STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

UNITED PUBLIC SERVICE EMPLOYEES UNION,

Petitioner,

-and- **CASE NO. C-6478**

CHURCHVILLE-CHILI CENTRAL SCHOOL DISTRICT,

Employer,

-and-

CHURCHVILLE-CHILI BUS DRIVERS ASSOCIATION,

Intervenor/Incumbent.

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;[1]

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

IT IS HEREBY CERTIFIED that the United Public Service Employees Union 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

[1] This unit has been represented by the Churchville-Chili Bus Drivers Association, which notified PERB, by letter dated October 3, 2017, that it disclaims any interest in further representing the unit.

exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Included: All regular Drivers of the District and the Bus Monitors and Bus Attendants.

Excluded: All others as defined by the Act.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the United Public Service Employees Union. 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: December 18, 2017
Albany, New York

John F. Wirenius, Chairperson

Robert S. Hite, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

AMALGAMATED TRANSIT UNION (ATU), LOCAL 1179,

Petitioner,

-and- **CASE NO. TIA2017-014**

MTA BUS COMPANY,

Respondent.

GLADSTEIN, REIF & MEGINNISS, LLP (BETH M. MARGOLIS, ESQ., of counsel) for Petitioner

PROSKAUER ROSE, LLP (NEIL H. ABRAMSON, ESQ., of counsel) for Respondent

BOARD DECISION AND ORDER

This matter comes to us by reason of a report and recommendation of the Director of Conciliation (Director) regarding a petition for interest arbitration filed by the Amalgamated Transit Union, Local 1179 (ATU) under §209.5 of the Public Employees' Fair Employment Act (Act) and §205.15 of our Rules of Procedure (Rules) with respect to an impasse in contract negotiations between ATU and the MTA Bus Company (MTA).

In his report and recommendation, the Director concludes that a voluntary resolution of the contract negotiations between ATU and the MTA cannot be effected and recommends that the impasse be referred to a public interest arbitration panel.

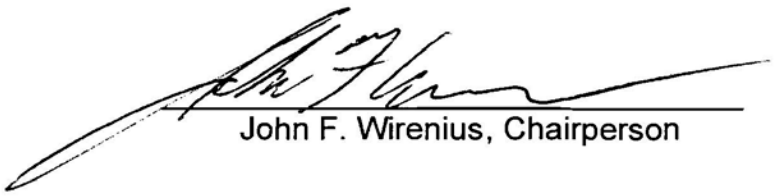
The MTA has not filed an objection to the Director's report and recommendation

pursuant to §205.15(b) of the Rules.

Following our review of the Director's report and recommendation, we hereby certify that a voluntary resolution of the contract negotiations between ATU and the MTA cannot be effected and we, therefore, refer the impasse involving these parties to a public interest arbitration panel.

SO ORDERED.

DATED: December 18, 2017
Albany, New York



John F. Wirenius, Chairperson

Robert S. Hite, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

NEW YORK STATE COURT CLERKS ASSOCIATION,

Charging Party,

CASE NO. U-35805

- and -

STATE OF NEW YORK UNIFIED COURT SYSTEM

Respondent.

PITTA, LLP (BRUCE J. COOPER and JOSEPH BONOMO, of counsel), for Charging Party

LAUREN DESOLE, ESQ., DIRECTOR OF HUMAN RESOURCES (JON L. DUELTGEN and CAROLYN GRIMALDI, of counsel), for Respondent

BOARD DECISION AND ORDER

This case comes to us on what we deem to be a motion for leave to file interlocutory exceptions pursuant to §213.4 of our Rules of Procedure (Rules) by the State of New York-Unified Court System (UCS) to an August 3, 2017 letter determination of an Administrative Law Judge (ALJ).[1] In her letter, the ALJ declined to grant UCS's pre-hearing motion to dismiss an improper practice charge filed by the New York State Court Clerks Association (Association) or to defer the improper practice proceeding to collateral litigation and/or arbitration. The ALJ's letter scheduled a

[1] Although UCS's exceptions state that they are filed "as of right pursuant to Section 213.2 of the Rules," *id*. at n. 1, counsel for UCS conceded at oral argument, that, as there had been no final decision in the case, the appeal was interlocutory in nature. Tr at 4.

hearing, should the case not be resolved beforehand, on January 10, 2018, to, in part, "provide the parties time to assess their progress in the other pending actions and determine what effect, if any, those have on the case before PERB."[2]

MOTION FOR LEAVE TO FILE INTERLOCUTORY EXCEPTIONS

UCS makes five arguments, which it contends establish extraordinary circumstances warranting the grant of leave and to support its contention that the ALJ erred in her letter determination. First, UCS excepts to the ALJ's refusal to dismiss the charge, on the ground that the ALJ and this Board lack subject matter jurisdiction over contractual claims and claims arising under statutes other than the Public Employees' Fair Employment Act (Act), and/or are reviewable only under Article 78 of the Civil Practice Law and Rules. UCS contends in its second exception that the ALJ erred in relying on the "processing of the case on the pleading" by the Director of Public Employment Practices and Representation (Director) as wholly dispositive in denying its motion to dismiss the charge for failure to state a claim.[3] UCS asserts in its third exception that the ALJ erred in refusing to consider UCS's affirmative defenses as set forth in its pre-hearing motion to dismiss without specifying grounds for refusing to do so. In its fourth exception, UCS claims that the "ALJ failed to defer, in whole or in part, to virtually identical claims already pending in state court or that [the Association] submitted to arbitration, and failing to articulate any basis therefore [*sic*]."[4] Finally, UCS's fifth exception alleges that the ALJ erred in directing UCS to respond to the Association's requests for information, on the ground that the documents relate to the

[2] Letter Determination at 1-2.
[3] Exception No. 2, quoting letter determination at 1.
[4] Exception No. 4.

pending Article 78 proceeding, and that the ALJ "is not only permitting [the Association] to evade established prohibitions against pre-litigation discovery but actually facilitating the same."[5]

The Association filed a response supporting the ALJ's letter determination, and asserting that the exceptions were untimely filed and served.

Oral argument was held before the Board on November 6, 2017.

FACTS

The charge alleges that Court Clerk Judy Torres-Albert (Torres) was discriminated and retaliated against for engaging in protected activity in violation of §§209-a.1(a) and (c) of the Act. The charge further alleges that UCS subsequently violated §§209-a.1(a) and (d) of the Act by refusing to produce information relevant to a potential contractual grievance about the interpretation, application or alleged violation of a provision of the parties' collective bargaining agreement. Because of the procedural context of the case, we assume the following allegations in the charge are true for the purposes of determining the motion to file an interlocutory appeal of the ALJ's letter determination.

On March 3, 2017, Torres refused her direct supervisor's direction to rewrite the performance evaluation of another bargaining unit member in retaliation for that member's filing a grievance and told the supervisor that she would inform the Association of his directive.[6] The same day, Torres communicated with the Association regarding this incident, and the Association's Second Vice President sent an e-mail to

[5] Exception No. 5.
[6] Other allegedly protected activity included Torres's communicating regarding this situation in an online group consisting of approximately 600 union members.

Torres's direct supervisor protesting his pressure on Torres to change the evaluation.[7] Ten days later, on March 13, 2017, Torres's direct supervisor extended her probationary period by another 40 days.[8] Two weeks later, on March 27, 2017, Torres was terminated from her probationary position as Principal Court Clerk and returned to her prior position as an Associate Court Clerk, which the Association contends was done in retaliation for her protected activity.

On April 4, 2017, the Association submitted a written request for information regarding demotion of court clerks in probationary periods. On April 12, 2017, the Association, through counsel, submitted a further request for information "re: Judy Torres Grievance." On April 14, 2017, the Association filed a grievance asserting that UCS's termination of Torres from her probationary position violated the parties' collective bargaining agreement's management rights[9] and discipline provisions.[10] That grievance was denied at Step 1 on May 3, 2017.[11] The grievance was again denied at Step 2.[12]

On May 18, 2017, UCS denied the April 4 request in a letter by Lauren DeSole, then UCS's Director of Human Resources, on the basis that probationary periods, "including but not limited to their extension and/or termination thereof," are governed

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[7] Charge, Ex B.
[8] Charge, Ex C.
[9] Ans, Ex 1. The relevant portion of the parties' Agreement is found at Charge, Ex A, Art 5 ("Except as expressly limited by other provisions of this Agreement, all of the authority, rights and responsibilities possessed by the State are retained by it, including but not limited to, . . . the right to promote, discipline or discharge employees in accordance with law and the provisions of this Agreement."
[10] Charge, Ex A, Art 23.
[11] Ans, Ex 1.
[12] Id.

solely by the Rules of the Chief Judge, and are thus not subject to the grievance procedure.[13] DeSole's letter pointed out that Torres had been provided with a copy of her personnel file, "which may contain information/documentation relevant to your inquiry," and also that a response would be sent under separate cover to the request for information and documents "re: Judy Torres Grievance."[14]

Also on May 18, 2017, UCS responded in a letter by Carolyn Grimaldi, to the April 12 request for information submitted by the Association's counsel.[15] Grimaldi's letter stated that because "the allegations set forth in the grievance do not give rise to any cognizable claim under any provision of the Agreement, the information being sought is neither necessary nor relevant to the [Association's] investigation of any grievance," and therefore denied the request.[16] Like DeSole's letter, Grimaldi's letter referred the Association to the hard copy of Torres's personnel file that UCS had provided her directly.

The instant charge was filed on June 16, 2017. Two weeks later, on June 30, the Association filed a petition pursuant to Article 78 captioned *New York State Court Clerks Assn, et anon, v. New York State et al*, Index No. 155967/2017 in Supreme Court, New York County. The "Fifth Cause of Action" asserts that "Section 209-a (1) of the [Act] makes it unlawful to discriminate or retaliate against an employee for engaging in

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[13] Answer, Ex 4.
[14] Id.
[15] Charge, Ex G.
[16] Id. Grimaldi's letter denied that Article 5, Management Rights, provided "any independent basis for a contract grievance." The letter also states that the disciplinary procedure in the Agreement does not apply to probationary employees, and, like DeSole's letter, that the probationary periods and termination thereof are governed solely by the Rules of the Chief Judge, and therefore "cannot be challenged under any provision of the Agreement." Id at 2.

protected activity," and "Respondents unlawfully discriminated and retaliated against Ms. Torres in violation of Section 209-a (1) when it terminated her probation and demoted her for (i) refusing to falsify a business record with respect to the [co-worker's] evaluation; (ii) posting her intention of filing complaints for sexual harassment and racial discrimination on the Facebook Group page; (iii) requesting the assistance of the Union to file a grievance over the Employer's aforementioned conduct; and (iv) reporting [her supervisor's] serious and sexual harassment in the Courthouse to OIG."[17]

On August 3, 2017, after holding a conference in this matter, the ALJ issued the letter determination at issue. First, the ALJ denied UCS's motions to dismiss the charge:

> To the extent that it asserts failure to state a claim that has already been resolved by the Director's processing the case on the pleading. To the extent that the motion asserts that the Charging Party would not be able to establish its prima facie case at hearing based on the facts provided, I disagree with that conclusion, especially under the favorable standard which must be applied to evaluating a Motion to Dismiss before hearing. Regarding what are affirmative defenses, I am not entertaining those as a threshold matter in the context of a Motion to Dismiss before hearing. Additionally, as to the last point, this case is not appropriate for deferral as to the (a) and (c) charges, and I see no source of right in the CBA on which to defer the (d) and the (e). The fact that the aggrieved has brought actions in other fora does not, alone, divest PERB of its jurisdiction.[18]

The ALJ then set a hearing date of January 10, 2018, stating that "[w]hile that scheduling is a function of my calendar, it will also provide the parties time to assess their progress in the other pending actions and determine what effect, if any, those have

[17] Response to Exceptions, Ex 4 at ¶¶ 67-68.
[18] Letter determination at 1.

on the cases before PERB."[19] She then memorialized the terms of a proposed settlement. Finally, she stated that the information request would be responded to, either by producing responsive documents, or by attesting to the non-existence of any such documents. Both parties agree that, as UCS states in its Brief in Support of Exceptions, that "the undersigned counsel already represented at the status conference that there are no records on minorities' extension of probation, nor would any such records be possessed in easily searchable form."[20] At oral argument, counsel for the Association agreed, stating that at the conference UCS "counsel represented in so many words that the information [the Association is] seeking doesn't exist, in which case Judge Cacavas said 'Okay, then either prepare an attestation to each of those matters that you're saying don't exist, or if the information does exist, to expand upon where in the record it could be found."[21]

DISCUSSION

We begin with the threshold question of whether UCS's exceptions are timely filed and served. Pursuant to §213.4(a) of the Rules, a motion seeking leave to file interlocutory exceptions must be filed with the Board and served on all other parties "[w]ithin ten working days after any interim decision, order or ruling" sought to be appealed. Filing is defined under §200.11(a) of the Rules as, in relevant part, "the act of mailing to the board, or deposit of the papers enclosed in a properly addressed wrapper into the custody of an overnight delivery service for overnight delivery, before the latest time designated by the overnight delivery service for overnight delivery." Service is

[19] Id at 1-2.
[20] UCS Brief at 15.
[21] Tr at 48.

defined under §200.11(b) as, again in relevant part, "the act of mailing to a party, or deposit of the papers enclosed in a properly addressed wrapper into the custody of an overnight delivery service for overnight delivery, before the latest time designated by the overnight delivery service for overnight delivery."

The documentary evidence provided by UCS establishes that it received the ALJ's letter determination on August 4, 2017. The documentary evidence further establishes that UCS filed its proposed exceptions with the Board and served its exceptions on the Association by delivery to United Parcel Service on August 18, 2017. As ten working days from August 4 requires filing and the effectuation of service by August 18, 2017, we find filing and service of the exceptions to be timely.

As we have consistently held, and recently reaffirmed in *County of Suffolk*, we will not grant leave to file interlocutory exceptions to non-final rulings and decisions unless the moving party demonstrates extraordinary circumstances.[22] As we explained in that case:

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

[22] *County of Suffolk*, 50 PERB ¶3010, 3047 (2017), citing *Mt Morris Cent Sch Dist*, 26 PERB ¶3085, 3165-3166 (1993); *Town of Shawangunk*, 29 PERB ¶3050, 3115 (1996); *Council 82, AFSCME*, 32 PERB ¶3040, 3089 (1999); *UFT (Grassel)*, 32 PERB ¶3071, 3168 (1999); *City of Newburgh*, 33 PERB ¶3031, 3084 (2000); *State of New York (Division of Parole),* 40 PERB ¶3007, 3019 (2007); *Hyde Leadership Charter School-Brooklyn*, 47 PERB ¶3022, 3063 (2014).

requests for permission to file exceptions.[23]

In improper practice cases, we have generally denied interlocutory appeals except in cases in which we have found "extraordinary circumstances where severe prejudice would result" to the party seeking an interlocutory appeal of an ALJ's interim determination or order.[24] An alternative phrasing the Board has used to delineate what constitutes extraordinary circumstances is that "[a]n interlocutory appeal from rulings by an ALJ is properly entertained only if our failure to consider the appeal would result in harm to a party which cannot be remedied by our review of the ALJ's final decision and order."[25]

Here, UCS has grounded its claim that the letter determination presents extraordinary circumstances on several bases. In its request for oral argument, UCS states that:

> Extraordinary circumstances are implicated here, including competing and potentially conflicting litigation and arbitration; the definition of protected activity under the Taylor Law; questions regarding the scope of the jurisdiction of [the] Public Employment Relations Board and the issues to be determined at hearing, and the adherence to broad statutory authority vested in the Chief Administrative Judge to administer the Court system as it relates to, inter alia, probationary periods.

In its brief in support of its exceptions, UCS reiterates these grounds, and asserts that "[w]ithout PERB's relief by remedying these exceptions at this stage, the parties are

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[23] Id, citing *Town of Shawangunk,* 29 PERB ¶3050, at 3115; *State of New York (Division of Parole),* 40 PERB ¶3007, at 3019; *see also NYCTA (Burke)*, 50 PERB ¶3015, 3061 (2017); *CSEA (Arredondo)*, 43 PERB ¶3021, 3080-3081 (2010).
[24] *UFT (Fearon)*, 37 PERB ¶3007 (2004); *State of New York (UCS)*, 36 PERB ¶3031, (2003).
[25] *State of New York (Division of Parole)*, 25 PERB ¶3007, at 3019-3020 (1992), citing *United Univ Professions*, 19 PERB ¶3009 (1986).

faced with extraordinary circumstances wherein a hearing is scheduled on matters pending before other fora and outside the scope of PERB's jurisdiction, and the parties' resources will be squandered."[26]

Finally, UCS argued in its brief, albeit in a footnote, that "[a]s a measure of the extraordinary circumstances implicated here, Charging Party has also delivered on Torres'[s] threats by dragging [her supervisor's] name through the mud, openly defaming and vilifying [him] and his wife (a New York City Criminal Court Judge) without restraint in the *New York Post*, and commencing an onslaught of litigation against the Court System in multiple fora . . ."[27] This last ground may be dealt with speedily. At oral argument, counsel for UCS readily acknowledged that neither the exercise by a litigant of First Amendment rights, nor the interest of the press in a particular matter pending before the courts, an ALJ, or the Board, constitutes an appropriate ground for treating that litigant's case differently than other cases.[28] We accept UCS's withdrawal of this alleged ground for finding extraordinary circumstances warranting interlocutory appeal to the Board.

The ruling refusing to defer to the arbitration process not only fails to constitute or to contribute to extraordinary circumstances, it does not establish any cognizable prejudice. As the Appellate Division, Fourth Department has recently reaffirmed in *Buffalo Teachers Federation v New York State Public Employment Relations Board*, "[n]otably, PERB will defer to an arbitration award only in limited circumstances, and it usually does not do so where the charging party alleges a violation of Civil Service Law

[26] UCS Brief at 2.
[27] UCS Brief at 4, n. 2.
[28] Tr at 18.

§209-a(1) (a)."[29] Here, as in *Buffalo Teachers Federation*, the statutory claim does not fall within the ambit of PERB's deferral policy.[30]

Similarly, the ALJ's refusal to defer to the Article 78 proceeding does not establish or even contribute to any cognizable prejudice, let alone extraordinary circumstances. Although the Association brought what purports to be a claim under the Act as part of its Article 78 proceeding, §205.5(d) of the Act expressly states that the Board "shall exercise exclusive nondelegable jurisdiction over" improper practice claims. Thus, such claims cannot be heard in the first instance in a judicial forum, and are not properly subject to the jurisdiction of the Court hearing the Association's Article 78 case.[31] Moreover, the improper practice charge was filed prior to the Article 78 proceeding, and the hearing before the ALJ is scheduled for January 10, 2018. By

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[29] 153 AD3d 1643, 1645 (4th Dept 2017) (citations omitted), citing *New York City Trans Auth [Bordansky]*, 4 PERB ¶3031 (1971); *State of New York (Division of State Police)*, 36 PERB ¶3048, n. 3 (2003); *Schuyler-Chemung-Tioga Bd of Cooperative Educ Servs*, 34 PERB ¶3019 (2001); *Matter of Addison Cent Sch Dist*, 17 PERB ¶3076 (1984).

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

[31] *Westchester Co Dept of Pub Safety Police Benevolent Assn, Inc. v Westchester Co*, 35 AD3d 592, 595 (2d Dept 2006) (dismissing Article 78 petition alleging that the County committed an improper employer practice in violation of §209–a.1(d)); *Peil v Beirne*, 72 AD3d 1095, 1096 (2d Dept 2010) (In Article 78 proceeding, "[t]he petitioner's contention that the [employer] committed an improper labor practice in violation of Section 209–a of the [Act] is within the exclusive jurisdiction of the Public Employment Relations Board and, thus, cannot be reviewed in this proceeding.") (citations omitted); *see generally Zuckerman v Bd of Educ, City Sch Dist of the City of NY*, 44 NY2d 336, 342-343 (1978); *Ifill v NYS Court Officers Assn*, 655 FSupp2d 382, 392 (SDNY 2009) (dismissing pendent state law claim under Act based on PERB's "exclusive, non-delegable" jurisdiction).

contrast, a motion to dismiss the later-filed Article 78 proceeding is pending, with an oral argument date of February 1, 2018.[32] As such is the case, no grounds can exist to defer to the Article 78 proceeding.[33] Thus, no prejudice, severe or otherwise, has been established, and no harm that could not be remedied through an appeal of the ALJ's final decision in due course to the Board has been shown.[34]

In denying UCS's motion to dismiss, the ALJ likewise did not create extraordinary circumstances warranting an interlocutory appeal. In *Board of Education of the City School District of the City of New York (Grassel)*, the Board declined to find that a denial of a motion to dismiss for lack of subject matter jurisdiction presented extraordinary circumstances.[35] In particular, the Board noted that "[u]nder the Act, PERB has jurisdiction to determine whether an employer's invocation of a statutory procedure is unlawfully motivated."[36] This observation applies here. Likewise, the Board in that matter held that "[a]n ALJ, in general, is granted considerable discretion with respect to the processing of an improper practice charge, including the conduct of a hearing."[37] Thus, as all the issues raised in the motion to dismiss could be briefed after the hearing

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[32] We take administrative notice of the date of the oral argument as set forth on UCS's e-courts website, visited on December 7, 2017.
[33] Indeed, at oral argument, when asked if UCS disputed that "any ruling on what purports to be a Taylor Law cause of action would not have any binding effect on us," UCS counsel agreed "it would not," and proposed that the improper practice claims be reopened ab initio after the resolution of the Article 78 case. Tr at 9.
[34] *County of Erie*, 30 PERB ¶3063 (1997), relied upon by UCS, is not to the contrary. In that matter, the Board had before it an improper practice charge over the employer's failure to remit dues to a newly certified employee organization during the period the Board's certification order was under review pursuant to Article 78. The Board deferred to a judicial proceeding that had jurisdiction over the issues under the Act, as the Court was reviewing the Board's order pursuant to §213(a) of the Act.
[35] 41 PERB ¶3031 (2008).
[36] *Grassel*, 41 PERB ¶3031 at 3137.
[37] Id at 3136, citing *City of Elmira*, 41 PERB ¶3018 (2008).

clarifies the facts, no "severe prejudice" or harm that could not be remedied through a due course appeal to the Board has been stated.

Under the circumstances presented herein, the ALJ's ruling on the information requests does not present extraordinary circumstances warranting an interlocutory appeal. The Association's requests were objected to at the time in letters that stated that no grievance was tenable and that responsive documents might be found in the hard copy of Torres's personnel folder that UCS had provided to her. In its Answer, UCS added to these reasons that the production would be unduly burdensome, and intimated that some documents requested did not exist, as well as stating that "[t]o the extent that [UCS] possessed responsive, relevant, and necessary materials," the personnel file constituted compliance.[38] At the conference, as both parties assert, UCS expressly stated that many of the documents requested did not exist and could not readily be generated.

The ALJ, in asking UCS to put this response in writing, with specific responses to the requests, did not, as far as we can see, prejudice UCS, let alone create extraordinary circumstances. As we have recently reaffirmed,

> For close to four decades, we have held that under the Act an employee organization has a general right to receive documents and information requested from an employer for use by the employee organization in the administration of a collectively negotiated agreement including processing a grievance and preparing for a grievance hearing and/or arbitration. Failure of an employer to produce requested information and documents may constitute a violation of both

[38] Ans, ¶48.

§§209-a.1(a) and (d) of the Act.[39]

We have also long held that:

> That duty includes an obligation on the part of the employer to provide information relevant to a union's investigation of the merits of a grievance. Moreover, an employee organization is entitled to a reasonable opportunity to examine requested information and documents before determining whether to continue to process a grievance, and the right to receive information and documents extends after a grievance has been processed to arbitration.[40]

Nothing in this analysis suggests that the opinion of a public employer that the grievance is meritless constitutes a ground upon which a public employer may simply refuse to respond to a request for information. The underlying purpose of the right is to allow the public employee organization to investigate the merits of the potential grievance, make an informed decision whether or not to pursue it, and to, should the matter go to arbitration, be able to present the evidence relevant to the merits of the grievance.[41] The right is, of course, not without limits, which the employer is free to assert. 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

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[39] *State of New York (DOCCS)*, 50 PERB ¶3031, 3122 (2017) (quoting *State of New York (OTDA)*, 50 PERB ¶3009, 3043 (2017); *see also quoting County of Montgomery*, 44 PERB ¶3045, 3134 (2011); *Board of Educ, City Sch Dist of the City of Albany*, 6 PERB ¶3012 (1973); *Hornell Cent Sch Dist*, 9 PERB ¶3032 (1976); *City of Rochester*, 29 PERB ¶3070 (1996).

[40] *State of New York (DOCCS)*, 50 PERB ¶3031 at 3122, quoting *State of New York (OTDA)*, *State of New York (OTDA)*, 50 PERB ¶3009, at 3043-3044 (citing cases).

[41] *See Hamptons Bay Union Free Sch Dist*, 41 PERB ¶3008, 3051 (2008), *confd sub nom Hamptons Bay Union Free Sch Dist v New York State Pub Empl Relations Bd*, 62 AD3d 1066, 42 PERB ¶7005 (3d Dept 2009).

> 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.[42]

Moreover, the Board has long held that the rule of reasonableness includes "the availability of the information elsewhere, the necessity therefor, the relevancy thereof, and, finally, that the information supplied need not be in the form requested as long as it satisfies a demonstrated need."[43] We have also long held that the employer is not required "to develop information not yet in existence and then to disclose that information."[44]

Some, if not all, of these limitations on the right to obtain information were asserted by UCS in its Answer and at the conference. However, the ALJ subsequently ordered in her letter determination that UCS specify which requests it had provided responsive documents in answer to and which requests no responsive documents existed, expressly with the hope that "we may resolve this portion of the Charge." The ALJ's letter does not order UCS to produce any of the requested documentation, but instead asks that UCS memorialize its responses at the conference before the ALJ. Essentially, the ALJ exercised her authority to narrow the issues in dispute pursuant to §212.4 of the Rules through an offer of proof as to what requests documents had been produced in response to and as to which others, responsive documents did not exist.

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[42] *State of New York (OTDA)*, 50 PERB ¶3009, at 3044 (footnotes and quotation marks removed; citing and quoting*, inter alia*, *Utica City School Dist*, 48 PERB ¶3008 (2015).
[43] *Hornell City Sch Dist*, 9 PERB ¶3032, 3061 (1976), quoting *Bd of Educ, City Sch Dist, City of Albany*, 6 PERB 3029, 3030 (1973).
[44] *New York State Inspection, Sec & Law Enforcement v Kinsella*, 197 AD2d 341, 344, 27 PERB ¶7006 (3d Dept 1994), *confg State of New York (GOER)*, 25 PERB ¶3078 (1992); *see also Town of Evans*, 37 PERB ¶3016 (2004).

As we reiterated in *State of New York (OTDA)*,[45] "requiring the parties to submit offers of proof as to not only claims and defenses as to which they bear the burden of proof, but their responses to such claims and defenses, does not, absent more, impermissibly shift the burden of proof."[46] Rather, "[s]uch a requirement provides the party with an opportunity to identify the facts it intends to prove at a hearing."[47] We therefore do not find either severe or irremediable prejudice, or other extraordinary circumstances warranting an interlocutory appeal.

The remainder of the grounds asserted to constitute extraordinary circumstances all suffer from the same flaw: they assume that the ALJ, in scheduling a hearing, intended to allow the case to proceed not just on the claims under the Act, but on all the collateral issues, such as the sexual harassment and racial discrimination claims, and on retaliation and discrimination claims based on activity protected not under the Act but under various other statutes. We find nothing in the ALJ's letter determination indicating that she will not limit the issues litigated at the hearing to claims that arise under the Act. The ALJ did not indicate that all claims asserted in the charge were cognizable under the Act. Rather, she merely indicates that the charge does state a claim. The letter determination memorializes the ALJ's denial of the motion to dismiss, a settlement proposal that was open as of the date of the letter, and schedules a hearing. In scheduling the hearing, the ALJ expressly advises the parties "to assess their progress in the other pending actions and determine what effect, if any, those have on the cases

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[45] 50 PERB ¶3009.
[46] *Id*, at 3042-3043.
[47] 50 PERB ¶3009, at 3043, quoting *Niagara Frontier Transit Metro System*, 42 PERB ¶3023, 3090 (2009).

before PERB." Simply put, it is clear in this context that the ALJ intended to convey that case to be heard at the hearing would be narrowed to claims under the Act. Although it would be clear error for the ALJ to entertain claims beyond the scope of those pleaded under the Act, a letter memorializing a conference at which settlement was not ruled out, and which hints that the effect of the other claims is yet to be addressed, does not suggest that the ALJ was inclined toward such error.

Accordingly, the motion for leave to file an interlocutory appeal must be, and hereby is, denied.

DATED: December 18, 2017
Albany, New York

John F. Wirenius, Chairperson

Robert S. Hite, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

POLICE BENEVOLENT ASSOCIATION OF THE VILLAGE OF WAPPINGERS FALLS,

Charging Party,

CASE NO. U-35184

- and -

MATT ALEXANDER, MAYOR AND VILLAGE OF WAPPINGERS FALLS,

Respondents.

LAW OFFICE OF JOHN K. GRANT (JOHN K. GRANT, ESQ., of counsel), for Charging Party

WALLACE & WALLACE, LLP (PAUL ACKERMANN, ESQ., of counsel), for Respondent

BOARD DECISION AND ORDER

This case comes to us on a motion filed by Matt Alexander, Mayor, and the Village of Wappingers Falls (collectively, Village), seeking leave to file interlocutory exceptions to a letter ruling by the Assistant Director of the Office of Public Employment Practices and Representation (Assistant Director) dated October 19, 2017.[1] In the letter, the Assistant Director confirmed that Keith P. Byron, Esq., is no longer representing the Charging Party and that John K. Grant, Esq., has been substituted as counsel for the Charging Party.

EXCEPTIONS

The Village argues that the Board should grant leave to file interlocutory exceptions because "the legal representation of the Charging Party in this matter has

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[1] Attachment to motion seeking leave to file interlocutory exceptions.

been called into question."[2] Specifically, the Village alleges that a conflict exists preventing Attorney Byron from representing the Charging Party due to his relationship with Carl Calabrese, the Commissioner of the Village's Police Department. Byron is counsel in a matter pending in Dutchess County Supreme Court, in which Calabrese is a party. The Village alleges that Calabrese is both a witness in this case and the subject of allegations in the improper practice charge, where Byron previously represented the Charging Party. The Village alleges that Grant shares the same conflict as Byron because the two are "interchangeable" on matters involving the Charging Party.[3] It argues that neither should be permitted to continue representing the Charging Party in the improper practice proceeding. The Village requests that the Board grant its motion seeking leave to file interlocutory exceptions, find that Grant shares the same conflict as Byron, and conclude that Grant's representation of the Charging Party violates the New York Rules of Professional Conduct. It seeks an order directing the Charging Party to obtain alternate representation.

The Charging Party argues that the Village's motion should be denied because it is untimely pursuant to our Rules of Procedure (Rules), because the Village has not met the requisite showing of extraordinary circumstances for permission to file an interlocutory appeal, and because PERB lacks the authority to grant the relief sought by the Village.

For the following reasons, we deny the motion seeking leave to file interlocutory exceptions.

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[2] Motion seeking leave to file interlocutory exceptions, at 2.
[3] *Id*.

DISCUSSION

The Village's motion seeking leave to file interlocutory exceptions was mailed to the Board on November 2, 2017 and was, therefore, timely filed with the Board pursuant to Section 213.4(a) of our Rules. However, the Village did not provide proof of service on Attorney Grant, who, by then, had become the Charging Party's representative.[4] A letter was sent to the Village's attorney on November 15, 2017, pointing out this omission and requesting proof that the motion seeking leave to file interlocutory exceptions and brief in support were timely served on Grant pursuant to PERB's Rules. By letter dated November 17, 2017, the Village provided an affidavit of service stating that its motion seeking leave to file interlocutory exceptions and brief in support were sent to Grant via facsimile and mail on November 15, 2017.

Initially, we find that the Village's motion seeking leave to file interlocutory exceptions must be denied because of the Village's failure to timely serve its motion and supporting brief on the opposing party. Section 213.4(a) of PERB's Rules require that a motion seeking leave to file interlocutory exceptions and supporting brief be filed within 10 working days after the interim decision, order, or ruling that is being appealed. The Rule also requires that the motion and brief "shall be served simultaneously on all other parties and proof of such service shall be filed with the board." Timely service upon all other parties is a necessary component for the filing of exceptions under the

[4] The Village did file proof of service on Byron and another attorney, Marilyn Berson.

Rules, and this timeliness requirement is strictly applied.[5] The motion and supporting brief here were not served on the Charging Party simultaneously with the motion and brief sent to the Board. In fact, the Charging Party was not served until 19 working days after the Assistant Director's letter. Thus, on the record before us, the Village's motion and supporting brief were not timely served on the Charging Party and, therefore, must be denied.[6]

Even assuming that the motion and brief had been timely served on the Charging Party, we would still deny Respondents' motion seeking leave to file interlocutory exceptions. As we have consistently held and as our Rules now require, we will not grant leave to file interlocutory exceptions to non-final rulings and decisions unless the moving party demonstrates extraordinary circumstances.[7] We find that Respondents

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[5] *See NYCTA (Ayala)*, 50 PERB ¶3017, 3073 (2017); *Transport Workers Union of Greater New York, Local 100, AFL-CIO (Waters)*, 49 PERB ¶3026, 3083 (2016); *United Federation of Teachers (Hunt)*, 48 PERB ¶3005, 3012 (2015); *State of New York (Commission of Correction)*, 47 PERB ¶3019, at 3058 (citing *UFT (Pinkard)*, 44 PERB ¶3011, 3042 (2011); *UFT (Elgalad),* 43 PERB ¶3028 (2010); *see generally Honeoye Falls-Lima Cent Sch Dist (Malcolm),* 41 PERB ¶3015 (2008); *Town/City of Poughkeepsie Water Treatment Facility*, 35 PERB ¶3037 (2002*); Yonkers Fedn of Teachers (Jackson)*, 36 PERB ¶3050 (2003), dealing with the service of exceptions under § 213.2(a) of our Rules. Prior to the revision of our Rules in August of 2017, this same rule applied to filing and service of interlocutory appeals.

[6] *See, eg, (Fonseca)*, 50 PERB ¶3038 (2017); *TWU (Waters)*, 49 PERB ¶3026, at 3083; *UFT (Hunt)*, 48 PERB ¶3005, at 3012; *UFT (Pinkard)*, 44 PERB ¶3011, at 3042.

The Respondents' assertion, in a letter dated November 14 and received by PERB on November 15, that it had not served Grant because it had not received any Notice of Appearance or Consent to Change Attorney is, at best, disingenuous, considering that the Respondents are disputing the Assistant Director's decision to allow Grant to represent the Charging Party.

[7] *See* §213.4 (b)(1) of our Rules; *Hyde Leadership Charter School - Brooklyn*, 47 PERB ¶3022, 3063 (2014); *State of New York (Division of Parole),* 40 PERB ¶3007, 3019 (2007); *City of Newburgh*, 33 PERB ¶3031, 3084 (2000); *UFT (Grassel)*, 32 PERB ¶3071, 3168 (1999); *Council 82, AFSCME*, 32 PERB ¶3040, 3089 (1999); *Town of Shawangunk*, 29 PERB ¶3050, 3115 (1996); *Mt Morris Cent Sch Dist*, 26 PERB ¶3085, 3165-3166 (1993).

have failed to demonstrate extraordinary circumstances warranting the grant of interlocutory appeal here.

The Respondents argue that allowing Grant to represent the Charging Party here would violate New York's Rules of Professional Conduct.[8] The Board has previously declined to administer or enforce the Rules of Professional Conduct. In *Board of Education of the City School District of the City of Buffalo*,[9] the Board addressed a motion seeking to preclude the introduction of evidence obtained in violation of the Code of Professional Responsibility (the predecessor of the Rules of Professional Conduct). The Board rejected the motion, holding that PERB would not enforce the Code of Professional Responsibility in the context of our proceedings. As the Board explained, "[t]o ensure consistency in approach, enforcement of an attorney's ethical responsibilities is best left to the professional bodies and the judicial system charged with that specific duty."[10]

The Village failed to distinguish or otherwise address this precedent in the motion seeking leave to file interlocutory exceptions and supporting brief and has given us no reasons to revisit these clear holdings. Accordingly, and given that the ALJ's ruling was fully consistent with our prior precedent, we find that the Village has failed to establish

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[8] 22 NYCRR § 1200.

[9] 24 PERB ¶3033 (1991), *confd* sub nom *Bd of Educ for the City Sch Dist of the City of Buffalo v Buffalo Teachers Federation*, 191 AD2d 985, 26 PERB ¶7002 (4th Dep't 1993).

[10] *Id*, at 3065. *See also Mohawk Valley Community College and County of Oneida*, 45 PERB ¶3050, 3124 (2012); *Union-Endicott Cent Sch Dist*, 28 PERB ¶3029, 3071 (1995), *confd sub nom Bd of Educ of the Union-Endicott Cent Sch Dist v NYS Public Empl Relations Bd*, 233 AD2d 602, 29 PERB ¶7020 (3d Dept 1996); *Amalgamated Transit Union, Local 1056*, 24 PERB ¶3008, 3016 (1991). The body charged with enforcing the Rules of Professional Conduct is the Appellate Division of the Supreme Court.

extraordinary circumstances warranting consideration of an interlocutory appeal, and would deny the Village's motion even if it had been timely served on Charging Party.

DATED: December 18, 2017
Albany, New York

John F. Wirenius, Chairperson

Robert S. Hite, Member