's request for, and use of, union representation during disciplinary meetings, or the filing of APPR resolution requests and grievances, motivated Budney's observation ratings. Indeed, Budney was unaware of the majority of this activity. Budney's March 30 and May 26, 2017 observations were not inconsistent with her prior observations and with Cohn's prior performance, dating back to

[58] Rules of Procedure § 213.2; *See, eg, City of Cortland*, 51 PERB ¶ 3014, 3067, n 5 (2018) *Lawrence Union Free Sch Dist*, 50 PERB ¶ 3034, 3140, n 20 (2016); *County of Chemung and Chemung County Sheriff*, 50 PERB ¶ 3022, 3090 (2017); *Village of Endicott*, 47 PERB ¶ 3017, 3052, n 5 (2014); *NYCTA (Burke)*, 49 PERB ¶ 3021, 3072, n 4 (2016) (citing cases).

the 2012-2013 school year, when Cohn was placed on the "PIP Plus" program. Likewise, no evidence was adduced, beyond Cohn's unsubstantiated speculation, to suggest that Urena imposed improper motives of his own upon Budney's decision-making in her ratings. Although the specific adverse employment actions alleged took place after Cohn engaged in protected activity, temporal proximity, even assuming that the time lapse is sufficiently proximate to the adverse actions, alone is insufficient to establish the "but for" element of a *prima facie* case.[59]

With respect to the 2016-2017 overall MOTP score, Cohn does not allege that the calculation of the MOTP is incorrect in any respect, and there is no evidence that the District exercised any discretion with respect to the score—the rating system "uses a set of "scoring steps" that results in a score derived solely from a mathematical calculation."[60] We agree with the ALJ that Cohn's argument that we should find the "ineffective" MOTP score to be retaliatory is in reality an untimely allegation that Urena's November 15, 2016 observation rating was improperly motivated under the Act. We affirm the ALJ's dismissal of this argument.

We find that the ALJ did not abuse her discretion in declining to draw an adverse inference against the District based on its failure to call Budney to testify. The burden of establishing a *prima facie* case fell on Cohn, and he could not rely on cross-examination of the respondent's witness to meet this burden.[61]

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[59] *State of New York (DOCCS)*, 52 PERB ¶ 3003, 3016 (2019); *Board of Educ of the City Sch Dist of the City of New York (Miller),* 35 PERB ¶ 3002, 3004 (2002); *Roswell Park Cancer Institute*, 34 PERB ¶ 3040, 3096 (2001).
[60] 52 PERB ¶ 4566, at 4823.
[61] CWA, Local 1104, Graduate Student Employees Union (Boehme), 47 PERB ¶ 3003, 3008 (2014), citing *State of New York (SUNY Buffalo)*, 46 PERB ¶ 3021, 3040 (2013).

Accordingly, the exceptions are denied, 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

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

CHENANGO COUNTY LAW ENFORCEMENT ASSOCIATION, INC.,

Charging Party, **CASE NO. U-36007**

- and -

COUNTY OF CHENANGO and CHENANGO COUNTY SHERIFF,

Respondent.

JOHN MICHAEL GRANT, ESQ., for Charging Party

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

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Chenango County Law Enforcement Association (Association) to a decision by an Administrative Law Judge (ALJ) granting the County of Chenango's and the Chenango County Sheriff's (County) motion to dismiss the instant charge as moot.[1] The Association filed the charge on October 5, 2017, alleging that the County violated § 209-a.(1) (d) of the Public Employees' Fair Employment Act (Act) by submitting proposals to fact-finding that were directly related to compensation and had been properly submitted to interest arbitration under § 209.4 (g) of the Act. The ALJ granted the motion on the basis that the charge was rendered moot by the issuance of the fact finder's report and recommendation, withdrawal of the demands at issue from fact-finding, the interest arbitration award, and the parties' reaching a collective bargaining agreement (CBA) covering the period from January 1, 2016 through December 31, 2020.

EXCEPTIONS

The Association's exceptions to the ALJ's decision may be reduced to four

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[1] 52 PERB ¶ 4568 (2019).

grounds urged as bases for reversal. First, the Association contends that the ALJ did not apply our mootness analysis, which requires a determination of whether under the specific facts of the case under review, the policies of the Act are best advanced by resolution on the merits or a finding that the matter is moot.

Second, the Association argues that the ALJ erred by applying judicial decisions, both state and federal, to the instant matter, despite such cases not applying to improper practice charges. Third, the Association asserts that even applying these judicial decisions, the Association has established that the case is not moot as it involves an issue capable of repetition and yet escaping review and further raises substantial and novel issues not previously passed on. Finally, the Association claims that the Board should, rather than remand the matter to the ALJ, itself reach the substantial and novel issue of whether the County violated the Act by submitting the same proposals to both fact-finding and interest arbitration.

The County supports the ALJ's decision. For the reasons stated below, we affirm the ALJ's decision, and dismiss the charge.

FACTS

Because the Association's exceptions seek reversal of the ALJ's decision granting a motion to dismiss, we "assume the truth of all of the charging party's evidence and give the charging party the benefit of all reasonable inferences that could be drawn from those assumed facts."[2]

The Association represents employees in the title of deputy sheriff employed by the County.[3] On December 2, 2016, the Association filed a demand for compulsory

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[2] *UFT (Spaulding)*, 51 PERB ¶ 3022, 3094 (2018), quoting *CSEA (Trowbridge)*, 48 PERB ¶ 3024, at 3093; *Town of Tuscarora*, 45 PERB ¶ 3044, 3112 (2012); *County of Livingston*, 43 PERB ¶ 3018, 3073 (2010); *County of Nassau (Unterweiser)*, 17 PERB ¶ 3013, 3030 (1984).

[3] Charge, ¶ 5(B); Answer, ¶ 1.

interest arbitration pursuant to § 209.4 of the Act.[4] The County's proposals submitted to the interest arbitration panel related to retiree health insurance and base wage calculation.[5] Both the Association and the County filed an improper practice charge challenging the propriety of the other's submitted proposals to the interest arbitration panel.[6]

On December 5, 2016, the Association also requested that PERB appoint a fact finder to issue findings and recommendations to the parties on those issues that, by law, are not subject to interest arbitration.[7] At the fact-finding hearing on September 5, 2017, the County submitted to the fact finder the same retiree health insurance and base wage compensation proposals that had already been submitted to the interest arbitration panel.[8]

On December 24, 2017, the fact finder issued a preliminary ruling declining to consider the County's two at-issue proposals and, on February 25, 2018, the fact finder issued a report and recommendation.[9] By letter dated March 16, 2018, the County "irrevocably and unconditionally" withdrew the at-issue proposals from the fact-finding

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[4] Charge, ¶ 5(C); Answer, ¶ 1.
[5] Charge, ¶ 5(E); Answer, ¶ 6.
[6] The County claimed in its improper practice charge (Case No. U-35444) that the Association violated § 209-a.2 (b) of the Act by submitting proposals to the interest arbitration panel which were either nonmandatory, not directly related to compensation as required by § 209.4 (g) of the Act, or prohibited under the Act. The Association's improper practice charge (Case No. U-35476) alleged that the County violated § 209-a.1 (d) of the Act by submitting proposals to interest arbitration which were regressive or had not previously been the subject of negotiations. *See* Charge, Exhibit B. Both charges were withdrawn in January of 2019.
[7] Charge, ¶ 5 (G); Answer, ¶ 1.
[8] Brief in Support of Exceptions at 4; *see also* Charge, ¶¶ 5 (J)-(K); Answer, ¶¶ 8-9 (the County's proposals submitted to interest arbitration were subsequently modified with regard to their effective date).
[9] Letter, March 16, 2018, John F. Corcoran to Marilyn Berson. In her letter responding to Corcoran, dated April 5, 2018, Berson did not dispute the County's assertions concerning the fact finder's preliminary ruling and report and recommendation.

proceeding.[10]

In August 2018, the interest arbitration panel issued an award covering the period from January 1, 2014 through December 31, 2015. Thereafter, the parties negotiated and ratified a CBA with a duration of January 1, 2016 through December 31, 2020.[11]

DISCUSSION

We begin by noting, as we have before, that "strict application of New York or federal civil practice precedent may be inappropriate due to the distinct procedures in the Rules along with the public policies underlying the Act," and therefore we do not consider ourselves bound to follow such precedents, especially when they conflict with those policies.[12]

We specifically applied that approach to the mootness doctrine in *East Meadow Union Free School District*, explaining that "[w]e have long held that where 'the issues raised by improper practice charges are academic, we do not consider that the policies of the Act would be served by our consideration of the charges.'" [13] As we stated in *East Meadow Union Free School District*:

> We decline to follow so much of any prior decisions which hold or suggest that traditional mootness concepts may not be applied in any of our improper practice proceedings. Our decision in this respect is limited to the facts and circumstances of this case. We recognize that the application of a mootness concept is controlled by

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[10] *Id*. Berson's April 5, 2018 letter acknowledges that the County withdrew the at-issue demands from fact-finding.
[11] *See* Letter, John F. Corcoran to Marilyn Berson, October 25, 2018; Letter, Marilyn Berson to John F. Corcoran, November 1, 2018.
[12] *County of Nassau*, 49 PERB ¶ 3014, 3058 n 20 (2016), quoting *MaBSTOA*, 40 PERB ¶ 3023, 3095, n 16 (2007) (declining to apply earlier Board decision relying on state judicial precedent as binding in cases where such precedent did not comport with or advance the policies of the Act).
[13] 48 PERB ¶ 3006, 3018-3019 (2015) (editing marks omitted), quoting *City of Peekskill*, 26 PERB ¶ 3062, 3109 (1993).

> the particular facts of the case and applied only to the extent consistent with the policies of the Act.[14]

We find that the ALJ correctly found this matter to be governed by our reasoning in *City of New York*,[15] in which we held that the issuance by an interest arbitration panel of an arbitration award rendered moot exceptions to an ALJ decision on an application for a declaratory ruling that addressed the mandatory or nonmandatory nature of various proposals submitted to the panel. *City of New York* reaffirmed and expanded our prior holding that "no purpose is served by making a scope determination at this time following the withdrawal of a proposal from interest arbitration."[16] Rather than limiting our reasoning to the discrete issue before us in *City of New York*, we also relied upon decisions establishing that "the parties' reaching a CBA renders moot disputes over terms at issue in the negotiations culminating in that agreement."[17]

We qualified our holding in *City of New York* by referring to prior decisions in which we "declined to find mootness where the parties' agreement itself reserves the right to seek resolution of outstanding issues, or where the pending charge is that a party decided to 'cease participating in negotiations because it may believe that the other party's bargaining position constitutes an improper practice.'"[18] Such, of course, is not the case here, as no argument has been made that the issue was carved out of either the interest arbitration award or from the subsequently negotiated collective

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[14] *Id*.
[15] 49 PERB ¶ 6501, 6501 (2016).
[16] *Id*, at 6501, citing *City of Buffalo*, 23 PERB ¶ 3036, 3073 (1990); *see also City of New York v NYS Pub Empl Relations B*d, 54 AD3d 480, 41 PERB ¶ 7004 (3d Dept 2008), *lv denied*, 12 NY3d 701 (2009).
[17] *Id*, citing *Suffolk Co Comm Coll*, 18 PERB ¶ 3030 (1985), *confd*, 125 AD2d 307, 308, 19 PERB ¶ 7002 (2d Dept 1986); *Bd of Educ of the Yonkers City Sch Dist*, 8 PERB ¶ 3020 (1975), *confd sub nom*, *Yonkers Teachers Fedn v Helsby*, 8 PERB ¶ 7014 (Sup Ct Alb Co 1975).
[18] *Id*, citing *City of Peekskill*, 26 PERB ¶ 3062, 3109 (1993); *see also Town of Wallkill*, 43 PERB ¶ 3026, 3101 (2010), *confd sub nom Town of Wallkill v NYS Pub Empl Relations Bd,* 44 PERB ¶ 7004 (Sup Ct Alb Co 2011).

bargaining agreement, despite the fact that the charge was pending at the very time that the panel issued its award and the parties negotiated their CBA.

Here, as we found to be the case in *East Meadow Union Free School District*, the County's request that we treat the matter as moot, "in view of our inability to fashion any remedy to the benefit of [the Association], is not without logic or precedent."[19] The academic nature of the exceptions pending before us is demonstrated by the complete resolution through the conciliation processes and by collective negotiations.

The Association and the County have received a fact finder's report and recommendation declining to address the matters asserted to be improperly submitted to factfinding, obtained an interest arbitration award which set the terms and conditions of employment for the at-issue period, and have subsequently negotiated a CBA that covers the period from the expiration of the award through the end of 2020.

Simply put, the successful employment by the parties of the conciliation avenues open to them, and the negotiation process, has demonstrated that "our reasoning for dismissing the charge cannot constitute prejudice to [the Association]," as the ALJ's "decision has in no way altered the relationship between the parties" and that "neither the outcome nor the reasoning has materially changed the legal landscape from that which would pertain." [20] Moreover, reopening these issues now would disserve the policies of the Act. As we explained in *City of New York*, "[t]he core of the Taylor Law is the policy that governments should negotiate with and enter into written agreements with employee organizations representing public employees."[21] There as here, "[a]n after-the-fact advisory opinion as to the efficacy of the parties' respective negotiating

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[19] 48 PERB ¶ 3006, at 3019.
[20] *County of Nassau*, 49 PERB ¶ 3014, at 3058 n 18.
[21] *City of New York*, 49 PERB ¶ 6501 at 6502, n 8, quoting *City of Mt Vernon*, 5 PERB ¶ 3057, 3100 (1972).

strategies could vitiate that core policy by discouraging parties from finding their own resolutions at the bargaining table in future negotiations.[22]

Nor do we find persuasive the Association's argument that the issue of whether the County violated the Act by submitting the demands regarding base wage compensation and retiree health insurance benefits to the fact finder justifies our addressing an entirely academic question. As was the case in *City of New York*, "[t]he fact that the panel issued its award, resolving all issues between the parties, does not bring this matter within any of the three exceptions to the mootness doctrine."[23]

Based on the foregoing, the exceptions are denied, the ALJ's decision is affirmed for the reasons set out herein, 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

[22] *Id*.
[23] 49 PERB ¶ 6501 at 6502 n. 8, citing *City of New York v NYS Pub Empl Relations B*d, 54 AD3d at 482.

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

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

Charging Party,

-and- **CASE NO. U-32492**

COUNTY OF ROCKLAND,

Respondent.

In the Matter of

ROCKLAND COUNTY DISTRICT ATTORNEY CRIMINAL INVESTIGATORS ASSOCIATION,

Charging Party,

-and- **CASE NO. U-32518**

COUNTY OF ROCKLAND,

Respondent.

In the Matter of

CORRECTIONS OFFICERS BENEVOLENT ASSOCIATION OF ROCKLAND COUNTY,

Charging Party,

-and- **CASE NO. U-32688**

COUNTY OF ROCKLAND AND ROCKLAND COUNTY SHERIFF,

Respondent.

In the Matter of

ROCKLAND COUNTY SHERIFF'S DEPUTIES ASSOCIATION,

Charging Party,

-and- **CASE NO. U-32734**

COUNTY OF ROCKLAND AND ROCKLAND COUNTY SHERIFF,

Respondent.

In the Matter of

SUPERIOR OFFICERS COUNCIL OF THE SHERIFF'S CORRECTIONS OFFICERS ASSOCIATION OF ROCKLAND COUNTY,

Charging Party,

-and- **CASE NO. U-32737**

COUNTY OF ROCKLAND AND ROCKLAND COUNTY SHERIFF,

Respondent.

DAREN J. RYLEWICZ, GENERAL COUNSEL (STEVEN M. KLEIN of counsel), for CIVIL SERVICE EMPLOYEES ASSOCIATION, INC., LOCAL 1000, AFSCME, AFL-CIO

BRAUNFOTEL & FRENDEL, LLC (KEITH BRAUNFOTEL of counsel), for ROCKLAND COUNTY DISTRICT ATTORNEY CRIMINAL INVESTIGATORS ASSOCIATION

WATFORD JACKSON, PLLC (GREGORY J. WATFORD, of counsel), for CORRECTION OFFICERS BENEVOLENT ASSOCIATION OF ROCKLAND COUNTY

DAVIS & FERBER, LLP (ALEX J. KAMINSKI, of counsel), for ROCKLAND COUNTY SHERIFF'S DEPUTIES ASSOCIATION

BUNYAN & BAUMGARTNER, LLP (RICHARD P. BUNYAN of counsel), for SUPERIOR OFFICERS COUNCIL OF THE SHERIFF'S CORRECTIONS OFFICERS ASSOCIATION OF ROCKLAND COUNTY

GIRVIN & FERLAZZO, PC (JAMES E. GIRVIN and RYAN P. MULLAHY of counsel), for COUNTY OF ROCKLAND and ROCKLAND COUNTY SHERIFF

BOARD DECISION AND ORDER

These cases come to us on exceptions to an ALJ's decision filed by the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO (CSEA); the Rockland County Sheriff's Deputies Association (RCSDA); and the Superior Officers Council of the Sheriff's Corrections Officers Association of Rockland County (SOC); and cross-exceptions filed by the County of Rockland. In her decision, the ALJ found that the County of Rockland and, as joint employer, where relevant, the Rockland County Sheriff (collectively, the Respondents), did not violate § 209-a.1 (d) of the Public Employees' Fair Employment Act (Act), when they terminated their employee prescription drug program, which permitted employees represented by the Charging Parties to obtain prescription drugs at one specific pharmacy in Pomona, New York, without making any copayment.[1] The Respondents did not bargain with the Charging Parties prior to ending the prescription drug benefit. The ALJ found that the Respondents did not violate the Act because they simply reverted to the terms of their contracts with the Charging Parties.

EXCEPTIONS

CSEA filed five exceptions to the ALJ's decision asserting that the contract provisions are silent on the issue of prescription drug payments and that, therefore, the

[1] 51 PERB ¶ 4564 (2018). The Rockland County Sheriff is a joint employer for employees represented by the Corrections Officers Benevolent Association of Rockland County (COBARC), the RCSDA, and the SOC.

County did not meet its burden of proving a contract reversion defense.

RCSDA filed 3 exceptions to the ALJ's decision. RCSDA contends that the ALJ improperly used extrinsic evidence in her contract reversion analysis. Assuming that extrinsic evidence is allowed, RCSDA asserts that the stipulation of facts, the evidence looked at by the ALJ, is not the type of extrinsic evidence allowed and that the ALJ improperly failed to look at the parties' negotiating history and past practice. Finally, RCSDA contends that the language of the NYSHIP plans is not inconsistent with the past practice and does not support the County's contract reversion defense.

SOC filed one exception asserting that the contract language is consistent with the practice of providing prescription drugs at the Pomona pharmacy with no copayment and that the contract language is not reasonably clear that employees are required to pay pharmacy copayments.[2]

No exceptions were filed by the Rockland County District Attorney Criminal Investigators Association or by COBARC. The ALJ's decision is therefore final and binding as to them.[3]

The Respondents argue that the ALJ properly found that the County reverted to the terms of its contracts with the Charging Parties. The Respondents except to the ALJ's dismissal of three of their affirmative defenses. The Respondents assert that the closure of the Pomona pharmacy was a legislative act not subject to PERB's

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[2] SOC timely filed only a brief in support of its exceptions, without a separate particularized list of exceptions. SOC subsequently filed untimely a particularized list of exceptions, asserting that its failure to do so initially was the result of inadvertent error. The Respondents argue that SOC's failure to file its particularized list within the time frame provided by § 213.2 of our Rules of Procedure (Rules) should be deemed a waiver of its arguments. We consider only the brief in support of exceptions. The brief in support complies with § 213.2 of our Rules related to exceptions and is adequate to preserve its arguments. The particularized list of exceptions, being untimely, has not been considered.

[3] Section 213.10 (b) of the Rules.

jurisdiction. The Respondents also contend that the Charging Parties failed to establish an enforceable past practice because employees could not have a reasonable expectation of the practice of not paying copayments to continue. Finally, the Respondents argue that the benefit of not paying copayments was an unconstitutional gift of funds.

For the reasons given below, we reverse the decision of the ALJ.

FACTS

The facts are set forth in full in the ALJ's decision and are included here only as necessary to decide the exceptions.

The County and the Sheriff are public employers for purposes of the Act, and a joint employer, where applicable, for purposes of the Act. Each of the Charging Parties, except CSEA, has a collective bargaining agreement (CBA) with the County or the Joint Employer that expired on December 31, 2010.[4] As no new agreements have been negotiated for these bargaining units, the terms of the expired agreements continue pursuant to § 209-a.1 (e) of the Act. CSEA negotiated a CBA, dated July 20, 2012, with the County for the period of January 1, 2011 through December 31, 2013, with no changes to terms and conditions of employment except for those specified in the CBA.[5]

Each of the parties' 2007-2010 CBAs contains an article entitled "Medical, Surgical and Hospitalization Insurance and Other Benefits," the language of which was first agreed to in 2002.[6]

Article XIV of the 2007-2010 SOC CBA provides, in pertinent part, that the "employer agrees to pay 100 percent of the premium or cost for the individual employee

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[4] Joint Exs 2-5.
[5] Joint Ex 6.
[6] Joint Ex 8, ¶¶ 5-6, 8-9, 11-12, 14-15, 17-18.

and dependents for coverage under a core plus medical and psychiatric enhancements plan as described in the New York State [sic] Insurance Plan…."[7] This is the only reference to the provider in Article XIV of the CBA.[8]

In addition, the record contains copies of Article XVI of the CBAs between the County and CSEA for the periods January 1, 1989 through December 31, 1991; January 1, 1993 through December 31, 1995; January 1, 1996 through December 31, 1998; January 1, 1999 through December 31, 2001; January 1, 2002 through December 31, 2004; and January 1, 2005 through December 31, 2006.[9] None of these CBAs contain specific language concerning copayments for prescription drugs.

In a section of the stipulation of facts[10] entitled "FACTS RELATING TO ALL PARTIES," the parties stipulated as follows:

> 19. Since 2002, the county has been providing prescription drug coverage for employees represented by each of the Charging Parties, and the dependents of such employees, and prescription drug coverage for retirees who were formerly in the collective bargaining units represented by the Charging Parties, and their dependents and surviving spouses, through its participation in the New York State Health Insurance Program ("NYSHIP"). NYSHIP provides benefits through the Empire Plan, and the Core Plus Enhancements option provides prescription drug coverage through Empire Blue Cross Blue Shield/Caremark.
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> 20. Since the time when the County joined NYSHIP in 2002, the Empire Blue Cross Blue Shield/Caremark prescription drug coverage has included a co-pay feature that requires a co-payment to be made by or on

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[7] Joint Ex 2, § 1; Joint Ex 5, § 1.a.

[8] The language in the RCSDA and CSEA's CBAs is substantially the same. Article XIV of the 2007-2010 RCSDA CBA provides, in pertinent part, that the "Employer agrees to pay 100% of the premium or cost for the individual employee and dependents under a core plus medical and psychiatric enhancements [sic] as described in the New York State [sic] Insurance Plan." Joint Ex 5, § 1.

Article XIV of the 2007-2010 CSEA CBA provides, in pertinent part, that the "Employer agrees to pay 100% of the premium or cost for the eligible individual employee and dependents … for coverage under a core plus medical and psychiatric enhancements [sic] as described in the New York State [sic] Insurance Plan."[8] Joint Ex 7, § 1.

[9] Respondents' Exs 32-37.

[10] Joint Ex 8.

behalf of covered persons to the participating pharmacy for a portion of the cost of the prescribed drugs. . . .[11]

21. From at least the year 2002 until February 4, 2013 employees of Rockland County and their dependents, as well as retirees of the County, their dependents and surviving spouses were eligible to receive the benefit of obtaining prescription medications at no charge without paying a co-payment, provided, however, that the individuals filled the prescriptions with a specified pharmacy located at a service counter on the second floor of 50 Sanatorium Road in Pomona, NY. For purposes of this stipulation, this pharmacy shall be referred to as "the At-Issue Pharmacy."

23. Subsequent to February 4, 2013, the County is and has been providing NYSHIP prescription drug coverage for employees represented by each of the Charging Parties, plus retirees, plus the dependents and surviving spouses of such employees and retirees. Subsequent to February 4, 2013, the County has not paid to Med World or any other pharmacy the co-payment amount that is due under the Empire Plan for employees, retirees, dependents and surviving spouses who have had prescription drug medications filled at participating pharmacies.

24. From at least 2002 until February 4, 2013, the County contracted with a third-party pharmacy for the purpose of providing said medications at the At-Issue Pharmacy.

25. From at least 2002 until February 4, 2013, said third party pharmacy was a private company named "Med World Pharmacy" ("Med World").[12]

29. Beginning in 2002, the County paid Med World the co-pay amounts that were due and payable for filling the prescriptions for the employees, retirees, dependents and surviving spouses who used the At-Issue Pharmacy.

31. On or about January 4, 2013, County employees and retirees were sent a notice from County Executive Vanderhoef and Director of Insurance and Risk Management, Karen Ann Cassa, regarding the At-Issue Pharmacy. A copy of the January 4, 2013 notice is attached hereto….[13]

32. The 2013 budget that was adopted by the Rockland County Legislature did not provide funding for a renewal of the aforementioned Med World contract or the expenses that would have been incurred by the County by virtue of the County's payment of prescription drug co-payments described above in Paragraph 29.

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[11] *See* Respondents' Ex 2.
[12] *See* Respondents' Ex 1.
[13] *See* Joint Ex 1.

The January 4, 2013 memorandum referencing the "Closure of Med World Employee Pharmacy in Pomona" states, in pertinent part:

> Med World's contract to provide Employee Pharmacy Services to the County of Rockland will expire on February 4, 2013. As such, Med World will cease the provision of the Employee Prescription Drug Program at the close of business on Friday, February 1, 2013.
>
> The termination of the Employee Prescription Drug Program will require employees and retirees to be responsible for the full cost of all prescription copays in accordance with [the] terms of their respective County health insurance plan.[14]

Karen Cassa, the County's Director of Insurance and Risk Management, testified that the County was self-insured for purposes of health and prescription drug benefits from 1989 until 2002, when the County became a participating employer in NYSHIP. By resolution dated October 3, 1989, the County Legislature authorized the use of the pharmacy, then run by the County Department of Health and Hospitals, for all County employees, and waived the previously required $1 generic and $4 brand name copayments for prescription drugs.[15]

In 2000, the County entered into a "consultant agreement" with Med World Pharmacy, Inc. to run the Employee Prescription Program.[16] The term of this agreement was three years, with the County's option to extend the agreement for two additional one-year terms. The agreement was amended in April 2002 to require Med World to bill NYSHIP, rather than the County, for the cost of all pharmaceuticals provided pursuant to the Employee Prescription Program.[17] The amendment also required Med World to bill the County for "the appropriate Co-pay amount that would

[14] Joint Ex 1.
[15] Respondents' Ex 17.
[16] Respondents' Ex 3.
[17] Respondents' Ex 5.

normally be paid by the employee."[18]

The County's agreement with Med World was extended several times between 2002 and 2006.[19] In December 2007, the County Legislature approved a second three-year agreement with Med World for the Employee Pharmacy program, again with two one-year extensions at the option of the County.[20] This agreement again required Med World to bill the County for the amount of copayments that employees and retirees were not required to make.[21] The Med World agreement was extended by legislative resolution several more times, through February 4, 2013.[22]

In July 2003, the Office of the State Comptroller issued a "Report of Examination" of the County's health insurance program.[23] In this report, the auditors recommended that the County Legislature "reevaluate Resolution #620-1989 in light of the change from self-insurance since the resolution was passed."[24] The auditors concluded that waiving copayments for prescription drugs as an incentive for employees to use the County pharmacy no longer made "economic sense" once the County was no longer self-insured.[25] Also in 2003, the Rockland County Legislature passed a resolution stating that it opposed "the unilateral curtailment, reduction or undermining" of any health care benefits.[26]

Robert Bergman, the County's Commissioner of Finance and Business from 2003 to 2006, testified concerning events following the 2003 Comptroller's audit. According to

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[18] *Id*.
[19] Respondents' Exs 6-10.
[20] Respondents' Ex 20.
[21] Respondents' Exs 1, 31.
[22] Respondents' Exs 23-25.
[23] Respondents' Ex 11A.
[24] *Id*, at 9.
[25] *Id*.
[26] Respondents' Ex 19.

Bergman, it was his responsibility to assist the County Executive in preparing the County's annual budget, which is prepared and adopted prior to each December 31, for the next fiscal year. The Comptroller's audit, which was issued, as Bergman testified, too late in 2003 to be acted upon for the 2004 fiscal year, nevertheless became a "notable topic of discussion" within County government in 2004.[27]

Bergman testified that the Comptroller's recommendation was incorporated into the Executive budget for fiscal year 2005, which was published in October 2004. Following the publication of the Executive budget, the County legislature held a series of public meetings, attended by, among others, union leaders, representatives of the various County bargaining units and members of the public.[28] The 2005 Executive budget eliminated all funding for the Employee Pharmacy. The County Legislature thereafter adopted the 2005 County budget, which included $1.3 million "to continue the free prescription benefit at the employee pharmacy."[29] In a December 14, 2004 budget message from the County Executive to the Clerk of the County Legislature, the County Executive vetoed the Legislature's amendment adding $1.3 million for the free prescription benefit.[30] The County Executive's budget was overridden by the County Legislature, and the $1.3 million remained in the 2005 budget.[31]

The Charging Parties offered the following oral stipulation into the record, which was accepted by the County:

> We being the Charging Parties will stipulate to the following facts with respect to [Respondents' Exhibits] 14[A], 15[A] and 16[A]. There were legislative hearings, public legislative hearings on the budget in '06, '09, and 2012. That the funding for the pharmacy was discussed at those legislative hearings and that CSEA representatives attended the legislative hearings

[27] Tr, at 166-167.
[28] Tr, at 171.
[29] Respondents' Ex 13A.
[30] *Id*.
[31] Tr, at 172.

> and spoke in favor of continuing the benefit of receiving prescription drugs at the County pharmacy with no copay, the copay being paid by the pharmacy—I'm sorry—the copay being paid by the County at a rate of a hundred percent of the copay. CSEA favored that. And the budget each year was passed to include the money for the pharmacy until it was closed, which was the subject—which is the subject of this Improper Practice Charge proceeding. The hearings were legislative hearings which were open to the public and CSEA representatives attended those hearings and spoke in favor of continuing the benefit.[32]

A number of employees who used the Pomona pharmacy testified about their awareness, or lack thereof, of the County Executive's attempts to end the prescription drug benefit. Luciano Cavezzi worked for the County as a chauffeur from 1999 until 2010 and was a CSEA member during that period. He testified that, prior to his retirement, he heard "gossip" from his coworkers about whether the free prescription benefit would continue, but did not really pay attention to it. Cavezzi denied receiving communications from CSEA concerning fighting back against the County Executive's efforts, through the budget process, to eliminate the free prescription benefit.

John Fincken, who worked as an assistant shift operator at the Rockland County Sewer Department from 1994 until his retirement in 2011, was asked whether he was aware of any "political wrangling"[33] between the County Executive and the County Legislature concerning the funding for the pharmacy. He responded that:

> I wouldn't—I didn't call it wrangling. I called it this show every year when they say they're going to cut costs and threaten to close it, and then the Legislature approves it because they don't want to lose it either. I mean, there's nobody that wants to cut their own throat.[34]

Fincken was asked, on cross-examination, whether it was "true at the time you were employed that there was conversation and discussion going on by employees of the County that "Uh-oh, they're talking about getting rid of the County pharmacy and. . .

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[32] Tr, at 175-176;
[33] Tr, at 206.
[34] *Id*.

having us pay for the copayment?"[35] Fincken's response was that "[i]t was never discussed."[36]

Ronald Wilson was employed by the County from 1987 through 2014 in several different titles in the Department of Social Services. When asked how he became aware that the pharmacy was going to close, Wilson replied that "[t]here had been people talking about it back and forth."[37] Wilson did not recall receiving the January 4, 2013 memo announcing the closure of the pharmacy. Wilson testified that he had been aware that the County Executive and the County Legislature were going back and forth about funding the free prescription benefit at the employee pharmacy. He testified that he did not think much about it "because there's always back and forth, political issues back and forth, and it's something that I expected we would have forever as an employee with County insurance."[38]

Edward Sanchez, who worked for the County as a clerk-typist from 1981 to 2006, testified that he was unaware of the 2005 efforts of the County Executive to eliminate the free prescription benefit. He testified that he did not have conversations with coworkers about the free prescription drug benefit.

Aloysius McMahon, a Deputy Sheriff with the Rockland County Sheriff's Department, testified that he had never participated in any meeting, formal or informal, regarding the free prescription drug benefit prior to the termination of that benefit.[39] McMahon was repeatedly asked about his knowledge of the 2003 Comptroller's report on the County's health insurance program and about whether he had ever been told by

[35] Tr, at 217.
[36] Tr, at 218.
[37] Tr, at 260.
[38] Tr, at 261-262.
[39] Tr, at 332.

the RCSDA that it intended to lobby the County Legislature to continue the free prescription drug benefit. McMahon denied any knowledge of the Comptroller's report and stated that, while he could not remember this as a topic at a union meeting, "[t]here might have been talk. . . ."[40] With respect to media coverage of the free prescription drug benefit, McMahon said that he knew the issue was covered at some point, but could not recall when, and that he took reports in the local media "with a grain of salt."[41]

Richard Knapp was the vice president of the SOC from 2009 to 2015, and he became the president in May of 2015. Knapp denied knowledge of discussions between the County Executive and members of the County Legislature concerning the pharmacy, and denied hearing any rumors that the County was going to close the pharmacy.

DISCUSSION

It is uncontested that the benefit at issue here is a mandatory subject of negotiation that could give rise to a past practice, and that the County was well aware of the practice.[42] In order to establish an enforceable past practice, a charging party must demonstrate that the practice at issue 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.[43]

We affirm the ALJ's finding that the Charging Parties have carried their burden of proof in demonstrating an enforceable past practice in the circumstances here. The

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[40] Tr, at 349.
[41] Tr, at 350.
[42] 51 PERB ¶ 4564, at 4788. *See Chenango Forks Cent Sch Dist*, 40 PERB ¶ 3012 (2007), *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).
[43] *State of New York (Dept of Transportation)*, 50 PERB ¶ 3004, 3020 (2017); *Chenango Forks Cent Sch Dist*, 40 PERB ¶ 3012, at 3046-3947.

practice is one that began in 1989, when employees utilizing the employee pharmacy were able to obtain 30-day supplies of their prescriptions without making copayments for their prescription drugs.

The Respondents argue that the relevant past practice began, at the earliest, in 2002, when the County went from being self-insured to utilizing the NYSHIP plan for employee coverage. At this time, instead of waiving the required copayment, the County began reimbursing Med World for employees' copayments. We agree with the ALJ that the switch from being self-insured to using NYSHIP did not change the practice as it affected the employees in any relevant way. Under both regimens, employees were able to obtain their prescriptions without paying any copayments. Thus, from a unit member's perspective, the practice remained unchanged since 1989.

The County repeats the arguments it made to the ALJ that unit members could not have reasonably expected the benefit to continue based on the language of the CBAs between the Respondents and the Charging Parties, the fixed duration of the County's contracts with Med-World, and the public debate surrounding the benefit, including the County Executive's attempts to defund the benefit. We are not persuaded by these arguments.

Duty satisfaction, of which contract reversion is a particular form, can be found where a party points to "contractual provisions that either expressly or implicitly demonstrate that the parties had reached accord on the specific subject" at issue, and establish a basis for finding that the specific subject has been "negotiated to fruition."[44] When an employer and employee organization have reached an agreement with

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[44] *County of Sullivan & Sheriff of Sullivan County*, 51 PERB ¶ 3008, at 3035, quoting *State of New York (OMH-Rochester Psy Cent)*, 50 PERB ¶ 3032, 3129-3130 (2017). *See generally Orchard Park Cent Sch Dist*, 47 PERB ¶ 3029, 3089 (2014); *New York City Transit Auth*, 41 PERB ¶ 3014, 3076 (2008).

respect to a specific subject following negotiations, a party may unilaterally end an inconsistent past practice, without violating the Act, by reverting to the terms of the negotiated provision of the agreement.[45] The burden rests with the respondent to prove a contract reversion defense through negotiated terms that are reasonably clear on the specific subject at issue.[46]

Such reasonably clear terms may be explicit or implicit; as we explained in *County of Sullivan*, "where a contractual provision or interlocking contractual provisions, evidence that the parties have comprehensively negotiated a subject, the employer may revert to the contract and eliminate an inconsistent past practice on the same subject."[47] Here, however, no such comprehensive negotiation inconsistent with the past practice has been established.

No language in any of the CBAs has been cited that either explicitly or implicitly serves to bar the employees from developing a reasonable expectation that the practice will continue.[48]

The CBA language that the Respondents point to in support of their contract reversion defense is contained in the "Medical, Surgical and Hospitalization Insurance and Other Benefits" article of the CBAs. The language varies in non-substantive ways between the three contracts at issue here, but each provides that the Employer agrees to pay 100% of the premium or cost for the individual employee and dependents "under

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[45] *County of Sullivan & Sheriff of Sullivan County*, 51 PERB ¶ 3008, at 3035; *City of Watertown*, 47 PERB ¶ 3015, 3041 (2014). *See also Shelter Island Union Free Sch Dist*, 45 PERB ¶ 3032, 3075-3076 (2012); *New York City Transit Auth*, 41 PERB ¶ 3014, at 3076.
[46] *Id*.
[47] *Id*. text at n 41.
[48] *See, eg, County of Sullivan & Sheriff of Sullivan County*, 51 PERB ¶ 3008, 3034-3035 (2018), *confd* 179 AD3d 1270, 53 PERB ¶ 7001 (3d Dept, 2020); *Village of Mount Kisco*, 43 PERB ¶ 3029, 3108-3109 (2010).

a core plus medical and psychiatric enhancements as described in the New York State Insurance Plan."[49] This language in no way supports the Respondents' contract reversion defense. The issue of copayments is not specifically mentioned, and nothing in the various CBAs before us alludes to or even inferentially addresses the issue of copayments, Thus, based on the text of the CBAs relied upon by the County, no contractual language even potentially establishes a reasonably clear conclusion that the Respondents will not provide the benefit of paying for employees' copayments.

The Respondents, however, argue that this language incorporates by reference the underlying plan description, which provides that prescription drugs require a copayment to be made by or on behalf of covered persons.[50]

As a threshold matter, were we to find sufficient ambiguity to resort to extrinsic evidence, the language in the plan description does not support the conclusion argued for by the County. The parties stipulated that the prescription drug program required payments to be made "by or on behalf of covered persons."[51] This language is entirely consistent with the practice as it existed, whereby the Respondents made the copayment "on behalf of" employees. Because there is nothing incompatible about the existence of the practice and the language of the prescription drug program, there is no contrary CBA language for the Respondents to revert to. Accordingly, we find the Respondents' contract reversion defense to lack merit.

The same result would pertain were we to deem the plan description to be incorporated by reference. Under New York State law, "the doctrine of incorporation by reference is grounded on the premise that the material to be incorporated is so well

[49] Joint Ex 5, § 1.a (SOC's CBA); Joint Ex 5 § 1 (RCSDA's CBA); Joint Ex 7, § 1.
[50] Respondents Ex 2.
[51] Joint Ex 8, § 20.

known to the contracting parties that a mere reference to it is sufficient."[52] In particular, "[t]he referenced materials must be described in the contract such that it is identifiable beyond all reasonable doubt."[53] Here, the CBAs at issue do not explicitly refer at all to the plan description. The Respondents argue from implication that we should find incorporation by reference based not on the text of the CBAs but on the argument that the plan description, by relating to the issue of health insurance, should be implicitly incorporated by reference. The courts of this State have found that an "oblique reference" to a document is "insufficient to meet [the] exacting standard" of beyond all reasonable doubt, and here there is not even such an oblique reference to rely upon. We thus reject the claim that the contents of the plan description were incorporated into the CBAs at issue by reference.[54] This is especially true where, as here, the practice has continued through the negotiation and ratification of numerous CBAs.

The length of the contracts with Med World also does not undermine employees' reasonable expectation that the benefit would continue. As the ALJ noted, there is no record evidence that employees represented by the Charging Parties were even aware of the duration of the contracts, therefore the length of the contracts would have no bearing whatsoever on employees' reasonable expectations.

The Respondents also assert that the efforts of the County Executive to

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[52] *Eshaghpour v Zepsa Industries, Inc*, 170 AD3d 440, 441 (1st Dept 2019), quoting *Maines Paper & Foods Svcs v Keystone Assocs, Architects, Engrs, & Surveyors, LLC*, 134 AD3d 1340, 1342 (3d Dept 2015) (editing marks omitted).

[53] Id, citing *Shark Information Svcs Corp v Crum & Forster Commercial Ins*, 222 AD2d 251, 251-252 (1st Dept 1995); *see also Chiacchia v National Westminster Bank USA*, 124 AD2d 626, 628 (2d Dept 1986).

[54] *Compare Genesee Comm Coll*, 29 PERB ¶ 3072, 3172-3173 (1996) (finding Board Policy to be incorporated by reference where agreement stated "to such extent as Board Policy #236 applies to unit members on continuing contracts and is not inconsistent with this Agreement, the evaluation standards therein set forth shall be controlling. . . .").

terminate the benefit make any expectation that the practice would continue unreasonable. We reject this argument, for the reasons given by the ALJ. As she noted, while the County Executive attempted to eliminate funding for the benefit in 2004, 2006, 2009, and 2012, no such efforts were made in 2005, 2007, 2008, 2010, or 2011. The County Legislature, in direct response to the County Executive's efforts, passed a resolution expressing its opposition to any unilateral reduction in health benefits for County employees and retirees. The ALJ also found that the record did not support a conclusion that employees receiving the benefit were broadly aware of the County Executive's efforts to eliminate the benefit. While CSEA representatives spoke at legislative hearings in 2006, 2009, and 2012 in favor of continuing the benefit, there is no evidence that representatives of the other Charging Parties spoke. While some union witnesses recalled hearing people talk about the benefit not being continued, others did not, and there is no evidence that the intricacies of the maneuverings between the County Executive and the County Legislature were widely known among unit employees. In sum, we affirm the ALJ's finding that employees' expectation that the benefit would continue was objectively reasonable.

Accordingly, we find that there existed a cognizable past practice by which unit employees utilizing the Pomona pharmacy could receive their prescriptions with no copayment.

We next address the Respondents' affirmative defense that the benefit of paying for employees' prescription drug copayments is an unconstitutional gift of public funds. Like the ALJ, we reject this argument. As we held in *Fashion Institute of Technology*, "[i]t is well established that where there is a legal obligation for a public employer to pay public employees, whether as a result of an arbitration award, a court decision, contractual language or the continuation of a past practice under the Act, such payment

does not constitute a prohibited gift."[55] In the present case, paying for employees' prescription drug copayments constitutes an enforceable past practice under the Act that the County may not alter unilaterally. Based upon the Respondents' legal obligation under the Act to continue the payments, such payments do not constitute an unconstitutional gift of public funds.

We also affirm the ALJ's finding that the closure of the Pomona pharmacy is not the type of legislative action that is outside of our jurisdiction.[56] In *Buffalo City School District*, we held that the legislative imposition of a smoking ban applicable not just to employees but to the public generally, without executive adoption, did not violate § 209-a.1 (d) of the Act.[57] We found that only where the City, as employer, separately adopted the terms of the legislation as work rules and advised its employees that, as employees, they would face discipline or any other employment-related consequences for failure to comply with the legislation, would a cause of action under § 209-a.1 (d) of the Act lie.[58]

The instant situation is easily distinguishable from that in *Buffalo City School District*. Here, the legislature did not adopt legislation that was applicable to the general public. Instead, the action was targeted directly at unit employees. Moreover, the Rockland County Legislature did not take its own action, but instead adopted the recommendation of the County Executive that the 2013 budget include closing the

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[55] 41 PERB ¶ 3010, at 3067, *confd sub nom Fashion Institute of Technology v NYS Pub Empl Relations Bd*, 68 AD3d 605, 42 PERB ¶ 7011 (1st Dept 2009), *citing Board of Educ Union Free Sch Dist No. 3 of the Town of Huntington v Associated Teachers of Huntington, Inc*, 30 NY2d 122 (1972).
[56] *See Buffalo City Sch Dist*, 29 PERB ¶ 3077 (1996); *City of Glens Falls*, 24 PERB ¶ 3015, 3030, n 4 (1991).
[57] 29 PERB ¶ 3077, at 3183-3184.
[58] *Id*.

employee pharmacy.[59] If we were to accept the argument that the Legislature's action here was excluded from our jurisdiction as an action taken in its legislative capacity, the County Executive could nullify the results of the collective bargaining process simply by submitting desired unilateral changes for legislative enactment. Such a result is contrary to the policies of the Act.[60]

Based on the foregoing, we conclude that the ALJ erred in sustaining the Respondents' contract reversion defense. Therefore, we reverse the ALJ's decision dismissing the charge and conclude that the Respondents violated § 209-a.1 (d) of the Act when they unilaterally ended the practice of permitting employees represented by the Charging Parties to obtain prescription drugs at one specific pharmacy in Pomona, New York, without making any copayment.

THEREFORE, IT IS HEREBY ORDERED that the County of Rockland and the Rockland County Sheriff:

1. Reinstate the practice of permitting employees represented by the Charging Parties to obtain prescription drugs without having to themselves incur the expense of a copayment at a designated pharmacy in Pomona, New York or, if no pharmacy is available in Pomona, New York, within reasonable proximity thereto.
2. Make unit employees whole for wages and benefits lost, if any, as a result of the Respondents' unilaterally ceasing the practice of allowing unit employees to obtain prescription drugs at one specific pharmacy in Pomona, New York, with

[59] Respondents' Ex 14A.
[60] *Compare County of Suffolk Legislature and County of Suffolk*, 34 PERB ¶ 3034, 3080 (2001) (finding that County, through its Legislature, cannot unilaterally adopt legislation for individual employees).

interest at the maximum legal rate; and

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

DATED: April 28, 2020
Albany, New York

John F. Wirenius, Chairperson

Anthony Zumbolo, Member

Monte A. Klein, Member

NOTICE TO ALL EMPLOYEES

PURSUANT TO

THE DECISION AND ORDER OF THE

NEW YORK STATE
PUBLIC EMPLOYMENT RELATIONS BOARD

and in order to effectuate the policies of the

NEW YORK STATE
PUBLIC EMPLOYEES' FAIR EMPLOYMENT ACT

We hereby notify all employees of the County of Rockland (County) in the bargaining unit represented by the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO (CSEA) that the County will:

1. Reinstate the practice of permitting employees represented by CSEA to obtain prescription drugs without having to themselves incur the expense of a copayment at a designated pharmacy in Pomona, New York or, if no pharmacy is available in Pomona, New York, within reasonable proximity thereto.
2. Make unit employees whole for wages and benefits lost, if any, as a result of the County's unilaterally ceasing the practice of allowing unit employees to obtain prescription drugs at one specific pharmacy in Pomona, New York, with interest at the maximum legal rate.

Dated . . . . . .

By . . . . . .
on behalf of the County of Rockland

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

NOTICE TO ALL EMPLOYEES

PURSUANT TO

THE DECISION AND ORDER OF THE

NEW YORK STATE
PUBLIC EMPLOYMENT RELATIONS BOARD

and in order to effectuate the policies of the

NEW YORK STATE
PUBLIC EMPLOYEES' FAIR EMPLOYMENT ACT

We hereby notify all employees of the County of Rockland and the Rockland County Sheriff (together, the Joint Employer) in the bargaining unit represented by the Rockland County Sheriff's Deputies Association (RCSDA), that the Joint Employer will:

1. Reinstate the practice of permitting employees represented by RCSDA to obtain prescription drugs without having to themselves incur the expense of a copayment at a designated pharmacy in Pomona, New York or, if no pharmacy is available in Pomona, New York, within reasonable proximity thereto.
2. Make unit employees whole for wages and benefits lost, if any, as a result of the Joint Employer's unilaterally ceasing the practice of allowing unit employees to obtain prescription drugs at one specific pharmacy in Pomona, New York, with interest at the maximum legal rate.

Dated . . . . . .

By . . . . . .
on behalf of the County of Rockland &
the Rockland County Sheriff

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

NOTICE TO ALL EMPLOYEES

PURSUANT TO

THE DECISION AND ORDER OF THE

NEW YORK STATE
PUBLIC EMPLOYMENT RELATIONS BOARD

and in order to effectuate the policies of the

NEW YORK STATE
PUBLIC EMPLOYEES' FAIR EMPLOYMENT ACT

We hereby notify all employees of the County of Rockland and the Rockland County Sheriff (together, the Joint Employer) in the bargaining unit represented by the Superior Officers Council of the Sheriff's Corrections Officers Association of Rockland County (SOC), that the Joint Employer will:

1. Reinstate the practice of permitting employees represented by SOC to obtain prescription drugs without having to themselves incur the expense of a copayment at a designated pharmacy in Pomona, New York or, if no pharmacy is available in Pomona, New York, within reasonable proximity thereto.
2. Make unit employees whole for wages and benefits lost, if any, as a result of the Joint Employer's unilaterally ceasing the practice of allowing unit employees to obtain prescription drugs at one specific pharmacy in Pomona, New York, with interest at the maximum legal rate.

Dated . . . . . .

By . . . . . .
on behalf of the County of Rockland &
the Rockland County Sheriff

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

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

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

Charging Party, **CASE NO. U-35132**

- and -

STATE OF NEW YORK (OFFICE OF GENERAL SERVICES),

Respondent.

DAREN J. RYLEWICZ, GENERAL COUNSEL (JENNIFER C. ZEGARELLI of counsel) for Charging Party

MICHAEL N. VOLFORTE, ACTING GENERAL COUNSEL (RONALD S. EHRLICH of counsel) for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the State of New York (Office of General Services) (State or OGS) to a decision of an Administrative Law Judge (ALJ) finding that the State violated § 209-a.1 (g) of the Public Employees' Fair Employment Act (Act). The ALJ found that the State violated the Act when it denied representation to four employees represented by the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO (CSEA) during questioning by OGS representatives on June 3, 2016.[1]

EXCEPTIONS

The State filed four exceptions to the ALJ's decision. In its first exception, the State contends that the ALJ incorrectly found that the "only issue" disputed by the parties is whether OGS afforded the employees a reasonable period of time to obtain

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[1] 52 PERB ¶ 4543 (2019).

representation before conducting the interrogation.[2] The State's second exception contends that the ALJ incorrectly found that OGS did not give employees a reasonable period of time to obtain representation before conducting its interrogation. In its third exception, the State asserts that the ALJ erred in finding that CSEA Local 660 President, Tracy Carnavale, sought out another CSEA representative to appear with employees but that none was available. Finally, in its fourth exception, the State contends that the affirmative defense available under § 209-a.1 (g) of the Act is applicable here and that the charge should be dismissed on that basis.

CSEA filed a response supporting the ALJ's decision and contending that no basis has been demonstrated for reversal.

For the reasons given below, we reverse the decision of the ALJ.

FACTS

The facts are fully set forth in the ALJ's decision and are repeated here only as necessary to decide the exceptions.

Carnavale is employed by OGS as a plant utility engineer, a position he has held for approximately 30 years. He is also president of CSEA Local 660, which is the local bargaining unit of the OGS employees who are at issue in this proceeding. Carnavale works Monday through Thursday, from 7:00 a.m. to 5:00 p.m.[3] Carnavale has regularly scheduled union release time every Monday and Tuesday, and his days off are Friday, Saturday and Sunday.[4]

Carnavale testified that pursuant to CSEA policy, only individuals who have been certified and appointed by the local unit president are permitted to represent bargaining

[2] Exception No. 1, citing *id*, at 4705.
[3] Tr, at 63.
[4] *Id.*

unit members who are a potential subject of discipline during an interrogation.[5]

On June 1 and 2, 2016, CSEA bargaining unit members Kent Thomas, Nick Rizzo, Carl Frost, and Matt Poggoli were notified that they would be required to submit to interrogations by OGS on June 3, 2016. Each member was separately notified of the scheduled interrogation by hand delivery of a letter from Richard Mohrmann, OGS's Director of Labor Relations.[6] Each member received an individually addressed letter that was substantively the same, except for the time that the interrogation would be held. The letters state:

> [p]lease be advised that as a result of work related actions, the Office of Labor Relations has determined that it will be necessary to formally question, or interrogate, you. Therefore you are directed to report to the Empire State Plaza, 40th Floor, on Friday June 3, 2016…for questioning.
>
> You are advised that your presence at this questioning session is mandatory. Failure to appear on the scheduled date and time will be considered insubordination and may result in administrative action being taken against you for impeding a State investigation.
>
> Under the terms of the CSEA contract, you are entitled to representation by CSEA or private counsel during this formal questioning session. Please be advised that it is your responsibility to contact and obtain a CSEA representative to accompany you at this interrogation.
>
> If you have any questions regarding this matter, please contact your union representative prior to the scheduled interrogation.[7]

Upon being notified of the interrogations, Thomas, Rizzo, Frost, and Poggoli separately emailed Mohrmann on June 2, 2016, requesting that the interrogation be rescheduled for the following week because Carnavale was unavailable to represent

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[5] Tr, at 59.
[6] According to the delivery receipts, although all four letters were dated June 1, 2016, Rizzo and Thomas did not receive their letters until June 2, 2016. Tr, at 134; Respondent's Ex 1.
[7] Respondent's Ex 1.

them on June 3, 2016.[8]

Carnavale testified that on June 1, 2016, at 4:45 p.m., he received an email from Matt Devane, Human Resources Specialist at OGS, notifying him that OGS had scheduled interrogations of Thomas, Rizzo, Frost, and Poggoli, to take place on June 3, 2016, beginning at 7:00 a.m.[9] Carnavale responded to Devane's email on the following morning at 10:51 a.m., stating that Fridays are one of his regularly scheduled days off, and asking that the interrogations be rescheduled.[10]

In response to the emails sent by Thomas, Rizzo, Frost, and Poggoli, Mohrmann sent the following email:

> [t]here was considerable planning between Human Resources, Legal Services and RPM staff in determining the dates for these interrogations, to minimize operational impact and allow for necessary administrative staff to attend. Please be advised that the interrogation scheduled for Friday morning will not be canceled or rescheduled. You are expected to attend at the designated time.
>
> With respect to union representation, note there is no requirement that any specific union representative provide representation. I understand Tracy Carnavale has indicated he is unavailable because Fridays are his pass day. This does not preclude him, as your elected CSEA Local 660 President, from coming in to represent you. However, if Tracy Carnavale is unavailable, he may designate an alternate union representative or call the local CSEA headquarters for assistance in securing you representation. There are other representatives trained in representation. Kevin Piazza and Chuck Leibach have recently attended interrogations and other meetings with Labor Relations, and may be available for representation. I would encourage you to promptly contact Tracy Carnavale or CSEA to secure representation.[11]

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[8] Poggoli's email requests that the interrogation be rescheduled for the following week, Monday through Thursday. Frost's email simply asks that the interrogation be rescheduled, without requesting a specific timeframe. Thomas and Rizzo's emails request that the interrogation be rescheduled to the following Wednesday. Joint Exs 2-5.

[9] Tr, at 62; Joint Ex 1.

[10] Joint Ex 1.

[11] Joint Exs 2-5.

Mohrmann's response to Carnavale was substantively the same as the emails that were sent to the union members, but added:

> Thomas Kent, Nick Rizzo, Carl Frost and Matt Poggoli all contacted me today to advise that they can't attend their scheduled interrogations because you are off duty on Fridays. I will be sending each of them notice that they are expected to report at the designated times and that they should contact you or the regional CSEA office to arrange for alternate representation (if you cannot be here).[12]

Carnavale testified that, as of June 1, 2016, he, Kevin Piazza, and Chuck Leibach were the only three individuals certified pursuant to CSEA's constitution to represent unit members of CSEA Local 660 during interrogations.[13] After receiving Mohrmann's email, Carnavale reached out to both Leibach and Piazza to determine if either was available to represent the members at the interrogations scheduled for June 3, 2016. According to Carnavale, Piazza was unavailable because he was going to be out on sick leave and Leibach was also unavailable because he was scheduled to be off on that date.[14]

Angelique Bywater, a CSEA Labor Relations Specialist, testified that she received a telephone call from Carnavale "after 5 o'clock" on June 1, 2016.[15] Carnavale asked her if she was available to attend four interrogations that Friday, June 3, 2016. Carnavale told her that both he and the two other CSEA representatives for the local

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[12] Joint Ex 1.
[13] Tr, at 61-62.
[14] Piazza's time and attendance record shows that he utilized eight hours of sick leave on June 3, 2016. Leibach's time and attendance record shows that he used four hours of vacation time on June 3, 2016, beginning at 11:00 a.m. Respondent's Exs 3-4.
[15] Although Bywater testified that she received a call from Carnavale on June 1, the ALJ found that consideration of the record as a whole suggested that the call actually occurred on June 2, since Carnavale did not receive notice of the interrogations until he arrived at work on June 2 and had not been advised by Mohrmann that OGS would not reschedule the interrogations until the afternoon of June 2. Tr, at 87. The State argues that the evidence more strongly suggests that the conversation took place on June 1. We find it unnecessary to resolve this discrepancy, as it makes no substantive difference whether the conversation occurred on June 1 or 2.

were unavailable to attend the interrogations.[16] She testified that, in addition to Carnavale, Leibach and Piazza were certified by CSEA to attend the interrogations for CSEA Local 660 unit members.[17] Bywater was not available to attend the interrogations on June 3rd because she was already scheduled to meet with representatives of the Town of Rotterdam to negotiate a CBA.

Mohrmann oversees the agency's labor relations program, which handles all employee disciplinary matters, contractual grievances, and labor-management issues. Mohrmann also oversees OGS's interrogation process.

Mohrmann testified that when the labor relations department receives a referral for potential employee misconduct, labor relations staff evaluate the facts and circumstances of the referral and determine whether an interrogation of the involved employee is necessary. With respect to Thomas, Rizzo, Frost, and Poggoli, Mohrmann testified that a complaint had been filed with the New York State Inspector General (IG) alleging that those employees, along with three others, had engaged in "drug use, time abuse, lack of supervision [and] selling drugs."[18] He added that "[t]here were some serious allegations of potential misconduct…which would certainly, if found to be true…result in disciplinary action to some or all of the employees."[19]

Mohrmann testified that he received emails from all four employees and Carnavale requesting that the interrogations be rescheduled, on the basis that Carnavale was unavailable. Mohrmann further stated that he did not feel Carnavale's unavailability was an adequate reason to reschedule the interrogations, in light of the

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[16] When asked if he contacted Bywater, Carnavale testified that he could not recall if he had contacted her.
[17] Tr, at 88.
[18] Tr, at 117; Respondent's Ex 5.
[19] Tr, at 117.

fact that there were other CSEA representatives who could attend the interrogations with the employees.[20] Nevertheless, Mohrmann acknowledged that he interpreted the emails as expressing the employees' "desire to have representation."[21] He stated that he did not receive a response to any of the emails he sent to the employees or Carnavale.

Mohrmann testified that he was not aware of the efforts made by CSEA to arrange for a representative, other than Carnavale, to be present at the interrogations. Mohrmann stated that if he had known that all of the other CSEA representatives were unavailable on June 3, 2016 he would have "assessed the situation"[22] and, if the circumstance was such that no CSEA representative could appear, then he "would have worked to reschedule the interrogations."[23] He continued that, in this circumstance, the employees and CSEA did not present a "legitimate reason" to reschedule.[24]

Morhmann testified that after OGS completed its investigation of the employees, no disciplinary charges were filed. He stated that the employees were notified on July 1, 2016 that they were not targets of disciplinary action.[25]

Mohrmann testified that he spoke with Leibach on the morning of June 3, 2016 about the interrogations that would be taking place that morning. Mohrmann testified:

> [i]f my recall is correct, he explained that [Carnavale] did not notify him of the interrogations that morning and said that he was tied up that morning…making preparations for the Freihofer's Run for Women and that he would check with his boss to see if he could be relieved from his duties to come up and represent the employees.[26]

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[20] Tr, at 137.
[21] Tr, at 145.
[22] Tr, at 151.
[23] *Id*.
[24] *Id.*
[25] Tr, at 152.
[26] Tr, at 149.

Mohrmann stated that he offered to contact Leibach's supervisor to obtain employee organization leave (EOL) for him so that he could attend the interrogations. Mohrmann testified that Leibach stated he would call his supervisor himself and then would call Mohrmann back. Mohrmann stated that he did not receive a call back from Leibach, and proceeded with the interrogations.[27]

DISCUSSION

Section 209-a.1 (g) of the Act makes it an improper practice for a public employer

> to fail to permit or refuse to afford a public employee the right, upon the employee's demand, to representation by a representative of the employee organization, or the designee of such organization, which has been certified or recognized under this article when at the time of questioning by the employer of such employee it reasonably appears that he or she may be the subject of a potential disciplinary action.

Section 209-a.1 (g) of the Act further provides that "[i]f representation is requested, and the employee is a potential target of disciplinary action at the time of questioning, a reasonable period of time shall be afforded to the employee to obtain such representation."

To establish a violation of § 209-a.1 (g) of the Act, a charging party must prove, by a preponderance of evidence, that a demand for representation was made by a public employee, the employer failed to permit or refused to afford the employee organizational representation during questioning by the employer, and, at the time of the employer's questioning, it reasonably appeared that the employee may be the subject or target of potential disciplinary action.[28]

Initially, we address whether a valid demand for representation was made. The State disputes that Thomas, Rizzo, Frost, and Poggoli made valid requests for

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[27] Tr, at 182.
[28] *State of New York (DOCS)*, 43 PERB ¶ 3031, 3117 (2010).

representation. We find no merit to this exception. The four employees' emails to Mohrmann, in which each asked to reschedule their interrogations so that Carnavale could be present, are sufficient demands for representation the following day. Indeed, Mohrmann testified that he interpreted the emails as the employees expressing a desire to have representation.[29] We find that the employees invoked their right to have a CSEA representative with them at the interrogation.

The parties do not dispute that it reasonably appeared that Thomas, Rizzo, Frost, and Poggoli may have been the target of potential disciplinary action at the time of the interrogation, and we therefore move on to examine whether the State gave employees a reasonable period of time to obtain representation.

The ALJ found that it was unreasonable for the State to proceed with the interrogations when no CSEA representative appeared at the interrogations. For the reasons that follow, we find that it was not unreasonable for the State to proceed with the interrogations on June 3, 2016 and, in the specific circumstances here, we find that the State did not violate § 209-a.1 (g) of the Act by interrogating employees without a CSEA representative present.

We have not yet ruled on the issue of whether an employer is required to reschedule an interrogation where the employee's preferred representative is unavailable under 209-a.1 (g).[30] We see no need to do so in this case. For present purposes, it is sufficient that we find that an employer is not required to reschedule

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[29] Tr, at 145.

[30] In other contexts, we have held that either party to a bargaining relationship may choose its own representatives and neither may attempt to control the other's selection, and the choice of a representative generally belongs to the employee organization, not the individual employee. *State of New York (DOCCS)*, 50 PERB ¶ 3037, 3157 (2017); *Erie County Water Auth*, 25 PERB ¶ 3030, 3063 (1992); *UFT (Greenberg)*, 15 PERB ¶ 3114, 3176 (1982).

solely because the employee's preferred representative is not available unless it is informed that no alternative representative is available. Here, the State was never informed that alternatives to the employees' preferred representative (Carnavale) were not available at the time scheduled for interrogations.

Instead, the State knew of the possibility of at least two legitimate alternatives (Piazza and Leibach) and expressed its awareness that either of these representatives might represent Thomas, Rizzo, Frost, and Poggoli. Indeed, there is uncontroverted testimony that both Carnavale and the State, through Mohrmann, reached out to certified representatives to inform them of the need for representation. There is no evidence that Mohrmann was ever definitively informed that no representatives were available. No evidence tends to suggest that either Carnavale or the employees being interrogated informed the State that all possible alternative representatives were not available and that Carnavale had made further attempts to obtain representation for the employees by contacting Bywater, a Labor Relations Specialist for CSEA. There is no indication that even at the commencement of the interrogations on June 3, 2016 any of the employees reiterated their desire for representation or communicated that no alternate representatives were available. Had Mohrmann been so advised, it is his uncontroverted testimony that he would have "assessed the situation"[31] and, if the circumstance was such that no CSEA representative could appear, then he "would have worked to reschedule the interrogations."[32]

While Carnavale took diligent and reasonable steps to obtain alternative representatives, these steps were not communicated to the State by CSEA or by the employees. Just as it is the employee's responsibility to ask for union representation,

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[31] Tr, at 151.
[32] *Id*.

we find that the employee (or the employee organization that represents the employee) must alert the employer if the employee is unable to obtain representation for the time of the scheduled interrogation. As on the record before us such was not the case here, CSEA did not carry its burden of establishing that the State violated § 209-a.1 (g) of the Act by proceeding with the interrogations.[33]

For the foregoing reasons, we find that the charge should have been dismissed.

IT IS, THEREFORE, ORDERED that the ALJ's decision is reversed, 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

[33] Given our disposition of this case, we need not address the State's argument that the affirmative defense provided in § 209-a.1 (g) of the Act applies here.