STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

NEW YORK STATE PUBLIC EMPLOYEES FEDERATION, AFL-CIO,

Charging Party,

CASE NO. U-33773

- and -

STATE OF NEW YORK (OFFICE OF TEMPORARY AND DISABILITY ASSISTANCE),

Respondent.

BARRY MARKMAN, for Charging Party

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 the New York State Public Employees Federation, AFL-CIO (PEF) to a decision of an Administrative Law Judge (ALJ).[1] The ALJ granted a motion to dismiss made by the State of New York (Office of Temporary and Disability Assistance) (State or OTDA). The ALJ found that PEF failed to establish a *prima facie* case that the State violated §§ 209-a.1 (a) and (d) of the Public Employees' Fair Employment Act (Act) by refusing to provide a report requested by PEF in connection with the processing of a grievance and preparation for arbitration of the grievance filed on behalf of an employee, Usher Piller.

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[1] 51 PERB ¶ 4550 (2018).

EXCEPTIONS

PEF filed seven exceptions to the ALJ's decision.[2] PEF claims that its information request was specific enough and that the ALJ erred in finding that it had not shown that its request was relevant and necessary.[3] PEF asserts that the grievance filed on Piller's behalf concerned the same underlying events as a complaint that Piller filed with OTDA's Bureau of Equal Opportunity and Diversity (EOD). PEF claims that the report generated from the EOD investigation, the requested information here, would demonstrate if Piller's allegations of discrimination had merit.[4] Finally, PEF contends that there were no facts that required an independent investigation on its part.[5]

The State avers that PEF's exceptions are deficient under § 213.2 of our Rules of Procedure (Rules). On the merits, the State supports the ALJ's decision and contends that no basis has been demonstrated for reversal.

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

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[2] In a separate proceeding (Case No U-32952), Piller filed a charge in which, among other things, he sought a subpoena *duces tecum* for the same information PEF seeks via its information request here. Piller's request for a subpoena for the same material had the potential to resolve this matter, rendering any decision by us moot. On April 29, 2021, the ALJ in Case No U-32952 issued a decision finding it unnecessary to resolve the subpoena matter. 54 PERB ¶ 4512 (2021). As the ALJ's decision does not resolve the matter before us, we issue this decision.

[3] Charging Party Exceptions Nos 1-3, 5.

[4] Charging Party Exceptions Nos 4-6.

[5] Charging Party Exceptions No 7.

In the preface to its exceptions, PEF states that "[t]hese exceptions are taken to each unfavorable ruling on evidence and to each and every part of the Decision finding that the Respondent did not violate [§§ 209-a.1 (a) and (d) of the Act]." Charging Party Exceptions, at 1. We have often held that "such blunderbuss exceptions do not comport with the Rules [of Procedure]," and "do not preserve arguments not expressly made in the exceptions." *State of New York (DOCCS)*, 52 PERB ¶ 3003, 3016, n 2 (2019), quoting *Village of Saranac Lake,* 51 PERB ¶ 3034, 3148, n 4 (2018); *see also NYCTA,* 47 PERB ¶ 3032, 3009 (2014), *UFT (Pinkard),* 47 PERB ¶ 3020, 3061 (2014); *Town of Orangetown,* 40 PERB ¶ 3008, 3023 (2007), *confd sub nom Town of Orangetown v NYS Pub Empl Relations Bd,* 40 PERB ¶ 7008 (Sup Ct Albany Co 2007).

PROCEDURAL HISTORY

The charge in this case was filed on September 17, 2014. The then-assigned ALJ ordered PEF to submit a written offer of proof as to the allegations against OTDA, and gave OTDA an opportunity to respond.[6] Based on the offer of proof and the response, the ALJ found that OTDA violated §§ 209-a.1 (a) and (d) of the Act when it refused to provide a copy of the report requested by PEF.

OTDA filed exceptions to the ALJ's decision, and we vacated the ALJ's decision on April 10, 2017.[7] We found that the ALJ's notice to the parties regarding the offer of proof and response was insufficient and that the ALJ therefore erred by deciding the case based solely on the offer of proof and the response thereto. In addition, we found that the ALJ did not apply the applicable standard for cases involving an alleged failure to provide requested information. We vacated the ALJ's decision and remanded for further processing. We stated that "[w]e do not intend to bind the newly assigned ALJ to the procedural vehicles employed by her predecessor. We leave open to the successor ALJ whether to proceed directly to a hearing or to narrow the issues via new offers of proof, or in any other way permitted by our Rules."[8]

The case was subsequently reassigned to another ALJ, who issued the decision at issue here. The ALJ conducted a hearing at which PEF presented its case-in-chief. Prior to the second day of hearing, OTDA moved to dismiss the charge for PEF's alleged failure to present a *prima facie* case. As stated above, the ALJ granted the motion, finding that PEF failed to establish the relevance of and necessity for the

[6] 49 PERB ¶ 4503 (2016).
[7] 50 PERB ¶ 3009 (2017).
[8] *Id*, at 3045, n 34.

requested information.

FACTS

Because PEF's exceptions seek reversal of the ALJ's decision granting a motion to dismiss, we "assume the truth of all of the charging party's evidence and give the charging party the benefit of all reasonable inferences that could be drawn from those assumed facts."[9]

Usher Piller is employed by OTDA and serves as a PEF representative. On July 19, 2013, he was instructed by his supervisor to neither report early for work, nor stay late. On August 9, 2013, Piller filed a contractual grievance asserting that OTDA discriminated against him in restricting his arrival and departure times, allegedly in retaliation for his "strident advocacy" of another PEF member.[10] He also filed a complaint with OTDA's EOD on August 15, 2013, challenging his supervisor's order as discrimination, unequal treatment, intimidation, and harassment, allegedly for his "opposing discriminatory practices."[11] The EOD complaint form includes the following options upon which the complaint may be based: "age, race, creed/religion, color, national origin, sex, sexual orientation, military status, disability, gender identity, predisposing genetic characteristics, and victim of domestic violence status."[12] Based on these categories, it does not appear that investigations of discrimination based on activity protected by the Act falls within the EOD's purview. Piller handwrote that his

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[9] *County of Chenango and Chenango County Sheriff*, 53 PERB ¶ 3006, 3019 (2020); *UFT (Spaulding)*, 51 PERB ¶ 3022, 3094 (2018), quoting *CSEA (Trowbridge)*, 48 PERB ¶ 3024, 3093 (2015); *Town of Tuscarora*, 45 PERB ¶ 3044, 3112 (2012); *County of Livingston*, 43 PERB ¶ 3018, 3073 (2010); *County of Nassau (Unterweiser)*, 17 PERB ¶ 3013, 3030 (1984).

[10] PEF's brief in opposition to motion to dismiss, at 3.

[11] Joint Ex 2.

[12] Joint Ex 3.

complaint was based on "opposing discriminatory practices."[13]

In response to the EOD complaint, an investigation was commenced by Sylvia Hamer, OTDA's Chief of Diversity and Affirmative Action. She notified Piller on October 3, 2013 of her role and her interest in interviewing him, and also informed him that others within OTDA would be interviewed as well. On November 27, 2013, Hamer issued her report.

The grievance filed by Piller, which forms the basis for his instant claim of entitlement to the report sought, cites Article 36 (2) of the collective bargaining agreement (CBA) between the parties, which provides:

> The State agrees to continue its established policy against all forms of illegal discrimination with regard to . . . the proper exercise by an employee of the rights guaranteed by the Public Employees' Fair Employment Act.[14]

At the hearing on this matter, Piller testified that he filed the grievance because he believed he was discriminated against based on his activity as a PEF representative.[15]

On May 4, 2014, Piller requested Hamer's report from OTDA. The request did not detail the specific facts Piller sought, nor did it explain the relevance of the report to Piller's grievance.[16] On May 12, 2014, OTDA provided Piller with a heavily redacted copy of the report, pursuant to the Personal Privacy Protection Law (PPPL).[17] Unsatisfied with that response, Piller filed the instant charge.

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[13] *Id*.
[14] Joint Ex 1A.
[15] Tr, at 27, 29, 62 (Piller).
[16] Respondent's Ex 2.
[17] In the version of the report that was released, all information other than that which Piller had provided to Hamer was redacted. PEF's offer of proof, Ex F.

At the hearing, Piller maintained that since Hamer's report pertains to him, it must be relevant to his grievance.[18] In its offer of proof, PEF asserted that the report "more than likely contains crucial and relevant findings relevant to the grievance."[19] Piller noted his expectation that at least part of the report is likely to contain information that he provided to Hamer on several occasions. In fact, he specifically recalled a "lengthy conversation" during which he was questioned about "all the circumstances" leading up to his filing of the complaint and why he felt he was being discriminated against.[20] He also testified that he provided several documents to Hamer. Asked on cross-examination to identify the specific information provided, Piller responded that he did not keep notes.

DISCUSSION

We first address OTDA's objection to the exceptions as procedurally deficient. Section 213.2 (b) of our Rules requires that exceptions set forth specifically the questions or policy to which exceptions are taken, identify that part of the decision to which exceptions are taken, designate by page citation the portions of the record relied upon, and state the grounds for exceptions. We agree with OTDA that the exceptions here are not in technical compliance with our Rules because they fail to designate by page citation the portions of the record relied upon. Nevertheless, we find that the exceptions are in what we have deemed to be "satisfactory form under § 213.[2 (b)] of our Rules."[21]

Recently, in *State of New York (SUNY Upstate Medical Center)*, we assumed

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[18] Tr, at 42 (Piller).
[19] PEF's offer of proof, at 2.
[20] Tr, at 36 (Piller).
[21] *New York State Canal Corp*, 30 PERB ¶ 3070, 3174 (1997).

that the deficiencies of two exceptions warranted their dismissal, but found that the remaining exceptions nonetheless raised the same issues.[22] In so doing, we did not squarely decide upon a standard pursuant to which we intend to treat exceptions that are not in technical compliance with our Rules, as the issues posed were otherwise properly before us. However, a thorough study of our application of Rule 213.2 (b) (and its predecessors) establishes that we have, in certain circumstances, addressed exceptions on the merits even when such exceptions failed to meet all the requirements of the Rule.[23] We have considered such exceptions where the gravamen of the asserted error was clear; in particular, where we are able to discern the basis of the excepting party's arguments and identify the portions of the ALJ's decision that it disagrees with.[24] However, we will not search through extensive or voluminous records to find the basis for a party's exceptions or to identify evidence which may support a party's arguments.

In applying this standard here, we find that PEF's failure to cite to the specific

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[22] 53 PERB ¶ 3013, 3061 (2020). The deficiencies included the failure to set forth specifically the questions or policy to which exceptions were taken, designate by page citation the portions of the record relied upon, or state the grounds for exceptions.

[23] *See, eg, Town of Smithtown*, 11 PERB ¶ 3099, 3161, n 2 (1978); *City of New Rochelle*, 18 PERB ¶ 3021, 3044 (1985); *New York State Canal Corp*, 30 PERB ¶ 3070, 3174 (1997); *Board of Educ of the City Sch Dist of the City of New York (Cohn)*, 53 PERB ¶ 3011, 3053 (2020).

[24] *Board of Educ of the City School District of the City of New York (Cohn)*, 53 PERB ¶ 3011, 3053 (2020); *New York State Canal Corp*, 30 PERB ¶ 3070, at 3174. *Compare Churchville-Chili Cent Sch Dist*, 51 PERB ¶ 3003, 3010 (2018) (declining to review exceptions where the party appealing did not state the grounds for its exception or present any arguments for finding the ALJ's analysis to be incorrect); *UFT (Pinkard)*, 44 PERB ¶ 3011, 3042-3043 (2011) (dismissing exceptions where Board was "unable to discern an arguably meritorious basis for [Charging Party's] challenge to the ALJ's decision").

While this has been a long-standing PERB policy, parties should not assume that their technically deficient exceptions will always be found to meet this standard and are strongly advised to comply with the letter as well as the spirit of Rule 213.2 (b).

pages of the record relied on is not sufficient to warrant dismissal of the exceptions for failure to comply with the Rules.[25] The record in this case was not voluminous, and the gravamen of PEF's complaint was clear.[26] We find that the exceptions are not so deficient as to warrant dismissal "[i]n view of the substantial compliance with the Rule's requirements."[27] As always, we limit our review to arguments expressly made in the exceptions.[28]

An employee organization has a general right under the Act to receive documents and information requested from an employer for use by the employee organization in the administration of a collectively negotiated agreement, including processing a grievance and preparing for a grievance hearing and/or arbitration. Failure of an employer to produce requested information and documents may constitute a violation of both §§ 209-a.1 (a) and (d) of the Act.[29]

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[25] *See County of Monroe and Sheriff of Monroe County*, 45 PERB ¶ 3048, 3120 (2012); *Town of Smithtown*, 11 PERB ¶ 3099, 3161, n 2 (1978).
[26] *Board of Educ of the City School District of the City of New York (Cohn)*, 53 PERB ¶ 3011, 3053 (2020); *New York State Canal Corp*, 30 PERB ¶ 3070, at 3174. *Compare Churchville-Chili Cent Sch Dist*, 51 PERB ¶ 3003, 3010 (2018) (declining to review exceptions where the party appealing did not state the grounds for its exception or present any arguments for finding the ALJ's analysis to be incorrect); *UFT (Pinkard)*, 44 PERB ¶ 3011, 3042-3043 (2011) (dismissing exceptions where Board was "unable to discern an arguably meritorious basis for [Charging Party's] challenge to the ALJ's decision").
[27] *Board of Educ of the City Sch Dist of the City of New York (Smith)*, 51 PERB ¶ 3035, 3151 (2018).
[28] *See, eg, Board of Educ of the City Sch Dist of the City of New York (Cohn)*, 53 PERB ¶ 3011, at 3053; *Village of Saranac Lake*, 51 PERB ¶ 3034, 3148, n 5 (2018), citing *NYCTA*, 47 PERB ¶ 3032, 3009 (2014), quoting *UFT (Pinkard)*, 47 PERB ¶ 3020, 3061 (2014).
[29] *State of New York (UCS)*, 50 PERB ¶ 3042, 3171 (2017); *State of New York (DOCCS)*, 50 PERB ¶ 3031, 3122 (2017); *State of New York (OTDA)*, 50 PERB ¶ 3009, 3043 (2017); *see also County of Montgomery*, 44 PERB ¶ 3045, 3134 (2011); *City of Rochester*, 29 PERB ¶ 3070, 3164 (1996); *Hornell Cent Sch Dist*, 9 PERB ¶ 3032, 3061 (1976); *Board of Educ, City Sch Dist of the City of Albany*, 6 PERB ¶ 3012, 3030 (1973).

In *State of New York (OTDA)*, we also explained:

> That duty includes an obligation on the part of the employer to provide information relevant to a union's investigation of the merits of a grievance. Moreover, an employee organization is entitled to a reasonable opportunity to examine requested information and documents before determining whether to continue to process a grievance, and the right to receive information and documents extends after a grievance has been processed to arbitration.[30]

However, the right is not without limitations. We have long held that the general right to receive requested documents and information is subject to three primary limitations: reasonableness, which includes the burden on the responding party; relevance; and necessity.[31] This duty may, where appropriate, prevail over confidentiality rights under statutes other than the Act. In such cases, we have further held that prior to refusing to disclose information under the Act based upon a claim of confidentiality, a respondent is obligated to first engage in good faith negotiations for the purpose of reaching an agreed-upon accommodation concerning the requested information.[32]

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[30] *State of New York (OTDA)*, 50 PERB ¶ 3009, at 3043-3044 (footnotes and quotation marks omitted), citing and quoting *County of Erie v State of New York*, 14 AD3d 14, 37 PERB ¶ 7007, 7015 (3d Dept 2004). *See also State of New York (UCS)*, 50 PERB ¶ 3042, 3171 (2017); *State of New York (DOCCS)*, 50 PERB ¶ 3031, 3122 (2017); *Matter of Schuyler-Chemung-Tioga BOCES,* 34 PERB ¶ 3019, 3042-3043 (2001); *State of New York (Dept of Health & Roswell Mem Inst*), 26 PERB ¶ 3072, 3137 (1993).

[31] *Id.*

[32] *State of New York (OTDA)*, 50 PERB ¶ 3009, at 3044 (footnotes and quotation marks omitted), citing and quoting *Utica City School Dist*, 48 PERB ¶ 3008 (2015). *See also County of Erie*, 45 PERB ¶ 3036, 3084 (2012); *Hampton Bays Union Free Sch Dist*, 41 PERB ¶ 3008, 3051 (2008), *confd sub nom Hampton Bays Union Free Sch Dist v NYS Pub Empl Relations Bd*, 62 AD3d 1066, 42 PERB ¶ 7005 (3d Dept 2009), *lv denied*, 13 NY3d 711, 42 PERB ¶ 7009 (2009); *State of New York (OMRDD)*, 38 PERB ¶ 3036, 3126 (2005), *confd sub nom CSEA v NYS Pub Empl Relations Bd*, 14 Misc3d 199, 39 PERB ¶ 7009 (Sup Ct, Albany County 2006), *affd*, 46 AD3d 1037, 40 PERB ¶ 7009 (3d Dept 2007).

We agree with the ALJ that PEF has not demonstrated the relevance and necessity of Hamer's report to its processing of the grievance filed on behalf of Piller. The grievance alleges that OTDA discriminated against Piller because of his exercise of the rights guaranteed by the Act. The EOD complaint, by contrast, does not allege that OTDA violated the Act, but instead that it discriminated against Piller for "opposing discriminatory practices," without specifying what the alleged discriminatory practices sound in. However, the EOD form filled out by Piller provides a list of matters EOD will investigate: "age, race, creed/religion, color, national origin, sex, sexual orientation, military status, disability, gender identity, predisposing genetic characteristics, and victim of domestic violence status." Even taking as true, as we do, PEF's factual allegations in this matter, PEF has not established the relevance or necessity of Hamer's report to the claimed violations of the Act, which require a showing of discriminatory intent predicated on union activity, membership, or participation. While Hamer could find that Piller was discriminated against for "opposing discriminatory practices," as delineated by EOD, PEF has not provided grounds as to why such a finding has any probative value in terms of Piller's contention that he was also discriminated against for activity protected under the Act (and the CBA).

In these circumstances, we find that the necessity and relevance of PEF's information request is not reasonably discernible from the request itself or when read in conjunction with other evidence in the record.[33] Therefore, we conclude that PEF failed

[33] *See Hampton Bays Union Free Sch Dist*, 41 PERB ¶ 3008, at 3051 ("A request for documents and information must be sufficiently particular so that the necessity and relevancy of the requested information is reasonably discernible."). *See also Town of Wallkill*, 42 PERB ¶ 3006, 3017 (2009) (dismissing charge where relevance and necessity of information was not reasonably discernible).

to meet its burden of demonstrating that its initial information request was relevant and necessary under the Act.[34] While it may be the better practice for a responding party, when it doubts the relevance and necessity of the request, to seek greater specificity and not to simply ignore or refuse the request, such a requirement is not a statutory obligation under the Act.[35]

Based on the foregoing, we deny PEF's exceptions and affirm the ALJ's decision dismissing PEF's charge.[36]

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

DATED: May 26, 2021
Albany, New York

John F. Wirenius, Chairperson

Anthony Zumbolo, Member

Monte A. Klein, Member

[34] We make no findings as to whether a more specific information request, laying out why Hamer's report might be relevant and what facts PEF expected to learn from the report, would have triggered OTDA's obligation to provide the requested information. We simply find that the request, as drafted, was insufficient.
[35] *Hampton Bays Union Free Sch Dist,* 41 PERB ¶ 3008, at 3051.
[36] Because we are reviewing the grant of a motion to dismiss, we assume the truth of the alleged facts, including that PEF conducted an adequate investigation into the grievance filed on behalf of Piller. This finding does not, however, change our finding regarding the relevance and necessity of the requested information.

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

SCHERON McDOWALL,

Charging Party,

CASE NO. U-36865

-and-

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

Respondent.

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

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

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by Scheron McDowall to a decision of an Administrative Law Judge (ALJ), dismissing McDowall's 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).[1] McDowall's charge alleged that the District violated the Act by retaliating against her for engaging in protected activities by issuing McDowall disciplinary letters, negative observations, and poor performance ratings. The ALJ found that McDowall failed to establish a *prima facie* case that the District would not have taken these actions "but for" McDowall's protected activity.

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[1] 53 PERB ¶ 4550 (2020).

EXCEPTIONS

McDowall filed five exceptions to the ALJ's decision, which advance three main claims. McDowall asserts that the close timing between her protected activity and the alleged retaliatory actions by the District are sufficient to raise an inference of retaliatory intent.[2] McDowall also contends that it is premature to dismiss her complaint without requiring testimony from the District regarding its actions and that "actual testimony subject to cross-examination would aid in clarifying the actual facts."[3]

McDowall's third claim is that, to the extent the ALJ found that McDowall had not shown that District decisionmakers had knowledge of her protected activity, the ALJ's decision should be reversed and it should be found that McDowall made out a *prima facie* case of retaliation.[4] McDowall asks that the ALJ's decision be reversed and the case remanded for a hearing.

The District avers that McDowell's exceptions are both untimely and deficient under § 213.2 of our Rules of Procedure (Rules). On the merits, the District supports the ALJ's decision and contends that no basis has been demonstrated for reversal or remand.

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

FACTS

The ALJ required McDowall to file an offer of proof concerning the specific facts that she would present at a hearing in support of the charge as well as any legal argument supporting her position. These facts are drawn from McDowall's offer of proof

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[2] *See* Charging Party's Exceptions Nos 1-3.
[3] Charging Party's Exceptions, at 2. *See also* Exception No 3.
[4] *See* Charging Party's Exceptions Nos 4 & 5.

and attached documents. For purposes of this decision, we presume the truth of McDowall's asserted facts and draw all reasonable inferences in her favor, viewing her case in a light most favorable to her.[5]

Since approximately September of 1998, McDowall has been employed by the District as a "common branches/early childhood" teacher, at PS/MS 394.[6] The 2014-2015 "Summary Report" of McDowall's Measures of Teacher Practice (MOTP)[7] for the school year indicates that McDowall was tentatively rated "effective" by Gwendalina Pieters.[8] Subsequently, McDowall received, as the final ratings for that school year, an "effective" MOTP and "effective" Measures of Student Learning (MOSL) rating, for an overall combined "effective" rating. For the 2015-2016 school year, McDowall was rated "effective" for the year in MOTP; the MOSL rating is not listed in the printout submitted with the offer of proof. For the 2016-2017 school year, McDowall was rated "effective" in both MOTP and MOSL, for an overall combined "effective" rating.

Sojourner Welch-David has been the principal at PS/MS 394 since November of 2017, and Elizabeth Stewart has been an assistant principal at the school since May of 2018. During the 2017-2018 school year, Ronda Kornegay[9] conducted three informal

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[5] *See, eg, TCU (Shah)*, 53 PERB ¶ 3016, 3081 (2020); *Niagara Falls Police Club, Inc. (Drinks-Bruder)*, 52 PERB ¶ 3007, 3028 (2019); *CSEA (Davitt)*, 45 PERB ¶ 3028, 3065 (2012).

[6] Offer of Proof, ¶ 4.

[7] Ex A, annexed to Offer of Proof. In the District's evaluation system (Annual Professional Performance Review, or APPR), the MOTP rating reflects the quality of a teacher's pedagogy, and the MOSL rating is a combination of the state and local grades that the students receive in standardized testing. *See Board of Educ of the City School Dist of the City of New York (Smith)*, 51 PERB ¶ 3035 (2018). Possible ratings in the APPR system, from highest to lowest, are "highly effective," "effective," "developing," and "ineffective."

[8] Pieters' title is not indicated in the record.

[9] Kornegay's title is not indicated in the record.

observations of McDowall. Kornegay's observation reports rate McDowall "effective," and occasionally "highly effective," on various MOTP components.[10] For the overall annual rating of the 2017-2018 school year, McDowall was rated "effective" in both MOTP and MOSL, for an overall combined "effective" rating.

On November 7, 2018, Stewart conducted an informal observation of McDowall's teaching. In the corresponding observation report, dated January 21, 2019 (signed on February 25, 2019 by McDowall), Stewart rated McDowall as "effective" in all rated components.[11] Stewart noted that there was room for improvement in certain areas and asked McDowall to see her for support.[12]

On February 24, 2019, Stewart "made an inappropriate comment" to McDowall "about being out of work for almost a month," though McDowall asserts that she was "only out six days" due to a foot injury.[13]

On February 25, 2019, McDowall called a parent to discuss a student's "behavioral and academic progress."[14] In response, on February 26, 2019, the parent appeared in person to meet with McDowall and was escorted by Stewart to McDowall's classroom at approximately 2:15 p.m. McDowall informed Stewart and the parent that she could not discuss the student's progress at that time, because she needed to attend to the dismissal of the class and then leave for a doctor's appointment. Stewart then instructed the paraprofessional in the classroom to escort the class for dismissal, and told McDowall to reschedule the meeting with the parent for March 5, 2019.

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[10] Ex B, annexed to Offer of Proof.
[11] Ex C, annexed to Offer of Proof.
[12] *Id*.
[13] Offer of Proof, ¶ 10.
[14] Ex G, annexed to Offer of Proof.

On March 5, 2019, the same parent and her sister appeared for the conference with McDowall, at which Stewart was also present. McDowall's "intent" was to inform the parent that her child needs to put effort into preparing for math class and parental intervention was needed to assist him.[15] McDowall began to outline the student's behavior, but Stewart interjected and asked McDowall to share the student's portfolio with the parties present at the meeting. During the meeting, Stewart suggested that McDowall should bring students to the classroom for detention during lunch, and McDowall asked who would be conducting the detention. Stewart asked whether McDowall could eat lunch with the children and McDowall replied "NO (emphasis in original)."[16] McDowall asserts that Stewart then responded that she was trying to help McDowall, and that if she did not want the help, she would "come into [McDowall's] classroom and give [her] 'ineffective,' 'ineffective,' 'ineffective,' 'ineffective,' 'ineffective,' 'ineffective,' in a threatening tone" while wagging her finger at McDowall.[17]

McDowall further asserts the following, in her offer of proof:

> [O]n or about March 6, 2019, I complained to my UFT chapter leader Ms. Callendar about Ms. Stewart's inappropriate comments, and Ms. Callendar said she would speak to the school principal about the offensive comments. When I followed up with Ms. Callendar, she later told me the principal said "I was loud" when she met with the principal and said there was nothing further she could do.[18]

McDowall further states:

> [S]oon after I went to the union chapter leader Ms. Callendar, and Ms. Callendar complained to the principal on my behalf, by letter dated March 13, 2019, I was summoned by the principal to a disciplinary

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[15] *Id*.
[16] *Id*.
[17] Offer of Proof, ¶ 9; Ex G, annexed to Offer of Proof.
[18] Offer of Proof, ¶ 11.

> meeting to discuss allegedly unprofessional behavior . . . . I had never previously received a disciplinary notice before in my career.[19]

The March 13, 2019 letter indicates that Stewart scheduled a meeting, in Welch-David's office, for March 15, 2019 "to discuss behavior unbecoming a professional," and that McDowall could bring a union representative, if she wished, because the meeting might lead to disciplinary action.[20] The meeting was rescheduled to March 25, 2019 and then to April 9, 2019.[21]

A disciplinary letter, dated May 9, 2019, was issued by Stewart and placed in McDowall's file.[22] The letter states that it memorializes the April 9, 2019 meeting, attended by Stewart, Welch-David, Callendar, and McDowall. Stewart's letter includes her version of the events that occurred on February 25, 26, and March 5, 2019 concerning the parent of a student in McDowall's class, and makes a number of allegations of "behavior unbecoming a professional."[23]

On March 13, 2019, Welch-David informally observed McDowall in her classroom. On March 28, 2019, Welch-David emailed McDowall a "post-observation summary" for the March 13, 2019 observation, indicating that McDowall would be rated "developing" in four components and "ineffective" in the remaining three.[24] Welch-David noted various specific examples of pedagogical issues in her observation of McDowall, including that she did not see evidence of "how students with IEP's and ELL's are instructed differently" from the general education students, and she expressed concerns

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[19] Offer of Proof, ¶ 12.
[20] Ex D, annexed to Offer of Proof.
[21] Offer of Proof, ¶ 15; Ex G, annexed to Offer of Proof.
[22] Ex G, annexed to Offer of Proof.
[23] *Id*.
[24] Offer of Proof, ¶ 13; Ex E, annexed to Offer of Proof.

with McDowall's seeming lack of planning with the paraprofessional because the students in her group "weren't doing anything."[25] She also wrote that:

> Based on the Danielson rubric for effective teaching, several components of the lesson were ineffective. Important elements were missing during instruction: I strongly recommend that you become familiar with the Danielson Rubric for Teaching. This is the rubric in which you are rated on [sic] (emphasis in original).[26]

Welch-David also wrote that she would return in a few days to observe whether McDowall complied with a series of "next steps" and recommended that McDowall see her assistant principal "for resources for rubrics," and "conduct inter-visitation with [McDowall's] colleagues that are using grouping strategies in all of their lessons."[27] In the final observation report, issued on May 8, 2019, Welch-David notes that the "developing" ratings were issued for four components.[28] McDowall was rated "ineffective" in the remaining three components.[29]

On April 5, 2019, McDowall filed the instant improper practice charge, which was amended on July 22, 2019 to add additional allegations of retaliation.[30]

Welch-David issued McDowall a letter, dated April 12, 2019, titled "Warning Attendance Letter," stating that, to date, McDowall had 8 days absent.[31] Welch-David

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[25] Ex E, annexed to Offer of Proof. "IEP" is an acronym for "Individualized Education Plan," which is designed to set goals for meeting a student's specific service needs. *See Board of Educ of the City Sch Dist of the City of New York*, 50 PERB ¶ 3030 (2017). "ELL" refers to "English Language Learner."
[26] Ex E, annexed to Offer of Proof.
[27] *Id*.
[28] Ex I, annexed to Offer of Proof.
[29] *Id.*
[30] Offer of Proof, ¶ 14.
[31] Ex H, annexed to Offer of Proof.

also stated that her absences were becoming excessive, and that if her attendance did not improve, disciplinary action might result.[32]

On May 8, 2019, McDowall and Welch-David both signed the final observation report issued for the March 13, 2019 observation.[33] On May 8, 2019, McDowall filed an APPR complaint with Welch-David about the observation report. Concerning the observation report, McDowall wrote:

> On March 13, 2019, an informal observation was done by the principal, Ms. Sojourner David. I received an ineffective rating which was unfair. For over twenty years all my ratings were highly effective and effective, as well as the one recently done. I would like this ineffective report to be removed because it was unfairly rated.[34]

On May 8, 2019, at 6:53 p.m., Stewart emailed McDowall to inform her that during an observation that she conducted at 1:47 p.m. that day, McDowall ended the lesson too early (at 2 p.m. instead of 2:20 p.m.), and should revise future lesson plans to conclude concurrently with the end of the day. McDowall replied, disputing Stewart's facts. McDowall asserts, in the offer of proof, that the email was "unjustified," but does not explain why.[35]

On May 15, 2019, Stewart observed McDowall's class; she issued her report of the observation on May 28, 2019. McDowall was rated "developing" in seven components and "ineffective" in one component.[36] In the notes annexed to the report, Stewart described examples of what she observed in relation to the various components

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[32] *Id*.
[33] Ex I, annexed to Offer of Proof.
[34] *Id*.
[35] Offer of Proof, ¶ 20; Ex J, annexed to Offer of Proof.
[36] Ex K, annexed to Offer of Proof.

and provided recommendations, including that McDowall should meet with her for support.

On June 5, 2019, Stewart again observed McDowall's class; she issued the observation report on June 7, 2019.[37] McDowall was rated "ineffective" in five components, "developing" in one component, and "N/A" in one component.[38] In the notes annexed to the report, Stewart noted examples of what she observed in relation to the various components and provided recommendations, including that McDowall needed to establish classroom rules and procedures, work on planning and preparation, and become familiar with the Danielson framework.

McDowall filed an APPR appeal of Stewart's June 7, 2019 observation report, writing, in part:

> On June 5, 2019, an observation was done by Ms. Stewart. I received an ineffective rating. Report does not provide any positive feedback. [Assistant Principal] does not consider six ESL students (no services), six IEP (irregular services), and none for at risk . . . . I would like the observation report to be removed because of the inaccuracies in the report and, the composition of the classroom. Students were coming from a class on another floor. The AP did not give the students time to start assigned task.[39]

In the offer of proof, McDowall alleges that:

> I further intend to establish through testimony that these ineffective observations were unjustified as my class was comprised of 29 students, 6 ESL students, and 6 IEP students, without the required assistance of a special education teacher. The ESL students did not receive any services for the entire year, and the 6 IEP students only received services sometimes. The guidance counselor and social worker were assigned to clearing the hallways and performing

[37] Ex L, annexed to Offer of Proof.
[38] *Id*.
[39] *Id*.

> lunchroom duties. Therefore, the at-risk students did not receive the required services as mandated by the Department of Education.[40]

McDowall further asserts that on or about June 17, 2019, "school administration" "encouraged a parent to call 311 to file a complaint" against her.[41] By letter dated June 20, 2019, Welch-David scheduled an appointment to meet on June 25, 2019 to discuss the 311 complaint. The letter further advised that McDowall should bring a union representative because the conference may lead to disciplinary action.[42] At the June 25, 2019 conference, Welch-David accused McDowall of "not helping a child."[43] McDowall alleges that the child's mother's refusal to allow the child to participate in test preparation sessions "would prove that the allegation is false."[44] There is no information in the record about the outcome of this meeting.

DISCUSSION

We first address the District's assertion that McDowall's exceptions are untimely. Section 213.2 of our Rules requires exceptions to be filed within 15 working days after receipt of an ALJ's decision. United States Postal Service records indicate that McDowall received the ALJ's decision on January 6, 2021, meaning that she had until January 28, 2021 to file her exceptions. Her exceptions were mailed, and thus filed, on January 22, 2021, well within 15 working days of January 6, 2021. As a result, we find that McDowall's exceptions are timely and properly before us.

The District also objects to the exceptions as procedurally deficient. Section

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[40] Offer of Proof, ¶ 19.
[41] Offer of Proof, ¶ 24.
[42] Ex N, annexed to Offer of Proof.
[43] Offer of Proof, ¶ 25.
[44] *Id*.

213.2 (b) of our Rules requires that exceptions set forth specifically the questions or policy to which exceptions are taken, identify that part of the decision to which exceptions are taken, designate by page citation the portions of the record relied upon, and state the grounds for exceptions. We agree with the District that the exceptions here are not in technical compliance with our Rules because they fail to set forth specifically the questions or policy to which exceptions are taken or to designate by page citation the portions of the record relied upon. Nevertheless, we find that the exceptions are in what we have deemed to be "satisfactory form under § 213.[2 (b)] of our Rules."[45]

Recently, in *State of New York (SUNY Upstate Medical Center)*, we assumed that the deficiencies of two exceptions warranted their dismissal, but found that the remaining exceptions nonetheless raised the same issues.[46] In so doing, we did not squarely decide upon a standard pursuant to which we intend to treat exceptions that are not in technical compliance with our Rules, as the issues posed were otherwise properly before us. However, a thorough study of our application of Rule 213.2 (b) (and its predecessors) establishes that we have, in certain circumstances, addressed exceptions on the merits even when such exceptions failed to meet all the requirements of the Rule.[47] We have considered such exceptions where the gravamen of the

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[45] *New York State Canal Corp*, 30 PERB ¶ 3070, 3174 (1997). *See also Board of Educ of the City Sch Dist of the City of New York (Smith)*, 51 PERB ¶ 3035, 3151 (2018).
[46] 53 PERB ¶ 3013, 3061 (2020). The deficiencies included the failure to set forth specifically the questions or policy to which exceptions were taken, designate by page citation the portions of the record relied upon, or state the grounds for exceptions.
[47] *See, eg, Town of Smithtown*, 11 PERB ¶ 3099, 3161, n 2 (1978); *City of New Rochelle*, 18 PERB ¶ 3021, 3044 (1985); *New York State Canal Corp*, 30 PERB ¶ 3070, 3174 (1997); *Board of Educ of the City Sch Dist of the City of New York (Cohn)*, 53 PERB ¶ 3011, 3053 (2020).

asserted error was clear; in particular, where we are able to discern the basis of the excepting party's arguments and identify the portions of the ALJ's decision that it disagrees with.[48] However, we will not search through extensive or voluminous records to find the basis for a party's exceptions or to identify evidence which may support a party's arguments.

In applying this standard here, we review McDowall's exceptions because we find that the gravamen of her complaint is clear; that is, we are able to discern the basis of McDowall's arguments and identify the portions of the ALJ's decision that she disagrees with. As always, we limit our review to arguments expressly made in the exceptions.[49]

As we have often held, and recently reaffirmed,

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

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[48] *See Board of Educ of the City School District of the City of New York (Cohn)*, 53 PERB ¶ 3011, at 3053; *New York State Canal Corp*, 30 PERB ¶ 3070, at 3174. Compare *Churchville-Chili Cent Sch Dist*, 51 PERB ¶ 3003, 3010 (2018) (declining to review exceptions where the party appealing did not state the grounds for its exception or present any arguments for finding the ALJ's analysis to be incorrect); *UFT (Pinkard)*, 44 PERB ¶ 3011, 3042-3043 (2011) (dismissing exceptions where Board was "unable to discern an arguably meritorious basis for [Charging Party's] challenge to the ALJ's decision").

While this has been a long-standing PERB policy, parties should not assume that their technically deficient exceptions will always be found to meet this standard and are strongly advised to comply with the letter as well as the spirit of Rule 213.2 (b).

[49] *See, eg, Board of Educ of the City Sch Dist of the City of New York (Cohn)*, 53 PERB ¶ 3011, at 3053; *Village of Saranac Lake*, 51 PERB ¶ 3034, 3148, n 5 (2018), citing *NYCTA*, 47 PERB ¶ 3032, 3009 (2014), quoting *UFT (Pinkard)*, 47 PERB ¶ 3020, 3061 (2014).

> often reaffirmed, the ultimate burden of proof always remains with the charging party.
>
> However, the initial burden of proof to establish a *prima facie* case (an inference of improper motivation) is relatively low . . . [and] a charging party can establish the existence of anti-union animus by statements or by circumstantial evidence . . . .[50]

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

The ALJ found that McDowall engaged in protected activity on March 6, 2019 when she spoke with Callendar, her UFT chapter leader, about Stewart's "inappropriate comments" and when McDowall filed the APPR complaint with Welch-David on June 17, 2019. The ALJ found that McDowall's filing of the charge with PERB cannot serve as the basis of the alleged adverse employment actions because McDowall provided no evidence that Stewart or Welch-David knew of the filing of the charge. As McDowall did not except to this finding, any such exceptions are therefore waived, and this finding is not before us for review.[51]

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[50] *Board of Educ of the City Sch Dist of the City of New York (Cohn)*, 53 PERB ¶ 3011, at 3053, quoting *Board of Educ, City Sch Dist City of New York (Elgalad)*, 52 PERB ¶ 3001, 3004-3005 (2019); *see also Board of Educ, City Sch Dist City of New York (Bagarozzi)*, 51 PERB ¶ 3032, 3140 (2018); *State of New York (Dept of Transportation)*, 50 PERB ¶ 3004, 3021 (2017), citing *State of New York (SUNY)*, 38 PERB ¶ 3019 (2005), *confd sub nom CSEA v NYS Pub Empl Relations Bd*, 35 AD3d 1005, 39 PERB ¶ 7012 (3d Dept 2006).

[51] Rules § 213.2 (b) (4); see, eg, *State of New York (Department of Civil Service)*, 51 PERB ¶ 3027, 3115 (2018); *Village of Westhampton Dunes*, 50 PERB ¶ 3035, 3146, n 8 (2017); *County of Chemung and Chemung County Sheriff*, 50 PERB ¶ 3022, 3090 (2017); *Village of Endicott*, 47 PERB ¶ 3017, 3052, n 5 (2014); *NYCTA (Burke)*, 49 PERB ¶ 3021, 3072, n 4 (2016) (citing cases).

The ALJ went on to find that Welch-David was aware of McDowall's protected activity, but that McDowall failed to allege that Stewart was also aware of her protected activity. McDowall excepts to this finding by the ALJ and asserts that Stewart's knowledge should be presumed because she and Welch-David work together and "shar[e] information."[52] Even were we to impute knowledge of McDowall's protected activity to Stewart, we would nevertheless find that McDowall failed to establish a *prima facie* case of retaliation because she failed to demonstrate that Stewart would not have taken adverse actions against McDowall "but for" McDowall's protected activity.

The alleged adverse actions taken against McDowall include the March 13, May 15, and June 5, 2019 observations and their associated reports and Stewart's May 9, 2019 disciplinary letter. Further, McDowall alleges that she was threatened with disciplinary action on June 20, 2019 and required to attend a disciplinary conference on June 25, 2019. The ALJ found that the April 12, 2019 attendance warning letter and Stewart's May 8, 2019 email were not adverse employment actions and that McDowall's allegation that "school administration encouraged a parent to call 311" and lodge a complaint against her was not supported by specific factual allegations sufficient to make out a claim for a violation of the Act. McDowall does not except to these findings by the ALJ. Any exceptions are therefore waived, and we accept these findings as conclusive.[53]

Fundamentally, McDowall argues that the timing of the adverse actions against her indicate animus towards her protected activity because all of the alleged retaliatory

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[52] Charging Party's Exceptions, at 3.
[53] *See* Rules § 213.2 (b) (4); *State of New York (Department of Civil Service)*, 51 PERB ¶ 3027, at 3115.

action took place after McDowall complained to Callendar of her treatment by Stewart. It is well-established, however, that temporal proximity, even assuming that the time lapse is sufficiently proximate to the adverse actions, alone is insufficient to establish the "but for" element of a *prima facie* case.[54] As the ALJ correctly found, McDowall's allegations concerning the context of the alleged retaliatory actions are not sufficient to show that these actions would not have been taken "but for" McDowall's protected activity. Welch-David's statement to Callendar, that McDowall "was loud," does not, directly or indirectly, imply animus against McDowall for bringing the complaint regarding Stewart. Moreover, as the ALJ noted, McDowall herself presented alternative reasons for her declining performance ratings, namely the composition of her class and lack of resources for her special needs and ELL students.[55] While it appears that Stewart followed through on her March 5th threat to rate McDowall "ineffective," that threat was made before McDowall engaged in any protected activity.

McDowall further asserts that it is "premature" to dismiss her charge before a hearing requiring both sides to present evidence and testimony subject to cross-

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[54] *State of New York (DOCCS)*, 52 PERB ¶ 3003, 3016 (2019); *Lawrence Union Free Sch Dist,* 50 PERB ¶ 3034, 3141-3142 (2017), *Bellmore-Merrick Cent High Sch Dist,* 48 PERB ¶ 3022, 3076 (2015); *Board of Educ of the City Sch Dist of the City of New York (Miller),* 35 PERB ¶ 3002, 3004 (2002); *Roswell Park Cancer Institute,* 34 PERB ¶ 3040, 3096 (2001).

[55] In her exceptions, McDowall states that she "is claiming that in connection with her union activity, she is not being granted the necessary educational materials or support." Charging Party's Exceptions, at 2. Neither the charge, nor the offer of proof, contains such an allegation, and we decline to consider it. Our review is limited to the record developed in front of the ALJ, and we will not consider arguments first raised in exceptions. *See UFT (Konteye)*; 53 PERB ¶ 3010, 3046 (2020); *NYCTA (Burke)*, 52 PERB ¶ 3017, 3072 (2019); *Board of Educ, City Sch Dist of the City of New York (Bagarozzi),* 51 PERB ¶ 3032, at 3139; *CUNY (Javed),* 50 PERB ¶ 3028, 3106 (2017); *NYS Thruway Assn,* 47 PERB ¶ 3032, 3100, n 25 (2014).

examination.[56] We find that the ALJ did not abuse her discretion in requiring an offer of proof and basing her decision on McDowall's statements of what she intended to prove at the hearing. Requiring offers of proof falls within the ALJ's broad discretion to "regulat[e] the course of the proceeding."[57] When a party fails to set forth sufficient facts in an offer of proof that would demonstrate a violation under the Act, an ALJ does not err by declining to proceed to a hearing.[58] Moreover, it is well-established that the charging party bears the burden of establishing a *prima facie* case and cannot rely on cross-examination of the respondent's witnesses to do so.[59] Here, McDowall failed to allege sufficient facts, either in her charge or in her offer of proof, to demonstrate a violation of the Act.

Accordingly, the exceptions are denied, the ALJ's decision is affirmed, and the charge must be, and hereby is, dismissed.

DATED: May 26, 2021
Albany, New York

John F. Wirenius, Chairperson

Anthony Zumbolo, Member

Monte A. Klein, Member

[56] Charging Party's Exceptions, at 3.
[57] Section 212.4 (d) of our Rules.
[58] See *State of New York (Office of Temporary and Disability Assistance)*, 50 PERB ¶ 3009, at 3042, quoting *CSEA (Davitt)*, 45 PERB ¶ 3028, at 3065.
[59] *See, eg, Board of Educ of the City Sch Dist of the City of New York (Cohn)*, 53 PERB ¶ 3011, at 3054; *CWA, Local 1104, Graduate Student Employees Union (Boehme)*, 47 PERB ¶ 3003, 3008 (2014), citing *State of New York (SUNY Buffalo)*, 46 PERB ¶ 3021, 3040 (2013).

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

NEW YORK STATE PUBLIC EMPLOYEES FEDERATION, AFL-CIO,

Charging Party,

CASE NO. U-37459

- and -

STATE OF NEW YORK,

Respondent.

RENEE L. DELGADO, GENERAL COUNSEL (DAVID J. FRIEDMAN of counsel), for Charging Party

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

INTERIM BOARD DECISION AND ORDER

This case comes to us on a motion for leave to file interlocutory exceptions pursuant to § 213.4 of our Rules of Procedure (Rules) to a March 4, 2021 interim decision of an Administrative Law Judge (ALJ). The motion was filed by the State of New York (State) to a decision of the ALJ denying the State's application for a *subpoena duces tecum* to be issued to the New York State Public Employees Federation, AFL-CIO (PEF), pursuant to § 211.3 of our Rules. The ALJ denied the application, finding "at this point, the [State] is requesting pre-hearing discovery, which [] does not exist in PERB proceedings."[1]

MOTION FOR LEAVE TO FILE INTERLOCUTORY EXCEPTIONS

The State argues that extraordinary circumstances exist here warranting the

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[1] Notice of Motion Seeking Leave to File Interlocutory Exceptions, Ex F.

grant of its motion and the Board's review of its exceptions on the merits. The State asserts that the ALJ's ruling constitutes an abuse of discretion and means that the State will be forced to litigate the merits of the improper practice charge without documents that are relevant and material to the State's defenses, resulting in severe prejudice to the State. The State contends that this harm cannot be adequately remedied by review of the ALJ's final decision and order. The State also claims that addressing its exceptions now will prevent "potential unnecessary delays" in the final resolution of the factual and legal issues raised by the improper practice charge.[2] On the merits, the State argues that the ALJ did not apply the proper standard for determining whether to grant a subpoena request.

PEF contends that the State has not demonstrated extraordinary circumstances warranting the grant of its motion. On the merits, PEF supports the ALJ's decision and asserts that the ALJ did not abuse her discretion in denying the State's subpoena request.

For the following reasons, we decline to grant the motion for leave to file interlocutory exceptions.

FACTS

On April 9, 2020, PEF filed an improper practice charge alleging that the State violated §§ 209-a.1 (a) and (d) of the Public Employees' Fair Employment Act (Act) by failing to provide information requested by PEF. The information requested included dental claims data for employees in the Professional, Scientific, and Technical Services (PS&T) unit represented by PEF for a specified time period, as well as demographic

[2] Brief in Support of Motion to File Interlocutory Exceptions, at 2.

information.[3] The charge alleged that PEF needed the data so that its consultant could analyze the benefits currently provided to PS&T employees through EmblemHealth.[4] The charge also stated that PEF needed the requested information "in order to obtain meaningful responses to a possible request for proposal regarding the dental plan."[5]

The State filed an answer asserting that PEF had failed to establish that its information request was reasonable, necessary, and/or not available elsewhere and asserting various other defenses and affirmative defenses.[6]

A hearing on this case was scheduled for March 11, 2021. On February 24, 2021, the State submitted a subpoena request to the ALJ pursuant to § 211 of our Rules. The subpoena request sought three categories of documents:

a. A complete copy of the "Request for Proposal for Self Insured Dental Benefits Administrator or Fully Insured Dental Benefits" issued by the Charging Party.
b. Communications, documents and/or data sent or received by the Charging Party to/from EmblemHealth (a.k.a., Group Health Insurance) in connection with EmblemHealth's bid/proposal for the Charging Party's "Request for Proposal for Self Insured Dental Benefits Administrator or Fully Insured Dental Benefits."
c. The "dental survey" or other communications sent to PS&T Unit members by the Charging Party seeking dental plan coverage data or documents from the PS&T Unit members and their dependents, and the individual responses thereto.[7]

PEF filed a response in which it asserted that the State's subpoena request should be denied in its entirety.[8]

As stated above, the ALJ denied the subpoena request, finding that the State

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[3] Notice of Motion Seeking Leave to File Interlocutory Exceptions, Ex A, ¶ N.
[4] *Id*, at ¶ O.
[5] *Id.*
[6] Notice of Motion Seeking Leave to File Interlocutory Exceptions, Ex B.
[7] *Id*, Ex D.
[8] *Id*, Ex E.

was seeking impermissible pre-hearing discovery.[9] The ALJ also stated that:

> If, during the testimony of witnesses, it becomes clear that specific documents exist and are necessary for the State's defense, production of these documents can be addressed at that time. The Respondent may, at that time, renew this request, and/or request an adjournment of the hearing to seek other avenues of production of specific documents.[10]

DISCUSSION

Section 212.4 (h) of our Rules states, in relevant part, that:

> All motions and rulings made at the hearing shall be part of the record of the proceeding, and unless expressly authorized by the board, shall not be appealed directly to the board, but shall be considered by the board whenever the case is submitted to it for decision.

More broadly, we have required a party to move for leave to file interlocutory exceptions to non-final rulings and decisions. We have often held that leave to file interlocutory exceptions to non-final rulings and decisions, pursuant to § 212.4 of our Rules, will only be granted in situations where the moving party demonstrates extraordinary circumstances.[11]

The reasoning underlying the extraordinary circumstances standard stems from our:

> recognition that it is far more efficient for the Board and the parties to await a final disposition of the merits of a charge before examining interim determinations. The improvident grant of leave results in unnecessary delays in the final resolution of the factual and legal issues raised by an improper practice charge or representation petition. As a result, the Board has consistently rejected the majority

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[9] Notice of Motion Seeking Leave to File Interlocutory Exceptions, Ex F.
[10] *Id*.
[11] *City of Albany*, 53 PERB ¶ 3004, 3011-3012 (2020); *County of Suffolk and Suffolk County Sheriff*, 52 PERB ¶ 3018, 3075 (2019); *NYCTA*, 51 PERB ¶ 3031, 3133 (2018); *State of New York (UCS)*, 50 PERB ¶ 3042, 3169-3170 (2017).

of requests for permission to file [interlocutory] exceptions.[12]

In improper practice cases, we have held that a showing of extraordinary circumstances requires either a showing of "severe prejudice" or that "failure to consider the appeal would result in harm to a party which cannot be remedied by our review of the ALJ's final decision and order."[13]

Pursuant to § 211 of our Rules, an ALJ has the discretion to grant or deny a request for the issuance of subpoenas. The mere denial of such a request, without any additional relevant allegations, does not constitute extraordinary circumstances warranting the grant of leave to file interlocutory exceptions.[14] The extraordinary circumstances alleged by the State here include that not addressing the subpoena at this time will potentially result in further "lengthy, repetitive, and costly litigation at a later time."[15] The State claims that severe prejudice will result if the Board does not review its exceptions at this point. The State asserts that the ALJ will be conducting a hearing based upon incomplete facts if its subpoena is not granted and, further, that the harm caused to the State cannot be remedied by Board review of the ALJ's final decision and order.

We find that the State has not demonstrated extraordinary circumstances

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[12] *City of Albany*, 53 PERB ¶ 3004, at 3012, quoting *Hyde Leadership Charter School*, 47 PERB ¶ 3022, 3063 (2014). *See also Town of Shawangunk*, 29 PERB ¶ 3050, 3115 (1996).

[13] *City of Albany*, 53 PERB ¶ 3004, at 3012, quoting *State of New York (UCS)*, 50 PERB ¶ 3042, at 3170. *See also UFT (Fearon)*, 37 PERB ¶ 3007, 3020 (2004); *State of New York (UCS)*, 36 PERB ¶ 3031, 3090 (2003); *State of New York (Division of Parole)*, 25 PERB ¶ 3007, 3019-3020 (1992), *United Univ Professions*, 19 PERB ¶ 3009, 3016 (1986).

[14] *NYCTA (Burke)*, 50 PERB ¶ 3015, 3061 (2017); *CSEA (Davitt)*, 43 PERB ¶ 3015, 3057 (2011).

[15] Brief in Support of Motion to File Interlocutory Exceptions, at 3.

warranting our grant of its motion for leave to file interlocutory exceptions.

The circumstances here are similar to those in *NYCTA (Burke)*, where we denied a charging party's request to file interlocutory exceptions to an ALJ's denial of his subpoena request.[16] As we held in that case, "[w]e cannot at this stage of the proceedings determine whether [the State] has in fact been [severely] prejudiced, or whether the ALJ's denial of a subpoena might be ameliorated or revisited during a hearing."[17] Indeed, in her letter denying the State's subpoena request, the ALJ stated that if, during the hearing, the need for the requested documents became clear, the State could renew its subpoena request and/or seek an adjournment of the hearing to seek other avenues of production of specific documents. Here, as in *NYCTA (Burke)*, we "cannot undertake the appropriate review at this time."[18] For this reason, we deny the request to file interlocutory exceptions without prejudice to the State's bringing the issues raised therein before the Board in an appeal from a final order of the ALJ.

SO ORDERED.

DATED: May 26, 2021
Albany, New York

John F. Wirenius, Chairperson

Anthony Zumbolo, Member

Monte A. Klein, Member

[16] 50 PERB ¶ 3015 (2017).
[17] *Id,* at 3062.
[18] *Id*.

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

UNIFORMED FIRE FIGHTERS' ASSOCIATION, INC. OF THE CITY OF MOUNT VERNON, LOCAL 107, IAFF, AFL-CIO,

CASE NO. U-35616

Charging Party,

- and -

CITY OF MOUNT VERNON,

Respondent.

ARCHER, BYINGTON, GLENNON & LEVINE LLP (RICHARD S. CORENTHAL of counsel), for Charging Party

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Uniformed Fire Fighters' Association, Inc. of the City of Mount Vernon, Local 107, IAFF, AFL-CIO (Local 107) to a decision of an Administrative Law Judge (ALJ).[1] In her decision, the ALJ dismissed an improper practice charge alleging that the City of Mount Vernon (City) violated §§ 209-a.1 (a) and (d) of the Public Employees' Fair Employment Act (Act) when it unilaterally implemented a procedure for obtaining benefits under New York State General Municipal Law (GML) § 207-a (2). The ALJ found that the change applied only

[1] 53 PERB ¶ 4516 (2020).

to retired employees and was thus not a mandatory subject of bargaining, citing our recent decision in *City of Yonkers*.[2]

EXCEPTIONS

Local 107 filed two exceptions to the ALJ's decision. In its first exception, Local 107 disputes the ALJ's findings that there is no record evidence that the City sent a letter to current employees, or undertook any other action, to advise current employees of a change in their benefits under GML § 207-a (2). Local 107 contends to the contrary that "there is significant, undisputed record evidence that the City advised [Local 107] and its current bargaining unit members of the City's unilateral change to the GML § 207-a (2) procedure, a mandatory subject of bargaining."[3] Specifically, Local 107 asserts that an email sent to Local 107's president, attached to which was a copy of the unilaterally-promulgated GML § 207-a (2) procedures, "constitutes evidence of the City's announcement to the bargaining unit that the City intended to apply its new, unilaterally-implemented procedure, instead of the procedure that the City had negotiated with [Local 107]."[4]

Local 107's second exception insists that the ALJ misinterpreted and misapplied *City of Yonkers* by creating a "bright-line rule" that requires a specific announcement to current employees that their future benefits are being changed. Further, Local 107 avers that the current case is distinguishable from *City of Yonkers* because the

[2] 52 PERB ¶ 3015 (2019). Our decision in *City of Yonkers* is under review pursuant to Article 78 of the Civil Practice Law and Rules. The proceeding is pending before the Appellate Division, Third Department.
[3] Local 107's Exceptions, at 2.
[4] *Id.*

evidence substantiates the City's intent to make changes to the benefits of current employees who may retire during the life of the agreement.

The City did not file any response to Local 107's exceptions.

For the reasons that follow, we reverse the ALJ's decision and find that the City has violated § 209-a.1 (d) of the Act, based on the unrebutted allegations in the charge and the facts adduced at the hearing in this matter.

FACTS

Because, as described below, the ALJ properly exercised her discretion pursuant to § 212.4 of our Rules of Procedure (Rules) in striking the City's answer, the only factual allegations before us are those set forth in Local 107's charge, the referenced admissions in the otherwise dismissed Answer, and the documentary evidence and testimony.

Local 107 and the City are parties to a collective bargaining agreement (CBA), which was in effect from January 1, 2014 to December 31, 2017.[5] The CBA contains a negotiated procedure for benefits under GML § 207-a.[6] That procedure was first agreed to by the parties and incorporated in the CBA on or about November 25, 1991.[7]

Of relevance here, GML § 207-a (1) provides benefits for currently employed firefighters who are injured or taken ill in the line of duty. GML § 207-a (2) provides supplementary benefits to retired, former firefighters who become permanently disabled due to an injury or illness incurred on the job. The ALJ found that the contractual

[5] Charge, ¶ 4.
[6] Charge, ¶ 5.
[7] Charging Party Exs 3 and 4.

procedure by its terms related only to applications for GML § 207-a (1) benefits, not applications for GML § 207-a (2) benefits. Nonetheless, the charge alleges, upon information and belief, that "claims for benefits under GML § 207-a (2) have been processed in the past under the Negotiated 207-a Procedure."[8] This fact is deemed admitted based on the ALJ's ruling striking the City's answer.

On or about December 14, 2016, the City's Fire Commissioner, Theo Beale, sent via e-mail a document entitled "City of Mount Vernon Fire Department Procedure for filing [for] General Municipal Law § 207-a (2) benefits (Procedure Document)," to Kevin Holt, Local 107's President, without any explanation.[9]

According to the admitted allegations of the charge, the procedure sent by Beale "is different than the [n]egotiated 207-a procedure. For example, the City's [u]nilateral 207-a (2) procedure does not provide for arbitration or contain other [negotiated] protections, such as a time deadline by which a decision on applications must be made."[10] The charge expressly alleges that the City has failed to follow the negotiated procedure with respect to applications for GML § 207-a (2) benefits.[11]

Holt testified that Local 107 did not represent retired employees with respect to claims under GML § 207-a (2).[12] Rather, as counsel for Local 107 stated, the gravamen of the charge was that the unilateral change affected by the issuance of the non-

[8] Charge, ¶ 7.
[9] Charge, ¶¶ 10 and 12.
[10] Charge, ¶ 10.
[11] Charge, ¶ 15.
[12] Tr, at 25-26.

negotiated procedure was "prejudicial to the members of the Department represented by the Union in this case."[13]

Holt testified that, prior to December 19, 2016, he had not ever seen the unilaterally promulgated procedure for filing for GML § 207-a (2) benefits.[14] Holt further testified that the City had never given him prior notice that it was implementing this new procedure for filing for GML § 207-a (2) benefits.[15] Holt additionally averred that the City did not negotiate this new procedure with Local 107.[16] Holt asserted under oath that the City had not "[e]ver followed this [new] procedure prior to [Holt's] getting this email and then sending it on to Justin Chase."[17]

DISCUSSION

Initially, we note that the ALJ made certain findings which are not before us for review. Pursuant to § 212.4 (b) of our Rules, "[t]he failure of a party to appear at the hearing may, in the discretion of the administrative law judge, constitute grounds for dismissal of the absent party's pleading and a default determination." In view of the City's failure to appear at the hearing or to offer any excuse or justification for its failure to appear, the ALJ dismissed the City's answer, found that the City admitted the material facts of the charge, and allowed Local 107 to enter testimony and documentary

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[13] Tr, at 14; Charge, ¶¶ 8, 15, and 17 (Asserting rights of "current employees who retire during the life of the collective bargaining agreement" and of "members").
[14] Tr, at 28-29.
[15] Tr, at 29.
[16] *Id*; see also Charge, ¶ 16.
[17] Tr, at 29. Justin Chase was a retired bargaining unit member who was applying for GML § 207-a (2) benefits. Local 107 does not represent employees applying for GML § 207-a (2) benefits. Tr, at 25-26, 28.

evidence to supplement the allegations in the charge.[18] The ALJ found no evidence supporting a violation of § 209-a.1 (a) of the Act. Neither the City nor Local 107 filed any exceptions to these determinations by the ALJ. Any exceptions thereto have therefore been waived, and these findings are not before us for review.[19]

The ALJ found that PERB had jurisdiction over the charge because Local 107 had no arguable source of right in the CBA. The ALJ examined the CBA and found that a review of the negotiated GML § 207-a procedure, as a whole, shows that it is intended to address only the procedures to be followed when employees seek to qualify for, or maintain, benefits under GML § 207-a (1). The ALJ found that several of the substantive provisions, such as the requirement that individuals file a report of an injury or illness within 48 hours of when it initially occurred, the allowance for employees to use their leave accruals pending a determination of their benefits claim, and the repeated references to "employees", could not apply to retirees requesting benefits under GML § 207-a (2). The ALJ also relied on the lack of provisions in the negotiated procedure that are specific to a determination under GML § 207-a (2), such as a requirement that retirees provide statutorily required information. We affirm this finding,

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[18] Tr, 16; Rules, § 212.4 (b); *see, eg*, *State of New York (Dept of Civil Service)*, 51 PERB ¶ 3027, 3115 (2018); *Village of Westhampton Dunes*, 50 PERB ¶ 3035, 3146, n 8 (2017); *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). We note further that, were these issues properly before us, we would find the ALJ providently and appropriately exercised her discretion in ruling as she did.

[19] Rules § 213.2 (b) (4); *see, eg*, *State of New York (Dept of Civil Service)*, 51 PERB ¶ 3027, at 3115.

for the reasons given by the ALJ. Not only has no exception been filed, but the ALJ's finding is supported by the provisions of the CBA.

Against this backdrop, we find Local 107's first exception to be dispositive.[20] We affirm the ALJ's decision to the extent that she dismissed claims for relief solely applicable to retirees. We have long held, and recently reaffirmed in *City of Yonkers*, relied upon by the ALJ, that changes with respect to retirees fall outside the ambit of the Act.[21] Thus, the City did not violate the Act through its actions taken towards Chase, a retired employee. However, we reverse the ALJ's finding as to a lack of jurisdiction over the claim asserted on behalf of current employees who might retire during the life of the CBA, and find that such a claim is properly before us. The ALJ's conclusion is predicated on her determination that "[t]here is no record evidence that the City sent a letter to current employees, or undertook any other action, to advise current employees of a change in their benefits under GML § 207-a (2)."[22]

That holding, squarely controverted by Local 107 in its exceptions, is the basis upon which we find that the decision must be reversed and relief awarded. We find that the record evidence, coupled with the uncontested allegations of the effect of the emailing of the non-negotiated procedure, was sufficient to establish that the City undertook action to advise current employees of a change in the procedure for employees to apply for benefits under GML § 207-a (2) after they retired.

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[20] *See City of Yonkers*, 52 PERB ¶ 3015, at 3067; *Town of Brookhaven*, 30 PERB ¶ 3040 (1997).
[21] 52 PERB ¶ 3015, 3068 (2019), citing *Aeneas McDonald Police Benevolent Assn v City of Geneva*, 92 NY2d 326, 330-331 (1998) (*Aeneas McDonald*).
[22] 53 PERB ¶ 4516, at 4560.

With respect to Local 107's second exception, we find that the current case is distinguishable from *City of Yonkers*.[23] In *City of Yonkers*, we examined whether letters sent to retirees were sufficient to establish notice of a change to a past practice. There was no notification to current employees of any change. In the current case, as explained above, the City did notify current employees of a change to their post-retirement benefits.

Accordingly, we reverse the ALJ's dismissal of the charge on the ground of insufficiency with regard to communication with either Local 107 or with the employees it represents. Post-retirement monetary benefits, including procedures for the grant of GML § 207-a (2) benefits, are mandatory subjects of bargaining that cannot be unilaterally altered for current employees who may retire during the life of the CBA.[24] We find that the announcement violated the rights solely of employees who may have retired between the date of the announcement and the expiration of the CBA; that is, between December 14, 2016 and December 31, 2017.

Accordingly, and for the reasons stated above, we reverse the ALJ's dismissal of the charge and conclude that the City violated § 209-a.1 (d) of the Act when it announced changes to the procedure for applying for benefits pursuant to

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[23] 52 PERB ¶ 3015 (2019).

[24] *City of Albany*, 53 PERB ¶ 3009, 3038 (2020); *City of Yonkers*, 52 PERB ¶ 3015, 3067 (2019); *Chenango Forks Cent Sch Dist*, 40 PERB ¶ 3012, 3048 (2007), *on remand* 42 PERB ¶ 4527 (2009), *affd* 43 PERB ¶ 3017 (2010), *confd sub nom Chenango Forks Cent Sch Dist v NYS Pub Empl Relations Bd*, 92 AD3d 1479, 45 PERB ¶ 7006 (3d Dept 2012), *affd* 21 NY3d 255, 46 PERB ¶ 7008 (2013) (*Chenango Forks*); *Incorporated Village of Lynbrook*, 10 PERB ¶ 3065, 3115-3116 (1977); *Aeneas McDonald*, 92 NY2d 326, at 330-331; *Myers v City of Schenectady*, 244 AD2d 845, 846-847 (3d Dept 1997), *lv den* 91 NY2d 812 (1998).

GML § 207-a (2). We order the City to rescind the announcement, the same relief we granted in *Chenango Forks*, a case where a public employer similarly unilaterally announced changes to employees' post-retirement benefits.[25]

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

1. Rescind the December 14, 2016 announcement to employees changing the procedures for applying for GML § 207-a (2) benefits;
2. Sign and post the attached notice at all physical and electronic locations customarily used by it to post notices to unit employees.

DATED: May 26, 2021
Albany, New York

John F. Wirenius, Chairperson

Anthony Zumbolo, Member

Monte A. Klein, Member

[25] 43 PERB ¶ 3017, at 3069.

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 City of Mount Vernon (City) in the unit represented by Uniformed Fire Fighters' Association, Inc. of the City of Mount Vernon, Local 107, IAFF, AFL-CIO that the City will:

rescind the December 14, 2016 announcement to employees changing the procedures for applying for GML § 207-a (2) benefits.

Dated . . . . . .

By . . . . . .
on behalf of the CITY OF MOUNT VERNON

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.