STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

JEAN OLIVER,

Charging Party,

CASE NO. U-34335

- and -

STATE OF NEW YORK (NEW YORK STATE POLICE),

Respondent.

JEAN OLIVER, *pro se*

MICHAEL N. VOLFORTE, ACTING GENERAL COUNSEL (CLAY J. LODOVICE of counsel), for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by Jean Oliver (Oliver) to a decision of an Administrative Law Judge (ALJ) dismissing her amended improper practice charge alleging that the State of New York (New York State Police) (State or NYS Police) violated §§ 209-a.1 (a) and (c) of the Public Employees' Fair Employment Act (Act).[1] The amended charge alleged that the State violated the Act by retaliating against Oliver for having exercised her rights under Title VII of the Civil Rights Act of 1964 and for filing "non-contractual" grievances.[2] More specifically, Oliver's amended charge alleged that the NYS Police subjected her to disciplinary charges and, *inter alia*, forced her to transfer from Troop H, Community Narcotics Enforcement Team West (CNET West) to a less

---

[1] 51 PERB ¶ 4555 (2018). Although the decision is captioned as a decision by the Regional Director, we refer to it here as an ALJ decision, because the Regional Director was acting as an ALJ when he issued the decision.

[2] The original charge was filed by Oliver on May 29, 2015 (see discussion of filing date below) and alleged that the State violated § 209-a.1 (d) of the Act. Pursuant to the Director of Public Employment Practices and Representation (Director)'s preliminary review of the charge under § 204.2 of PERB's Rules of Procedure (Rules), the Director informed Oliver that individuals lacked standing to allege a violation of § 209-a.1 (d) of the Act. Oliver filed an amended charge on June 19, 2015.

desirable post because she filed an internal equal employment opportunity (EEO) complaint against her CNET West supervisor(s) on or about October 26, 2013 and because she filed non-contractual grievances on September 8, 2014 and October 27, 2014.

EXCEPTIONS

Oliver filed a six-page document of exceptions, in which she objects to a number of the ALJ's findings and requests that an "investigative inquiry" be conducted in response to the ALJ's decision.[3] Oliver objects to the ALJ's failure to cite to the U.S. Equal Employment Opportunity Commission (EEOC)'s specific finding that Oliver was subjected to "retaliation" for engaging in protected activity under Title VII and argues that the ALJ recites an incorrect date on which the original improper practice charge was filed. Oliver also argues that delays in scheduling her grievances were acts of retaliation and asserts that additional grievances she filed are relevant to the timeliness of her improper practice charge. Finally, Oliver "request[s] clarification" on how the ALJ could find that the filing of grievances is activity protected by the Act, yet also find that Oliver was not engaged in activity protected under the Act.[4]

The State argues in response that Oliver's exceptions do not comply with § 213.2 (b) of our Rules of Procedure (Rules) because the grounds for the exceptions are not set forth with sufficient specificity. On the merits, the State argues that the ALJ's decision dismissing the amended charge is correct and should be affirmed.

We affirm the ALJ's decision for the following reasons.

FACTS

The facts are fully set forth in the ALJ's decision and are discussed here only as

[3] Exceptions, at 1.
[4] Exceptions, at 5.

far as is necessary to address the exceptions.

Oliver began her employment with the NYS Police as a trooper in 1997.[5] In 2005 she was promoted to the rank of investigator.[6]

In the fall of 2013, Oliver filed an EEO complaint with the NYS Police, alleging sexual harassment and gender discrimination at CNET West.[7]

On May 16, 2014, Oliver submitted a request for transfer out of CNET West to Troop A, Counter Terrorism Investigation Unit (CTIU).[8]

Discipline

On or about June 20, 2014, CTIU commander Major Michael Cerretto (Cerretto) informed Oliver that a Level 4 Personnel Complaint accusing her of violating rules and regulations relative to the mishandling of a confidential informant[9] had been lodged against her.[10] A Level 4 complaint is the most severe form of personnel complaint and carries with it the penalty of dismissal from employment.[11]

---

[5] Oliver's Offer of Proof, paragraph 1; Oliver's filing dated June 7, 2015 (this is a packet of documents copied by Oliver to the ALJ that is addressed to the Honorable Randolph F. Treece, U.S. Magistrate Judge at the U.S. District Court in the Northern District of New York), Ex, Civil Complaint, statement of fact attached thereto, paragraph 7.
[6] Oliver's Offer of Proof, paragraph 2; Oliver's filing dated June 7, 2015, Ex, Civil Complaint, statement of fact attached thereto, paragraph 8.
[7] Oliver's filing dated June 7, 2015, Ex, Civil Complaint, statement of fact attached thereto, paragraphs 22-25.
[8] *Id*. Oliver contends that this transfer was forced on her by Colonel Francis Christensen. Oliver's offer of proof, paragraph 8. *See also* Oliver's surreply dated May 9, 2017, Ex, Step 4 Appeal, Oliver's statement attached thereto.
[9] Oliver's filing dated August 3, 2015 (this is a packet of documents copied from Oliver to the ALJ that is addressed to the Honorable Brenda K. Sannes, U.S. District Judge at the U.S. District Court in the Northern District of New York), Ex, Complaint to Disciplinary Committee, attachment thereto entitled "Correspondence Dated January 24, 2015 . . ," at 1-2.
[10] Oliver's filing dated June 7, 2015, Ex, Civil Complaint, attachment dated January 24, 2015, entitled Right to Request Dismissal of Level 4 Personnel Complaint, paragraph 7.
[11] Amended improper practice charge, details of charge, at 4, paragraph 4. *See also* Oliver's offer of proof, paragraph 20.

On or about July 17, 2014, Oliver was interviewed by the NYS Police Internal Affairs Bureau (IAB) regarding the Level 4 Personnel Complaint.[12] IAB ultimately determined that the complaint was worthy of further investigation and, in August 2014, referred the matter to First Deputy Superintendent Kevin Gagan (Gagan) for further processing. Gagan drafted a memorandum based on IAB's findings accusing Oliver of violating rules and regulations relating to activities in March, May, and July of 2014.[13] Gagan issued this memorandum to Oliver on September 24, 2014, which offered discipline, less than termination, but consisting of a suspension without pay for 30 days, a formal censure, and return to probationary status for a period of one year.[14]

Oliver chose not to accept the findings or the discipline as proposed in the memorandum, and instead requested that formal charges against her be filed and a hearing be held.[15] Pursuant to that request, charges and specifications for the Level 4 Personnel Complaint were issued to her on October 21, 2014, by Superintendent Joseph D'Amico (D'Amico).[16]

The Level 4 Personnel Complaint is comprised of five charges. The first four charges allege a failure by Oliver to follow orders given to her by Captain Steve Nigrelli (Nigrelli) on May 19, 2014 and a failure by Oliver to be truthful with IAB when questioned regarding the circumstances.[17] The fifth charge alleges the making of a false entry in an

---

[12] Oliver's filing dated August 3, 2015, Ex, Complaint to Disciplinary Committee, attachment thereto entitled "Correspondence Dated January 24, 2015 . . ," at 2.
[13] Oliver's offer of proof, paragraph 37. *See also* Gagan's memorandum attached to Respondent's reply to the offer of proof, Ex 5.
[14] Oliver's offer of proof, paragraph 37.
[15] *Id*.
[16] *Id*, at paragraph 38. *See also* Ex 7 to the State's reply to Oliver's offer of proof.
[17] Oliver's filing dated June 7, 2015, Ex, Civil Complaint, attachment entitled "Amended Charges and Specifications against Investigator Jean C. Oliver," dated May 29, 2015. *See also* Ex 12 to the State's reply to Oliver's offer of proof.

official police record on March 5, 2014, while still assigned to CNET West.[18]

On May 29, 2015, the Level 4 Personnel Complaint issued against Oliver on October 21, 2014 was amended by the NYS Police.[19] The amendments are limited to the identification of possible witnesses not previously identified by the NYS Police and address changes for recently retired witnesses. A comparison of the documents reveals no material change to the substance of the charges as they were issued on October 21, 2014.[20] On or about June 3, 2015, a hearing on the Level 4 Personnel Complaint was scheduled for June 30, 2015 and July 1, 2015.[21]

The hearing was conducted as scheduled and, on July 13, 2015, the hearing board issued its findings of fact and recommendation that Oliver be dismissed.[22] On July 14, 2015, D'Amico accepted the hearing board's findings and recommendation and dismissed Oliver from employment with the NYS Police, effective July 14, 2015.[23]

First Grievance

Oliver filed a non-contractual grievance on September 8, 2014, challenging her May 16, 2014 "forced removal" from CNET West.

On September 9, 2014, Cerretto denied the grievance based on untimeliness and because the remedy sought could not be provided at his (Cerretto's) level.[24] Oliver appealed that decision, and on December 3, 2014, Colonel Francis Christensen

---

[18] *Id*.
[19] Oliver's filing dated June 7, 2015, Ex, Civil Complaint, attachments entitled "Amended Charges and Specifications against Investigator Jean C. Oliver" dated May 29, 2015, and "Charges and Specifications against Investigator Jean C. Oliver" dated October 21, 2014. *See also* Ex 7 and 12 to State's reply to Oliver's offer of proof.
[20] *Id.*
[21] Oliver's filing dated October 4, 2017 (this was a packet of documents sent by Oliver to the ALJ), paragraph 10.
[22] Hearing Board decision dated July 13, 2015, attached to Respondent's reply to the offer of proof. Ex 16.
[23] *See* Oliver's surreplies dated May 5, 2017, May 9, 2017, and May 26, 2017.
[24] *Id.*

(Christensen) and Lieutenant Colonel David McBath (McBath) met with Oliver, her then-attorney George Muscato (Muscato), and Oliver's NYSPIA Delegate, Mark Dembrow (Dembrow), to conduct a Step 3 review of the grievance.[25] On December 22, 2014, Christensen issued a decision denying the grievance because it was untimely and because Oliver's May 16, 2014 transfer request was "properly requested and honored."[26]

On January 15, 2015, Muscato, on behalf of Oliver, issued a final grievance procedure appeal, referred to as a "Step 4 appeal" of Christensen's December 22, 2014 decision.[27] This appeal was filed with the Governor's Office of Employee Relations (GOER), and culminates in a hearing and decision.[28] As discussed below, this hearing has not yet been held and a decision not yet issued. Pending the outcome, Oliver remained at CTIU.

Second Grievance

On October 27, 2014, Oliver filed a second non-contractual grievance.[29] This grievance repeats the allegations of a forced transfer from CNET West to CTIU and also claims that the NYS Police violated Administrative Manual Regulation 2.2, which states "seniority shall be determined first by rank, second by service in rank," when they transferred Investigator Robert Kotin (Kotin) to CNET West instead of Oliver.[30] Oliver sought a transfer back to CNET West as a remedy.[31] On November 3, 2014, Cerretto

[25] Oliver's September 8, 2014 grievance and responses thereto, attached to Respondent's reply to Oliver's offer of proof. Ex 9.
[26] *Id.*
[27] *Id.*
[28] *Id. See also* Oliver's filing dated June 7, 2015. Ex, Civil Complaint, attachment entitled "Grievance Procedures," at 1-4.
[29] Oliver's October 27, 2014 grievance and responses thereto, attached to Respondent's reply to the offer of proof. Ex 4.
[30] *Id.*
[31] *Id*.

met with Oliver regarding this grievance and denied the grievance because "the remedy [she] sought [could] not be provided at [his] level."[32]

Oliver appealed that denial and, on December 3, 2014, Christensen and McBath met with Oliver, Muscato, and Dembrow to conduct a Step 3 review of the October 27, 2014 grievance.[33] On December 22, 2014, Christensen denied the grievance.[34]

On January 15, 2015, Muscato filed a Step 4 appeal of Christensen's denial of the October 27, 2014 grievance with GOER.[35] This is the final step in the grievance process and includes a "Step 4" hearing and decision.[36]

The Step 4 hearing for both the September 8, 2014 and October 27, 2014 grievances was scheduled for April 21, 2015.[37] However, Oliver requested an adjournment of this hearing to allow for a meeting or a "mediation," at which the parties would discuss a settlement of the charges of misconduct pending against her.[38] This meeting took place on April 28, 2015.[39] The NYS Police was represented by NYS Police Counsel Lois Goland (Goland).[40] At this "mediation," Goland allegedly waved the Level 4 charges and specifications in Oliver's face and told her that she would be dismissed if

---

[32] *Id.*
[33] Oliver's October 27, 2014 grievance and responses thereto, attached to Respondent's reply to the offer of proof. Ex 4.
[34] *Id*.
[35] *Id.*
[36] *See* Oliver's filing dated June 7, 2015. Ex, Civil Complaint, attachment entitled "Grievance Procedures," at 1-4.
[37] Oliver's surreply dated May 5, 2017, at 5-6.
[38] Oliver's surreply dated May 9, 2017, Ex, grievance dated May 4, 2015, statement of fact attached thereto, at 1.
[39] Amended improper practice charge, details of the charge, at 6.
[40] *Id.*

she refused the settlement.[41]

Oliver rejected the proposed settlement, and the matter continued to a hearing.[42]

On July 3, 2015, the Step 4 grievance hearing was rescheduled for July 28, 2015.[43] As of July 23, 2015, however, Oliver was under the impression that the hearing had been rescheduled from July 28, 2015, to a date in the first week of August 2015.[44] Oliver was also informed by her attorney on July 23, 2015, nine days after her dismissal from the NYS Police, that the grievances were considered moot by reason of her dismissal, and that GOER's hearing officer Michael Volforte (Volforte) cancelled the July 28, 2015 hearing with the caveat that he would consider reviving the grievance hearing if Oliver's employment with the NYS Police were reinstated.[45] Oliver's attorney at the time also informed her that she "[did] not see a basis for challenging that the grievances are moot at this time."[46]

Other Grievances

Oliver filed additional grievances on April 17, 2015, May 4, 2015, and May 26, 2015. The ALJ's decision recites the content and history of these grievances, which we do not repeat here.

---

[41] *Id. See also* Oliver's surreply dated May 5, 2017, at 2; Oliver's filing dated August 3, 2015, Ex, Disciplinary Complaint, statement attached thereto, at 2. The terms of the proposed settlement were stated in an email from Goland to Oliver's new attorney, Meredith Savitt, dated May 19, 2015. Oliver's surreply dated May 5, 2017, Ex, email from Goland to Savitt dated May 19, 2015. The proposal allowed Oliver to remain an investigator with the NYS Police on the following conditions: Oliver would accept reassignment to Troop K, backroom investigator duties; plead guilty to the charges of misconduct dated October 21, 2014; serve a suspension without pay, the length of which would be determined by D'Amico; and withdraw the grievances pending before GOER, the EEOC claim, and the Title VII civil complaint pending in U.S. District Court. *Id.*

[42] Goland also represented the NYS Police in Oliver's misconduct hearing.

[43] Oliver's surreply dated May 5, 2017. Ex, email from Oliver's attorney (Savitt) to Oliver dated July 3, 2017. In her exceptions, Oliver appears to claim that the grievance hearing was rescheduled for August during the week of July 6, 2015.

[44] Oliver's filing dated July 24, 2015 (this was a packet of documents sent by Oliver to the ALJ). Ex, email chain attached thereto, at 1.

[45] *Id*; Ex, email chain attached thereto, at 3.

[46] *Id*.

DISCUSSION

We first address the State's argument that the exceptions in this matter are deficient. We agree that many of Oliver's exceptions do not "set forth specifically the questions or policy to which exceptions are taken," "identify that part of the decision . . . to which exceptions are taken," "designate . . . the portion of the record relied upon," or "state the grounds for exceptions," as required by our Rules. However, we are mindful that Oliver is currently unrepresented, and that her exceptions should be liberally construed.[47] We have examined the exceptions and the record.[48]

We next discuss the issue of when Oliver filed her improper practice charge. Oliver argues that she filed her charge on May 26, 2015, not May 29, 2015, as found by the ALJ. Section 204.1 of our Rules provides that an improper practice charge may be filed with the director within four months of when the public employee first knew, or reasonably should have known, of the alleged improper practice. The term "filing" is defined in our Rules at § 200.11 as "delivery to the board or an agent thereof, or the act of mailing to the board, or deposit of the papers enclosed in a properly addressed wrapper into the custody of an overnight delivery service for overnight delivery, before the latest time designated by the overnight delivery service for overnight delivery."

We affirm the ALJ's finding that Oliver's charge was filed on May 29, 2015. The

---

[47] *UFT (Leon)*; 48 PERB ¶ 3016, 3055 (2015); *UFT (Pinkard)*, 47 PERB ¶ 3020, 3061 (2014).

[48] We do, however, disregard assertions made for the first time in Oliver's exceptions, such as her claim that she learned of the IAB investigative report for the first time in April of 2018. Our review is limited to the record as it existed before the ALJ. *See, eg, Mt Pleasant Cottage Union Free Sch Dist*, 50 PERB ¶ 3002, 3009 n 12 (2017); *County of Cortland and Cortland County Sheriff*, 48 PERB 3028, 3111 n 27 (2015); *CSEA (Bienko)*, 47 PERB ¶ 3027, 3082 (2014); *UFT (Goldstein)*, 42 PERB ¶ 3035, 3128 (2009); *State Island Rapid Transit Operating Auth*, 30 PERB ¶ 3071, 3178 n 2 (1997). We also disregard Oliver's unsupported and unwarranted request that an "investigative inquiry" be conducted in response to the ALJ's decision.

label on the priority express mail envelope that Oliver's original improper practice charge was received in shows that Oliver's package was accepted for mailing on May 29, 2015. The stamp showing the amount of postage paid also confirms that the package was postmarked on May 29, 2015. Thus, we find that the "act of mailing to the board" and, therefore, filing in conformance with our Rules, was effectuated on May 29, 2015.[49]

Because Oliver's charge was filed on May 29, 2015, the period of limitations for the State's conduct that we will review extends back until January 29, 2015, as correctly found by the ALJ. The period of time for which we will review the State's conduct ends on June 19, 2015, the date that the amended charge was filed. We will not review conduct which is not alleged in a timely charge or amended charge.[50]

We next clarify precisely what issues are in front of us for review. It is clear from Oliver's improper practice charge, amended charge, her offer of proof, and, indeed, even her exceptions, that Oliver believes she has been the target of retaliation as a result of the EEO complaint she filed in 2013.[51] Indeed, that was the finding of the EEOC in January of 2015.[52] PERB, however, lacks jurisdiction to find and remedy violations based on activity protected by Title VII of the Civil Rights Act. Similarly, retaliation for activity protected under Title VII is not retaliation prohibited by the Act that we enforce.

---

[49] This finding is further supported by the date of the cover letter Oliver attached to her charge and the notary stamp affixed to the charge, both dated May 29, 2015.

[50] *See County of Rockland*, 31 PERB ¶ 3062, 3136 (1998); *NYCTA*, 31 PERB ¶ 3024, 3054 (1998); *International Brotherhood of Teamsters (Girolamo)*, 31 PERB ¶ 3008, 3015 (1998); *County of Nassau*, 29 PERB ¶ 3016, 3040 n 4 (1996).

[51] For example, in her improper practice charge and amended charge, Oliver stated, "I believe that I continue to be the subject of retaliation in response to me exercising my rights under Title VII of the Civil Rights Act of 1964." Her offer of proof stated that she worked without any disciplinary issues "until her activity covered under anti-discrimination statutes and the Taylor Law." Oliver's exceptions claim that her CNET West supervisors, IAB personnel, and Troop A supervisors conspired to have her wrongfully terminated in direct retaliation for the EEO complaint she filed.

[52] Determination submitted with Oliver's exceptions.

For this reason, the ALJ's failure to cite the EEOC's finding that the NYS Police retaliated against Oliver for engaging in activity protected by Title VII is not relevant to the case in front of us. We also affirm the ALJ's finding that, to the extent Oliver's charge, amended charge, and offer of proof allege that she engaged in protected activity by filing an EEO complaint, such activity is not activity protected by the Act, and lies outside of our ability to enforce, and to remedy.

Our jurisdiction, as relevant here, is limited to the determination and remediation of improper practices under the Act.[53] When an improper practice charge alleges retaliation in violation of §§ 209-a.1 (a) and (c) of the Act, the charging party has the burden of demonstrating three elements by a preponderance of the credible evidence: a) that the affected individual engaged in protected activity under the Act; b) that such activity was known to the person or persons taking the employment action; and c) that the employment action would not have been taken "but for" the protected activity.[54] These elements establish a *prima facie* case and give rise to an inference of improper motivation.[55] 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."[56]

The ALJ found that Oliver engaged in conduct protected under the Act when she filed non-contractual grievances on September 8, 2014 and October 27, 2014. While the

---

[53] *See* § 205.5 (d) of the Act.
[54] *Mt Pleasant Cottage Union Free Sch Dist*, 50 PERB ¶ 3002, 3008 (2017); *Bellmore-Merrick High Cent Sch Dist*, 48 PERB ¶ 3022, 3976 (2015), citing *Village of Endicott*, 47 PERB ¶ 3017, 3050 (2014); *see generally UFT, Local 2, AFL-CIO (Jenkins)*, 41 PERB ¶ 3007 (2008), *confd sub nom Jenkins v NYS Pub Empl Relations Bd*, 41 PERB ¶ 7007 (Sup Ct NY Co 2008), *affd*, 67 AD3d 567, 42 PERB ¶ 7008 (1st Dept 2009); *State of New York (SUNY Buffalo)*, 46 PERB ¶ 3021 (2013); *see also City of Salamanca*, 18 PERB ¶ 3012 (1985).
[55] *See Town of Tuscarora*, 48 PERB ¶ 3011, 3037 (2015).
[56] *Id*; *see generally Littlejohn v City of New York*, 795 F3d 297, 307-308 (2d Cir 2015).

ALJ noted that there may be some question as to whether filing a non-contractual grievance is activity protected under the Act,[57] we adopt the ALJ's finding for purposes of deciding Oliver's exceptions. This is the only protected activity that Oliver alleged in her charge or amended charge. Although Oliver filed further grievances on April 17, 2015, May 4, 2015, and May 26, 2015, she did not allege this to be protected activity.[58] Even assuming that filing these grievances was further protected activity adds nothing to the analysis because, as the ALJ found, Oliver did not allege any further acts of retaliation based on these filings in her charge or amended charge.[59]

The ALJ then went on to examine whether the charge states a cause of action or *prima facie* case. He found that only three of the acts of retaliation alleged by Oliver are timely: 1) the amendments made to the Level 4 Personnel Complaint served on Oliver on May 29, 2015; 2) the April 28, 2015 "mediation"; and 3) the cancellation of the grievance hearing on or about July 23, 2015.

As explained above, we find that the relevant time frame for the examination of alleged retaliatory action by the State is January 29 to June 19, 2015, the four month period prior to the filing of the original charge through the date that the amended charge was filed.

In her exceptions, Oliver argues that the adjournments of her grievance hearings in February, April, and July of 2015 were also retaliatory acts that the ALJ should have examined in his decision. Only the February and April adjournment requests took place during the relevant time frame. The record shows that the April adjournment took place

[57] *See* 51 PERB ¶ 4555, at 4745, 4751 n 126.
[58] Oliver mentioned these grievances for the first time in her May 5, 2017 surreply.
[59] *See* 51 PERB ¶ 4555, at 4748.

at Oliver's request,[60] and it cannot be an act of retaliation on the State's part. We do not find the simple request of adjournments by the State, without more, to be sufficient to raise an inference of retaliatory motive on the State's part. There is simply no evidence that the State requested an adjournment in February of 2015 (or at any other time) for the purpose of retaliating against Oliver for having filed the grievance initially (or to retaliate against Oliver for having filed an improper practice charge with PERB in May or June of 2015).

Oliver does not otherwise identify any alleged retaliatory actions that took place from January 29 to June 19, 2015, and she provides no basis for overturning the ALJ's finding that the remaining acts of retaliation alleged by Oliver occurred outside the limitation period.

We turn next to the ALJ's analysis of the three acts of retaliation that he found fell within the relevant time frame.

Amendments to Level 4 Personnel Complaint

Oliver contended in her offer of proof that the Level 4 Personnel Complaint was amended by the NYS Police on May 29, 2015, to include two new allegations related to a failure to follow orders.[61] Oliver also stated that following the addition of these new allegations, the NYS Police deprived her of her contractual rights to respond to those new charges and to conduct an investigation into the veracity of the new charges.

The ALJ dismissed these allegations because the amended Level 4 Personnel Complaint[62] does not in fact contain any new allegations of misconduct. The amendments are limited to the addition of witnesses the NYS Police may call in support

[60] *See* Oliver's surreply dated May 9, 2017.
[61] The Level 4 Personnel Complaint was initially issued on October 21, 2014, prior to the limitations period at issue. Ex 7 to the State's reply to Oliver's offer of proof.
[62] Ex 12 to the State's reply to Oliver's offer of proof.

of the charges and updated addresses for a number of witnesses identified in the original Level 4 Personnel Complaint.

We affirm, for the reasons given by the ALJ. Because there are no adverse substantive changes to the Level 4 Personnel Complaint, it cannot be argued that the State has retaliated against Oliver for filing the improper practice charge before us (the argument that Oliver presented to the ALJ) or for filing the non-contract grievances in September and October of 2014. And, because no new charges were presented, Oliver was not deprived of any right to respond or conduct an investigation into the new charges.

Mediation

Oliver alleged that Goland threatened her with termination at the April 28, 2015 "mediation" if she did not agree with the "false and fabricated" charges. The ALJ found that the State's alleged actions did not constitute an adverse employer action as required to state a cause of action under §§ 209-a.1 (a) and (c) of the Act.

We find that Oliver has not established a *prima facie* case of retaliation under §§ 209-a.1 (a) and (c) of the Act for the following reasons. As the ALJ found, it is clear that at the "mediation," a settlement in lieu of Oliver's possible dismissal was offered. The terms of the settlement offered by Goland included a requirement that Oliver admit to the Level 4 Personnel Complaint. As the ALJ found, however, if the charges were prosecuted to completion they could be upheld after a hearing and, if upheld, Oliver would be in jeopardy of being dismissed. Although, again as the ALJ found, Oliver is dissatisfied with a settlement proposal that required her to admit to charges that she believes to be to false and fabricated in lieu of dismissal, an attempt at settlement of the pending charges, without more, is not a threat of retaliation for having brought

grievances in September and October of 2014.[63] In other words, the statement that Oliver would be terminated if she did not accept the terms of the settlement was a statement of opinion regarding the possible consequences of a hearing which, without more, is not retaliatory.[64]

Cancellation of Grievance Hearing

Finally, we address the cancellation of Oliver's grievance hearing, which occurred on or about July 23, 2015. Although this occurred beyond the date the amended charge was filed, the ALJ considered the allegation timely, allowing it as an amendment to the charge pursuant to § 204.1 (d) of our Rules.

The ALJ nevertheless dismissed the allegation, finding that the conduct of Oliver's employer is not implicated because Volforte is not Oliver's employer and does not work for her employer.[65] The ALJ went on to note that, at the heart of Oliver's allegation is the accusation that Volforte conspired with the NYS Police to cancel the grievance hearing. The ALJ found, however, that the offer of proof, the surreplies, and all of Oliver's other filings in this matter are completely devoid of any basis upon which a reasonable inference can be drawn that Volforte either colluded with the NYS Police, or that his decision to cancel her hearing was unlawfully motivated. The ALJ found that Oliver's mere accusations were insufficient to establish a *prima facie* case in the absence of any direct or circumstantial evidence in support of the accusation.[66]

---

[63] We note that this "mediation" occurred before Oliver filed an improper practice charge with PERB, so it is chronologically impossible for the State's conduct to have occurred in retaliation for Oliver's having filed a charge.
[64] *See, eg, Town of Greenburgh*, 32 PERB ¶ 3025, 3055 (1999); *City of Albany*, 17 PERB ¶ 3068, 3107 (1984).
[65] Volforte is employed by GOER, and although GOER is an agency of the State of New York, the ALJ found that it is distinct from the NYS Police and is not Oliver's employer. Our conclusions below make it unnecessary for us to pass on this conclusion.
[66] 51 PERB ¶ 4555, at 4748.

We affirm the ALJ's findings, because we agree that Oliver's conclusory accusations are insufficient to establish a reasonable inference that Volforte either colluded with the NYS Police or that his decision to cancel her hearing was unlawfully motivated. There is simply no evidence, circumstantial or direct, that lends support to Oliver's bare accusations of a conspiracy between Volforte and the NYS Police. Moreover, we agree with the ALJ that the context and timing of the hearing cancellation do not raise an inference of improper motivation. Given Oliver's dismissal from the NYS Police on July 14, 2015, it was impossible, even assuming she was successful at the hearing, for Volforte to grant the relief requested in the grievances (transferring Oliver back to CNET West).

For the foregoing reasons, we affirm the ALJ's findings that the Oliver's charge failed to set forth facts sufficient to establish a *prima facie* case of retaliation under §§ 209-a.1 (a) and (c) of the Act.

IT IS, THEREFORE, ORDERED that the improper practice charge is dismissed.

DATED: December 17, 2018
Albany, New York

John F. Wirenius, Chairperson

Anthony Zumbolo, Member

Monte A. Klein, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

VILLAGE OF SARANAC LAKE,

Charging Party,

-and- **CASE NO. U-35367**

SARANAC LAKE POLICE BENEVOLENT ASSOCIATION, INC.,

Respondent.

ROEMER WALLENS GOLD & MINEAUX LLP (MATTHEW P. RYAN of counsel), for Charging Party

JOHN M. CROTTY, ESQ., for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Saranac Lake Police Benevolent Association, Inc. (PBA) to a March 22, 2018 decision of an Administrative Law Judge (ALJ).[1] The ALJ found that the PBA's proposals for interest arbitration violated § 209-a.2 (b) of the Public Employees' Fair Employment Act (Act), and ordered that the proposals be withdrawn. The ALJ further found that, pursuant to our decisions in *City of Ithaca* (*Ithaca I*)[2] and *City of Ithaca* (*Ithaca II*),[3] the Village of Saranac Lake (Village) had satisfied its duty to negotiate terms and conditions of employment for the period from June 1, 2012 through May 31, 2014.

---

[1] 51 PERB ¶ 4515 (2018). Although the decision is captioned as a decision by the Assistant Director of Employment Practices and Representation, we refer to it here as an ALJ decision to avoid confusion with other administrative decisions, generally of a preliminary nature, that the Assistant Director may be called upon to issue from time to time. We also note that the violation alleged is one of § 209-a.2, not of § 209-a.1.
[2] 49 PERB ¶ 3030 (2016).
[3] 50 PERB ¶ 3006 (2017).

EXCEPTIONS[4]

The PBA excepts to the ALJ's decision on several grounds.[5] First, the PBA asserts that the ALJ erred in finding that the "Board's illustrative recitation of the grounds for objections to arbitrability in its Rules of Procedure allows for the creation of a substantive law of impropriety," and that she further erred in finding mandatory subjects could fall "outside the scope of permissible arbitration."[6] The PBA then claims that the ALJ incorrectly relied on "employer duty satisfaction concepts to effect a loss of union and employee statutory rights," which, absent a waiver, cannot be forfeited or nullified.[7] In particular, the PBA contends that our decision in *New York City Transit Authority*[8] establishes that the employer's satisfaction of the statutory duty to negotiate does not "negate a union's statutory rights even as to closely related matters,"

---

[4] An unsolicited letter was received via facsimile on December 14, 2018 from the Village's counsel which, by further addressing the merits was essentially a further legal argument, and therefore did not comport with § 213.3 of our Rules of Procedure. This letter has not been considered in determining this matter.

[5] The PBA's exceptions do not comport with § 213.2 (b) (4) of our Rules of Procedure (Rules) in that the PBA merely "except[s] to every part of the [ALJ's] decision that was used by the [ALJ] to support those parts of the decision and order being challenged by the PBA in these exceptions." Exceptions at II. Notably, those "parts" are not identified anywhere in the exceptions. Rather, the specific grounds we address are only to be found in the PBA's brief in support of its exceptions (PBA Brief) which it purports to incorporate by reference into the exceptions. Exceptions at III. We have often held that "such blunderbuss exceptions do not comport with the [Rules]," and "do not preserve arguments not expressly made in the exceptions." *NYCTA*, 47 PERB ¶ 3032, 3009 (2014), quoting *UFT (Pinkard)*, 47 PERB ¶ 3020, 3061 (2014); *see also Town of Orangetown*, 40 PERB ¶ 3008 (2007), *confd sub nom Matter of Town of Orangetown v NYS Pub Empl Relations Bd*, 40 PERB ¶ 7008 (Sup Ct Albany Co 2007); *Town of Walkill*, 42 PERB ¶ 3006 (2009)). As the Village has not objected to the sufficiency of the exceptions, we decline on this occasion to dismiss them *sua sponte* for failure to comply with § 213.2 (b) of our Rules.

[6] PBA Brief at 4, 7-9.

[7] PBA Brief at 4, 9-19.

[8] 41 PERB ¶ 3014 (2008).

analogizing the instant case to the ongoing duty to negotiate impact after satisfying the duty to negotiate an agreement.[9] Finally, the PBA contends that the policies of the Act regarding interest arbitration and the *status quo* provisions of the Triborough Amendment[10] are thwarted by the ALJ's decision, and warrant reversal of the ALJ's decision.

FACTS

In April 2012, the Village and the PBA began negotiations for a successor to their expiring collective bargaining agreement covering the period July 1, 2008 through May 31, 2012. On or about July 13, 2012, the PBA filed a declaration of impasse with PERB. On or about July 24, 2014, after mediation had failed to resolve the impasse, the Village filed a petition for compulsory interest arbitration pursuant to § 209.4 of the Act.

In a letter dated July 25, 2014, the PBA advised PERB's Director of Conciliation (Director) that it did not consent to interest arbitration and that it did not "waive or relinquish its rights under the Act to a continuation of the terms contained in the parties' expired collective bargaining agreement until such time as a successor agreement is reached, or the PBA files for interest arbitration."[11] By letter dated August 8, 2014, the Director advised the Village and the PBA that he would not process the Village's petition.

Two years later, on October 21, 2016, the PBA filed a petition for compulsory interest arbitration, attaching a document described in the petition as reflecting the terms and conditions of employment raised during negotiations, none of which were

[9] PBA Brief at 12-14.
[10] Act, § 209-a.1 (e).
[11] Ex 2 to the amended charge.

agreed upon during negotiations.[12] The PBA's proposal as to the duration of the agreement was "Two (2) years June 1, 2012 – May 31, 2014,"[13] the same two years that it previously declined to submit to arbitration.

On November 3, 2016, the Village filed the instant improper practice charge and a response to the PBA's October 21, 2016 petition for interest arbitration, which objected to the further processing of the PBA's petition.

DISCUSSION

This matter presents what is essentially the same constellation of facts and legal issues as involved in our decisions in *Ithaca I* and *Ithaca II*, relied upon by the parties. While neither of those decisions resolves the issues and arguments raised in this matter, the final case in the series, *City of Ithaca* (*Ithaca III*)[14] is dispositive of all of them.

In *Ithaca III*, we examined *City of Kingston*,[15] and overruled it to the extent that it created a right of an employee organization under the Triborough Amendment to refuse to participate in an interest arbitration proceeding.[16] We did so on two bases. First, we noted that "the Board's refusal to process the interest arbitration petition pursuant to *Kingston* had the effect of denying finality to either the employer or employee

[12] Ex 4 to the amended charge. The PBA's proposals were for increases in compensation, such as base wages, longevity payments, shift differentials, and the uniform allowance, all of which were specific to the years 2012 and 2013. Although the PBA included proposals concerning other matters, *not* specifically limited to calendar years 2012 and 2013, no argument was made before the ALJ or in the exceptions or PBA Brief regarding these matters not specific to the 2012-2013 time period.
[13] *Id*, attachment 1, ¶ 1.
[14] 51 PERB ¶ 3020 (2018).
[15] 18 PERB ¶ 3036 (1985).
[16] 51 PERB ¶ 3020, at 3084.

organization, and does so in contravention of the statutory language."[17] The second basis for our partially overruling *Kingston* was that time—and the very facts involved in *Ithaca III* itself—had demonstrated that the *Kingston* Board erred in assuming that interest arbitration would be "futile" where the employee organization asserted its Triborough Amendment rights.[18] Rather, as we explained:

> [T]he facts of this case establish that the paradigm established by the *Kingston* Board did not recognize that processing an interest arbitration petition under circumstances such as those presented here could substantially advance the policies of the Act. This is so, even if the result would inevitably be an award confirming the status quo. An interest arbitration award would at a minimum serve to punctuate the end of negotiations of an immediate successor agreement to the expired contract, and would establish the status quo for the duration of the award, as determined by the interest arbitration panel within the statutory time frame, based upon the parties' bargaining history and other appropriate factors. This avoids the sort of delay that has left the parties here caught up in procedural brinkmanship more than five years after the declaration of impasse.[19]

In so holding, we found "that the invocation of an employee organization's Triborough rights limits the scope and the enforceability of any award that an interest arbitration panel may issue, but does not negate the statutory right of the petitioning employer to an interest arbitration."[20] We emphasized that "an employee organization that informs the Director of its decision to stand on its rights and its designated panel member but does not participate further in the interest arbitration does not waive its Triborough rights," which limit the interest arbitration panel just as firmly as it limits

---

[17] 51 PERB ¶ 3020, at 3083 (editing marks omitted). We also noted that the "tension between *Kingston* (and thus also [*City of*] *Yonkers*, [46 PERB ¶ 3027 (2013)]), with this statutory mandate is noted in the very text of *Kingston* itself, which expressly states that 'the purpose of arbitration under § 209.4 of the Taylor Law is to provide a final disposition of a negotiation deadlock,'" a result thwarted by the holding in *Kingston* and in *Yonkers*, which reaffirmed it.
[18] 51 PERB ¶ 3020, at 3083 (quoting *Kingston*, 18 PERB ¶ 3036, at 3076).
[19] *Id*, at 3083.
[20] *Id*, at 3084.

legislative imposition, or, for that matter, any decision by an ALJ or the Board.[21]

We need not determine whether the equities are so strong as to preclude retrospectively applying our partial overruling of *Kingston* and *Yonkers*,[22] as such retrospective application would not affect the substantive outcome of this decision. Absent the *Kingston* right to not participate in interest arbitration, the PBA's invocation of the *status quo*, combined with its refusal to participate in interest arbitration, would result in an interest arbitration award limited to the *status quo* for the period at issue, here (2012-2014). Likewise, under our analysis in *Ithaca I*, as applied in *Ithaca III*, "the same substantive outcome—albeit not in the form of an interest arbitration award—would govern: the parties' rights and obligations for those two years would be those encompassed within the *status quo*."[23]

Here, as in *Ithaca III*, there is no dispute that the Village satisfied its duty to negotiate for the years in issue—here, the period from June 1, 2012–May 31, 2014; rather, the PBA contends that despite that satisfaction, the PBA retains its statutory right to interest arbitration for that period. For the reasons we gave in *Ithaca III*, we disagree.

As we explained in that case:

> The satisfaction of that duty necessarily implies that both the City and the PBA exhausted all means of conciliation, and that the PBA's good faith decision to not participate in interest arbitration, effectively set, albeit unilaterally, the terms governing the terms and conditions for the applicable duration of an interest arbitration award, which we found in *Ithaca I* "to be the presumptive default period of two years from the expiration of the previous agreement. . . ."[24]

Here, as in *Ithaca III*, the PBA's decision "to refuse to participate in interest

---

[21] *Id*.
[22] *See, eg, County of Washington*, 42 PERB ¶ 3021, 3076 (2009).
[23] 51 PERB ¶ 3020, at 3084.
[24] *Id*, at 3085, quoting *Ithaca I*, 49 PERB ¶ 3030, at 3098.

arbitration, coupled with the Village's satisfaction of its duty to negotiate, serves to exhaust the negotiation for those years, and effectively substitutes for an agreement, just as would an arbitration award."[25]

Moreover, we reaffirm our finding in both *Ithaca I* and *Ithaca III*, that "[t]he policies underlying § 209.4 of the Act are best served by treating the *status quo* right as a shield, and not allowing it to be deployed as a sword to reopen the negotiations for which interest arbitration and its resultant finality was avoided."[26] In sum, the parties, having exhausted all available options to achieve finality for calendar years 2012-2013, are no longer required to negotiate for that time period, and no matters are subject to arbitration for the period of the *status quo*.

Accordingly, we affirm the ALJ's finding that the PBA violated § 209-a.2 (b) of the Act, and order that the PBA withdraw from arbitration all of the proposals submitted with its 2016 demand for arbitration. As we find that the PBA's petition for interest arbitration must be and hereby is dismissed, the Village's response to the interest arbitration is thereby rendered moot.

DATED: December 17, 2018
Albany, New York

John F. Wirenius, Chairperson

Anthony Zumbolo, Member

Monte A. Klein, Member

[25] *Id*, at 3085, citing *Town of Southampton v NYS Pub Empl Relations Bd*, 2 NY3d at 523, 37 PERB ¶ 7001, at 7006.
[26] 49 PERB ¶ 3030, at 3098; *see also Ithaca II*, 51 PERB ¶ 3020, at 3085.

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

KEVIN PATRICK SMITH,

Charging Party,

-and- **CASE NO. U-35403**

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

Respondent.

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

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

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by Kevin Patrick Smith (Smith) to a decision of an Administrative Law Judge (ALJ) dismissing his improper practice charge alleging 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 discontinued his employment.[1] Smith's charge alleged that the District discontinued his employment in retaliation for his seeking assistance from the employee organization that represented him.

EXCEPTIONS

Smith filed a 17-paragraph document of exceptions in which he argues that the ALJ ignored key evidence at the hearing and/or did not admit admissible evidence.

---

[1] 51 PERB ¶ 4539 (2018).

Smith also argues that the ALJ erred in her credibility determinations and asks that the decision be reversed and/or a remand be ordered.

The District argues in response that Smith's exceptions do not comply with § 213.2 (b) of our Rules of Procedure (Rules) because the grounds for the exceptions are not set forth with sufficient specificity. On the merits, the District argues that the ALJ's decision dismissing the charge is correct and should be affirmed.

For the following reasons, we affirm the ALJ's decision.

FACTS

Smith worked for the District as a probationary teacher for one school year, from September 2015 to June 2016. He worked at Metropolitan Diploma High School (MDHS) and was in the bargaining unit represented by the United Federation of Teachers, Local 2 (UFT).

Meri Yallowitz (Yallowitz) is the principal of MDHS, a small transfer high school for students who have had difficulties in other schools. Smith was hired as one of three social studies teachers. While at MDHS, Smith taught four classes of either United States or Global History.

At the beginning of the 2015-2016 school year, Smith selected the type of evaluation method that requires an administrator to conduct a minimum of four classroom observations during the school year (three informal and one formal). Informal observations require the evaluator to observe a teacher for a minimum of 15 minutes. Formal observations must be based on a full period observation. Both types of observations require the evaluator to issue a written observation report and are used

to issue the teacher's end of the year performance review, referred to as the "Annual Professional Performance Review" or "APPR." Yallowitz conducted all of Smith's APPR observations.

Yallowitz observed Smith for the first time on October 13, 2015, when she conducted an informal APPR observation of his fourth period history class. In her written evaluation, she rated his teaching as "ineffective" in six of eight pedagogical categories and "developing" in two.[2] In that evaluation, Yallowitz noted, among other things, that Smith had not prepared a lesson plan for the class activity and had not addressed certain inappropriate student behavior, such as a student walking out of the classroom without permission.[3]

On December 14, 2015, Yallowitz conducted her second informal APPR observation of Smith. In her written evaluation, Yallowitz rated Smith as ineffective in four categories, and developing in four others.[4] In that observation, Yallowitz again noted Smith's inability to manage student behavior. On February 23, 2016, Yallowitz conducted a third informal APPR observation. In her written evaluation of that lesson, she rated Smith ineffective in four, and developing in four, categories.[5] Yallowitz again noted Smith's deficiency in managing his students.

On April 4, 2016, Yallowitz conducted a formal, period-long, APPR observation of Smith's teaching. In the written evaluation, Yallowitz rated Smith ineffective in three,

---

[2] Charging Party's Ex 2. Teachers may be rated highly effective, effective, developing, or ineffective in their APPR classroom observations.
[3] *Id*.
[4] Charging Party's Ex 3.
[5] Charging Party's Ex 4.

and developing in five, categories.[6] Smith's inability to manage student behavior was again noted.

On April 13, 2016, Smith called the UFT office and spoke with Ualin Smith, a UFT district representative. During that conversation, Smith complained of the unfairness of Yallowitz's April 4, 2016 observation. Smith called Ualin Smith again on April 23, 2016 and complained of several other work issues, including the lack of mentoring, micromanagement issues, and class composition.[7] Smith testified that, during that conversation, he asked Ualin Smith to speak with Yallowitz on his behalf and she agreed to do so.[8] Smith never told Yallowitz that he had spoken with Ualin Smith or any other UFT representative regarding her treatment of him. Smith never contacted Ualin Smith to learn whether she had spoken with Yallowitz on his behalf. Smith testified that he presumed that she had, but he did not know whether she did in fact speak with Yallowitz.

In early April 2016, Smith asked Yallowitz for a letter of recommendation. Yallowitz was reluctant to provide it. When Smith first asked for the recommendation, Yallowitz responded, "We'll see."[9] Smith persistently asked Yallowitz for a recommendation every week, until May 6, 2016, when Yallowitz gave it to him.[10] Smith did not testify about the reasons why he asked for the recommendation. Yallowitz testified that Smith told her that he wanted the letter to obtain a position in another

[6] Charging Party's Ex 5.
[7] Tr, at 73-74, 118.
[8] Tr, at 74.
[9] Tr, at 66.
[10] Charging Party's Ex 7.

school district outside of New York City. She further testified that she considers it a mistake for her to have issued the letter.

On May 25, 2016, Yallowitz met with Smith to discuss his absences on 12 occasions that school year. Smith was represented during that meeting by Ualin Smith. Yallowitz issued a May 25, 2016 disciplinary letter finding that Smith was excessively absent that school year.[11] In that letter, Yallowitz noted that many of Smith's absences were on Mondays and that he did not submit medical notes for more than half of the absences.

On May 31, 2016, Yallowitz conducted another informal APPR observation of Smith. Yallowitz conducted a fifth evaluation because Smith asked her to in order to improve his overall rating. Yallowitz allowed Smith to select the date for all of his observations, including the one held on May 31, 2016.

Yallowitz held a disciplinary meeting with Smith on June 8, 2016. Smith was represented during that meeting by Ualin Smith and the UFT building chapter leader. During that meeting, Yallowitz raised four incidents that occurred in May 2016. On June 23, 2016, she issued a disciplinary letter finding fault with Smith's performance.[12] One of the issues Yallowitz raised was the allegation that students in Smith's classroom held cellular telephones outside the classroom windows. Although Smith denied that his students had engaged in that behavior, Yallowitz relied upon the statement of a security officer who told her that he had observed the conduct. Yallowitz issued a second

[11] Smith disputes the accuracy of the dates listed in Yallowitz's letter.
[12] Charging Party's Ex 11.

disciplinary letter, also dated June 23, 2016, finding that Smith had failed to effectively manage his students.[13]

On June 23, 2016, Smith received Yallowitz's report of his May 31, 2016 observation. Yallowitz rated Smith ineffective in every category and noted, among several other issues, that Smith's lesson plan was insufficient because it consisted of only three short sentences.[14] Also on June 23, 2016, Smith received the portion of his year-end evaluation that is referred to as the "Measures of Teacher Practice," or MOTP. That evaluation is based on a teacher's APPR observations. Smith received an ineffective rating on his MOTP. Smith subsequently received the complete APPR, which included his rating based on students' performance on standardized testing. That portion of the evaluation is known as the "Measures of Student Learning," or MOSL. Although Smith's MOSL rating was highly effective, his overall rating for the 2015-2016 school year was ineffective.[15]

At the end of the 2015-2016 school year, Yallowitz recommended to her superintendent that Smith's employment be discontinued. On July 28, 2016, the superintendent issued a letter advising Smith that his probationary employment with the District would be discontinued effective July 29, 2016.

DISCUSSION

We first address the District's argument that Smith's exceptions are deficient because they fail to comply with the requirements of § 213.2 (b) of our Rules. We agree

[13] Charging Party's Ex 10.
[14] Charging Party's Ex 6.
[15] Charging Party's Ex 16.

that many of Smith's exceptions do not "set forth specifically the questions or policy to which exceptions are taken," or "identify that part of the decision . . . to which exceptions are taken," as required by our Rules. However, these failings do not taint all of the exceptions, most of which identify the ruling objected to (though failing to identify the page in the decision) and each exception does state the ground and provide references to the relevant portions of the record to support the exceptions. In view of the substantial compliance with the Rule's requirements, we do not find that Smith's exceptions are so deficient as to warrant dismissal. However, we nonetheless affirm the ALJ's decision, as we are unable to discern a meritorious basis for Smith's challenge to the ALJ's decision.

The ALJ found that the only timely allegation in the charge was that Smith's discontinuance was improperly motivated. Smith did not file any exceptions to this finding. Any exceptions to the ALJ's finding are thus waived and are not properly before us.[16]

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

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

been taken "but for" the protected activity.[17] These elements establish a *prima facie* case and give rise to an inference of improper motivation.[18] 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."[19]

The ALJ found that Smith failed to satisfy his burden of demonstrating that Yallowitz took action against him because he engaged in activity protected under the Act. Even assuming that Smith established a *prima facie* case, the ALJ found that the District established that Yallowitz recommended the discontinuation of Smith's employment because she perceived his performance to be subpar.

Initially, the ALJ dismissed the allegation in the charge that Yallowitz recommended Smith's discontinuance because Smith contacted Ualin Smith on May 13, 2016, because there was no record evidence that Smith spoke with Ualin Smith on that date. Again, Smith did not file any exceptions to the ALJ's finding, and therefore it is not before us for review. Although the ALJ found that the record shows that Smith spoke to Ualin Smith on April 13 and 23, 2016, she did not make any findings based on the events of those dates because the charge does not allege retaliation based on a conversation that occurred on those dates. At no point did Smith move to amend the

---

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

[18] *See Town of Tuscarora*, 48 PERB ¶ 3011, 3037 (2015).

[19] *Id*.; *see generally Littlejohn v City of New York*, 795 F3d 297, 307-308 (2d Cir 2015).

charge to conform it to the evidence. As the ALJ properly found, she could not consider an allegation that was not pled either in the charge or in a timely amendment thereto, even if that allegation has been litigated.[20]

The ALJ found that the allegation that Yallowitz retaliated against Smith because he was represented by Ualin Smith during the May 25, 2016 disciplinary meeting was not properly considered because it was not raised in the charge. We affirm this finding. Nowhere in the charge does it state that Ualin Smith was involved in the May 25, 2016 disciplinary meeting.

Even if the ALJ's ruling was in error, however, such error would be harmless because the ALJ went on to consider Smith's allegation on the merits. The ALJ found that the record overwhelmingly established that Yallowitz considered Smith to be f ea teacher who was performing poorly and had issued four evaluations that reflected that opinion before Ualin Smith represented Smith at the disciplinary meeting on May 25, 2016. Overall, the ALJ credited Yallowitz's testimony that she rated Smith ineffective in all categories because of his poor performance and because he had not improved during the school year, despite the assistance provided him. The ALJ further credited Yallowitz's testimony that she recommended the discontinuation of Smith's employment because she perceived his performance to be subpar.

Credibility determinations by an ALJ are generally entitled to "great weight unless

[20] *Cayuga Community College*, 50 PERB ¶ 3003, 3015 (2017); *UFT (Cruz)*, 48 PERB ¶ 3004, 3011 (2015), *petition denied, Cruz v NYS Pub Empl Relations Bd,* 48 PERB ¶ 7003 (2015); *County of Rockland*, 31 PERB ¶ 3062, 3136 (1998); *County of Nassau*, 29 PERB ¶ 3016 (1996); *Arlington Cent Sch Dist*, 25 PERB ¶ 3001 (1992); *City of Buffalo*, 15 PERB ¶ 3027 (1982); *City of Mt Vernon*, 14 PERB ¶ 3037 (1981).

there is objective evidence in the record compelling a conclusion that the credibility finding is manifestly incorrect. This is especially true where, as here, the credibility determination rests in part on the witness' demeanor."[21] Smith has not provided any such objective evidence that establishes that the ALJ manifestly erred.

The ALJ's credibility determinations here establish that the District had a legitimate business reason for discontinuing Smith's employment and demonstrate that its conduct was not improperly motivated. We find it unnecessary to address the bulk of the remainder Smith's exceptions. Even if we were to agree with Smith in all respects, our findings would not provide a basis on which to reverse the ALJ's credibility-based finding that Yallowitz recommended Smith's discontinuance for legitimate business reasons.

Smith also argues that the ALJ should have admitted into evidence student surveys, Smith's mentoring log, and a class attendance list. The ALJ excluded this evidence as not reliable or relevant. We find no abuse of discretion in the ALJ's refusal to admit these exhibits as evidence, as this evidence does not undermine the ALJ's

---

[21] *Bellmore-Merrick Cent Sch Dist*, 48 PERB ¶ 3022, at 3077, *quoting UFT (Cruz);* 48 PERB ¶ 3004 (2015), *see also Mt Pleasant Cottage Union Free Sch Dist,* 50 PERB ¶ 3002, 3008 (2017); *Catskill Housing Auth*, 49 PERB ¶ 3025, 3081 (2016); *County of Clinton*, 47 PERB ¶ 3026, 3079 (2014); *Manhasset Union Free Sch Dist*, 41 PERB ¶ 3005, 3019 (2008), *confd and mod, in part, Manhasset Union Free Sch Dist v NYS Pub Empl Relations Bd*, 61 AD3d 1231, 42 PERB ¶ 7004 (3d Dept 2009), on remand, 42 PERB ¶ 3016 (2009); *Mount Morris Cent Sch Dist*, 41 PERB ¶ 3020 (2008); *City of Rochester*, 23 PERB ¶ 3049 (1990); *Hempstead Housing Auth*, 12 PERB ¶ 3054 (1979); *Captain's Endowment Assn*, 10 PERB ¶ 3034 (1977); *see also County of Ulster*, 39 PERB ¶ 3013, at 3045-3046, *citing Fashion Institute of Technology v Helsby*, 44 AD2d 550, 7 PERB ¶ 7005, 7009 (1st Dept 1974) (deference due credibility determinations based on observation of witness's demeanor).

credibility-based determination that Yallowitz recommended the discontinuation of Smith's employment because she perceived his performance to be subpar. Similarly, we reject Smith's attempt to introduce a recommendation letter from an administrator outside the District that he has received after his discontinuance. This letter, arising after the events that led to Smith's discontinuance, has no bearing on whether the District had legitimate business reasons for discontinuing Smith's employment.

Accordingly, we affirm the ALJ's decision to dismiss Smith's charge alleging that the District violated §§ 209-a.1 (a) and (c) of the Act.

IT IS, THEREFORE, ORDERED that the improper practice charge is dismissed.

DATED: December 17, 2018
Albany, New York

John F. Wirenius, Chairperson

Anthony Zumbolo, Member

Monte A. Klein, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

CIVIL SERVICE EMPLOYEES ASSOCIATION, INC., LOCAL 1000, AFSCME, AFL-CIO, PINE VALLEY UNIT, LOCAL 807,

Charging Party,

CASE NO. U-35436

- and -

PINE VALLEY CENTRAL SCHOOL DISTRICT,

Respondent.

DAREN J. RYLEWICZ, GENERAL COUNSEL (AARON E. KAPLAN & BETHANY K. HURTEAU of counsel), for Charging Party

HODGSON RUSS LLP (JEFFREY F. SWIATEK of counsel), for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Pine Valley Central School District (District) to a decision of an Administrative Law Judge (ALJ), finding that the District violated § 209-a.1 (d) of the Public Employees' Fair Employment Act (Act).[1] The ALJ found that the District violated the Act by failing to satisfy its collective bargaining obligations with Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO, Pine Valley Unit, Local 807 (CSEA) before using non-unit bus drivers employed by the Silver Creek and Forestville school districts to transport alternative education students from locations within the District to and from a regularly scheduled academic program located outside of the District. CSEA claims that the work of transporting District students from locations within the District is exclusive to employees it represents.

EXCEPTIONS

The District filed 28 exceptions to the ALJ's decision.

---

[1] 51 PERB ¶ 4512 (2018).

Exceptions 1-8 argue that language in the expired collective bargaining agreement (CBA) between the parties demonstrates either that CSEA has waived its right to bargain over the transfer of work at issue here or that the District has satisfied its duty to negotiate with CSEA concerning the subject.

Exceptions 9-24 contest various aspects of the ALJ's conclusion that CSEA established that employees it represents exclusively performed the work of transporting District students. The District argues that it has a clear and consistent history of entering into cooperative shared transportation arrangements with various other school districts, thereby defeating CSEA's claim of exclusivity. In that regard, the District argues that the ALJ erred in crediting CSEA's witnesses over the District's witness and documentary evidence.

Exception 25 argues that the District's decision was a proper exercise of management discretion driven by economic needs. Exception 26 argues that the ALJ erred in finding that CSEA did not need to make a demand for bargaining prior to filing a charge. Exceptions 27 and 28 are simply boilerplate exceptions asserting that the ALJ's finding of a violation and his order are in error.

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

FACTS

The facts are fully set forth in the ALJ's decision and are discussed here only as far as is necessary to address the exceptions. CSEA represents a bargaining unit of various non-instructional titles, including approximately 18 bus drivers employed by the District. The term of the most recent CBA between the parties, now expired, is July 1, 2012 through June 30, 2016. Negotiations for a successor agreement commenced on April 12,

2016, and impasse was declared sometime in September 2016. Thereafter, the parties participated in mediation. At the time of the hearing, the parties remained at impasse.[2]

Section 1.5 of the parties' expired agreement, entitled "Management Rights," contains two subparts which read as follows:

> 1.5.1 Except as expressly limited by other provisions of this Agreement, all of the authority, rights and responsibilities possessed by the Board of Education are retained by it, including, but not limited to, the right to determine the mission, purposes, objectives, and policies of the school district; to determine the facilities, methods, means and number of personnel required for conduct of school district programs; to administer any Merit System, including the examination, selection, recruitment, hiring, appraisal, training, retention, promotion, assignment or transfer of employees pursuant to law; to direct, deploy and utilize the work force; to establish specifications for each class of positions and to classify or reclassify and to allocate or re-allocate new or existing positions in accordance with law; and to discipline or discharge employees in accordance with law and the provisions of this Agreement.
>
> 1.5.2 Terms and Conditions of Employment Not Covered by This Agreement.
>
> All terms and conditions of employment not covered by this Agreement shall continue to be subject to the Board's discretion and control and shall not be the subject of negotiations until the commencement of the negotiations for a successor to this Agreement.[3]

Article 7 of the parties' expired agreement, entitled "Bus Drivers," governs various terms and conditions of employment applicable to bus drivers, including bus run assignments and wages. Pursuant to the express wording of this Article, bus run assignments fall into one of three categories: Regular Runs (Section 7.1), Extra Runs (Section 7.2), and Activity Runs (Section 7.5).[4]

Pursuant to the CBA, Regular Runs are posted by the head bus driver prior to the beginning of the school year. The posting includes the name, location, and assigned

---

[2] Tr, at 92 (Graziano), 96, 99-100, 103 (Smith).
[3] Jt Ex 1.
[4] Jt Ex 1.

hours of each regular run. Bus drivers bid on Regular Runs based on seniority, and those runs, or a combination of them, are awarded to the most senior bus driver to bring them as close to 40 hours per week as possible.[5]

Section 7.1.1 of the parties' expired agreement identifies Regular Runs and corresponding hours of compensation as follows:

> Regular Runs and Wages. The following are defined as regular runs and the compensation for these runs will be paid in accordance to the following schedule for school bus drivers unless abnormal conditions create a necessary extension of time in which case the extended time will be paid based on the bus driver's hourly wage:
>
> | | |
> |---|---|
> | AM Run | 2 hours |
> | PM Run | 2 hours |
> | ***Alternate Education AM/PM Run*** | ***2.5 hours***[6] |
> | Amish AM/PM Run | 2.5 hours |
> | BOCES Special Education AM/PM Run | 2.5 hours |
> | Leon AM/PM Run | 2.5 hours |
> | Saint Joe's Private School AM/PM Run | 2.75 hours |
> | Gustavus Adolphus AM/PM Run | 2.5 hours |
> | AM BOCES | 2 hours |
> | PM BOCES | 2 hours |
> | Midday BOCES | 2 hours |
> | UPK | 2 hours |
> | 4:00 Academic Run | 2 hours |
> | 5:30 Academic Run | 2 hours[7] |

The last paragraph of § 7.1.1 states:

> Nothing in this section shall guarantee that each regular run listed will be filled each school year. If the regular run is filled the hours listed will be paid in accordance with Section 7.1.1.[8]

---

[5] Jt Ex 1, §§ 7.1.2 & 7.1.3.

[6] Emphasis added. This is the run at issue in CSEA's charge.

[7] Jt Ex 1.

[8] *Id*. It is undisputed that the number and type of Regular Runs routinely vary both at the start and during the course of any given school year based upon program needs. Hence, the list of Regular Runs contained in the parties' expired agreement, though representative, does not accurately reflect Regular Runs as they exist at any particular time. However, it is undisputed that the "Alternative Education" run here at issue existed, was bid, assigned, and performed exclusively by bargaining unit bus drivers prior to the start of the 2016-2017 school year.

The charge relates to a change in a Regular Run involving the transportation of alternative education students. The relevant history, which is uncontested, reveals that during the 2014-2015 school year, and for approximately 20 years prior, alternative education students were separately transported by CSEA bargaining unit bus drivers, both to and from a BOCES facility located outside of the District, to attend a regularly scheduled academic program.[9] Consistent with the parties' agreement, that work was bid at the beginning of the school year and awarded to CSEA bargaining unit bus drivers on a seniority basis.[10]

At the start of the 2015-2016 school year, a change occurred whereby alternative education students, for the first time, were intermingled with career technical education students (CTE students) during the transportation function.[11] CSEA bargaining unit bus operators continued to perform the work, as modified.

At the start of the 2016-2017 school year, BOCES changed the location of its regularly scheduled academic program for alternative education students from Erie 2 BOCES to Maple Academy, located in Cassadaga Valley, New York. Given the change in program location, the District decided that it would utilize the transportation services of another school district, initially Silver Creek, then Forestville, in transporting alternative education students to Maple Academy. This is the change that is the subject of the current charge.

Three bargaining unit bus drivers, Roxanne Overturf (Overturf), Chuck Luce (Luce), and Tina Graziano (Graziano), testified for CSEA to establish that no employees

---

[9] The specific location of the BOCES facility changed over time.
[10] The record contains bus route bid sheets for each school year dating back to approximately 2011-2012 (Charging Party Exs 1-5).
[11] Payne testified that the intermingling was the product of Education Law requirements. Tr, at 137-138.

other than bargaining unit bus drivers transported District students. Overturf, a District bus driver for 28 years and the most senior bus driver in the unit, testified that no one other than bargaining unit bus drivers have historically transported Pine Valley students. This included the transportation of Pine Valley students from home to Pine Valley's main campus and returning; as well as from Pine Valley to academic programs located outside of the District. Overturf further testified that, with the exception of the football program, to her knowledge, no one other than District bus drivers have historically transported Pine Valley students to and from extra-curricular activities, including academic activities.[12]

As for football, Overturf testified that for approximately the last three or four years, Pine Valley "didn't have enough players for a football team."[13] Consequently, arrangements were made allowing Pine Valley students to join the team of another district (Gowanda). As part of the related transportation function, Pine Valley students were transported from Pine Valley to Gowanda and back by CSEA bargaining unit bus drivers for both practices and games. Overturf explained that on game days, however, after District bus drivers took Pine Valley students from Pine Valley to Gowanda, "the Gowanda driver would take them to their game—and then they would come back to Gowanda and then our drivers would pick them up and bring them back to Pine Valley."[14] On cross-examination, Overturf denied knowledge of any Gowanda bus driver picking up Pine Valley football players in the District.[15]

Luce, who retired in June 2015, had previously worked for the District for 26 years as a bus driver. He also served as CSEA's unit president for a total of 18 years, eight of which directly preceded his retirement. During his time with the District, he performed the

---

[12] Tr, at 32-33.
[13] Tr, at 33.
[14] *Id.*
[15] Tr, at 50.

alternative education run. He explained that when he performed the alternative education run, he picked up alternative education students from home and transported them to and from a BOCES location outside of the District. Consistent with Overturf's testimony, he described the same transportation arrangement involving the football program and further indicated that a similar arrangement was made for the wrestling program involving the Cattaraugus-Little Valley School District. Luce stated that "[w]e did the practice, we'd take them there (Cattaraugus-Little Valley) and then pick them up. We'd have to go pick them up after a meet and bring them back home to Pine Valley. That was pretty much because Pine Valley didn't have enough [students] to have their own team, so they merged."[16]

Luce described additional Regular Runs that he performed over the years involving the transportation of Pine Valley students from home to various regular academic programs located outside of the District. He stated that, to the best of his recollection, no one other than Pine Valley bus drivers ever performed this work. He also stated that Pine Valley bus drivers "always did the field trips."[17]

Graziano has been a District bus driver for 26 years and is the second most senior bus driver in the bargaining unit. She has also served as CSEA's unit treasurer since 2010, and is a member of CSEA's current negotiating team. Graziano testified that other than the alternative education run, which gave rise to the instant case, no one other than CSEA bargaining unit drivers have historically transported Pine Valley students from home to Pine Valley and returning; from home to academic programs located inside of the District and returning; from Pine Valley to academic programs located outside of the District and returning; to and from field trips; to and from academic extracurricular

[16] Tr, at 62.
[17] Tr, at 64.

activities; and to and from special events.[18]

Consistent with the earlier testimony of Overturf and Luce concerning the football program, Graziano testified that "because we are so short of kids—Gowanda has . . . taken some of our students and allow them to be part of their team."[19] Graziano stated that, as part of this arrangement, CSEA bargaining unit bus drivers transport Pine Valley students from Pine Valley to Gowanda for practice and "when they're finished with practice, we will go back to Gowanda . . . and bring them back to Pine Valley."[20] For the games, Graziano explained that "it's the same, we take them to Gowanda, Gowanda transports them to the game—after Gowanda returns them—[we] pick them up and bring them back to Pine Valley."[21] During the 2015-2016 school year, Graziano successfully bid and performed the game day football transportation function as described above.[22]

Regarding the alternative education run, Graziano explained that, had the District made it available for bidding at the start of the 2016-2017 school year, she would have bid on it. If that had been the case, she would have given up her then-current five-hour run in exchange for a regular AM/PM Run, which pays four hours per day. Graziano explained that combined with the alternative education run, she then would have reached the maximum eight (8) hours per day contractual limit. In turn, another bargaining unit bus driver would have picked up her former five-hour run, thereby increasing that bus driver's daily work hours as well.[23]

Scott Payne (Payne), the District's superintendent for approximately two years, testified about the District's reasoning for entering into the collaborative transportation

---

[18] Tr, at 76-77.
[19] Tr, at 77.
[20] *Id.*
[21] Tr, at 79.
[22] Charging Party Ex 2, at 3.
[23] Tr, at 79-80.

arrangement at issue. Payne testified that, given the limited resources available to the District, it made sense to utilize the Silver Creek bus as the transportation vehicle for moving Pine Valley alternative education students to and from BOCES' new location (Maple Academy).[24] On cross-examination, he conceded that, in retrospect, it would have been possible to assign a bargaining unit bus driver to transport Pine Valley alternative education students to and from Maple Academy, but given the situation, it made more sense to utilize the Silver Creek bus.[25]

During his testimony, Payne emphasized the operational challenges facing small school districts like Pine Valley, Silver Creek, and Forestville, given limited financial resources and declining student enrollment. He stated that it was common practice among superintendents in these small rural school districts to reach out to one another periodically and to look for ways to maximize their available resources for the mutual benefit of each district.[26] In addition to the arrangement which led to the filing of the instant charge, Payne described other arrangements involving the transportation of students to various extracurricular activities, including sports. Payne explained that Pine Valley's student population has diminished to the point where the District, on its own, could no longer field a football or wrestling team. In order to provide interested students with an opportunity to participate in these sports, an arrangement was made with other school districts whereby Pine Valley students were allowed to participate in these activities with students from other schools. In the case of football, Pine Valley joined forces with Gowanda. In wrestling, a similar arrangement was made with the Cattaraugus/Little Valley School District.

---

[24] Tr, at 148-149.
[25] Tr, at 161.
[26] Tr, at 112-113.

In explaining the nature of the transportation arrangement associated with the combined football program, Payne testified that it was common practice to assign a CSEA bargaining unit bus driver to transport Pine Valley students to and from practices held at Gowanda.[27] On game days, however, contrary to the testimony of Overturf, Luce and Graziano, Payne stated that bargaining unit bus drivers would transport the Pine Valley students to Gowanda, and a Gowanda driver would transport the entire team to and from the game only if the game was being played north of Gowanda. If the game location was south, Payne testified that Gowanda drivers would pick up Pine Valley students at Pine Valley and transport them to and from the game.[28]

During Payne's direct testimony, the District introduced a three-page document that had been prepared by Payne in anticipation of his testimony. Payne described it as a summary of collaborative transportation activities between Pine Valley and other school districts whereby either Pine Valley bus drivers transported students from other districts, or drivers from other districts transported Pine Valley students to certain identified activities or events.[29] Payne testified that he obtained this information from "personal notes and records" from the "transportation office" that are kept in the normal course of business for the District.[30] Copies of the actual corresponding business records were not introduced. Payne further stated that he confirmed the accuracy of this information in a verbal discussion with the District's Head Bus Driver, Mr. Gooday (Gooday).[31] Gooday, who is not in CSEA's unit, was not called to testify. The overwhelming majority of the cited examples involve either the transportation of students to and from an academic

---

[27] Gowanda is located geographically north of Pine Valley.
[28] Tr, at 130-131.
[29] Respondent Ex 1. Tr, at 116.
[30] Tr, at 116.
[31] Tr, at 117.

competition referred to as a "Challenge Seminar," or an activity for special education students identified as "Special Olympics Bowling."[32]

As to the former (Challenge Seminars), Payne's summary indicates that bus drivers from other districts transported Pine Valley students to these events on two occasions in 2008, four occasions in 2009, and two occasions in 2010. There are no cited examples beyond the date of April 29, 2010. When Forestville bus drivers provide the transportation to these events, CSEA bargaining unit drivers first transported Pine Valley students from Pine Valley to Forestville for pick-up.[33] After the event, the students were returned to Pine Valley by CSEA bargaining unit drivers.[34]

As to the latter (Special Olympics Bowling), Payne's summary indicates that bus drivers from other districts transported Pine Valley students to these events on three occasions in 2008, five occasions in 2009, and three occasions in 2010. There are no cited examples beyond the date of March 26, 2010. On cross-examination, Payne clarified that on days when Pine Valley special education students were picked-up from Fredonia and transported to and from a Special Olympics Bowling event by bus drivers from other districts, CSEA bargaining unit bus drivers still transported those same students from Pine Valley to Fredonia and returning, as part of a regularly scheduled Special Education AM/PM Run.[35]

In addition, Payne's summary indicates that bus drivers from other districts transported Pine Valley students to various wrestling meets or tournaments on ten occasions in 2011, one occasion in 2012, two occasions in 2014, and one occasion in 2015.

---

[32] Respondent Ex 1.
[33] Tr, at 152-153.
[34] *Id*.
[35] Tr, at 154,156.

There are a number of additional entries in Payne's summary. An entry dated November 21, 2008, involves the transportation of a Pine Valley student within the geographical confines of the Gowanda School District. The entry states that "Gowanda begins transporting a daily run of [a student][36] from St. Joe's[37] to Gowanda Elementary School to receive speech/language therapy services."[38] As background, the record reveals that at various times in the past, the District has transported students residing within the District to and from St. Joe's for purposes of attending a regularly scheduled academic program offered there. Section 7.1.1 of the parties' agreement identifies that transportation service as a Regular Run ("Saint Joe's Private School AM/PM Run").[39] The last bus route bid sheet containing a St. Joe's Regular Run dates back to school year 2013-2014.[40] In describing the November 21, 2008 entry, Payne testified that:

> [w]e had a student with a disability who was receiving speech/language services. The student attended a program at St. Joe's school, which is located in the Gowanda School District. Gowanda picked up that child at St. Joe's school, transported that child to the elementary school at Gowanda to receive that speech/language therapy, and then brought that child back to the school [where] they were attending their regular program at St. Joe's.[41]

Neither Payne's testimony, nor the record as a whole, identifies the specific duration of this arrangement other than the entry itself, which indicates that it "begins" November 21, 2008.[42]

Another entry dated May 18, 2015, states "Physics Regents Program to Darien Lake

---

[36] Again, for reasons of privacy, the student's name was redacted from the exhibit.
[37] St. Joe's is a private school located within Gowanda's District.
[38] Respondent Ex 1.
[39] Joint Ex 1, at 25.
[40] Charging Party Ex 4.
[41] Tr, at 121-122.
[42] Respondent Ex 1.

were transported by Cassadaga CSD."[43] Payne described this as a "culminating activity" of the physics program.[44] There are no other entries involving this activity.

Another entry identifies a time frame of 2014-2016 and states: "Pine Valley has collaborated with Forestville to transport golf students to Silver Creek."[45] When asked to explain this entry during his cross-examination, Payne clarified that because there were less than ten Pine Valley students participating in the golf program, as a general rule, the District "would not have provided transportation."[46] Rather, "it's up to the parents to get them to that sport."[47] When asked specifically if Forestville drivers were transporting Pine Valley students to golf events during the 2014-2016 time frame, Payne stated: "I believe so—I've not delved deeply into this particular instance − it probably needs some further clarification."[48]

Payne's summary also contains a number of entries that involve Pine Valley drivers transporting students from other school districts. For example, there is an entry labelled "2015-16 school year" that involves Pine Valley transporting a Forestville student from Pine Valley to Gustavus Adoplphus Learning Center, an entry labelled "2008-Present" involving an "extra run for Special Olympics Bowling", and an entry labelled "2016-17 involving Pine Valley picking up a Falconer student.[49]

DISCUSSION

We first affirm the ALJ's finding that no demand to bargain by CSEA was necessary prior to filing the charge. As the ALJ explained, the Board has specifically held

---

[43] *Id.* Darien Lake is an amusement park located in Darien, New York.
[44] Tr, at 127.
[45] Respondent Ex 1.
[46] Tr, at 135.
[47] *Id.*
[48] Tr, at 136.
[49] The summary contains a second "2016-2017" entry that describes the arrangement that is the subject of the current charge.

that the unilateral subcontracting of unit work is a "rejection of the bargaining process and a refusal to bargain," and that under such circumstance "no demand to bargain is necessary."[50]

It is well established that two essential questions must be addressed when determining whether a transfer of unit work violates § 209-a.1 (d) of the Act: (1) was the at-issue work exclusively performed by unit employees for a sufficient period of time to establish a binding past practice; and (2) was the work assigned to non-unit personnel substantially similar to that exclusive unit work.[51] If both these questions are answered in the affirmative, a violation of § 209-a.1 (d) of the Act will be found unless there has been a significant change in job qualifications. When there has been a significant change in job qualifications, the respective interests of the employer and the unit employees must be balanced to determine whether the Act has been violated.[52]

The ALJ defined the at-issue work here to be the "transportation of Pine Valley students from locations within the District to locations both inside and outside of the

---

[50] *Cayuga Community College*, 50 PERB 3003, 3011-3012 (2017), quoting *Germantown Cent Sch Dist*, 26 PERB ¶ 3003, at 3007; *State of New York (UCS*), 28 PERB ¶ 3014, 3039, n 10 (1995); *City of Niagara Falls*, 31 PERB ¶ 3085, 3190; *see also Hewlett-Woodmere Union Free Sch Dist v NYS Pub Empl Relations Bd*, 232 AD2d 560, 29 PERB ¶ 7019 (2d Dept 1996) ("Where, as here, an improper practice charge is grounded upon a theory of unilateral subcontracting, the attempted initiation of negotiations by the employee organization is not a prerequisite to the filing of an improper practice charge"). *See also City of Niagara Falls*, 44 PERB ¶ 3015, 3055 (2011), *confd*, *City of Niagara Falls v NYS Pub Empl Relations Bd*, 45 PERB ¶ 7004 (Sup Ct Albany Co 2012).

[51] *Manhasset Union Free Sch Dist*, 41 PERB ¶ 3005, 3021-3022 (2008), *confd and mod, in part, Manhasset Union Free Sch Dist v NYS Pub Empl Relations Bd*, 61 AD3d 1231, 42 PERB ¶ 7004 (3d Dept 2009), on remand, 42 PERB ¶ 3016 (2009). *See also County of Chemung and Chemung Co Sheriff*, 50 PERB ¶ 3022, 3089 (2017); *Cayuga Community College*, 50 PERB ¶ 3003, at 3012-3013; *Greater Amsterdam City Sch Dist*, 49 PERB ¶ 3011, 3046 (2016); *Town of Riverhead*, 42 PERB ¶ 3032, 3119 (2009); *Town of Stony Point*, 45 PERB ¶ 3045, 3115 (2012); *Niagara Frontier Transp Auth*, 18 PERB ¶ 3083, 3182 (1985).

[52] *Cayuga Community College*, 50 PERB ¶ 3003, at 3012-3013*, quoting State of New York (Div State Police),* 48 PERB ¶ 3012, 3041 (2015); *Town of Stony Point*, 45 PERB ¶ 3045, at 3115, *citing Town of Riverhead*, 42 PERB ¶ 3032 (2009).

District, and returning."[53] The District excepts to this definition of the work at issue as too narrow and argues that the work at issue should be defined as the "transportation of District students to locations both inside and outside the District in relation to any District-sponsored or approved program or activity." We deny this exception. Functionally, the District's definition appears identical to the ALJ's. We fail to see, and the District fails to explain, how the District's definition would change the amount or type of work that is included within the definition of the work at issue.

Turning to the question of exclusivity, the ALJ found that CSEA satisfied its burden of establishing a *prima facie* case of exclusivity over the work at issue through the testimony of Overturf, Luce, and Graziano. The ALJ found that neither Payne's testimony, nor the information contained in Respondent's Exhibit 1, destroyed CSEA's showing of exclusivity.

For the following reasons, we affirm these findings.

First, we agree with the ALJ that Overturf, Luce, and Graziano's testimony is sufficient to establish that bus drivers represented by CSEA exclusively performed the work at issue. The testimony of these witnesses establishes that, with the exception of the joint football and wrestling programs, discussed further below, no one other than CSEA-represented bargaining unit bus drivers have historically transported Pine Valley students.

With regard to the football and wrestling programs, we affirm the ALJ's finding that CSEA represented bus drivers have retained the work of transporting Pine Valley students to the host team location (Gowanda for football and Cattaraugus-Little Valley for wrestling) for practices and games, and returning. Once delivered to the host team

---

[53] 51 PERB ¶ 4512, at 4541.

location, the drivers of the host team transport Pine Valley students to and from games and meets. We agree with the ALJ that this arrangement does not undermine the exclusivity of CSEA-represented bus drivers over the at-issue work, as this work both originates and ends outside of the District and is separate and distinct from the defined work at issue here. Therefore, a discernible boundary exists between the at-issue work and the transportation by the host teams to the football and wrestling games and meets.[54]

We also affirm the ALJ's finding that this testimony is not undermined by Payne's testimony, combined with the information contained in Respondent's Exhibit 1. As the ALJ found, the bulk of the examples provided in Respondent's Exhibit 1 do not undermine CSEA's showing of exclusivity for a number of reasons. First, there are only a handful of entries since 2011. As described in the facts, the majority of these entries appear to involve *Pine Valley* drivers transporting students, which are not relevant to the charge in front of us. There is one entry from May 18, 2015 that bears on exclusivity involving students apparently transported to a "Physics Regents Program" at Darien Lake by Cassadaga CSD and a few occasions involving non-unit drivers transporting students to wrestling events in 2012, 2014, and 2015. We find these isolated events to be insufficient to destroy CSEA's exclusivity over the work at issue.[55]

---

[54] *Manhasset Union Free Sch Dist*, 41 PERB ¶ 3005, at 3024-3025.

[55] *Greater Amsterdam Sch Dist*, 49 PERB ¶ 3011, 3048 (2016) ("incidental use of nonunit personnel to perform tasks is insufficient to defeat exclusivity"); *Manhasset Union Free Sch Dist*, 41 PERB ¶ 3005, at 3024; *see also Cayuga Community College*, 50 PERB ¶ 3003, at 3027-3028 ("limited and incidental" performance of unit work does not breach exclusivity. While another entry in the same area of the summary states that one student was transported by Silver Creek to Special Olympics programs "for the years he attended the SE program at Silver Creek," we find this undated entry to be too vague to be probative of CSEA's exclusivity. There also may be an entry related to golf students. We find no error in the ALJ's decision to exclude this example given Payne's inability to provide details about whether Pine Valley golf students were, in fact, transported by bus drivers from different districts during the time frame identified. See 41 PERB ¶ 4512, at 4541.

The other entries on Respondent's Exhibit 1 date from 2011 and earlier. We find these outdated entries to be immaterial. The transfer at issue here took place at the start of the 2016-2017 school year. Five years was ample time for CSEA to establish exclusivity over the work at issue, and any earlier breaches of exclusivity, if they in fact occurred, are no longer relevant to the question of exclusivity at the time of the events at issue.[56] We also note that many of the examples provided, in addition to being outdated, do not fall within the discernible boundary of the work at issue, as the transportation originated outside of the District.

With respect to Payne's testimony regarding the football program, specifically his testimony that when games were played south of Gowanda, Gowanda drivers would pick-up Pine Valley students at Pine Valley and transport them to the game, we find that the ALJ did not err in crediting Graziano's contrary 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 manifestly incorrect."[57] No such objective evidence was presented here, as Payne's testimony was supported primarily by his own notes prepared for his testimony. By contrast, Graziano had performed game day football transportation work for an entire football season as recently as the 2015-2016 school year and thus was in a position to know if in fact Gowanda drivers had been transporting Pine Valley students. This provides a reasonable basis for the ALJ to have credited Graziano's testimony over Payne's.

In sum, we find that CSEA-represented bus drivers have exclusively performed the

---

[56] *County of Chemung*, 50 PERB ¶ 3022, 3090 (2017).
[57] *Village of Scarsdale*, 50 PERB ¶ 3007, n. 51 (2017), quoting *Village of Endicott*, 47 PERB ¶ 3017, 3051 (2014); *see also Pleasantville Union Free Sch Dist*, 51 PERB ¶ 3024, 3100 (2018).

work of transporting Pine Valley students from locations within the District to locations both inside and outside of the District, and returning, the work at issue here. The District has established, at most, a handful of *de minimis* exceptions that do not affect our finding of exclusivity.[58] Other alleged examples, most notably the football and wrestling programs, do not fall within the work at issue here, as they originate outside the District.

The ALJ next found that the work assigned to non-unit drivers was substantially similar to exclusive unit work and that there had been no significant change in job qualifications, thus establishing a violation.[59] Although the District filed an exception to the ALJ's finding, it failed to support its exception with any argument. We thus deny this bare exception and move on to the District's waiver and duty satisfaction arguments.

The District argues that the Association waived its right to bargain with the District on the issue of subcontracting by agreeing to §§ 1.5.1 and 1.5.2 of the CBA. The District argues that § 1.5.1 of the CBA is a comprehensive management-rights clause that gives the District broad discretion "to determine the facilities, methods, means and number of personnel required for conduct of school district programs . . . [and] to direct, deploy and utilize the work force."[60] The District goes on to argue that nothing in the CBA addresses or limits the District's ability to enter into cooperative transportation arrangements with other districts and that the District's decision thus falls squarely within the reservation of management rights of § 1.5.2 of the CBA.

The District also argues that, even if §§ 1.5.1 and 1.5.2 of the CBA do not establish

---

[58] *Compare Manhasset*, 41 PERB ¶ 3005, at 3028 with *Greater Amsterdam City Sch Dist*, 49 PERB ¶ 3011, 3048 (2016).

[59] *Manhasset Union Free Sch Dist*, 41 PERB ¶ 3005 (2008). *See also City of Newburgh*, 31 PERB ¶ 3017 (1998), on remand 31 PERB ¶ 4621 (1998), *affd* 32 PERB ¶ 3015 (1999), *confd sub nom CSEA, Local 1000, AFSCME, AFL-CIO v NYS Pub Empl Relations Bd*, 273 AD2d 626 (3d Dept 2000); *Fairview Fire Dist*, 29 PERB ¶ 3042 (1996); *West Hempstead Union Free Sch Dist*, 14 PERB ¶ 3096 (1981).

[60] Joint Ex 1, at 2.

a waiver of the District's obligation to bargain, they at a minimum represent a satisfaction of that obligation. The District argues that the language of these two sections demonstrates that the parties agreed that the District should have "significant flexibility and discretion over the means by which it conducts programs and the extent to which it does, or does not, deploy the work force."[61]

Duty satisfaction occurs when a specific subject has been negotiated to fruition and may be established by contractual terms that either expressly or implicitly demonstrate that the parties had reached accord on that specific subject.[62] A satisfaction of the duty to negotiate necessitates record evidence of facts establishing that the parties negotiated an agreement upon terms which are reasonably clear on the subject presented to us for decision.[63]

In contrast to duty satisfaction, waiver involves either the express relinquishment of specified rights or the use of language that establishes "a clear, intentional, and unmistakable relinquishment of the right to negotiate the particular subject at issue" by relieving the other party of the duty to negotiate on that subject.[64]

In short, duty satisfaction is found when the duty to negotiate the specific subject at issue has been in fact satisfied, while waiver relieves the beneficiary of the specified statutory duties, including the duty to negotiate under the Taylor Law.[65]

In determining whether an agreement contains a provision that satisfies a respondent's duty to negotiate or a waiver of a charging party's right to negotiate a

---

[61] District's Brief in Support of Exceptions, at 11.
[62] *BOCES of Nassau County*, 51 PERB ¶ 3007, 3031 (2018); *Orchard Park Cent Sch Dist*, 47 PERB ¶ 3029, 3089 (2014).
[63] *BOCES of Nassau County*, 51 PERB ¶ 3007, at 3031; *Orchard Park Cent Sch Dist*, 47 PERB ¶ 3029, at 3089; *NYCTA*, 41 PERB ¶ 3014, 3076 (2008).
[64] *Orchard Park Cent Sch Dist*, 47 PERB ¶ 3029, at 3089; *NYCTA*, 41 PERB ¶ 3014, at 3076.
[65] *Id*; *BOCES of Nassau County*, 51 PERB ¶ 3007, at 3031.

mandatory subject, we apply standard principles of contract interpretation.[66] When the contract language is clear and unambiguous, evidence outside the four corners of the agreement will not be considered. However, where the language is susceptible to more than one reasonable interpretation, extrinsic evidence, such as negotiation history and/or a past practice, is admissible to clarify the ambiguity and thereby effectuate the intent of the parties.[67]

Addressing the issue of waiver first, we affirm the ALJ's finding that neither § 1.5.1 nor § 1.5.2 of the CBA waives the Association's right to bargain with the District over the issue of subcontracting of unit work. Section 1.5.1 is a general management rights clause which does not give rise to a waiver of the right to negotiate over the specific mandatory subject of subcontracting.[68] Section 1.5.1 does not speak to the issue of subcontracting and the language in it does not establish a clear, intentional, and unmistakable relinquishment of the right to negotiate over subcontracting.[69]

We also affirm the ALJ's finding that § 1.5.2 does not demonstrate that the Association waived its right to negotiate over the issue of subcontracting of the performance of unit work. Section 1.5.2 expressly applies only to terms and conditions of

---

[66] *State of New York (SUNY Buffalo)*, 50 PERB ¶ 3001, 3004 (2017); *see also NYCTA*, 41 PERB ¶ 3014, at 3076; *County of Columbia*, 41 PERB ¶ 3023, 3106 (2008).
[67] *Id*.
[68] *See, eg*, *NYCTA*, 30 PERB ¶ 3004, 3009 (1997), *confd sub nom NYCTA v NYS Pub Empl Relations Bd*, 251 AD2d 583, 31 PERB ¶ 7012 (2d Dept 1998); *State of New York – UCS*, 28 PERB ¶ 3014, 3039 (1995); *County of Onondaga*, 12 PERB ¶ 3035, 3066 (1979), *confd sub nom County of Onondaga v NYS Pub Empl Relations Bd*, 77 AD2d 783, 13 PERB ¶ 7011 (3d Dept 1980).
[69] *Compare County of Livingston*, 26 PERB ¶ 3074, at 3143-3144 (1993) (finding waiver of right to bargain over subcontracting where employer retained the right "to determine whether and to what extent the work required in operating its business and supplying its services shall be performed by employees covered by this Agreement); *County of Allegany*, 33 PERB ¶ 3019, 3053-3054 (2000) (same).

employment not covered by the agreement.[70] As the ALJ correctly found, the expired agreement is not silent on the subject of the performance of bargaining unit work. Rather, Article 7, § 7.1.1 of the CBA specifically identifies agreed-upon Regular Runs, including an AM/PM Run for Pine Valley alternative education students, the very run that was subcontracted. We agree with the ALJ's conclusion that, although the last paragraph of § 7.1.1 of the CBA states that there is no "guarantee that each regular run listed will be filled each school year," the language of the Article, taken as a whole, communicates that the District will offer the work to bargaining unit drivers if it offers the run (i.e. provides the service). The District is still providing the service here, although using drivers from Silver Creek and Forestville. The parties' agreement does not allow this arrangement. Because the parties' agreement speaks to the term and condition of employment at issue, § 1.5.2 of the agreement is not applicable.[71]

Moreover, even if § 1.5.2 allowed the District to subcontract the run at issue here, it would provide no shelter to the District in the current situation. Not only was the agreement expired at the time the subcontracting took place, but the parties had begun negotiations for a successor agreement on April 12, 2016. By § 1.5.2's express terms, all terms and conditions of employment, even those not covered by the CBA, were subject to negotiations as of that point. Thus, the District cannot invoke this clause to justify any unilateral changes that occurred after April 12, 2016. Because the subcontracting here

---

[70] *See, eg, County of Nassau*, 48 PERB ¶ 3014, 3015 (2015) *Orchard Park Cent Sch Dist*, 47 PERB ¶ 3029, 3089-3090 (2014); *Sachem Cent Sch Dist*, 21 PERB ¶ 3021, 3042 (1988).

[71] The District argues that, if we find that § 1.5.2 is not applicable, we should defer this case to the parties' grievance arbitration mechanism. Even if it would have been appropriate to defer this case at an earlier stage, we find that deferral is not appropriate now, after all of the allegations have been fully litigated. *See County of Sullivan and Sullivan County Sheriff*, 41 PERB ¶ 3006, 3036 (2008). *See also State of New York (Office of Mental Health – Rochester Psychiatric Center)*, 50 PERB ¶ 3032, 3129 (2017).

took place at the beginning of the 2016-2017 school year, after negotiations had begun, it would not apply to the subcontracting at issue here even if the expired agreement did not speak to the issue.

We also find that the language of §§ 1.5.1 and 1.5.2 of the CBA does not support the District's duty satisfaction defense. There is simply nothing in §§ 1.5.1 and 1.5.2, viewed separately or together, that demonstrate, either expressly or implicitly, that the parties had reached accord on the subject of subcontracting unit work. Sections 1.5.1 and 1.5.2 do not speak to the issue of subcontracting and do not contain language that is reasonably clear on that subject.[72]

Finally, the District argued that its decision to subcontract was an effort to address its transportation needs in an efficient and effective way.[73] We affirm the ALJ's finding that the merit of the District's decision is not relevant to the negotiability of its decision. We have long held that "the fiscal or operational wisdom of a decision to subcontract unit work is immaterial to the negotiability of the subject."[74]

Accordingly, we affirm the ALJ's finding that the District violated § 209-a.1 (d) of the Act by using non-unit bus drivers employed by the Silver Creek and Forestville school districts to transport alternative education students from locations within the District to and from a regularly scheduled academic program located outside of the District without bargaining with CSEA.

---

[72] *Compare State of New York (SUNY at Buffalo)*, 50 PERB ¶ 3001, 3004 (2017) (finding provision stating that employer "shall not contract out for goods and services performed by employees which will result in any employee being reduced or laid off without prior consultation with the Union . . ." satisfied duty to negotiate issue of subcontracting to third parties).

[73] 51 PERB ¶ 4512, at 4545-4546.

[74] *City of Lockport*, 47 PERB ¶ 3030, 3092 (2014), quoting *City of Niagara Falls*, 31 PERB ¶ 3085, 3188 (1998); *see also Cayuga Community College*, 50 PERB ¶ 3003, at 3012; *Manhasset Union Free Sch Dist*, 41 PERB ¶ 3005, at 3021.

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

1. Return the work of transporting Pine Valley alternative education students to CSEA's bargaining unit;

2. Make all affected bargaining unit bus drivers whole for the work lost to the unit for each school day on which Pine Valley alternative education students were transported to and from Maple Academy by non-unit bus drivers, with interest at the maximum legal rate; and

3. Sign and post the attached notice at all physical and electronic locations customarily used by it to post notices to unit employees.

DATED: December 17, 2018
Albany, New York

John F. Wirenius, Chairperson

Anthony Zumbolo, Member

Monte A. Klein, Member

NOTICE TO ALL EMPLOYEES

PURSUANT TO
THE DECISION AND ORDER OF THE

NEW YORK STATE
PUBLIC EMPLOYMENT RELATIONS BOARD

and in order to effectuate the policies of the

NEW YORK STATE
PUBLIC EMPLOYEES' FAIR EMPLOYMENT ACT

we hereby notify all employees of the Pine Valley Central School District (District) in the unit represented by the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO, Pine Valley Unit, Local 807 (CSEA), that the District will forthwith:

1. Return the work of transporting Pine Valley alternative education students to CSEA's bargaining unit;

2. Make all affected bargaining unit bus drivers whole for the work lost to the unit for each school day on which Pine Valley alternative education students were transported to and from Maple Academy by non-unit bus drivers, with interest at the maximum legal rate.

Dated . . . . . . **By . . . . . .**
on behalf of the **PINE VALLEY CENTRAL SCHOOL DISTRICT**

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

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

MARGUERITE M. BAGAROZZI,

Charging Party,

CASE NO. U-35863

- and -

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

Respondent.

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

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

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Board of Education of the City School District of the City of New York (District)[1] to a decision of an Administrative Law Judge (ALJ) finding that the District violated §§ 209-a.1 (a) and (c) of the Public Employees' Fair Employment Act (Act).[2] The ALJ found that the District violated the Act

---

[1] Under Education Law § 2590-g (2), the Board of Education of the City School District of the City of New York is "for all purposes . . . the government or public employer of all persons appointed or assigned by the city board [of education] or by the community school districts." Thus, to be clear, neither the City of New York nor its nominally characterized "Department of Education" is Bagarozzi's "employer" for purposes of the Act. *See, eg, Matter of City of New York v NYS Pub Empl Relations Bd.*, 103 AD3d 145, 151, 46 PERB ¶ 7001, 7004 (3d Dept 2012); *Perez v City of New York*, 41 AD3d 378 (1st Dept 2007). Although the District styles itself in the caption to its exceptions as the "Department of Education of the City School District of the City of New York," it is "[f]ormally, the Board of Education of the City School District of the City of New York." *Possner v NYC Dept of Educ*, 53 Misc3d 1205(A), 2016 NY Slip Op 51401(U) (Sup Ct NY Co Sept 1, 2016) (Freed, J); *see also Dikovskiy v NYC Bd of Educ*, 157 AD3d 501 (1st Dept 2018) (describing the District as "doing business as [the] New York City Department of Education").

[2] 51 PERB ¶ 4549 (2018).

when it initiated an investigation against Charging Party Marguerite Bagarozzi (Bagarozzi), brought disciplinary charges against her, denied her per session work, and issued a disciplinary letter dated May 18, 2017, which was placed in her personnel file.

EXCEPTIONS

The District has excepted on seven grounds to the ALJ's decision, which analytically can be reduced to three. First, the District contends that the ALJ impermissibly characterized as evidence of anti-union animus and/or evidence of discriminatory and retaliatory intent the exercise of managerial functions, including the initiation of an investigation and the bringing of disciplinary charges against Bagarozzi.[3] In the District's Brief in Support of Exceptions (District Brief), this exception is expanded to include a claim that the ALJ should have deferred to the arbitration pursuant to § 3020-a of the Education Law.[4] Second, the District asserts that the ALJ erred in finding Principal Shomari Akil's (Akil) testimony not credible, in finding a disciplinary letter was issued by Akil and was retaliatory, and that his statements "reflect[ed] his disdain for union involvement."[5] Finally, the District excepts to the remedies ordered by the ALJ.[6]

---

[3] Exceptions Nos 1, 3, 4.

[4] District Brief, at 4-9. The District claims that it "continues to advance all of the arguments it presented to the ALJ," and invites the Board to review "the positions advanced in the Board's post-hearing brief," which it annexes as Exhibit A. District Brief at 4, n 3. We decline to do so, as it is well established that such blunderbuss exceptions do not comport with the Rules of Procedure," and "do not preserve arguments not expressly made in the exceptions." *New York State Thruway Auth*, 47 PERB ¶ 3032, 3009 (2014), quoting *UFT (Pinkard)*, 47 PERB ¶ 3020, at 3061 (2014); *see also Village of Endicott*, 47 PERB ¶ 3017, at 3052, n 5 (2014) (citing § 213.2 (b) (4) PERB Rules of Procedure (Rules).

[5] Exceptions Nos 3, 4, 5.

[6] Exceptions Nos 2, 6, 7.

Bagarozzi did not respond to the exceptions.

For the reasons given below, we affirm the ALJ's decision as modified herein.

FACTS

Bagarozzi has been employed by the District as a high school English teacher since 2000. She has worked at William Cullen Bryant High School and, more recently, at Queens Academy High School, which has two sites, one in Jamaica, New York and the other in Flushing in the Borough of Queens, New York. In September of 2007, she was assigned to the Jamaica site. Until 2017, Bagarozzi's performance had been rated consistently as "satisfactory," or "effective/highly effective."

As a teacher in the District, Bagarozzi is represented by the United Federation of Teachers (UFT). She was active with the union while at Queens Academy High School, serving for two years as the chapter chairperson, and subsequently as an unofficial "surrogate" for the chapter chairperson for the Jamaica campus for the 2016-2017 school year. Bagarozzi testified that the school's chapter chair, Jennifer Squires (Squires), asked her to assist in representing teachers at the Jamaica site because Squires was located at the Flushing campus. Bagarozzi was not elected by the membership or formally appointed by the UFT, but acted informally to ensure coverage for both sites. Bagarozzi also served on the school safety committee.

Akil became principal at Queens Academy High School in the fall of 2015. In a May 2016 observation, he rated Bagarozzi as "highly effective."[7] Bagarozzi was also rated "highly effective" on the "Measures of Teacher Performance" (MOTP) scale for the

[7] Charging Party's Ex 5.

2015-2016 school year.[8]

During the 2016-2017 school year, Bagarozzi filed multiple grievances against the school administration on behalf of herself and others. She also filed safety reports through the UFT, but in her name. On November 14, 2016, she filed a grievance regarding parking permits.[9] In or around December 2016, she filed a grievance over the administration's alleged failure to properly provide special education services at the Jamaica site.[10] Shortly thereafter, she grieved the administration's alleged failure to file an Occurrence Report about an incident with a student.[11] On May 1, 2017, she filed a grievance alleging improper post-evaluation procedures relating to observations on April 20 and 26, 2017.[12] Finally, on May 23, 2017, she grieved a letter to her personnel file which was issued to her more than three months after the incident alleged, as violative of the time frame required by the collective bargaining agreement.[13]

During the second half of the 2016-2017 school year, Bagarozzi's performance evaluations reflected lower ratings than had prior evaluations. One such evaluation, dated February 27, 2017, was issued by Nathifa Morris (Morris), a new assistant principal hired by Akil in the spring of 2017, and rated Bagarozzi as "developing" in the MOTP category. Around that time, Morris also called Bagarozzi into a meeting to discuss her grading policy and issued a March 10, 2017 letter addressing Bagarozzi's failure to attend a staff meeting, which Bagarozzi claimed conflicted with one of her

[8] Charging Party's Ex 6.
[9] Charging Party's Ex 8.
[10] Charging Party's Ex 10.
[11] Charging Party's Ex 11.
[12] Charging Party's Ex 17.
[13] Charging Party's Ex 18.

assignments.[14] Bagarozzi also received a March 24, 2017 notice of a disciplinary meeting, which never took place.[15]

Morris observed Bagarozzi a second time on April 26, 2017, and issued a second negative evaluation.[16] Akil observed Bagarozzi in April and May, but, Bagarozzi claimed, she did not receive timely written reports or verbal feedback from him. On May 18, 2017, Assistant Principal Derek Phillips (Phillips) issued a disciplinary letter, which was removed from her file in October of 2017 as "uncontractual."[17] Although her overall rating for the school year was initially "developing," it was adjusted upwards to "effective" after a recalculation of the student performance component, due to an error which affected several teachers in the school.

In May of 2017, Bagarozzi was served with disciplinary charges under Education Law (EL) § 3020-a. Akil initiated the investigation that led to those charges, and resulted in her reassignment out of the classroom during their pendency, pursuant to standard District policy. The first group of charges stemmed from an investigation commenced by Akil in the spring of 2017, relating to Bagarozzi's slipping and falling on school premises in December 2016. The second group of charges related to Bagarozzi's interactions with a student in 2015, prior to Akil's tenure at Queens Academy High School.

The slip and fall related charges of fraudulent reporting involved Bagarozzi's claiming that she had slipped on a wet floor in the hallway, which was contradicted by

[14] Charging Party's Ex 13.
[15] Charging Party's Ex 14.
[16] Charging Party's Ex 16.
[17] Tr, at 72; Charging Party's Ex 19.

school custodians and a surveillance video. Akil referred this incident to the District's Office of Special Investigations (OSI), which found it to be substantiated in a May 2017 report.[18] The remaining charges alleged that in 2015 Bagarozzi did not assist a student when she failed to respond to his questions regarding her negative feedback regarding an essay he had written. The EL § 3020-a arbitrator dismissed the charge as to the slip and fall claim. The arbitrator sustained the charges arising from Bagarozzi's 2015 exchanges with the student and fined Bagarozzi $2,000.[19]

Bagarozzi testified that during the spring of 2017, Akil approached her and asked, in effect "why can't we just settle this" without "the benefit of Jenny [Squires, the UFT Chapter Chair, representing Bagarozzi at the time]."[20] Akil testified that he did not recall making that statement.

Bagarozzi testified that during the summer of 2017, she was offered a summer school position, but turned it down because of the pending EL § 3020-a case and because she was "trying to be honorable and do the right thing." She also lost per session work at Queens Academy in tutoring, college advisement, and similar tasks.

The District called Morris and Akil as witnesses. Morris testified that she was not aware of a surrogate position within the UFT and had not been informed by anyone, including Squires, that Bagarozzi held that role. She also said that she was unaware of Bagarozzi's grievance and reporting activity against the administration.

Morris explained that her evaluations of Bagarozzi were based on her observations and concerns she had with Bagarozzi's pedagogy. Morris also explained

[18] Charging Party's Ex 23.
[19] Charging Party's Ex 25.
[20] *See* Tr, at 84 (Bagarozzi); 188-189 (Akil).

that the staff meeting for which Bagarozzi was not present was held during lunch, common planning time and specifically discussed the universal grading policy. Morris testified that she subsequently held a meeting regarding that policy with Bagarozzi, that the meeting was not disciplinary, and that within a week, Bagarozzi revised her grading system. Morris also said that the letter to Bagarozzi's file regarding her grading concerns and the missed staff meeting, was not a disciplinary letter.

Morris also testified that Akil did not discuss Bagarozzi's union activity with her. She said that she showed Akil her first observation report for Bagarozzi and advised him that she had told the teacher that she was available to help her. Additionally, she did not discuss the disciplinary charges with Akil and was informed of them by the district superintendent after Bagarozzi's reassignment.

Like Morris, Akil also disclaimed any knowledge of a surrogate UFT post. Akil said that he, at times, knew that Bagarozzi attended school safety meetings. Akil denied any animus toward the UFT and denied knowledge of Bagarozzi's grievance activity. Akil said that the UFT, and not Bagarozzi, files grievances on behalf of members.

According to Akil, Bagarozzi often had difficult interactions with students, requiring mediation by the administration. Akil said that he never told Phillips or Morris how to evaluate Bagarozzi, and that he had no role in computing end of year ratings, explaining that they are devised according to a formula that factors in the observations, plus student performance. Akil testified that he had noted that Morris' observation of Bagarozzi was significantly different from his observation the year before, and that he concluded that the teacher's performance was heading in a different direction.

Akil advised that he felt it was his responsibility to initiate the investigation of Bagarozzi, given the conflicting stories he received about the slip and fall, and the video, which showed that the teacher tripped over her handbag which was on the floor. Akil's only role, he said, was to forward the information to OSI. He then received a report back, which found the claim of fraudulent reporting to be substantiated and recommended that Bagarozzi be removed from the classroom and not participate in per session or summer school work.

Akil testified that the determination to pursue disciplinary charges against Bagarozzi was made by the District and the reassignment out of the classroom was pursuant to District policy. Akil testified that he had no role in the proceedings, other than as a witness. He also claimed that he had no role in determining whether to charge Bagarozzi for the 2015 incident.

On cross-examination, Akil testified that during his first year at Queens Academy, he had issues with Bagarozzi's teaching, but did not document them. Akil could not recall if Bagarozzi was involved in grievance activity, but knew she had filed some grievances during Akil's second year at Queens Academy.[21] Akil testified that he did not recall Bagarozzi challenging observation procedures or filing a safety complaint. Akil acknowledged that he had been aware of Bagarozzi's complaint that the school did not accurately report incidents with students and that his awareness of this complaint preceded his making his report to OSI.

DISCUSSION

The District's assertion in its Brief that the ALJ should have deferred to the

[21] This testimony was contradictory to his testimony on direct examination.

arbitrator's award in the disciplinary process pursuant to EL § 3020-a is not properly before us, as it was not raised in the District's original Answer,[22] its Answer to the Amended Charge,[23] or, for that matter, its post-hearing Brief.[24] It "is well established that the Board will not address arguments raised for the first time on exceptions."[25] Because "our review is limited to the record before the ALJ, we do not address" issues that are "impermissibly raised for the first time in [the] exceptions."[26] Moreover, even were we to consider the question of deferral, we have recently reaffirmed our long-standing policy 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)."[27] Here as in *State of New York (UCS)* and *Buffalo Teachers Federation*, "the statutory claim does not fall within the ambit of PERB's

---

[22] ALJ Ex 3.
[23] ALJ Ex 4.
[24] District Brief, Ex A.
[25] *CUNY (Javed)*, 50 PERB ¶ 3028, 3108, n 25 (2017), citing *New York State Thruway Assn*, 47 PERB ¶ 3032, 3100, at n 25 (2014); *Rochester Teachers Assn (Hirsch)*, 46 PERB ¶ 3035, 3078 (2013); *County of Sullivan and Sullivan County Sheriff*, 41 PERB ¶ 3006, 3038 (2008); *Town of Penfield*, 30 PERB ¶ 3060, 3154 n 7 (1997); *see also City of Cortland*, ("having not raised this argument or factual precedent to the ALJ, the [District] may not raise the issue to us for the first time on exceptions"), 51 PERB ¶ 3014, at 3065 (2018), citing *City of Poughkeepsie*, 33 PERB ¶ 3029, 3079-3080 (2000); *TWU, Local 100 (Guichard)*, 31 PERB ¶ 3066, 3147 (1998); *Town of New Hartford*, 29 PERB ¶ 3076, 3181 (1996); *Mt Markham Cent Sch Dist*, 27 PERB ¶ 3030, 3073 (1994).
[26] *CUNY (Javed)*, 50 PERB ¶ 3028, at 3106, citing *New York State Thruway Assn*, 47 PERB ¶ 3032, at 3100, n 25.
[27] *State of New York (Unified Court System)*, 50 PERB ¶ 3042, 3170 (2017), quoting *Buffalo Teachers Fedn v NYS Pub Empl Relations Bd*, 153 AD3d 1643, 1645, 50 PERB ¶ 7005 (4th Dept 2017) (citations omitted), citing *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).

deferral policy.[28]

As a threshold matter, the District properly objects to the ALJ's remedial order to the extent it orders the removal from Bagarozzi's personnel file of the May 18, 2017 letter, as the letter has already been removed from Bagarozzi's personnel file. This removal was established by Bagarozzi's own testimony and her documentary evidence. Bagarozzi's own testimony and a letter from Phillips to Bagarozzi dated October 12, 2017, establish that "the letter was written and placed in [her] official personnel file beyond the three-month contractually permissible time period," and that the letter was removed from her official personnel file.[29] No basis for any remedial order as to the May 18, 2017 letter can be gleaned from the record. Nor can the May 18, 2017 letter, written by Phillips, and not linked by any evidence to Akil, be deemed probative of any anti-union animus attributable to the District on the record before us. We therefore grant that prong of the District's exceptions and modify the ALJ's order accordingly.

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

---

[28] 50 PERB ¶ 3042, at 3170, *Buffalo Teachers Fedn*, 153 AD3d 1643, at 1645 (finding that PERB properly declined to defer charge under § 209-a.1 (a) and (d)); *See also Chenango Forks Cent Sch Dist v NYS Pub Empl Relations Bd*, 21 NY3d 255, 265 (2013); *County of Rockland v CSEA*, 93 AD3d 721, 722 (2d Dept 2012) (Arbitration of grievances not barred by PERB's exclusive improper practice jurisdiction where "grievances do not allege that the petitioner committed improper employer practices in violation of Civil Service Law § 209-a").

[29] Tr, 96: 13-15; Charging Party Ex 21.

been taken 'but for' the protected activity."[30] As we have often reaffirmed, "[t]he ultimate burden of proof always remains with the charging party."[31]

However, the initial burden of proof to establish a *prima facie* case (an inference of improper motivation) is relatively low.[32] The "ALJ is required to accept the charging party's evidence as true, and give it the benefit of every reasonable inference that can reasonably be drawn from that evidence."[33] Moreover, a "charging party can establish the existence of anti-union animus by statements or by circumstantial evidence, which may be rebutted by evidence of legitimate business reasons for the actions taken, unless those reasons are found to be pretextual."[34]

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."[35] The employer "can dispel the *prima facie* case, and

---

[30] *Mt Pleasant Cent Sch Dist (Hall)*, 50 PERB ¶ 3019, 3079 (2017), quoting *Bellmore-Merrick Cent High Sch Dist*, 48 PERB ¶ 3022, 3976 (2015), citing *Village of Endicott*, 47 PERB ¶ 3017, 3050 (2014); *see generally, UFT, Local 2, AFL-CIO (Jenkins)*, 41 PERB ¶ 3007 (2008), *confd sub nom UFT (Jenkins) v NYS Pub Empl Relations Bd*, 41 PERB ¶ 7007 (Sup Ct NY Co 2008), *affd*, 67 AD3d 567, 42 PERB ¶ 7008 (1st Dept 2009); *see also City of Salamanca*, 18 PERB ¶ 3012 (1985).
[31] *Id*, quoting *Town of Tuscarora*, 48 PERB ¶ 3011, 3037 (2015); *Catskill Housing Auth*, 49 PERB ¶ 3025, 3080 (2016); *Village of Endicott*, 47 PERB ¶ 3017, at 3050.
[32] *Id*, citing*, inter alia*, *UFT (Jenkins)*, 41 PERB ¶ 3007, at 3043; *Bd of Educ of the City Sch Dist of the City of New York (Grassel)*, 43 PERB ¶ 3010 (2010); *Town of Tuscarora,* 45 PERB ¶ 3044 (2012); *Bd of Educ of the City Sch Dist of the City of New York (Guttman)*, 46 PERB ¶ 3008 (2013).
[33] *Id*, quoting *Town of Tuscarora*, 45 PERB ¶ 3044, at 3112, *citing Bd of Ed of the City Sch Dist of the City of New York (Baez)*, 35 PERB ¶ 3044 (2002) and *Bd of Ed of the City Sch Dist of the City of New York (Freedman)*, 34 PERB ¶ 3036 (2001).
[34] *State of New York (Dept of Transportation)*, 50 PERB ¶ 3004, 3021 (2017), citing *State of New York (SUNY)*, 38 PERB ¶ 3019 (2005), *confd sub nom CSEA v NYS Pub Empl Relations Bd*, 35 AD3d 1005, 39 PERB ¶ 7012 (3d Dept 2006).
[35] *Mt Pleasant Cent Sch Dist (Hall)*, 50 PERB ¶ 3019, at 3079; *Town of Tuscarora*, 48 PERB ¶ 3011, at 3037.

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."[36] If the respondent establishes a legitimate non-discriminatory reason, then the burden, "shifts back to the charging party to establish that the articulated non-discriminatory reason is pretextual."[37] When a charging party "fails to meet its burden, a charge of improper motivation must be rejected and the charge dismissed."[38]

The ALJ credited Bagarozzi's testimony that she acted as a union "surrogate," and that in late 2016 and early 2017, she "began challenging Akil through grievances and complaints to external entities."[39] The District does not dispute in its exceptions that these acts fall within the ambit of protected activity. Nor does the District except on the grounds that it, and in particular, Akil, was not aware of this protected activity on Bagarozzi's part. As the ALJ summarized her findings, "Bagarozzi offers a compelling chain of adverse actions stemming from her intensified activities with respect to grievances and her complaint about the school's inadequate reporting of incidents."[40]

The ALJ further found that "[f]ollowing closely on the heels of her actions were a series of reactions by Akil, most notably the initiation of a special investigation and the

---

[36] *Id*, quoting *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.
[37] *Id*, citing *Bellmore-Merrick Cent Sch Dist*, 48 PERB ¶ 3022, at 3076.
[38] *Catskill Housing Auth (Biegel)*, 49 PERB ¶ 3025, at 3081, citing *Bellmore-Merrick Cent Sch Dist*, 48 PERB ¶ 3022, at 3076; *Town of Tuscarora*, 48 PERB ¶ 3011, at 3037, *citing State of New York (SUNY Buffalo)*, 46 PERB ¶ 3021, 3040 (2013); *County of Tioga*, 44 PERB ¶ 3016 (2011).
[39] 51 PERB ¶ 4549, at 4700.
[40] *Id*.

disciplinary charges which followed."[41]

We begin by noting that the ALJ did not rely solely on the close temporal proximity between the protected activity and the initiation of the investigation, as well as Bagarozzi's declining ratings on her evaluations in finding a *prima facie* case. Rather, she also took into account the bringing of verbal abuse charges that, while within the three-year limitations period for § 3020-a charges under the Education Law, had not been raised in either 2015-2016 or the first half of the 2016-2017 school year. While the District correctly notes that these charges are not time-barred, the fact that the charges were not brought until shortly after Bagarozzi's exercise of protected activity is a piece of circumstantial evidence tending to support the inference of discriminatory intent.

The ALJ's finding of a *prima facie* case is further buttressed by her crediting "Bagarozzi's testimony about Akil's comment made to her, wherein he indicated his desire to bypass the union in addressing her complaints."[42] The District does not dispute that this statement was made (Akil had no recollection one way or the other). It does, however, reasonably point out that the ALJ elsewhere in her discussion mischaracterizes this evidence, as "statements, which reflect his disdain for the union."[43] This specific instance of rhetorical excess on the part of the ALJ does not undercut her factual finding, properly tethered to Bagarozzi's unrefuted testimony, that Akil endeavored to directly deal with Bagarozzi in resolving one of her grievances, and

---

[41] *Id*.
[42] 51 PERB ¶ 4549, at 4700 (referring to Bagarozzi's testimony, which Akil did not dispute, that he had approached her in the Spring of 2017, and asked, in effect "why can't we just settle this" without "the benefit of Jenny [Squires, the UFT Chapter Chair, representing Bagarozzi at the time]"). *See* Tr, at 84 (Bagarozzi); 188-189 (Akil).
[43] 51 PERB ¶ 4549, at 4700.

to induce her to waive her right to union representation, a violation of § 209-a.1 (a) of the Act in and of itself.[44] This forms another link in the chain of circumstantial evidence which, taken in conjunction with the suspicious timing of both Bagarozzi's suddenly falling ratings and Akil's initiating of the disciplinary charges against Bagarozzi, is more than sufficient to establish a *prima facie* case.[45]

Nor did the ALJ err in finding that the District had failed to refute the elements of a *prima facie* case. When asked what, if any, impact Bagarozzi's filing grievances had on her observations, Akil answered simply "Ms. Bagarozzi didn't file any grievances."[46] On cross-examination, Akil admitted knowledge of the protected activity, and did not deny Bagarozzi's testimony that he had sought to deal directly with Bagarozzi, bypassing the union. While he denied any retaliatory or discriminatory intent, Akil acknowledged that, as principal, he had "discretion [as to] what to report" to OSI, even as a mandated reporter.[47] When the ALJ asked him whether he had any role in determining whether the 2015 verbal abuse allegations would be included in charges against Bagarozzi, Akil answered only "I don't think so."[48] Neither Akil nor the Department provided any explanation as to how the 2015 incident came to the attention

---

[44] *Buffalo City Sch Dist*, 51 PERB ¶ 3006, 3028 (2018), citing *Dutchess Community College*, 41 PERB ¶ 3029, 3129 (2008); *CUNY*, 38 PERB ¶ 3011 (2005); *City of Schenectady*, 26 PERB ¶ 3047 (1993); *Town of Huntington*, 26 PERB ¶ 3034 (1993); *County of Cattaraugus*, 8 PERB ¶ 3062 (1975). We do not find a direct dealing violation here only because the charge did not allege such a violation. We will not find a violation that is not alleged in a charge or in a timely amendment thereto, even if it has been litigated. *County of Rockland*, 31 PERB ¶ 3062, 3136 (1998); *NYCTA*, 31 PERB ¶ 3024, 3054 (1998).
[45] *See State of New York*, 50 PERB ¶ 3004, at 3021.
[46] Tr, at 155.
[47] Tr, at 221-222.
[48] Tr, at 203.

of OSI and was investigated and acted upon only after Bagarozzi's adoption of a vocal union role.

The District has not established a legitimate, non-discriminatory reason for Akil's actions, and those as to which he disclaimed responsibility, but no other cause was identified by the District—the sole basis for the ALJ's finding of liability.[49] Morris's lack of knowledge of Bagarozzi's protected activity led the ALJ to exclude her evaluations and other actions from the determination of anti-union animus. We have already disclaimed that any finding can appropriately be based upon the placement of Phillips's May 18, 2017 letter in Bagarozzi's personnel file. Thus, the legitimate, non-discriminatory basis for Akil's reporting of the "slip and fall" incident, and the initiating of the investigation of the 2015 allegations, rests solely on his testimony, deemed by the ALJ to be not credible.

In sum, the ALJ found that Bagarozzi was credible, and that, by contrast, "Akil was not credible as a witness; he was not forthcoming in his testimony and could not recall his behavior on a number of issues of significance."[50] To take but one example, on direct examination, Akil bluntly testified that "Ms. Bagarozzi did not file grievances," only to testify equally unequivocally on cross-examination that "I remember Ms. Bagarozzi filing some grievances the second year."[51] When asked if he had "no issues with" Bagarozzi, Akil testified "[t]hat's not true," only to have no explanation when confronted with his positive evaluations of her and the lack of any documentation or specification of any other difficulties or concerns regarding Bagarozzi's performance in

[49] 51 PERB ¶ 4549, at 4700-4701.
[50] 51 PERB ¶ 4549, at 4700.
[51] Tr, at 155, 183.

that first year.[52] Along with Akil's shifting answers, his evasion of direct answers to critical questions led the ALJ to discount his credibility.

We find that, taken as a whole, "the record adequately supports the ALJ's credibility determinations, as well as the conclusions that the ALJ drew from the testimony."[53] Credibility determinations by an ALJ are generally entitled to "great weight unless there is objective evidence in the record compelling a conclusion that the credibility finding is manifestly incorrect."[54] Here, the District has not provided any such objective evidence that establishes that the ALJ manifestly erred.

Finally, we address the District's contention, separate from its deferral argument, that we should not affirm the ALJ's order to the extent that it grants Bagarozzi make whole relief, both as to the fine she was ordered to pay pursuant to the EL § 3020-a arbitration award, and to the lost opportunities for per session work. The District essentially argues that the arbitrator's award should be deemed dispositive as to the question of Bagarozzi's culpability, and that by remitting the penalty, the ALJ improperly annulled the arbitration.

This argument is wholly without merit. The issue of whether an employer's actions in bringing disciplinary charges violate the Act is outside of the scope of

---

[52] Tr, at 181-182.
[53] *State of New York* (*Office of Parks, Recreation & Historic Preservation*), 51 PERB ¶ 3025, 3107 (2018).
[54] *Id*, citing *Bellmore-Merrick Cent Sch Dist*, 48 PERB ¶ 3022, at 3077 (quoting *UFT (Cruz)*, 48 PERB ¶ 3004 (2015)); *see also Village of Scarsdale*, 50 PERB ¶ 3007, n 51 (2017); *County of Clinton*, 47 PERB ¶ 3026, 3079 (2014); *Village of Endicott*, 47 PERB ¶ 3017, 3051 (2014); *City of Rochester*, 23 PERB ¶ 3049 (1990); *Hempstead Housing Auth*, 12 PERB ¶ 3054 (1979); *Captain's Endowment Assn*, 10 PERB ¶ 3034 (1977); *see also County of Ulster*, 39 PERB ¶ 3013, at 3045-3046 (citing *Fashion Institute of Technology v Helsby*, 44 AD2d 550, 7 PERB ¶ 7005, 7009 (1st Dept 1974)) (deference due credibility determinations based on observation of witness's demeanor).

arbitration, and is distinct from whether the employee is in fact guilty of a disciplinary infraction.[55] 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."[56] In such cases, we have routinely directed "make whole" relief, including reinstatement with an unconditional award of back pay and benefits.[57] 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.[58] For these reasons, we affirm, as modified, the ALJ's decision.

THEREFORE, IT IS ORDERED THAT the District shall forthwith:

1. Cease retaliating, discriminating, or interfering against Bagarozzi for her engagement in protected activity;

---

[55] *See, eg, Buffalo Teachers Fedn v NYS Pub Empl Relations Bd*, 153 AD3d at 1645, 50 PERB ¶ 7005; *see generally Chenango Forks Cent Sch Dist v NYS Pub Empl Relations Bd*, 21 NY3d at 266 ("PERB improperly relied upon its policy of deference as the sole basis for resolving an improper practice charge because the relevant inquiry in the prior disciplinary proceeding—whether there was cause for the employee's dismissal—was 'very different than' the inquiry in an improper practice proceeding, which was whether the employer's action was motivated by anti-union bias, even if cause existed"), summarizing *CSEA v NYS Pub Empl Relations Bd,* 267 AD2d 935, 937, 32 PERB ¶ 7027 (3d Dept 1999).

[56] *CSEA v NYS Pub Empl Relations Bd*, 276 AD2d 967, 969, 33 PERB ¶ 7018 (3d Dept 2000), quoting *CSEA v NYS Pub Empl Relations Bd,* 267 AD2d at 937 (editing marks and internal quotations omitted); *Matter of 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).

[57] *CSEA v NYS Pub Empl Relations Bd*, 276 AD2d at 969, citing *Sag Harbor Union Free Sch Dist v Helsby,* 54 AD2d 391, 9 PERB ¶ 7023 (3d Dept 1976); *Matter of United Sch Workers,* 28 PERB ¶ 3045 (1995); *Matter of Buffalo PBA,* 20 PERB ¶ 3048 (1987).

[58] *Hudson Valley Community College v NYS Pub Empl Relations Bd,* 132 AD3d 1132, 1135-1136, 48 PERB ¶ 7005 (3d Dept 2015); *see also State of New York (Office of Parks, Recreation & Historic Preservation)*, 51 PERB ¶ 3025, at 3108.

2. Make Bagarozzi whole for lost per session work and the $2,000 fine she incurred as a result of the disciplinary charges brought against her, including interest at the currently prevailing maximum legal rate; and

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

DATED: December 17, 2018
Albany, New York

John F. Wirenius, Chairperson

Anthony Zumbolo, Member

Monte A. Klein, Member

NOTICE TO ALL EMPLOYEES

PURSUANT TO
THE DECISION AND ORDER OF THE

NEW YORK STATE
PUBLIC EMPLOYMENT RELATIONS BOARD

and in order to effectuate the policies of the

NEW YORK STATE
PUBLIC EMPLOYEES' FAIR EMPLOYMENT ACT

we hereby notify all employees of Board of Education of the City School District of the City of New York (District) that the District will:

1. Not retaliate, discriminate, or interfere against Bagarozzi for her engagement in protected activity; and

2. Make Bagarozzi whole for lost per session work and the $2,000 fine she incurred as a result of the disciplinary charges brought against her, including interest at the currently prevailing maximum legal rate.

Dated . . . . . . **By . . . . . .**

On behalf of the Board of Education of the City School District of the City of New York

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

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

SANJA DRINKS-BRUDER,

Charging Party, **CASE NO. U-36235**

- and -

NIAGARA FALLS POLICE CLUB, INC.,

Respondent,

- and -

CITY OF NIAGARA FALLS,

Employer.

SANJA DRINKS-BRUDER, *pro se*

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by Sanja Drinks-Bruder (Drinks-Bruder), a police officer employed by the City of Niagara Falls (City) to a decision of the Director of Public Employment Practices and Representation (Director) dismissing her twice amended improper practice charge.[1] In her original charge, filed on February 14, 2018, Drinks-Bruder alleged that the Niagara Falls Police Club, Inc. (Union) violated § 209-a.2 (c) of the Public Employees' Fair Employment Act (Act) by failing to represent her in connection with her suspension in July 2017, including at a Civil Service Law § 75 (CSL § 75) hearing on July 20, 2017.

Pursuant to the Director's preliminary review of the charge under § 204.2 of PERB's Rules of Procedure (Rules), on March 1, 2018, the Director advised Drinks-

---

[1] 51 PERB ¶ 4558 (2017).

Bruder that her charge was deficient because it was untimely filed pursuant to § 204.1 (a) (1) of the Rules. In response, Drinks-Bruder filed a four-page "amendment" to her charge on March 13, 2018. The amendment consists of a handwritten statement in which Drinks-Bruder alleges that she gave the Union paperwork relating to her July 20-21 suspension and asked for help, received no assistance and filed two grievances on her own (on undisclosed dates). The statement also alleges that in September 2017, she was told that she could see her "personal and OPS file," which she reviewed on October 3, 2017. Drinks-Bruder claims that she "found nothing within the OPS file allowing a suspension," and that she contacted Human Resources but was "never contacted back." The issue of Drinks-Bruder's access to her personnel file is the subject of a separate pending improper practice charge.[2]

The amendment alleges that Drinks-Bruder "received paperwork" from the City on October 19, 2017, closing all of her grievances that were still pending. Finally, the amendment alleges that Drinks-Bruder did not file a grievance about the suspension until "knowing [it] was improper," which was after "all who could and should neglected to provide proper documentation that allowed a suspension [*sic*]." She also alleges that Union President Michael Lee (Lee) responded to her on January 3, 2018, informing her that her grievance "was already being looked at by PERB." Drinks-Bruder avers that Lee's statement is incorrect.

On March 29, 2018, the Director advised Drinks-Bruder that the charge, as amended, remained deficient because the amendment was confusing and non-

[2] *See id*, at 4756 n 5.

responsive to the Notice of Deficiency informing her that the charge was not timely filed. Drinks-Bruder was directed to go through the charge, as originally filed, and indicate "which of [her] allegations are…timely filed," and that failure to comply with this direction "will result in dismissal of [her] charge."

On April 27, 2018, Drinks-Bruder filed a second amendment to her charge, consisting of a one-page sworn statement. In this statement, Drinks-Bruder claims that "[a]ll allegations are true and were filed in a timely manner." The amendment alleges that Drinks-Bruder "could not file an improper practice charge against the union until it was known that [she] was not being represented by the union." She contends that she only learned this on October 19, 2017, when she asked Lee "what was happening with [her] suspension?" and was told that "nothing was happening since [she] did return back to work."

The Director found that Drinks-Bruder's twice-amended charge failed to correct the timeliness deficiency of the original charge, and she dismissed the charge.

EXCEPTIONS

Drinks-Bruder excepts to the ALJ's decision by a letter. In her letter, Drinks-Bruder argues that her charge was timely filed. Drinks-Bruder argues that she was informed that the Union would not represent her before the hearing on July 20, 2017. Drinks-Bruder alleges that she "believed" on October 19, 2017 that she was not being represented and that she had been improperly suspended. Drinks-Bruder argues that representation by the Union during her disciplinary hearing would have allowed proper procedures to be followed and that not having the proper documentation has "stopped

[Drinks-Bruder] from having a [CSL § 75] hearing that [she] was entitled to[]."[3]

For the reasons that follow, we affirm the Director's finding that the charge was untimely filed.

DISCUSSION

Initially, we note that Drinks-Bruder's exceptions contain asserted facts and documents that were not presented to the Director, including facts about events in October and November 2017 and text messages allegedly between Drinks-Bruder and various Union representatives. Our review of the Director's decision is limited to the record as it existed before her.[4] Therefore, we do not consider the facts and documents presented by Drinks-Bruder for the first time on exceptions.

Section 204.1 (a) of our Rules requires that an improper practice charge to be filed within four months of when the charging party had actual or constructive knowledge of the conduct that forms the basis for the alleged improper practice.[5] Drinks-Bruder's charge was filed on February 14, 2018. Thus, any events within Drinks-Bruder's knowledge that occurred prior to October 14, 2017 are untimely.

Drinks-Bruder's improper practice charge complains about her lack of representation at her CSL § 75 hearing on July 20, 2017, which she knew of at the time of the hearing itself, and her subsequent suspension, which also occurred in July 2017.

---

[3] Exceptions, at 5.
[4] *CSEA (Brewster)*, 50 PERB ¶ 3027, 3102 (2017); *Mt. Pleasant Cottage UFSD,* 50 PERB ¶ 3002, 3009, n 12 (2017); *CSEA (Josey),*49 PERB ¶ 3022, 3072 (2016); *Smithtown Fire District,* 28 PERB ¶ 3060, 3135 (1995).
[5] *State of New York (Office of Children and Family Services (Leone))*, 50 PERB ¶ 3039, 3163 (2017); *CSEA, Inc., Local 1000, AFSCME, AFL-CIO*, 28 PERB ¶ 3072, 3168, n 4 (1995).

Drinks-Bruder's statement attached to her charge focused on the events surrounding her CSL § 75 hearing.[6] When informed that her charge was untimely, Drinks-Bruder submitted information connected to a separate and unrelated pending improper practice charge regarding her access to her personnel file.[7] This information, which is at issue in a separate pending proceeding, has no bearing on the issues in the instant matter and thus does not act in some way to extend the period of time that Drinks-Bruder had to file a charge regarding the lack of representation at her CSL § 75 hearing or regarding her suspension, which occurred in July. Drinks-Bruder knew in July that the Union had not represented her at the CSL § 75 hearing, and we agree with the Director that there are no facts alleged indicating that the Union was entertaining a request for representation from Drinks-Bruder after July that might extend her time to file a charge.[8] Further, Drinks-Bruder's filing of a grievance over her suspension does not extend her time to file an improper practice charge regarding the July events.[9]

Because the events that Drinks-Bruder complains of occurred in July 2017, her improper practice charge, filed on February 14, 2018, was untimely filed.

Based upon the foregoing, we deny the exceptions, affirm the decision of the Director, and dismiss the charge.

---

[6] This focus is also shown in Drinks-Bruder's exceptions, where she argues that representation by the Union during her disciplinary hearing would have allowed proper procedures to be followed and that not having the proper documentation has "stopped [Drinks-Bruder] from having a [CSL §75] hearing that [she] was entitled to[]." Exceptions, at 5.
[7] *See* 51 PERB ¶ 4558, at 4756 n 5.
[8] *Id*, at 4755.
[9] *State of New York (SUNY at Stony Brook)*, 44 PERB ¶ 3021, 3075 (2011); *NYCTA*, 40 PERB ¶ 3014, 3054 (2007).

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

DATED: December 17, 2018
Albany, New York

John F. Wirenius, Chairperson

Anthony Zumbolo, Member

Monte A. Klein, Member