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In the Matter of

**INTERNATIONAL BROTHERHOOD OF  
TEAMSTERS, LOCAL 317,**

Petitioner,

-and-

**CASE NO. C-6720**

**CITY OF HORNELL,**

Employer.

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**CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE**

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

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

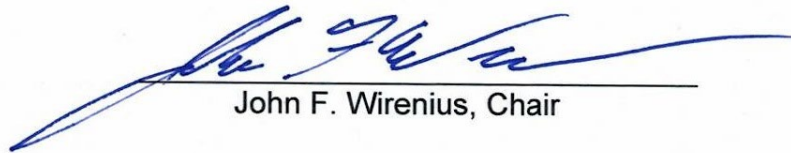
IT IS HEREBY CERTIFIED that the International Brotherhood of Teamsters, Local 317 has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Included: All regular full-time employees in the job titles of Laborer (all Grades) and Automotive Mechanic/Laborer (all Grades).

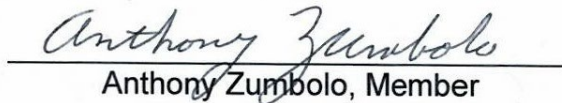
Excluded: All part-time, seasonal, and temporary employees (regardless of grade).

FURTHER, IT IS ORDERED that the above-named public employer shall negotiate collectively with the International Brotherhood of Teamsters, Local 317. The duty to negotiate collectively includes the mutual obligation to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party. Such obligation does not compel either party to agree to a proposal or require the making of a concession.

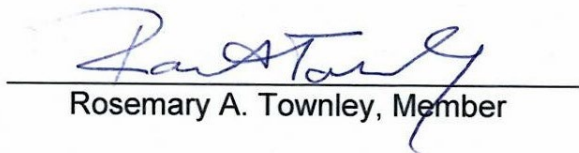
DATED: November 8, 2023  
Albany, New York



John F. Wirenius, Chair



Anthony Zumbolo, Member



Rosemary A. Townley, Member

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In the Matter of

**TEAMSTERS LOCAL 294,**

Petitioner,

-and-

**CASE NO. C-6722**

**TOWN OF FAIRFIELD,**

Employer,

-and-

**UNITED PUBLIC SERVICE EMPLOYEES  
UNION,**

Incumbent.

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**CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE**

A representation proceeding having been conducted in the above matter by the Public Employment Relations Board in accordance with the Public Employees' Fair Employment Act and the Rules of Procedure, and it appearing that a negotiating representative has been selected;<sup>1</sup>

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

IT IS HEREBY CERTIFIED that the Teamsters Local 294 has been designated

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<sup>1</sup> By email dated July 5, 2023, the United Public Service Employees Union disclaimed any interest in representing this unit.

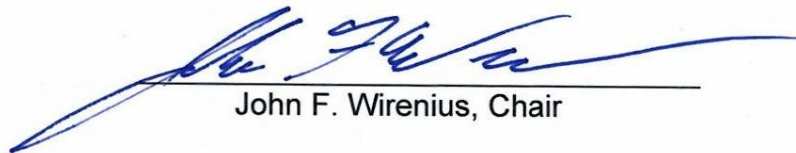
and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Included: All full-time, part-time, and seasonal employees of the Highway Department.

Excluded: Highway Superintendent and all others.

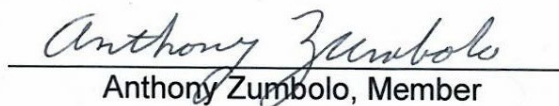
FURTHER, IT IS ORDERED that the above-named public employer shall negotiate collectively with the Teamsters Local 294. The duty to negotiate collectively includes the mutual obligation to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party. Such obligation does not compel either party to agree to a proposal or require the making of a concession.

DATED: November 8, 2023  
Albany, New York



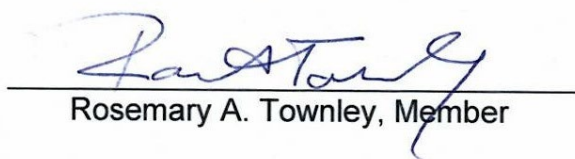
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John F. Wirenius, Chair



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Anthony Zumbolo, Member



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Rosemary A. Townley, Member

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

B/R	56-4513
	54-7027
	54-7026
	54-7025
	54-7024
	54-7023
	54-7022
	54-7021
	54-7020
	54-7019
	54-7016
	54-7015

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In the Matter of

**SUFFOLK COUNTY COURT EMPLOYEES ASSOCIATION, INC.; NEW YORK STATE SUPREME COURT OFFICERS ASSOCIATION, ILA, LOCAL 2013, AFL-CIO; NEW YORK STATE COURT OFFICERS ASSOCIATION; CIVIL SERVICE EMPLOYEES ASSOCIATION, INC., LOCAL 1000, AFSCME, AFL-CIO; COURT OFFICERS BENEVOLENT ASSOCIATION OF NASSAU COUNTY; ASSOCIATION OF SUPREME COURT REPORTERS; NINTH JUDICIAL DISTRICT COURT EMPLOYEES ASSOCIATION; DISTRICT COUNCIL 37, LOCAL 1070, AFSCME, AFL-CIO; COURT ATTORNEYS ASSOCIATION OF THE CITY OF NEW YORK; NEW YORK STATE COURT CLERKS ASSOCIATION, INC.,**

**CASE NOS. U-38081, U-38084, U-38087, U-38090, U-38091, U-38093, U-38096, U-38099, U-38104, U-38107, U-38129**

Charging Parties,

- and -

**NEW YORK STATE UNIFIED COURT SYSTEM,**

Respondent.

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**ARCHER, BYINGTON, GLENNON, & LEVINE, LLP (MARTY GLENNON of counsel), for SUFFOLK COUNTY COURT EMPLOYEES ASSOCIATION, INC.**

**DeNIGRIS LAW FIRM PLLC (STEPHEN G. DeNIGRIS of counsel), for NEW YORK STATE SUPREME COURT OFFICERS ASSOCIATION, ILA, LOCAL 2013, AFL-CIO**

**PAT BONANNO & ASSOCIATES, P.C. (PAT BONANNO of counsel), for NEW YORK STATE COURT OFFICERS ASSOCIATION**

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

**DAVIS & FERBER, LLP (ALEX KAMINSKI of counsel), for COURT OFFICERS BENEVOLENT ASSOCIATION OF NASSAU COUNTY**

**CLIFTON BUDD & DeMARIA, LLP (DOUGLAS P. CATALANO & STEFANIE R. TOREN of counsel), for ASSOCIATION OF SUPREME COURT REPORTERS**

**GREENBERG BURZICHELLI GREENBERG P.C. (SETH H. GREENBERG of counsel), for NINTH JUDICIAL DISTRICT COURT EMPLOYEES ASSOCIATION and COURT ATTORNEYS ASSOCIATION OF THE CITY OF NEW YORK**

**ROBIN ROACH, GENERAL COUNSEL (MICHAEL COVIELLO of counsel), for DISTRICT COUNCIL 37, LOCAL 1070, AFSCME, AFL-CIO**

**PITTA LLP (JOSEPH BONOMO of counsel), for NEW YORK STATE COURT CLERKS ASSOCIATION, INC.**

**PAUL WEISS RIFKIND WHARTON & GARRISON LLP (BRUCE BIRENBOIM, LINA DAGNEW, GREGORY F. LAUFER, ELIZA P. STRONG & LISA M. VELAZQUEZ of counsel), for NEW YORK STATE UNIFIED COURT SYSTEM**

### **BOARD DECISION AND ORDER**

These cases come to us on exceptions filed by the New York State Unified Court System (UCS) and cross-exceptions filed by the New York State Court Officers Association (NYSCOA), the Court Officers Benevolent Association of Nassau County (COBANC), and the Association of Supreme Court Reporters Within the City of New York (Association) to a decision of an Administrative Law Judge (ALJ).<sup>1</sup>

In her decision, the ALJ found that UCS violated § 209-a.1 (d) of the Public Employees' Fair Employment Act (Act) when it failed to negotiate the procedures

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<sup>1</sup> 56 PERB ¶ 4513 (2023).

associated with its mandatory COVID-19 testing requirement for unvaccinated non-judicial employees (Testing Policy) and its mandatory COVID-19 vaccination program for non-judicial employees (Vaccination Policy) (together, the Policies). The ALJ also found that UCS violated § 209-a.1 (d) of the Act by failing to bargain the impact of the Policies with District Council 37, Local 1070, AFSCME, AFL-CIO (DC 37), the New York State Court Clerks Association, Inc. (CCA), the Court Attorneys Association of the City of New York (CAA), and the Ninth Judicial District Court Employees Association (NJDCEA).

### EXCEPTIONS

UCS filed four exceptions to the ALJ's decision. UCS claims that the ALJ erred by *sua sponte* addressing whether decisional bargaining was required over UCS's decision to include procedures in the Policies.<sup>2</sup> UCS also excepts to the make-whole remedy ordered by the ALJ, contending that it had no obligation to bargain over procedures and that a make-whole remedy is therefore not appropriate.<sup>3</sup>

The Charging Parties support the ALJ's decision and contend that no basis has been demonstrated for reversal.<sup>4</sup>

NYSCOA, COBANC, and the Association except to the ALJ's decision to the extent it included a finding that none of them had alleged a violation of § 209-a.1 (d) of the Act through UCS' failure to bargain the impact of the Policies.

UCS filed a response supporting the ALJ's decision in this respect and contending that no basis has been demonstrated for reversal of that finding.

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<sup>2</sup> UCS Exceptions Nos. 1 and 2.

<sup>3</sup> UCS Exceptions Nos. 2-4.

<sup>4</sup> All Charging Parties except for the Suffolk County Court Employees Association, Inc. (SCCEA) submitted a combined brief. SCCEA submitted a separate brief.

For the reasons given below, we affirm the ALJ's decision with respect to certain Charging Parties but modify her recommended remedy as described herein.

### FACTS

The facts are set forth fully in the ALJ's decision and are only included here as necessary to decide the exceptions. UCS operates all levels of state courts in the State of New York, which hear and decide legal cases and controversies, as prescribed by the New York State Constitution.<sup>5</sup> Historically, UCS has conducted its operations in person. The Charging Parties each represent different bargaining units of non-judicial employees of UCS. UCS has around 1,200 paid judges and around 14,000 non-judicial employees. Non-judicial employees have a variety of duties and titles, including but not limited to court officers, court clerks, reporters, interpreters, clerical staff, and technological staff.

In the wake of the emergence of COVID-19, and in accordance with guidance from state and federal public health officials,<sup>6</sup> beginning in or around March of 2020, UCS began instituting substantial changes to its operations.<sup>7</sup> Proceedings in many non-essential matters were halted or postponed, and many proceedings were conducted virtually. A return to larger in-person operations began in May of 2020 and expanded over that year. As part of the effort to return to in-person operations, UCS implemented various policies aimed at protecting public health, including use of personal protective equipment, social distancing, increased sanitization and hygiene protocols, and

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<sup>5</sup> Tr, at 487, 490-91; *see also* Respondent's Ex. 45.

<sup>6</sup> *See generally* Respondent's Exs. 12, 15, 16, 17, 20, 22, 36.

<sup>7</sup> *See generally* Respondent's Exs. 1-10, 13.

reconfiguring physical spaces.<sup>8</sup>

During the summer of 2021, UCS communicated to its employees its intention to implement a policy which would require employees, if not vaccinated, to provide proof of a COVID-19 test result, issuing memoranda explaining the new policy. On August 18, 2021, UCS issued another memorandum to all non-judicial staff regarding the new mandatory COVID-19 testing program, effective on September 7, 2021.<sup>9</sup> Under the Testing Policy, non-judicial staff who were not vaccinated against COVID-19 were required to test weekly for COVID-19 at a “licensed medical facility” and provide proof of such test to UCS no later than the next business day; those who were vaccinated against COVID-19 would not be required to test.

Staff subject to the Testing Policy were directed to coordinate with their supervisor to take their test during their regularly scheduled work time and were granted one hour of excused leave to get tested. They could also choose to test outside of work hours, but they would not be granted leave or compensatory time under this option. The Testing Policy also states that employees who were not compliant would be designated as “unfit for service” and charged annual or compensatory leave, and those without leave would have their “pay docked.”<sup>10</sup> The Testing Policy also allowed staff to request from UCS a medical exception by providing a letter from a medical health provider, and, if approved, an employee would “not be required to submit proof of

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<sup>8</sup> Respondent’s Ex. 13.

<sup>9</sup> Joint Ex. 2. UCS also expressed “supplemental information” regarding the mandatory testing in a memorandum dated September 1, 2021, which is included in the record as Joint Ex 4. A policy pertaining to judicial staff was outlined in a separate document issued the same day, which is contained in the record as Joint Ex. 1.

<sup>10</sup> Joint Ex. 2.

testing for the period of time prescribed by the medical health provider.”<sup>11</sup> On September 7, 2021, the Testing Policy became effective.

On August 25, 2021, by email to its employees, UCS announced that all employees, both judicial and non-judicial, would be required to be vaccinated for COVID-19, effective September 27, 2021.<sup>12</sup> The email set forth that, “absent a valid medical or religious exemption, judges and non-judicial personnel will be required to provide proof of full vaccination [and those] who receive a medical or religious exemption will have to submit proof of a weekly COVID test.”<sup>13</sup>

In a memorandum dated September 10, 2021, UCS set forth the terms of its new mandatory COVID-19 vaccine requirement for all non-judicial personnel (Vaccination Policy).<sup>14</sup> The Vaccination Policy required that staff provide proof, by September 27, 2021, of either full COVID-19 vaccination or a first vaccine dose with the second within about three weeks. Staff who had not yet received their second dose of vaccine or who were waiting for a response from UCS regarding an exemption request were required to continue testing pursuant to the Testing Policy.

The Vaccination Policy provided a process for staff to apply for medical and religious exemptions. Employees would also be eligible for excused leave and/or compensatory time, but only up to 3.5 hours for each vaccination appointment for which proof was provided. Further, the Vaccination Policy stated that those who were non-compliant may be “absent without authorization,” that approval to charge leave could be

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

<sup>12</sup> Joint Ex. 3.

<sup>13</sup> *Id.*

<sup>14</sup> Joint Ex. 5.

denied until an employee had “taken steps to remedy their non-compliance,” and that “[c]ontinued failure to comply may result in disciplinary action, up to and including termination.”<sup>15</sup>

### DISCUSSION

The ALJ found that UCS’ decision to institute the Policies was not a mandatory subject of bargaining because the Policies “were implemented in response to COVID-19 and in furtherance of [UCS]’ defining mission . . . to provide an accessible forum to every litigant seeking redress of grievances”<sup>16</sup> and because the Policies did not “unnecessarily intrude on protected interests of the employees in the bargaining units, nor did the Policies go beyond what is necessary to further UCS’ effort to ensure an accessible forum.”<sup>17</sup>

In accord with this finding, the ALJ found that UCS did not violate the Act when it decided to require employees to test and subsequently required employees to be vaccinated against COVID-19. No party filed any exceptions to the ALJ’s finding that UCS had no obligation to bargain over its decision to establish the Policies. As a result, any such exceptions are waived, and this finding is not before us for review.<sup>18</sup>

Separate from the decision to institute the Policies, the ALJ found that UCS violated § 209-a.1 (d) of the Act by failing to negotiate the impact of the Policies with DC 37, CAA, NJDCEA, and CCA. There are no exceptions to the ALJ’s finding with respect to these

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<sup>15</sup> *Id.*

<sup>16</sup> 56 PERB ¶ 4513, at 4582, quoting Tr 639.

<sup>17</sup> *Id.*, at 4583.

<sup>18</sup> Section 203.2 (b) of PERB Rules of Procedure (Rules). *See eg, Vil of Tuxedo Park*, 55 PERB ¶ 3002, 3010 n 2 (2022); *Vil of Endicott*, 47 PERB ¶ 3017, 3052, n 5 (2014); *NYCTA (Burke)*, 49 PERB ¶ 3021, 3072, n 4 (2016), *confd sub nom Burke v NYC Tr Auth*, 51 PERB ¶ 7009 (Sup Ct, New York County 2018).

Charging Parties. Again, any such exceptions have been waived, and this finding is not before us for review.

NYS COA, COBANC, and the Association assert that they should also be included among the parties with whom UCS must negotiate the impact of the Policies. We find no error by the ALJ in excluding NYS COA and the Association from the Order. The charges filed by NYS COA and the Association do not allege a violation based on a demand and refusal to bargain impact<sup>19</sup> and neither of these Charging Parties ever moved to amend their charge to allege such a violation or to conform the pleadings to the evidence. We have often held that we will not find a violation of the Act that is not pled in the charge, a timely amendment thereto, or a in motion before the ALJ to conform the pleadings to the evidence, even if such a violation is litigated.<sup>20</sup>

We find that COBANC's charge did allege a failure to bargain the impact of the Policies.<sup>21</sup> Although it could have been more artfully pled, the allegations in COBANC's charge make it clear that COBANC made demands to bargain both the requirements of the Policies and their impacts, and that COBANC alleges both that the refusal to bargain over

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<sup>19</sup> See ALJ Exs. 5, 13.

<sup>20</sup> See, eg *Board of Educ of the City Sch Dist of the City of New York (Smith)*, 51 PERB ¶ 3035, 3152 (2018); *Cayuga Community College*, 50 PERB ¶ 3003, 3015 (2017), enforcement granted sub nom *NYS Pub Empl Relations Bd v Cayuga Community Coll*, 50 PERB ¶ 7010 (Sup Ct, Albany County 2017); *County of Rockland and Rockland County Sheriff*, 31 PERB ¶ 3062, 3136 (1998). See also *City of Niagara Falls (Drinks-Bruder)*, 52 PERB ¶ 3002, 3009 (2019) (allegation of bad faith raised before Board but not before the ALJ cannot be considered); *Bd of Educ, City Sch Dist of City of NY (Bagarozzi)*, 51 PERB ¶ 3032, 3139 (2018) (deferral argument not considered when raised before Board but not before ALJ because it "is well established that the Board will not address arguments raised for the first time on exceptions.") (quoting *State of New York (Unified Court System)*, 50 PERB ¶ 3042, 3170 (2017) (other citations omitted).

<sup>21</sup> ALJ Ex. 11.

the decision to implement the Policies and their impact violated the Act.<sup>22</sup> The ALJ analyzed the Policies here as work rules, and neither party has excepted to this framing of the issue.<sup>23</sup> We look only to whether the ALJ erred in finding that, while the decision to implement the Policies was non-mandatory, the procedures associated with implementation were mandatory subjects of bargaining.

UCS asserts that the ALJ erred by “*sua sponte*” addressing this issue because none of the Charging Parties separately alleged in their charges that UCS violated § 209-a.1 (d) of the Act by failing to bargain over the procedures necessary to implement the testing and vaccination requirements. Although none of the Charging Parties used the precise framework adopted by the ALJ, we find that many of the charges gave ample notice that the Charging Party was contesting the lawfulness of the procedures implemented by UCS. Specifically, the charges filed by the New York State Supreme Court Officers Association, ILA, Local 2013, AFL-CIO (NYSSCOA), the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO (CSEA), COBANC, NJDCEA, DC 37, CAA, and CCA contested UCS’ failure to bargain over subjects such

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<sup>22</sup> *Id.*, at ¶¶ 7, 8, 11, 15, 17.

<sup>23</sup> As such, we need not address whether the Policies were also a new qualification for continued employment. While certain rulings by the Supreme Court, New York County, and the Second Circuit Court of Appeals have found vaccination to constitute a qualification of employment, that argument has not been addressed before or by us. See *NYC Mun Labor Committee v City of New York*, 75 Misc3d 411, 416-417 (Sup Ct, New York County 2022); *Maniscalco v NYC Dept of Educ*, 563 FSupp3d 33, 38 (EDNY 2021), *affd* 2021 WL 4814767 (2d Cir Oct 15, 2021), *cert denied* 142 SCt 1668 (2022). We further note that new qualifications for continued employment are mandatorily negotiable as are generally the “grounds for the imposition of discipline and the penalty to be imposed.” *NYCTA*, 30 PERB ¶¶ 3030, 3074 (1997), *confd sub nom NYC Tr Auth v NYS Pub Empl Relations Bd*, 33 PERB ¶¶ 7020 (2d Dept 2000), *reargument and lv denied* 34 PERB ¶¶ 7010 (2d Dept 2001), *lv denied* 34 PERB ¶¶ 7022 (2001).

as “the loss of time and accruals, the costs of surveillance testing,”<sup>24</sup> and excused leave for testing, breaks, costs associated with testing, and the impact of out-of-pocket expenses.<sup>25</sup> These subjects would clearly be at issue during bargaining over procedures, and the charges, read in full, adequately allege that the failure to bargain these subjects violated the Act. The ALJ is not limited to theories of the violation as explicitly expressed by the parties as long as “fair notice of the actions intended to be proved as violations” is provided.<sup>26</sup> Such was clearly the case in this matter with respect to Charging Parties NYSSCOA, CSEA, COBANC, NJDCEA, DC37, CAA, and CCA.

By contrast, the remaining charges<sup>27</sup> are not sufficiently broad to encompass the allegation that UCS violated the Act by failing to bargain over the procedures attendant to its decision to implement the Policies. The parties that did not allege a failure to bargain over procedures are bound by their charges, and we have long held that we will not find a violation of the Act upon an allegation which has not been pleaded, even if that allegation has been litigated.<sup>28</sup>

Second, we find that the ALJ did not err in finding the procedures associated with the decision to implement the Policies to be mandatory subjects of bargaining. It is well-established that, even if certain subjects are removed from collective bargaining, the

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<sup>24</sup> CSEA Charge, ALJ Ex 7, at ¶ 11.

<sup>25</sup> NYSSCOA Charge, ALJ Ex 3, at ¶¶ 18-23, 26-28, 32, 34. See also COBANC’s Charge, ALJ Ex 11, at ¶ 8, 17; NJDCEA Charge, ALJ Ex 15, at ¶ 25, DC37 Charge, ALJ Ex 17, at ¶ 22; CAA Charge, ALJ Ex 19, at ¶ 27, and CCA Charge, ALJ Ex 21, at ¶ 44.

<sup>26</sup> *County of Nassau*, 32 PERB ¶ 3034, 3077 (1999) (quoting *Wappingers Cent Sch Dist*, 28 PERB ¶ 3016 (1995); *Civ Serv Empls Assn (Dennis)*, 26 PERB ¶ 3059 (1993)).

<sup>27</sup> Filed by the Suffolk County Court Employees Association, Inc. (ALJ Ex 1), NYSSCOA (ALJ Ex 5), and the Association (ALJ Ex 13).

<sup>28</sup> See cases cited in fn 20.

procedures associated with them may not be.<sup>29</sup> For example, procedures associated with permissive subjects of bargaining are themselves mandatory to the extent they impact terms and conditions of employment.<sup>30</sup> Even procedures related to prohibited subjects of bargaining may be bargainable.<sup>31</sup> Contrary to UCS' assertion, the procedures here are not so inextricably intertwined with the non-bargainable decisions as to make the procedures a non-mandatory subject of bargaining.<sup>32</sup>

We recognize the unique circumstances here. The COVID-19 pandemic presented unprecedented challenges for society as a whole, including public employers such as UCS seeking to fulfill their statutory and constitutional mandates. However, the fact that a public

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<sup>29</sup> See, eg, *City of Long Beach v NYS Pub Empl Relations Bd*, 39 NY3d 17 (2022) (while termination under Civil Service Law (CSL) § 71 is not bargainable, pre-termination procedures are mandatorily bargainable); *City of Watertown v State of NY Pub Empl Relations Bd*, 95 NY2d 73, 79 (2000) (finding that procedures for contesting City's determinations under General Municipal Law (GML) § 207-c are mandatory subject of bargaining but initial determinations are not); *City of Schenectady*, 19 PERB ¶ 3051, 3108 (1986), *confd sub nom City of Schenectady v NYS Pub Empl Relations Bd*, 135 Misc2d 1088 (Sup Ct, Albany County 1986), *affd* 132 AD2d 242 (3d Dept 1987), *lv denied* 71 NY2d 803 (1988) (procedures to apply for mandated benefits for injuries incurred in the line of duty under GML § 207-c are mandatory subjects of bargaining, but subjects specifically covered by GML § 207-c are not).

<sup>30</sup> See eg, *City of Utica*, 32 PERB ¶ 3056, 3132 (1999) (finding that procedures related to unilaterally implemented non-mandatory requirement were negotiable).

<sup>31</sup> See eg, *City of Long Beach*, 39 NY3d at 24 (explaining how procedures to terminate are mandatorily bargainable even though "public policy prohibits an employer from bargaining away its right to remove those employees satisfying the plain and clear statutory requisites for termination") (quoting *Economico v Village of Pelham*, 50 NY2d 120, 129 (1980), *partially abrogated*, *Prue v Hunt*, 78 NY2d 364 (1991)).

<sup>32</sup> We note that the New York City mini-PERB has similarly so held. See *City of New York*, 15 OCB2d 34, at 2-3 (BCB 2022) (NYC Board of Collective Bargaining finding that the City had obligation to bargain over "mandatory subjects contained in its policies to implement the Vaccine Mandate" with respect to City employees). See also *City of Cohoes*, 25 PERB ¶ 3042, 3086 (1992) (employer required to bargain the impact of policy regarding testing for tuberculosis where employer had multiple options regarding testing but refused to bargain, unilaterally imposed one, and the "unilateral choice of testing procedures implicated many of the employees' terms and conditions of employment apart from the grounds for the imposition of discipline").

health emergency existed did not suspend or preempt the obligations of public employers under the Act, especially where, as in this matter, rights under the Act did not interfere with the employer's ability to secure a safe environment, as the employer's ability to restrict in-person access to its facilities and personnel is unchallenged.

Rights conferred by the Act do not, and did not, interfere with the employer's ability to immediately and effectively address the public health emergency.<sup>33</sup> As such, we agree with the ALJ that UCS had an obligation to bargain over the procedures associated with implementation of the Policies, such as whether paid time off was available for employees testing and/or receiving a vaccination and the process through which employees could apply for religious or medical exemptions prior to implementing the Policies.

In terms of the remedy, we find it appropriate to order a make-whole remedy, but not to order reinstatement. The Policies here were enacted in response to an unprecedented public health crisis and in furtherance of UCS' mission. Further, the Policies did not unnecessarily intrude on protected interests of employees in the bargaining units. Bargaining over the procedures associated with the Policies would not have exempted employees from the obligation to be tested and subsequently vaccinated, and there is no showing on the record before us that any negotiable procedures would have led to

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<sup>33</sup> UCS responded to the health emergency by March 2020 with the restriction on in-person services, followed by several unchallenged protocols related to returning to in-person services in May 2020 (use of personal protective equipment, social distancing, increased sanitization and hygiene protocols, and reconfiguring physical spaces). The Policies at issue here were not implemented until August and September 2021, well over a year later. No effort at bargaining over procedures to implement the Policies was undertaken by UCS in the 16 months between the pandemic closing most in-person access to the courts and the implementation of the Policies.

compliance with the Policies.<sup>34</sup> Our make-whole remedy in the Order below therefore does not require reinstatement of employees separated from service as a result of non-compliance with the Policies. Employees' separation from service does not stem from the failure to bargain procedures, but rather from employees' choice not to comply with UCS' non-mandatorily bargainable decision to test and subsequently to vaccinate.<sup>35</sup> Ordering reinstatement in these circumstances would essentially eviscerate any incentive for employees to comply with the lawfully enacted Policies.<sup>36</sup>

We do not limit the make-whole remedy to Charging Parties who specifically requested such a remedy, as UCS urges.<sup>37</sup> Neither our improper practice charge forms nor our Rules require that a charging party enumerate the specific relief sought. We have “construe[d] our authority to effectuate the purposes and policies of the Act pursuant to § 205.5 (d) of the Act to include the authority to fashion appropriate relief, whether relief has been specifically requested or not.”<sup>38</sup>

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<sup>34</sup> See *City of Cohoes*, 25 PERB ¶¶ 3042, at 3086 (rejecting the employer's public policy argument that it could unilaterally impose procedures related to testing but noting that “[b]argaining about the choice of testing procedures and the timing of that testing would not have exempted the employees from an obligation to be tested nor would the bargaining otherwise have interfered with the City's effort to cooperate with the County Health Department in the accomplishment of a public health goal”).

<sup>35</sup> *Compare City of Long Beach*, 39 NY3d at 25, 55 PERB ¶¶ 7014 (2022) (finding that the Act requires bargaining over pretermination procedures under CSL § 71, which is “fundamentally different from requiring the City to negotiate over the right to terminate an employee after the year-long period of absence protected by section 71”).

<sup>36</sup> We retain jurisdiction for a compliance proceeding to resolve any disputes regarding the make whole remedy.

<sup>37</sup> UCS Brief in Support of Exceptions, at 18-19.

<sup>38</sup> *Uniondale Union Free Sch Dist*, 21 PERB ¶¶ 3044, 3098 n 2 (1998), *affd and enforcement order granted sub nom Uniondale Union Free Sch Dist v Newman*, 167 AD2d 475 (2d Dept 1990), *lv denied* 77 NY2d 809 (1991).

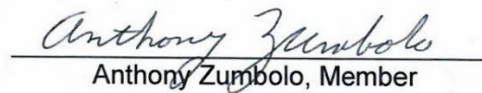
In sum, we affirm the ALJ's finding that UCS violated § 209-a.1 (d) of the Act when it failed to negotiate the procedures associated with its mandatory Testing Policy and Vaccination Policy with the parties enumerated below, but we modify her recommended remedy as explained above.


IT IS, THEREFORE, ORDERED that UCS will forthwith:

1. Cease and desist from unilaterally imposing procedures that employees must follow in order to be tested or vaccinated for COVID-19 for employees in the units represented by NYSSCOA, CSEA, COBANC, NJDCEA, DC 37, CAA, and CCA;
2. Make whole bargaining unit employees for any economic losses resulting from UCS' failure to bargain procedures associated with implementation of the Testing Policy and Vaccination Policy, with interest at the maximum legal rate for employees in the units represented by NYSSCOA, CSEA, COBANC, NJDCEA, DC 37, CAA, and CCA;
3. Bargain with DC 37, CAA, NJDCEA, CCA, and COBANC regarding the impacts, if any, of the Policies;
4. Sign and post the attached notice at all physical and electronic locations normally used to post notices to unit employees.

DATED: November 8, 2023  
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 New York State Unified Court System (UCS) in the bargaining units represented by the Suffolk County Court Employees Association, Inc.; the New York State Supreme Court Officers Association, ILA, Local 2013, AFL-CIO (NYSSCOA); New York State Court Officers Association (NYSCOA); Civil Service Employees Association, Inc; Local 1000, AFSCME, AFL-CIO (CSEA); Court Officers Benevolent Association of Nassau County (COBANC); Association of Supreme Court Reporters; Ninth Judicial District Court Employees Association (NJDCEA); District Council 37, Local 1070, AFSCME, AFL-CIO (DC 37); Court Attorneys Association of the City of New York (CAA); and New York State Court Clerks Association, Inc. (CCA), that UCS will forthwith:

1. Stop unilaterally imposing procedures that employees must follow in order to be tested or vaccinated for COVID-19 for employees in the units represented by NYSSCOA, CSEA, COBANC, NJDCEA, DC 37, CAA, and CCA;
2. Make whole bargaining unit employees for any economic losses resulting from UCS' failure to bargain procedures associated with implementation of the Testing Policy and Vaccination Policy, with interest at the maximum legal rate for employees in the units represented by NYSSCOA, CSEA, COBANC, NJDCEA, DC 37, CAA, and CCA;
3. Bargain with DC 37, CAA, NJDCEA, CCA, and COBANC regarding the impacts, if any, of the Policies.

Dated . . . . .

By . . . . .  
on behalf of New York State Unified  
Court System

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

In the Matter of

**EUGENIA PINKARD,**

Charging Party,

**CASE NO. U-38871**

- and -

**BOARD OF EDUCATION OF THE CITY SCHOOL  
DISTRICT OF THE CITY OF NEW YORK and  
UNITED FEDERATION OF TEACHERS,**

Respondents.

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**EUGENIA PINKARD, *pro se***

**KAREN SOLIMANDO, EXECUTIVE DIRECTOR OF LABOR RELATIONS  
(ALLISON BILLER of counsel), for Respondent Board of Education of the  
City School District of the City of New York**

**BOARD DECISION AND ORDER**

This case comes to us on exceptions filed by Eugenia Pinkard to a decision of the Director of Public Employment Practices and Representation (Director) dismissing Pinkard's amended improper practice charge.<sup>1</sup> In her charge, originally filed on April 17, 2023, Pinkard alleged that the Board of Education of the City School District of the City of New York (District) violated §§ 209-a.1 (a) and (c) of the Public Employees' Fair Employment Act (Act), and that the United Federation of Teachers (UFT) violated § 209-a.2 (c) of the Act. The details of the charge alleged that Pinkard's "secretary's license was terminated on August 16, 2010, for excessive absences . . . but some time in 2022, the [District] reversed the excessive absences charges of 2010, and said

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<sup>1</sup> 56 PERB ¶ 4550 (2023).

[Pinkard] requested a leave of absence without pay . . . and changed [her] termination of August 16, 2010 into a resignation.”<sup>2</sup> Pinkard avers that she now wants the resignation “removed from her records,” and that she should be “returned to payroll immediately . . . with all back-pay and benefits.”<sup>3</sup>

Attached to the charge are several documents, including correspondence from 2010 concerning Pinkard’s employment history, as well as an April 6, 2023 letter to Pinkard from the Teachers’ Retirement System (TRS). The letter from TRS states that it is in reply to a letter from Pinkard and notes that the unpaid leave period reflected in Pinkard’s TRS membership service periods from April 9, 2010, to April 11, 2010, is based on employment records obtained from the District. The letter further informs Pinkard that she owes \$8,468.28 for a membership service deficit that she incurred in 2009, and that this payment is due by April 23, 2023.

The Director, pursuant to § 204.2 of PERB’s Rules of Procedure (Rules), sent Pinkard a notice dated April 20, 2023, that the charge was deficient. The deficiency notice advised Pinkard of the following, in its entirety:

You have filed multiple improper practice charges with PERB regarding the same issues. The charges were all dismissed by both the Director of Public Employment Practices and Representation, and the Board. PERB will not process repetitive charges that have previously been dismissed by all levels of the Agency. See Case Nos. U-38028, U-38048, and U-38452.

On April 24, 2023, Pinkard filed an amended improper practice charge. The amended charge claimed that “recently the [District] changed my records” and that only after receiving the information from TRS on April 6, 2023, Pinkard “began to understand

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<sup>2</sup> Original Improper Practice Charge, filed on April 17, 2023.

<sup>3</sup> *Id.*

what was done to justify the termination.”<sup>4</sup>

Pinkard submitted another letter to PERB dated May 29, 2023, with a number of attachments. In her letter, Pinkard stated that she has “a new understanding that I would like to bring to your attention.”<sup>5</sup> Pinkard claims that her employment records “have been changed” and that she became aware of this change on May 29, 2023.<sup>6</sup> With the exception of a two-page document from the New York City Department of Education which appears to be dated May 22, 2023, all of the attachments to Pinkard’s letter are dated in the range of 2005 to 2010.

The Director in her decision found that the charge remained deficient. The Director found that “it is the fourth time Pinkard has filed a charge for the same issue, and I decline to process a duplicative, repetitive charge that has previously been processed and dismissed at all levels of the Agency. . . .”<sup>7</sup> The Director also found that the charge was untimely filed. The Director explained that § 204.1 (a) (1) of our Rules requires that an improper practice charge be filed within four months of when a charging party has actual or constructive knowledge of the conduct that forms the basis for the alleged improper practice. The Director found that the current charge complains of Pinkard’s adverse employment history with the District, which ultimately culminated in Pinkard’s final separation in 2010, making Pinkard’s charge untimely by at least 12 years.<sup>8</sup>

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<sup>4</sup> Amended Improper Practice Charge, filed April 27, 2023.

<sup>5</sup> Letter from Pinkard dated May 29, 2023.

<sup>6</sup> *Id.*

<sup>7</sup> 56 PERB ¶ 4550, at 4951.

<sup>8</sup> The Director found that Pinkard’s submission dated May 29, 2023 did not contain any new or relevant information.

As a result of these deficiencies, the Director dismissed Pinkard's amended charge.

### EXCEPTIONS

Pinkard filed six pages of unnumbered exceptions, with attachments. Pinkard asserts that she is not "rearguing the same issues from my old 2010 case," but is instead asserting that the District "changed my records again in July 2023, regarding my 2010 termination."<sup>9</sup> Pinkard claims that the new records are inaccurate (concerning her 2010 termination), that she has been "exonerated of the charges,"<sup>10</sup> and that she is entitled to an order awarding her "all salary, benefits, and other consideration."<sup>11</sup>

The District filed a responsive brief in which it claims that Pinkard's exceptions are procedurally deficient because they do not comply with § 213.2 (b) of our Rules. On the merits, the District supports the Director's decision and contends that no basis has been demonstrated for reversal.

Pinkard filed a reply brief to the District's responsive brief. Section 213.3 of our Rules does not allow for the filing of reply briefs unless requested by the Board or filed with the Board's authorization.<sup>12</sup> As the Board neither requested nor authorized Pinkard's additional filing here, we need not consider it.<sup>13</sup>

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<sup>9</sup> Exceptions, at 1.

<sup>10</sup> *Id.*, at 5.

<sup>11</sup> *Id.*, at 6.

<sup>12</sup> Pinkard is aware of this Rule, as we have previously declined to consider reply briefs filed by her. See *UFT (Pinkard)*, 56 PERB ¶¶ 3002, 3008 (2023).

<sup>13</sup> *Watervliet Teachers' Assn (Cea)*, 55 PERB ¶¶ 3001, 3002 (2022); *Niagara Falls Police Club, Inc (Drinks-Bruder)*, 52 PERB ¶¶ 3011, 3052 (2019); *Amalgamated Transit Union*, 32 PERB ¶¶ 3053, 3126, n 2 (1999). Even were we to formally consider Pinkard's reply brief, it contains nothing that would change our analysis below.

### DISCUSSION

First, we note that the attachments to Pinkard's exceptions contain documents that were not included with Pinkard's original charge, amended charge, or her submission to the Director dated May 29, 2023, specifically two July 2023 letters from TRS. It is well established that when reviewing the Director's decision, our review is limited to the record as it existed before the Director.<sup>14</sup> Even were we to consider these documents, they would make no difference to our analysis here.

We next address the District's contention that Pinkard's exceptions are deficient under our Rules. We agree that Pinkard's exceptions are not in technical compliance with our Rules.<sup>15</sup> However, we are mindful that Pinkard is unrepresented and that her exceptions should be liberally construed.<sup>16</sup> We have examined the exceptions and the record.

We agree with the Director's conclusion that issues surrounding Pinkard's 2010 separation from service are time barred under our 4-month period of limitations.<sup>17</sup>

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<sup>14</sup> *TWU (Gallo)*, 56 PERB ¶¶ 3010, 3045 (2023); *Board of Educ of the City Sch Dist of the City of New York (Coleman)*, 54 PERB ¶¶ 3021, 3067 (2021); *CSEA (Sainpaulin)*, 51 PERB ¶¶ 3011, 3051 (2018); *TWU (Ayala)*, 50 PERB ¶¶ 3017, 3074 (2017); *CSEA (Josey)*, 49 PERB ¶¶ 3022, 3072 (2016); *Smithtown Fire Dist*, 28 PERB ¶¶ 3060, 3135 (1995); *State of New York (Rockland Psychiatric Center)*, 25 PERB ¶¶ 3012, 3031 (1992); *Board of Coop Educ Services of Sullivan Cnty*, 14 PERB ¶¶ 3101, 3170-3171 (1981).

<sup>15</sup> Section 213.2 our Rules requires that exceptions: (1) set forth specifically the questions or policy to which exceptions are taken; (2) identify that part of the decision, report, order, ruling or other findings or determinations to which exceptions are taken; (3) designate by page citation the portions of the record relied upon; and (4) state the grounds for exceptions.

<sup>16</sup> See *Niagara Falls Police Club, Inc (Drinks-Bruder)*, 52 PERB ¶¶ 3007, 3028 (2019); *State of New York (New York State Police) (Oliver)*, 51 PERB ¶¶ 3037, 3166 (2018); *UFT (Leon)*, 48 PERB ¶¶ 3016, 3055 (2015); *UFT (Pinkard)*, 47 PERB ¶¶ 3020, 3061 (2014).

<sup>17</sup> Section 204.1 (a) (1) of our Rules.

Pinkard's attempts to resuscitate these claims through various letters received from TRS are unavailing, as these letters do not restart the period of limitations for her charge.<sup>18</sup>

We recognize that Pinkard is alleging that a purported "change" to her records in either May or July 2023 violates the Act.<sup>19</sup> For purposes of this decision, we assume that Pinkard's records were changed. Nevertheless, we cannot find that Pinkard has alleged facts that would arguably support a violation of either §§ 209-a.1 (a) and (c) of the Act by the District or of § 209-a.2 (c) of the Act by the UFT.

A charging party alleging a violation of §§ 209-a.1 (a) and (c) of the Act must demonstrate 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.<sup>20</sup> Before the Director, the charging party must allege facts which "may constitute an improper practice."<sup>21</sup> If

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<sup>18</sup> *UFT (Pinkard)*, 56 PERB ¶ 3002.

A charge that is merely duplicative of previously filed charges is properly dismissed. See, eg, *Hyde Park Cent Sch Dist*, 23 PERB ¶ 3013, 3029 (1990); *Kings Park Cent Sch Dist*, 26 PERB ¶ 4567, 4703 (1993).

<sup>19</sup> Pinkard's submission to the Director dated May 29, 2023 alleged that the District had changed her records, as shown by the document dated May 22, 2023. In her exceptions, however, Pinkard asserts that the change occurred in July 2023. Both assertions suffer from the fatal deficiencies outlined below.

Pinkard does not appear to be challenging her deficit owed to TRS, contrary to her most recent improper practice charge filed with the Director. *UFT (Pinkard)*, 56 PERB ¶ 3002.

<sup>20</sup> *Board of Educ of the City Sch Dist of the City of New York (Cohn)*, 53 PERB ¶ 3011, 3053 (2020), quoting *Board of Educ, City Sch Dist City of New York (Elgalad)*, 52 PERB ¶ 3001, 3004-3005 (2019); see also *State of New York (Dept of Transportation)*, 50 PERB ¶ 3004, 3021 (2017); *UFT, Local 2 (Jenkins)*, 41 PERB ¶ 3007 (2008), *confd sub nom Jenkins v State of NY Pub Empl Relations Bd*, 41 PERB ¶ 7007 (Sup Ct, New York County 2008), *affd* 67 AD3d 567, 42 PERB ¶ 7008 (1<sup>st</sup> Dept 2009), *lv denied* 43 PERB ¶ 7003 (2010); *City of Salamanca*, 18 PERB ¶ 3012 (1985).

<sup>21</sup> Rules § 204.2.

the facts alleged are not sufficient to support a finding that the Act may have been violated, the Director does not err in dismissing the charge, rather than assigning it to an Administrative Law Judge for further processing.<sup>22</sup> Fundamentally, Pinkard does not allege facts sufficient, if proven true, to establish any of the three prongs necessary for a violation of §§ 209-a.1 (a) and (c) of the Act. There are no allegations that Pinkard engaged in protected activity, that such activity was known to a person taking the employment action,<sup>23</sup> or that the action would not have been taken “but for” Pinkard’s protected activity. Indeed, Pinkard appears to be “seeking redress for her 2010 separation from the District.”<sup>24</sup> As found by the Director, these claims are simply untimely.

Similarly, Pinkard does not allege facts sufficient to demonstrate that the UFT breached its duty of fair representation, in violation of § 209-a.2 (c) of the Act. To establish a breach of the duty of fair representation under the Act, a charging party has the burden of proof to “demonstrate that an employee organization’s conduct or actions are arbitrary, discriminatory, or founded in bad faith.”<sup>25</sup> There are no allegations in Pinkard’s original charge, amended charge, or in her submission dated May 29, 2023 to

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<sup>22</sup> *Niagara Falls Police Club, Inc (Drinks-Bruder)*, 54 PERB ¶¶ 3019, 3060 (2021).

<sup>23</sup> Given that Pinkard has not worked for the District since 2010, we fail to even see facts alleged that demonstrate that the District took any adverse employment action.

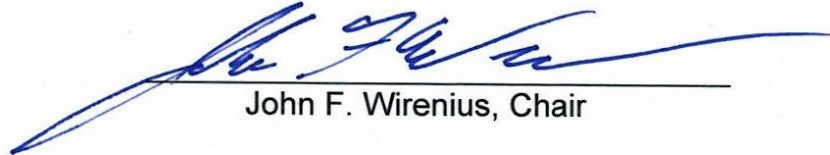
<sup>24</sup> 56 PERB ¶ 4550, at 4951.

<sup>25</sup> See *UFT (Imbert)*, 54 PERB ¶¶ 3020, 3064 (2021), *affd sub nom Imbert v NYS Pub Empl Relations Bd*, 55 PERB ¶ 7007 (Sup Ct, New York County 2022), *affd* 214 AD3d 574 (1st Dept 2023); *Transp Communications Union/IAM (Shah)*, 53 PERB ¶¶ 3016, 3081 (2020); *Professional Staff Congress of the City Univ of NY (Giammarella)*, 51 PERB ¶¶ 3010, 3048 (2018); *District Council 37 (Fonseca)*, 50 PERB ¶¶ 3038, 3161 (2017). See generally *De Oliveira v NYS Pub Empl Relations Bd*, 133 AD3d 1010 (3d Dept 2015), *affg Cairo-Durham Teachers Assn (De Oliveira)*, 47 PERB ¶¶ 3008, 3026 (2014).

demonstrate any conduct by the UFT which could even arguably meet this standard.

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

DATED: November 8, 2023  
Albany, New York



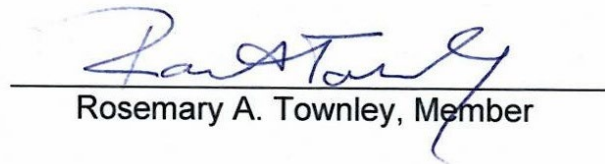
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John F. Wirenius, Chair



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Anthony Zumbolo, Member



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Rosemary A. Townley, Member