STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

VALHALLA TEACHERS' ASSOCIATION,

Petitioner,

CASE NO. CP-1593

- and -

VALHALLA UNION FREE SCHOOL DISTRICT,

Employer.

THOMAS PERETTI, for Petitioner

SHAW, PERELSON, MAY & LAMBERT, LLP (DAVID S. SHAW and ELIZABETH E. LEDKOVSKY of counsel), for Employer

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Valhalla Union Free School District (District) to a decision of an Administrative Law Judge (ALJ) granting a unit placement petition filed by the Valhalla Teachers' Association (Association).[1] In granting the petition, the ALJ placed Leave Replacement Teachers (LRTs) and Long-Term Daily Assignment Substitutes (Daily Assignment substitutes) who are certificated and appointed by the District for a term of four weeks or more into the unit of District employees represented by the Association.

EXCEPTIONS

The District filed one exception, with multiple subparts, to the ALJ's decision. The District asserts that the employees in the Daily Assignment substitute titles lack the

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[1] 53 PERB ¶ 4009 (2020).

requisite regularity and continuity to warrant placement in the Association's bargaining unit. Citing Education Law (EL) § 1709 (16), the District contends that the ALJ's decision is inconsistent with New York's public policy vesting school boards with the authority and duty to adopt policies they deem best to meet their statutory responsibilities of oversight and stewardship of their school districts. The District also claims that there is insufficient community of interest between employees in the Daily Assignment substitute title and other employees in the Association's bargaining unit to warrant unit placement of the Daily Assignment substitute title into the bargaining unit.

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

For the reasons that follow, we modify the ALJ's decision and place LRTs in the unit represented by the Association. We also place all Daily Assignment substitutes who work for more than 40 days into the unit.

FACTS

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

The Association represents a unit of "all professional certificated teacher personnel" of the District.[2]

The District's policy concerning temporary personnel is set forth in writing, and states that the needs of the District will dictate whether temporary appointments are necessary, and that "the terms of these appointments will be defined by the Board on a

[2] Joint Ex 1, at 1. The Collective Bargaining Agreement (CBA) was in effect from July 1, 2014 through June 30, 2018. The CBA has been extended, by the parties' agreement, through June 30, 2021. *Id*.

case-by-case basis."[3] The policy addresses substitute teachers, as follows:

> The Superintendent will employ appropriately qualified substitute teachers. A substitute teacher is employed in the place of a regularly appointed teacher who is absent, but is expected to return.
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> The Board will annually establish the rate for per diem substitute teachers.
>
> New York State recognizes the following three categories of substitute teachers:
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> a) Substitutes with valid NYS teaching certificates or certificates of qualification. A substitute teacher in this category may be employed in any capacity, for any number of days, in any number of school districts. However, if employed for more than 40 days by a school district in any given school year, the substitute teacher must be employed in the area for which they are certified.
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> b) Substitutes without a valid NYS certificate, but who are completing collegiate study toward NYS certification at the rate of not less than six semester hours per year. A substitute teacher in this category may be employed in any capacity, for any number of days, in any number of school districts. However, if employed for more than 40 days by a school district in any given school year, the substitute teacher must be employed in the area for which they are seeking certification.
>
> c) Substitutes without a NYS valid certificate and who are not working toward NYS certification. A substitute teacher in this category may be employed in any capacity, but is limited to 40 days in one school district in any school year.
>
> Education Law § 3023
> 8 NYCRR §§ 80-1.5 and 80-5.4[4]

The District recognizes three types of substitute teachers. Per diem substitute teachers substitute for permanent teachers for fewer than 16 days. The Association

[3] Petitioner's Ex 1.
[4] *Id*. (emphasis in original)

does not seek to represent per diem substitutes in this proceeding.[5] Daily Assignment substitutes have a term of appointment that lasts from 16 to 88 days. The LRTs, also referred to as Long-Term Substitutes, are appointed by resolution of the Board of Education (BOE) for terms greater than 88 days.[6] A substitute hired as a Daily Assignment substitute will be converted to a LRT if they work more than 88 days.[7] The ALJ found that LRTs should be included in the unit. There are no exceptions to this finding, and LRTs will not be discussed further.

Daily Assignment substitutes are appointed by BOE resolution, by name. An example of a BOE appointment was introduced for a Daily Assignment substitute named Vera Allen. On September 4, 2018, the resolution was unanimously approved, as follows:

> RESOLVED, upon the recommendation of the Superintendent of Schools, the board appoints Vera Allen (replacing Julie Gencarelli) as a Long Term Assignment Substitute Teacher at a rate of $177.00 per day (assignment 16 – 88 days) assigned to the Valhalla Middle School effective September 1, 2018 through a date not to exceed December 31, 2018.[8]

Daily Assignment substitutes are expected to replace a teacher and perform the same tasks as any permanent teacher, such as teaching, lesson planning and grading, meeting parents, and attending faculty meetings.[9] Daily Assignment substitutes are

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[5] Tr, at 6 (ALJ).
[6] The maximum teacher work year contains 186 days, and the minimum work year contains 183 days. Joint Ex 1, at 12.
[7] Upon being converted to a LRT, the substitute receives full benefits, retroactive to her date of hire. Full benefits included health insurance, leave accruals, and being compensated for the days that she did not work while under the Daily Assignment substitute appointment and extensions.
[8] Joint Ex 2.
[9] Tr, at 17 (Steven Reich, retired history teacher and former president of Association); 47 (Howe).

required to undertake all of the office duties of the teacher they are replacing. Examples of "office duties" are lunch or hall duty.[10] It is not expected that Daily Assignment substitutes attend nighttime parent-teacher conferences, concerts, or sporting events.[11] However, if they did choose to do so, "they can chaperone those events for which they would be paid additional compensation . . . and they have equal opportunity to [sic] those assignments, as anyone else does in the building."[12] The rate of pay for chaperoning an event is "based on the CBA."[13]

Employer Exhibit 1 consists of the "Valhalla UFSD Substitute Scale" for the 2018-2019 and 2019-2020 school years. Christina Howe, interim superintendent for the District, testified that the document was recently created, due to the fact that "[b]ecause the titles are similar, there was some confusion with the nomenclature so we decided to put it in a chart that would delineate it more clearly for understanding."[14] Daily Assignment substitutes are paid a daily rate for days worked within a two-week period, on a two-week lag, and do not receive benefits. Permanent teachers are paid for a two-week period with no time lag and receive full benefits.

Howe testified that possession of a teaching certificate is preferred, but not required, for appointment to a Daily Assignment substitute position.[15] The preference exists because the District believes, as Howe testified, that it is always best to have a substitute who is familiar with the subject area that he or she will be covering for

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[10] Tr, at 47-48 (Howe).
[11] Tr, at 71-72 (Howe); 97-98 (Kevin McLeod, Assistant Superintendent for Business).
[12] Tr, at 72 (Howe).
[13] Tr, at 85 (Howe).
[14] Tr, at 44 (Howe).
[15] Tr, at 68, 76 (Howe).

continuity for the students and lesson planning purposes.[16]

There is no bar to a Daily Assignment substitute being appointed to another, subsequent Daily Assignment substitute position, presuming the District has a need. Daily Assignment substitutes can also be hired for more than one leave coverage per school year; however, a break in service will prevent them from being converted into an LRT. When asked what constitutes a break in service, Howe stated “a day, a week, whatever . . . .”[17] Howe testified that if a Daily Assignment substitute exceeds 88 days worked cumulatively during one school year to cover multiple “vastly different assignments,” the District would “probably” consider them as new, separate assignments, implying that said Daily Assignment substitute would be ineligible for conversion to an LRT.[18] However, to her knowledge, such a situation has not yet arisen.

None of the three categories of substitute teachers are subject to the District’s performance evaluation system, though school administrators may observe substitutes’ teaching in the course of their daily rounds.

The number of Daily Assignment substitutes employed by the District varies from year to year. In the 2010-2011 school year (when the title was first created) there were four Daily Assignment substitutes, there were seven in 2011-2012, two in each school year from 2012-2013 through 2016-2017, four Daily Assignment substitutes in 2017-2018, and in 2018-2019, there were five Daily Assignment substitutes employed by the

[16] Tr, at 68 (Howe).
[17] Tr, at 88 (Howe).
[18] Tr, at 89 (Howe).

District.[19]

DISCUSSION

The ALJ dismissed the unit clarification portion of the petition, finding that the Daily Assignment substitute and LRT titles were not already included in the unit. There are no exceptions to this finding. There are also no exceptions to the ALJ's finding that LRTs should be included in the unit.[20] Any exceptions are therefore waived, and these findings are not before us for review.[21]

The sole issue to be reviewed by us is the ALJ's placement of certificated Daily Assignment substitutes who were appointed for a term of four weeks or more into the unit of permanent teachers. Our primary decision addressing the status of long-term substitute teachers is *Weedsport Central School District* & *Union Springs Central School District* (*Weedsport*).[22] In *Weedsport*, we found that the criteria for determining seasonal employment was inapplicable to long-term temporary positions. Instead, we found that "the long-term substitutes are hired for specific periods of time, determined in advance by the employer, and these periods are themselves of sufficient length to measure the continuity of employment necessary to warrant coverage under the Act."[23] The length of employment for the long-term substitutes at issue in *Weedsport* ranged

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[19] Employer Ex 3.
[20] Indeed, the parties have historically treated LRTs as being included in the unit.
[21] Rules § 213.2 (b) (4); *see, eg*, *City of Niagara Falls*, 54 PERB ¶ 3003, 3018, n 35 (2021); *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).
[22] 12 PERB ¶ 3004 (1979). The two cases were consolidated for decision by the Board.
[23] *Id*, at 3006.

from two months to 20 months.[24]

Here, the length of employment of Daily Assignment substitutes ranges from approximately three weeks (16 days) to over four months (88 days, or approximately 17 ½ weeks), assuming no holidays.

Thus, the question presented is whether employment ranging from 16 to 88 days is "of sufficient length to measure the continuity of employment necessary to warrant coverage under the Act."[25]

We find that Daily Assignment substitutes who are employed for more than forty days are public employees pursuant to § 201.7 of the Act. Pursuant to EL § 3023, Daily Assignment substitutes employed for 40 days or more will either possess a valid New York State teaching certificate in the area in which they are teaching, or they will be completing collegiate study toward NYS certification. While not controlling here, the commitment of teachers to their employment is demonstrated by their compliance with

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[24] 11 PERB ¶ 4064, 4103 (1978). In *Union Springs Cent Sch Dist*, the length of employment ranged from less than one year to two full school years. 11 PERB ¶ 4065, 4104 (1978).

[25] *Weedsport*, 12 PERB ¶ 3004, at 3006.

Section 201.7 (d) of the Act provides, in relevant part, that:

> A substitute teacher . . . who has received a reasonable assurance of continuing employment . . . which is sufficient to disqualify the substitute teacher . . . from receiving unemployment insurance benefits shall be deemed to be an employee of the school district or board of cooperative educational services that has furnished such reasonable assurance of continuing employment.

Neither party argues that § 201.7 (d) of the Act applies to Daily Assignment substitutes, and no evidence was introduced regarding whether employees in the Daily Assignment substitute title received a reasonable assurance of continuing employment. Therefore, Daily Assignment substitutes cannot be found to be public employees by virtue of § 201.7 (d) of the Act.

these mandates of the EL, and thus we find more than 40 days to be the appropriate measure of the necessary continuity of employment. Requiring that Daily Assignment substitutes be employed for more than 40 days to be considered employees is also consistent with *Weedsport*, where substitutes were employed for at least two months (i.e. 40 working days).[26]

In the instant case, Daily Assignment substitutes work the same schedule as full-time teachers when they are employed by the District. They perform the same tasks, with the minor difference of not being required to attend evening parent-teacher conferences. Daily Assignment substitutes are expected to teach, lesson plan and grade, meet parents, and attend faculty meetings. In essence, Daily Assignment substitutes are the functional equivalent of full-time, permanent teachers for whatever period they are hired for. Daily Assignment substitutes are hired for specific periods of time, determined in advance by the District, as in *Weedsport*.[27] We find that a period of more than 40 days is sufficient to establish "the continuity of employment necessary to warrant coverage under the Act."

Because of the nature of employment for Daily Assignment substitutes, a multifactor balancing test will not illuminate the question before us. We are required to apply a rule which, although it could be deemed to be over - or under-inclusive in given circumstances, provides greater clarity than a multifactor standard would.[28]

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[26] 11 PERB ¶ 4064, at 4103.
[27] We note that the period of time Daily Assignment substitutes are hired for are sometimes extended by the District.
[28] *See State of NY (DOCCS)*, 50 PERB ¶ 3031, 3122 (2017); citing Adam I. Muchmore, "Jurisdictional Standards (And Rules)," 46 Vand. J. Transnat'l L. 171, 176-183 (2013) (explaining distinction between a standard and a rule); HLA Hart, *The Concept of Law* 128-30 (Oxford Press 1961) (same).

We find that the Daily Assignment substitute position also evinces the regularity of employment necessary to find public employee status under the Act. Although the number of Daily Assignment substitutes varies from year to year, the District's continued need for the position is demonstrated by the fact that there have always been at least two Daily Assignment substitutes each year since the District created the title in 2010.

We affirm the ALJ's finding that Daily Assignment substitutes share a sufficient community of interest to be included within the unit represented by the Association. Daily Assignment substitutes share a strong occupational community of interest with permanent teachers. As explained above, Daily Assignment substitutes perform all the same tasks as permanent teachers with the exception of working at evening events such as parent-teacher conferences. We agree with the ALJ that this is a minor difference that does not overcome the otherwise strong occupational community of interest. Moreover, Daily Assignment substitutes work in the same location as permanent teachers, and there is no showing of any actual or potential conflict of interest between Daily Assignment substitutes and permanent teachers.

Although Daily Assignment substitutes are paid a per diem rate with a lag of two weeks, unlike permanent teachers, and are not entitled to the range of benefits embodied in the CBA between the parties, these differences in terms and conditions of employment are insufficient to overcome the strong occupational community of interest between Daily Assignment substitutes and permanent teachers.[29]

The District argues that including Daily Assignment substitutes in a unit of

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[29] *Unatego Cent Sch Dist*, 15 PERB ¶ 3097, 3149 (1982) ("performance of the same assignment over an extended period of time makes it unnecessary to consider the differences in . . . benefits").

certificated, salaried professionals is inconsistent with New York's public policy, embodied in the Education Law, vesting school boards with "the authority and duty to adopt policies they deem best to meet their statutory responsibilities of oversight and stewardship of their school districts, including those related to the employment of necessary professional staff."[30] We see no conflict, however, between the Education Law and the District's requirements under the Act. The District is free to impose hiring requirements and to hire the employees that it chooses; it simply must treat Daily Assignment substitutes that work for more than 40 days as employees under the Act. We note that these Daily Assignment substitutes will either be certificated or will be working towards their certificate. Contrary to the District's argument, our decision does not require that Daily Assignment substitutes receive the "rate of pay or the rich benefits" afforded to LRTs or permanent teachers.[31] Our decision simply requires that the District bargain with the Association about the terms and conditions of employment for Daily Assignment substitutes, as it must for all employees in the unit.

Accordingly, we modify the ALJ's decision and place Daily Assignment substitutes who are employed by the District for more than 40 days into the bargaining unit represented by the Association. We affirm the ALJ's finding that the addition of Daily Assignment substitutes and LRTs to the unit does not require an election or other proof of majority status, as the addition of these employees constitutes an increase of less than thirty percent to the unit.

[30] District's Exceptions, at 3.
[31] *Id*.

SO ORDERED.

DATED: October 13, 2021
Albany, New York

John F. Wirenius, Chair

Anthony Zumbolo, Member

Rosemary A. Townley, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

JESSICA PETERSON,

Charging Party, **CASE NO. U-36036**

- 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 (JESSICA W. FAITH of counsel), for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by Jessica Peterson to a decision of an Administrative Law Judge (ALJ) dismissing Peterson'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) by bringing disciplinary charges against her, reassigning her to a central office, and treating her in a disparate manner during her reassignment.[1]

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[1] 54 PERB ¶ 4517 (2021).

EXCEPTIONS

Peterson filed 15 exceptions to the ALJ's decision. One cluster of exceptions claim that the ALJ ignored or discounted key evidence from the hearing.[2] Peterson also asserts that the ALJ should have drawn an adverse inference based on the failure of Principal Joseph Scarmato to testify and that the ALJ erred in crediting the testimony of Human Resources Director, Nikki Shakespeare, and Reassignment Manager, Colin Caldwell.[3] Peterson also contends that the ALJ erred by finding that her removal from the table of organization was not an act of retaliation based on animus towards her protected activity.[4] Finally, Peterson objects to the ALJ's refusal to allow her to amend her charge based on ongoing retaliation.[5]

The District claims that Peterson's exceptions are deficient because they fail to comply with § 213.2 of our Rules of Procedure (Rules). On the merits, the District supports the ALJ's decision and contends that no basis has been demonstrated for reversal or remand.

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

FACTS

The facts are set forth fully in the ALJ's decision and are repeated here only as necessary to decide the exceptions. Jessica Peterson has been employed by the District since 1995, teaching English at the high school level. During most of her employment with the District, Peterson worked at Tottenville High School (Tottenville).

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[2] Exceptions Nos 1-3, 5, 8-9, 11, 15.
[3] Exceptions Nos 4, 6, 10, 12, 13.
[4] Exception No 7.
[5] Exception No 14.

In June 2015, Peterson was elected to serve as the United Federation of Teachers (UFT) Chapter Leader of Tottenville, and she served in this capacity until June of 2018. In her role as chapter leader, Peterson was actively engaged in union activity, filing numerous grievances, some of which went to arbitration and received attention from union-related publications. She also represented Tottenville UFT members at monthly Consultation Meetings with school administrators, including Principal Scarmato.[6] Peterson testified that she and Scarmato had a tense relationship.[7]

Chancellor's Regulation A-421, entitled Pupil Behavior and Discipline—Verbal Abuse, defines as verbal abuse as:

> Language . . . about or directed toward students, that:
>
> 1) Belittles, embarrasses or subjects students to ridicule; or
>
> 2) Has, or would have the effect of unreasonably and substantially interfering with a student's educational performance or ability to participate in or benefit from an educational program, school-sponsored activity or any other aspect of a student's education; or
>
> 3) Has or would have the effect of unreasonably and substantially interfering with a student's mental, emotional, or physical well-being; or
>
> 4) Reasonably causes or would reasonably be expected to cause a student to fear for his/her physical safety;
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> 5) Reasonably causes or would reasonably be expected to cause physical injury or emotional harm to a student.[8]

Chancellor's Regulation A-421(IV)(B) includes the following information regarding

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[6] Scarmato was appointed principal at Tottenville in 2015.
[7] Scarmato did not testify.
[8] Charging Party's Ex 21.

the obligations of a principal to report an allegation of verbal abuse:

> The principal . . . must immediately report all allegations of verbal abuse of students by DOE employees . . . to [the Office of Special Investigations] within one school day of learning of the allegation by entering the information in the DOE's Online Occurrence Reporting System ("OORS").[9]

The record includes a memorandum of understanding between the UFT and the District, setting forth terms governing the reassignment of employees charged with misconduct. In pertinent part, it states that:

> Pending investigation of possible misconduct and completion of the § 3020-a [of the Education Law] hearing, the DOE may reassign an employee only to (i) a DOE administrative office to do work consistent with law . . . or (ii) an administrative assignment within his or her school program consisting of Professional or Administrative Activities.[10]

In October of 2016, Peterson was informed that the Office of Special Investigations (OSI) was conducting an investigation into an allegation of employee misconduct filed against her.[11] In December of 2016, Scarmato met with Peterson regarding his investigation of an allegation that she violated Chancellor's Regulation A-421, which concerns verbal abuse of students.[12] In February of 2017, Scarmato met with Peterson regarding alleged misconduct, specifically that she took photographs of students.[13]

In a report dated June 22, 2017, Regina Loughran, First Deputy Commissioner of the Special Commissioner of Investigation (SCI) for the District, set forth findings that

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[9] *Id*.
[10] Respondent's Ex 8.
[11] Charging Party's Ex 6.
[12] Charging Party's Ex 7A.
[13] Charging Party's Ex 9.

Peterson "submitted a false document which increased the [number of] work accommodations she was approved to receive, from three to six."[14] The report states that the investigation at issue was initiated when Peterson complained to the District's Office of Equal Opportunity and Diversity Management that Scarmato refused to honor an accommodation she received in 2007. The report also contains a recommendation that disciplinary action be taken against Peterson, including termination.[15]

By letter dated June 23, 2017, Katherine G. Rodi, Director of the District's Office of Employee Relations, notified Peterson that she was the subject of Education Law (EL) § 3020-a charges. The letter stated that Peterson was being reassigned from her position as a teacher and directed her to report to the Staten Island Central Office. The letter also stated that Peterson could not report to any DOE school without prior written permission.[16] These charges concerned allegations that she engaged in "verbal abuse, inappropriate comments, neglect of duty and conduct unbecoming her position."[17]

On June 27, 2017, Peterson met with Scarmato to discuss the findings of the SCI investigation.[18] Scarmato issued a letter to file, dated June 28, 2017, which memorializes the meeting held on June 27, 2017. The letter to file notes Scarmato's findings, which he stated as follows:

> Based on our meeting, a review of the attached SCI report, my review of the documentation regarding your [medical] accommodation in 2007, and your responses at our meeting, I conclude that you submitted false documentation which increased your work accommodations which you were

[14] Charging Party's Ex 12.
[15] *Id*.
[16] Charging Party's Exs 22, 23.
[17] Charging Party's Ex 15A.
[18] Charging Party's Exs 10A, 13.

approved to receive in 2007 from three (3) to six (6).[19]

On September 18, 2017, Peterson was informed of additional charges under EL § 3020-a, regarding allegations that she submitted a forged document to the District in order to obtain accommodations to which she was not entitled.[20]

A hearing was held on the EL § 3020-a charges in January through March of 2018. In an award issued on April 24, 2018, the EL § 3020-a hearing officer found Peterson guilty of some of the specifications, specifically:

> On or about and between February 29, 2016 and March 4, 2016 . . . [Peterson] called a student "bat shit crazy" for going on vacation.
>
> On or about March of 2016, [Peterson] stated to one or more students . . . that it is bat shit crazy if they did not begin a project yet.
>
> On or about August 22, 2016, [Peterson] intentionally created and/or possessed and submitted a forged document containing false information to Principal Joseph Scarmato with the intent to defraud the Department of Education by improperly obtaining medical accommodations that [Peterson] was not entitled to namely: secured locked cabinets to avoid carrying teaching/testing materials and or supplies; to not share a classroom with other teachers; delivery of all required proctoring materials for exams; to avoid hall passing; not subjecting accommodations to annual review.
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> On or about October 17, 2016, [Peterson] intentionally created and/or possessed and submitted a forged document containing false information to the Medical Division of the Department of Education with the intent to defraud the Department of Education by improperly obtaining medical accommodations that [Peterson] was not entitled to namely: secured locked cabinets to avoid carrying teaching/testing materials and or supplies; to not share a classroom with other teachers; delivery of all required proctoring materials

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[19] Charging Party's Ex 13.
[20] Charging Party's Exs 15A, 17.

> for exams; to avoid hall passing; not subjecting accommodations to annual review.[21]

The hearing officer imposed a penalty of $20,000, stating that "given the extremely serious nature of the allegations of which the Respondent has been found guilty concerning submission of a falsified document, a very serious penalty must issue." The hearing officer found Peterson not guilty of specifications alleging that Peterson caused students to believe she was taking photographs of them with a cell phone.

When Peterson was reassigned out of Tottenville to the Staten Island Central Office, she was assigned to a room without a computer or internet access, which left her unable to access her email and tend to her duties as Tottenville's UFT chapter leader.

Because Peterson was not permitted to enter Tottenville, she used her cell phone to participate in union meetings, such as the monthly Consultation Meetings. Peterson was assigned to "multiple" rooms while working from the Staten Island Central Office. Peterson complained that in her second room assignment there were several administrators also working in that room, about which she testified, "I felt almost like my movements that anything that I said or anything that I did was potentially being watched."[22] While she was reassigned, Peterson was provided with two periods per day to conduct her business as chapter leader.

Regarding her communications with Tottenville's administration in her capacity as UFT chapter leader, after she was reassigned Peterson was required to conduct all UFT-related business with Tottenville employees other than Scarmato, such as

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[21] Respondent's Motion to Dismiss, Ex B, at 3-4.
[22] Tr, at 778.

assistant principals. While excluded from the school building, Peterson filed grievances, including a grievance alleging that Scarmato had displayed anti-union animus and failed to consult with her as UFT chapter leader.[23] Peterson also testified that while she was reassigned from Tottenville, she was removed from the school's table of organization.[24]

Shakespeare testified that she became familiar with Peterson when she was assigned to the Staten Island Central Office, and that prior to that time, she had never discussed Peterson with Scarmato. Shakespeare also testified that she communicated to the UFT that Peterson, as chapter leader, was granted two periods a day to perform union business. She further stated that the District must provide reassigned staff with "[s]omewhere that they can sit," but it is not required to provide them with computer, telephone, or internet access.[25] However, she noted that staff are permitted to bring laptops and cell phones when they are on reassignment. She also noted that the Staten Island Central Office has a computer lab, and that Peterson was free to use it. She affirmed that Peterson would have been able to access her District email within the computer lab. Shakespeare testified that she told UFT Representative, Donna Coppola, that Peterson could use the computer lab to perform her chapter leader activities and that Coppola voiced no objection and did not request additional accommodations for Peterson.

Caldwell testified that reassigned staff may not return to their school without first receiving written authorization from his office. Caldwell also stated that the District's HR system tracks employees allocated to each school location using a "table of

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[23] Tr, at 420-21; Charging Party's Ex 20.
[24] Tr, at 773.
[25] Tr, at 829.

organization," and that employees are removed from a school's table of organization while they are reassigned from that school.[26]

DISCUSSION

We first address the District's claim that Peterson's exceptions are deficient under § 213.2 of our Rules. We agree that many of Peterson'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. The failure to identify the portion of the record relied upon is particularly problematic in a case such as this, where nine days of hearing were held, generating over 1,300 pages of testimony. However, as we recently reaffirmed in *State of New York (Office of Temporary and Disability Assistance)*,[27] we will consider exceptions where the gravamen of the asserted error is clear; in particular, where we are able to discern the basis of the excepting party's arguments and identify the portions of the ALJ's decision that it disagrees with. Peterson's exceptions here meet this standard.

We do not consider facts raised in Peterson's exceptions that are not part of the record before the ALJ. This includes assertions about the testimony at Peterson's EL § 3020-a hearing and claims that Shakespeare was acting at Scarmato's "direction."[28] These asserted "facts" were not established by the testimony and exhibits before the ALJ,

[26] Tr, at 1263.
[27] 54 PERB ¶ 3011 (2021).
[28] *See* Exceptions 8, at 3; 10 and 12, at 4. *See also* Exception 11, at 4, alleging that Scarmato "coerced" a student into writing a false allegation against Peterson.

and we will not consider them.[29] Similarly, we do not consider the conclusory allegations made in Peterson's exceptions, such as that the EL § 3020-a disciplinary charges "would not have been brought against Peterson if she had not been a successful UFT chapter leader . . . ."[30] Such "conclusory statements cannot substitute for proof."[31]

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.[32] As we have often reaffirmed, the ultimate burden of proof always remains with the charging party.[33]

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

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[29] Our review is limited to the record developed in front of the ALJ. *See Board of Educ of the City Sch Dist of the City of New York (McDowall)*, 54 PERB ¶ 3012, 3038 n 55 (2021); *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, 3139 (2018); *CUNY (Javed),* 50 PERB ¶ 3028, 3106 (2017); *NYS Thruway Assn,* 47 PERB ¶ 3032, 3100, n 25 (2014).
[30] Exception 3, at 2.
[31] *DC 37 (Fonseca)*, 50 PERB ¶ 3038, 3161 (2017).
[32] *State of New York (State University of New York – Upstate Medical University)*, 53 PERB ¶ 3013, 3061 (2020); *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).
[33] *Id*.

not improperly motivated. 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.[34]

The alleged adverse actions here include issuing a letter to Peterson's file regarding the results of the SCI investigation into her medical accommodation, bringing disciplinary charges against Peterson for the allegations concerning her medical accommodation as well as her use of inappropriate language, reassigning Peterson to a central office, and treating her in a disparate manner during her reassignment.[35]

With respect to the allegations concerning Peterson's discipline for falsifying documents in connection with her medical accommodation, the ALJ found that, even assuming that Scarmato's questions about the medical accommodations were improperly motivated (an act that took place prior to the relevant period of limitations), it does not necessarily follow that the actions taken by the District thereafter were retaliatory themselves. We affirm the ALJ's finding that the penalty to Peterson as a result of the charges brought by the District relating to the medical accommodations are "directly attributable to Peterson's decision to send a forged document containing false information to her school principal . . . in order to obtain medical accommodations to which she was

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[34] *State of New York (State University of New York – Upstate Medical University)*, 53 PERB ¶ 3013, at 3062; *Catskill Housing Auth (Biegel)*, 49 PERB ¶ 3025, 3080 (2016); *Bellmore-Merrick Cent Sch Dist*, 48 PERB ¶ 3022, 3076 (2015); *UFT (Jenkins),* 41 PERB ¶ 3007, 3043 (2008), *confd sub nom, Jenkins v NYS Pub Empl Relations Bd,* 41 PERB ¶ 7007 (Sup Ct New York County 2008), *affd*, 67 AD3d 567, 42 PERB ¶ 7008 (1st Dept 2009).

[35] Peterson's charge was filed on October 23, 2017. Therefore, the period of limitations covers actions which Peterson knew of or should have known of on or after June 23, 2017. To the extent that facts earlier than June 23, 2017 are included in this decision, they are relevant only as background material, and no improper practice allegation can be based on them.

not entitled."[36] The EL § 3020-a procedure is negotiated by the UFT and the District,[37] and the Education Law itself provides for an appeal process.[38] The actions taken by the District in following the EL § 3020-a procedures do not demonstrate animus towards Peterson's union activity.

Peterson argues that Scarmato's failure to testify should have led the ALJ to draw an adverse inference "regarding [] Scarmato's improper motives for questioning [] Peterson's disability accommodations."[39] Peterson also asserts that without Scarmato's testimony, she did not have the opportunity to question him on his motives. We find that the ALJ did not err in not drawing an adverse inference regarding Scarmato's testimony. As the Court of Appeals held in *People v Gonzalez*,[40] requests for an adverse inference should be made as soon as is practicable. The issue is not preserved for review on appeal when a party fails to request an adverse inference.[41] In the context of an administrative hearing, the proper time to request an adverse inference is at the hearing itself. This would give the party against whom the inference is sought the opportunity to account for the "absence of the witness or otherwise show that [an adverse inference] is inappropriate."[42] Peterson did not ask the ALJ to draw an adverse inference after it

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[36] 54 PERB ¶ 4517, at 4606.
[37] Joint Ex 1, Article 21, § G.
[38] Education Law § 3020-a.5.
[39] Peterson's Exceptions, at 2.
[40] 68 NY2d 424, 428 (1986). *See also Lewis v Stewart*, 158 AD3d 1247, 1250-1251 (4th Dept 2018) (request for adverse inference untimely where not made until written closing statement); *3657 Realty Co., LLC v Jones*, 52 AD3d 272, 272 (1st Dept 2008), *lv dismissed* 11 NY3d 829 (2008) (request for adverse inference untimely where made after close of evidence).
[41] *People v Bonaparte*, 196 AD3d 866 (3d Dept 2021); *People v Woodridge*, 30 AD3d 898, 900 (3d Dept 2006), *lv denied* 7 NY3d 852 (2006).
[42] *Prince, Richardson on Evidence,* 11th edition § 3-140, p 89.

became clear that Scarmato was not going to testify, and the issue is not preserved on appeal. Peterson also did not attempt to subpoena Scarmato or call him to the stand, despite his presence in the courtroom.[43] Further, to the extent that Peterson argues that she needed Scarmato's testimony to establish her *prima facie* case of retaliation, "the burden of establishing a *prima facie* case fell on [Peterson], and [she] could not rely on cross-examination of the respondent's witness to meet this burden."[44]

With respect to the allegations concerning Peterson's use of allegedly abusive language, the ALJ found that Scarmato reported Peterson's use of the language "bat shit crazy" to the OSI in retaliation for her protected activity, but that the District successfully refuted Peterson's *prima facie* case by setting forth a legitimate business reason for Scarmato's decision to report Peterson's use of language to OSI based on Chancellor's Regulation A-421. Peterson has presented no basis on which we could find the ALJ's finding to be incorrect, and we affirm it.

The ALJ found no evidence that Peterson was treated in a discriminatory manner during her reassignment to the Staten Island Central Office. In excepting to this finding, Peterson argues that the ALJ erred by crediting the testimony of Shakespeare and Caldwell. Credibility determinations by an ALJ are generally entitled to great weight unless there is objective evidence in the record compelling a conclusion that

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[43] *See Board of Educ of the City Sch Dist of the City of New York (Elgalad)*, 52 PERB ¶ 3001, 3006 n 40 (2019). The sign-in sheet for each day of the hearing is in our files and demonstrates that Scarmato was present on at least a majority of the days the hearing was held, including on the days when Peterson was presenting her case in chief.

[44] *Board of Educ of the City Sch Dist of the City of New York (Cohn)*, 53 PERB ¶ 3011, 3054 (2020). *See also CWA, Local 1104, Graduate Student Employees Union (Boehme)*, 47 PERB ¶ 3003, 3008 (2014); *State of New York (SUNY Buffalo)*, 46 PERB ¶ 3021, 3040 (2013).

the credibility finding is manifestly incorrect.[45] Here, Peterson has not presented any objective evidence that the ALJ erred in her credibility determination. Accordingly, we see no basis to overturn the ALJ's credibility finding.[46] We further find that the testimony credited by the ALJ supports her finding that Peterson failed to show that she was treated in a discriminatory manner during her reassignment.

Additionally, we agree with the ALJ that the evidence does not show that Peterson's removal from Tottenville's table of organization demonstrated animus on the District's part. Caldwell's unrebutted testimony shows that the District removes reassigned staff such as Peterson from a school's table of organization.[47]

Peterson contends that animus towards her union activities is demonstrated by the fact that three other employees who had pending investigations or disciplinary charges brought against them were not reassigned from the school while their charges or investigations were pending. Peterson further alleges that these three employees were not active UFT chapter persons and that this demonstrates disparate treatment towards her as a UFT chapter leader. Even assuming that Peterson's representations regarding the three employees are accurate, the record unequivocally demonstrates that Katherine

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[45] *Buffalo City Sch Dist*, 53 PERB ¶ 3015, 3074 (2020); *Pine Valley Cent Sch Dist,* 51 PERB ¶ 3036, 3160 (2018), quoting *Village of Scarsdale,* 50 PERB ¶ 3007, 3037 n 51 (2017). *See also Rochester Housing Authority*, 52 PERB ¶ 3014, 3061 (2019); *Pleasantville Union Free Sch Dist,* 51 PERB ¶ 3024, 3100 (2018); *Village of Endicott,* 47 PERB ¶ 3017, 3051 (2014).

[46] In Exception 15, Peterson asserts that the ALJ erred by making "no mention whatsoever" of the testimony of Irene Giacalone and Hank Maiorano. We see no error in the ALJ's treatment of the testimony of these witnesses. The ALJ briefly summarized the testimony of Giacalone and Maiorano regarding their observations of consultation meetings. 54 PERB ¶ 4517, at 4602. Peterson failed to explain the relevance of any unsummarized testimony to her case, and our review of the transcript reveals no salient testimony that was not otherwise included and summarized by the ALJ.

[47] Tr, at 1263.

Rodi made the decision whether to reassign employees from their school during pending investigations.[48] There is no evidence in the record demonstrating that Rodi had any knowledge of employees' protected activity (or lack thereof), including that of Peterson. Thus, the status of other employees who were not reassigned does not demonstrate animus towards Peterson on the basis of her protected activity.

Finally, Exceptions 1 and 2 contend that the ALJ ignored or discounted evidence that Peterson's disability accommodations were not questioned, and she received no discipline or poor ratings prior to her becoming a UFT chapter leader. It is well-established, however, that timing alone is insufficient to establish the "but for" element of a charge of unlawful retaliation.[49]

Finally, Peterson asserts that the ALJ denied her permission to amend her charge "based on ongoing retaliation during the pending PERB hearings . . . ."[50] Consistent with § 204.1 (d) of our Rules, "an ALJ has considerable discretion to grant or deny a request to amend a charge so long as the decision is consistent with due process."[51] There was no request to amend the charge made on the record. Assuming that the ALJ did in fact decline Peterson's request to amend the charge, we find that it was not an abuse of her discretion. Peterson had the ability to file a new charge challenging any alleged new

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[48] Tr, at 1256.
[49] *State of New York (DOCCS)*, 52 PERB ¶ 3003, 3016 (2019); *Lawrence Union Free Sch Dist,* 50 PERB ¶ 3034, 3141-3142 (2017), citing *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,* 35 PERB ¶ 3002, 3004 (2002); *Roswell Park Cancer Institute,* 34 PERB ¶ 3040, 3096 (2001).
[50] Exception No 14, at 5.
[51] *Town of Tuxedo*, 53 PERB ¶ 3003, 3007 (2020); *Local 456, Intl Brthd of Teamsters (Rojas)*, 45 PERB ¶ 3031, 3072 (2012); *Board of Educ of the City Sch Dist of the City of New York (Grassel)*, 41 PERB ¶ 3024, 3111 (2008); *UFT (Ayazi)*, 32 PERB ¶ 3069, 3164 n 3 (1999); *Village of Johnson City*, 12 PERB ¶ 3020, 3039 (1979).

improper practices without needing to amend her charge, and the ALJ's decision is consistent with due process.

Based on the foregoing, the exceptions filed by Peterson are denied, and the ALJ's decision is affirmed.

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

DATED: October 13, 2021
Albany, New York

John F. Wirenius, Chair

Anthony Zumbolo, Member

Rosemary A. Townley, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

NEW YORK STATE CORRECTIONAL OFFICERS AND POLICE BENEVOLENT ASSOCIATION, INC.,

Charging Party,

CASE NO. U-34217

-and-

STATE OF NEW YORK (DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION),

Respondent.

LIPPES MATHIAS WEXLER FRIEDMAN LLP (EMILY G. HANNIGAN of counsel), for Charging Party

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

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the State of New York (Department of Corrections and Community Supervision) (State or DOCCS) to a decision of an Administrative Law Judge (ALJ) finding that the State violated §§ 209-a.1 (a) and (d) of the Public Employees' Fair Employment Act (Act).[1] The ALJ found that the State violated its duty to negotiate in good faith when it refused to provide the New York State Correctional Officers and Police Benevolent Association, Inc. (NYSCOPBA) with requested information relating to the alleged misconduct of a unit member whose disciplinary grievance was pending, but prior to the filing of a demand for arbitration.

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[1] 53 PERB ¶ 4548 (2020).

EXCEPTIONS

The State filed three exceptions to the ALJ's decision.[2] The State asserts that the decision of the Appellate Division, Third Department in *Pfau v NYS Public Employment Relations Board*[3] supports its position that it had no obligation to provide the information requested by NYSCOPBA. Assuming that it did have an obligation to provide the requested information, the State next contends that NYSCOPBA's request for documentation and a video was unreasonable based on: (1) DOCCS's past practice of allowing NYSCOPBA to view (but not provide copies of) materials sought in a disciplinary proceeding before the agency level meeting; and (2) the burden that would be placed on DOCCS if it had to provide copies of requested material before the agency level meeting. Finally, the State's third exception claims that DOCCS's offer to allow NYSCOPBA to view the requested information at its facility fulfills any obligations it has under the Act.

FACTS

The facts are set forth fully in the ALJ's decision and are repeated here only as necessary to decide the exceptions. NYSCOPBA represents the titles in the Security Services bargaining unit of New York State employees, including the title of Correction

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[2] In the preface to its exceptions, the State avers that "[t]hese exceptions are taken to each unfavorable ruling on evidence and to each and every part of the Decision generally finding that the Respondent violated [§§ 209-a.1 (a) and (d) of the Act]." State's 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 (OTDA)*, 54 PERB ¶ 3011, 3028, n 5 (2021); *State of New York (DOCCS)*, 52 PERB ¶ 3003, 3016, n 2 (2019), *Village of Saranac Lake,* 51 PERB ¶ 3034, 3148, n 4 (2018); *see also NYCTA,* 47 PERB ¶ 3032, 3009 (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).

[3] 69 AD3d 1080, 43 PERB ¶ 7001 (3d Dept 2010).

Sergeant. NYSCOPBA and the State are parties to a collective bargaining agreement (CBA), which contains two procedures for the resolution of disputes. Article 7, entitled "Grievance and Arbitration," provides procedures for disputes concerning the application and/or interpretation of the CBA. Article 7 (c) states that "a claim of improper or unjust discipline against an employee shall be processed in accordance with Article 8 of this Agreement."[4]

Article 8 of the CBA, titled "Discipline," describes the procedure negotiated by the parties for the discipline and discharge of bargaining unit employees. The disciplinary procedure described in Article 8 is the "exclusive procedure" applicable to these employees, in that:

> Discipline shall be imposed upon employees otherwise subject to the provisions of Sections 75 and 76 of the Civil Service Law only pursuant to this Article, and the procedure and remedies herein provided shall apply in lieu of the procedure and remedies prescribed by such sections of the Civil Service Law which shall not apply to employees.[5]

Article 8.2 (a) states that "[d]iscipline shall be imposed only for just cause," and then continues on to describe the procedure concerning the issuance of a Notice of Discipline (NOD).[6] Article 8.2 (c), (d) and (e) read, as follows:

> (c) The penalty proposed may not be implemented until the employee (1) fails to file a disciplinary grievance within 14 days[] of service of the notice of discipline, or (2) having filed a grievance, fails to file a timely appeal to disciplinary arbitration, or (3) having appealed to disciplinary arbitration, until and to the extent that it is upheld by the disciplinary arbitrator, or (4) until the matter is settled.
>
> (d) The notice of discipline may be the subject of a disciplinary grievance which shall be served upon the department or agency head or his designee in person or by registered or certified mail

[4] Joint Ex 1, at 15.
[5] Joint Ex 1, at 23.
[6] *Id*.

> within 14 days of the date of the notice of discipline by the employee or the Union. The employee or the Union shall be entitled to a meeting to present his position to the department or agency head or his designee within 14 days of the receipt of a disciplinary grievance, and upon consideration of such position, the department or agency head shall advise the Union of its response in writing by registered or certified mail within seven days of such meeting.
>
> (e) If the disciplinary grievance is not settled or otherwise resolved, it may be appealed to disciplinary arbitration by the employee or the President of the Union (or his designee) within 14 days of the service of the department or agency head response. Notice of appeal to disciplinary arbitration shall be served, by personal service, registered or certified mail, with the Public Employment Relations Board, with a copy to the department or agency head, or his designee.[7]

Article 8.3 of the CBA, titled "Settlement," states, in part:

> A disciplinary grievance may be settled at any time following the service of a notice of discipline . . . An employee offered such a settlement shall be offered a reasonable opportunity to have his attorney or a union representative present before he is required to execute it. The Union grievance representative at the appropriate level shall be provided with a copy of any settlement within 24 hours of its execution.[8]

During the timeframe relevant to this improper practice charge, Correction Sergeant, Erik Raykoff, worked for DOCCS at Sullivan Correctional Facility. DOCCS alleged that Raykoff engaged in misconduct on June 16, 2014, while on duty. Subsequently, DOCCS conducted an investigation into the allegations against Raykoff, and interrogated Raykoff on January 21, 2015.

On or about March 9, 2015, DOCCS issued a NOD, alleging that an inmate was injured during an escort that Raykoff supervised, and that false statements were made to DOCCS during the January 21, 2015 interrogation, concerning whether Raykoff

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[7] Joint Ex 1, at 24.

[8] Joint Ex 1, at 26.

notified, or was notified by, other DOCCS staff of certain information concerning that inmate's injury.[9]

By letter dated March 12, 2015, NYSCOPBA filed a disciplinary grievance concerning the NOD "[p]ursuant to Article 8.2(d) of the current Agreement for the Security Services Unit . . . ."[10] On March 20, 2015, NYSCOPBA's then-legal counsel, Erin Parker, an attorney with Lippes, Mathias, Wexler Friedman LLP, sent an email to DOCCS Labor Relations Representative, Jared Tallman, stating, in part, that NYSCOPBA was "hereby requesting a copy of the transcript of Sgt. Raykoff's interrogation on or about January 21, 2015" and "[a] grievance has been filed challenging this NOD. The transcript is necessary in order to investigate and pursue this grievance."[11] Tallman did not respond to the email.

On March 23, 2015, Parker sent another email to Tallman, which reads:

> Jared—
>
> As a follow up, on behalf of Sgt. Raykoff, we request the following documents, also necessary in order to investigate and pursue his disciplinary grievance:
>
> - Copy of the video during strip frisk process and escort to cell on 6/16/14.
> - Copy of the complete Use of Force and/or Unusual Incident packet, including, but not limited to, the inmate's injury report and/or other medical reports from the cited 6/16/14 incident.
> - Phone records of outgoing internal phone calls placed on 6/16/14 from ext. 6117 and 6124.
> - Copy of SHU Sign in/out log and SHU log book entries for 6/16/14.
> - Copy of any report by any Investigator from the Office of Special Investigations (formerly DOCCS Inspector General's

[9] Joint Ex 2.
[10] Joint Ex 3.
[11] Joint Ex 4.

> Office), including any draft report and final report.
>
> - Copy of any and all To/Froms (or other memoranda) submitted by any DOCCS employee regarding this incident.
> - Copies of all interrogations of any DOCCS employee regarding this incident.
>
> It is requested that a copy of these documents be provided prior to the agency level hearing on this matter so that the grievant can be properly represented. We are happy to make whatever arrangements necessary to retrieve copies of these documents from you.[12]

On March 31, 2015, Tallman forwarded the email thread to his supervisor, Michele O'Gorman, who responded to him and Parker immediately, asking whether the matter had been scheduled for arbitration; Tallman replied that it had not, nor had the Step 2 hearing been held.[13] O'Gorman then replied, directly to Parker only, "I am confused . . . Why are you requesting at this point?"[14] Parker replied, "We are requesting because there is a[] pending grievance, challenging the NOD, and the information is necessary and relevant in representing Sgt. Raykoff in this matter, beginning with his agency level hearing."[15] O'Gorman replied four minutes later, still on March 31, 2015, copying DOCCS Labor Relations Director, John Shipley, and Tallman:

> Erin,
>
> I am sorry but as there has been no demand for arbitration in this regard, we will not provide the requested records at this time. If the union representative(s) would like to come and watch the video, we can establish an appointment time to do so as we have in the past."[16]

Parker sent a reply email to the group stating, *inter alia*, "We respectfully disagree with

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[12] *Id*. "SHU" is an acronym for "Special Housing Unit."
[13] *Id*.
[14] *Id*.
[15] Joint Ex 4.
[16] *Id*.

the position that there has to be a demand for arbitration in order to receive copies of documents . . . We hope that you will re-consider this request. If you would like citations to the case law I am referencing, please let me know."[17] O'Gorman replied to the group, approximately twenty minutes later:

> As we have an appellate court decision that says otherwise, we must disagree. Our understanding based upon this decision is that there is no mandated discovery in this matter. I would state again, however, that if the union would like to set up an appointment with the respective BLR representative to discuss this matter prior to the Step 2 hearing, we would certainly agree to do so as we have in the past.[18]

Parker replied that she would "pass along the message regarding the appointment with the respective BLR representative to the relevant union reps."[19]

NYSCOPBA automatically files a grievance on behalf of any member who receives a NOD, within 10 or 15 days of the issuance of the NOD. After a grievance is filed, an agency-level hearing is held at step 2 of the CBA's grievance procedure. At this stage, DOCCS and NYSCOPBA ordinarily discuss the charges and their merits, as well as possible avenues for resolution of the charges. Charges have been resolved at the agency-level hearing stage.

Parker represented Raykoff at the January 21, 2015 DOCCS interrogation and the subsequent disciplinary matter. Parker testified that, at Raykoff's January 21, 2015 interrogation, she learned that DOCCS alleged that a video recording proved an aspect of the allegations against Raykoff. Therefore, she requested a copy of the video recording. Parker requested phone records because DOCCS called into question

[17] *Id*.
[18] *Id*.
[19] Joint Ex 4.

whether Raykoff had made certain communications to other staff members. Further, during the interrogation, it was evident to Parker that other facility staff had been questioned about the events constituting Raykoff's alleged misconduct, so she requested transcripts of those employees' interrogations, as well as Raykoff's, from DOCCS.[20]

By letter dated July 3, 2015, Tallman denied the agency-level grievance held on May 1, 2015. Tallman wrote, in part:

> The Union contends that the grievant is not guilty of the charges and, therefore, the proposed penalty of Ninety (90) Days Suspension Without Pay is inappropriate. The Union also contends that information regarding the investigation was requested and not sent to them in order to present their case. This information includes, but is not limited to, a copy of the video, transcripts of interrogations, notebooks of Special Housing Unit (SHU) log entry, phone records, medical documents and the Investigation Report.
>
> Management had nothing to add to this case.
>
> This grievance is denied. The penalty of Ninety (90) Days Suspension Without Pay will be implemented unless a timely appeal to arbitration is filed in accordance with Article 8 of the Negotiated Agreement. Furthermore, it has always been standard practice that information requested by the Union regarding the case does not get turned over to them until a request for arbitration is submitted. This includes transcripts of interrogations. Therefore, at this juncture, no information will be turned over to the Union until such request is submitted and received by the Bureau of Labor Relations.[21]

By letter dated July 13, 2015, NYSCOPBA filed a notice of appeal of the grievance to arbitration with PERB, with a copy to DOCCS.[22]

The requested documents were provided in September of 2015, after the demand for arbitration was filed and an arbitrator was assigned. None of the

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[20] *Id*.
[21] Joint Ex 5.
[22] Joint Ex 6.

documentation was physically available to NYSCOPBA prior to the demand for arbitration, except that DOCCS allowed a NYSCOPBA representative to view the videotape of the incident. NYSCOPBA was not allowed to have a physical copy.

Parker testified that, upon receipt of the documents NYSCOPBA requested, particularly the videotape, she and the union were able to sit with Raykoff and thoroughly discuss the materials and determine that certain charges were unsupported by the evidence. Shortly thereafter, DOCCS Labor Relations reached out to NYSCOPBA to discuss settlement of the charges. Parker asserted that, because NYSCOPBA had been able to review all of the evidence at this point, it was able to have substantive discussions that led to settlement of the case. The case did settle, the day before the arbitration hearing; the settlement agreement was signed on October 15, 2015.[23]

John Shipley is DOCCS's director of labor relations. As director of labor relations, Shipley has oversight of approximately 103 worksites and 13 subordinates. His office receives referrals for disciplinary action from those worksites, as well as from investigative bodies such as the Office of Special Investigations and the Office of Diversity Management.

Shipley's office receives approximately 500 requests for discipline per year, and 350-380 of them are related to NYSCOPBA members. In 2014, approximately 50-80 of the matters went to hearing at the arbitration level. According to Shipley, there is no requirement in the CBA to provide evidentiary material to the union, unless the matter is proceeding through the contract's expedited procedure. Shipley stated that his office

[23] Joint Ex 7.

relies on the "*Pfau*" decision, that is, the decision by the Appellate Division in *Pfau v NYS Public Employment Relations Board* [24] in relation to the issue of whether it must turn information over to the union.[25] If NYSCOPBA requests regular, not expedited, arbitration and requests information ". . . as the hearing approaches, there's no set timeframe . . . [DOCCS is] responsive as [it] can be in providing the evidentiary material," though it does not recognize any requirements to do so.[26] Initially, Shipley stated that DOCCS permits the union or employee to view the "sought information," even prior to the agency-level hearing, and does not limit who may view the information, nor the frequency with which they may view the information.[27] However, on cross-examination, Shipley's testimony was as follows:

> Q In this case the video, the Union could come to Building 2 and review the video?
>
> A The Union did.
>
> Q And they could bring whoever they want with them?
>
> A I think it would be a limited number.
>
> Q They could bring the grievant?
>
> A Yes.
>
> Q They could bring an attorney?
>
> A Yes.
>
> Q And they could review it as many times as they want?
>
> A I would have preferred, say, a reasonable number of times.

[24] 69 AD3d 1080, 43 PERB ¶ 7001 (3d Dept 2010) (hereinafter, *Pfau*).
[25] Tr, at 85.
[26] *Id*.
[27] Tr, at 89-90.

Q But you wouldn't present them with a copy of the video?

A Not at that point in time.

> LAW JUDGE: Just for clarification, that point in time, again, is at the agency level review process step of the process, and prior to the filing of a notice to go to arbitration?
>
> THE WITNESS: Right.[28]

Shipley further testified that prior to allowing NYSCOPBA to view information it had requested, sensitive health, privacy, and security information would be redacted.[29]

Shipley testified that being required to produce information to NYSCOPBA in advance of the agency-level disciplinary meeting would slow the disciplinary grievance procedure, in that:

> If we were to duplicate and turn over the volumes of evidentiary material in our case files prior to conducting an agency level meeting, it would significantly extend the timeframe in which agency level meetings are conducted and ultimately the outcomes of the disciplines themselves.[30]

Shipley further explained that the procedure would slow down because:

> of the volume . . . It's staggering. Because there are thousands of pages of evidentiary material in our disciplinary files. It's unbelievable. And to have to go through and evaluate each and every document to determine whether or not there's some piece of it that has to be redacted, somebody's Social Security number, somebody's protected sensitive information, their health information, security matters.[31]

DISCUSSION

We have previously addressed the State's argument that the court in *Pfau* found

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[28] Tr, at 149-50.
[29] Tr, at 151, 167.
[30] Tr, at 91-92.
[31] Tr, at 131.

that the Act does not entitle unions to the same rights to request and receive information in employee disciplinary proceedings as they receive when filing non disciplinary grievances. Indeed, we have previously squarely held, consistent with the Court of Appeals' ruling on a substantially similar case,[32] that where the parties have negotiated a contractual disciplinary grievance procedure, the same rights pertain to both proceedings. As we explained in *State of New York (DOCCS)*[33] (*DOCCS 2017*), a case involving the same parties and the same contract language at issue here, *Pfau* "does not apply where a union seeks documents and information to evaluate a pending contract grievance concerning discipline and to enable it to provide representation to the at-issue unit members at arbitration pursuant to the negotiated terms of the parties' agreement."[34] The situation here is identical to that in *DOCCS 2017*. The contractual grievance and arbitration procedures relating to discipline wholly displace the statutory procedures and remedies under Civil Service Law §§ 75 and 76.[35] By "defining 'grievance' to include disciplinary action, the CBA has, as a matter of contract, incorporated as to disciplinary actions the information requirements applicable to grievances."[36] These information requirements, based in § 203 of the Act, do "not distinguish between grievances arising out of disputes over benefits, over other unit-wide terms and conditions, or over discipline. The right applies to grievances, writ large."[37]

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[32] *City of New York v NYS Nurses Assn*, 29 NY3d 546 (2017).
[33] *State of New York (DOCCS)*, 50 PERB ¶ 3031, citing *City of New York v NYS Nurses Assn*, 29 NY3d 546.
[34] 50 PERB ¶ 3031, 3121 (2017), internal quotations omitted, citing *County of Montgomery*, 44 PERB ¶ 3045, 3135 (2011).
[35] *Id*.
[36] *Id*, quoting *City of New York v NYS Nurses Assn*, 29 NY3d 546, 552 (2017).
[37] *Id*.

For the reasons given in *DOCCS 2017* and summarized above, we again find that our case law involving the right of employee organizations to receive information relevant to investigating grievances on request fully applies to NYSCOPBA's request here, made after a grievance was filed but before a demand for arbitration was filed. We note that the State could have, but did not choose to, seek judicial review of *DOCCS 2017*, perhaps because its reasoning and outcome were predicated on the Court of Appeals' reasoning in *City of New York v NYS Nurses Association*.[38]

As to the specific contours of that right, 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; relevancy; and necessity. 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.[39]

DOCCS asserts that NYSCOPBA's request was not reasonable for two reasons. First, DOCCS contends that it had a reasonable expectation that it did not have to provide the requested material based on its long-standing practice of allowing NYSCOPBA to view the materials sought before the agency-level meeting and only

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[38] 29 NY3d 546, 552 (2017).

[39] *DOCCS 2017*, 50 PERB ¶ 3031, at 3122, citing *State of New York (OTDA)*, 50 PERB ¶ 3009, 3043 (2017); *County of Montgomery*, 44 PERB ¶ 3045, at 3134; *City of Rochester*, 29 PERB ¶ 3070 (1996); *Hornell Cent Sch Dist*, 9 PERB ¶ 3032 (1976); *Board of Educ, City Sch Dist of the City of Albany*, 6 PERB ¶ 3012 (1973).

The duty to provide information includes an obligation on the part of the employer to provide information relevant to an employee organization's investigation of the merits of a grievance. *County of Erie v State of NY*, 14 AD3d 14, 18, 37 PERB ¶ 7007 (2004), *confg* 36 PERB ¶ 3021 (2003); *State of New York (OTDA)*, 50 PERB ¶ 3009, at 3043-3044; *State of New York (Dept of Health & Roswell Mem Inst)*, 26 PERB ¶ 3072, 3137 (1993). There is no dispute here that the information requested by NYSCOPBA was relevant to its investigation of the merits of the grievance filed on Raykoff's behalf.

providing copies of requested material after a demand for arbitration was filed. We find that DOCCS's past practice does not excuse its failure to provide the requested information here. Although, in the past, DOCCS had only allowed viewing of the video and other requested material, NYSCOPBA's decision not to file an improper practice charge over DOCCS's failure to provide copies of this information does not amount to a clear and unmistakable waiver of NYSCOPBA's right to insist on compliance with the Act's requirements, or otherwise render the current charge untimely.[40] In short, NYSCOPBA's acquiescence to an arguable improper practice in the past does not preclude it from challenging that practice as unlawful at this time.

DOCCS's second contention for why NYSCOPBA's request was unreasonable is that such requests would place an undue burden on DOCCS, given the volume of requests that it anticipates. In this respect, DOCCS asserts that it receives approximately 500 requests for discipline annually, of which approximately 350-380 relate to employees in the Security Services unit and that needing to review and, where appropriate, redact this volume of requests would unduly delay the conduct of agency-level hearings.

We find that NYSCOPBA's request did not place an undue burden on DOCCS. Shipley testified that, prior to allowing NYSCOPBA to review requested information, DOCCS would conduct a review of the requested information and redact any confidential security, health, or identifying information. DOCCS conducts a similar review prior to releasing copies of requested information after a request for arbitration is

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[40] *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); *Auburn Enlarged City Sch Dist*, 25 PERB ¶ 3055, 3116 (1992).

received. Because, in both cases, DOCCS must review the requested information, resulting in a delay in providing the information, we affirm the ALJ's finding that DOCCS has not explained "why such 'delay' is acceptable after an arbitration request is filed, but intolerable prior to the agency-level hearing stage of the grievance procedure."[41]

Finally, DOCCS asserts that its offer to NYSCOPBA to allow it to "come and watch the video"[42] satisfies its burden under the Act. In *DOCCS 2017*, we left open the question of whether allowing NYSCOPBA to view requested materials would be sufficient to meet DOCCS's obligation to provide relevant, requested information in nearly identical circumstances.[43] Similar to *DOCCS 2017*, we find it unnecessary to resolve this question today. DOCCS did not offer to let a NYSCOPBA representative (or others, such as the grievant himself) review all of the requested materials, including the Use of Force and/or Unusual Incident packet, phone records, the SHU Sign in/out log and SHU log book entries, any report by any Investigator from the OSI, any and all To/Froms, and interrogations of any DOCCS employee regarding the incident. DOCCS's offer was instead limited to only the video of the incident in question. DOCCS did not raise any question regarding confidentiality of the requested information to NYSCOPBA or before us with respect to the information requested. As such, no issue regarding confidential information is present in this matter. As discussed above, DOCCS does not dispute that all of the information requested by NYSCOPBA was relevant to its investigation into the grievance. Even if an offer to view the requested material would satisfy DOCCS's obligations under the Act, such an offer must include all

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[41] 53 PERB ¶ 4548, at 4782.
[42] Joint Ex 4.
[43] 50 PERB ¶ 3031, at 3122.

relevant, requested information.

Accordingly, we affirm the ALJ's finding that the State violated §§ 209-a.1 (a) and (d) of the Act when it refused to make available all of the material requested by NYSCOPBA on March 23, 2015.

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

1. Negotiate in good faith with NYSCOPBA by making available information that is relevant and necessary to NYSCOPBA's evaluation, investigation and/or pursuit of grievances, or potential grievances, deriving from the parties' collective bargaining agreement, pursuant to reasonable request(s) by NYSCOPBA.
2. Sign and post the attached notice at all physical and electronic locations ordinarily used to post written communications to unit employees.

DATED: October 13, 2021
Albany, New York

John F. Wirenius, Chair

Anthony Zumbolo, Member

Rosemary A. Townley, Member

NOTICE TO ALL EMPLOYEES

PURSUANT TO
THE DECISION AND ORDER OF THE

NEW YORK STATE
PUBLIC EMPLOYMENT RELATIONS BOARD

and in order to effectuate the policies of the

NEW YORK STATE
PUBLIC EMPLOYEES' FAIR EMPLOYMENT ACT

we hereby notify all employees of the State of New York (Department of Corrections and Community Supervision) in the unit represented by the New York State Correctional Officers and Police Benevolent Association, Inc. (NYSCOPBA) that the State of New York will:

1. Negotiate in good faith with NYSCOPBA by making available information that is relevant and necessary to NYSCOPBA's evaluation, investigation and/or pursuit of grievances, or potential grievances, deriving from the parties' collective bargaining agreement, pursuant to reasonable request(s) by NYSCOPBA.

Dated . . . . **By . . . .**
on behalf of the **State of New York**

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

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

ISABEL MANZO,

Charging Party, **CASE NO. U-36578**

- and -

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

Respondent.

GLASS KRAKOWER LLP (JORDAN HARLOW of counsel), for Charging Party

KAREN SOLIMANDO, EXECUTIVE DIRECTOR OF LABOR RELATIONS (KERRY J. FERRELL 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) 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).[1] The ALJ found that the District violated the Act when Principal Rosita Rivera recommended Isabel Manzo for discontinuance by a May 9, 2018 letter to the superintendent. The ALJ dismissed the rest of Manzo's claims, and ordered that the May 9, 2018 letter be removed from her file and that the District reconsider the decision to discontinue Manzo's employment and license, without consideration of the May 9, 2018 letter.

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[1] 54 PERB ¶ 4518 (2021).

EXCEPTIONS

The District excepted to the ALJ's decision on, effectively, two grounds. First, the District asserts that the ALJ erred in finding "that elements of Rivera's behavior throughout the school year are sufficient to establish an inference of improper motivation."[2] The District specifically faults the ALJ's finding that only "after Manzo filed an APPR Complaint and brought union representation to her meeting with Rivera that Rivera directed instructional coaches to give Manzo remedial assistance and to document that assistance."[3]

The District's second exception similarly contends that the ALJ erred in finding "that elements of Rivera's behavior throughout the school year are sufficient to establish an inference of improper motivation," relying on "Rivera's statement to Manzo in her letter to file, dated May 7, 2018, which reads 'if you continue to not meet your professional responsibilities it can lead to you being rated Ineffective for the 2017-2018 school year.'"[4]

Manzo supports the ALJ's decision and seeks its affirmance by us.

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

FACTS

The facts in this matter are fully set out in the ALJ's decision and are only stated here as necessary to address the exceptions. At the time of the events in question, Manzo was employed by the District as a probationary special education teacher, and

[2] Exception No 1, quoting Decision, at 12, 16.
[3] *Id*. An APPR Complaint is more formally known as an Annual Professional Performance Review Resolution (APPR) Assistance Request.
[4] Exception No 2.

she was a member of the United Federation of Teachers (UFT). From 2014 through 2018, Manzo was employed by the District, and she held both a general education and a special education license. Prior to the 2017-2018 school year, she taught in a variety of classes. In 2017-2018, she was assigned to an "integrated co-teaching" second grade classroom setting (ICT). In the ICT classroom, a general education teacher, here Manzo, and a special education teacher cooperate to integrate students with special needs and those with Individualized Education Plans (IEPs).

The District rates teachers using two measures, the "Measure of Teacher Practice," (MOTP) based on observations of a teacher's performance, and the "Measures of Student Learning" (MOSL), which measures the progress of students at the school, including those of the teacher under review. The teacher's overall rating is a composite of both scores. Teachers are deemed to be either "highly effective," "effective," "developing," or "ineffective."

Manzo's annual ratings were as follows: for 2014-2015, she was rated as "developing"; for 2015-2016, she was rated overall as "effective," including an "effective" MOTP rating; for 2016-2017, she was rated overall as "effective," with an "effective" MOTP rating.[5] Finally, for 2017-2018, Manzo was rated "effective" overall, which included a "developing" MOTP rating.[6]

Manzo was the subject of six observations during the 2017-2018 school year. The first, conducted by Assistant Principal Debra Handler, took place on November 8, 2017. According to Handler's November 30, 2017 report of her observation, Manzo was

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[5] In 2017, Manzo's probationary period was extended by agreement.
[6] 54 PERB ¶ 4518, at n 1-6.

rated “effective” in three categories, and “developing” in two areas.

The second observation, by Rivera, took place on January 10, 2018, and was summarized in a report dated January 30, 2018. Rivera rated Manzo “effective” in two categories, and “developing” in four.[7]

On January 18, 2018, Rivera conducted an observation of Manzo with Superintendent Mabel Sarduy, as part of Sarduy’s Principal Performance Evaluation of Rivera; no written report of the observation appears to have resulted. Rivera testified that she did not write a report on this observation because the Advance Guide requires at least two weeks between observations, and Manzo had been observed just a week earlier. Manzo testified that being observed on January 18, without having received any feedback on the January 10 observation, made her “feel like [sh]e was being set up and not supported.”[8]

On or about January 29, 2018, Manzo received Rivera’s report on the January 10, 2018 observation, and met with her to discuss it. On January 31, Manzo filed the APPR Resolution Assistance Request (or APPR Complaint), which was served on Rivera on February 1.

On February 8, 2018, Rivera met with Manzo and UFT Representative Michael Terpstra to discuss the APPR Complaint. Both Manzo and Rivera testified that Rivera told Manzo that, in Manzo’s words, she should not have filed the APPR Complaint “for the reasons that she had.” Rivera testified that she told Manzo that disagreeing with her rating was not a proper basis for filing an APPR Complaint under the Advance Guide,

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[7] Charging Party’s Ex 20.
[8] Tr, at 68.

and that she had not raised any appropriate procedural basis for the Complaint.

The same day, Rivera sent an email to Nazreen Ghafoerkhan, directing her to meet with Manzo twice a week to assist her in areas Rivera had marked Manzo as "developing." Rivera's email to Ghafoerkhan directed that Ghafoerkhan "create a log of assistance" recording her work with Manzo.

The fourth observation, also by Rivera, took place on March 28, 2018. In her April 11, 2018 report of this observation, Rivera rated Manzo as "effective" in three categories and "developing" in three areas.

The fifth observation, again by Rivera, took place on April 16, 2018, memorialized in a report dated April 25, 2018. Rivera again rated her as "effective" in three categories and "developing" in three. On April 26, one day after Rivera drafted her report, Rivera sent an email to Instructional Literacy Coach, Jill Brogan, directing Brogan to work with Manzo on "creating lessons aimed at engaging students based on their readiness levels."[9]

On April 27, 2018, Manzo filed a second APPR Complaint, asserting that the April 16 observation took place after Manzo had dismissed her bus-transported students, and 15 minutes before dismissing her class for the day. She also asserted that the observation should be removed, and that her file should "be evaluated prior [to] making comments of discontinuing me," as she "should not fear retribution when I come to discuss my evaluation with my [principal]."[10] Manzo testified that in April 2018,

[9] 54 PERB ¶ 4518, at 4610.
[10] *Id.*

Rivera told Manzo that "she didn't want to deal with [her] for another year."[11]

At a meeting held on May 7, 2018 to discuss the second APPR Complaint, Rivera informed Manzo that she intended to recommend the discontinuance of Manzo's employment. Rivera gave Manzo a letter to file, including Ghafoerkhan's "log of assistance" and other materials related to professional development sessions attended by Manzo. Rivera's letter to Manzo stated that "[i]f you continue to not meet your professional responsibilities it can lead to you being rated ineffective for the 2017-2018 school year." As the ALJ noted, Manzo had not yet been rated "ineffective" in any of her evaluations during the course of the year, which were purportedly to be the basis for her year-end rating.

Manzo filed a Step 1 Grievance with the UFT to challenge this letter and its attachments.

On May 9, 2018, Rivera sent a letter to Sarduy recommending Manzo's discontinuance, basing the recommendation on her classroom observations and analysis of the data of Manzo's students and their inadequate progress despite the "great deal of support" Manzo had received.

Two days later, Rivera denied the second APPR Complaint on the ground that Manzo had not "articulate[d] any procedural violation of the Advance Guide."

On May 16, 2018, Sarduy issued a letter to Manzo denying her Certification of Completion of Probation and terminating her license. Two days later, Rivera denied the grievance filed by Manzo on May 7. The UFT requested that the grievance be

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[11] *Id*., at 4612 n 29, quoting Tr, at 73.

advanced to Step 2, again seeking removal of the May 7 letter from Manzo's file.

On May 31, 2018, Rivera performed a sixth and final observation of Manzo, two weeks after her discontinuance by Sarduy, on Rivera's recommendation, and a day after the UFT requested Manzo's grievance be advanced to Step 2. Rivera rated Manzo as "effective" in three categories and "developing" in four categories, including a seemingly new one, "Growing and Developing Professionally."

In September 2018, Manzo began teaching at P.S. 48 under her special education license.

Rivera acknowledged in her testimony that no teacher other than Manzo had filed any grievances during the 2017-2018 school year. She further testified that, in her more than seven years conducting teacher observations in her supervisory capacity, no teacher had ever filed an APPR Complaint regarding one of her evaluations.

DISCUSSION

As we have often held, and recently reaffirmed,

> When an improper practice charge alleges retaliation in violation of §§ 209-a.1 (a) and (c) of the Act, the charging party has the burden of demonstrating three elements by a preponderance of the credible evidence: a) that the affected individual engaged in protected activity under the Act; b) such activity was known to the person or persons taking the employment action; and c) the employment action would not have been taken "but for" the protected activity. As we have often reaffirmed, the ultimate burden of proof always remains with the charging party.
>
> However, the initial burden of proof to establish a *prima facie* case (an inference of improper motivation) is relatively low . . . [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.[12]

Significantly, the District's recitation of the elements does not address the "relatively low" initial burden of proof and is based not on decisions of this Board but rather on ALJ decisions that are not precedential before us.[13]

The District asserts that the evidence before the ALJ did not support an inference of retaliation by Rivera. However, the District elides certain facts that support the ALJ's finding that the inference was appropriately drawn. By Rivera's own testimony, no teacher at the school other than Manzo engaged in any union activity during the 2017-2018 school year. Nor had any teacher under Rivera's supervision ever filed an APPR complaint in her seven years as a supervisor. There is no dispute here that Manzo's two APPR Complaints, in addition to her grievance, clearly constitute protected union activity under the Act.[14] Nor is there any dispute that Rivera was aware of these protected activities by Manzo; she testified to her direct involvement in the February 8,

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[12] *Board of Educ of the City Sch Dist of the City of New York (Cohn)*, 53 PERB ¶ 3011, 3053 (2020), quoting *Board of Educ, City Sch Dist City of New York (Elgalad)*, 52 PERB ¶ 3001, 3004-3005 (2019); *see also 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).

[13] See District Memo of Law, at pp 3-4. ALJ decisions are non-precedential and are not binding on other, subsequent ALJs. *See City of Niagara Falls*, 54 PERB ¶ 3003, 3020 (2021); *Seaford Administrative Assn*, 47 PERB ¶ 3034, 3107 n 2 (2014); *Village of Sleepy Hollow*, 31 PERB ¶ 3067, 3149 (1998). More directly on point, an ALJ's decision is never binding on the Board. *See, eg*, *City of Watertown*, 51 PERB ¶ 3030, 3131 (2018); *Sachem Cent Sch Dist*, 21 PERB ¶ 3021, 3042 (1988).

[14] As we recently held in *Board of Educ, City Sch Dist City of NY (McDowall)*, 54 PERB ¶ 3012, 3036 (2021) consulting with a union representative and filing an APPR Complaint are protected union activities under the Act.

2018 meeting with Manzo and Terpstra about the first APPR Complaint (based on the January 10, 2018 observation) and the May 7, 2018 meeting with Manzo and Terpstra, about the second APPR Complaint (based on the April 16, 2018 observation). Clearly, the first two elements of the *prima facie* showing were unequivocally established.

As to the third element, the "but for" element can be established by statements, circumstantial evidence, and, in conjunction with these, timing. The ALJ found that the evidence established several bases for finding the existence of a *prima facie* case.

First, the ALJ found indicative of improper motivation the fact that only after Manzo's filing her first APPR Complaint and on the very day that Manzo exercised her right to union representation at the meeting with Rivera regarding it, did Rivera direct Ghafoerkhan to assist Manzo and, especially, to create a "log of assistance." The ALJ found that the delay of nearly a month between Rivera's observation and her assigning Ghafoerkhan to assist her on the very day of her meeting with Manzo and her union representative was suspicious. As the ALJ wrote, she found "that the record contains no credible explanation for the fact that Rivera initiated the coaching on which she relied to recommend Manzo's termination on the very same day, and immediately after, meeting with Manzo and her union representative to discuss her grievance."[15] In support of her reading of the record, the ALJ found indicative Rivera's answer on cross-examination to why she had not assigned Ghafoerkhan earlier than February 8, "I don't know. Maybe I was busy."[16]

The District excepts in part because the ALJ relied on this bald statement of

[15] 54 PERB ¶ 4518, at 4614, n 42.
[16] *Id.*, quoting Tr, at 252.

Rivera's as opposed to more favorable statements elicited by the District's counsel. Under the circumstances here, this exception to the ALJ's credibility finding is unavailing. As we have long held, "[c]redibility determinations by an ALJ are generally entitled to "great weight unless there is objective evidence in the record compelling a conclusion that the credibility finding is manifestly incorrect."[17] Here, the District offers no such objective evidence establishing that the ALJ was manifestly incorrect. Indeed, the circumstances here support the finding—the odd coincidence in the date of the union meeting and the assignment of Gharfoerkhan, the fact that the only union activity during the school year was on behalf of Manzo, and the use of the "log of assistance" to support Manzo's termination, all ground the ALJ's finding in the facts of the record.

Similarly, the ALJ found redolent of animus a statement in Rivera's May 7, 2018 letter to file, in which Rivera cautioned: "If you continue to not meet your professional responsibilities it can lead to you being rated Ineffective for the 2017-2018 school year." The District asserts at length that this warning is consistent with precedent requiring that "adequate notice must be provided to a teacher at risk of receiving a year-end rating of Unsatisfactory [*sic*]."[18] This statement was cited to by the ALJ not on the basis that Rivera as principal somehow had no right, duty, or obligation to provide Manzo notice that she might receive a possible "Ineffective" rating under the Advance Guide.

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[17] *Town of Tuxedo*, 53 PERB ¶ 3003, 3008 (2020), quoting *Board of Educ of the City Sch Dist of the City of New York (Elgalad),* 52 PERB ¶ 3001, 3005 (2019), *see also Bellmore-Merrick Cent Sch Dist,* 48 PERB ¶ 3022, at 3077; *see also Village of Scarsdale,* 50 PERB ¶ 3007, 3037, n 51 (2017); *County of Clinton,* 47 PERB ¶ 3026, 3079 (2014); *Village of Endicott,* 47 PERB ¶ 3017, 3051 (2014); *City of Rochester,* 23 PERB ¶ 3049 (1990); *Hempstead Housing Auth,* 12 PERB ¶ 3054 (1979).

[18] District Memo of Law, at 9-12.

Rather, the ALJ took issue with the logic of the statement in Rivera's May 7, 2018 letter as an application of the APPR scale of measurement. As APPR year end ratings are based on ratings throughout the year, how could Manzo, who had never received an "ineffective" rating in any of the measured areas, be in danger of receiving an overall "ineffective" rating for the school year? Indeed, for the 2017-2018 school year at issue here, Manzo's overall rating was "effective" with a "developing" MOTP rating.[19]

This discrepancy between Manzo's actual "effective" overall rating in a heavily data-driven system and Rivera's warning of a possible overall rating of "ineffective for the 2017-2018 school year" is sufficiently lacking in internal logic as to read more as a threat than as a disinterested administrator providing a required notice.

Certain background incidents, while not timely raised in the charge, are consistent with the ALJ's finding of animus. We do not outline these examples, but in the record they provide context reflecting on the interactions that are properly before us.[20]

Finally, the ALJ declined to find that the District articulated a persuasive legitimate business reason for Manzo's discontinuance. We affirm this finding, noting

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[19] Charging Party's Ex 41.

[20] We have long held that factual allegations outside of our four month limitations period may be admitted not as a basis for relief, but to provide background and context. *See, eg, PSC (Giammarella)*, 51 PERB ¶ 3010, 3047 (2018), citing *Town of Henrietta*, 28 PERB ¶ 3079, 3180 (1995). Certain background incidents, while not timely challenged before the Board, provide some disturbing background. For example, while the ALJ did not cite to Manzo's testimony regarding Rivera's alleged changed attitude toward her after the February 8, 2018 union meeting, this testimony is consistent with the ALJ's finding on animus. So too is Manzo's testimony that, in April 2018, Rivera told Manzo that she wanted to discontinue her as "she didn't want to deal with [her] for another year." Tr, at 73.

that the District did not except to all of the grounds upon which the ALJ declined to find a legitimate business reason.

As we explained in *Bellmore-Merrick Central High School District*, "a proffered legitimate business reason is properly regarded as pretextual if the credible evidence establishes that the decision was not so motivated, either directly or circumstantially, or because the articulated reasons are so lacking in merit as to be patently false."[21]

In the instant case, we find that the former is the case.

The ALJ acted well within her discretion in finding that Rivera's seeming dismissal of the progress that Manzo's students made in reading, absent any context regarding the students' history and Manzo's overall "effective" rating for the school year at issue in and of itself makes the District's effort to construct a legitimate business reason savor of pretext.

The ALJ's observation that Rivera in her May 9, 2018 letter to Sarduy "appears as though Rivera cites data to justify her pre-determined conclusion" carries substantial weight. As the ALJ pointed out, the May 9, 2018 letter to file notes that although some of Manzo's students progressed as much as three reading levels during the school year, they remained below grade level according to City benchmarks. The relationship between these facts is completely unclear—that is, student improvement was documented under Manzo's tutelage in reading. However, no comparison with where these students stood in respect to these benchmarks prior to Manzo's tenure is provided, rendering it impossible to discern whether Manzo's not having brought these

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[21] 48 PERB ¶ 3022, 3078 (2015).

students up to the benchmarks was a failure on her part, or the result of prior instruction. Additionally, no consideration appears to have been given to the co-teaching environment and the impact, if any, of the variety of aptitudes in the classroom mix of general and special educational students in Manzo's ICT classroom.

In similar fashion, the ALJ acted within her discretion in finding incredible Rivera's testimony that her decision to recommend discontinuance was based in part on Manzo being in her fourth year of teaching, as no explanation, such as a District measure or requirement that teachers in their fourth year are required to meet, was cited or referenced.

Finally, the ALJ was within her discretion in rejecting as a legitimate business reason Rivera's statement in her May 9, 2018 letter to file that she had not seen sufficient progress in Manzo's teaching in the three months since Ghafoerkhan had been assigned to assist her, in view of the absence of any articulated benchmarks or expectations Rivera expected in those three months. The ALJ's finding that the suspicious and unexplained timing of Rivera's initiation of the coaching on the very day of a union meeting coupled with the conveniently content-free expectations Rivera purports to apply legitimate the ALJ's declining to find these purported bases credible.

Accordingly, we affirm the ALJ's finding that the District violated §§ 209-a.1 (a) and (c) of the Act when Principal Rivera recommended Manzo for discontinuance by her May 9, 2018 letter to Superintendent Sarduy, and we affirm the ALJ's dismissal of the remainder of the charge.

IT IS, THEREFORE, ORDERED THAT the District shall forthwith:

1. Cease and desist from retaliating against Isabel Manzo for her engagement in

protected activity under the Act;

2. Cease and desist from interfering with Isabel Manzo's exercise of her rights to engage in protected activity under the Act;

3. Remove from Isabel Manzo's file the May 9, 2018 letter recommending discontinuance of Manzo's employment and of her general education license;

4. Reconsider its decision to discontinue Isabel Manzo, deny her completion of probation, and terminate her license, without consideration of Rosita Rivera's letter dated May 9, 2018; and

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

DATED: October 13, 2021
Albany, New York

John F. Wirenius, Chair

Anthony Zumbolo, Member

Rosemary A. Townley, Member

NOTICE TO ALL EMPLOYEES

PURSUANT TO
THE DECISION AND ORDER OF THE

NEW YORK STATE
PUBLIC EMPLOYMENT RELATIONS BOARD

and in order to effectuate the policies of the

NEW YORK STATE
PUBLIC EMPLOYEES' FAIR EMPLOYMENT ACT

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

1. Not retaliate against Isabel Manzo for her engagement in protected activity under the Act;

2. Not interfere with Isabel Manzo's exercise of her rights to engage in protected activity under the Act;

3. Remove from Isabel Manzo's file the May 9, 2018 letter recommending discontinuance of Manzo's employment and of her general education license; and

4. Reconsider its decision to discontinue Isabel Manzo, deny her completion of probation, and terminate her license, without consideration of Rosita Rivera's letter dated May 9, 2018.

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

SALVATORE BATTAGLIA,

Charging Party, **CASE NO. U-37954**

- and -

TRANSPORT WORKERS UNION, LOCAL 100,

Respondent,

-and-

NEW YORK CITY TRANSIT AUTHORITY,

Employer.

SALVATORE BATTAGLIA, *pro se*

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by Salvatore Battaglia to a decision of the Director of Public Employment Practices and Representation (Director) dismissing Battaglia's amended improper practice charge which alleged that the Transport Workers Union, Local 100 (TWU) violated §§ 209-a.2 (a), (b), and (c) of the Public Employees' Fair Employment Act (Act).[1]

The gravamen of Battaglia's complaint is that, in the Spring of 2018, Battaglia (an employee with the New York City Transit Authority) exercised his "right of job preference," known as a "pick." Battaglia asserts that he was misled concerning the rate of pay for the job he chose and that, in September of 2018, he was notified that he was not going to receive the rate of pay he was "entitled to."

The charge asserted that officers of TWU are responsible for allowing the

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[1] 54 PERB ¶ 4536 (2021).

violations to take place, "coercing" drivers to work out-of-title, and "knowingly" disregarding the collective bargaining agreement (CBA).

Finally, the charge alleged that a grievance was filed in April of 2019, and that the arbitration decision, issued on April 23, 2021, violates the CBA's "time limitation" for grievance processing. Battaglia avers that TWU purposefully stalled the grievance process in order to appease management, and he also disagrees with several of TWU's legal strategies employed during the arbitration hearings, which were held on December 17, 2020 and January 21, 2021.

On June 9, 2021, the Director, pursuant to § 204.2 of our Rules of Procedure (Rules), sent Battaglia a deficiency notice, noting that individuals lack standing to allege a violation of § 209-a.2 (b) of the Act and that PERB's Rules impose a four-month period of limitations within which to file a charge. Battaglia was informed that his claims appeared untimely and that receipt of the arbitration decision did not begin the filing period.

On June 17, 2021, Battaglia filed an amendment to his charge that consisted of an unsworn letter summarizing his allegations (in sum and substance, the same content as set forth in the charge as originally filed) and several attachments in support thereof. Battaglia asserted that he was not aware of TWU's "misrepresentation" until the date he received the arbitration decision, which was April 23, 2021.[2]

The Director in her decision found that the amended charge remained deficient. She dismissed the § 209-a.2 (b) allegation against TWU for lack of standing. The Director then dismissed the remainder of the charge as untimely filed. Based on the

[2] On August 12, 2021, Battaglia filed an application for injunctive relief. That application was denied by Office of Counsel on August 13, 2021.

facts as alleged in the charge, the Director found that Battaglia stated that he became aware, in September of 2018, that he would not be receiving the rate of pay he thought he was entitled to. A grievance was filed in April of 2019, and arbitration hearings were held on December 17, 2020 and January 21, 2021, resulting in an arbitration decision that issued on April 23, 2021. The instant improper practice charge was not filed until May 26, 2021. The Director found that the arbitration decision was not the complained-of action that forms the basis of the charge and did not begin the period of limitations.

Rather, the Director found that Battaglia was complaining of TWU's conduct in addressing the employment issues Battaglia references in his charge, which occurred at or around the time when Battaglia discovered that his rate of pay was, allegedly, inaccurate and the grievance was filed. These occurrences took place in 2018-2019 and made the charge, filed on May 26, 2021, untimely.

Moreover, to the extent that Battaglia complains of the TWU's representation during the arbitration hearings, the Director found that those dates were also outside of the four-month period of limitations. The Director found that there were no facts set forth in either the charge as originally filed or in the amendment that supported any plausible rationale for why Battaglia became aware of anything new and different regarding the actions of TWU upon reading the arbitration decision.

EXCEPTIONS

Battaglia filed cursory exceptions to the Director's decision. He requests that his matter be sent to hearing and states that "[o]nly after April 23, 2021 can a determination be made if [I] was properly represented."[3] Battaglia's exceptions do not mention the

[3] Exceptions, at 1.

Director's dismissal of the allegation that TWU violated § 209-a.2 (b) of the Act on grounds of standing.

For the reasons given below, we affirm the Director's dismissal of the charge.

DISCUSSION

Because Battaglia did not except to the Director's dismissal of the allegation that the City violated § 209-a.2 (b) of the Act, any such exceptions are waived and this finding is not before us for review.[4] Were this finding before us, we would affirm the Director's decision. It is well-settled that an individual lacks standing to pursue an alleged violation of § 209-a.2 (b) of the Act.[5] The standing to allege a violation of this subsection of the Act belongs to the public employer and not to an individual employee.[6]

With respect to the allegations of violations of §§ 209-a.2 (a) and (c) of the Act, we affirm the Director's finding that Battaglia's charge is untimely. Section 204.1 (a) of our Rules requires that an improper practice charge be filed within four months of when the charging party "first knew, or reasonably should have known" of the conduct that forms the basis for the alleged improper practice.[7]

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[4] Rules § 213.2 (b) (4); *see, eg, City of Niagara Falls*, 54 PERB ¶ 3003, 3013 (2021); *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).

[5] *TCU/IAM (Shah)*, 53 PERB ¶ 3016, 3080-3081 (2020); *Bd of Educ of the City Sch Dist of the City of New York (Jenkins)*, 38 PERB ¶ 3012, 3040 (2005); *UFT (Assante)*, 27 PERB ¶ 3072, 3165 (1994).

[6] *Id*.

[7] *Niagara Falls Police Club, Inc (Drinks-Bruder),* 52 PERB ¶ 3002, 3008 (2019); *UFT (Martinez),* 51 PERB ¶ 3021, 3088 (2018); *District Council 37 (Bacchus),* 50 PERB ¶ 3013, 3057-3058 (2017); *UFT (Davis),* 50 PERB ¶ 3014, 3059 (2017); *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).

Battaglia does not assert that the Director erred in any way in her summary of the allegations in the charge. As laid out above and by the Director, Battaglia complains of TWU's actions or inaction at the time he became aware he was not going to receive the rate of pay he expected and filed a grievance regarding the issue. These occurrences took place in 2018-2019 and make the charge, filed on May 26, 2021, untimely. The dates of the arbitration hearings likewise fall outside our four month period of limitations and, to the extent that Battaglia complains of the TWU's representation during the arbitration hearings, those allegations are also untimely. We agree with the Director that receipt of the arbitration decision does not start a new period of limitations because Battaglia had knowledge of TWU's actions complained of at the time of the arbitration hearing itself.[8] The Director does not err in refusing to process a charge to pre-hearing conference or hearing when, as here, the charge is facially deficient.[9]

Accordingly, the exceptions are denied, the Director's decision is affirmed, and the charge must be, and hereby is, dismissed.[10]

DATED: October 13, 2021
Albany, New York

John F. Wirenius, Chair

Anthony Zumbolo, Member

[8] *See, eg*, *NYCTA (Fredericson)*, 34 PERB ¶ 3006, 3007 (2001).
[9] *See Niagara Falls Police Club (Drinks-Bruder)*, 54 PERB 3019 (2021); *City of Ithaca*, 45 PERB ¶ 3034, 3081 (2012).
[10] Member Rosemary A. Townley recused herself from consideration of this case.