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In the Matter of

**UNITED TRANSIT LEADERSHIP ORGANIZATION,**

Petitioner,

-and-

**CASE NO. C-6675**

**STATEN ISLAND RAPID TRANSIT OPERATING  
AUTHORITY,**

Employer.

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**CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE**

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

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

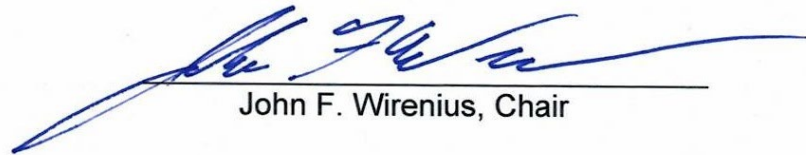
IT IS HEREBY CERTIFIED that the United Transit Leadership Organization has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations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

Included: All employees holding the Hay Titles of "Superintendent" and "Deputy Superintendent".

Excluded: All other employees.

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

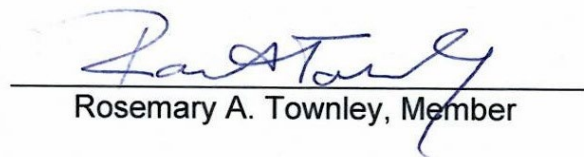
DATED: August 9, 2022  
Albany, New York



John F. Wirenius, Chair



Anthony Zumbolo, Member



Rosemary A. Townley, Member

In the Matter of

**KENTON GRAHAM,**

Charging Party,

**CASE NO. U-37889**

- and -

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

Respondent.

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

**KAREN SOLIMANDO, EXECUTIVE DIRECTOR OF LABOR RELATIONS  
(CAITLIN F. BREEN of counsel), for Respondent**

**BOARD DECISION AND ORDER**

This case comes to us on exceptions filed by Kenton Graham to a decision of an Administrative Law Judge (ALJ) dismissing Graham's improper practice charge.<sup>1</sup> The charge alleged 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) when it gave Graham a poor professional reference in retaliation for protected activity. The ALJ found that Graham failed to allege facts sufficient to establish a *prima facie* case of retaliation.

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<sup>1</sup> 55 PERB ¶ 4534 (2022).

### EXCEPTIONS

Graham filed 15 exceptions to the ALJ's decision in which he contends that he alleged facts sufficient to demonstrate a *prima facie* case of retaliation and that the ALJ should have conducted a hearing on the allegations in his charge.<sup>2</sup> Specifically, Graham asserts that the ALJ's statement that it is unclear whether providing a poor professional reference constitutes an adverse employment action under the Act should be "reconsidered."<sup>3</sup> Graham claims that the timing and context of the professional reference he received demonstrate that he would have received a better professional reference "but for" his protected activity.<sup>4</sup>

The District filed a response in which it asserts that Graham's exceptions should be dismissed because they fail to comply with § 213.2 of our Rules of Procedure (Rules). On the merits, the District supports the ALJ's decision and contends that no basis has been demonstrated for reversal.

For the reasons given below, we vacate the ALJ's decision and remand for further proceedings consistent with this decision.

### FACTS

The ALJ required Graham to file an offer of proof, specifying the facts he intended

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<sup>2</sup> Exceptions Nos 1, 3, and 15.

<sup>3</sup> Exception No 13.

<sup>4</sup> Exceptions No 8 through 12, and 14. Exceptions Nos 2 through 7 restate the ALJ's findings regarding Graham's protected activity and the District's knowledge of this activity and claim that the ALJ should have found that the District was aware of more of Graham's protected activity. The ALJ found that Graham engaged in protected activity and that the District was aware of his activity, both elements of a *prima facie* case of retaliation. There are no exceptions to the ALJ's findings. Because these elements are not disputed, we find it unnecessary to address these exceptions.

to prove at a hearing. The facts here are taken from the improper practice charge and Graham's offer of proof and attached documents. Like the ALJ, we assume for our decision today the truth of the allegations in the charge and the offer of proof, granting all reasonable inferences that can be drawn from the facts alleged in support of the charge.<sup>5</sup>

Graham is a teacher at Brooklyn High School for Law and Technology, where he has worked since 2018; throughout his employment, Vernon Johnson has served as the school principal. Graham is represented by the United Federation of Teachers (UFT).

In October 2020, the UFT filed an operational complaint with the Department of Education concerning Graham's teaching assignments.

On October 1, 2020, Graham sent an email to Johnson about unsafe working conditions in his classroom, and copied his UFT district representative on this email. That same day, Johnson entered Graham's classroom and approached Graham in a confrontational manner, asking him why he had to notify the UFT and "proclaiming" that Graham was looking for sympathy and was not a victim.<sup>6</sup>

On March 3, 2021, Graham requested Johnson to complete a professional evaluation reference form as part of an application he had made for employment with the United States Department of Defense, and Johnson responded that he would complete the evaluation.

On March 5, 2021, Graham asked his UFT chapter leader about his complaint

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<sup>5</sup> *NYS Correctional Officers and Police Benevolent Assn (Sticht Case)*, 55 PERB ¶¶ 3006, 3023 (2022); *County of Livingston*, 43 PERB ¶¶ 3018, 3072 (2010); *Board of Educ of the City Sch Dist of the City of New York (Grassel)*, 43 PERB ¶¶ 3010, 3033 (2010); *Niagara Frontier Transit Metro System, Inc.*, 42 PERB ¶¶ 3023, 3089 (2009).

<sup>6</sup> Addendum to Charge, ¶ 4.

regarding his teaching assignments, and the chapter leader contacted Johnson on Graham's behalf. On March 16, 2021, Graham's UFT district representative reached out to Johnson on Graham's behalf regarding Graham's teaching assignments.

On March 17, 2021, Johnson returned the completed reference form to Graham. On most of the components requesting a rating, Johnson rated Graham as a "level less than professionally expected."<sup>7</sup> Johnson rated Graham's overall professional ability as "average."<sup>8</sup> In response to a question of whether he would employ or re-employ Graham, Johnson stated "no."<sup>9</sup> Johnson also replied "no" to the question of whether he had "any knowledge of any behavior, activities, or association which tend to show that [Graham] is not reliable, honest, trustworthy, and of good conduct and character," and that he did not have "knowledge or suspicion that [Graham] engaged in any form of child abuse."<sup>10</sup> Johnson also included the following narrative report on the form:

The candidate has been a teacher in my school for the past 2 years. In his tenure at our school, unfortunately, he has not established a positive rapport with our students and several complaints have been reported to administration. There have been several discipline meetings to discuss complaints throughout his tenure and there has not been any evidence of a change in his demeanor. The candidate has shown that he has the skill and ability to teach higher level math courses and has the knowledge of the content. He has the ability to instruct a classroom and present the information in a way that is understandable. I am confident that the candidate can be successful in a different environment as long as he understands the role of an educator and establish[es] a positive rapport with his students.<sup>11</sup>

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<sup>7</sup> Offer of Proof, Ex 2.

<sup>8</sup> Offer of Proof, Ex 2.

<sup>9</sup> Offer of Proof, Ex 2.

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

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

Graham was not selected for the position he sought with the United States Department of Defense.

### DISCUSSION

We first address the District's claim that Graham's exceptions are deficient under § 213.2 of our Rules. Although some of Graham's exceptions simply restate the findings of the ALJ, and others are not in technical compliance with our Rules, we decline to dismiss the exceptions.<sup>12</sup> As we recently reaffirmed in *State of New York (Office of Temporary and Disability Assistance)*,<sup>13</sup> we will consider exceptions where the gravamen of the asserted error is clear; in particular, where we are able to discern the basis of the excepting party's arguments and identify the portions of the ALJ's decision that it disagrees with. Graham's exceptions here meet this standard.

As we have long held:

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

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<sup>12</sup> Section 213.2 (b) of our Rules require that exceptions "set forth specifically the questions or policy to which exceptions are taken," "identify that part of the decision . . . to which exceptions are taken," "designate . . . the portion of the record relied upon," and "state the grounds for exceptions." Not all of Graham's exceptions meet all four requirements.

<sup>13</sup> 54 PERB ¶ 3011 (2021).

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, and a charging party can establish the existence of anti-union animus by statements or by circumstantial evidence.<sup>14</sup>

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.”<sup>15</sup> 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.”<sup>16</sup>

The ALJ correctly found that Graham engaged in protected activity when he asked his UFT representatives to bring complaints and concerns on his behalf to his school administration, including Johnson (the individual whose actions are challenged) and when Graham emailed Johnson regarding unsafe working conditions and copied his UFT representative on the message. The ALJ also properly found that Johnson had

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<sup>14</sup> *Board of Educ of the City Sch Dist of the City of New York (Cohn)*, 53 PERB ¶ 3011, 3053 (2020), quoting *Board of Educ, City Sch Dist City of New York (Elgalad)*, 52 PERB ¶ 3001, 3004-3005 (2019); see also *State of New York (Dept of Transportation)*, 50 PERB ¶ 3004, 3021 (2017); *UFT, Local 2 (Jenkins)*, 41 PERB ¶ 3007 (2008), *confd sub nom Jenkins v State of NY Pub Empl Relations Bd*, 41 PERB ¶ 7007 (Sup Ct New York County 2008), *affd* 67 AD3d 567, 42 PERB ¶ 7008 (1<sup>st</sup> Dept 2009), *lv denied* 43 PERB ¶ 7003 (2010); *City of Salamanca*, 18 PERB ¶ 3012 (1985).

<sup>15</sup> *Board of Educ, City Sch Dist City of New York (Bagarozzi)*, 51 PERB ¶ 3032, 3140 (2018); *Mt Pleasant Cent Sch Dist (Hall)*, 50 PERB ¶ 3019, at 3079; *Town of Tuscarora*, 48 PERB ¶ 3011, 3037 (2015).

<sup>16</sup> *Id*, citing *Catskill Housing Auth (Biegel)*, 49 PERB ¶ 3025, 3080-3081 (2016); see also *Dutchess Community College*, 47 PERB ¶ 3018, 3056 (2014), *citing UFT (Jenkins)*, 41 PERB ¶ 3007, at 3018.

knowledge of, at a minimum, Graham's email sent directly to him.

The ALJ found that the only allegation Graham put forward to demonstrate that he would not have received a negative evaluation from Johnson was the timing of events; i.e., that Graham was issued the negative evaluation after he engaged in protected activity. As the ALJ found, 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.<sup>17</sup>

Contrary to the ALJ, we find that Graham alleged facts sufficient, if established at a hearing, to meet the relatively low initial burden of raising an inference of improper motivation. Specifically, Graham alleged that, after he sent his email to Johnson about unsafe working conditions in his classroom, Johnson entered Graham's classroom and approached Graham in a "confrontational" manner, asking why Graham "had to notify the UFT" and saying that Graham "was looking for sympathy and was not a victim."<sup>18</sup> We find that Johnson's hostility to Graham's exercise of his protected rights, combined with the timing of events, if proven true, would suffice to meet Graham's initial burden of proof to demonstrate a *prima facie* case. Again, these facts remain to be proven at a hearing, and the District retains the opportunity to either refute elements of Graham's *prima facie* case or to demonstrate a legitimate, non-discriminatory reason for its actions.

The ALJ noted that it was "not clear that an employer's reference letter relating to

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<sup>17</sup> *Board of Educ (McDowall)*, 54 PERB ¶¶ 3012, 3037 (2022), citing *State of New York (DOCCS)*, 52 PERB ¶¶ 3003, 3016 (2019); *Lawrence Union Free Sch Dist*, 50 PERB ¶¶ 3034, 3141-3142 (2017); *Bellmore-Merrick Cent High Sch Dist*, 48 PERB ¶¶ 3022, 3076 (2015); *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).

<sup>18</sup> Addendum to Charge, at ¶ 4.

an employee's job application for a different employer should constitute an employment action."<sup>19</sup> As we have stated, an improper employment action under the Act can include a termination, demotion, involuntary transfer, reassignment, reprimand, denial of a promotion, or denial of pay or benefits.<sup>20</sup> It can also include explicit or implied threats of retaliatory action for engaging in protected activity.<sup>21</sup> We find that a reference letter given to a current employee could constitute an adverse employment action, and that development of this issue is an appropriate matter for a hearing.<sup>22</sup>

Whether the reference letter at issue here constitutes an adverse employment action depends on several factors, including (but not limited to) whether the reference letter was given in compliance with the District's policies or practices regarding reference letters; the accuracy of the reference letter; the existence of any malice or retaliatory motive in the reference letter and the impact, if any, on Graham's existing terms and conditions of employment. The factual record here is insufficient at this early stage to make a determination as to whether the reference letter given to Graham was an adverse employment action.

IT IS, THEREFORE, ORDERED that the ALJ's findings are vacated, and the

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<sup>19</sup> 55 PERB ¶ 4534, at 4733.

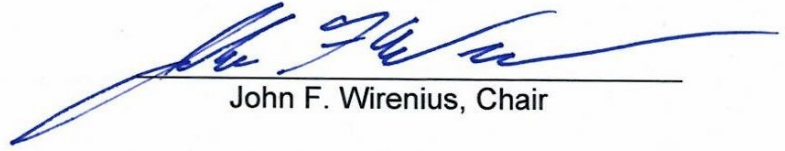
<sup>20</sup> *UFT, Local 2 (Jenkins)*, 41 PERB ¶ 3007, at 3044.

<sup>21</sup> *Id.*


<sup>22</sup> We do not opine on whether a reference letter given to a former employee, as opposed to a current employee, could constitute an adverse employment action.

matter is remanded to the ALJ for further proceedings consistent with this decision.

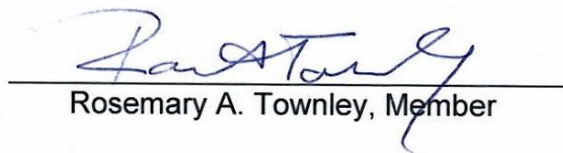
DATED: August 9, 2022  
Albany, New York



John F. Wirenius, Chair



Anthony Zumbolo, Member



Rosemary A. Townley, Member

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In the Matter of

**UNITED FEDERATION OF TEACHERS,  
LOCAL 2, AFT, AFL-CIO,**

Charging Party,

-and-

**CASE NOS. U-35630 & U-36580**

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

Respondent.

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**ROBERT T. REILLY, GENERAL COUNSEL (ERIC W. CHEN of counsel), for  
Charging Party**

**KAREN SOLIMANDO, EXECUTIVE DIRECTOR OF LABOR RELATIONS  
(ANJANETTE D. PIERRE of counsel), for Respondent**

**BOARD DECISION AND ORDER**

These cases come to us on exceptions to a decision of an Administrative Law Judge (ALJ) finding that the Board of Education of the City School District of the City of New York (District) violated §§ 209-a.1 (a) and (c) of the Public Employees' Fair Employment Act (Act).<sup>1</sup> In case number U-35630, the ALJ found that the District violated the Act when, in retaliation for Brenda Cartagena's protected activities, it collapsed her second grade class and reassigned her as a science cluster teacher. In case number U-36580, the ALJ found that the District violated the Act when, again in retaliation for Cartagena's protected activities, it gave her negative observation ratings,

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<sup>1</sup> 55 PERB ¶ 4532 (2022).

required that she submit weekly lesson plans, belittled and treated her unprofessionally, and threatened her with discipline.

### EXCEPTIONS

The District filed three specific exceptions to the ALJ's decision. The District first excepts to the ALJ's award of a make-whole remedy, specifically her order that the District reimburse Cartagena for the \$6,000 fine levied against Cartagena in an Education Law (EL) § 3020-a proceeding. The District's second exception claims that the ALJ erred by finding that the EL § 3020-a proceeding was initiated as part of a course of conduct aimed at removing Cartagena from her school because of her protected activity and ordering the District to rescind the discipline. Finally, the District's third exception contends that the ALJ should have deferred to the arbitrator's decision in the EL § 3020-a proceeding and that the ALJ should not have drawn conclusions different than those drawn by the arbitrator.

In addition to these three exceptions, the District asserted, in a footnote, that it "continues to advance all of the arguments it presented to the ALJ."<sup>2</sup> The arguments presented to the ALJ in the District's post-hearing brief included that there was no *prima facie* demonstration of retaliation and that, even if there were, the District demonstrated that it had legitimate business reasons for the actions it took against Cartagena. These arguments are briefly repeated in the District's brief before us.<sup>3</sup>

The United Federation of Teachers, Local 2, AFT, AFL-CIO (UFT), which represents Cartagena, supports the ALJ's decision and contends that no basis has been demonstrated for reversal.

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<sup>2</sup> District's Memorandum of Law in Support of Exceptions, at 3 n 2.

<sup>3</sup> *Id.*, at 1-3.

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

### FACTS

#### **Case No. U-35630**

Cartagena has been employed by the District for 33 years and is currently a teacher represented by the UFT. Since 1999, Cartagena has been a common branches teacher at P.S. 1 in the Bronx, meaning that she is licensed to teach all subject areas to pupils in kindergarten through sixth grade. P.S. 1 is comprised of pre-K through fifth grades, with approximately 100 students per grade.

Cartagena was a UFT Chapter Leader for approximately seven years at P.S. 1. Cartagena was responsible for providing P.S. 1 UFT members with information and special services, and holding monthly meetings, including meetings with Jorge Perdomo, the principal of P.S. 1.

Before Cartagena became the building's Chapter Leader, Perdomo was cordial with her and commended her on her work and the accomplishments of her students.<sup>4</sup> After she became a Chapter Leader, he was not happy with her work, and only when she was not raising teachers' concerns with him did their working relationship improve. Cartagena felt that her relationship with Perdomo was hostile and unprofessional.<sup>5</sup> In explaining what she meant, Cartagena testified that she believed that her working relationship with Perdomo was difficult because she wished to comply with the Collective Bargaining Agreement between the District and the UFT (CBA), and he did not.<sup>6</sup> Moreover, Cartagena testified that, at staff meetings, he would speak negatively

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<sup>4</sup> Tr, at 110 (Cartagena).

<sup>5</sup> Tr, at 97, 140 (Cartagena).

<sup>6</sup> Tr, at 97 (Cartagena).

toward her.<sup>7</sup> On one occasion, he said “some people think they know everything” and looked pointedly at Cartagena.<sup>8</sup> He also said, at one point, that he did not “give a sh\*t about the union.”<sup>9</sup>

William Woodruff has been the UFT District Representative for District 7 for approximately four years. Woodruff convenes monthly meetings with the Chapter Leaders in his assigned district, and provides training and assistance within, and outside of, the school buildings. Part of his duties as the District Representative for District 7 is to provide guidance to Chapter Leaders, including Cartagena.

During the Fall of 2016, Woodruff’s office received a complaint that the District had improperly hired someone into an Individualized Education Plan (IEP) teacher position, in that the person was not hired in accordance with the job posting and was not performing the requisite duties.<sup>10</sup> Woodruff asked Cartagena to raise the issue with Perdomo at a consultation meeting, which is a type of meeting regularly convened by the Chapter Leader in order to address specific agenda items with her school’s principal. Cartagena attempted to speak with Perdomo about the hiring but Perdomo kept cancelling the consultation meetings, resulting in the matter being escalated to the superintendent.

At the beginning of the 2016-2017 school year, Cartagena’s preference was to teach fourth, fifth, or third grade, in that order. She submitted those preferences to Perdomo, but was assigned to be the science cluster teacher, meaning that she would only teach that one subject. Perdomo makes the final decision as to whether a teacher

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

<sup>8</sup> Tr, at 127-128 (Cartagena).

<sup>9</sup> Tr, at 129 (Cartagena).

<sup>10</sup> See Charging Party’s Ex 2. The posting is dated June 20, 2016.

gets her teaching assignment preference. Cartagena indicated to Perdomo that she was going to file a grievance about the assignment. They subsequently resolved the matter by agreeing that she would teach a class of second grade students.

The headcount at P.S. 1 fluctuates yearly. The school receives student registration projections in the Spring, and the official numbers in the Fall. The register numbers for student enrollment determine how much funding the school will get. If the projections are not met because fewer children attend the school, the school loses some of its funding and decisions must be made to close a class or program.

As of September 19, 2016, P.S. 1's register loss was 62 students, which was estimated to be a \$203,431 loss in funding. Perdomo testified that he realized the second grade had the fewest number of students, and that the smallest second grade class was Cartagena's. At the same time, he noted that he had a vacancy for a science teacher. He "collapsed" Cartagena's class while Cartagena was in the hospital on medical leave, and assigned all of Cartagena's students to other second grade classes.<sup>11</sup> When Cartagena returned from medical leave, she was once again a science cluster teacher.<sup>12</sup>

Cartagena was informed by Perdomo that the student registration levels were low. Cartagena believed that her twenty years of seniority should have prevented her from being the teacher whose class was collapsed, as another second grade teacher who had taught science for many years had less seniority than Cartagena.

The UFT filed a reorganization grievance on Cartagena's behalf, pursuant to the CBA, because it believed that Perdomo's decision to collapse her class violated the

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<sup>11</sup> Tr, at 109 (Cartagena).

<sup>12</sup> Tr, at 124 (Cartagena).

CBA. The grievance went to arbitration and, as memorialized in the arbitrator's March 1, 2017 award, was sustained by the arbitrator.<sup>13</sup> The award does not contain a recitation of the facts upon which it was based, nor a discussion of the analysis underpinning the decision. The arbitrator directed that "Brenda Cartagena shall be granted one of her program preferences for the 2016-2017 school year."<sup>14</sup>

Also during the 2016-2017 school year, Cartagena filed a paperwork complaint on behalf of UFT members at P.S. 1 regarding notebooks that Perdomo had directed that the teachers maintain. The UFT believed that Perdomo's directives concerning the notebooks violated the CBA, in that they were an excessive amount and type of paperwork. Cartagena met with Perdomo to attempt to resolve the issue. Cartagena testified that Perdomo seemed to believe that the complaint was coming from her, asked her why she wanted "things to go back to the way they used to be," and said that he is the principal and this is what he wanted done.<sup>15</sup>

Cartagena took Perdomo's statement, about things "go[ing] back to the way they used to be," to be a reference to prior occasions when their relationship was bad because of her union-related activities.<sup>16</sup> She believed that "things were going to get bad" for her again because, she testified, "whenever I did something he wasn't happy with he would come observe me, he would collapse my class, he would try to embarrass me in front of the staff."<sup>17</sup>

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<sup>13</sup> Charging Party's Ex 5.

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

<sup>15</sup> Tr, at 106, 108 (Cartagena).

<sup>16</sup> Tr, at 108 (Cartagena).

<sup>17</sup> Tr, at 108-109 (Cartagena).

Cartagena was unable to resolve the paperwork grievance with Perdomo, so the complaint was escalated to the district level and then to arbitration, where the matter was resolved prior to any arbitration decision being issued.

Sharin Tirado, Assistant Principal at P.S. 1, observed Cartagena's teaching during the 2016-2017 school year, while she was teaching second grade, and gave her an "effective" rating in all five rated components: demonstrating knowledge of content and pedagogy, designing coherent instruction, creating an environment of respect and rapport, managing student behavior, and engaging students in learning.<sup>18</sup>

#### **Case No. U-36580**

The record contains an observation report, signed on November 14, 2017 by Perdomo, detailing an observation he conducted on October 31, 2017.<sup>19</sup> Perdomo rated Cartagena "ineffective" in all eight rated components: demonstrating knowledge of content and pedagogy, designing coherent instruction, creating an environment of respect and rapport, managing student behavior, using questioning and discussion techniques, engaging students in learning, using assessment in instruction, and growing and developing professionally.<sup>20</sup> In this observation report, Perdomo requested that "effective immediately" Cartagena submit her lesson plans to him on a weekly basis.<sup>21</sup>

In May 2018, Woodruff began receiving complaints from the staff at P.S. 1 that Perdomo had violated the CBA's terms concerning SBOs. "SBO" stands for "School Based Option" and is a method, outlined in the CBA, by which teachers in an individual school may vote to modify certain terms and conditions of their employment, for the

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

<sup>19</sup> Respondent's Ex 3.

<sup>20</sup> *Id.*

<sup>21</sup> Tr, at 287-288 (Perdomo).

duration of the next school year.<sup>22</sup> The CBA provides that the principal and Chapter Leader negotiate on the specific SBO and, once they agree on the option, the Chapter Leader has the right to take the SBO to the school staff for a vote. Only the Chapter Leader may bring the option to the UFT members, and the principal does not have the right to call an SBO vote. If the Chapter Leader does not believe there will be support among the staff for the particular SBO option, she may decide to forgo a vote.

In determining whether a vote by teachers was to be held, Cartagena would present the proposed SBO to her UFT District Representative and then canvass the teachers to gauge their interest in the proposal. If there appeared to be sufficient support for the SBO, she would then call for the teachers to vote on it.

Cartagena testified that during the 2017-2018 school year, her relationship with Perdomo was still bad and that she was being “rated across the board ineffective.”<sup>23</sup> Moreover, he made comments, such as, “if you don’t like it here why don’t you go somewhere else. Why stay here and fight with me when you can go somewhere else, I’m the principal, this is my school . . . .”<sup>24</sup> Cartagena also testified that Perdomo threatened to refer her for disciplinary charges, pursuant to EL § 3020-a.<sup>25</sup>

In May 2018, Perdomo called Cartagena to his office one morning, where Assistant Principals Tirado and DeLuca were present, handed her a piece of paper describing an SBO, and told her that he wanted to have the teachers vote on it later that day.<sup>26</sup> Cartagena told him that a vote could not happen immediately, and that there was a process that needed to be undertaken prior to potentially holding an SBO vote.

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<sup>22</sup> See Charging Party’s Exs 1, 7, 8.

<sup>23</sup> Tr, at 132 (Cartagena).

<sup>24</sup> Tr, at 132-133 (Cartagena).

<sup>25</sup> Tr, at 149 (Cartagena).

<sup>26</sup> Tr, 134-135 (Cartagena); Charging Party’s Ex 6.

Perdomo was unreceptive and told her that she did not know what she was doing or talking about. Cartagena testified that:

He didn't want to understand what I was saying. He said the numbers are there, why don't you see, I don't understand what you are saying[,] you need to speak to Woodruff. This is for our school. You don't know how the SBO goes. Let me explain it to you.<sup>27</sup>

Cartagena spoke to various teachers and learned that they were against the SBO, and though she expressed this to Perdomo, he did not believe her.<sup>28</sup> At the end of the day, during a staff meeting, Perdomo presented the SBO option to the entire staff and told them that Cartagena was "keeping them in the dark" and not sharing information.<sup>29</sup> He also told the staff that they "could check for themselves."<sup>30</sup> Cartagena testified that it was "a big, big mess. The staff was divided."<sup>31</sup> She told the teachers that there would be no SBO vote that day.

Tirado observed Cartagena on May 29, 2018.<sup>32</sup> Tirado testified that she was concerned about the impact that Cartagena's poor attendance had on her students' pedagogy, because of the lack of continuity of instruction. Tirado recalls that Cartagena was absent "often" but that she "could not recall specifics of her attendance record."<sup>33</sup> Tirado acknowledged that a teacher's attendance is not a part of the District's rubric for rating teachers' pedagogy.<sup>34</sup>

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<sup>27</sup> Tr, at 136 (Cartagena).

<sup>28</sup> Tr, at 137 (Cartagena).

<sup>29</sup> *Id.*

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

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

<sup>32</sup> The observation report, dated May 29, 2018, is in evidence as Respondent's Ex 1, and is discussed further, *infra*.

<sup>33</sup> Tr, at 223 (Tirado).

<sup>34</sup> Tr, at 241 (Tirado).

In the report memorializing her observation, Tirado rated Cartagena “ineffective” in the same eight rated components as Perdomo did. Perdomo’s November 14, 2017 report and Tirado’s May 29, 2018 report share other similarities as well. Both reports contain the following phrases, in reference to what was observed:

Designing coherent instruction- Learning activities are poorly aligned with the instructional outcomes, do not follow an organized progression, are not designed to engage students in active intellectual activity, and have unrealistic time allocations.

\* \* \*

Creating an environment of respect and rapport- Patterns of classroom interactions, both between teacher and students and among students, are mostly negative, inappropriate, or insensitive to students’ ages, cultural backgrounds, and developmental levels. Student interactions are characterized by sarcasm, put-downs, or conflict.

\* \* \*

Managing student behavior- There is little or no teacher monitoring of student behavior, and response to students’ misbehavior is repressive or disrespectful of student dignity.

\* \* \*

Growing and developing professionally- The teacher resists feedback on teaching performance from either supervisors or more experienced colleagues.<sup>35</sup>

The following exact phrase is found three times in Tirado’s May 29, 2018 observation report, under the “using questioning and discussion techniques,” “engaging students in learning,” and “using assessment in instruction” components:

The teacher’s questions are of low cognitive challenge, with single correct responses, and are asked in rapid succession. Interaction between the teacher and students is predominantly recitation style, with the teacher mediating all questions and answers; the teacher

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<sup>35</sup> Respondent’s Exs 1, 3.

accepts all contributions without asking students to explain their reasoning. Only a few students participate in the discussion.<sup>36</sup>

Perdomo's November 14, 2017 report and Tirado's May 29, 2018 report also share the following phrases, including the same typographical errors: "Ms. Cartagena, I am seriously concerned with the poor instruction taking place in your classroom"; "Effective immediately, please submit your lesson plans to me, for revision and feedback"; and

I also further advise you to make use of the Danielson Framework rubric to self-assess your work and the Hess' Cognitive Rigor Matrix (provided to you with this observation)to [sic] improve your questioning and lesson planning and to help you differentiate tasks to meet the learning needs of your students.

Please make every effort to adhere to the feedback and suggestions outlined in this observation.<sup>37</sup>

For her 2017-2018 APPR year-end rating, Cartagena received a "developing" MOTP rating which, combined with the MOSL score of "effective," resulted in an overall rating of "developing" for the school year.<sup>38</sup> Cartagena testified that the MOSL rating is out of Perdomo's control, as it is a "third-party thing," comprised of students' test scores and calculated by an outside entity.<sup>39</sup> However, the MOTP consists of observations and ratings of her pedagogy during classroom visits.<sup>40</sup> The year-end MOTP score is provided in June and finalized in the beginning of the following school year, at which point it may be appealed.<sup>41</sup> Cartagena filed an APPR grievance concerning the 2017-2018 year-end rating, because she believed that she was being retaliated against.<sup>42</sup> On July 11, 2019, the grievance was heard at arbitration by a three-person panel that

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<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> Tr, at 130-132, 140-141 (Cartagena); Charging Party's Ex 10.

<sup>39</sup> Tr, at 130-132, 142-143 (Cartagena).

<sup>40</sup> Tr, at 131-132, 142 (Cartagena).

<sup>41</sup> Tr, at 143 (Cartagena).

<sup>42</sup> Tr, at 143-144 (Cartagena).

included one member picked by the UFT, one member selected by the District, and a neutral panel member, who issued the decision on the panel's behalf.<sup>43</sup>

The issue that was determined at arbitration on July 11, 2019 is "Was the 2017-2018 evaluation of Brenda Cartagena the result of harassment or factors unrelated to teacher performance? If so, what shall be the remedy?"<sup>44</sup>

By way of background information, the panel noted that "[i]t is undisputed that [Cartagena's] relationship with Perdomo has been rocky."<sup>45</sup> Cartagena's 2017-2018 overall "MOTP score ("Measure of Teacher Performance") was 1.00, the lowest or one of the lowest of any active teacher" in the District.<sup>46</sup>

Both parties presented their positions on the stated issue and provided evidence in support of their positions. Based upon the record before the panel, the neutral member found that the "suspicion" that Cartagena's low MOTP was motivated by reasons other than her teaching "is given life by the factual record" before the panel.<sup>47</sup> He also found that during March 2018 through June 2018, after the SBO "brouhaha," Cartagena was observed on four occasions and was rated "ineffective" in each component, thereby receiving the lowest possible score."<sup>48</sup> He also noted that "[t]hough she had some poor scores previously, this rating was 60 per cent [sic] lower than her previous one. Viewed in the context of the Principal's repeated criticisms during this time [sic] leads to the conclusion that the ratings were caused by factors other than her classroom performance."<sup>49</sup> The arbitrator based this finding, in part, on his

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<sup>43</sup> Charging Party's Ex 11.

<sup>44</sup> Charging Party's Ex 11, at 3.

<sup>45</sup> Charging Party's Ex 11, at 2.

<sup>46</sup> *Id.*

<sup>47</sup> Charging Party's Ex 11, at 9.

<sup>48</sup> Charging Party's Ex 11, at 9-10.

<sup>49</sup> Charging Party's Ex 11, at 10.

determination that Perdomo's version of the disputed events was non-credible. However, the arbitrator noted that the pattern of animus against Cartagena "may not have been completely based on an anti-Union sentiment" but was "nonetheless improper since the standard permits [the arbitrator] to find for the teacher if factors other than teaching performance and not just union animus resulted in the poor rating."<sup>50</sup> The arbitrator found that that her evaluations were "impermissibly tainted" by Perdomo's animus toward Cartagena, and issued the following award:

The 2017-18 rating for Brenda Cartagena was the result of harassment or factors unrelated to teaching performance.

Principal Jorge Perdomo is directed to give Brenda Cartagena a rating other than Developing for the 2017-18 school year.<sup>51</sup>

Both Tirado and Perdomo had observed Cartagena's teaching during the 2017-2018 school year. Tirado testified that she and Perdomo created an observation cycle at the beginning of the school year that indicates who would observe the teachers at various points during the year.<sup>52</sup> Cartagena was scheduled to be observed four times during the 2017-2018 school year. Tirado and Perdomo each observed Cartagena twice during the year.

Perdomo testified that disciplinary charges were brought against Cartagena in the 2018-2019 school year, for excessive absences during the 2017-2018 school year. He testified that:

we have a way of tracking teacher's absences. I assigned my secretary to inform me when there is a pattern of absences. Once we see excessive absences and a pattern of absences we send that information to legal and we ask legal for advice as to how to proceed to address the absences. So, once legal provides advice this may lead

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<sup>50</sup> Charging Party's Ex 11, at 11.

<sup>51</sup> Charging Party's Ex 11, at 12-13.

<sup>52</sup> Tr, at 215-216 (Tirado).

to a sequence of steps, among them disciplinary action, a letter to file.<sup>53</sup>

Perdomo signed the “document of disciplinary action,” which is titled “Notice of Determination of Probable Cause on Education Law § 3020-a Charges.”<sup>54</sup>

Cartagena was charged, on October 10, 2018, with having been fully, or fractionally, absent on 16 dates during the 2017-2018 school year, and failing to properly notify school administration of her absence on two dates.<sup>55</sup> The hearing occurred on February 25 and 26, 2019, at which Cartagena and the District were both represented by counsel.

The decision indicates that Perdomo issued a “letter to file” to Cartagena, dated June 4, 2018, stating, in relevant part:

On Monday, June 4, 2018 I met with you and your Union Representative, Mr. William Woodruff, to discuss unprofessional conduct observed and excessive absences . . . .

Ms. Cartagena your unprofessional conduct is creating an unsafe learning environment for our students and a hardship on our staff. By not properly reporting your absences, your class could not be properly covered by a sub and as a result, you[r] students missed on essential learning and instruction for these days.

After careful consideration of your misconduct and your blatant disregard of my directives and school policy, I conclude that your behavior is insubordinate and unbecoming of your duties and responsibilities.

Please know that your unprofessional conduct and failure to adhere to school policy will lead to further disciplinary action and termination of employment.<sup>56</sup>

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<sup>53</sup> Tr, at 289 (Perdomo).

<sup>54</sup> Tr, at 303, 307 (Perdomo); Charging Party’s Ex 14.

<sup>55</sup> Respondent’s Ex 4, at 2-3, 12; Charging Party’s Ex 14.

<sup>56</sup> Respondent’s Ex 4, at 11-12.

The decision also notes that Cartagena acknowledged having received this letter on June 6, 2018.

In the hearing officer's decision, it is noted that on December 4, 2011, an arbitrator found Cartagena to have been excessively absent during the 2008-2009, 2009-2010, and 2010-2011 school years, and that the majority of the absences "fell into a pattern of Monday or Friday or week-end extending absences."<sup>57</sup>

Regarding the 2017-2018 school year, the hearing officer found that the District met its burden of proof for all of the specified charges.<sup>58</sup> The District sought termination as a penalty. The hearing officer credited Cartagena's testimony that she submitted doctor's notes concerning seven of the absences, despite the fact that six of them were inexplicably missing from her personnel file.<sup>59</sup> Only a note for an absence in September of 2017 was available to be entered in evidence, as a result.<sup>60</sup> The hearing officer also found that Perdomo and Tirado should have provided actual notice to Cartagena of her rights under the Family and Medical Leave Act (FMLA), once it became clear that, for some of the absences, she was caring for her ill husband.<sup>61</sup> The hearing officer determined that termination was not an appropriate penalty and instead ordered that Cartagena pay a fine of \$6,000.

### DISCUSSION

As we have long held:

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:

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<sup>57</sup> Respondent's Ex 4, at 8-9.

<sup>58</sup> Respondent's Ex 4, at 15-16.

<sup>59</sup> Respondent's Ex 4, at 17.

<sup>60</sup> Respondent's Ex 4, at 10, n 2.

<sup>61</sup> Respondent's Ex 4, at 19.

- 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, and a charging party can establish the existence of anti-union animus by statements or by circumstantial evidence.<sup>62</sup>

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.”<sup>63</sup> 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.”<sup>64</sup> If the respondent establishes a legitimate non-discriminatory reason, then the burden shifts

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<sup>62</sup> *Board of Educ of the City Sch Dist of the City of New York (Cohn)*, 53 PERB ¶ 3011, 3053 (2020), quoting *Board of Educ, City Sch Dist City of New York (Elgalad)*, 52 PERB ¶ 3001, 3004-3005 (2019); see also *State of New York (Dept of Transportation)*, 50 PERB ¶ 3004, 3021 (2017); *UFT, Local 2 (Jenkins)*, 41 PERB ¶ 3007 (2008), *confd sub nom Jenkins v State of NY Pub Empl Relations Bd*, 41 PERB ¶ 7007 (Sup Ct New York County 2008), *affd* 67 AD3d 567, 42 PERB ¶ 7008 (1<sup>st</sup> Dept 2009), *lv denied* 43 PERB ¶ 7003 (2010); *City of Salamanca*, 18 PERB ¶ 3012 (1985).

<sup>63</sup> *Board of Educ, City Sch Dist City of New York (Bagarozzi)*, 51 PERB ¶ 3032, 3140 (2018); *Mt Pleasant Cent Sch Dist (Hall)*, 50 PERB ¶ 3019, at 3079; *Town of Tuscarora*, 48 PERB ¶ 3011, 3037 (2015).

<sup>64</sup> *Id*, citing *Catskill Housing Auth (Biegel)*, 49 PERB ¶ 3025, 3080-3081 (2016); see also *Dutchess Community College*, 47 PERB ¶ 3018, 3056 (2014), citing *UFT (Jenkins)*, 41 PERB ¶ 3007, at 3018.

back to the charging party to establish that the articulated non-discriminatory reason is pretextual.<sup>65</sup>

As we explained in *Bellmore-Merrick Central High School District*, “a proffered legitimate business reason is properly regarded as pretextual if the credible evidence establishes that the decision was not so motivated, either directly or circumstantially, or because the articulated reasons are so lacking in merit as to be patently false.”<sup>66</sup>

In case number U-35630, the ALJ found that the UFT established all three elements of its *prima facie* case and that the District’s asserted reasons for collapsing Cartagena’s second grade class and assigning her as a science teacher were pretextual. The District filed no specific exceptions to the ALJ’s findings but instead relies on its post-hearing brief submitted to the ALJ. We discourage this type of diffuse pleading, as it does not conform to our Rules of Procedure (Rules). Section 213.2 (b) of our Rules require that exceptions “set forth specifically the questions or policy to which exceptions are taken,” “identify that part of the decision . . . to which exceptions are taken,” “designate . . . the portion of the record relied upon,” and “state the grounds for exceptions.” Relying on its post-hearing brief makes it difficult, if not impossible, to ascertain any of these elements. We address the arguments in the District’s post-hearing brief only to the extent they are contained in the District’s exceptions. It appears that the District is asserting that, even if the UFT established its *prima facie* case, the District demonstrated that it had a legitimate business reason for collapsing Cartagena’s class, namely that her class contained the fewest number of students. In

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<sup>65</sup> *State of New York (State University of New York Upstate Medical University)*, 53 PERB ¶¶ 3013, 3062 (2020); *Catskill Housing Auth (Biegel)*, 49 PERB ¶¶ 3025, at 3080; *Bellmore-Merrick Cent Sch Dist*, 48 PERB ¶¶ 3022, 3076 (2015); *UFT (Jenkins)*, 41 PERB ¶¶ 3007, 3043 (2008).

<sup>66</sup> 48 PERB ¶¶ 3022, at 3078.

addition to being in the District's post-hearing brief, this argument is restated in the District's Memorandum of Law in Support of Exceptions.

In finding that the UFT established its *prima facie* case, the ALJ credited Cartagena's testimony about her interactions with Perdomo and found that the contextual backdrop of "tenacious advocacy on Cartagena's part—for which, Perdomo's disdain was clear" and the temporal proximity between the paperwork complaint and the collapse of Cartagena's class, were sufficient to warrant an inference that, but for her protected activity, Perdomo would not have collapsed her class.<sup>67</sup>

The ALJ also rejected the argument that the District collapsed Cartagena's class solely because it had the fewest number of students. In doing so, the ALJ credited Cartagena's testimony about her seniority and noted that an arbitrator sustained her grievance and reversed Perdomo's decision. Although not probative as to the ultimate issue in this case, the ALJ deferred to the arbitrator's finding that the collapse violated the parties' CBA.

The ALJ's findings are heavily reliant on her decision to credit Cartagena's testimony in full, and not to credit Perdomo's testimony. As we have often stated, "[c]redibility determinations by an ALJ are generally entitled to great weight unless there is objective evidence in the record compelling a conclusion that the credibility finding is

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<sup>67</sup> The ALJ also found that Cartagena engaged in protected activity, of which the District was aware. There are no exceptions to these findings, and the District did not contest these elements of a *prima facie* case in its post-hearing brief. In the absence of exceptions, these findings are not before us for review. Rules § 213.2 (b) (4); see, eg, *Village of Tuxedo Park*, 55 PERB ¶¶ 3002, 3010, n 2 (2022); *Village of Westhampton Dunes*, 50 PERB ¶¶ 3035, 3146, n 8 (2017); *Village of Endicott*, 47 PERB ¶¶ 3017, 3052, n 5 (2014); *NYCTA (Burke)*, 49 PERB ¶¶ 3021, 3072, n 4 (2016), *confd sub nom Burke v NYC Tr Auth*, 51 PERB ¶¶ 7009 (Sup Ct New York County 2018).

manifestly incorrect.”<sup>68</sup> The ALJ carefully explained the basis for her credibility determinations,<sup>69</sup> and the District has not presented any objective evidence compelling a conclusion that these findings are manifestly incorrect. As a result, we see no basis to overturn the ALJ’s findings in case number U-35630.

Given that the ALJ discredited Perdomo’s non-discriminatory explanation for his actions and that the District violated the CBA in collapsing Cartagena’s class, we affirm the ALJ’s finding that the District’s purported explanation for its actions was a pretext to retaliate against Cartagena for her protected activity.

In case number U-36580, the ALJ found that the UFT established its *prima facie* case and that the District’s asserted business reasons for issuing Cartagena negative observation ratings, requiring that she submit weekly lesson plans, treating her unprofessionally, and threatening her with discipline were pretextual. The District again does not dispute that Cartagena engaged in protected activity and that it was aware of such activity. The District asserts, however, that it demonstrated a legitimate business reason for observing Cartagena when it did, namely that Cartagena was observed in May 2018 because the observation had been scheduled well in advance.

The ALJ rejected this argument, not crediting the testimony of Tirado and Perdomo that they had scheduled these observations well in advance. We see no reason to disturb this credibility-based finding of the ALJ’s, which is buttressed by the

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<sup>68</sup> *CSEA (Sainpaulin)*, 55 PERB ¶ 3007, 3029 (2022). See also *Buffalo City Sch Dist*, 53 PERB ¶ 3015, 3074 (2020); *Pine Valley Cent Sch Dist*, 51 PERB ¶ 3036, 3160 (2018); *Rochester Housing Authority*, 52 PERB ¶ 3014, 3061 (2019); *Pleasantville Union Free Sch Dist*, 51 PERB ¶ 3024, 3100 (2018); *Village of Endicott*, 47 PERB ¶ 3017, 3051 (2014); *Manhasset Union Free Sch Dist*, 41 PERB ¶ 3005, n 37 (2008), *confd sub nom Manhasset Union Free Sch Dist v NYS Pub Empl Relations Bd*, 61 AD3d 1231 (3d Dept 2009).

<sup>69</sup> 55 PERB ¶ 4532, at 4721. The ALJ found Perdomo’s testimony as to both charges to be “largely non-credible,” given his demeanor and evasiveness.

absence of any written schedule or other evidence demonstrating that the observations were pre-planned. Further, we agree with the ALJ that the similarity of Tirado's observation and ratings to Perdomo's prior observation, including identical language and even the same typographical errors, demonstrates that the observations themselves were driven by animus towards Cartagena's protected activity. Moreover, the ALJ's finding that the observations were driven by animus is supported by the APPR grievance arbitration decision, where the arbitrator found that Cartagena's ratings were not based on her teaching performance.<sup>70</sup>

The District also asserts that the ALJ erred by not deferring to the arbitration award issued in the EL § 3020-a proceeding. The District contends that it adhered to the process for preferring EL § 3020-a charges, that the omissions the ALJ found to be "ominous" were not so found by the arbitrator, and that it should not be required to reimburse Cartagena for the \$6,000 fine issued by the arbitrator.

We find no error in the ALJ's treatment of the EL § 3020-a arbitration award. It is well established that we "will defer to an arbitration award only in limited circumstances, and we usually do not do so where the charging party alleges a violation of Civil Service Law § 209-a.1 (a) (editing marks omitted)."<sup>71</sup> The statutory claim here does not fall within the ambit of PERB's deferral policy.<sup>72</sup>

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<sup>70</sup> Charging Party Ex 11.

<sup>71</sup> *Board of Educ of the City Sch Dist of the City of New York (Bagarozzi)*, 51 PERB ¶ 3032, 3139 (2018), quoting *State of New York (Unified Court System)*, 50 PERB ¶ 3042, 3170 (2017); *Buffalo Teachers Fedn v NYS Pub Empl Relations Bd*, 153 AD3d 1643, 1645, 50 PERB ¶ 7005 (4th Dept 2017) (citations omitted). See also *NYCTA (Bordansky)*, 4 PERB ¶ 3031 (1971); *State of New York (Division of State Police)*, 36 PERB ¶ 3048, n 3 (2003); *Schuyler-Chemung-Tioga BOCES*, 34 PERB ¶ 3019 (2001); *Matter of Addison Cent Sch Dist*, 17 PERB ¶ 3076 (1984).

<sup>72</sup> *Id.*

The ALJ found that the District's failure to notify Cartagena of her FMLA rights and the fact that notes from Cartagena's doctor were missing from Cartagena's medical file to be "rather ominous."<sup>73</sup> The District asserts that the ALJ erred by finding these omissions to further support her finding that the District's reasons for disciplining Cartagena were pretextual. While it would not be appropriate for the ALJ to relitigate the factual findings made by the arbitrator,<sup>74</sup> that is not what she did here. The ALJ did not make any factual findings that were contrary to the arbitrator's decision—she simply drew her own conclusions from the facts as found. Moreover, the ALJ did not rely solely on these facts, but found that the District's entire course of conduct, including Perdomo's monitoring of Cartagena's absences, his exercise of discretion to bring her absences to the attention of the legal department, and his threat of the specific discipline of termination in the June 4, 2018 letter to Cartagena, all demonstrated a "course of conduct aimed at removing Cartagena from P.S. 1 because of her protected activity."<sup>75</sup> We find no error by the ALJ in her analysis.

We also find that the ALJ did not err by granting Cartagena make-whole relief, including reimbursement of the fine she was ordered to pay pursuant to the EL § 3020-a arbitration award. As we explained in *Board of Education of the City School District of the City of New York (Bagarozzi)*, the issue of whether an employer's actions in bringing disciplinary charges violate the Act is outside the scope of arbitration, and is distinct

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<sup>73</sup> 55 PERB ¶ 4532, at 4725.

<sup>74</sup> *Town of Tuscarora*, 45 PERB ¶ 3044, 3111 (2012); *State of New York (Division of Parole)*, 41 PERB ¶ 3033, 3145 (2008).

<sup>75</sup> 55 PERB ¶ 4532, at 4725.

from whether the employee is in fact guilty of a disciplinary infraction.<sup>76</sup> “We have long held, and the courts have affirmed, that ‘[i]f an employer’s action was motivated by anti-union animus, it is irrelevant whether or not cause for the employer’s action in terminating the employee actually existed.’”<sup>77</sup> In such cases, we have routinely directed “make whole” relief, including reinstatement with an unconditional award of back pay and benefits.<sup>78</sup> Such make whole relief in any case in which an employer’s violation of the Act deprives affected employees of income has long been deemed to be “lawful and within PERB’s broad remedial powers.”<sup>79</sup>

In sum, we find that the District’s exceptions do not raise any issues warranting reversal of the ALJ’s decision. As a result, we affirm the ALJ’s finding that the District violated §§ 209-a.1 (a) and (c) of the Act when it collapsed Cartagena’s second grade class and reassigned her as a science cluster teacher, gave Cartagena negative observation ratings, required that she submit weekly lesson plans, belittled and treated

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<sup>76</sup> 51 PERB ¶ 3032, at 3141, citing *Buffalo Teachers Fedn v NYS Pub Empl Relations Bd*, 153 AD3d at 1645, 50 PERB ¶ 7005 (4<sup>th</sup> Dept 2017); *Chenango Forks Cent Sch Dist v NYS Pub Empl Relations Bd*, 21 NY3d 255, at 266 (2013); *Civ Serv Empl Assn Inc., Local 1000, AFSCME, AFL-CIO v NYS Pub Empl Relations Bd*, 267 AD2d 935, 937, 32 PERB ¶ 7027 (3d Dept 1999).

<sup>77</sup> *Id.*, quoting *Civ Serv Empl Assn Inc., Local 1000, AFSCME, AFL-CIO v NYS Pub Empl Relations Bd*, 276 AD2d 967, 969, 33 PERB ¶ 7018 (3d Dept 2000), lv denied 96 NY2d 704 (2001); *Civ Serv Empl Assn Inc., Local 1000, AFSCME, AFL-CIO*, 267 AD2d at 937. See also *City of Albany v NYS Pub Empl Relations Bd*, 57 AD2d 374, 375, 10 PERB ¶ 7006 (3d Dept 1977), *affd* 43 NY2d 954, 11 PERB ¶ 7007 (1978).

<sup>78</sup> *Id.*, citing *Civ Serv Empl Assn Inc., Local 1000, AFSCME, AFL-CIO*, 276 AD2d at 969; *Sag Harbor Union Free Sch Dist v Helsby*, 54 AD2d 391, 9 PERB ¶ 7023 (3d Dept 1976); *United Sch Workers*, 28 PERB ¶ 3045 (1995); *Buffalo PBA*, 20 PERB ¶ 3048 (1987).

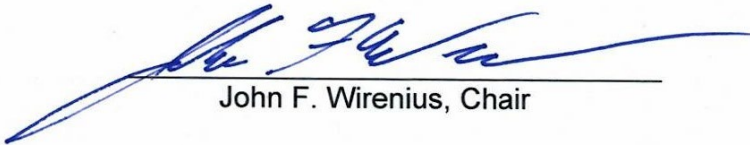
<sup>79</sup> *Id.*, at 3141-3142, quoting *Hudson Valley Community College v NYS Pub Empl Relations Bd*, 132 AD3d 1132, 1135-1136, 48 PERB ¶ 7005 (3d Dept 2015); *State of New York (Office of Parks, Recreation & Historic Preservation)*, 51 PERB ¶ 3025, 3108 (2018), *confd sub nom State of New York v NYS Pub Empl Relations Bd*, 183 AD3d 1172 (3d Dept 2020).

her unprofessionally, and threatened and initiated discipline against Cartagena.

THEREFORE, IT IS ORDERED that the District shall forthwith:

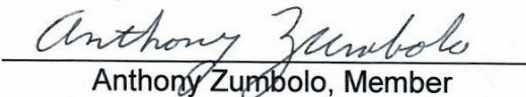
1. Cease interfering with, restraining, and coercing Brenda Cartagena in her exercise of rights protected under the Act;
2. Cease discriminating against Brenda Cartagena for the purpose of discouraging her participation in the activities of, or membership in, the UFT;
3. Cease threatening and initiating disciplinary action against Brenda Cartagena in retaliation for her engagement in protected activity;
4. Cease negatively rating observations of Brenda Cartagena's teaching in retaliation for her engagement in protected activity;
5. Purge Brenda Cartagena's personnel file of the reports concerning the May 14 and 25, 2018 observations of her pedagogy, refrain from considering the contents of these observations for any purpose, and refrain from requiring weekly submission of lesson plans as the result of these observations;
6. Make Brenda Cartagena whole including, but not limited to, expungement of the June 4, 2018 disciplinary letter from Cartagena's personnel records; reimbursement of the \$6,000 disciplinary fine, plus interest at the currently prevailing maximum legal rate; restore her teaching position at P.S. 1 with any attendant benefits including, but not limited to, full restoration of any seniority rights within the school as though she had never been reassigned; and
7. Sign and post the attached notice at all physical and electronic locations customarily used to post written communications to unit employees.

DATED: August 9, 2022  
Albany, New York



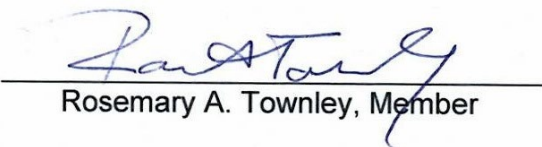
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John F. Wirenius, Chair



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Anthony Zumbolo, Member



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Rosemary A. Townley, 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 Board of Education of the City School District of the City of New York (District) in the unit represented by United Federation of Teachers, Local 2, AFT, AFL-CIO (UFT) that the District will:

1. Stop interfering with, restraining, and coercing Brenda Cartagena in her exercise of rights protected under the Act;
2. Stop discriminating against Brenda Cartagena for the purpose of discouraging her participation in the activities of, or membership in, the UFT;
3. Stop threatening and initiating disciplinary action against Brenda Cartagena in retaliation for her engagement in protected activity;
4. Stop negatively rating observations of Brenda Cartagena's teaching in retaliation for her engagement in protected activity;
5. Purge Brenda Cartagena's personnel file of the reports concerning the May 14 and 25, 2018 observations of her pedagogy, refrain from considering the contents of these observations for any purpose, and refrain from requiring weekly submission of lesson plans as the result of these observations; and
6. Make Brenda Cartagena whole including, but not limited to, expungement of the June 4, 2018 disciplinary letter from Cartagena's personnel records; reimbursement of the \$6,000 disciplinary fine, plus interest at the currently prevailing maximum legal rate; restore her teaching position at P.S. 1 with any attendant benefits including, but not limited to, full restoration of any seniority rights within the school as though she had never been reassigned.

Dated .....

By .....  
on behalf of the **Board of Education of the City  
School District of the City of New York**

*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.*

55 PERB ¶ 3025  
B/R 55-4536  
54-7030  
50-3034  
49-4587

STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

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In the Matter of

**INTERNATIONAL BROTHERHOOD OF TEAMSTERS,  
CITY EMPLOYEES UNION, LOCAL 237,**

Charging Party,

**CASE NO. U-34446**

- and -

**LAWRENCE UNION FREE SCHOOL DISTRICT,**

Respondent.

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**ARCHER, BYINGTON, GLENNON & LEVINE, LLP (MARTY GLENNON of  
counsel), for Charging Party**

**MINERVA & D'AGOSTINO, PC (CHRISTOPHER G. KIRBY of counsel),  
for Respondent**

**BOARD DECISION AND ORDER**

This case comes to us on exceptions filed by the Lawrence Union Free School District (District) to a decision of an Administrative Law Judge (ALJ).<sup>1</sup> The ALJ, on a remand from us, found that the District violated § 209-a.1 (d) of the Public Employees' Fair Employment Act (Act) when it transferred exclusive bargaining unit work performed by employees represented by the International Brotherhood of Teamsters, City Employees Union, Local 237 (Local 237). The ALJ found that the work transferred to outside contractors employed by Summit Security Services (Summit) included "personal

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<sup>1</sup> 55 PERB ¶ 4536 (2022).

protection” security duties performed by Security Aides. At the initial hearing, the parties stipulated that “exclusivity with respect to the Security Aides is not contested.”<sup>2</sup> In finding the violation here, the ALJ found that this stipulation included personal protection security duties.

### PROCEDURAL HISTORY

The charge in this matter alleged that the District violated §§ 209-a.1 (a), (c), and (d) of the Act when it unilaterally transferred exclusive bargaining unit work performed by Security Aides and by technology employees. The ALJ issued a decision dismissing the charge in its entirety.

On appeal, the Board reversed the ALJ’s dismissal, in part.<sup>3</sup> The Board affirmed the ALJ’s dismissal regarding technology employees, and these employees will not be discussed further. The Board also affirmed the ALJ’s dismissal of the charge to the extent that it alleged violations of §§ 209-a.1 (a) and (c) of the Act.

The Board determined that there were two distinct types of work at issue: 1) “property protection,” which was the protection of the District’s property, and 2) “personal protection,” or the protection of people. Regarding property protection, the Board reversed the ALJ’s dismissal and found that property protection duties had been unilaterally transferred outside of the unit in violation of the Act. The Board found that the District had stipulated to exclusivity of the property protection work, that this work was then transferred to a contractor without bargaining, and that there was no showing

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<sup>2</sup> Tr, at 6.

<sup>3</sup> 50 PERB ¶ 3034 (2017), *confd sub nom Lawrence Union Free Sch Dist v NYS Pub Empl Relations Bd*, 200 AD3d 886 (2d Dept 2021).

that the job qualifications for those performing the work had changed significantly.<sup>4</sup>

The Board found that “the scope of the stipulation is ambiguous in such a way that we cannot fully assess the correctness of the ALJ’s conclusions” regarding personal protection work.<sup>5</sup> The Board noted that there was testimony that Security Aides, in addition to protecting property, “also intervened in situations to protect the safety of persons using the District’s premises (i.e., ‘personal protection’). It is not clear whether the stipulation covered these additional duties, particularly since the District argued that the ability to intervene [in physical matters and disputes] was one of the key differences between Security Aides and Summit employees.”<sup>6</sup> The Board remanded for clarification of the stipulation, stating

[T]he exclusivity of the ‘personal protection’ work is not clear. If the parties stipulated that ‘personal protection’ work was exclusively performed by Security Aides, it would appear that such work was subsequently performed by Summit employees. Such circumstances, as explained above, would establish a violation of the Act here, where no change in qualifications has been shown. By contrast if the stipulation does not cover ‘personal protection’ work, the element of the violation would not have been established by the Charging Party, and no violation of the Act would have occurred with respect to ‘personal protection’ work. Under these circumstances, we remand this aspect of the charge to the ALJ for a clarification of the scope of the stipulation. If there is a dispute over the scope of the stipulation, the ALJ may, at her discretion, reopen the record for the parties to present offers of proof and/or additional evidence as well as arguments about the scope of the stipulation and related issues concerning the exclusivity of ‘personal protection’

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<sup>4</sup> *Id.*, at 3140-3141. The district appealed this portion of the Board’s decision pursuant to Civil Practice Law and Rules Article 78. By decision dated December 15, 2021, the Supreme Court, Appellate Division, Second Department confirmed the Board’s decision and dismissed the District’s appeal. See *Lawrence Union Free Sch Dist*, 200 AD3d 886.

<sup>5</sup> *Id.*, at 3140.

<sup>6</sup> *Id.*, at 3141.

security work.<sup>7</sup>

After our remand, the ALJ conducted a conference with the parties and allowed the parties to submit offers of proof regarding evidence that either party would submit at a hearing. Both parties submitted letters, which the ALJ found did not express an interest in providing additional evidence on the question before her. Both parties submitted legal arguments to the ALJ. The ALJ, finding that neither party offered new evidence to be considered, closed the record and made her decision based on the evidence already introduced and the parties' briefs.

The ALJ found that Security Aides intervened in situations involving personal security, and that the frequency or at whose direction they intervened was not relevant. The ALJ noted that the District agreed that "whatever work Security Aides did, no one but Security Aides did."<sup>8</sup> Because Security Aides did personal protection work, the ALJ found that the stipulation includes that work.

#### EXCEPTIONS

The District filed two exceptions to the ALJ's decision. The District's first exception asserts that the ALJ's determination that the stipulation includes personal protection work is against the weight of the evidence and the "obvious intent of the parties." In support, the District claims that the evidence shows that personal protection work was not generally performed by Security Aides, that the District could not require such work be performed by Security Aides, that personal protection work was out-of-title work for Security Aides, and that the absence of such work was the primary basis for

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<sup>7</sup> *Id.*, at 3141.

<sup>8</sup> 55 PERB ¶ 4536, at 4738.

the District's decision to outsource security to Summit. The District avers that things employees rarely and voluntarily do cannot count as "work."

The District's second exception claims that there is no basis in the record for the ALJ to conclude that personal protection work was exclusive to the unit and that further evidence would be necessary to make such a finding.

Local 237 supports the ALJ's decision and contends that no basis has been demonstrated for reversal.

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

### FACTS

In our prior decision, we found that Security Aides would monitor or report emergency situations or disorder, but would not ordinarily directly intervene. One former Security Aide, Danette Jemal, however, "provided some specific instances where intervention did occur."<sup>9</sup>

### DISCUSSION

The parties here essentially dispute the scope of the unit work. That is, Local 237 asserts that, because Security Aides have intervened in physical disputes in the past, such "personal protection" work falls within the scope of unit work that cannot be unilaterally transferred. The District, on the other hand, contends that personal protection work is not generally performed by Security Aides, that it could not require

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<sup>9</sup> 50 PERB ¶ 3034, at 3139. Specifically, Jemal testified that she had gotten involved in breaking up fights, but "not that often." Tr, at 113. She also testified as to one specific instance where a Security Aide named Mary Alice attempted to break up a fight. Tr, at 119-121.

that such work be performed, and that, to the extent any such work was performed, it was out-of-title work and was performed “voluntarily.”<sup>10</sup>

If personal protection work falls within the scope of unit work, the stipulation, even as the District reads it, would mean that exclusivity as to that work is not contested by the District (the District agrees that any work performed by Security Aides was exclusively performed by Security Aides).

We find that the evidence here demonstrates that Security Aides did directly intervene in physical altercations, albeit not on every occasion. The District did not seek to introduce evidence that it was not aware of this intervention or that it ever directed Security Aides to stop performing this work. As a result, we find that Security Aides performed personal protection work. The unilateral transfer of work performed by unit employees, even incidental tasks, violates the Act.<sup>11</sup> Because the District does not contest that work performed by Security Aides was only performed by Security Aides, a hearing on exclusivity was not required, and we affirm the ALJ’s finding that the stipulation here covers personal protection work.

As we explained in our prior decision, because the stipulation covers personal protection work, a violation of the Act has been made out. The personal protection work performed by Security Aides has subsequently been performed by Summit employees, and no change in qualifications has been demonstrated.<sup>12</sup> As a result, we affirm the

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<sup>10</sup> Brief in Support of Exceptions, at 14.

<sup>11</sup> *Village of Tuxedo Park*, 55 PERB ¶ 3002, 3010 (2022); *Seaford Union Free Sch Dist*, 47 PERB ¶ 3034, 3105 (2014).

<sup>12</sup> 50 PERB ¶ 3034, at 3141.

ALJ's finding that the District violated § 209-a.1 (d) of the Act when it unilaterally transferred "personal protection" security work to Summit employees.

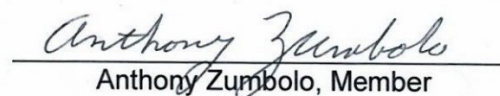
THEREFORE, IT IS ORDERED that the District shall forthwith:

1. Stop unilaterally transferring to non-unit personnel the work of "personal protection" security previously exclusively performed by Security Aides within the bargaining unit represented by Local 237;
2. Restore to the unit represented by Local 237 the work of "personal protection" security;
3. Offer reinstatement to all unit employees terminated as a result of the District's transfer of "personal protection" security work, under the prevailing terms and conditions of employment as they existed when the work was transferred;
4. Make the affected unit employees whole for wages and benefits, if any, lost as a result of its unilateral transfer to non-unit employees of said work, with interest at the maximum legal rate;
5. Sign and post the attached notice at all physical and electronic locations customarily used to post notices to unit employees.


DATED: August 9, 2022  
Albany, New York



John F. Wirenius, Chair



Anthony Zumbolo, Member



Rosemary A. Townley, 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 Lawrence Union Free School District (District) that the District will:**

1. Stop unilaterally transferring to non-unit personnel the work of "personal protection" security previously exclusively performed by Security Aides within the bargaining unit represented by the International Brotherhood of Teamsters, City Employees Union, Local 237 (Local 237);
2. Restore to the unit represented by Local 237 the work of "personal protection" security;
3. Offer reinstatement to all unit employees terminated as a result of the District's transfer of "personal protection" security work, under the prevailing terms and conditions of employment as they existed when the work was transferred;
4. Make the affected unit employees whole for wages and benefits, if any, lost as a result of its unilateral transfer to non-unit employees of said work, with interest at the maximum legal rate.

**Dated .....**

**By .....  
On behalf of the Lawrence Union Free  
School District**

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

In the Matter of

LOCAL 338, RWDSU, UFCW,

Petitioner,

CASE NO. CU-6678

- and -

PAUMANOK VINEYARDS AND PALMER  
VINEYARDS,

Employer.

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GLADSTEIN, REIF, & MEGINNISS, LLP (AMELIA K. TUMINARO of counsel),  
for Petitioner.

BOND, SCHOENECK & KING, PLLC (HILARY MOREIRA of counsel), for  
Employer

**BOARD DECISION AND ORDER**

This case comes to us on exceptions filed by Paumanok Vineyards and Palmer Vineyards (Vineyards) to a decision of the Acting Director of Private Employment Practices and Representation (Director) concerning certification of Local 338, RWDSU, UFCW (Local 338) as the exclusive negotiating agent of the unit as defined, without an election, pursuant to § 705.1-a of the State Employment Relations Act (SERA). The Director found that Local 338 had submitted evidence establishing that it represents a majority of the employees in the unit.

**EXCEPTIONS**

The Vineyards filed 13 exceptions to the Director's decision. In their first exception, the Vineyards assert that part-time employees should not be included in the negotiating unit. The Vineyards's second, third, and fourth exceptions contend that the

Director erred in not allowing the employers to view the dues deduction authorization cards with the names of the signatories redacted, and that the Director did not “identify what was confidential about disclosing redacted dues authorization cards.”<sup>1</sup>

In their fifth through seventh exceptions, the Vineyards maintain that the Director erred in finding that their offer of proof “does not raise allegations of fraud and/or coercion on the part of Local 338 sufficient to require a hearing,” and that she further erred in finding that the affidavits provided by the Vineyards were “insufficient to demonstrate that fraud or coercion were used by Local 338 in soliciting cards.”<sup>2</sup>

The Vineyards claim in their seventh through tenth exceptions that the Director failed to address Local 338’s not denying that it had offered Foreman Ramon Gonzales money in excess of \$700, nor that it had offered other agricultural employees of the Vineyards money, or that it had financially compensated other agricultural employees of the Vineyards. Similarly, the Vineyards except to the Director’s finding that Gonzales’s testimony was insufficient to establish fraud or coercion, or to at least require a hearing.

The Vineyards allege in their eleventh exception that the Director did not consider “the facts in a light most favorable to them by assuming their truth and drawing all reasonable inferences in their favor.”<sup>3</sup>

The Vineyards contend that the Director erred in finding that “Local 338 has submitted evidence that it represents a majority of the employees in the unit” on the basis that the parties have never agreed, identified, or even discussed the appropriate dates to

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<sup>1</sup> Exception 4.

<sup>2</sup> Exception 5, quoting Decision at 8, 9.

<sup>3</sup> Exception 11, quoting Decision at 5.

be used to identify the number of employees at the Vineyards in order to determine whether Local 338 actually represents a majority of the employees.”<sup>4</sup>

Finally, the Vineyards except on the basis that the Director did not address whether the dues deduction authorization cards submitted by Local 338 are required to identify the appropriate name of the employer(s) and that should the employer be misidentified, incomplete, or inaccurate, such dues authorization cards should be deemed invalid, and excluded from being counted in determining the existence of a majority.<sup>5</sup>

In a final unnumbered exception, the Vineyards reassert their claims of fraud and coercion and their claim regarding exclusion of cards that inaccurately reflect the name(s) of the employer(s) as stated in exception 12. These duplicative statements will not be separately considered.

For the reasons given below, we affirm the Director’s decision and certify the unit.

#### PROCEDURAL HISTORY

Local 338 filed the petition concerning representation of agricultural laborers of Palmer and Paumank Vineyards on April 7, 2022. The petition was accompanied by signed dues deduction authorization cards numerically making up a majority of the employees sought to be certified. The petition was subsequently served at the address of Paumanok Vineyards, which timely filed an answer, asserting, among other defenses that the Vineyards were distinct and separate employers and that service upon Paumanok did not constitute service on Palmer Vineyards. The answer also sought exclusions of personel from the negotiating unit proposed. Paumanok objected to

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<sup>4</sup> Exception 12.

<sup>5</sup> Exception 13.

certification of the proposed unit on the basis that it was a separate employer from Palmer. It also contended that supervisors, part-time laborers, family members working at Paumanok, and agricultural laborers working at Paumanok on an H-2A Visa for Temporary Agricultural Workers should be excluded from the unit. Paumanok also objected to the certification of the proposed unit without its being able to view the dues deduction authorization cards signed by employees.

At a conference on May 9, 2022, before a PERB Administrative Law Judge (ALJ), Paumanok reasserted the various arguments it had asserted to the petition, and added a claim that Local 338 had engaged in fraudulent or coercive conduct in obtaining evidence of support. In a May 12, 2022 letter, the ALJ directed Paumanok to file an offer of proof setting forth the specific facts it would present at a hearing, as well as stating any connection between Paumanok and Palmer Vineyards, including “any common employees, owners, officers, managers, supervisors, and the form of ownership (whether corporate or otherwise.)”<sup>6</sup> On May 23, 2022, Paumanok filed a letter from its counsel containing its offer of proof, accompanied by two affidavits, one from Ramon Gonzales and another from Kareem Massoud.

On May 26, 2022, Local 338 filed an amended petition, in which it named both Vineyards and provided separate addresses for each. The amended petition proposed as the appropriate bargaining unit “All full-time and regular part time agricultural laborers employed by Paumanok and Palmer Vineyards, but excluding the foreman, family

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<sup>6</sup> ALJ Letter dated May 12, 2022.

members working as agricultural laborers, seasonal employees, temporary employees, and employees on H-2A Visas for Temporary Agricultural Workers.”

On June 24, 2022, Palmer filed its response to the amended petition, objecting to the proposed unit on the ground that Palmer and Paumanok are separate and distinct employers, and also objected to the unit definition, seeking exclusion of multiple sets of workers, most of which had been excluded from the proposed unit by Local 338, except for supervisory employees other than the foreman, and joined in Paumanok’s offer of proof. Palmer also objected to certification of the unit without an election on the grounds of fraud and coercion in the obtaining of signatures. Palmer also requested to view the dues deduction authorization cards with the names redacted to ensure that the appropriate employer was listed on the cards.

### FACTS

The facts here are based on the offer of proof filed by Paumanok and joined in by Palmer. Paumanok was founded by Ursula and Charles Massoud, and the family has owned and operated Paumanok since approximately 1989.<sup>7</sup> Paumanok is an S Corporation, incorporated in the State of New York, with its own EIN number.<sup>8</sup> Paumanok employs eight agricultural employees, as to whom it files W-2 forms and withholds taxes. Paumanok maintains unemployment insurance, workers compensation insurance, and disability insurance for its employees.<sup>9</sup>

Each of Paumanok’s eight employees has worked at Palmer in the last year.<sup>10</sup>

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<sup>7</sup> Massoud affidavit at ¶¶ 1-3.

<sup>8</sup> *Id.*, ¶ 4.

<sup>9</sup> *Id.*, at ¶¶ 10, 11-13.

<sup>10</sup> *Id.*, at ¶ 15.

Palmer is also owned by the Massoud family and has been in operation since on or about August 1, 2018. Palmer has its own EIN number, files W-2 forms, and withholds taxes from its six employees, as well as maintaining unemployment insurance, workers compensation insurance, and disability insurance for its employees. Each of Palmer's six employees has worked at Paumanok in the last year.

The allegations of fraud and coercion stem from affidavits submitted by Kareem Massoud, Director of Operations at Paumanok, and the son of the owners of both Paumanok and Palmer, and by Ramon Gonzales, Foreman, at Paumanok. Gonzales's affidavit alleges that individuals representing Local 338 began persistently contacting him at some point in 2021, despite Gonzales's repeatedly telling these individuals that he did not want to have any further contact with them.<sup>11</sup>

Gonzales alleged that one of the Local 338 representatives who contacted him told him that "there would be a check waiting for him if he supplied Local 338 with more information, including information about his employer."<sup>12</sup> Gonzales did not identify by name or position any of the Local 338 representatives who approached him, nor does his affidavit even describe any alleged Local 338 representatives who he claims approached him.

In his affidavit, Gonzales states that it was his understanding that receipt of the check, in an amount more than \$700, was contingent on his joining the union.<sup>13</sup> In his affidavit, Gonzales further states that "upon information and belief, the other agricultural

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<sup>11</sup> Gonzales affidavit at ¶ 2.

<sup>12</sup> Decision at 5, quoting Gonzales affidavit at ¶¶ 3-4 (editing marks omitted).

<sup>13</sup> Decision at 5, citing Gonzales affidavit at ¶¶ 3-4 (editing marks omitted).

workers of Paumanok and Palmer were made the same offer by Local 338.”<sup>14</sup> In his affidavit, Gonzales does not identify which workers he believed were made the same offer as he was, or the basis for his belief that such an offer was made to other agricultural workers, or any information tending to support that belief. Gonzales told Massoud of Local 338’s alleged offer on May 4, 2022.<sup>15</sup>

On May 27, 2022, Local 338 filed a response to the offer of proof, to which a declaration by Local 338 organizer, Margaret Palmquist, was attached. In her declaration, Palmquist attested, under penalty of perjury, that she had “never made any promises to pay Ramon Gonzales or any of the other agricultural workers employed by Paumanok or Palmer money to join the Union, nor has any other representative of Local 338 RWDSU, UFCW offered to pay workers to join the Union.”<sup>16</sup>

### DISCUSSION

As a threshold matter, we address the contentions that are no longer properly before us. Pursuant to § 253.48 (c) (4) of our Rules of Procedure (Rules) in cases under the SERA, “An exception which is not specifically urged is waived.” Pursuant to this Rule, we note what issues are not preserved for review by this Board.

First, no exception has been filed by the Vineyards that, should certification be granted, the Vineyards should be deemed separate employers, or that a finding as to joint employer status was required. Nor has any exception been filed to the Director’s finding that in this case, “common ownership aside, a single unit encompassing both employers

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<sup>14</sup> Gonzales affidavit at ¶ 5 (editing marks omitted).

<sup>15</sup> Massoud affidavit at ¶¶ 25-31.

<sup>16</sup> Palmquist declaration ¶ 10.

is appropriate,” and that “the interchange of employees among the two companies and common supervision alone would support a finding that a single unit is appropriate.”<sup>17</sup>

Because this is the first occasion we have had to construe the Farm Laborers’ Fair Labor Practices Act (FLFLPA) in conjunction with SERA as applied to agricultural employees, we note that were this finding properly before us on the merits, we would affirm the Director’s finding that the single multi-employer unit is appropriate for the reasons set forth by the Director. The Director’s finding is supported both by the explicit text of § 705 (2) of SERA and the decisions rendered under it.<sup>18</sup> As the Court of Appeals explained in *Long Island College Hospital*, it is the duty of this Board to determine the appropriate unit under the Act, and “because of the complexity and difficulty of the problem of designating the [a]ppropriate unit, the power to make the decision has been delegated exclusively to the expert judgment of the board which has wide discretion in making the determination.”<sup>19</sup> As the Court of Appeals had previously held, “questions as to representation, including any issue as to the appropriate bargaining unit, call particularly for the expert judgment of the [ ] Board.”<sup>20</sup>

Nor has any exception asserted that any supervisory employees beyond the foreman, excluded by accord, are not eligible for organization. As no exceptions have

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<sup>17</sup> Decision at 6, citing *Clinton Dry Cleaners*, 30 SLRB No 5, 30 (1987); *Paragon Oil Co, Inc*, 8 SLRB 94, 97-101 (1945).

<sup>18</sup> *Metropolitan Life Ins Co v NYS Labor Relations Board*, 280 NY 194, 208-210 (1939); see also *Long Island College Hospital v NYS Labor Relations Board*, 32 NY2d 314, 322 (1973), *cert denied* 415 US 957 (1974) (“It is for the board to establish ‘in each case’ [a]n ‘employer unit, multiple employer unit, craft unit, plant unit, or any other unit’”)

<sup>19</sup> 32 NY2d 314, at 321.

<sup>20</sup> *Long Island College Hospital v Catherwood*, 23 NY2d 20, 34 (1968), *appeal dismissed* 394 US 716 (1969).

been filed as to these rulings, they are not properly reviewable before us, having been waived.

With respect to the composition of the unit, Local 338 clarified that it does not seek to represent supervisors, family members working as agricultural laborers, seasonal employees, temporary employees, and employees on H-2A Visas for Temporary Agricultural Workers.

As the Director correctly found, the only dispute remaining as to unit composition is whether part-time employees should be included in the unit, which she found they should be. The Vineyards challenge the Director's conclusion, asserting in their brief in support of their exceptions, that "as stated in the Decision, there are no part-time employees employed as agricultural workers at the Vineyards."<sup>21</sup> From this, the Vineyards fault the Director as having rendered a hypothetical designation.

This is not exactly correct. In her decision, the Director wrote that "Neither Paumanok nor Palmer presents any factual or legal basis on which part-time employees should be excluded. Neither even contends that they employ part-time workers."<sup>22</sup> In Paumanok's answer, objecting to the unit including part-time employees, there is no averment as to whether or not any of its employees were part-time employees; Palmer's answer exercised a similar discretion.<sup>23</sup> Nor did the offer of proof, which included the names of all employees at both Vineyards, expressly state that there were or were not part-time employees at either Vineyard.<sup>24</sup>

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<sup>21</sup> Vineyards's brief at 10.

<sup>22</sup> Decision at 7.

<sup>23</sup> Paumanok answer, ¶ 8; Palmer answer, ¶ 7.

<sup>24</sup> Offer of proof, ¶¶ 9, 16.

The Vineyards not having made this issue clear at any point prior to their filing exceptions before the Board is unhelpful, and would normally be deemed waived under our Rules.<sup>25</sup>

In its brief before us, Local 338 maintains that the Director did not err in including part-time employees in the unit, maintaining that “no citation to any authority nor any reasoning for why part-time employees should be excluded from the unit simply because there are currently no employees working part-time.”<sup>26</sup> In support of its argument for including part-time employees, Local 338 relied upon an ALJ decision in *Maker Stables, LLC*, for the proposition that “[r]egular part-time employees are entitled to representation, and were included in an appropriate unit even when the number of employees working at one time fluctuates due to the employer’s business and none of the employees worked regular fixed hours.”<sup>27</sup>

As the ALJ correctly noted in *Maker Stables*, our predecessor Board, the State Labor Relations Board (SLRB) explained in its decision in *Wyckoff Heights Hospital*, that “[m]ost employment is at will, with no guarantee as to how long it will continue,” and that it is “the Board’s consistent practice and established policy to include in the unit all regularly employed employees who perform the same work.”<sup>28</sup> In that decision, SLRB also

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<sup>25</sup> Rules, § 253.48 (c) (4).

<sup>26</sup> Local 338 response to exceptions, at 9.

<sup>27</sup> 54 PERB ¶ 4401, 4406 (2021), *citing Golden Arrow Line*, 29 SLRB 163, 164 (1966) (part time employees included in unit; casual employees excluded); *Charles Kessler, et al*, 28 SLRB 380 (1965) (same).

<sup>28</sup> 35 SLRB 313, 316-317 (1972) (discussing the inclusion of temporary workers in a unit). *See also Menorah Home and Hospital for the Aged*, 31 SLRB 354, 355-356 (1968) (including in an appropriate unit vacation replacement and call-in nurses, and noting that the issues of unit eligibility and the eligibility to vote were separate).

emphasized “that whether an individual employee had a continuing interest in terms and conditions of employment was not a matter of unit inclusion, but a separate matter to be determined when addressing employee's eligibility to vote.”<sup>29</sup>

Under the circumstances here, we believe that the record evidence is not sufficiently clear for us to determine whether or not the Vineyards have had in the past part-time employees, especially in view of the Vineyards’s admission that employees of Paumanok would work at times at Palmer, and the converse. How such employees would be classified with respect to the Vineyard at which they were not formally employed but nonetheless worked at for some period of time is not dispositive of the determination of whether such employees were part-time at one or both Vineyards, but could in fact be indicative.

We find that the policy of the Act “to include in a unit all regularly employed employees who perform the same work” is best served by including part-time employees as members of the multi-employer unit at issue here.<sup>30</sup> This ruling is without prejudice to the Vineyards ability to file a petition seeking to exclude future-hired part-time employees whose work and duties they believe do not equate to a community of interest with the employees within the unit.

We now turn to the most significant component of the Vineyards’s exceptions, the claim that the Director failed to afford the Vineyards’s claims of fraud and coercion the appropriate review, and especially failing to treat the factual allegations of the offer of proof “in a light most favorable to them [the Vineyards] by assuming their truth and

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<sup>29</sup> *Id.*

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

drawing all reasonable inferences in their favor.”<sup>31</sup>

We are not persuaded by the Vineyards’s exceptions. The Vineyards erroneously assume that the Director’s treating the statements in the offer of proof as truthful, and in drawing reasonable inferences from them, necessarily means that those statements suffice to meet the appropriate standard of review. That is, unequivocally, not the case.

Pursuant to § 705.1 of the Act, as relevant to the exceptions in this matter, the standard for challenges to employees’ choice of representative under SERA is exacting:

In the event that either party provides to the board, prior to the designation of a representative, clear and convincing evidence that the dues deduction authorizations, and other evidence upon which the board would otherwise rely to ascertain the employees’ choice of representative, are fraudulent or were obtained through coercion, the board shall promptly thereafter conduct an election.

“Clear and convincing evidence” is not a self-evident standard; however, as it has been well phrased:

Between the normal civil standard and the criminal standard lies an intermediate civil standard, variously formulated by the courts but most often described as a standard of clear and convincing evidence. Despite this description, the clear and convincing evidence standard does not refer to the quantity or kind of evidence presented, but to the apparent probability that the assertion is true: the party with the burden of proof must convince the trier of fact that it is highly probable that the facts he alleges are correct. Exactly how high the probability must be is unclear, and consequently the clear and convincing evidence standard has been criticized as unworkably vague. Nevertheless, in various categories of cases, courts regularly instruct juries to look for clear and convincing proof.<sup>32</sup>

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<sup>31</sup> Exception 11.

<sup>32</sup> Emily Sherwin, “Clear and Convincing Evidence of Testamentary Intent: The Search for a Compromise Between Formality and Adjudicative Justice, 34 Connecticut Law Rev 453, 460- 462 (2002) (Citations, notes, and editing marks omitted).

In New York State, clear and convincing evidence has been treated as just such an intermediate burden of proof, resting somewhere between a preponderance of the evidence and the higher beyond a reasonable doubt standard.<sup>33</sup> Here, as in *Currie v McTeague*, “we find the proof inadequate to satisfy this exacting standard.”<sup>34</sup> Even accepting, as the Director did, the veracity of the factual allegations before her, the facts alleged were vague and unsubstantiated, and in certain places self-contradictory. Gonzales’s affidavit alleged that, at some unknown time in 2021, an unknown person or persons claiming to represent Local 338 began contacting him on numerous occasions, despite his informing them that he was not interested in further contact with them. He provided no names, positions, or even a description of the individual(s) with whom he spoke. Nor did he inform his employer until May 4, 2022, significantly after the events in question.

Similarly, his allegation that “there would be a check waiting for him if he supplied Local 338 with more information,” including information about his employer, suffers from the same deficiencies.<sup>35</sup> Gonzales also averred that his “understanding” was that “receipt of the check was contingent on [his] joining the union.”<sup>36</sup> Gonzales’s account is internally inconsistent, in that it first states that receipt of the check was a fee for providing information, but then he alleges that receipt of the check was contingent on his joining the

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<sup>33</sup> See, eg, *Currie v McTeague*, 83 AD3d 1184, 1185 (3d Dept 2011) (“Clear and convincing evidence standard requires the party bearing burden of proof to adduce evidence that makes it highly probable that what he or she claims is what actually happened.”).

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

<sup>35</sup> Decision at 5, quoting Gonzales affidavit at ¶¶ 3-4 (editing marks omitted).

<sup>36</sup> Decision at 5, citing Gonzales affidavit at ¶¶ 3-4 (editing marks omitted).

union. He also alleged that the other workers at the Vineyards were made the same offer as he was, but did not identify any source of his knowledge, which workers were made the offer, or the basis for his alleged “information and belief.”<sup>37</sup>

These inconsistencies in Gonzales’s affidavit, as was the case in *Currie v McTeague*, lead us to find that “in view of these contradictions, as well as the uncorroborated nature of [Gonzales’s] testimony” we are unable to find that Gonzales’s proffered testimony, absent significant information not contained in the offer of proof, could conceivably rise to the level of clear and convincing evidence.<sup>38</sup>

We also note the Vineyards’s claim that Local 338 did not deny Gonzales’s claims of wrongdoing are sufficiently refuted by the express denial under oath of those claims comprised within the Palmquist declaration on behalf of Local 338. We do not rely on this factual error, as the sufficiency of the offer of proof is at issue, not the thoroughness of Local 338’s denial of the alleged wrongdoing.

The Vineyards’s claim that the Director erred in refusing to permit them and/or their counsel from viewing the employees’ dues deduction authorization cards with the employees’s names redacted is presented absent citation of relevant statutory authority, case law from this Board or its ALJs, our predecessor board, any comparable legal statutory schema, or any other legal basis to allow the Vineyards to breach the

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<sup>37</sup> Gonzales affidavit at ¶ 5 (editing marks omitted). To the extent that the Vineyards's exceptions can be read to argue that the Director was obligated to hold a hearing, we reject that argument. Hearings held are discretionary, not required by law, and are held only where there is a material issue of disputed fact. As the Director, and this Board for purposes of its analysis, presumed the offer of proof to be true (albeit insufficient), no such disputed fact was at issue.

<sup>38</sup> *Id.*

confidentiality in which this Board has long held dues deduction authorization cards.<sup>39</sup>

It is well-established that “Both PERB and the NLRB have always treated showings of interest as strictly confidential, whether sought by employers or unions confronted with a petition for certification or for decertification,” which is “in furtherance of the statutory policy of protecting employees’ rights of organization.”<sup>40</sup>

This has been true for decades in our public sector jurisprudence, and is no less integral to our private sector duties, pursuant to the statutory mandates of SERA and our Rules. Indeed, our Rules expressly provide that dues deduction authorization cards are not part of the record, either before the courts or pursuant to the State’s Freedom of Information Law.<sup>41</sup>

Moreover, redaction of the signer’s names alone is insufficient to protect the employees’s rights under the Act, as other identifying information is contained within the cards, information such as address, phone number, date of hiring, and the individual’s handwriting.<sup>42</sup> This is particularly the case in view of the small workforces of each of the Vineyards (eight and six employees, respectively).

We agree with Local 338 that, under our Rules and the applicable precedents, review of dues deduction authorization cards is a purely internal administrative matter for the Director, as is necessary to preserve the sanctity of each employee’s right to choose

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<sup>39</sup> Vineyards’s brief in support of exceptions at 10-11.

<sup>40</sup> Opinion of Counsel, 41 PERB ¶ 5001, 5001-5002 (Dec 1, 2008); *see also Fairmont Mills, Inc*, 87 NLRB 21 (1949); *NLRB v Biophysics Sys, Inc*, 91 LRRM 3079 (SDNY 1996) (“The interest in confidentiality which attaches to a union authorization card approaches that which surrounds the secret ballot in an election.”).

<sup>41</sup> Rules, §§ 253.50, 253.51.

<sup>42</sup> Local 338’s response to offer of proof, at 10.

to join a union or to refrain from joining one.<sup>43</sup> We affirm the Director's finding that Palmer's expressed concern over misnomer of the correct employer in the cards does not raise an issue that comes anywhere near to warranting breaching the confidentiality of the cards here.

As the Director correctly noted, her finding the multi-employer unit appropriate would render the issue moot unless we reversed or annulled that finding. In view of the Vineyards's failure to except to the Director's finding that a multi-employer unit was appropriate, the issue was waived pursuant to § 253.48 (c) (4) of our Rules, thereby rendering the claim moot.

Based on the foregoing, we affirm the Director's findings as here discussed. We find the following unit as appropriate to be certified to Local 338:

**Included:** All full time and regular part time agricultural laborers employed by Paumanok Vineyards and Palmer Vineyards.

**Excluded:** Foreman, family members working as agricultural laborers, seasonal employees, temporary employees, and employees on H-2A Visas for Temporary Agricultural Workers.

Local 338 has submitted evidence that it represents a majority of the employees in this unit. Pursuant to § 705.1-a of the New York State Labor Relations Act, Local 338 has hereby satisfied the requirements for certification without an election, and is hereby

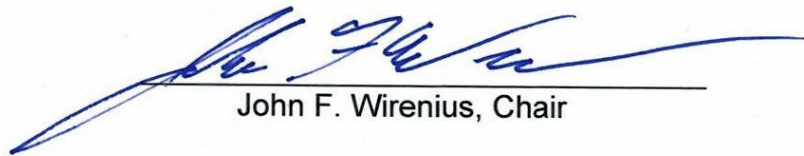
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<sup>43</sup> See Rules, § 251.15 (a); see also *Police Benevolent Assn of New York State v Helsby*, 84 Misc2d 17, 19 (Sup Ct Albany Co, Oct 30, 1975) (Conway, J.) ("PERB's director has the power to pass upon the sufficiency of the 'showing of interest'. Revealing the names of the employees who support one employee organization, to another incumbent employee organization, may subject employees to many forms of harassment and reprisal and would violate the long established policy of secrecy of the employees' choice in such matters."). In this case, while the names might not be revealed, the identities would be easily discerned, as discussed in the text *ante*.

certified as the exclusive negotiating agent for the unit.

IT IS, THEREFORE, ORDERED that the Director's findings are affirmed, and that the petitioned-for unit is certified. FURTHER, IT IS ORDERED that the Vineyards shall negotiate collectively with Local 338.

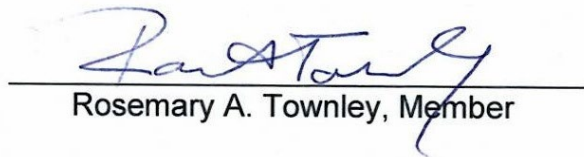
DATED: August 9, 2022  
Albany, New York



John F. Wirenius, Chair



Anthony Zumbolo, Member



Rosemary A. Townley, Member

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

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In the Matter of

**TOWN OF HEMPSTEAD,**

**CASE NO. S-0003**

for a determination pursuant to  
Section 212 of the Civil Service Law.

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**BOARD DECISION AND ORDER**

Section 212.1 of the Civil Service Law (CSL) declares certain provisions of the Public Employees Fair Employment Act (Act) inapplicable to those local governments which have adopted their own provisions and procedures which have been submitted to this Board “and as to which there is in effect a determination by the board that such provisions and procedures and the continuing implementation thereof are substantially equivalent . . .” to those which control this Board.

In order for us to ascertain whether the continuing implementation of local provisions and procedures remain substantially equivalent to those which govern this Board, our Office of Counsel historically has canvassed the appropriate local governments each year to gather data on their local boards’ operations.

Since 2018, our Office of Counsel has attempted, on numerous occasions, to obtain required documentation from the Town of Hempstead (Town) and the Town of Hempstead Local Board (Local Board). Although the Local Board submitted an incomplete response in October 2021, partially supplemented in February 2022, we have yet to obtain confirmation that the Local Board has adopted PERB’s current Rules of Procedure (Rules).

The attorney for the Town advised that the current PERB Rules would be adopted by the Local Board during its meeting on February 17, 2022. However, we received no confirmation of this adoption, and the Town's attorney did not respond to follow-up contacts. The attorney for the Local Board subsequently advised that the current PERB Rules would be adopted by the Local Board in March 2022. Similarly, no confirmation of this adoption was received, and the Local Board's attorney failed to respond to multiple inquiries regarding the status of the Local Board's rules of procedure.

Moreover, the current Local Board rules require a three-person board with staggered six-year terms, but the Local Board has not had three members since prior to 2017. Richard Bilello, Chair, and Michael Sepe, are listed as Local Board members from 2017 through 2020.

The last contact we had with the Local Board was February 25, 2022, when the Local Board provided some of the required information and advised that PERB's Rules, as amended, would be adopted at the Local Board's March 2022 meeting. Since then, the Local Board has not responded to our inquiries and, as far as we are aware, has not adopted our most recent Rules. As a result, we are no longer warranted in concluding that the continuing implementation by the Town of Hempstead Local Board of its provisions and procedures is substantially equivalent to the provisions and procedures governing this Board.

WE THEREFORE ORDER that the determination of this Board dated April 11,

1968,<sup>1</sup> approving the enactment establishing a local PERB for the Town of Hempstead  
be, and the same is hereby, suspended subject to reinstatement upon application and  
demonstration by the Town of Hempstead Local Board that the continuing  
implementation of its local provisions and procedures is substantially equivalent to those  
governing this Board;


FURTHERMORE, PLEASE TAKE NOTICE that unless such application is filed  
by September 15, 2022, this Board shall, without further notice, rescind, pursuant to  
CSL § 212, its order dated April 11, 1968, approving the Town of Hempstead's local  
enactment and such other orders as approved amendments to its local enactment<sup>2</sup>  
upon the ground that the continuing implementation of said local enactment and  
amendments thereof is no longer substantially equivalent to the provisions and  
procedures applicable to this board.

DATED: August 9, 2022  
Albany, New York



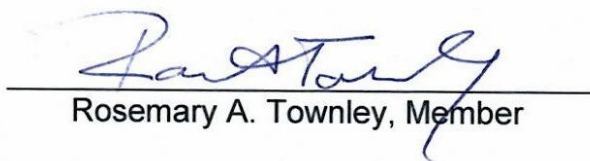
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John F. Wirenius, Chair



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Anthony Zumbolo, Member



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Rosemary A. Townley, Member

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<sup>1</sup> 1 PERB ¶ 395 (1968).

<sup>2</sup> 4 PERB ¶ 3019 (1972); 5 PERB ¶ 3041 (1973); 6 PERB ¶ 3081 (1974); 11 PERB ¶ 3059 (1978).