STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

UNITED PUBLIC SERVICE EMPLOYEES UNION,

Petitioner,

-and-

ENLARGED CITY SCHOOL DISTRICT OF TROY,

Employer,

CASE NO. C-6377

-and-

CIVIL SERVICE EMPLOYEES ASSOCIATION, INC., LOCAL 1000, AFSCME, AFL-CIO,

Incumbent.

GLEASON, DUNN, WALSH & O'SHEA (MARK T. WALSH of counsel), for Petitioner

LAW OFFICES OF GUERCIO AND GUERCIO, LLP (ERIN O'GRADY-PARENT of counsel), for Employer

DAREN J. RYLEWICZ, GENERAL COUNSEL (AARON E. KAPLAN of counsel), for Incumbent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO (CSEA) to a decision of an Administrative Law Judge (ALJ) granting the United Public Service Employees Union (UPSEU)'s petition to represent employees of the Enlarged City School District of Troy (District) in the titles of Registered Nurse (RN), Occupational Therapist (OT), and Physical Therapist (PT). These employees are presently in an existing collective bargaining unit represented by CSEA.[1] The ALJ granted the petition, finding that the

[1] 52 PERB ¶ 4002 (2019).

RNs, OTs, and PTs should be placed into a separate bargaining unit and ordering that an election by secret ballot be held among employees in that unit as to their choice of representative.

EXCEPTIONS

CSEA filed 12 exceptions to the ALJ's decision. CSEA's first exception argues that the ALJ erred in finding that all titles in a general unit that are considered "professional" must be fragmented from the "non-professional" titles in the bargaining unit. CSEA's second and fourth exceptions assert that the ALJ erred in relying on the Board's decision in *Ichabod Crane Central School District*[2] in granting the petition because there are additional professional titles in CSEA's unit. CSEA's third exception contends that, if "professional" titles are fragmented from a larger unit, an election is ordered to determine if a majority of those in the professional titles wish to remain in the larger unit.

CSEA's fifth through tenth exceptions argue that the ALJ erred in finding that the conduct of CSEA towards members of the bargaining unit demonstrate a conflict of interest or inadequate representation by CSEA of the RNs, OTs, and PTs under the Board's traditional fragmentation standards. CSEA's eleventh exception contends that the ALJ erred in placing RNs, OTs, and PTs in their own separate bargaining unit and that the ALJ should have determined whether fragmented titles were properly placed into any other existing bargaining unit in the District. Finally, CSEA asserts that the ALJ erred in finding that the District did not take a position against granting the petition.

UPSEU supports the ALJ's decision and contends that no basis has been demonstrated for reversal. The District did not file any response.

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[2] 33 PERB ¶ 3042 (2000), *confd sub nom CSEA, Inc., Local 1000, AFSCME, AFL-CIO, Ichabod Crane Cent Sch Dist CSEA Unit v NYS Pub Empl Relations Bd*, 300 AD2d 929, 35 PERB ¶ 7020 (3d Dept 2002).

Based upon our review of the record and our consideration of the parties' arguments, we affirm the decision of the ALJ.

FACTS

CSEA represents a unit of noninstructional employees employed by the District. Among the titles represented are RNs, OTs, and PTs. Prior to the start of the hearing, the parties entered into a stipulation of facts and certain exhibits. The stipulation included a copy of the applicable collective bargaining agreement between CSEA and the District that was effective July 1, 2009 through June 30, 2013.[3]

The parties also stipulated that the titles of RNs, OTs, and PTs are "professional and/or the employees in th[ese] title[s] possess professional attributes."[4]

Monica Scattareggia, a RN with a Bachelor of Science degree, has been employed by the District since 2006. She testified that her position with the District is a ten-month position at salary grade 7A, and that her current annual salary is approximately $35,000.[5]

Scattareggia testified that one RN is assigned to each of the District's elementary schools, two RNs are assigned to the District's middle school, and two RNs are assigned to the District's high school. The RNs are the primary healthcare providers in their assigned buildings. According to the job description for the RN position, applicants for the position must have graduated from "a school of nursing approved by the State Education Department from a course approved by such department as qualifying for Registered Professional Nurse" and must possess a license issued by the State of New

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[3] Joint Ex 1, Joint Ex "A."
[4] Joint Ex 1.
[5] The contractual salary schedule in the 2009-2013 agreement between the parties shows that the step one salary for grade 7A positions is $31,999. The annual salary for grade 7A positions at the top of the grade, step 11, is $38,280. Joint Ex 1, at Ex A.

York to practice as a Registered Professional Nurse.[6] The job description notes, as a distinguishing feature of the position, that it is "a professional nursing position involving responsibility for giving care and treatment to students and for performing related nursing services such as pupil health appraisals and follow-through and communicable disease control requiring specialized judgment and skills."[7]

Scattareggia testified that RNs do routine vision and hearing screening, immunization monitoring, communicable disease reports, and assist physicians with student physical examinations. Nurses employed by the District also routinely dispense medications to, and monitor the condition of, students with ADHD, diabetes, and seizure disorders.[8]

Ani Mooney, who has an associate degree in nursing, has been employed by the District for 18 years and has worked in all eight of the District's schools. Mooney agreed with Scattareggia's testimony about the duties performed by a RN in the District, though she added that, at the middle school and high school, RNs have to "deal with sports"[9] and at the high school, with working-paper physicals.

Karen Blanchfield, a RN who has been employed by the District for nine years, also testified on behalf of UPSEU. Blanchfield has a bachelor's degree in nursing. During her tenure at the District, Blanchfield has been assigned to a number of the District's schools, including five elementary schools, the high school, the charter schools, and the parochial school.

The last witness to testify on behalf of UPSEU was Laura Lilac, a PT employed by the District for 17 years. Lilac has a Bachelor of Science degree and a doctorate

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[6] Joint Ex 1, at Ex B. The job description is referred to in the parties' stipulation of facts as a "classification specification." *See* Joint Ex 1.
[7] *Id.*
[8] Tr Vol 1, at 18-19.
[9] Tr Vol 1, at 46.

degree in physical therapy. She is licensed and registered by the State of New York as a physical therapist, and is one of two PTs employed by the District.

According to the job description in place at the District, individuals in the title of physical therapist must possess:

> either a Bachelor's or Master's degree in physical therapy, complete at least six (6) months of supervised field work and have passed the national certification examination and be licensed and currently registered by the New York State Education Department as a physical therapist.[10]

Lilac works with students in kindergarten through fifth grade who are developmentally delayed, with the goal of making those children functional within the school environment. Lilac works with other professionals employed by the District, including OTs, speech therapists, psychologists, teachers, RNs, the Committee on Special Education, and other special education personnel. The PTs and OTs are all ten-month employees.

Lilac testified that PTs licensed by the State of New York are required to have 12 hours of continuing education annually.[11]

Lilac testified that she works with the RNs and OTs on a daily basis in providing services to the students she treats. With regard to RNs, Lilac testified that she is in contact with them on a daily basis, "updating on student status and collaborating on treatment plans or cohesiveness of the treatment."[12] With regard to her work with the OTs, Lilac testified:

> we usually share a space, and we sometimes co-treat or treat the same student at the same time. We have similar responsibilities in

[10] Joint Ex 1, at Ex D.
[11] Lilac's later testimony indicates that OTs also have State-mandated continuing education requirements to maintain licensure. She also stated that the OTs shared the same kinds of concerns as the PTs regarding the teacher-based content of the District's Professional Development Days. Tr Vol 1, at 84.
[12] Tr Vol 1, at 81.

> terms of working on functional life skills or activities of daily living. Occasionally we have to share a computer to do the Medicaid billing which requires additional time, or one of us to sacrifice their billing for the day.[13]

Although no testimony was obtained from any OT employed by the District, the OT job description is included in the record. The parties have agreed that the OT job description accurately reflects the actual duties and qualifications of an OT employed by the District. The job description states:

> **Distinguishing Features of the Class:**
>
> This is a professional position involving responsibility for evaluating, planning and implementing the total occupational therapy program by providing occupational therapy treatment to students in accordance with written prescription or referral from the school physician. The incumbent in this position is also responsible for training staff and students in the use of adaptive assistance devices necessary to achieve maximum independence. Work is performed under the direct supervision of the "Pupil Services Director." Does related work as required…
>
> **Minimum Qualifications:**
>
> Graduation from a regionally accredited or New York State registered college or university with either a Bachelor's or Master's Degree in Occupational Therapy; completion of at least (6) months of supervised field work and have passed the national certification examination, and be licensed and currently registered by the New York State Education Department as an Occupational Therapist.[14]

Dominick Rizzo testified on behalf of CSEA. Rizzo is employed by the District in the maintenance department, where he has worked since 1999. Rizzo has been the president of the CSEA local which represents the bargaining unit of noninstructional employees of the District since 2013.

Rizzo testified that CSEA had proposed to the District that the RNs and therapists be removed from CSEA and placed in a separate bargaining unit, though still

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[13] *Id.*

[14] Joint Ex 1, at Ex C.

represented by CSEA. According to Rizzo, CSEA drafted a formal memorandum of agreement to be provided to the school board. Rizzo was unable to state when this memorandum was provided by CSEA to the District.[15] No evidence of any response by the District or the school board was introduced.

Rizzo testified about an email message he received on March 30, 2015, from Seth Cohen, who was the President of the Troy Teachers Association (TTA), asking to meet with CSEA concerning a letter Cohen had received from unnamed RNs and therapists asking to be removed from CSEA's unit and placed in the unit represented by the TTA.[16] Cohen's email was forwarded by Rizzo to CSEA Labor Relations Specialist, Tim Vallee. Vallee responded to Rizzo, as follows:

> We are not interested in meeting to negotiate positions out of our bargaining unit. TTA should contact their main office to better understand. Do they have the same amount of positions they would like to place in CSEA? These positions were placed in our unit years ago when no one, not the TTA [*sic*] were interested in them then. Why now? PERB placed them in our unit for a reason. We are not giving them a letter to relinquish the positions. CSEA HQ will not allow it and neither will NYSUT allow TTA to give us positions.[17]

Rizzo then forwarded Vallee's response to Cohen, who forwarded it to Mooney and Lilac. On April 2, 2015, Mooney forwarded the entire email chain to the other RNs.

CSEA offered the job descriptions of four other job titles—Applications Engineer, Mobile Learning Technician, Local Education Agency Coordinator, and Purchasing Manager—that are in the bargaining unit represented by CSEA.[18] CSEA contends that these four titles are professional titles similar to the RNs, OTs, and PTs. The parties stipulated that all of the job descriptions accurately reflect the duties and minimum

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[15] Tr Vol 1, at 176-178.
[16] Tr Vol 1, at 170-178; Petitioner's Ex 2.
[17] Petitioner's Ex 2.
[18] Joint Ex 1, at ¶ 9.

qualifications of an individual employed by the District in each position.[19]

The job description for the title Applications Engineer states:

> **Distinguishing Features of the Class:**
>
> The work involves performing highly responsible systems and applications administration functions for the school district, and assist in collecting, analyzing and synthesizing student and district data for the purpose of creating various Federal, State and district reports. . . .
>
> **Minimum Qualifications:**
>
> Graduation from a regionally accredited or NYS registered college or university with an Associate's degree in Computer Science, or a closely related field, and five (5) years of increasingly responsible full-time paid experience in system administration, network administration and/or computer applications; OR Graduation from high school or possession of a GED and seven (7) years of full-time paid experience, four (4) years of which shall have included computer server or network administration duties.
>
> Possession of a Master's Degree may be used to replace two (2) years of experience, and possession of a Bachelor's Degree may be used to replace one (1) year of experience.[20]

The job description for the title of Mobile Learning Technician states:

> **Distinguishing Features of the Class:**
>
> The work involves responsibility for managing technical support and assistance in the configuration, distribution, and maintenance of the School District's current and future mobile devices. The work includes the installation of software and applications, diagnosing, troubleshooting, repairing and problem solving for various mobile devices. . . .
>
> **Minimum Qualifications:**
>
> Graduation from a regionally accredited or New York State registered college or university with an Associate's degree in Computer Science, or a closely related field, and two (2) full years of full-time paid experience* in the installation, maintenance and repair of various mobile devices, applications and software; OR Graduation from high school or possession of a GED and four (4) years of full-

[19] Joint Ex 1, at ¶¶ 5-8.
[20] Joint Ex 1, at Ex E.

time paid experience* in the installation, maintenance and repair of various mobile devices, applications and software.

*Part-time or volunteer experience may be credited on a FTE basis.[21]

The job description for the title of Local Education Agency Coordinator states:

Distinguishing Features of the Class:

This is a semi-skilled work involving responsibility for independently performing a variety of mechanical and other building maintenance tasks or for serving as a helper to a journeyperson or tradesperson. In either case, although a working knowledge of one or more trades is necessary, a maintenance worker does not utilize the more skilled journeyperson techniques for any considerable portion of his time. . ..

Minimum Qualifications:

Graduation from high school or possession of a high school equivalency diploma and two (2) years of experience working in the building trades.

Special Requirements:

Certification as required by the United States Environmental Protection Agency, Asbestos Hazard Emergency Response Act of 1987.

A Class G Supervisor Asbestos Certificate issued by the State of New York Department of Labor must be obtained at the earliest date possible as arranged by the District. The initial course is a five (5) day training course that will be scheduled and paid for by the District. The annual refresher course is a one (1) day course that will be scheduled and paid for by the District. Both courses are only provided during the day shift.

The Class G Supervisor Asbestos Certificate must remain valid at all times during the duration of employment in this role.[22]

Finally, the job description for the title of Purchasing Manager states:

Distinguishing Features of the Class:

The work involves responsibility for managing the process and staff

[21] Joint Ex 1, at Ex F.
[22] Joint Ex 1, at Ex G.

> involved in the purchase of a wide range of materials, supplies and equipment for the Troy City School District. An employee in this class, prepares and analyzes bids and makes recommendations regarding purchases, interviews salesmen, and contacts vendors and directly manages staff involved in the purchasing and receiving of all supplies and services needed by the District. . . . This position directly manages the work of the purchasing and stock room staff . . . .
>
> **Minimum Qualifications:**
>
> A. Graduation from a regionally accredited or NYS registered four-year college or university with a Bachelor's degree in either accounting, business, public administration or economics, and one year of experience in large scale purchasing of a variety of commodities; OR
>
> B. Graduation from a regionally accredited or NYS registered two-year college or university with an Associate's degree in either accounting, business, public administration or economics, and three years of experience in large scale purchasing of a variety of commodities; OR
>
> C. Graduation from high school and five years of experience in large scale purchasing of a variety of commodities; OR
>
> D. An equivalent combination of training and experience as defined by the limits of A, B, and C above.[23]

DISCUSSION

We first address CSEA's argument that the ALJ erred in finding that the District did not take a position against granting the petition. CSEA argues that it made a request to the District that it agree to allow the RNs, PTs, and OTs to have their own bargaining unit.[24] Indeed, Rizzo testified that such a request was made at some point since he became local president in 2013.[25] CSEA then goes on to state, without any citation to the record, that the District refused to agree to such a bargaining unit represented by CSEA. As the ALJ noted, the record does not include evidence of any

[23] Joint Ex 1, at Ex H.
[24] Brief in Support of Exceptions, at 41.
[25] Tr, Vol 1, at 176-178.

response by the District or the school board.[26] These circumstances do not support our drawing an inference that the District has a preference against fragmentation of the existing unit. In this proceeding, the District has explicitly taken a neutral position on the petition on multiple occasions, including in its verified response to the petition and at the hearing itself.[27] We, therefore, find that the ALJ correctly found that the District took no position with respect to the petition in this proceeding.

We next examine the ALJ's application of *Ichabod Crane Central School District* (hereinafter *Ichabod Crane*)[28] to the petition at issue here. In *Ichabod Crane*, the Board held that RNs are not properly placed in units of nonprofessional or noninstructional employees. RNs are required to have a college education, meet certification and licensing requirements, participate in continuing professional education, and are subject to changing professional requirements brought about by legislation and court decisions.[29] They have daily direct contact with students, teachers, administrators, parents, and other health care professionals.[30] RNs clearly share an occupational identity and professional community of interests. The duties of RNs establish a unique community of interest and/or conflict of interest with other, nonprofessional employees who may not have any similar duties.[31]

In *Newburgh Enlarged City School District*, the Board explained that its finding in *Ichabod Crane* was based not only on the professional status of registered nurses, "although that was a factor. We also considered the qualifications, education, and

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[26] 52 PERB ¶ 4002, at 4010.
[27] ALJ Ex 3 (Verified Petition) ¶ 4; Tr, vol 1, at 10.
[28] 33 PERB ¶ 3042 (2000), *confd sub nom CSEA, Local 1000, AFSCME, AFL-CIO, Ichabod Crane Cent Sch Dist CSEA Unit v NYS Pub Empl Relations Bd*, 300 AD2d 929, 35 PERB ¶ 7020 (3d Dept 2002).
[29] *Id*, at 3109.
[30] *Id.*
[31] *Id*, quoting *County of Dutchess and Dutchess Co Sheriff*, 26 PERB ¶ 3069, 3130 (1993).

duties of registered nurses as compared to other employees."[32] *Ichabod Crane* "return[s] to the early standards [the Board] had applied in initial uniting cases involving nurses and bring[s] fragmentation decisions back to that standard."[33]

We find that the ALJ correctly applied *Ichabod Crane* to the circumstances here. As we previously held, RNs are simply not properly included in a unit of nonprofessional employees. Their significantly different educational and licensing requirements, their occupational identity, and their duties, requiring daily, direct contact with students, teachers, administrators, parents, and other health care professionals, establish a "compelling, unique community of interest,"[34] distinguishable from the District's non-professional personnel.

We need not decide whether *Ichabod Crane*'s approach to fragmenting nurses out from an otherwise nonprofessional unit best serves the policies of the Public Employees' Fair Employment Act (Act) under all circumstances. Rather, *Ichabod Crane* constitutes one of a subgroup of cases standing for the proposition that nurses form a cohesive group with their own special community of interest that should not be submerged within a nonprofessional unit. These cases warrant the fragmentation of RNs out of the unit in which they are currently situated.

We likewise find that OTs and PTs are properly included in the unit with RNs. As the ALJ found, RNs, OTs, and PTs are the only positions in the bargaining unit for which a license to practice and continuing education are required. The RNs, OTs, and PTs all provide direct care to students and collaborate to "co-treat" common patients.[35] RNs,

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[32] 37 PERB ¶ 3027, 3077 (2004) (affirming ALJ's determination that teaching assistants were appropriately placed in a bargaining unit of professional employees). *See also Southern Cayuga Cent Sch Dist*, 37 PERB ¶ 3028 (2004) (same).
[33] *Southern Cayuga Cent Sch Dist*, 37 PERB ¶ 3028, 3080 (2004).
[34] *Newburgh Enlarged City Sch Dist*, 37 PERB ¶ 3027, at 3077.
[35] 52 PERB ¶ 4002, at 4014.

OTs, and PTs share professional interests that are unique from other CSEA bargaining unit members. In sum, we find that RNs, OTs, and PTs share the same unique community of interest. Moreover, in *Ichabod Crane*, as we do here, the Board applied the initial uniting standards for nurses in a combined unit with nonprofessional staff to determine that they were properly fragmented from that mixed unit. In *Ichabod Crane*, the Board found that "nurses are not properly placed in units of nonprofessional or noninstructional employees."[36] In applying this standard, ALJs have appropriately included OTs and PTs in a unit with nurses.[37] We find the unit of nurses, OTs, and PTs to the be the most appropriate unit under the circumstances here.

CSEA argues that the titles of Applications Engineer, Mobile Learning Technician, Local Education Agency Coordinator, and Purchasing Manager are professional titles and that the inclusion of such professional titles in the unit distinguishes the instant case from *Ichabod Crane*. We affirm the ALJ's finding that these titles do not share the professional attributes of RNs, OTs, and PTs. In terms of educational requirements, the possession of a high school diploma or GED and work experience can be substituted for a college degree for all of the titles. As the ALJ correctly found, the evidence does not establish that the asbestos certificate required of the Local Education Agency Coordinator can reasonably be deemed analogous to the professional licenses and oversight required of the RNs, PTs, and OTs.[38] Nor does the record support a finding that the titles cited by CSEA have daily contact with students, parents, or health professionals, as do the RNs, OTs, and PTs.

We further affirm the ALJ's finding that the evidence here establishes that the

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[36] 33 PERB ¶ 3042, at 3109.
[37] *See, eg, Hyde Park Cent Sch Dist*, 42 PERB ¶ 4020 (2009); *Jamestown City Sch Dist*, 21 PERB ¶ 4036 (1988).
[38] 52 PERB ¶ 4002, at 4015.

RNs, OTs, and PTs share a unique community of interest, and therefore should be placed into a separate bargaining unit together. While the Board has never had an exactly comparable case, ALJs have, on similar evidence of a unique community of interest, placed nurses alone, and also nurses, OTs, and PTs into units of teachers and other instructional personnel.[39] However, the situation here is analogous to that in *Ichabod Crane*, where we placed nurses into their own bargaining unit.[40] The analogy is not an exact identity in that the PTs and OTs share in the unique community of interest, leading to a bargaining unit that is broader in scope than that found to be most appropriate in *Ichabod Crane*, albeit by applying the same uniting criteria as we employed in that decision. Our conclusion is furthered by the fact that, as in *Ichabod Crane*, the representative of the instructional unit, the TTA, has not intervened or otherwise expressed an interest in representing the RNs, OTs, and PTs in this proceeding,[41] and the District has not raised an argument that the at-issue titles would be more appropriately placed in one of the existing bargaining units based on administrative convenience pursuant to § 207.1 (c) of the Act.[42] In these circumstances, we find it appropriate to place the RNs, OTs, and PTs in their own bargaining unit.

Under the Board's traditional fragmentation standards, a fragmentation petition is not granted in the absence of compelling evidence of the need to do so.[43] Compelling

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[39] *See, eg, Hyde Park Cent Sch Dist*, 42 PERB ¶ 4020 (2009); *Jamestown City Sch Dist*, 21 PERB ¶ 4036 (1998).
[40] *See also Lindenhurst Union Free Sch Dist*, 10 PERB ¶ 4023 (1977).
[41] *Ichabod Crane,* 33 PERB ¶ 3042, at 3108. Where the instructional employees' representative has not expressed an interest in representing the unit, as here, placement in that unit need not be made over objection. See, e*g, Southwestern Cent Sch Dist*, 42 PERB ¶ 4017, 4063 (2009).
[42] *Id* at 3109, n. 2.
[43] *Town of Southampton*, 37 PERB ¶ 3001, 3004 (2004); *State of New York (Long Island Park, Recreation and Historical Preservation Commission)*, 22 PERB ¶ 3043,

need is generally established by proving the existence of a conflict of interest or inadequate representation.[44] CSEA argues that there is no evidence warranting fragmentation under the Board's traditional fragmentation standards. However, our ruling in *Ichabod Crane* did not turn on those standards but rather on the policy of the Act described above. Accordingly, our decision is not dependent on a finding of conflict of interest or of inadequate representation. The Board in *Ichabod Crane* found as a matter of law that nurses should not be included in a unit of nonprofessional titles. As such, no further examples of conflict or demonstrations of the uniqueness of nurses' community of interest is necessary.[45]

CSEA's third exception argues that if professional titles are fragmented from a larger unit there is an "election ordered to determine if a majority of those in the professional titles wish to remain in the general unit."[46] Employee preference, however, is not a factor in unit placement.[47] As we have previously held, "if the felt-interests of the employees were a factor, bargaining units would fluctuate depending on the personalities of those involved."[48] CSEA cites no precedent for its contrary proposition, nor does it present any argument for overruling our precedent, and we adhere to our prior rulings.

Finally, we wish to make clear, as the Board did in *Ichabod Crane*, that our holding does not apply to all titles considered professional in a unit. Our holding today applies only to RNs and to professional titles that share RNs' unique community of

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3098 (1989).
[44] *Id.*
[45] *See also Southern Cayuga Cent Sch Dist*, 37 PERB ¶ 3028, at 3080 ("the standard of inadequate representation or conflict of interest normally used in deciding fragmentation cases should not be used in cases involving registered nurses because it was inconsistent with the standards we used in initial uniting cases.")
[46] Exceptions, at 2.
[47] *State of New York – Unified Court System*, 22 PERB ¶ 3023, 3060 n 1 (1989).
[48] *Marcus Whitman Cent Sch Dist*, 33 PERB ¶ 3016, 3038 (2000).

interest, as do OTs and PTs under the circumstances pleaded and proven here.

Accordingly, we hereby find the following unit to be most appropriate:

Included: All Registered Nurses, Occupational Therapists and Physical Therapists.

Excluded: All other employees.

For the reasons set forth above, we deny CSEA's exceptions, affirm the decision of the ALJ, and remand the case to the ALJ for further proceedings consistent with this opinion.

DATED: August 20, 2019
Albany, New York

John F. Wirenius, Chairperson

Anthony Zumbolo, Member

Monte A. Klein, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

TEAMSTERS LOCAL 687,

Petitioner,

-and - **CASE NO. C-6528**

TOWN OF KEENE,

Employer.

SATTER LAW FIRM, PLLC (SARAH E. RUHLEN of counsel), for Petitioner

WHITSON & TANSEY (DEBRA A. WHITSON of counsel), for Employer

BOARD DECISION AND ORDER

On August 2, 2018, the Teamsters Local 687 (petitioner) filed, in accordance with the Rules of Procedure of the Public Employment Relations Board, a timely petition seeking certification as the exclusive representative of certain employees of the Town of Keene (employer).

Thereafter, the parties executed a consent agreement in which they stipulated that the following negotiating unit was appropriate:

Included: All full-time Floating Laborers, Transfer Station Attendants, Heavy Equipment Operators, Motor Equipment Operators and Water Superintendent.

Excluded: All other employees.

Pursuant to that agreement, a secret-ballot election was held on June 10, 2019, in accordance with the Public Employees' Fair Employment Act and the Rules of

Procedure, at which a majority of ballots were cast against representation by the petitioner.

Inasmuch as the results of the election indicate that a majority of the eligible voters in the unit who cast ballots do not desire to be represented for the purpose of collective negotiations by the petitioner, IT IS ORDERED that the petition is dismissed.

DATED: August 20, 2019
Albany, New York

John F. Wirenius, Chairperson

Anthony Zumbolo, Member

Monte A. Klein, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

LOCAL 342, LONG ISLAND PUBLIC SERVICE EMPLOYEES, UNITED MARINE DIVISION INTERNATIONAL LONGSHOREMAN'S ASSOCIATION, AFL-CIO,

Petitioner,

-and- **CASE NO. C-6538**

TOWN OF SMITHTOWN,

Employer.

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 Local 342, Long Island Public Service Employees, United Marine Division International Longshoreman's Association, AFL-CIO 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: Part-time Applicant & Complaint Investigator, part-time Bay Constable, part-time Dispatcher, part-time Fire Marshall I, part-time Guard, part-time Park Ranger I, part-time Park Ranger II, part-time Ordinance Inspector, and part-time Senior Bay Constable.

Excluded: All other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Local 342 Long Island Public Service Employees, United Marine Division International Longshoreman's Association, AFL-CIO. 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: August 20, 2019
Albany, New York

John F. Wirenius, Chairperson

Anthony Zumbolo, Member

Monte A. Klein, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

KAREN COLANGELO,

Petitioner,

-and-

CASE NO. C-6548

GREENBURGH-GRAHAM UNION FREE SCHOOL DISTRICT,

Employer,

-and-

LOCAL 456, INTERNATIONAL BROTHERHOOD OF TEAMSTERS,

Incumbent.

KAREN COLANGELO, for Petitioner

GIRVIN & FERLAZZO, PC (KRISTINE AMODEO LANCHANTIN of counsel), for Employer

EMILY A. ROSCIA, ESQ., for Incumbent

BOARD DECISION AND ORDER

On January 7, 2019, Karen Colangelo (petitioner) filed, in accordance with the Public Employees' Fair Employment Act and the Rules of Procedure of the Public Employment Relations Board, a timely petition for decertification of the Local 456, International Brotherhood of Teamsters (incumbent), the current negotiating

representative for employees in the following negotiating unit:

Included: Office Assistant, Office Assistant (Automated Systems), Office Assistant (Financial Support), Receptionist, Typist, Administrative Assistant, Secretary to School Principal, and Senior Office Assistant (Automated Systems).

Excluded: All other titles.

Upon consent of the parties, an election was held on July 10, 2019. The results of the election show that a majority of eligible employees in the unit who cast valid ballots no longer desire to be represented for purposes of collective negotiations by the incumbent.

THEREFORE, IT IS ORDERED that the incumbent is decertified as the negotiating agent for the unit.

DATED: August 20, 2019
Albany, New York

John F. Wirenius, Chairperson

Anthony Zumbolo, Member

Monte A. Klein, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL UNION NO. 17,

Petitioner,

-and- **CASE NO. C-6553**

TOWN OF WINDHAM,

Employer.

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 Laborers' International Union of North America, Local Union No. 17 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 full-time and part-time Motor Equipment Operators and Laborers in the highway department.

Excluded: Highway Superintendent and all other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Laborers' International Union of North America, Local Union No. 17. 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: August 20, 2019
Albany, New York

John F. Wirenius, Chairperson

Anthony Zumbolo, Member

Monte A. Klein, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

UNITED FEDERATION OF TEACHERS, LOCAL 2, AFT, AFL-CIO,

Charging Party,

-and- **CASE NO. U-32479**

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

Respondent.

ROBERT T. REILLY, ESQ. (ARIANA A. DONNELLAN of counsel), for Charging Party

KAREN SOLIMANDO, EXECUTIVE DIRECTOR OF LABOR RELATIONS (ALLISON S. BILLER of counsel), for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the United Federation of Teachers, Local 2, AFT, AFL-CIO (UFT) to a decision of an Administrative Law Judge (ALJ), dismissing an improper practice charge alleging that the Board of Education of the City School District of the City of New York (District) violated § 209-a.1 (d) of the Public Employees' Fair Employment Act (Act).[1] The charge alleged that the District violated the Act when it unilaterally began placing a "flag" in its computer system next to the names of unit employees who have been the subject of discipline because the "flag" constitutes an additional form of employee discipline. The charge also alleged that "none of the affected employees would have an opportunity to review the information upon which the 'flag symbol' was entered or to ascertain or contest whether the

[1] 51 PERB ¶ 4561 (2018).

disciplinary action the entry is based on actually occurred or is in error."[2] The ALJ dismissed the charge, finding that the flagging process was a duplicate, digitized version of certain documents already in the employees' personnel file and that the manner in which the District maintains employees' personnel files was not a mandatory subject of negotiations.

EXCEPTIONS

The UFT's exceptions argue that the "flagging" system is a mandatory subject of negotiation because a flag, "in and of itself, is a form of discipline."[3] The UFT argues that the "flag" system does not merely neutrally reproduce employees' paper personnel file, but consists solely of derogatory materials extracted therefrom. The UFT argues that the usage of this derogatory information impacts employees' working conditions, including negatively impacting employees' ability to transfer and secure new positions.

The UFT also argues that employees' lack of access to the flagged items in order to confirm the accuracy of the information contained in the "flagging" system effectively denies employees the right to review their complete personnel file in violation of the Act.

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

For the reasons given below, we vacate the ALJ's decision and remand for further proceedings consistent with this opinion.

FACTS

Because of the limited nature of our ruling, the facts are only set forth here to the

[2] Charge, ¶ 6.
[3] UFT Exceptions, at 2.

extent necessary to explain this decision. On March 15, 2012, in response to "a series of highly publicized cases in the news concerning [District] principals and supervisors that had hired individuals while being unaware of their prior disciplinary history," the District announced plans to initiate a new method of "flagging" negative work history in an online disciplinary support system.[4] The online disciplinary support system is linked to and accessible through the District's "Galaxy" computer system, an online budgetary system that provides a table of organization for all District offices and schools. The flagging system makes information regarding an employee's disciplinary history with the District available to school principals when an employee is applying for a new position or a transfer to another position. The information is only available to principals if they indicate in Galaxy that they intend to accept an individual for a position in their school.[5] This process is referred to as "intending" an employee in Galaxy. If an employee's name has been flagged, a "flag symbol" appears next to the employee's name when a principal "intends" the individual's name in Galaxy.[6] The appearance of the "flag symbol" indicates that there is disciplinary information in the employee's personnel file that is available to the principal by clicking on the flag. One or more digitized documents may be linked to a flag, and can be viewed by the "intending" principal.

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[4] District Brief in Response to Exceptions (District Brief), at 3 (citing Tr, at 75 (Rodi)), at 162-168 (Arundell). The District's Brief is not paginated, so the page numbers are based on Adobe Acrobat's numbering of pages constituting the pdf.

[5] Although the parties refer to the "hiring" of individuals, most of the individuals in question are already District employees, who are simply applying to transfer to a position at a different school or are seeking a permanent assignment. Some applicants may also be former District employees, who are seeking to return to the District.

[6] District Brief, at 6, citing Joint Ex 1. As the "flag symbol" is not reproduced in the cited Exhibit, and the system is not available to the UFT, we adopt the District's characterization for purposes of this decision.

However, the District has represented, and no contrary evidence has been adduced, that the decision whether or not to click on the flag symbol and see the attached documents remains for the principal. The District has represented that it "considers the *optional* review of the disciplinary support unit flag by hiring principal/supervisor as an opportunity to learn about an employee's prior history-similar to checking reference[s] before making a hiring decision."[7]

A series of other steps, not germane to our ruling today, are required prior to an "intending" principal either proceeding with the transaction (that is, submitting the candidate for hiring) after "acknowledge[ing] that [the principal is] aware of and acknowledge the prior disciplinary action concerning this individual," or cancelling the transaction.[8]

Katherine Rodi, the Director of the District's Office of Employee Relations, oversees the Disciplinary Support Unit (DSU), which manages the District's online disciplinary support system. The DSU tracks employee discipline and is responsible for flagging employee names when appropriate. The DSU began flagging employee names in approximately May of 2012.

A flag is intended to remain next to an employee's name as long as the underlying disciplinary letter remains in the employee's personnel file.[9] The DSU will also remove a flag if a settlement requires it to remove the disciplinary letter on which the flag was based. Similarly, the DSU removes a flag if an employee successfully pursues a grievance challenging a letter on which a flag is based, and the grievance

[7] *Id* (citing Tr, at 83-84 (Rodi) emphasis in original).
[8] Joint Ex. 1.
[9] Tr, at 113.

decision directs the District to remove that letter from the employee's personnel file.[10]

According to the District, documents linked to a flag are already included in an employee's personnel file. Those files are maintained at the school where an employee is currently employed, or was last employed. Because the District has not digitized the entire contents of employee personnel files, "intending" principals cannot view them online; they can only view the flagged documents online. To view a copy of an employee's personnel file, a principal considering whether to hire an employee must contact the school where the employee's file is kept, and either request that a hard-copy be made and sent to him or her or inspect the file on site. Thus, a principal is able to see a paper copy of all documents in the employee's personnel file, including those that have been flagged in Galaxy.

The parties do not dispute the ALJ's finding to the extent that she found that employees are able to view their personnel file.[11] Moreover, the ALJ also found that "[t]he collective bargaining agreement between the parties includes a grievance procedure that allows employees to seek the removal of disciplinary letters from their personnel file[]."[12]

Prior to the implementation of the flag symbols, principals could only view online an employee's service history, which shows whether an employee was rated effective or

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[10] Tr, at 113.

[11] 51 PERB ¶ 4561, at 4764; *see* Tr, at 28 (Arundell); Union Exceptions, at 2 ("It is well established that employees have the right to inspect their personnel files"; *see also* District Response, at 14, subhd 3 (quoting the ALJ's full finding that the "digitized file that is flagged in Galaxy includes only documents that are already in the employee's paper file, which the employee can view").

[12] 51 PERB ¶ 4561 at 4764, n 11.

ineffective in his or her yearly evaluation, and whether an employee was suspended.[13] To view an employee's disciplinary history, an "intending" principal would have to request the employee's personnel file from the employee's school.[14]

Rodi testified that the flag serves a purely informational function in assuring that a hiring principal is aware of flagged information. She further testified that flagging an employee's name does not restrict an employee's ability to apply for a new position or impose any restriction or limitation on the employee. Rodi testified that "intending" principals are not required to take, or refrain from taking, any action when an employee's name has been flagged; they may, if they so choose, hire an employee whose name is flagged.[15] Rodi testified that she personally knows principals who have hired employees whose names are flagged in Galaxy.[16]

Other than those working in the DSU, only an employee's current principal and the principal who intends to hire the individual can view whether an employee's name is flagged in Galaxy.[17] However, before their names are flagged, employees have received a copy of the letter of misconduct that is linked to the flag and have been advised that the document has been placed in their personnel file. According to the ALJ, "[e]mployees may inquire through the UFT whether their name has been flagged in Galaxy and what documents are linked to a flag."[18]

Rodi testified that she speaks to UFT representatives "a couple of times a week,"

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[13] Tr, at 89, 126.
[14] Tr, at 78.
[15] Tr, at 87-88.
[16] Tr, at 123.
[17] Tr, at 83.
[18] 51 PERB ¶ 4561, at 4762.

and that on "maybe about a dozen times" a UFT representative had requested information regarding "whether a specific employee had a flag next to his or her name."[19] Rodi further testified that every single time she was asked such a question, she answered, and that the UFT has never informed her that a person who had a flag had been misidentified.[20]

DISCUSSION

We conclude that this matter should be remanded on two grounds.[21] The first goes to our jurisdiction. In that regard, it is, as we have found, "axiomatic that we may only exercise the powers which have been bestowed upon us by the Legislature."[22] In particular, § 205.5 (d) of the Act provides that the Board "shall not have authority to enforce an agreement between an employer and an employee organization and shall not exercise jurisdiction over an alleged violation of such agreement that would not otherwise constitute an improper employer or employee organization practice."[23]

We "have held repeatedly that § 205.5 (d) of the Act is triggered if the provisions of an unexpired collective bargaining agreement constitute a reasonably arguable source of right to a charging party with respect to the subject matter of the improper

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[19] Tr, at 85.
[20] Tr, at 85-86.
[21] The ALJ found that the charge is timely. 51 PERB ¶ 4561, at 4762-4763. The District did not file any exceptions to this finding. Any such exceptions to the ALJ's finding are thus waived and are not properly before us. Rules of Procedure § 213.2; *see, eg, Board of Educ of the City Sch Dist of the City of New York (Smith)*, 51 PERB ¶ 3035, 3151 (2018); *City of Cortland*, 51 PERB ¶ 3014, 3067 n 5 (2018); *Lawrence Union Free Sch Dist*, 50 PERB ¶ 3034, 3140 n 20 (2016); *County of Chemung and Chemung County Sheriff*, 50 PERB ¶ 3022, 3090 (2017); *Village of Endicott*, 47 PERB ¶ 3017, 3052, n 5 (2014); *NYCTA (Burke)*, 49 PERB ¶ 3021, 3072, n 4 (2016) (citing cases).
[22] *State of New York (Dept Env Con)*, 29 PERB ¶ 3057, 3131 (1996).
[23] *Id*, quoting Act, § 205.5 (d).

practice charge."[24] In the instant case, it is clear that the parties have entered into a collective bargaining agreement, the terms of which the ALJ has referred to in the present tense.[25] Moreover, the ALJ further found that the collective bargaining agreement at a minimum "includes a grievance procedure that allows employees to seek to remove the disciplinary letters from their personnel files."[26]

While the parties do not dispute the right of employees to view their personnel file, its source is not specified in the record. While access to an employee's personnel file is, as the ALJ correctly found, a mandatory subject,[27] the parameters of that right, its origin here, and whether it is entirely contractual in nature, or the result of a past practice, are completely unclear. However, the ALJ's reference to a contractual right to seek removal of documents from the personnel file is salient, suggesting a significant likelihood that the right of access to the personnel file may be contractual in nature.

While the issue was not raised before the ALJ or in the exceptions, here, as in *State of New York (Department of Environmental Conservation*):

> These jurisdictional issues are not, however, affirmative defenses. They concern our very power to proceed with an investigation of a charge and the manner in which the existence of that power is decided and exercised. Substantial questions are presented on the existing record as to whether we have jurisdiction over this charge and whether consideration of that issue is properly deferred under our established policy. Disposition of those issues was required

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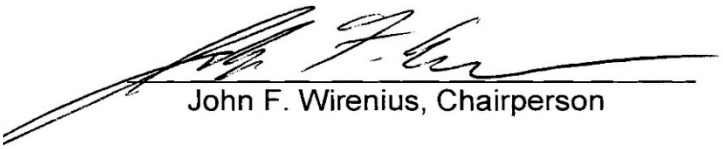
[24] *Id*, at 3133.
[25] 51 PERB ¶ 4561, at 4765, n 11.
[26] *Id*.
[27] *City of Schenectady*, 21 PERB ¶ 3022, 3049 (1988); *Town of Carmel,* 29 PERB ¶ 3053, 3121, 2122, n 3 ("notice of entries in personnel files" a mandatory subject). *See generally Niagara Falls Police Club (Drinks-Bruder)*, 52 PERB ¶ 4514 (2019), *affd* 52 PERB ¶ 3007 (2019) (union "satisfied its statutory obligation by successfully resolving a previously filed unit-wide grievance in the matter so that everyone, including the charging party, had the opportunity to review their personnel files").

> before addressing the merits of the charge as filed. . . . Once, as here, a substantial question concerning jurisdiction was presented on the record, it became incumbent upon the ALJ to obtain the grievances to enable her to make a fully informed decision on the jurisdictional/deferral issues.[28]

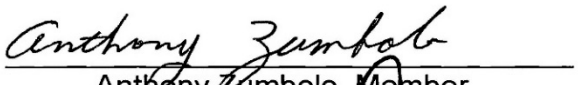
Second, we remand also as to the ALJ's finding that "Employees may inquire through the UFT whether their name has been flagged in Galaxy and what documents are linked to a flag."[29] While the first part of that sentence is supported by the testimony of Rodi, the latter part is not. We remand to the ALJ for an examination of the record so that she may determine whether any portion of the record supports this finding. Whether employees are able to verify the accuracy and appropriateness of materials attached to the flag as reflecting the contents of their personnel file may determine whether the institution of flagging has had any impact on terms and conditions of employment in the event the matter returns to us.

Accordingly, the decision of the ALJ is vacated and the matter remanded to her for further proceedings consistent with this opinion.

DATED: August 20, 2019
Albany, New York



John F. Wirenius, Chairperson



Anthony Zumbolo, Member

Monte A. Klein, Member

[28] 29 PERB ¶ 3057, at 3133.
[29] 51 PERB ¶ 4561, at 4762.

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

AMALGAMATED TRANSIT UNION, DIVISION 580,

Charging Party, **CASE NO. U-34608**

- and -

CENTRAL NEW YORK REGIONAL TRANSPORTATION AUTHORITY,

Respondent.

BLITMAN & KING, LLP (NATHANIEL G. LAMBRIGHT of counsel), for Charging Party

FERRARA FIORENZA, PC (CRAIG M. ATLAS of counsel), for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Central New York Regional Transportation Authority (CENTRO) to a decision by an Administrative Law Judge (ALJ) finding that CENTRO violated § 209-a.1 (d) of the Public Employees' Fair Employment Act (Act).[1] The ALJ found that CENTRO violated the Act when, in October 2015, it unilaterally changed a past practice regarding the procedures for granting requests for the use of intermittent leave pursuant to the Family Medical Leave Act (FMLA)[2] by employees in the bargaining unit represented by the Amalgamated Transit Union, Division 580 (ATU). For the reasons stated herein, we affirm the ALJ's decision.

EXCEPTIONS

CENTRO has filed 14 exceptions to the ALJ's decision, which reduce to six

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[1] 52 PERB ¶ 4515 (2019).
[2] 26 USC § 2601, *et seq.*

grounds upon which it seeks reversal of the ALJ's decision.

First, CENTRO contends that the ALJ erred in finding an enforceable past practice with regard to FMLA leave procedures.[3] In its second cluster of exceptions, CENTRO argues that the ALJ erred in finding that the record evidence established that CENTRO made a non-*de minimis* unilateral change to a past practice affecting terms and conditions of employment.[4]

The third basis upon which CENTRO urges reversal of the ALJ's decision is that "because the subject matter of the charge is addressed by the [parties'] contract, the charge is beyond the jurisdiction of PERB."[5] Relatedly, CENTRO maintains that it satisfied its duty to negotiate with ATU as the fourth basis upon which it contends the ALJ erred in finding a violation.[6]

Centro's fifth basis upon which it claims the ALJ erred is that its actions were "in compliance with the FMLA and the related regulations of the U.S. Department of Labor," and that the provisions of the FMLA and the regulations promulgated thereunder mandated its actions, and preclude negotiations of those actions.[7]

The sixth and final substantive ground upon which CENTRO asserts that the ALJ erred in finding a violation is that CENTRO's management rights permit CENTRO's actions at issue here.[8]

Finally, CENTRO excepts to the ALJ's finding of a violation, and her ordered

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[3] Exceptions Nos. 1-3, 12.
[4] Exceptions Nos. 3-6.
[5] Exceptions No. 7.
[6] Exceptions No. 8.
[7] Exceptions Nos. 9-10.
[8] Exceptions No. 11.

remedy, on the basis of the earlier exceptions and the record.[9]

The ATU filed a brief supporting the ALJ's decision.

FACTS

The facts are fully set forth in the ALJ's comprehensive decision,[10] and are only addressed here to the extent necessary to inform our analysis.

ATU represents a unit of bus operators, mechanics, and buildings and grounds workers employed by CENTRO. John Michael Riley, a Business Agent for ATU, is involved in contract negotiations and disciplinary matters. Riley testified that a clause in Article 18 of the parties' collective bargaining agreement (CBA) addresses the subject of FMLA and was first in effect in 2010. In the parties' then-current agreement (November 1, 2013 through October 31, 2016), the section reads:

> 18.09 FMLA Leave
>
> Employees who are out of work for reasons approved and qualified for under the FMLA are required to use any available un-paid/paid time off listed below (regardless of the reason for taking the time off) and such time may be taken in any order, but the employee is required to notify the Company which type of time off they are using for each FMLA day taken.
>
> 1. Book Off Days
> 2. Sick Time
> 3. Floating Holidays
>
> Maintenance Employees will be charged for [s]ick time and floating holidays.
>
> When using partial FMLA time, employees will be required to return to work within their work time for that day, however they will not be guaranteed eight (8) hours of pay if their remaining work time does not allow for it.[11]

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[9] CENTRO argues only that the ALJ should not have ordered a remedy at all and has not excepted to any of the specific provisions ordered by the ALJ.
[10] 52 PERB ¶ 4515, at 4570-4577.
[11] Joint Ex 1, at 86.

Riley explained that employees are allowed eight unpaid "book-off" days per year, which can be broken up into 16 half-days. Employees with less than five years of service receive three paid sick days per year, employees with five years of service receive four paid sick days per year, and employees with ten or more years of service receive five paid sick days per year. Finally, employees are allowed five floating holidays per year. Riley stated that bargaining unit members use book-off days, sick time and floating holidays to supplement what leave they are entitled to under the FMLA.

Riley testified that, prior to October 2015, the FMLA procedures were simply to go to the doctor, get forms, fill out the forms, and bring the forms back to CENTRO for approval or disapproval. If a bargaining unit member wanted to take an FMLA day, the procedure was to either sign it in the "Red Book" if the member knew in advance that he or she needed the day off or call and leave a message with the dispatcher if it was more last-minute. Riley stated that, under the prior procedure, bargaining unit members were never questioned by CENTRO about their FMLA leave. ATU members Sarah Sands, Daphne Ross-Powell, and Valerie Chisolm testified consistently with Riley as to this procedure.[12]

Jacquelyn Musengo, Director of Human Resources, since August 2012, and previously CENTRO's benefits manager, testified that she currently oversees FMLA leave and that, during her 12 years as benefits manager, she reviewed FMLA applications, ensured that the applications met the requisite qualifications, and authorized the FMLA leave for the employees. Musengo also testified that, in 2007,

[12] Tr, at 38-39 (Riley); 54, 59-60 (Sands); 108-111 (Ross-Powell); 122-124 (Chisolm).

CENTRO's Human Resources Department (HRD) developed a Standard Operating Procedure (SOP) regarding FMLA procedures, setting forth a "step-by-step process as to what happens when somebody wants to apply for [FMLA] leave."[13]

Regarding initial intake procedures, the SOP states that employees will be asked to complete the "Family and Medical Leave Request Application" and that the HRD will review the completed application to ensure that the employee is eligible for the leave. If eligible, the employee will receive an FMLA notification letter; if not eligible, the employee will receive a denial letter. The notification letter requires employees to submit a completed medical certification form, which will be reviewed by the HRD. The SOP states that CENTRO's HRD will review the medical certification and, if incomplete or unclear, return the certification to the employee with instructions to have his/her doctor answer a list of specific questions. If the certification is complete, the HRD will grant the FMLA leave.[14]

Regarding intermittent FMLA leaves, the SOP states:

> Managing Intermittent Leaves
>
> 1) When an employee has been granted an intermittent leave under the FMLA, the HRD will provide a copy of the final completed medical certificate and any related information to the employee's immediate supervisor for the employee's shift. The immediate supervisor will meet with the employee prior to their first (or next) intermittent FLMA absence to set up a schedule that includes as many treatments or doctor's visits as possible during off-work hours, when applicable to the employee's situation.
>
> 2) When an employee calls in to take an intermittent FMLA leave day(s), the person taking the call should record the time at which the call was received. Remember, CENTRO employees are required to call-in at least 30 minutes before

[13] Tr, at 158.
[14] Respondent's Ex 6.

their shift is to start.

3) The person taking the call should notify employee's immediate supervisor about the leave request and the time the call came in.

4) The employee's immediate supervisor will contact the employee to ask questions about the absence. The specific questions will vary depending on the circumstances. However, all the questions must be job-related. In other words the questions must be related to things such as:

a. why the employee will be absent
b. how long the employee will be absent
c. where will the employee be going during the absence
d. what the employee will be doing during the absence
e. if applicable, ask why it (e.g., doctor visits, physical therapy) cannot be done before or after work.

5) If an employee approaches a supervisor or dispatcher requesting an intermittent FMLA leave day(s) in person or if the employee places that request in the "Sign-Off" book, the supervisor/dispatcher should ask the same sort of job-related questions described above….

6) Whether the employee is questioned on the phone or in person, the manager who did the questioning must keep a written record of what was asked and said in the meeting.[15]

Finally, the SOP also states the following:

Notice to All Managers Aware of an Employee's FMLA Leave

1) If you see a suspicious pattern to the employee's FMLA absences, **REPORT IT TO HRD** (Example – Monday and Friday migraines)

2) If you see the employee where he/she should <u>not</u> be on a day of FMLA leave, **REPORT IT TO HRD**. (Example – at a football game on the day of surgery)

3) If answers/reasons for the absence are suspicious, **REPORT IT TO HRD** (Examples – FMLA leave day taken after vacation is denied for that day; joking comments about "I feel

[15] *Id*.

an FMLA day coming up")

Ongoing Medical Certifications and Misconduct Investigations

1) All employees who are granted FMLA leave on an intermittent basis for their own serious health condition and/or the serious health condition of their immediate family members, should be required to provide new medical certifications as requested by HRD.

2) If HRD receives a report indicating that an employee may be fraudulently using the FMLA leave, it will undertake a misconduct investigation of the employee. This may require obtaining evidence of the employee's use of the leave (e.g., doctor's notes to prove attendance at appointments, physical therapy, phone records, etc.)[16]

According to Musengo, in November 2015, the SOP was revised to include the change that the HRD would now be administering FMLA leave and asking follow-up questions, rather than the immediate supervisors.[17] During cross-examination, Musengo testified that she never questioned employees regarding their FMLA leave in either her capacity as director of human resources, or benefits manager, and agreed that the SOP was not negotiated with ATU.

KC Martin, Director of Operations, testified that in overseeing employee leave usage prior to 2015, he would speak to the employee involved if he suspected abuse of FMLA leave, and he would, on occasion, also inform representatives of ATU. Martin stated that the ATU representatives did not react in a negative fashion to what he told them. Martin referenced specific examples that prompted his questioning, such as when an employee would seek to use FMLA leave every Friday evening, or when employees sought to use FMLA leave for absence on Christmas, as well as when

[16] *Id.* (emphasis in original).
[17] Tr, at 159-160; Respondent's Ex 7.

CENTRO had reason to believe that an employee was attempting to use FMLA leave to attend a sporting event or to perform work for a side-business. Martin acknowledged that when he spoke to these employees, he did not ask them all of the questions in CENTRO's FMLA SOP.

Riley and Senior Vice President of Transportation, Joseph DeGray, testified to an October 2015 meeting at CENTRO between ATU and CENTRO's management, to allow the union's newly-elected Executive Board members to meet "the company people that they were going to be doing business with down the road."[18] Both Riley and DeGray testified that management brought up FMLA leave as a concern, and that CENTRO told ATU that the it had hired Human Resources Leave Specialist, Richard Kevin Perrin, "to help [CENTRO] with conformity regarding FMLA and on the basis that it was greater than had been in the past."[19] Both Riley and DeGray agreed that the parties never had a formal meeting and never reached any agreement on the issue of procedures to verify and control use of FMLA Leave, although DeGray stated that after this meeting, and prior to the filing of the charge, the parties engaged in some discussion regarding FMLA leave.[20] However, as DeGray testified, "[w]e were never able to reach an agreement at any time to at least sit down and discuss what we had presented."[21]

Riley testified that the week after the October 2015 meeting he began to receive calls from ATU members who complained of being questioned "by the FMLA leave

[18] Tr, at 33.
[19] Tr, at 312 (DeGray).
[20] Tr, at 35-37 (Riley); 312-313 (DeGray).
[21] Tr, at 312-313 (DeGray).

specialist" with respect to their FMLA use.[22] Between October 20 and November 25, 2015, Perrin wrote at least ten letters pertaining to the bargaining unit members' FMLA leave requests, notifying them that their FMLA leave had been deemed an "unexcused absence," for "failure to respond to [Perrin's] requests" to discuss their FMLA absence.[23] Riley testified that unexcused absences can, ultimately, result in termination.

Perrin testified that he began working at CENTRO in September 2015, and that his role is to manage FMLA absences and some workers' compensation cases. Perrin further testified that, in November 2015, he modified CENTRO's existing FMLA SOP to create a procedure under which Perrin or his office makes inquiries with respect to employees' FMLA leave requests.[24] Perrin explained that when an employee initially expresses interest in taking FMLA leave, he gives the employee forms to complete, including a certification from a medical provider. He reviews the medical certification to determine whether it is complete and authentic, and he also checks CENTRO records to see if the employee meets the qualifications for FMLA, such as length of service. After completing this review, Perrin will notify the employee that the leave is approved, or request that further information be provided.

As was the case prior to Perrin's hiring, when an employee has been certified for intermittent FMLA leave and wants to take leave on a particular date, the employee either notes the expected absence in the Red Book or notifies CENTRO dispatch by phone. However, Perrin testified that, since his arrival, he checks the attendance sheet in the Red Book "each morning and during the day as the day progresses…to see if

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[22] Tr, at 37-38 (Riley).
[23] *See* Joint Exs 6A-6J.
[24] Tr, at 258-260.

anyone has taken FMLA leave for the day and I will follow up with that employee with my FMLA questions that I have."[25] Perrin explained that his "FMLA questions" are set forth in a document entitled "CENTRO Employee Call-In Absence Questions." Those questions are:

1. Why are you going to be absent from work today?
2. Where will you be during the hours you were scheduled to work?
3. What will you be doing during the hours you were scheduled to work?
4. Is this something you could do before or after your shift?
5. How long have you known about the reason you will be absent? Why didn't you tell us about it sooner?
6. Are there any other reasons for your absence from work today that we haven't discussed?
7. Is your absence related to a Family and Medical Leave Act (condition) for you or an immediate family member already approved by CENTRO's Human Resources Department? If yes, skip remaining questions. If no, as[k] the following:

a. Have you been or will you be absent for 3 or more days in a row?
b. Has the patient seen or will the patient see a doctor? Or, if more applicable: Has the patient had or do you expect the patient to be (sic) in the hospital overnight?
   If the answer is yes in either case, the leave is automatically FMLA qualifying and the employee should receive the appropriate notice of his/her rights and responsibilities under the law to be provided by HRD. If the answer is no to both questions, ask the following:
c. Is your absence related to the patient's pregnancy (if applicable), a long-term condition (like cancer, diabetes, etc.), or other chronic condition (like asthma, epilepsy, diagnosed recurring back conditions?).[26]

Sands, Ross-Powell, and Chisolm all testified that, subsequent to October 12, 2015, they were each questioned by Perrin regarding their use of intermittent FMLA leave. However, in settlement of a complaint that Sands filed with the U.S. Department

[25] Tr, at 264-265.

[26] Charging Party's Ex 1. The questionnaire also states that a refusal to answer CENTRO's Human Resources staff regarding FMLA clarifying questions will result in the requested FMLA leave being changed to an "unexcused absence.

of Labor (Wage and Hour Division) (DOL), CENTRO subsequently changed the "unexcused absences" for the three dates to "approved FMLA leave."[27] Chisholm testified that Perrin requested a written summary of her visit to her doctor, and, because the summary did not include the time of her appointment, he would have to charge her with an unexcused absence as, she testified, he did.

Riley testified that CENTRO has an attendance policy[28] where employees are progressively disciplined if they call in sick after exhausting their available sick leave, book-off days and floating holidays; however, according to Riley, that policy never applied to FMLA leave. CENTRO's attendance policy defines excessive absenteeism as eight or more instances in a 12-month period. If an employee has eight absences within 12 months, the employee receives a verbal warning; progressive discipline ensues for nine or more instances within a 12-month period, up to and including termination for 12 instances within one year.[29]

Finally, the parties stipulated that:

> Between 2010 and 2015, approximately 40 to 50 bargaining unit members utilized FMLA leave, with the majority of those leaves being taken on an intermittent basis. In 2015, approximately 60 bargaining unit members utilized FMLA leave, with the majority of those taken on an intermittent basis.[30]

DISCUSSION

As a threshold matter, we reject CENTRO's arguments that it satisfied its duty to negotiate its changes to procedure applicable to FMLA leave, and that "because the

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[27] *See* Joint Ex 10.
[28] Joint Ex 5.
[29] *See id;* CENTRO's attendance policy is also set forth in the "Rules and Regulations" handbook (Joint Ex 4A).
[30] Tr, at 150-151.

subject matter of the charge is addressed by the contract, the charge is beyond the jurisdiction of PERB."[31] We treat with the jurisdictional issue first.

CENTRO's entire argument that this Board lacks jurisdiction is given in one sentence: "Indeed, since the subject matter of the charge is addressed by the contract, CENTRO respectfully submits that the charge is subject to dismissal as being beyond the jurisdiction of PERB."[32]

As we have often explained, "[t]he Board has jurisdiction over alleged unilateral changes in terms and conditions of employment unless an existing contract gives a *charging party* a reasonably arguable source of right regarding the subject of its improper practice charge."[33] The "jurisdictional limitation in § 205.5 (d) [of the Act] is implicated only when a term of the contract has arguably been violated by the respondent's action at issue under the charge," a claim not made by either party here.[34] Thus, we reject the claim that the charge falls outside of our jurisdiction.

As we have long held, "[d]uty satisfaction occurs when a specific subject *has been negotiated to fruition* and may be established by contractual terms that either expressly or implicitly demonstrate that the parties had reached accord on that specific subject."[35] A satisfaction of the duty to negotiate "necessitates record evidence of facts

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[31] Exceptions 7 and 8.
[32] Brief in Support of Exceptions, at 28, citing § 205.5 (d) of the Act; Exception No. 7. Although no argument for jurisdictional deferral is tied to the provisions of the CBA in the Brief in Support of Exceptions, its terms are summarized at pp 9-10.
[33] *State of New York (Office of Parks, Rec & Hist Pres)*, 51 PERB ¶ 3025, 3109 (2018) (emphasis added); *see also State of New York (OMH-Roch Psyc Ctr)*, 50 PERB ¶ 3032, 3128 (2017); *County of Nassau*, 23 PERB ¶ 3051, 3108 (1990).
[34] *Id*, citing *State of New York (Unified Court System)*, 25 PERB ¶ 3035, 3073 (1992); *County of Livingston*, 30 PERB ¶ 3046, 3106 (1997).
[35] *Pine Valley Cent Sch Dist*, 51 PERB ¶ 3036, 3160-3161 (2018) (emphasis added), citing *BOCES of Nassau County*, 51 PERB ¶ 3007, 3031 (2018); *Orchard Park Cent Sch Dist*, 47 PERB ¶ 3029, 3089 (2014).

establishing that the parties negotiated an agreement upon terms which are reasonably clear on the subject presented to us for decision."[36] The parties' CBA does not in any way address the specific subjects at issue here—that is, the procedure by which an employee obtains approval of intermittent FMLA leave, or procedures to verify that such leave is not being abused. Indeed, witnesses from both parties—Riley for the ATU and DeGray for CENTRO—testified the parties never reached an agreement, and indeed never actually negotiated regarding FMLA leave procedures. The preliminary conversations about negotiating the subject alluded to by DeGray cannot establish a duty satisfaction defense, and the ALJ correctly found that CENTRO had not carried its burden of proof of establishing duty satisfaction.[37]

CENTRO's arguments that the FMLA precludes it from negotiating with respect to the procedures at issue, and that CENTRO's procedures are compliant with the FMLA and regulations promulgated thereunder are not supported by our prior decisions, the FMLA, and/or the regulations promulgated under the FMLA.

As a threshold matter, we note that the FMLA itself expressly does not preempt

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[36] *Pine Valley Cent Sch Dist*, 51 PERB ¶ 3036, at 3160-3161, citing *BOCES of Nassau County*, 51 PERB ¶ 3007, at 3031; *Orchard Park Cent Sch Dist*, 47 PERB ¶ 3029, at 3089; *NYCTA*, 41 PERB ¶ 3014, 3076 (2008).

[37] *Id*. CENTRO does not argue, and thus the issue is not properly before us, that the ATU waived the right to negotiate over procedures appurtenant to FMLA leave. *See* § 213.2 (b) (4) of PERB's Rules of Procedure (Rules), which provides that an exception which is not specifically urged is waived. *See also State of New York (Dept of Corrections and Community Supervision)*, 50 PERB ¶ 3037, 3157-3158, n 2 (2017); *Buffalo Sewer Auth*, 50 PERB ¶ 3020, 3083, n 2 (2017); *NYCTA (Burke)*, 49 PERB ¶ 3021, 3072, n 4 (2016) (citing cases). We note that a waiver of the right to negotiate can only be established by "either the express relinquishment of specified rights or the use of language that establishes a clear, intentional, and unmistakable relinquishment of the right to negotiate the particular subject at issue by relieving the other party of the duty to negotiate on that subject." *Orchard Park Cent Sch Dist*, 47 PERB ¶ 3029, at 3089; *NYCTA*, 41 PERB ¶ 3014, 3076 (2008).

state laws in the sense of federal preemption ousting state legislation by comprehensively occupying the field; it simply sets a minimum standard below which no state or local law may fall.[38] Consistent with this, we have previously explained that in its enactment, "Congress clearly expressed an intent to provide a floor of benefits. Thus, although the [employer is] privileged to refuse to negotiate any leave benefits which would be *less* than those mandated by the FMLA, it was not free to refuse negotiations altogether."[39] Our prior statement should not be misread as limiting to benefits the appropriate scope of negotiations with respect to FMLA related issues; the realm of mandatory negotiation is not preempted by a federal statute unless expressly inconsistent with that statute or regulations promulgated under it encompasses procedures as well.[40]

Rather, the Court of Appeals has "time and again underscored, the public policy of this State in favor of collective bargaining is strong and sweeping, and that "[t]he presumption in favor of bargaining may be overcome only in special circumstances where the legislative intent to remove the issue from mandatory bargaining is plain and

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[38] 29 USCA § 2651; *see Bedillo-Sullivan v American Intern Group, Inc*, 123 F Supp 2d 161, 165-166 (EDNY 2000).

[39] *NYCTA*, 38 PERB ¶ 3015, 3053, n. 9 (2005) (emphasis in original; editing marks omitted), citing approvingly *Rome Hospital and Murphy Memorial Hospital*, 27 PERB ¶ 4754 (1994). Both federal and state courts have held that CBAs can provide more expansive rights to employees than required by the FMLA or regulations thereunder. *See, eg*, *Voltaire v Home Services Systems, Inc*, 823 F Supp 2d 77, 90 (EDNY 2011) (Where an employee is laid off during FMLA leave, "the employer's responsibility to continue FMLA leave, maintain group health plan benefits and restore the employee cease at the time the employee is laid off, provided the employer has no continuing obligations under a collective bargaining agreement or otherwise"), quoting 29 CFR § 825.216; *Bridge and Tunnel Officers Benev Assn v Triborough Bridge and Tunnel Auth*, 57 AD3d 398, 399 (1st Dept 2008).

[40] *See, eg, Patchogue-Medford Union Free Sch Dist,* 30 PERB ¶ 3041, 3094-3095 (1997).

clear."[41] Absent "clear evidence that the Legislature intended otherwise, the presumption is that all terms and conditions of employment are subject to mandatory bargaining."[42] In particular, leave and procedures relating to the granting and return from it are mandatory subjects.[43]

The Court of Appeals has held that:

> "Preemption," in the Taylor Law context, means that collective bargaining of terms and conditions of employment is prohibited because a plain and clear bar in statute or policy involving an important constitutional or statutory duty or responsibility leaves an agency with no discretion as to how an issue may be resolved. In the absence of such a law or policy, a subject may be negotiated.[44]

In applying this standard, the ALJ correctly held that "CENTRO has pointed to no explicit language contained in either federal law or regulation that leaves an employer with 'no discretion as to how [FMLA leave procedures] may be resolved."[45] In particular, CENTRO has not identified any specific provision of the FMLA or the regulations promulgated under it that explicitly mandates its actions, or otherwise precludes it from

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[41] *City of Watertown v NYS Pub Empl Relations Bd*, 95 NY2d 73, 78-79 (2000) (internal quotations and citations omitted); *LaPerche v City of Peekskill*, 162 AD3d 665, 667 (2d Dept 2018).
[42] *City of Watertown*, 95 NY3d at 79.
[43] *City of Cortland*, 51 PERB ¶ 3014, 3064 (2018); *see generally City of NY v Bd of Collective Bargaining of City of New York*, 107 AD3d 612, 46 PERB ¶ 7503 (1st Dept 2013).
[44] *Newark Valley Cent School Dist v NYS Pub Empl Relations Bd,* 83 NY2d 315, 27 PERB ¶ 7002, 7005 (1994) (editing marks omitted), quoting *Matter of Board of Educ v NYS Pub Empl Relations Bd*, 75 NY2d 660, 668 (1990); *see also City of NY v Bd of Collective Bargaining of City of New York*, 107 AD3d at 612 ("The federal regulations relied on by petitioners did not preempt their obligation to collectively bargain and permit them to unilaterally impose the disputed requirement" for returning from sick leave), citing *City of Watertown v NYS Pub Empl Relations Bd*, 95 NY2d 73, 77 (2000).
[45] 52 PERB ¶ 4515, at 4580.

negotiating with respect to the procedures at issue here.[46] In the absence of such a mandate, preemption does not apply, and the procedures for taking and returning from even statutorily prescribed leaves remain mandatory subjects of negotiation.[47]

The cases cited by CENTRO do not support its contention of preemption. *Village of Ellenville*[48] and *Town of Southold*[49] are ALJ decisions. It is well established that "a decision of an ALJ is not binding on the Board and has no precedential value."[50] Moreover, both of these cases involved demands that clearly conflicted with the explicit and specific requirements of the Federal Labor Standards Act,[51] as did the one Board

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[46] Indeed, CENTRO's citation of 26 USC § 2652 and the legislative history (Brief in Support of Exceptions at 36 and sources cited therein) are particularly unavailing, as both expressly contemplate CBAs, and require an employer to adhere to their terms as long as they "provide greater family or medical leave rights to employees" than the rights conferred by the FMLA, and only forbids the diminution of rights guaranteed by the FMLA. As the court in *Bedillo-Sullivan v American Intern Group, Inc* held, "[t]his is further proof that Congress did not wish for federal law—and therefore federal courts—to control the field in this area of litigation. Rather, Congress intended that the FMLA serve as a complement to state law." 123 F Supp 2d at 166, 165-167.

[47] *City of New York*, 107 AD3d at 612; *Patchogue-Medford Union Free Sch Dist,* 30 PERB ¶ 3041, at 3094-3095.

[48] 26 PERB ¶ 4546 (1993).

[49] 26 PERB ¶ 4590 (1993).

[50] *County of Nassau*, 48 PERB ¶ 3023, at 3089, n 89; *State of NY (SUNY Buffalo)*, 50 PERB ¶ 3001, 3006, n 43 (2017); *Westchester County Department of Correction Superior Officers' Assn*, 26 PERB ¶ 3077 (1993).

[51] 29 USC § 207, *et seq Village of Ellenville*, 26 PERB ¶ 4546, at 4632, involved an overtime proposal that "exceeds the maximum number of days (28) and the maximum hours (171) which are permitted by the [FLSA] § 207 (k) exemption to minimum standards for overtime paid to employees of public safety agencies, and thus was in express conflict with the terms of the FLSA as adumbrated by the regulations then in effect. Similarly, the ALJ in *Town of Southold* found that the Town's unilateral change to include tour differentials in calculating employees' regular hourly pay, reducing unit members' was required by § 207 (h) of the FLSA and 29 CFR § 778.207 (b) (requiring inclusion in the regular rate of pay nonovertime premiums including, but not limited to, such extra premiums as nightshift differentials).

decision cited by CENTRO, *City of Newburgh*.[52] Here, by contrast, CENTRO argues that "CENTRO's FMLA leave provisions—including the questioning of employees about the circumstances of their use of leave—are allowed by the FMLA and the DOL regulations."[53] Simply put, this does not suffice to establish the kind of preemption found in *City of Newburgh*, but rather falls within the ambit of *City of Watertown*, in which the existence of employer discretion as to what procedures will be adopted to implement the federal mandate renders negotiation mandatory.[54]

Likewise, CENTRO's contention that its "management rights . . . give CENTRO the right to take the action giving rise to the charge" is not borne out by the record. As the ALJ correctly noted, no specific management rights clause has been brought to her, or our, attention, and so the question before us is whether inherent managerial prerogative applies. CENTRO's straightforward reliance on our decision in *Town of Carmel*[55] fails to adequately capture the evolution of our decisions in this area. The Board in *Town of Carmel* viewed the issue before it as "deal[ing] only with a supervisor's duties in conjunction with an employee's use of leave time."[56] The Board found it "within the range of managerial prerogative for an employer to assign to supervisory personnel . . . tasks associated with the investigation and prevention of leave abuse

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[52] 18 PERB ¶ 3065 (1985), *confd*, *City of Newburgh v Newman*, 19 PERB ¶ 7005 (Sup Ct Alb Co 1986). *City of Newburgh* involved a demand for "overtime in excess of eight hours a day or in excess of the normal weekly tour to be paid in money or compensatory time off." *Id* at 3135. Because § 7 (k) of the FLSA "permits compensatory time only during the pay period in which the overtime is worked," the demand conflicted with the express provisions of the statute, and was preempted. *Id*.
[53] Brief in Support of Exceptions, at 29.
[54] 95 NY2d at 78-79; *City of Cortland*, 51 PERB ¶ 3014, at 3065; *see also City of NY v Bd of Collective Bargaining of City of New York*, 107 AD3d at 612.
[55] 31 PERB ¶ 3023 (1998).
[56] 31 PERB ¶ 3023, at 3051.

and/or the verification of an employee's compliance with the conditions attached to the grant of that leave."[57] The Board also found that expanding the set of employees subject to such investigation and verification was within managerial prerogative.[58] This case does not involve that question, however, but rather is governed by a series of decisions, most recently in *County of Cortland*, in which we reaffirmed that "the legitimate business reasons for the audit—here, the County' s legitimate managerial obligation to account for use of public funds and to ensure against fraud and waste—do not negate negotiability under the Act of the procedures requiring employee participation in the audit to the extent that they involve or affect mandatory terms and conditions of employment."[59] Increased employee participation in investigations or audits to ensure compliance with the terms of a grant of leave "impose[s] a new condition on receiving benefits, and impose[s] cost and additional work on employees."[60] As such, they neither fall within the scope of managerial prerogative, nor can they be deemed *de minimis*.[61]

Having disposed of the preliminary issues raised in the exceptions, we at last turn to the main substantive issue presented: Whether the ALJ correctly found the existence of a past practice regarding the questioning of employees utilizing intermittent FMLA leave, and a unilateral change to that past practice, in violation of § 209-a.1 (d) of the Act.

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[57] *Id*.
[58] *Town of Carmel*, 31 PERB ¶ 3023, at 3051.
[59] 48 PERB ¶ 3028, 3110, 3110-3112 (2015*); NYC Bd of Educ v NYS Pub Empl Relations Bd*, 75 NY2d 670-671 (1990); *City of Schenectady*, 26 PERB ¶ 3025, 3042 (1993); *City of Syracuse*, 44 PERB ¶ 3017, 3065-3066 (2011).
[60] *Id.*
[61] *County of Cortland*, 48 PERB ¶ 3028, at 3110-3111, 3112.

As we have often reaffirmed, "[i]n order to establish an enforceable past practice, the charging party must demonstrate that the practice was unequivocal and continued uninterrupted for a period of time sufficient under the circumstances to give rise to a reasonable expectation among the affected unit members that the practice would continue."[62]

The record in this case supports the ALJ's finding that from at least 2001 through October 2015, CENTRO had a past practice of questioning bargaining unit members about their use of intermittent FMLA leave only in isolated instances and when the employer had reason to believe that the leave usage was suspicious. Put another way, the practice was that CENTRO did not question every unit member using intermittent FMLA leave as a prophylactic measure, but only in isolated specific instances when it had individualized suspicion of misuse of the leave by a specific employee on a specific occasion. The evidence is likewise clear that the policy was changed in October 2015 to just such a universal prophylactic questioning directed to all unit employees exercising FMLA intermittent leave.

CENTRO excepts to the ALJ's finding that Sands, Ross-Powell, and Chisolm testified credibly that they were never questioned regarding their leave usage. As we have often stated, "[c]redibility determinations by an ALJ are generally entitled to "great weight unless there is objective evidence in the record compelling a conclusion that the

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[62] *State of NY (Off of Parks, Rec & Hist. Pres)*, 50 PERB ¶ 3024, 3094 (2017), citing *Chenango Forks Cent School Dist*, 40 PERB ¶ 3012, 3046-3047 (2007*), confd sub nom Chenango Forks Cent Sch Dist v NYS Pub Empl Relations Bd*, 95 AD3d 1479, 45 PERB ¶ 7006 (3d Dept 2012), *confd*, 21 NY3d 255, 46 PERB ¶ 7008 (2013); see generally *Manhasset Union Free Sch Dist*, 41 PERB ¶ 3005, 3024 (2008), *confirmed and mod, in part, Manhasset Union Free Sch Dist v NYS Pub Empl Relations Bd*, 61 AD3d 1231, 42 PERB ¶ 7004 (3d Dept 2009), *on remittitur*, 42 PERB ¶ 3016 (2009).

credibility finding is manifestly incorrect."[63] CENTRO has not presented any such objective evidence compelling a finding that the ALJ's credibility was manifest error, and we will not disturb it.

Rather, even taking into account the testimony of CENTRO's witnesses, the ALJ's finding as to the existence of a past practice and its subsequent violation remains uncontested. Musengo testified straightforwardly that she never asked employees questions about their use of intermittent FMLA leave. DeGray likewise testified that employees were only questioned "sporadically" about their use of FMLA leave. Martin testified that, prior to 2015, he only asked questions of employees whom he had reason to believe were misusing FMLA leave, such as taking the Christmas holiday off, attending a child's sporting event, or working at a side-business.[64] Martin recalled five such instances,[65] out of the 40 to 50 bargaining unit members who utilized FMLA leave between 2010 and 2015, with the majority of those leaves being taken on an intermittent basis. This is entirely consistent with the ALJ's finding of the past practice as defined—that questioning was limited to cases of individualized suspicion of abuse of the granted leave. Even were it not, we have found that the existence of a past practice is not defeated by "limited and incidental" deviations from the practice.[66] Leaving aside the fact that the incidents described by Martin actually fit the practice, the fact that he

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

[64] *See* 52 PERB ¶ 4515, at 4578-4579; *see also* Tr, at 241-242 (Martin).

[65] 52 PERB ¶ 4515, at 4578.

[66] *Manhasset Union Free Sch Dist*, 41 PERB ¶ 3005, at 3022.

recalled only questioning five employees out of up to 50 who utilized FMLA leave between 2010 and 2015 would best be classified as limited and incidental in nature.[67]

Accordingly, we deny CENTRO's exceptions, and affirm the ALJ's decision finding that CENTRO violated § 209-a.1 (d) of the Act when it unilaterally changed the procedures by which ATU bargaining unit members utilize intermittent FMLA leave.

IT IS, THEREFORE, ORDERED that CENTRO will forthwith:

1. Restore the practice and procedures for utilizing intermittent FMLA leave, as those procedures existed prior to October 2015;
2. Cease and desist from requiring that ATU bargaining unit members answer a list of seven questions from the "CENTRO Employee Call-In Absence Questions" each time they take intermittent FMLA leave; requiring recertification of the medical condition every six months; and requiring a doctor's note for medical appointments scheduled and taken as part of intermittent FMLA leave;
3. Make all affected unit members whole for wages and benefits lost, if any, as a result of its unilateral discontinuance of the pre-October 2015 intermittent FMLA leave procedures with interest at the maximum legal rate;
4. Remove any disciplinary documents in an affected unit member's personnel file relating to the member's refusal to comply with the unilateral changes, and rescind any resulting "unexcused absences" documented therein; and

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[67] *Id*.

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

DATED: August 20, 2019
Albany, New York

John F. Wirenius, Chairperson

Anthony Zumbolo, Member

Monte A. Klein, Member

NOTICE TO ALL EMPLOYEES

PURSUANT TO
THE DECISION AND ORDER OF THE

NEW YORK STATE
PUBLIC EMPLOYMENT RELATIONS BOARD

and in order to effectuate the policies of the

NEW YORK STATE
PUBLIC EMPLOYEES' FAIR EMPLOYMENT ACT

We hereby notify all employees of the Central New York Regional Transportation Authority (CENTRO) in the bargaining unit represented by the Amalgamated Transit Union, Division 580 (ATU) that CENTRO will:

1. Restore the practice and procedures for utilizing intermittent FMLA leave, as those procedures existed prior to October 2015;
2. Not require that ATU bargaining unit members answer a list of seven questions from the "CENTRO Employee Call-In Absence Questions" each time they take intermittent FMLA leave; not require recertification of the medical condition every six months; and not require a doctor's note for medical appointments scheduled and taken as part of intermittent FMLA leave;
3. Make all affected unit members whole for wages and benefits lost, if any, as a result of its unilateral discontinuance of the pre-October 2015 intermittent FMLA leave procedures with interest at the maximum legal rate; and
4. Remove any disciplinary documents in an affected unit member's personnel file relating to the member's refusal to comply with the unilateral changes, and rescind any resulting "unexcused absences" documented therein.

Dated ... .

By . . . . . .
on behalf of Central New York Regional Transportation Authority

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

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

SANJA DRINKS-BRUDER,

Charging Party, **CASE NOS. U-36111**
U-36513

- and -

NIAGARA FALLS POLICE CLUB, INC.,

Respondent,

- and -

CITY OF NIAGARA FALLS,

Employer.

SANJA DRINKS-BRUDER, *pro se*

JAMES B. TUTTLE, ESQ., for Respondent

CRAIG H. JOHNSON, CORPORATION COUNSEL (CHRISTOPHER M. MAZUR of counsel), for Employer

BOARD DECISION AND ORDER

These cases come to us on exceptions filed by Sanja Drinks-Bruder to a decision of an Administrative Law Judge (ALJ) dismissing two improper practice charges filed by her.[1] In her charges, Drinks-Bruder alleged that the Niagara Falls Police Club, Inc. (Union) violated § 209-a.2 (c) of the Public Employees' Fair Employment Act (Act) when it refused to file grievances on her behalf. The ALJ found that Drinks-Bruder failed to demonstrate that the Union's conduct or actions were arbitrary, discriminatory, or

[1] 52 PERB ¶ 4523 (2019).

founded in bad faith.

EXCEPTIONS

Drinks-Bruder filed exceptions in which she excepts to the "entire decision" of the ALJ.[2] She also claims that certain evidence is missing from the record and that she was not given an adequate opportunity to resubmit the evidence. She attached the purportedly missing evidence, a filing with the New York State Division of Human Rights, to her exceptions.

The Union filed a response in which it argues that Drinks-Bruder's exceptions should be rejected both because they are untimely and because they fail to comply with PERB's Rules of Procedure (Rules). On the merits, the Union supports the ALJ's decision and contends that no basis has been demonstrated for reversal.

The City of Niagara Falls (City) is named as a statutory party pursuant to § 209-a.3 of the Act and did not file any responsive pleadings or a brief.

Drinks-Bruder also filed a reply brief to the Union's brief. Section 213.4 of our Rules does not allow for the filing of reply briefs unless requested by the Board or filed with the Board's authorization. As the Board neither requested nor authorized Drinks-Bruder's additional filing here, we have not considered it.

Based on our review of the record, we affirm the ALJ's decision.

FACTS

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

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[2] Exceptions, at 1.

Drinks-Bruder has been employed as a City police officer for approximately 25 years. She is a member of a bargaining unit consisting of all uniformed police officers, detectives, communication technicians, and police dispatchers. The Union is recognized as the sole and exclusive representative of unit employees and is signatory to a collective bargaining agreement with the City covering the term of January 1, 2008 through December 31, 2010. That agreement was subsequently modified by an interest arbitration award dated November 4, 2015, as supplemented on January 8, 2016, and a Memorandum of Agreement covering the term of January 1, 2017 through January 1, 2018.

Section 8.03 of the parties' agreement provides, in relevant part, that a grievance must be presented within 180 calendar days from the day the cause of the grievance occurs.

Section 8.04 of the parties' agreement sets forth the grievance procedures between the Union and the City. The first stage of the grievance procedure provides that a grievance shall be initiated by presenting it to the police superintendent or his designee. The superintendent or his designee shall conduct an informal hearing and will provide a written decision to the grievant and his representative. If the grievance is not satisfactorily resolved, the grievant may proceed to the second stage within five days of receipt of the decision.

Under stage two, a grievant may submit his grievance to the Labor Relations Committee. The Labor Relations Committee will conduct a hearing, receive documents and other exhibits, and issue a written decision.

If the grievance is not satisfactorily resolved at stage two, the final stage of the

grievance procedures provides that either the City or the Union may seek resolution through binding arbitration.

Effective September 24, 2017, the Union instituted a procedure for unit employees to follow when they wish to file a grievance request for Union representation.[3] That procedure, entitled "Grievance Procedure," provides that Union members are required to submit a grievance request on a grievance inquiry form. The negotiating committee as a whole will then consider each submitted request and will respond to the submitting member with a written or typed response as follows:

> *Grievance request denied
> *Grievance request granted with union support
> *Grievance request granted without union support.[4]

In the event that the grievance request is granted without union support, the member will be entitled to pursue the grievance on his or her own and at his or her own expense through Steps 1 and 2, but no grievance may proceed to arbitration without union support.[5]

The remaining facts relating to each of the two at-issue charges are separately set forth below.

Case No. U-36111

Drinks-Bruder testified about an event that occurred on May 1, 2017. She stated that she was at home and had just gotten off work, when OPS (Office of Public Standards) officers came to her door. She indicated that the officers brought her

[3] Charging Party's Ex 4.
[4] *Id*.
[5] *Id.*

"paperwork of being written-up . . . for not showing up [at] a disciplinary hearing" occurring April 28, 2017.[6]

Drinks-Bruder testified that, pursuant to the Union's "Grievance Procedure," she filled out a "Complaint/Grievance Request Form" dated October 23, 2017, and hand-delivered it to Union Negotiator Rotella on that date.[7] That form consists of three handwritten pages and an attachment. The three handwritten pages read as follows:

> DATE OF COMPLAINT: 4/28/17 written 5/1/17 happened
>
> NATURE OF COMPLAINT: Threatening and Harassment
>
> COMPLAINT DESCRIPTION:
>
> I have asked for the union's help again starting in 10/2016. Oct 2016 until now there has [sic] been four grievances filed by complaintant [sic]. [Union President Michael] Lee has all four grievances. All were denied by the union and Chief Dalporto and work relations committee. The grievances filed have been related to write ups except 1. − I was suspended improperly. I cannot tell you which of the many improper/incorrect write ups I was suspended for and when trying to find out I was given additional suspended days, plus more. From 10/2016 until now I have asked the top party which is the union president (Michael Lee) to represent me on filing the grievances and/or attend my hearings (unknown disciplinary) but I was denied. Not one time was I told exactly or did I know what the hearings were going to be about. I was threatened and told after missing (because I was unsure of what it was about and not ever being told) that I could lose my job. I had no choice I believed so I did attend without union representation. After suspension I was waiting on the 75 hearing. Michael Lee knew this and I would have been able to fight the suspension being able to see paperwork that the chief would have had. The 75 hearing never happened. Mike was then asked to get the suspension paperwork so I could appeal. Mike Lee and union attorney Tuttle were given all paperwork from OPS/Chief Dalporto as they asked from me.

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[6] Tr, at 37.

[7] Charging Party's Ex 2.

> No actions were taken by union and the 30 day appeal period passed. I am now going to file a grievance for being threatened and harassed by Chief Dalporto and OPS officers that came to my home on 5/1/17. I now have the entire CBA past and current updates. Michael Lee's office is now next to Chief Dalporto. Michael has now been given the personnel position by chief Dalporto which involves distribution of overtime. − My civil, *Garrity* and *L[o]udermill* rights have been are continuing to be violated by the City of Niagara Falls and the Niagara Falls Police Club.[8]

In relevant part, the attachment entitled "Niagara Falls Police Department Officer Complaint Report," reads as follows:

> Complaint Name: Sup. E. Bryan DalPorto
>
> Officer's Name: Ofc. Sanja Drinks-Bruder
>
> Nature of Complaint: Ofc. Drinks-Bruder was ordered to attend a pre disciplinary hearing on April 28, 2017, at 9:00am. Ofc. Drinks-Bruder did not attend and stated, "Why should I see him, what help is or has he given me…" (referring to Sup. Dalporto).[9]

Prior to receiving the Union's response to her Complaint/Grievance Request Form, Drinks-Bruder filed a grievance on October 25, 2017 on her own, two days after submitting the request form to Rotella.[10] Drinks-Bruder explained that she did so to ensure that she would not be time barred from filing a related grievance as, under § 8.03 of the parties' agreement, a grievance must be presented within 180 calendar days from the day the cause of the grievance occurs. Applied to the May 1, 2017 incident, the deadline for filing a related grievance would have expired on or about October 26, 2017. Drinks-Bruder testified that she

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[8] *Id*. The complaint invokes rights pursuant to *Garrity v New Jersey*, 385 US 493 (1967) and *Cleveland Board of Education v Loudermill*, 470 US 532 (1985).
[9] Although unclear on the record, it appears likely that this is the write-up that OPS officers served upon Drinks-Bruder on May 1, 2017.
[10] Grievance No. 7271, Charging Party's Ex 1.

submitted the grievance via certified mail to Chief Dalporto but did not provide a copy to the Union.

By letter dated November 3, 2017, Lee responded to her October 23, 2017 Complaint/Grievance Request Form. Lee's response reads as follows:

> The negotiating committee has received and considered your complaint/ grievance request form dated October 23, 2017. Nowhere in your request is there any reference to any section of the collective bargaining agreement or any allegation that the City has violated any provision of the collective bargaining agreement. Accordingly, your request form fails to state the substance of a viable grievance to be filed under the collective bargaining agreement.
>
> The substance of your complaint/grievance request form is that you are unhappy with the quality of representation and or lack of representation that you are receiving from your union with respect to grievances previously filed. Those allegations are incorrect, but if you choose to pursue them, the appropriate place to do so would be at the Public Employment Relations Board where you currently have several pending similar allegations against the union before [the ALJ]. Accordingly, your complaint/grievance request form dated October 23, 2017 is denied without union support.

Case No. U-36513

Drinks-Bruder testified that, consistent with the Union's Grievance Procedure,[11] she completed a "Complaint/Grievance Request Form" on June 26, 2018.[12] The form identifies the "Date of Complaint" as "April 18, 2018," and the "Nature of Complaint" as "Misconduct."[13] In the "Complaint Description" portion of the form, Drinks-Bruder alleges, in relevant part, that:

> On April 18, 2018 Chief Dalporto by his improper and

[11] Charging Party's Ex 4.
[12] Charging Party's Ex 8.
[13] *Id*.

> unprofessional behavior was harassing and retaliatory which is misconduct on his part. His action was spiteful because there was no complaint against me as to what I was doing in trying to re[c]tify an unsafe working condition that did not take place at 1925 Main St. The chief instructed Lt. Nichols to write me up for a violated general order that I had never seen until it was given to me by Lt. Nichols.[14]

Drinks-Bruder testified that she gave the Union three days to respond to her grievance request for representation and, when she failed to hear back from the Union within that time frame, she filed a grievance on her own, by certified mail, with Chief Dalporto on June 30, 2018.[15] Drinks-Bruder acknowledged that the 180-day time limitation for filing a timely grievance under § 8.03 of the parties' agreement was not a factor in her decision to file Grievance No. 6901 on June 30, 2018. Drinks-Bruder testified that she filed the grievance because she was leaving for Florida and "needed it to be done before I left."[16] On its face, the grievance identifies the "Date of Grievance" as "4/18/2018" and the "Nature of Grievance" as "Retaliation/Harassment/Misconduct."[17]

During her testimony, Drinks-Bruder explained why she filed the grievance and indicated that, in essence, there were two issues involved: (1) the write-up she received on April 18, 2018 was neither signed nor dated and, therefore, was procedurally defective;[18] and (2) the April 18, 2018 write-up improperly criticized her for attempting to stop what she referred to as "unsafe working conditions" arising from an assignment

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[14] *Id*.
[15] Grievance No. 6901, Charging Party's Ex 7.
[16] Tr, at 126.
[17] Charging Party's Ex 7.
[18] Drinks-Bruder did not produce a copy of the April 18, 2018 write-up.

she was given on November 26, 2016, which required her to watch a mental health patient confined to a psychiatric hospital ER for the length of her eight-hour midnight shift. On cross-examination, the nature of the April 18, 2018 "write-up" referenced in Drinks-Bruder's grievance request for representation was illuminated, along with Chief Dalporto's related concerns. Specifically, Drinks-Bruder was charged with a violation of a departmental policy that prohibits officers from "discussing departmental policy with people outside the department."[19] The record reflects that, contrary to that policy, Drinks-Bruder communicated directly with hospital personnel regarding her perceived safety concerns arising from the November 26, 2016 psychiatric hospital ER assignment. Drinks-Bruder admitted that her concern regarding the November 26, 2016 hospital assignment, and the Union's unwillingness to represent her regarding that assignment, forms the basis of one of her earlier charges against the Union in PERB Case No. U-35661.

Drinks-Bruder testified that she received a letter from Lee dated July 6, 2018, which advised that her request for representation concerning her grievance was being denied because the grievance failed to identify facts that would evidence a violation of "our collective bargaining agreement."[20] Lee's letter also specifically indicates that, although the Union received a copy of Grievance No. 6901 along with some additional paperwork, consisting of a handwritten letter dated June 30, 2018[21] and another unrelated grievance (Grievance No. 6902),[22] "the required Grievance inquiry form . . . was not sent along with

[19] Tr, at 141-144.
[20] ALJ Ex 33.
[21] ALJ Ex 31.
[22] Tr, at 115-116.

these documents."[23]

In its defense, the Union called Lee as a witness. Lee, consistent with admissions contained within the body of the charge, testified that although the Union denied Drinks-Bruder's request for representation regarding her safety concern arising from the November 26, 2016 hospital ER assignment,[24] and her attempt to change the assignment by contacting hospital personnel directly in violation of department policy, it did successfully represent her concerning the procedural error associated with the April 18, 2018 write-up, specifically, that it was "unsigned." As to the latter, Lee testified that, due to his efforts, a signed write-up was generated.[25]

DISCUSSION

As a threshold matter, we are constrained to dismiss Drinks-Bruder's exceptions because they were untimely filed. United States Postal Service records establish that Drinks-Bruder received the ALJ's decision on May 11, 2019, and the postmark on the exceptions filed with us demonstrate that she filed her exceptions by mail on June 4, 2019. Section 213.2 of our Rules requires exceptions to be filed within 15 working days after receipt of an ALJ's decision. Fifteen working days from May 11, 2019 was June 3, 2019 (excluding May 27, 2019, a legal holiday), and Drinks-Bruder's exceptions needed to be filed by that day. Because Drinks-Bruder's exceptions were not filed until June 4, 2019, they were late by one day. The Union in its response objects to our consideration of the exceptions because they were not

[23] ALJ Ex 33.
[24] Also the subject of an earlier charge in PERB Case No. U-35661.
[25] Tr, at 203.

timely filed.

Our filing rules are strictly construed. When raised by a party, noncompliance with the time limits for filing has resulted in a dismissal of exceptions, even when late by one day.[26] Having been untimely filed, Drinks-Bruder's exceptions are not properly before us.

Even were we to consider Drinks-Bruder's exceptions, we would affirm the ALJ's finding that Drinks-Bruder has failed to meet her burden of demonstrating that the Union's conduct was arbitrary, discriminatory, or founded in bad faith.

We have often reaffirmed that "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."[27] As we have previously explained, the courts have:

> reject[ed] the standard . . . that "irresponsible or grossly negligent" conduct may form the basis for a union's breach of the duty of fair representation as not within the meaning of improper employee organization practices set forth in Civil Service Law § 209-a. An honest mistake resulting from misunderstanding or lack of familiarity with matters of procedure does not rise to the level of the requisite arbitrary, discriminatory or bad-faith conduct required to establish an

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[26] *See UFT (Barnes)*, 48 PERB ¶ 3017, 3059 (2015); *UFT (Jenkins)*, 28 PERB ¶ 3058, 3132 (1995).

[27] *Professional Staff Congress of the City University of New York (Giammarella)*, 51 PERB ¶ 3010, 3048 (2018); *District Council 37 (Fonseca)*, 50 PERB ¶ 3038, 3161 (2017), quoting *District Council 37 (Calendario)*, 49 PERB ¶ 3015, 3060 (2016); *see also UFT (Cruz)*, 48 PERB ¶ 3004, 3010 (2015), *petition denied, Cruz v NYS Pub Empl Relations Bd*, 48 PERB ¶ 7003 (Sup Ct NY Co 2015) (internal quotation and editing marks omitted), quoting *UFT (Munroe*), 47 PERB ¶ 3031, 3095 (2014), *petition denied*, 48 PERB ¶ 7002 (Sup Ct NY Co 2015) (*quoting CSEA* (*Bienko)*, 47 PERB ¶ 3027, 3082-3083 (2014)); *see District Council 37, AFSCME, AFL-CIO (Farrey)*, 41 PERB ¶ 3027, 3119 (2008).

improper practice by the union.[28]

Thus, "an employee's mere disagreement with the tactics utilized or dissatisfaction with the quality or extent of representation does not constitute a breach of the duty of fair representation."[29]

Looking at the Union's responses to Drinks-Bruder's filings, we see nothing that evidences conduct that is arbitrary, discriminatory, or in bad faith. With respect to Case No. U-36111, while the Union's response to Drinks-Bruder's "Complaint/Grievance Request Form" dated October 23, 2017 did not specifically mention the May 1, 2017 incident, we cannot find that omission to evidence arbitrary, discriminatory, or bad-faith conduct, given the wide-ranging and unfocused nature of Drinks-Bruder's "Complaint/Grievance Request Form" itself. We agree with the ALJ that the Union's response was reasonable and does not demonstrate a breach of the Union's duty of fair representation.

With respect to Case No. U-36513, to the extent that this charge challenges the Union's refusal to represent Drinks-Bruder in regards to her November 26, 2016 hospital ER assignment, we agree with the ALJ that that aspect of the charge is not before us in this case, as it is the subject of a separate charge, also decided today.[30] To the extent that the charge remains, we affirm the ALJ's finding that Drinks-Bruder

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[28] *Id; see also Cairo-Durham Teachers Assn*, 47 PERB ¶ 3008, 3026 (2014) (quoting *CSEA, L 1000 v NYS Pub Empl Relations Bd (Diaz)*, 132 AD2d 430, 432, 20 PERB ¶ 7024, 7039 (3d Dept 1987), *affd on other grounds*, 73 NY2d 796, 21 PERB ¶ 7017 (1988)).

[29] *Id.*

[30] As the ALJ explained, the Union's refusal to represent Drinks-Bruder in that grievance proceeding was the subject of a separate proceeding. See 52 PERB ¶ 3007 (2019), also decided today.

has failed to demonstrate that the Union's conduct, denying representation on the merits of Drinks-Bruder's grievance but providing representation on the procedural aspects, was arbitrary, discriminatory, or undertaken in bad faith. There is nothing in Drinks-Bruder's exceptions, or in her provided attachments, that provide evidence, as opposed to simply unsupported allegations, that the Union's conduct was arbitrary, discriminatory, or motivated by bad faith.[31] We note that, to the extent Drinks-Bruder exerts non-contractual claims in her grievances,[32] a union does not breach its duty of fair representation by refusing to bring non-contractual claims against an employer on an employee's behalf unless there is record evidence that the union has routinely filed non-contractual claims on behalf of members.[33] Here, there is no claim, much less any evidence, that the Union routinely files non-contractual claims on behalf of non-members.

Accordingly, we find that Drinks-Bruder has failed to demonstrate that the Union breached its duty of fair representation in violation of § 209-a.2 (c) of the Act in either of the two cases in front of us.

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[31] Because it is unclear from the record whether Drinks-Bruder had submitted these attachments earlier in the proceedings, we have reviewed them, although normally our review is limited to the record as it existed before the ALJ. *See, eg*, *Mount Pleasant Cottage Union Free Sch Dist*, 50 PERB ¶ 3002, 3009 n 12 (2017); *County of Cortland and Cortland County Sheriff*, 48 PERB ¶ 3028, 3112 n 27 (2015); *CSEA (Bienko)*, 47 PERB ¶ 3027, 3082 (2014); *UFT (Goldstein)*, 42 PERB ¶ 3035, 3128 (2009); *Lackawanna Cent Sch Dist*, 28 PERB ¶ 3023, 3055 (1995).

[32] For example, violations of any discrimination or safety statutes, which PERB does not have jurisdiction to enforce.

[33] *See UFT (West)*, 51 PERB ¶ 3002, 3005 (2018), *confd sub nom West v NYS Pub Empl Relations Bd*, 51 PERB ¶ 7005 (Sup Ct NY County 2018); *UFT (Morrell),* 44 PERB ¶ 3030, 3107 (2011); *United Steelworkers (Buchalski)*, 43 PERB ¶ 3002, 3008 (2010); *PEF (Hartner),* 15 PERB ¶ 3066, 3103 (1982).

Accordingly, the charges must be, and hereby are, dismissed.

DATED: August 20, 2019
Albany, New York

John F. Wirenius, Chairperson

Anthony Zumbolo, Member

Monte A. Klein, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

SANJA DRINKS-BRUDER,

Charging Party,

- and -

NIAGARA FALLS POLICE CLUB, INC.,

Respondent,

- and -

CITY OF NIAGARA FALLS,

Employer.

CASE NOS. U-35557
U-35636
U-35661
U-35916

SANJA DRINKS-BRUDER, *pro se*

JAMES B. TUTTLE, ESQ., for Respondent

CRAIG H. JOHNSON, CORPORATION COUNSEL (CHRISTOPHER M. MAZUR of counsel), for Employer

BOARD DECISION AND ORDER

These cases come to us on exceptions filed by Sanja Drinks-Bruder to a decision of an Administrative Law Judge (ALJ) dismissing four improper practice charges filed by her.[1] In her charges, Drinks-Bruder alleged that the Niagara Falls Police Club, Inc. (Union) violated § 209-a.2 (c) of the Public Employees' Fair Employment Act (Act) when it refused to file and/or process grievances on her behalf. The ALJ, granting all reasonable inferences to Drinks-Bruder, found that she alleged no facts which, if proven, would support a finding that

[1] 52 PERB ¶ 4514 (2019).

the Union breached its duty of fair representation in violation of § 209-a.2 (c) of the Act.

EXCEPTIONS

Drinks-Bruder filed exceptions in which she claims that "the process was not just and fair" and that the ALJ has shown bias against her.[2] She also claims that certain evidence, namely a "copy of [an] Article 78"[3] is missing from the record and that she was not given an adequate opportunity to resubmit the evidence.

The Union filed a response in which it argues that Drinks-Bruder's exceptions should be rejected because they fail to comply with PERB's Rules of Procedure (Rules). On the merits, the Union supports the ALJ's decision and contends that no basis has been demonstrated for reversal.

The City of Niagara Falls (City) is named as a statutory party pursuant to § 209-a.3 of the Act and did not file any responsive pleading or brief.

Drinks-Bruder also filed a reply brief to the Union's brief. Section 213.4 of our Rules does not allow for the filing of reply briefs unless requested by the Board or filed with the Board's authorization. As the Board neither requested nor authorized Drinks-Bruder's additional filing here, we have not considered it.

Based on our review of the record, we affirm the ALJ's decision.

FACTS

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

Drinks-Bruder has been employed as a City police officer for approximately 25

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[2] Exceptions, at 2 and 3.
[3] Exceptions, at 3.

years. She is a member of a bargaining unit consisting of all uniformed police officers, detectives, communication technicians, and police dispatchers. The Union is recognized as the sole and exclusive representative of unit employees and is signatory to a collective bargaining agreement with the City covering the term of January 1, 2008 through December 31, 2010. That agreement was subsequently modified by an interest arbitration award dated November 4, 2015, as supplemented on January 8, 2016, and a Memorandum of Agreement covering the term of January 1, 2017 through January 1, 2018.

Section 8.04 of the parties' agreement sets forth the grievance procedures between the Union and the City. The first stage of the grievance procedure provides that a grievance shall be initiated by presenting it to the police superintendent or his designee. The superintendent or his designee conducts an informal hearing and provides a written decision to the grievant and his representative. If the grievance is not satisfactorily resolved, the grievant may proceed to the second stage within five days of receipt of the decision.

Under stage two, a grievant may submit his grievance to the Labor Relations Committee. The Labor Relations Committee will conduct a hearing, receive documents and other exhibits, and issue a written decision.

If the grievance is not satisfactorily resolved at stage two, the final stage of the grievance procedures provides that either the City or the Union may seek resolution through binding arbitration.

Each of the four at-issue charges are separately discussed below.

Case No. U-35557

On October 20, 2016, at approximately 6:10 a.m., a fatal traffic accident occurred in the City of Niagara Falls. Drinks-Bruder, who was nearing the end of her eight-hour midnight shift, was advised to immediately report to the scene of the accident. Upon arrival, she was ordered to control traffic at the scene. Despite her repeated requests to be relieved from the assignment, she was forced to work overtime from 7:30 a.m. to 12:15 p.m.

With the assistance of Union President Michael Lee,[4] Drinks-Bruder filed a grievance at the first stage of the parties' negotiated grievance procedure, protesting her October 20, 2016 forced overtime assignment. That grievance was submitted on November 30, 2016 and denied by Drinks-Bruder's supervisor, Chief Dalporto, on December 2, 2016. Thereafter, Lee assisted Drinks-Bruder in advancing her grievance to the second stage of the parties' grievance procedure.[5] However, the Union did not further process that grievance to the final stage of the parties' negotiated grievance procedure, arbitration. Subsequent to Dalporto's denial of the grievance on December 2, 2016, Drinks-Bruder and Lee engaged in regular and extensive text messaging exchanges throughout the month of December 2016 regarding numerous issues, including Drinks-Bruder's desire to move her grievance to arbitration. In response to a text message from Drinks-Bruder to Lee on Sunday, December 11, 2016, Lee advised her that the "Union is no longer attempting to figure out any OT [overtime] issues as it

[4] *See* Case No. U-35557, paragraph 5, as well as Drinks-Bruder's typewritten, signed statement, attached to Grievance No. 7094.
[5] *See* Drinks-Bruder's sworn statement made part of her New York State Division of Human Rights Employment Complaint Form filed against the Union on October 18, 2017, which states: "Stage 2 was completed by myself and Michael Lee."

relates to forcing."[6]

Case No. U-35636

In a text message from Drinks-Bruder to Lee on Saturday, December 10, 2016, Drinks-Bruder complained about a new overtime distribution procedure being utilized within the police department. In part, her concerns centered upon that portion of the procedure which utilized email communications to advise officers of available overtime opportunities. She expressed her dissatisfaction with this approach, claiming that "if you are not on your email 24/7 you can miss getting OT [overtime]" and that the "contract does not allow" for overtime to be distributed in "this way."[7] Lee promptly responded to Drinks-Bruder's communication via text and explained to her that "email is secondary" to officers receiving telephone calls for overtime opportunities, and is only utilized as a "last ditch effort to find people" and helps "to protect someone from being forced."[8] He further explained that "if anyone has refused [an overtime opportunity], or not called back to answer the [overtime call], they have waived there [sic] right to complain on how we get it filled secondary to the call."[9] The text messaging exchange continued on Sunday, December 11, 2016, with Drinks-Bruder insisting that the overtime opportunities were not being distributed in accordance with the contract. Lee responded, and advised Drinks-Bruder that "if you feel you are not being called or skipped for OT [overtime], file a

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[6] The complete text message exchange occurring between Drinks-Bruder and Lee from November 11 through December 19, 2016 is contained in the Union's offer of proof and Drinks-Bruder's response thereto.
[7] *See* the complete text message exchange occurring between Drinks-Bruder and Lee from November 11 through December 19, 2016, as contained in the Union's offer of proof and Drinks-Bruder's response thereto.
[8] *Id.*
[9] *Id*.

grievance—I will submit it for you."[10] Lee also explained that "I get calls for OT [overtime], so I cannot file any grievance as I get contacted."[11] Thereafter, Drinks-Bruder submitted a grievance on December 12, 2016, alleging a violation of § 6.05 of the parties' agreement, entitled "Overtime Distribution."[12] Section 6.05 reads as follows:

> The opportunity to work overtime will be made available on an equitable basis to non-supervisory officers on a divisional seniority basis, as is practicable. An officer who has been given the opportunity to work eight hours of overtime shall then be placed at the bottom of the overtime distribution list and the next officer will be afforded the first opportunity to work overtime.
>
> Refusal to work overtime, which if offered, shall be considered the same as time worked, for purposes of distributing available overtime, unless the affected officer was on sick leave, vacation or otherwise excused by the Superintendent of Police.
>
> Beginning February 1, 1991, the Department will supply the Club on a weekly basis, the names and hours of overtime worked by each officer except for those in the Criminal Intelligence Unit. Said overtime shall also not include court time.[13]

In another text message to Drinks-Bruder on December 19, 2016, Lee further explained that, since the overtime distribution procedure is administered by the Union,[14] Drinks-Bruder's grievance "is a claim against other officers" and, therefore, "the Union

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[10] *Id.*
[11] *See* the complete text message exchange occurring between Drinks-Bruder and Lee from November 11 through December 19, 2016, as contained in the Union's offer of proof and Drinks-Bruder's response thereto.
[12] Grievance No. 7166.
[13] Pursuant to mutual agreement, the Union has administered the overtime distribution procedure since 2002. *See* City's third stage denial of Grievance No. 7166 dated October 11, 2017, which also states that Drinks-Bruder is "currently number three (3) on the department's overtime distribution list."
[14] *Id*.

cannot be involved in this."[15]

Case No. U-35661

On November 26, 2016, Drinks-Bruder was assigned to watch a mental health patient confined to a psychiatric hospital ER for the length of her eight-hour midnight shift. Drinks-Bruder claims this assignment "caused danger for both [herself] and/or others."[16]

On March 30, 2017, Drinks-Bruder submitted a grievance which raised numerous allegations against the City, including those relating to a "retaliatory hostile work environment."[17] Prior to Drinks-Bruder submitting Grievance No. 7168 on March 20, 2017, Union negotiator Spagnolo told her that "he could not represent [her] with [her] retaliatory hostile work environment [complaint]."[18] The City and the Union concur that Drinks-Bruder's assignment was no different than other assignments that are routinely given to other officers within the police department.

Drinks-Bruder's grievance was denied by the City at the first stage of the parties' grievance procedure on March 22, 2017. Thereafter, Drinks-Bruder moved the grievance to the second stage of the procedure. According to Drinks-Bruder's narrative in Case No. U-35661, when issues like this are brought up to the Union, "they seem disinterested and will give me minimum help grudgingly at first and later say there is nothing they can do at

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[15] *See* the complete text message exchange occurring between Drinks-Bruder and Lee from November 11 through December 19, 2016, as contained in the Union's offer of proof and Drinks-Bruder's response thereto.
[16] *Id*.
[17] Grievance No. 7168.
[18] Case No. U-35661, paragraph 5.

that time."[19] Drinks-Bruder acknowledges that Lee told her that the "Union could not represent [her]" on this grievance.[20] As a result of Lee's refusal, Drinks-Bruder filed Case No. U-35661 against the Union on April 4, 2017.

Case No. U-35916

On April 27, 2017, Drinks-Bruder submitted a grievance after the City denied her request to view her entire personnel file. A day or so earlier, Drinks-Bruder spoke to Lee and Spagnolo about the issue. They advised her that every unit employee had been denied that same privilege and that the Union was "already fighting so that every [Union] member would be allowed to see their [entire] work file."[21] According to Drinks-Bruder, they "refused" to file a separate grievance on her behalf.[22]

Drinks-Bruder filed Case No. U-35916 on August 24, 2017. As explained in the Union's answer filed on September 11, 2017, the parties were on the verge of resolving a "union-wide grievance" on the same subject which would allow "all bargaining unit members," including Drinks-Bruder, the opportunity "to see all portions of their personnel file with minor exceptions yet to be determined."[23] Shortly thereafter, the Union's related union-wide grievance was successfully resolved. As a result, Drinks-Bruder was afforded an opportunity to see her entire personnel file, which took place sometime prior to October 18, 2017.[24]

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[19] *Id*.
[20] *See* Drinks-Bruder's sworn statement made part of her New York State Division of Human Rights Complaint Form filed against the Union on October 18, 2017.
[21] *Id.*
[22] *Id.*
[23] *See* Union's answer.
[24] *See* Drinks-Bruder's sworn statement made part of her New York State Division of Human Rights Employment Complaint Form against the Union and the City's final answer to Grievance Nos. 7167 and 6903, attached to Deputy Corporation Counsel Christopher M. Mazur's letter to the ALJ dated November 1, 2017.

DISCUSSION

We first address the Union's argument that the exceptions in this matter are deficient. We agree that Drinks-Bruder's exceptions do not "set forth specifically the questions or policy to which exceptions are taken," or "designate . . . the portion of the record relied upon," or as required by § 213.2 our Rules. However, we are mindful that Drinks-Bruder is unrepresented and that her exceptions should be liberally construed.[25] We have examined the exceptions and the record.

The bulk of Drinks-Bruder's exceptions argue that the ALJ was biased against her, relying largely on statements made at the conference. Even assuming that Drinks-Bruder's characterization of the ALJ's comments are accurate, we do not find that they tend to establish bias. Instead, the ALJ's statement that it is "hard to win" a duty of fair representation case against a union[26] accurately reflects the fact that the courts have imposed a heightened burden of proof in such cases.[27] It appears that the ALJ was appropriately trying to explain this heightened standard to an unrepresented party, and we do not find this, or the other comments cited by Drinks-Bruder, tend to establish bias on the part of the ALJ.

Moreover, our independent review of the evidence in this case convinces us that the ALJ fairly and completely reviewed all of the evidence presented, and we agree with his conclusions. Specifically, we agree that, even granting Drinks-Bruder the benefit of all

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[25] *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).

[26] Exceptions, at 3.

[27] *See CSEA, L 1000 v NYS Pub Empl Relations Bd (Diaz)*, 132 AD2d 430, 432, 20 PERB ¶ 7024, 7039 (3d Dept 1987), *affd on other grounds*, 73 NY2d 796, 21 PERB ¶ 7017 (1988), discussed in the text below.

reasonable inferences that can be drawn from the pleaded facts, Drinks-Bruder has not demonstrated that the Union has acted in a manner that was arbitrary, discriminatory, or in bad faith.

We have often reaffirmed that "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."[28] As we have previously explained, the courts have:

> reject[ed] the standard . . . that "irresponsible or grossly negligent" conduct may form the basis for a union's breach of the duty of fair representation as not within the meaning of improper employee organization practices set forth in Civil Service Law § 209-a. An honest mistake resulting from misunderstanding or lack of familiarity with matters of procedure does not rise to the level of the requisite arbitrary, discriminatory or bad-faith conduct required to establish an improper practice by the union.[29]

Thus, "an employee's mere disagreement with the tactics utilized or dissatisfaction with the quality or extent of representation does not constitute a breach of the duty of fair representation."[30]

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[28] *Professional Staff Congress of the City University of New York (Giammarella)*, 51 PERB ¶ 3010, 3048 (2018); *District Council 37 (Fonseca)*, 50 PERB ¶ 3038, 3161 (2017), quoting *District Council 37 (Calendario)*, 49 PERB ¶ 3015, 3060 (2016); *see also UFT (Cruz)*, 48 PERB ¶ 3004, 3010 (2015), *petition denied, Cruz v NYS Pub Empl Relations Bd*, 48 PERB ¶ 7003 (Sup Ct NY Co 2015) (internal quotation and editing marks omitted), quoting *UFT (Munroe*), 47 PERB ¶ 3031, 3095 (2014), *petition denied*, 48 PERB ¶ 7002 (Sup Ct NY Co 2015) (*quoting CSEA* (*Bienko)*, 47 PERB ¶ 3027, 3082-3083 (2014)); *see District Council 37, (Farrey)*, 41 PERB ¶ 3027, 3119 (2008).

[29] *Id; see also Cairo-Durham Teachers Assn*, 47 PERB ¶ 3008, 3026 (2014) (quoting *CSEA, L 1000 v NYS Pub Empl Relations Bd (Diaz)*, 132 AD2d 430, 432, 20 PERB ¶ 7024, 7039 (3d Dept 1987), *affd on other grounds*, 73 NY2d 796, 21 PERB ¶ 7017 (1988)).

[30] *Professional Staff Congress of the City University of New York (Giammarella)*, 51 PERB ¶ 3010, at 3048.

In Case No. U-35557, involving the forced overtime grievance, the Union explained that it was "no longer attempting to figure out any OT [overtime] issue as it relates to forcing."[31] This explanation was promptly communicated to Drinks-Bruder, and there is no showing that the explanation itself was arbitrary, discriminatory, or made in bad faith. In particular, the Union's explanation, which has not been refuted, does not single out Drinks-Bruder for disparate treatment, but rather reflects a policy decision by the Union. Thus, Drinks-Bruder has failed to show that the Union's refusal to pursue her grievance to arbitration was a violation of the Union's duty of fair representation.

Case No. U-35636 involved Drinks-Bruder's belief that overtime was not being distributed fairly. Although Lee did not personally wish to file a grievance (because he personally was receiving overtime), the record is clear that Lee expressed his willingness to submit a grievance for Drinks-Bruder if she wished to file one.[32] Although the Union does not share Drinks-Bruder's view that the contract is being violated, a disagreement between the Union and an individual member over the meaning of the contract does not, absent more, establish a violation of the duty of fair representation.[33] It is clear that Drinks-Bruder is not happy with the Union's representation on this issue, but such dissatisfaction alone does not establish the elements of a breach of the duty of fair representation in the absence of a showing of arbitrary, discriminatory, or bad faith conduct by the Union. No such showing has been made here.

Case No. U-35661 concerns Drinks-Bruder's proposed grievance over her assignment to watch a mental health patient confined to a psychiatric hospital ER.

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[31] Text messages attached to Union's offer of proof.
[32] *Id*.
[33] *See William Floyd United Teachers, Local 1568*, 33 PERB ¶ 3055, 3151 (2000).

Again, the Union promptly communicated its decision not to file a grievance over this routine assignment, and Drinks-Bruder made no showing that this decision was arbitrary, discriminatory, or undertaken in bad faith. Nor did she offer any persuasive refutation of the Union's reason for declining to file a grievance—that the work assigned was well in line with assignments routinely given to officers in the same title.

Finally, Case No. U-35916 concerns the Union's refusal to file a separate grievance on Drinks-Bruder's behalf over the City's refusal to allow Drinks-Bruder to see her personnel file. The ALJ found that the Union promptly communicated its decision to Drinks-Bruder and that the charge had become moot in light of the fact that Drinks-Bruder has actually viewed her file. We find that the Union's timely response, coupled with the explanation that the Union was negotiating a unit-wide right for employees to view their personnel files that would include Drinks-Bruder, negates any claim that the Union breached its duty of fair representation to Drinks-Bruder by refusing to file a separate individual grievance on her behalf. As the Union successfully negotiated such an agreement, and Drinks-Bruder does not dispute that she has seen her file, pursuant to the agreement negotiated by the Union, no showing has been made that the Union did not fully and fairly represent her, securing for her exactly the right she sought. In these circumstances, we agree that the charge is moot.

With respect to Drinks-Bruder's allegation that a copy of an Article 78 is missing from the record, our review of the file shows that the document and its

attachments was included in the case file,[34] although it was not included in the record, and we have reviewed both the Article 78 petition and its attachments. We find that the ALJ did not abuse his discretion in not considering this document. To the extent that it relates to the grievances at issue here, the allegations made in the Article 78 petition are duplicative of the allegations made elsewhere in Drinks-Bruder's pleadings and her responses to the Union's offer of proof, and the attachments are already included in the record.

We note that we do not pass on the merits of any of Drinks-Bruder's grievances. A union has a wide range of reasonableness regarding the filing and prosecution of grievances, and we will not substitute our judgment for that of a union in this regard.[35] A union violates its duty of fair representation only if the record demonstrates that its conduct is arbitrary, discriminatory, or in bad faith. Drinks-Bruder has not established any of these elements here. Although Drinks-Bruder disagrees with the Union's decisions, the Union's decisions have been rational, reasonable, and communicated to her promptly. There is also no showing that the Union has treated similarly-situated unit members differently from Drinks-Bruder. Nor is there any showing that the Union's decisions have been made in bad faith.

For these reasons, we find that Drinks-Bruder has failed to allege facts which, if

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[34] Verified Petition, Index No. 165161/2018, In the Matter of the Application of Sanja Drinks-Bruder vs New York State Division of Human Rights and Niagara Falls Police Club, Inc, apparently filed in the Supreme Court of the State of New York County of Niagara.

[35] *See, eg, AFSCME, Council 66, Local 3933 (Altieri)*, 39 PERB ¶ 3015, 3051 (2006); *TWU, Local 100 and NYCTA (Ruse)*, 34 PERB ¶ 3018, 3040 (2001); *District Council 37, AFSCME (Gonzalez)*, 28 PERB ¶ 3062, 3138 (1995).

proven, would support a finding that the Union breached its duty of fair representation in violation of § 209-a.2 (c) of the Act.

Accordingly, the charges must be, and hereby are, dismissed.

DATED: August 20, 2019
Albany, New York

John F. Wirenius, Chairperson

Anthony Zumbolo, Member

Monte A. Klein, Member