STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

SUBWAY SURFACE SUPERVISORS ASSOCIATION,

Petitioner,

-and-

CASE NO. C-6512

STATEN ISLAND RAPID TRANSIT OPERATING AUTHORITY,

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 Subway Surface Supervisors Association 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 Transit Management Analyst Trainees, Assistant Transit Management Analysts Levels I and II, and Associate Transit Management Analysts.

Excluded: All other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Subway Surface Supervisors Association. 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: March 6, 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 1430, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO,

Petitioner,

-and- **CASE NO. C-6526**

MOUNT PLEASANT COTTAGE SCHOOL UNION FREE SCHOOL DISTRICT,

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 1430, International Brotherhood of Electrical Workers, 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: All full-time and regular part-time Teaching Aides.

Excluded: All Guards, Supervisors, Teachers, Teaching Assistants, Clerical and Maintenance employees, Safety Monitors, and all other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Local 1430, International Brotherhood of Electrical Workers, 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: March 6, 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

ALFRED BASSETTA,

Petitioner,

-and-

CASE NO. C-6527

PLAINVIEW WATER DISTRICT,

Employer,

-and-

LOCAL 342, LONG ISLAND PUBLIC SERVICE EMPLOYEES, UMD, ILA, AFL-CIO

Incumbent/Intervenor.

JONATHAN FIELDING, ESQ., for Petitioner

LITTLER MENDELSON, PC (DAVID M. WIRTZ, ESQ., of Counsel), for Employer

WILLIAM HENNESSEY, for Intervenor

BOARD DECISION AND ORDER

On August 15, 2018, Alfred Bassetta (petitioner) filed, in accordance with the Rules of Procedure of the Public Employment Relations Board, a timely petition for decertification of Local 342, Long Island Public Service Employees, UMD, ILA, AFL-CIO (incumbent/intervenor), the current negotiating representative for employees in the following negotiating unit:

Included: Senior Water Plant Operator, Water Plant Operators, Water Servicers and Auto-mechanic (part-time).

Excluded: All other employees.

Upon consent of the parties, an election was held on February 1, 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/intervenor.

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

DATED: March 6, 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

NEW YORK STATE PUBLIC EMPLOYEES FEDERATION, AFL-CIO,

Charging Party, **CASE NO. U-33190**

- and -

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

Respondent.

PRISCILLA C. MARCO, for Charging Party

MICHAEL N. VOLFORTE, ACTING GENERAL COUNSEL (RONALD S. EHRLICH of counsel), for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the New York State Public Employees Federation, AFL-CIO (PEF) to a decision of an Administrative Law Judge (ALJ), dismissing an improper practice charge alleging that the State of New York (Department of Corrections and Community Supervision) (State or DOCCS) violated §§ 209-a.1 (a) and (c) of the Public Employees' Fair Employment Act (Act).[1] The charge, as amended, alleged that DOCCS violated the Act when it issued a formal counseling memorandum to Pamela Dickerson and attempted to revoke Dickerson's approval to attend the PEF statewide convention, in retaliation for Dickerson's activities as a PEF shop steward and for attending a labor-management meeting.

The ALJ found that PEF failed to establish a *prima facie* case of discrimination in

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[1] 51 PERB ¶ 4548 (2018).

violation of §§ 209-a.1 (a) and (c) of the Act. Even assuming that PEF established a *prima facie* case, the ALJ found that DOCCS demonstrated that its conduct was motivated by legitimate business reasons.

EXCEPTIONS

PEF filed five exceptions to the ALJ's decision.[2] PEF's first exception argues that the ALJ erred in finding DOCCS's witnesses more credible than PEF's witnesses, particularly because the ALJ who issued the decision was not the same ALJ who conducted the hearing and heard witness testimony, and asserts that the case should have been ruled a "mistrial."[3]

In its second exception, PEF contends that the ALJ erred in finding that Senior Parole Officer Clarence Neely, who counselled Dickerson, had no knowledge of Dickerson's union activity at the time of her counseling. PEF's third exception asserts that it has shown that no employment action would have been taken against Dickerson "but for" her union activity, and PEF's fourth exception claims that it has shown that Dickerson was treated disparately because she was a shop steward. Finally, PEF's fifth exception argues that it has rebutted DOCCS's position that it demonstrated legitimate, non-discriminatory reasons for its actions towards Dickerson.

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

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[2] In the preface to its exceptions, PEF also excepted to "each unfavorable ruling on evidence and to each and every part of the Decision finding that the Respondent did not violate subsection 209-a.1 (a) and (c) of the Civil Service Law." We have often held that "such blunderbuss exceptions do not comport with the Rules [of Procedure]," and "do not preserve arguments not expressly made in the exceptions." *Village of Saranac Lake*, 51 PERB ¶ 3034, n 4 (2018); *see also NYCTA*, 47 PERB ¶ 3032, 3009 (2014), quoting *UFT (Pinkard)*, 47 PERB ¶ 3020, 3061 (2014); *Town of Orangetown*, 40 PERB ¶ 3008 (2007), *confd sub nom Matter of Town of Orangetown v NYS Pub Empl Relations Bd*, 40 PERB ¶ 7008 (Sup Ct Albany Co 2007); *Town of Walkill*, 42 PERB ¶ 3006 (2009).

[3] PEF's exceptions, at 2.

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.

Pamela Dickerson was employed as a parole officer by the Division of Parole and DOCCS for over 30 years. Dickerson was assigned to the Brooklyn 2 precinct, where she supervised individuals with felony convictions who had been released into the community. Dickerson was also a shop steward for PEF. In her role as shop steward, Dickerson attended labor-management meetings, assisted other unit members with grievances, and represented unit members with regard to health and safety issues that arose at their workplace.[4] Dickerson retired from DOCCS on May 1, 2014.

On July 18, 2013, Dickerson attended a labor-management meeting, at which the parties discussed a number of issues, including parole officer caseloads, the 10:00 p.m. curfew after which parole officers needed permission to work, and shop stewards' feeling that they were being subject to greater scrutiny from management when compared to other employees.[5] Adreina Adams, a parole officer and PEF shop steward, testified that the parties discussed what many union members perceived to be a "hostile work environment."[6] According to Adams

> [A] shop steward or even as a union activist, generally what would happen is if we had a labor-management meeting and something was said that [management] didn't like, or we had conversations with supervisors or bureau chiefs or area supervisors, if we brought up work-related issues and they had a problem with [it], generally there was some kind of retaliatory act.[7]

Mary Smith, DOCCS's regional director, was present at the July 18, 2013 labor-

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[4] Tr, at 23 (Dickerson).
[5] Joint Ex 4.
[6] Tr, at 226.
[7] Tr, at 226-27.

management meeting. She testified that she recalled discussing the issue of retaliation against PEF shop stewards, and that she invited Dickerson to bring specific instances of retaliation to her so that she could deal with them accordingly.[8] Smith testified that she was never approached after the meeting with any specific instances of retaliation.

Parole officers are supervised by a senior parole officer. In June 2013, Clarence Neely became Dickerson's supervisor. Senior parole officers assist parole officers in making case-related decisions and monitor caseloads.[9] Neely was not present at the July 18, 2013 labor-management meeting and testified that he had nothing to do with labor-management meetings.[10] Neely testified that he was aware that Dickerson was a PEF shop steward when he began supervising her.[11]

Parole officers conduct case conferences with their senior parole officer, during which they would go over cases and determine what action, if any, needs to be taken.[12] These meetings sometimes last for hours. Dickerson and Neely conducted their first formal case conference on August 9, 2013.[13] This meeting lasted approximately three to four hours, during which both parties entered information into DOCCS's Case Management System (CMS) about Dickerson's cases and what work needed to be done for each.[14]

During the meeting, Neely closed the door to Dickerson's office and advised her

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[8] Tr, at 421.
[9] Tr, at 25.
[10] Tr, at 309.
[11] Tr, at 360.
[12] Tr, at 272 (Neely).
[13] Tr, at 43 (Dickerson). Neely stated that he had discussions with Dickerson on an as-needed basis during the first few months of his supervision; thus, even though they did not have a formally scheduled case conference until August, they were in regular contact about what was happening with her cases.
[14] CMS is a computerized database that allows parole officers and senior parole officers to make entries regarding the status of a particular parolee's case.

that "this was a formal counseling session."[15] Neely told Dickerson that she "didn't meet compliance with [her] fieldwork."[16] According to Dickerson, her deficiencies in fieldwork were "not news to me because I have had an ongoing problem with doing my fieldwork, and this is something that I have brought up to Mr. Neely and Mr. Joseph."[17]

Neely testified that after becoming Dickerson's supervisor, he observed that Dickerson was not in compliance with many of her cases. In particular, she was not obtaining one "home visit positive" per month, as was required for the level-one offenders she was assigned. He testified that this issue was brought to Bureau Chief Nigel Joseph's attention when Dickerson requested that two of her cases be transferred, and the receiving bureau "did not want to accept the cases because there was . . . a lack of case contact."[18] Neely stated that he later discussed the matter with Joseph, who directed him to watch Dickerson's caseload for home visits and conduct a case conference for the specific purpose of verifying home visits. As bureau chief, Joseph supervises senior parole officers, parole officers and clerical staff to ensure compliance with DOCCS policies and procedures. Neely stated that after his discussion with Joseph, he told Dickerson that she needed to address the deficiencies in her field work and "step up [her] home visits."[19]

On August 29, 2013, Dickerson sent an email to Neely, copying Smith, among others, which stated

> On 8/9/13, I had a case conference with you for the first time and at the end of this session you advised me that this was a formal counseling session.

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[15] Tr, at 47 (Dickerson).
[16] *Id.*
[17] *Id.*
[18] Tr, at 287.
[19] Tr, at 288.

> This truly surprised me since as my supervisor. . .you are aware that my caseload count has been over the appropriate level standard for [COMPAS].[20] It is also noted that since our bureau has been down a number of parole officers due to leave, transfers, etc. that I have assisted in covering these various caseloads. It truly astonishes me that this expectation of meeting agency's standards is reasonable but in reality it is unrealistic. These conditions are still present and paramount. I have and continue to do the best of my ability even though these issues exist.
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> The timing of this counseling session that was disguised as a case conference concerns me. This is because two weeks ago, on 7/18/13, a local [labor-management] meeting was held and two agenda topics discussed were retaliation and hostile work environment and how staff members experienced these actions in the workplace. It is interesting that after this local meeting that I would expect some type of retaliation from my local managers.
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> As a result [of] this counseling session [] I'm being told that I will receive a formal counseling memo. This memo is nothing more tha[n] union animus treatment in which I believe is retaliatory and punitive. I submit that your action is viewed by me as an elected PEF representative is a form of harassment, a form of retaliation and covert action by local managers in silencing the union's voice.[21]

One of the recipients of Dickerson's email was Joseph. Joseph testified that he viewed the accusations made by Dickerson to be false and that he had a conversation with Smith wherein they agreed not to respond to the email.[22]

On September 17, 2013, Dickerson submitted a leave request to Neely for the dates of September 29, 2013 to October 2, 2013, so that she could attend PEF's statewide convention.[23] Dickerson's request was initially approved by Neely.[24] However, after a bureau meeting on September 26, 2013, Neely advised Dickerson that

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[20] COMPAS refers to the Standards of Supervision set by DOCCS that indicate the level and frequency of supervision a parole officer is required to carry out based upon the type of parolees they are assigned (for example, level one offenders).
[21] Joint Ex 1.
[22] Tr, at 603-604.
[23] Tr, at 68 (Dickerson).
[24] Charging Party's Ex 4.

he was revoking his approval for leave time to attend the convention because she had not conducted enough home visits in the month of September.[25] After being told that her leave was being denied due to lack of home visits, Dickerson obtained approval to conduct field work after 10:00 p.m. that evening.[26]

On September 27, 2013, Dickerson and Steve McClymont were summoned to a meeting with Joseph and Neely. McClymont was a parole officer in the same situation as Dickerson—his request for leave to attend the PEF convention had initially been approved, but was revoked on September 26, 2013 because of his past due fieldwork.[27] McClymont was not a PEF shop steward. Dickerson and McClymont were advised in the September 27, 2013 meeting that their leave to attend the PEF conference was being approved.[28]

After Dickerson and McClymont were told that their leave to attend the PEF convention was being approved, McClymont was told to leave the room. Dickerson was then given a counseling memorandum memorializing the August 9, 2013 counseling session. In sum, the counseling memorandum states that Dickerson was not meeting minimum agency standards for home visits.[29]

Neely testified that as a senior parole officer, it is his responsibility to review time-off requests submitted by his supervisees and approve or deny them within five days of receipt. Neely testified that he approved Dickerson's leave request as a matter of course.[30] Sometime before the leave was to occur, Joseph saw the request and

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[25] Tr, at 70 (Dickerson).
[26] Tr, at 74 (Dickerson).
[27] Tr, at 172-173 (McClymont).
[28] Dickerson was ultimately permitted to attend the PEF convention.
[29] Joint Ex 3.
[30] Tr, at 341.

advised Neely that "Dickerson was not allowed to go because of outstanding work. So in following directions, I brought Ms. Dickerson into my office and we had a conversation about her not going to the . . . PEF convention because of outstanding work."[31] Neely was later told that Dickerson would be permitted to attend the conference because she had already been approved to go, and DOCCS was not going to withdraw the approval despite her unfinished work.

Smith stated that she was familiar with the revocation of Dickerson's request to attend the PEF convention in 2013. She testified that

> Ms. Dickerson had put in her leave request for this particular union's session before Neely discussed her work, and according to the contract, he has to respond to her written request within five days. When I learned that Ms. Dickerson had put that in prior, I said, well, you can't now tell her she can't go when you . . . already approved her . . . leave.[32]

Joseph testified that he did not tell Dickerson not to contact her union about the leave issue, as alleged by Dickerson.[33] He testified that

> I did have a conversation with people . . . about following the chain of command, that if you have a problem . . . go to your senior first. If the senior can't resolve it, come to me. If I can't resolve it, then go to the regional director, and all I talked about was the chain of command. I didn't tell Ms. Dickerson or any union person that they didn't have a right to converse with their union representatives.[34]

Adams testified that she believed the counseling memorandum issued to Dickerson was made in response to the issues raised at the July 18, 2013 labor-management meeting because the memorandum was issued

> after a [labor-management] meeting, and it didn't engage in any level of progressive discipline which would mean that if there was an issue that they had with Ms. Dickerson, they would have a conversation with

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[31] Tr, at 342.
[32] Tr, at 460.
[33] Tr, at 561.
[34] Tr, at 561-62.

> her to address it as opposed to put[ting] pen to paper, and they didn't do that.[35]

DISCUSSION

Initially, we reject PEF's contention that the hearing should have been deemed a "mistrial" on the ground that the ALJ who conducted the hearing left PERB's employ, leaving an ALJ who had not been present for the hearing to make credibility determinations on a cold record. We find that the reassignment by the Director of Public Employment Practices and Representation was not an abuse of discretion under § 212.4 (a) of the Rules of Procedure (Rules), which explicitly provides that "[a]t any time, an administrative law judge may be substituted by the director for the administrative law judge previously assigned."[36] While it is preferable for the same ALJ to perform both functions, where the ALJ who presided over the hearing is not available to write the decision, reassignment is appropriate as long as the case does not turn on a credibility determination. Under such circumstances, the issuing ALJ may properly review and summarize the testimony and exhibits and make findings of fact based on the record before her without holding a *de novo* hearing. In the event that credibility determinations between conflicting witness testimony need to be made, a *de novo* hearing, at least on those points, would be necessary.[37] Given our resolution of the issues in this case, we find that there are no credibility questions presented which would warrant the holding of a *de novo* hearing.

When an improper practice charge alleges retaliation in violation of §§ 209-a.1 (a) and (c) of the Act, the charging party has the burden of demonstrating a *prima facie*

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[35] Tr, at 234.
[36] *Id*. *See generally Village of Greenport (Trowbridge)*, 48 PERB ¶ 3024, 3092 (2015).
[37] *See Town of Ramapo*, 36 PERB ¶ 3027, 3078 (2003).

case by establishing three elements by a preponderance of the credible evidence: "a) that the affected individual engaged in protected activity under the Act; b) such activity was known to the person or persons taking the employment action; and c) the employment action would not have been taken 'but for' the protected activity."[38] As we have often reaffirmed, "[t]he ultimate burden of proof always remains with the charging party."[39]

However, the initial burden of proof to establish a *prima facie* case (an inference of improper motivation) is relatively low.[40] The "ALJ is required to accept the charging party's evidence as true, and give it the benefit of every reasonable inference that can reasonably be drawn from that evidence."[41] Moreover, a "charging party can establish the existence of anti-union animus by statements or by circumstantial evidence, which may be rebutted by evidence of legitimate business reasons for the actions taken, unless those reasons are found to be pretextual."[42]

Only "if the charging party can establish such an inference, does the burden of

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[38] *Mt Pleasant Cent Sch Dist (Hall)*, 50 PERB ¶ 3019, 3079 (2017), quoting *Bellmore-Merrick Cent High Sch Dist*, 48 PERB ¶ 3022, 3976 (2015), citing *Village of Endicott*, 47 PERB ¶ 3017, 3050 (2014); *see generally, UFT, Local 2, AFL-CIO (Jenkins)*, 41 PERB ¶ 3007 (2008), *confd sub nom UFT (Jenkins) v NYS Pub Empl Relations Bd*, 41 PERB ¶ 7007 (Sup Ct NY Co 2008), *affd*, 67 AD3d 567, 42 PERB ¶ 7008 (1st Dept 2009); *see also City of Salamanca*, 18 PERB ¶ 3012 (1985).

[39] *Id*, quoting *Town of Tuscarora*, 48 PERB ¶ 3011, 3037 (2015); *Catskill Housing Auth*, 49 PERB ¶ 3025, 3080 (2016); *Village of Endicott*, 47 PERB ¶ 3017, at 3050.

[40] *Id*, citing*, inter alia*, *UFT (Jenkins)*, 41 PERB ¶ 3007, at 3043; *Bd of Educ of the City Sch Dist of the City of New York (Grassel)*, 43 PERB ¶ 3010 (2010); *Town of Tuscarora,* 45 PERB ¶ 3044 (2012); *Bd of Educ of the City Sch Dist of the City of New York (Guttman)*, 46 PERB ¶ 3008 (2013).

[41] *Id*, quoting *Town of Tuscarora*, 45 PERB ¶ 3044, at 3112, *citing Bd of Educ of the City Sch Dist of the City of New York (Baez)*, 35 PERB ¶ 3044 (2002) and *Bd of Educ of the City Sch Dist of the City of New York (Freedman)*, 34 PERB ¶ 3036 (2001).

[42] *State of New York (Dept of Transp)*, 50 PERB ¶ 3004, 3021 (2017), citing *State of New York (SUNY)*, 38 PERB ¶ 3019 (2005), *confd sub nom CSEA v NYS Pub Empl Relations Bd*, 35 AD3d 1005, 39 PERB ¶ 7012 (3d Dept 2006).

production shift to the respondent to present evidence demonstrating that its conduct was not improperly motivated."[43] The employer "can dispel the *prima facie* case, and defeat the charge, by rebutting any of the three prongs of the *prima facie* case or through the presentation of evidence demonstrating that the employment action or conduct was motivated by a legitimate non-discriminatory business reason."[44] If the respondent establishes a legitimate non-discriminatory reason, then the burden, "shifts back to the charging party to establish that the articulated non-discriminatory reason is pretextual."[45] When a charging party "fails to meet its burden, a charge of improper motivation must be rejected and the charge dismissed."[46]

There is no dispute here that Dickerson engaged in protected activity. Dickerson was a shop steward, in the course of which she assisted other unit members with grievances and represented them with regard to health and safety issues that arose at their workplace. Dickerson also attended a labor-management meeting on July 18, 2013, during which the parties discussed various issues, including caseloads and perceived retaliation by DOCCS against shop stewards.

The ALJ found that Joseph and Smith were aware of Dickerson's union activity at the time they instructed Neely to deny Dickerson's leave to attend the statewide PEF convention. The ALJ found, however, that there was no clear evidence that Neely was

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[43] *Mt Pleasant Cent Sch Dist (Hall)*, 50 PERB ¶ 3019, at 3079; *Town of Tuscarora*, 48 PERB ¶ 3011, at 3037.
[44] *Id*, quoting *Catskill Housing Auth (Biegel)*, 49 PERB ¶ 3025, 3080-3081 (2016); *see also Dutchess Community Coll*, 47 PERB ¶ 3018, 3056 (2014), *citing UFT (Jenkins)*, 41 PERB ¶ 3007, at 3018.
[45] *Id*, citing *Bellmore-Merrick Cent Sch Dist*, 48 PERB ¶ 3022, at 3076.
[46] *Catskill Housing Auth (Biegel)*, 49 PERB ¶ 3025, at 3081, citing *Bellmore-Merrick Cent Sch Dist*, 48 PERB ¶ 3022, at 3076; *Town of Tuscarora*, 48 PERB ¶ 3011, at 3037, *citing State of New York (SUNY Buffalo)*, 46 PERB ¶ 3021, 3040 (2013); *County of Tioga*, 44 PERB ¶ 3016 (2011).

aware of Dickerson's status as a shop steward at the time he counseled her on August 9, 2013. PEF excepts to this finding, and we find merit to the exception. On cross-examination, Neely acknowledged that he was aware that Dickerson was a PEF shop steward when he began supervising her in June of 2013.[47] This testimony is sufficient to meet the second prong of PEF's *prima facie* case.

As for showing that the employment action would not have been taken "but for" Dickerson's protected activity, the ALJ found that PEF had not met its burden with respect to either Dickerson's counseling on August 9, 2013 or the attempt to revoke Dickerson's approval to attend the statewide PEF convention. The ALJ found that PEF presented vague accusations of retaliation after labor-management meetings, suggesting that Dickerson's counseling was an example of just such retaliation. However, the ALJ found that PEF failed to substantiate its claims, presenting only conclusory testimony from Dickerson and Adams. The ALJ found that PEF provided no specific evidence to connect the alleged adverse actions against Dickerson to Dickerson's union activity besides relative timing and its vague allegations that PEF shop stewards believed that they were being treated disparately, which the ALJ found were insufficient to establish that PEF had met its burden. As we have often held, both vague, non-specific allegations, and "[t]iming alone, however, [are] insufficient to satisfy the 'but for' element of a § 201-a.1 (a) or (c) violation."[48]

PEF excepts to the ALJ's finding and argues that it has shown that DOCCS was motivated by anti-union animus when it counselled Dickerson and when it attempted to

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[47] Tr, at 360.

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

revoke permission for Dickerson to attend the statewide PEF convention. PEF argues that this animus is shown not only through the timing of the counseling session and the decision to revoke permission, but also through Joseph's receipt of Dickerson's August 29, 2013 email from Dickerson and Joseph's comment that Dickerson "went outside the chain of command" to have permission to attend the PEF convention restored.[49] PEF also argues that it has shown that Dickerson was treated disparately because she was a shop steward, asserting that Dickerson was not the only parole officer Neely supervised who was not in compliance, but that she was the only parole officer that Neely counseled and that Neely failed to engage in "progressive discipline." Finally, PEF excepts to the ALJ's finding that Adams's testimony was not specific about instances of retaliation by DOCCS against PEF stewards after labor-management meetings, characterizing the ALJ's finding as a credibility finding.

We find that the evidence that PEF points to does not establish anti-union animus, and we affirm the ALJ's finding that PEF has not shown that DOCCS would not have taken action against Dickerson "but for" Dickerson's protected activity.

First, Joseph's receipt of Dickerson's email does not demonstrate that he harbors anti-union animus. While Dickerson's email accused DOCCS officials of possessing animus toward protected rights, Dickerson cannot attribute such animus to DOCCS's actions by simply accusing DOCCS's officials of demonstrating animus. There is no showing that any retaliatory action was taken by Joseph, Neely, or any other recipient of Dickerson's email, directly or indirectly. Also, contrary to PEF's argument,[50] Joseph's view that Dickerson's accusations of retaliation were untrue does not itself demonstrate

[49] PEF Exceptions, at 3.
[50] *Id*.

any animus towards Dickerson's protected activity.

We also find that Joseph's comments regarding the "chain of command" are insufficient to demonstrate anti-union animus. As set forth above, Joseph testified that, "I did have a conversation with people. . .about following the chain of command, that if you have a problem. . .go to your senior first. If the senior can't resolve it, come to me. If I can't resolve it, then go to the regional director, and all I talked about was the chain of command."[51] This testimony, while encouraging Dickerson to follow proper DOCCS procedure, says nothing about not also contacting PEF, and is not, in and of itself probative of any animus towards Dickerson's exercise of her protected rights.

PEF presents no evidence to controvert the ALJ's finding that Neely had advised Dickerson that she needed to "step up" her home visits and that Dickerson stated that she knew her fieldwork was an issue and that she was behind, thus belying PEF's claim that Neely had not engaged in "progressive discipline" by having a conversation with Dickerson about her performance issues prior to counseling her. Additionally, although Dickerson was the only parole officer that Neely supervised that he counseled, we find no evidence in the record that supports the conclusion that the reason he did so was because she is a PEF shop steward. PEF's contention to the contrary is simply conjecture unsupported by circumstantial or direct evidence.

Finally, we address PEF's argument that Adams's testimony was sufficiently specific about instances of retaliation by DOCCS against PEF stewards after labor-management meetings. Contrary to PEF's claims, the ALJ's assessment of the testimony of Adams (and of Dickerson on this point) is not a credibility finding. The ALJ

[51] Tr, at 561-562. Contrary to PEF's exception, Joseph did not testify that he stated that Dickerson "went outside the chain of command."

was not making a judgment on the veracity of Adams's testimony or deciding how much weight to give to the testimony. She assumed the truth of her testimony and was, instead, assessing its probative value. Given the vagueness of Adams's testimony, the ALJ found that it was too conclusory to establish retaliation by DOCCS in the wake of labor-management meetings. We have reviewed the testimony ourselves, and we agree with the ALJ's assessment. Adams testified that "generally what would happen is if we had a labor management meeting and something was said that [DOCCS management] didn't like . . . generally there was some kind of retaliatory act,"[52] with no further elaboration. This type of vague and conclusory testimony is unpersuasive and lacks probative value.[53]

This leaves PEF with the sole argument that the timing of the actions taken against Dickerson was suspicious and demonstrates union animus. However, as the ALJ found, the Board has routinely held that timing alone is insufficient to satisfy the 'but for' element of a §§ 209-a.1 (a) and (c) violation.[54]

For the reasons given above, we affirm the ALJ's finding that PEF has failed to present sufficient evidence to establish a *prima facie* case of improper motivation and

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[52] Tr, at 226-227.

[53] See *Bellmore-Merrick Cent High Sch Dist*, 48 PERB ¶ 3022, at 3079, n. 17, citing *State of New York (Dept of Correctional Services)*, 32 PERB ¶ 4564 (1999) (reciting finding "conclusory testimony regarding 'arguments' too vague to establish anti-union animus"). Adams did provide herself as an example of retaliation by DOCCS, claiming that she received a NOD which was not based on merit. Adams also testified about a member who became a member of the health and safety team and was then denied a day off. However, Adams was unable to testify when these incidents occurred, and they do not appear to be tied to labor-management meetings. Tr, at 228. We find that the ALJ did not err in excluding these vague, undated examples that are unrelated to the salient point at issue.

[54] *See Lawrence Union Free Sch Dist*, 50 PERB ¶ 3034, 3142 (2017), citing *Bellmore-Merrick Cent High Sch Dist,* 48 PERB ¶ 3022 (2015); *Board of Educ of the City Sch Dist of the City of New York*, 35 PERB ¶ 3002 (2002); *Roswell Park Cancer Institute*, 34 PERB ¶ 3040 (2001).

that the charge should be dismissed for this reason. Although the ALJ went on to assess DOCCS's argument that it had legitimate business reasons for its actions, she did so based on her alternative assumption that PEF met its initial burden to establish a *prima facie* case of retaliation. Because we agree with the ALJ that PEF ultimately failed to prove the "but for" element of a case of retaliation, we need not address the merits of the State's assertion of legitimate business reasons for its actions or whether PEF failed to rebut that assertion with any compelling evidence of pretext.

IT IS, THEREFORE, ORDERED that the amended improper practice charge is dismissed.

DATED: March 6, 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

ROBERT D. LYNN,

Charging Party,

-and-

ROCKLAND COUNTY PATROLMEN'S BENEVOLENT ASSOCIATION,

Respondent,

-and-

TOWN OF CLARKSTOWN,

Employer.

CASE NOS. U-33564 & U-33702

ROBERT D. LYNN, *pro se*

RUTH B. KRAFT, ESQ., for Respondent

LAW OFFICE OF VINCENT TOOMEY (VINCENT TOOMEY of counsel), for Employer

BOARD DECISION AND ORDER

These cases come to us on exceptions to a decision of an Administrative Law Judge (ALJ) dismissing two improper practice charges alleging that the Rockland County Patrolmen's Benevolent Association (RCPBA) violated § 209-a.2 (c) of the Public Employees' Fair Employment Act (Act).[1] The charge in Case No. U-33564, as amended, alleged that the RCPBA breached its duty of fair representation when, by letter dated February 7, 2014, it refused to provide unit member Robert Lynn with legal representation in connection with his pending legal proceedings or to reimburse Lynn for the cost of his legal representation. The ALJ found that the RCPBA did not breach

[1] 51 PERB ¶ 4552 (2018).

its duty of fair representation and dismissed the charge. The charge in Case No. U-33702 alleged that the RCPBA breached its duty of fair representation by failing to respond to Lynn's grievance concerning the Town of Clarkstown (Town) notice that his health benefits would be terminated. The ALJ dismissed this charge as moot because Lynn's health benefits continued uninterrupted.

EXCEPTIONS

Lynn filed 16 pages of exceptions, in which he argues that the ALJ "only used selected testimony and evidence to confirm his predetermined decision and disregarded other relevant testimony and evidence which would [have] found a favorable decision for the Charging Party."[2] Lynn noted the ALJ's mootness finding but did not argue that it was incorrect or urge its overturning.[3]

The RCPBA cross-excepted to the ALJ's finding that Lynn's request for reconsideration of the RCPBA's decision to deny Lynn legal representation or reimbursement was timely.[4] The RCPBA also argues that Lynn's exceptions should not be reviewed because they do not comply with § 213.2 (b) of our Rules of Procedure (Rules). On the merits, the RCPBA argues that the ALJ's decision dismissing the amended charges is correct and should be affirmed.[5]

For the reasons given below, we affirm the ALJ's decision dismissing the charges but, in part, on different grounds.

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[2] Lynn's Exceptions, at 1, *see id* at 1-10.
[3] Lynn's Exceptions, at 13.
[4] RCPBA's Reply to Lynn's Exceptions and Cross-Exceptions, at 7.
[5] The Town is named as a statutory party, but has not filed any exceptions or briefs in this matter.

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.

The Town and the RCPBA are parties to a January 1, 2013 through December 31, 2017 collective bargaining agreement (Agreement). The Agreement memorializes the status of the RCPBA as the "sole and exclusive bargaining agent and representative" for a bargaining unit of "all police officers employed by the Town of Clarkstown Police Department."[6]

James Kelly was the elected president of the RCPBA from 2009 through December 2013. Kelly testified that the RCPBA has eight member units, including the Clarkstown PBA (CPBA). Kelly testified that the RCPBA provides legal counsel to members and member units, including legal counsel with respect to grievances, and litigation to pursue benefits pursuant to General Municipal Law (GML) § 207-c.[7] Chris Kiernan, a detective in the Town's police department, became the RCPBA first vice president on January 1, 2014.

Lynn was employed as a police officer by the Town from April 1985 until his retirement on August 2, 2014.[8] Lynn was a member of the RCPBA and the CPBA.[9]

Events Prior to January 27, 2014

Lynn testified that he was injured in the line of duty on July 3, 2012 (July 2012 Injury). He applied for benefits under GML § 207-c, but his application was denied by

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[6] Joint Ex 1, at Article 1.1 (Collective Bargaining Agreement).
[7] Tr, Vol IV, at 170-174,192.
[8] Tr, Vol II, at 183.
[9] *Id*; Respondent's Exs 6, 9.

Chief of Police Michael Sullivan.[10] Lynn then sought the assistance of the RCPBA's attorneys, Bunyan & Baumgartner LLP (Bunyan Firm), to contest Chief Sullivan's denial. In December 2012, the attorneys commenced a proceeding pursuant to Article 78 of the New York Civil Practice Law and Rules (CPLR) on Lynn's behalf (First Article 78), to compel the Town to provide Lynn the benefits of GML § 207-c, and restore all sick and other leave time deducted while he was off work due to his injuries. The services of the law firm, provided through the RCPBA, were free of any charge to Lynn.[11]

Lynn further testified that after he returned to work in late August 2012, he suffered another on-the-job injury. That injury occurred on October 16, 2012 (October 2012 Injury). Lynn again applied for GML § 207-c benefits. According to Lynn, Chief Sullivan did not act upon his application for benefits through April 2013, requiring Lynn to use his accrued sick leave to remain on the payroll.

In April 2013, the Bunyan Firm commenced a second Article 78 proceeding (Second Article 78) against the Town on Lynn's behalf to compel a determination on his application for benefits for the October 2012 Injury. As was the case regarding the First Article 78, the services of the law firm, because they were provided through the RCPBA, were free of charge to Lynn. Lynn testified that a week prior to the deadline for the Town to file an answer in the Second Article 78 proceeding, Chief Sullivan denied his application by letter dated May 29, 2013, thus making the Second Article 78 proceeding

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[10] Tr, Vol II, at 216-217; Charging Party's Ex 3. As more fully set forth in the statute, GML § 207-c entitles a municipal police officer "injured in the performance of his duties or who is taken sick as a result of the performance of his duties," to payment of "the full amount of his regular salary or wages until his disability arising therefrom has ceased," plus necessary medical treatment and hospital care.

[11] Tr, Vol I, at 218-219; Charging Party's Ex 4.

moot.[12] Lynn testified that he then left numerous telephone messages for the RCPBA attorneys that were not returned. Having received Chief Sullivan's denial, Lynn was seeking to commence a third Article 78 proceeding to require the Town to grant him GML § 207-c benefits with respect to the October 2012 Injury.[13]

On July 12, 2013, Lynn's First Article 78 petition was granted. The Town filed a notice of appeal dated July 24, 2013.[14]

Joe Baumgartner, of the Bunyan Firm sent Lynn a letter dated July 18, 2013, noting the favorable July 12, 2013 decision of the court, but stating that Baumgartner would not further represent Lynn because Lynn had retained counsel to represent him as to GML § 207-c matters. Specifically, the letter stated

> When an Officer retains another attorney to represent him on a matter, the RCPBA no longer has any responsibility for representing him on that matter. Accordingly, this office and the RCPBA no longer represents you with respect to any GML § 207-c matter.[15]

Baumgartner's letter also specifically advised Lynn that he would have to secure another attorney to handle any appeal by the Town of the First Article 78 decision and to represent him in a challenge to the Town's May 29, 2013 denial of his application for GML § 207-c benefits arising out of the October 2012 Injury.

Lynn retained the Bartlett Firm to commence an Article 78 proceeding to

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[12] Tr, Vol II, at 220-222, 228-229, 356; Charging Party's Exs 5, 8.
[13] Tr, Vol II, at 229-231, Vol III, at 125-127.
[14] Joint Exs 4, 5.
[15] Joint Ex 12. The ALJ's decision contains more details as to these factual matters, including the grounds upon which Baumgartner believed Lynn had retained other counsel. Because they relate to an untimely portion of the charge, as discussed below, we include them here in broad outline only for background purposes. *See RCPBA (Lynn)*, 51 PERB ¶ 4552, at 4714-4717.

challenge the denial of GML § 207-c benefits for his October 2012 Injury.[16] Lynn testified that on July 31, 2013, the Bartlett Firm commenced an Article 78 proceeding (Third Article 78) to compel the Town to grant Lynn GML § 207-c benefits for his October 2012 Injury.[17]

On December 4, 2013, the Rockland County Supreme Court granted Lynn's Third Article 78 petition. Lynn testified that, on December 31, 2013, the Town appealed that decision, as it had the First Article 78.

January 27, 2014 RCPBA Meeting and Lynn's Request for Reconsideration

On January 27, 2014, Lynn attended a monthly meeting of the RCPBA, where he was permitted to speak about the RCPBA's past denial of legal representation and his requests that the RCPBA provide him with legal representation for the two pending appeals and reimburse him for his past legal expenses. Philip Fantasia, the RCPBA's president, denied a motion by Lynn to have the membership vote on his requests. Lynn was given the opportunity to make his requests in writing to the RCPBA's Executive Board.[18]

Lynn submitted his requests to the RCPBA in a letter dated January 28, 2014.[19] In support of his requests, Lynn summarized the history of his efforts to obtain the benefits of GML § 207-c for his July 2012 and October 2012 injuries, including the

[16] Joint Ex 13.
[17] Joint Ex 6; Tr, Vol II, at 278-279.
[18] Tr, Vol II, at 255-256, Vol III, at 86-87, Vol IV, at 193-194, Vol V, at 36-37,87-88; Joint Ex 9; Respondent's Ex 12.
[19] Joint Ex 9.

history of his representation as he sought GML § 207-c benefits.[20] Lynn requested that the RCPBA have the Bartlett Firm represent him free of charge in the two Article 78 cases now on appeal, and reimburse him for the fees he paid for those matters after the RCPBA ceased to represent him.[21]

Events occurring after approximately January 30, 2014

Kiernan testified that the executive board, with counsel, met soon after the January 27, 2014 meeting and reviewed Lynn's request to determine whether he had presented any new information warranting a departure from the RCPBA's previous decision to withdraw representation. Kiernan testified that the executive board determined that Lynn had presented nothing new and, on that basis, the executive board adhered to its previous determination.[22]

By letter dated February 7, 2014, the RCPBA's attorneys advised Lynn that his request for legal representation and reimbursement of legal fees was denied by the executive board. The letter stated

> Please be advised that the Rockland County PBA's Executive Board has reviewed your request for legal representation dated January 28, 2014 and pursuant to Article XII, Section 3.4, is denying your request for legal representation for past as well as on-going matters referenced in your request.[23]

Article XII of the RCPBA's bylaws, entitled "Legal Assistance," provides, in relevant part

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[20] *Id.*
[21] Joint Ex 9.
[22] Tr, Vol IV, at 157-159, Vol V, at 102,118,119.
[23] Joint Ex 10.

SECTION 1	The RCPBA shall maintain a legal program to assist members with non-police related services.
SECTION 3	Disciplinary Interviews and/or Departmental Interrogations [hereinafter "hearings"].
SECTION 3.4	Any member upon being notified or during the actual commencement of a hearing declines necessary legal representation by RCPBA attorney(s), acts as their own representative or retains counsel of their own choosing shall be deemed to have waived any and all rights to legal representation provided by the RCPBA involving this and related matters.

Kiernan sent an email to Lynn that same day, advising Lynn of the letter that had been sent formally denying his requests, noting

> This was not an easy decision, as we fully recognize your membership of 30+ years. If we were to allow BMM to represent you, we would be breaking the Bylaws of the union and setting a precedent that would be difficult to overcome for similar situations in the future.
>
> With this said and for what it's worth, we, as a Union, are in support of you and your ongoing "battle." Please let us know if we can assist you in anyway.[24]

April 7, 2014 Grievance

On February 10, 2014, Lynn retained attorney Donald Feerick, of the law firm of Feerick Lynch MacCartney, PLLC (Feerick or Feerick Firm), to represent him in the Town's pending appeals of the two Article 78 proceedings decided in his favor.[25] In early March, Feerick made a motion in the appellate court to join the appeal from the Third Article 78 with the appeal from the First Article 78, for a scheduling preference, and an expedited briefing schedule. The motion included an alternative request that if

[24] Respondent's Ex 9. "BMM" refers to the Bartlett Firm.
[25] Tr, V II, at 259.

the requested preference and expedited scheduling were denied, that the court order the Town to reinstate Lynn to the payroll, restore his leave credits, and maintain his medical benefits pending the appeal.[26] In a decision dated March 24, 2014, the Appellate Division, Second Department, scheduled the appeals together, with an expedited briefing schedule. The court otherwise denied the relief sought.[27] The Town interpreted that part of the court's decision rejecting any other relief sought in the motion, particularly the alternative request for continuation of medical benefits, to privilege it to terminate those benefits. By letter dated March 31, 2014, the Town advised Lynn that his medical, dental and vision benefits would end as of April 30, 2014.[28]

Lynn testified that, on April 7, 2014, he filed a grievance with the RCPBA. The grievance included the following statement

> I was recently informed by Asst. Town Attorney Richard Glickel that the Town will be cancelling my health insurance for both myself and my family effective April 30, 2014. . .
>
> As the committee is aware, our Collective Bargaining Agreement, Article IX 9.1 guarantees that the Town will provide health insurance to me and my family without any cost to me. Not only does it guarantee my health insurance, it also guarantees my health insurance after I retire, and even guarantees that my families [sic] health insurance stays in effect after I die.
>
> The fact that the Town is going to cancel my health insurance is in direct violation of our CBA.
>
> I have spoken with Chairman, Mike Garvey on April 4th in regards to this grievance. I am asking the Grievance committee to take

[26] TR, Vol II, at 264; Joint Ex 17.
[27] Charging Party Ex 7.
[28] Joint Ex 11.

immediate action on this matter.[29]

In addition to his grievance, on April 9, 2014, Lynn, through the Feerick Firm, made a motion in the Appellate Division to reargue the prior motion to the court, requesting the court direct the Town to continue Lynn's family medical, dental and vision benefits, without cost to him. On April 21, 2014, the court granted the motion, and ordered those benefits continued pending the determination of the two appeals pending before the court.[30]

Lynn, and counsel for the RCPBA, advised the presiding ALJ that, after the commencement of the hearing in these matters, Lynn prevailed on both of his appeals, and the Town sought, but was denied, leave to appeal to the Court of Appeals.[31] Lynn confirmed that as a result of the decision of the appellate division ordering the continuation of his health benefits, and the subsequent appellate decisions in his favor, his health benefits were never terminated.[32]

DISCUSSION

We begin with the threshold matter of the RCPBA's objection to Lynn's exceptions as procedurally deficient. We have often found exceptions to be "deficient because they fail to comply with the requirements of § 213.2 (b) of our Rules" where the "exceptions do not set forth specifically the questions or policy to which exceptions are taken, identify that part of the decision to which exceptions are taken, or state the grounds

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[29] Charging Party Ex 11.
[30] Joint Exs 18, 19.
[31] Tr, Vol III, at 96-97; *Matter of Lynn v Town of Clarkstown*, 131 AD3d 966 (2nd Dept 2015), *lv den*, 26 NY3d 918 (2016); *Matter of Lynn v Town of Clarkstown*, 131 AD3d 968 (2nd Dept 2015), *lv den*, 26 NY3d 918 (2016).
[32] Tr, Vol II, at 359; Vol III, at 48.

for exceptions."[33] Some of Lynn's exceptions are not in technical compliance with § 213.2 (b) of our Rules. However, we are mindful that Lynn is unrepresented and that his exceptions should be liberally construed.[34] In light of Lynn's unrepresented status, we have examined all of Lynn's exceptions and the record.

We affirm the ALJ's finding that any claim that the RCPBA violated the Act by actions taken before January 30, 2014 is time-barred. Section 204.1 (a) of the Rules provides that an improper practice charge must be filed within four months of when the charging party had actual or constructive knowledge of the conduct that forms the basis for the alleged improper practice. Because Lynn's charge was filed on May 30, 2014, the period of limitations for RCPBA's conduct that we will review extends back four months, until January 30, 2014, as correctly found by the ALJ. Events that occurred prior to January 30, 2014 are simply not before us for review, and any claim that the RCPBA violated its duty of fair representation by its actions before this date are time-

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[33] *District Council 37*, 50 PERB ¶ 3038, 3161 (2017), quoting Rules § 213.2 (b) (internal quotation and editing marks omitted).

This case was originally assigned to ALJ Kenneth Carlson and was reassigned to ALJ Frederick K. Reich after ALJ Carlson left PERB's employment. In his exceptions, Lynn states that "[u]pon information and belief, Mr. Reich is employed by PERB as an [ALJ] AND as Assistant Counsel with the Office of Counsel for NYS PERB (emphasis in original). Exceptions, at 2. This is incorrect. Mr. Reich was always employed solely as an ALJ and never worked in PERB's Office of Counsel.

[34] *UFT (Leon)*; 48 PERB ¶ 3016, 3055 (2015); *UFT (Pinkard)*, 47 PERB ¶ 3020, 3061 (2014).

barred.[35]

As of January 30, 2014, it is undisputed that the RCPBA was not providing representation to Lynn to pursue his Third Article 78 proceeding or the appeal of his First Article 78 proceeding. However, the RCPBA agreed to reconsider its previous decisions to deny Lynn representation and payment for legal expenses, and again denied Lynn's request on February 7, 2014. The ALJ found that Lynn's allegation that this reconsideration decision violated RCPBA's duty of fair representation was timely. The RCPBA excepts to this finding, and we find merit to this exception. Here, as in *Captain's Endowment Association*, Lynn's request to RCPBA for reconsideration of its decision not to provide legal representation or to reimburse Lynn for the cost of his legal representation "does not effectively revive the charge. The reaffirmation of the [d]ecision [in February] raised no new factual or legal issues."[36]

The ALJ cited *Captain's Endowment Association* in his decision, but we find that he misapplied the decision. Given the ALJ's finding that Lynn presented no new

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[35] Lynn's exceptions are, for the most part, focused on events that occurred prior to January 30, 2014. For example, Lynn argues that "[t]his entire case revolves around Joe Baumgartner's letter and decision of July 18, 2013 deciding that Lynn had replaced him with another attorney and that RCPBA would not provide Lynn with representation again." Exceptions, at 2; *see id* at 2-10. Baumgartner's letter, however, is included only as background, as the circumstances surrounding the RCPBA's denial of representation to Lynn in July of 2013 are simply not before us for review.

[36] 10 PERB ¶ 3034, 3065 (1977). *See also CSEA, Local 1000 (Metzger)*, 50 PERB ¶ 3026, 3100 (2017); *NYCTA (Rosado)*, 37 PERB ¶ 3036, 3108 (2004); *UFT (Paul)*, 23 PERB ¶ 3038, 3077 (1990).

Even were we to find that the charge was timely, we would affirm the ALJ's finding that Lynn failed to show that the RCPBA's decision not to provide Lynn representation or to pay Lynn's legal expenses was arbitrary, discriminatory or founded in bad faith in violation of § 209-a.2 (c) of the Act, for the reasons given by the ALJ.

information to warrant a departure from the RCPBA's previous determination not to provide representation or to pay Lynn's legal expenses, he should have followed the holding of *Captain's Endowment Association* that a charge is not revived where no new factual or legal issues are raised in a request for reconsideration.

The ALJ dismissed the allegation that the RCPBA failed to pursue Lynn's April 7, 2014 grievance contesting the Town's notice that it would terminate Lynn's health insurance on April 30, 2014, or notify him of its determination with respect to that grievance, as moot. Lynn has not excepted to this finding. In the absence of any exceptions, we affirm the ALJ's finding.[37]

Based on the foregoing, the exceptions are denied, the ALJ's decision is affirmed for the grounds set out herein, and the charges must be, and hereby are, dismissed.

DATED: March 6, 2019
Albany, New York

John F. Wirenius, Chairperson

Anthony Zumbolo, Member

Monte A. Klein, Member

[37] *See* § 213.2 (b) (4) of our 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).

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

AHMED M. ELGALAD,

Charging Party,

CASE NO. U-35318

- and -

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

Respondent.

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

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

BOARD DECISION AND ORDER

This case comes to us on exceptions to a decision of an Administrative Law Judge (ALJ) dismissing an improper practice charge claiming that the Board of Education of the City School District of the City of New York (District) violated §§ 209-a.1 (a) and (c) of the Public Employees' Fair Employment Act (Act) by retaliating against Ahmed M. Elgalad for protected activity under the Act.[1] The ALJ held that Elgalad had established a *prima facie* case that the sudden downward trend in his performance evaluations and the bringing of disciplinary charges against him were motivated by his filing of grievances. However, she found that the District established it had acted because of legitimate business reasons, and not out of anti-union animus.

EXCEPTIONS

Elgalad has filed seven exceptions to the ALJ's decision, which occasionally overlap. The first exception contends that the ALJ's decision is inconsistent in its

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[1] 51 PERB ¶ 4551 (2018).

reasoning in that the "ALJ found that [Elgalad] met his burden of proof," only to then shift to a finding of legitimate business reason, or at most, personal animus as opposed to anti-union animus. The second exception asserts that the ALJ's decision is inconsistent with her prior decision in *New York City Board of Education (Bagarozzi)*,[2] based on the ALJ's finding in that case that the disciplinary proceedings against that teacher would never have been brought but for her union activity, which, Elgalad argues, "would appear to be the same situation here."[3]

Elgalad's third exception does not, in fact, claim an error on the part of the ALJ, but instead states her finding that multiple adverse actions took place in close temporal proximity to Elgalad's protected activity.

The fourth exception states that the primary charge against Elgalad was initiated by Assistant Principal Kabeya Mbuyi, against whom Elgalad had previously filed a grievance, adding that the retaliation against Elgalad was "virtually conceded" in the cross-examination of Principal Michelle Rochon. Elgalad's fifth exception states that the ALJ "did not even state AP Mbuyi's name correctly in her decision (calling him Bobti)," and claims that "a negative inference should have been drawn against the [District] based on [Mbuyi's] failure to be called as a witness" despite his availability and the relevance of his testimony.[4] This exception further states that "Principal Rochon continued to let AP Mbuyi interact with [Elgalad] even though [he] met with her and told her that AP Mbuyi had been discriminating against him."

The sixth exception contends that the ALJ erred in giving weight to Rochon's "false testimony about the attendance charges against Mr. Elgalad in her decision," despite the lack of any penalty being affixed to these charges by the hearing officer. Elgalad contends

[2] 51 PERB ¶ 4549 (2018), *affd*, 51 PERB ¶ 3032 (2018).
[3] Exceptions, ¶ 2.
[4] Exceptions, ¶ 5.

that he was unintentionally late on only two occasions due to unavoidable commuting issues and therefore not in violation of any School policies.

Finally, the seventh exception consists of a claim for relief, requesting that the negative observations and letters be removed from Elgalad's personnel file, and his 2015-2016 rating changed from "Developing" to "Effective."

The District supports the ALJ's decision, and argues that the exceptions should not be reviewed on the merits due to their failure to comply with § 213.2 (b) of our Rules of Procedure (Rules). For the reasons that follow, we affirm the ALJ's decision.

FACTS

Elgalad worked for the District as a high school swimming and physical education teacher for approximately 12 years prior to the events at issue. In September 2010, he was assigned to the High School of Global Citizenship in Brooklyn (School), where he worked until his removal in the fall of 2016. The leadership of the School consisted of, at the relevant times, Principal Michelle Rochon, Assistant Principal Kabeya Mbuyi, and Assigned Principal Livingston Hilaire.[5]

Elgalad testified that during his career, and through the end of the 2014-2015 school year, his performance ratings were always "Satisfactory" and "Effective," and "Highly Effective" during 2014 and 2015.[6] On June 1, 2015, Elgalad received a disciplinary letter from Mbuyi, which he successfully grieved, leading to the removal of the letter from his file.[7]

A few months later, on October 16, 2015, Hilaire rated Elgalad after an observation

[5] As the ALJ noted, an "Assigned Principal" does not administer a school, but is assigned to a school with its own Principal. The 2015-2016 school year was Hilaire's first at the High School of Global Citizenship.
[6] Charging Party's Exs 1, 2, 3. On cross-examination he conceded that, in 2009-2010, he was rated by a different principal as "Unsatisfactory."
[7] Charging Party's Ex 4.

as "Ineffective" in five categories and "Developing" in one.[8] Elgalad objected to the rating and also complained to Superintendent Michael Prayor.[9]

On December 7, 2015, Elgalad received an observation report from Rochon, rating him as "Effective" in five areas, "Ineffective" in two, and "Developing" in one.[10] Rochon revised the observation report after Elgalad filed a grievance regarding it.[11] Elgalad also filed a rebuttal.[12]

On or about February 1, 2016, Elgalad filed another grievance, this one challenging his assignments and class coverages for the second semester of the 2015-2016 school year.[13]

On March 24, 2016, Hilaire observed Elgalad and rated his performance as "Effective" across all categories. Four days later, on March 28, Rochon participated by telephone in a Step 2 hearing. The following day, Elgalad received five email notices to attend conferences on April 5, 2016, that could result in discipline.[14]

On April 6, 2016, Elgalad received another observation report prepared by Rochon, which rated him less than satisfactory.[15] Elgalad wrote a rebuttal to Rochon's rating of him and filed another grievance.[16]

Rochon issued four letters to Elgalad's file, all dated April 8, 2016, addressing Elgalad's not signing in and out of the School, not notifying the School of lateness, failing to sign out prior to leaving School, and another incident of failing to notify the School of

[8] Charging Party's Ex 6.
[9] Charging Party's Ex 7.
[10] Charging Party's Ex 8.
[11] Charging Party's Exs 13, 14.
[12] Charging Party's Ex 15.
[13] Charging Party's Ex 16.
[14] Charging Party's Ex 17.
[15] Charging Party's Ex 21.
[16] Charging Party's Exs 22, 23, 24.

lateness.[17] Also on April 8, 2016, Elgalad was called to two more disciplinary conferences, following which he received another letter to his personnel file from Rochon dated April 19, 2016, memorializing Elgalad's not providing adequate supervision for students on a specific day, due to his lateness in reaching the School.[18]

On May 25, 2016, Elgalad was summoned to another disciplinary conference, this time by Mbuyi, following which he received two more letters to file, dated May 26 and June 10, 2016, respectively.[19] The May 26 letter concerned Elgalad speaking to a student who had submitted a written statement to the administration involving Elgalad, which the District asserted violated Chancellor's Regulation A-421.[20]

On June 22, 2016, Elgalad was served with disciplinary charges pursuant to Education Law (EL) § 3020-a, seeking termination of his employment. Elgalad initiated a special harassment complaint through his union, the United Federation of Teachers (UFT), two days later. On June 28, 2016, he received a "Developing" rating for the school year.[21]

On September 13, 2016, Elgalad was reassigned from the School during the pendency of the charges against him.[22] After a hearing, by an October 2016 decision, he was assessed a $1,000 fine on a finding of guilt for specifications involving questioning a student during an investigation[23] and failing to notify the School of his lateness on March 21 and March 24, 2016.[24] He was assigned to the District's Absent Teacher Reserve Pool

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[17] Charging Party's Ex 18.
[18] Charging Party Exs 19, 20.
[19] Charging Party's Ex 28.
[20] Charging Party's Ex 28.
[21] Charging Party's Ex 31.
[22] Respondent's Ex 1.
[23] Rochon testified that the student who Elgalad spoke to was intimidated by the conversation, and feared that her standing as class valedictorian could be threatened if her involvement affected the grade assigned to her by Elgalad. (Tr, at 238). Elgalad claimed he was unaware of the pending investigation when he spoke to the student. (Tr, at 84).
[24] Charging Party's Exs 18, 20, 34.

once the decision was rendered.[25] For the 2016-2017 school year, he received a "Satisfactory" rating.[26]

Elgalad testified that Hilaire stated to him, in March 2016 before a Step 2 grievance meeting, words to the effect of, "[N]othing will affect Ms. Rochon. If you say a word, we will get you." Elgalad allegedly responded, "I can defend myself."[27] Hilaire's testimony was not consistent with Elgalad's; he recalled that, in mid-March of 2016, Elgalad had filed a number of grievances, but he did not recall the specifics. He denied having had any conversation with Elgalad about the grievances and said he attended, at Rochon's request, only to take notes and observe. He also denied that the grievances had any influence on his ratings of Elgalad. On redirect examination, Hilaire explained that part of his presence at those meetings was in response to Elgalad's hostility and confrontational behavior during prior meetings with administration.

Hilaire testified that in order to ensure feedback from different sources, he created an observation schedule at the School among the three administrators, pursuant to which he observed Elgalad twice. Hilaire's October 16, 2015 observation criticized Elgalad's failure to assign any group activity or other tasks to students while he was conducting individual students' height and weight measurements.[28] His observation, he insisted, was accurate and fair, and completely uninfluenced by Rochon, who was not Hilaire's supervisor, or Elgalad's grievance activity.

The March 23, 2016 informal observation that Hilaire conducted rated Elgalad as

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[25] District witness, Mallory Sullivan, Deputy Director of the Office of Employee Relations, testified that following a EL § 3020-a decision, the District Superintendent decides whether a teacher is returned to his or her school. She added that she did not know if a building principal weighs in on that decision and had no knowledge of, or involvement in, that aspect of Elgalad's case.
[26] Charging Party's Ex 35.
[27] Tr, at 120-122.
[28] Charging Party Ex 6.

"Excellent" in all but one category, for which an "N/A" was assigned. The end of the year rating, Hilaire explained, is a numerical calculation based on a teacher's ratings throughout the year, as well as student performance, and is not subject to manipulation.

Rochon testified that her observations of Elgalad yielded two concerns, one related to Elgalad's instructional style, in his "mediating all the questions," and not seeking to elicit student participation, and the other to his respect and rapport with students, which she found to have diminished.[29] Rochon characterized the classroom atmosphere as "neither cold nor warm, it was just neutral."[30] Rochon also noted a lack of professional growth, despite feedback that was provided to Elgalad. Rochon claimed that her evaluations of Elgalad were fact-based, and she reiterated Hilaire's testimony that the year-end rating is formulaic, rather than subjective.

Regarding the disciplinary charges against Elgalad, Rochon referenced the School's time and attendance policies. Pursuant thereto, teachers are to advise the administration as early as possible of lateness or absence so class coverage can be secured. Rochon recounted instances of Elgalad's failure to comply with the attendance procedure, and testified that on one occasion, Elgalad's lateness led his class to be unsupervised.[31]

Rochon testified that at the end of one of the disciplinary conferences, Elgalad and the UFT representative refused to leave her office. Rochon called security. Even then, she noted, Elgalad and his representative did not leave until after security arrived.[32] She testified that at another time, Elgalad came to her office and "demanded that [she] get off

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[29] Tr, at 220.
[30] *Id*.
[31] Tr, at 229-234.
[32] On rebuttal, Elgalad admitted that he was asked three times to leave, but said that he was gathering papers and that the UFT representative was typing up their meeting notes. Tr, at 315.

[her] phone."[33]

In terms of the special complaint Elgalad filed which asserted he was being harassed, Rochon said that she was aware of it and participated in its investigation, accompanied by her own union representative. She said it was her understanding that if harassment were indicated, a notice of that finding would be sent out; as of the PERB hearing dates, Rochon had heard nothing formal, but had been informed by her union that there was a finding of no guilt.

Regarding the disciplinary charges, Rochon maintained those were based on legitimate concerns regarding unprofessional conduct by Elgalad. She admitted that she had requested his reassignment out of the building based on the hostility he had shown toward her, particularly during the one conference in her office where he refused to leave. The District Superintendent agreed with the request, although the final decision rested with the Office of Labor Relations.

On cross-examination, Rochon attributed any decline in Elgalad's performance ratings to an actual decline in his performance, stating that he focused more on his issues with the administration than on his teaching. She cited instances when she asked Elgalad for feedback and he would state that he was not required to provide any. She added that he had called her a racist and "dragged" her through various judicial and administrative forums.[34] She said she worked to fulfill requests he made about class assignments and attended the grievance meetings with an attitude toward resolution, "to make [Elgalad] happy."[35] Also, when Elgalad had issues with Mbuyi, Rochon removed Mbuyi from observing Elgalad in order to try to "keep peace."[36]

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[33] Tr, at 260.
[34] Tr, at 249.
[35] Tr, at 255.
[36] Tr, at 259.

When queried about the treatment of Elgalad in relation to other teachers at the School during that same time period, Rochon admitted that Elgalad was the only teacher written up for time and attendance issues. She also acknowledged that he was required to punch in and out to record his attendance, although the handbook requires this after only two occasions of lateness. Rochon noted, however, that Elgalad had more than two occasions of lateness, but only two were documented in writing.

Rochon repeatedly testified that her ratings and other treatment of Elgalad were based upon his performance, and were not influenced by his grievance activity, or her personal interactions with him.

DISCUSSION

We begin with the threshold matter of the District's objection to the exceptions as procedurally deficient. We have often found exceptions to be "deficient because they fail to comply with the requirements of § 213.2 (b) of our Rules" where the "exceptions do not set forth specifically the questions or policy to which exceptions are taken, identify that part of the decision to which exceptions are taken, or state the grounds for exceptions."[37] Where, as here, exceptions do not comply with § 213.2 (b) of the Rules through overbroad statements absent specificity, "[w]e have often held that such blunderbuss exceptions do not comport with the Rules, and do not preserve arguments not expressly made in the exceptions."[38]

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[37] *District Council 37*, 50 PERB ¶ 3038, 3161 (2017), quoting Rules § 213.2 (b) (internal quotation and editing marks omitted).

[38] *Village of Saranac Lake*, 51 PERB ¶ 3034, text at n. 5 (2018), citing *NYCTA*, 47 PERB ¶ 3032, 3009 (2014), quoting *UFT (Pinkard)*, 47 PERB ¶ 3020, 3061 (2014); *see also Town of Orangetown*, 40 PERB ¶ 3008 (2007), *confd sub nom Matter of Town of Orangetown v NYS Pub Empl Relations Bd*, 40 PERB ¶ 7008 (Sup Ct Albany Co 2007); *Town of Walkill*, 42 PERB ¶ 3006 (2009)). In *Saranac Lake*, where the appellant filed exceptions that did not comply with the Rule, but also filed an accompanying brief that fulfilled the Rule's requirements, and the adverse party did not object, we reviewed all the arguments. Here, Elgalad has not filed a brief that addresses the deficiencies in the exceptions, and the District has properly objected.

In our recent decision in *Churchville-Chili Central School District*, we declined to review exceptions where the party appealing "has not, however, stated the grounds for its exception or presented any arguments for finding the ALJ's analysis to be incorrect," and thus "[w]e are simply unable to discern any arguably meritorious basis asserted to support the [appellant's] challenge to the ALJ's decision."[39] As in these prior decisions, we limit our review of the exceptions here to those arguments expressly made, and thus properly before us.

Similarly, the exception asserting that an adverse inference should have been drawn against the District for not producing Mbuyi is deficient because it does not comply with the requirements of § 213.2 (b) of our Rules requiring exceptions to "designate by page citation the portions of the record relied upon," and to "identify that part of the decision . . . to which exceptions are taken," and "state the grounds for exceptions."[40] The ALJ's decision does not rest on any findings regarding Mbuyi, but rather on the documentary evidence, the testimony of Elgalad himself, Hilaire, and, in part, of Rochon. The exceptions do not specify any manner in which Mbuyi's testimony would have negated any aspect of the ALJ's reasoning that the District had established a legitimate business reason for the actions at issue, or her credibility determinations undergirding that reasoning.

We reject the claim that the ALJ's decision is internally inconsistent, and inconsistent with her decision in *Bagarozzi*. Elgalad misstates the ALJ's reasoning,

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[39] *Churchville-Chili Cent Sch Dist*, 51 PERB ¶ 3003, 3010 (2018).

[40] *Id*.; *see also* Rules, § 213.2 (b). Indeed, as far as can be gleaned from the record, Elgalad did not request a subpoena compelling Mbuyi's testimony. Exception No. 5 does not provide any citation indicating that an adverse inference was requested from the ALJ, in either the transcript, the post-hearing briefs, or any other document in the record. Thus, the exception is deficient, and thus, even if such a request were made and denied, the exception is insufficient to bring the claimed error before us. *DC 37 (Fonseca)*, 50 PERB ¶ 3038, 3161 (2017); *NYCTA (Ayala)*, 50 PERB ¶ 3017, 3073 (2017).

claiming that she "found that he met his burden of proof—*i.e.*, that but for Mr. Elgalad's protected union activity, he would not have been retaliated against with adverse actions by his School administration."[41] In fact, the ALJ wrote that "[b]ased on the totality of the evidence presented by Elgalad in support of his *prima facie* case, I find that he has satisfied his *initial* burden of proof."[42]

As we have often held, and recently reaffirmed

> When an improper practice charge alleges retaliation in violation of §§ 209-a.1 (a) and (c) of the Act, the charging party has the burden of demonstrating three elements by a preponderance of the credible evidence: a) that the affected individual engaged in protected activity under the Act; b) such activity was known to the person or persons taking the employment action; and c) the employment action would not have been taken "but for" the protected activity. As we have often reaffirmed, the ultimate burden of proof always remains with the charging party.
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> However, the initial burden of proof to establish a *prima facie* case (an inference of improper motivation) is relatively low. The ALJ is required to accept the charging party's evidence as true, and give it the benefit of every reasonable inference that can reasonably be drawn from that evidence. Moreover, a charging party can establish the existence of anti-union animus by statements or by circumstantial evidence, which may be rebutted by evidence of legitimate business reasons for the actions taken, unless those reasons are found to be pretextual.[43]

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

> The employer "can dispel the *prima facie* case, and defeat the charge, by rebutting any of the three prongs of the *prima facie* case or through the presentation of evidence demonstrating that the employment

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[41] Exceptions, ¶ 1.
[42] 51 PERB ¶ 4551, at 4709 (emphasis added).
[43] *Board of Educ, City Sch Dist City of New York (Bagarozzi)*, 51 PERB ¶ 3032, 3140 (2018) (internal editing marks and citations omitted); *see also State of New York (Dept of Transportation)*, 50 PERB ¶ 3004, 3021 (2017), citing *State of New York (SUNY)*, 38 PERB ¶ 3019 (2005), *confd sub nom CSEA v NYS Pub Empl Relations Bd*, 35 AD3d 1005, 39 PERB ¶ 7012 (3d Dept 2006).

> action or conduct was motivated by a legitimate non-discriminatory business reason." If the respondent establishes a legitimate non-discriminatory reason, then the burden, "shifts back to the charging party to establish that the articulated non-discriminatory reason is pretextual. When a charging party fails to meet its burden, a charge of improper motivation must be rejected and the charge dismissed.[44]

Here, the ALJ found that Elgalad had established the elements of a *prima facie* case (protected activity, employer's knowledge thereof, and evidence supporting an inference of retaliatory intent). However, such a finding is not inconsistent with the ALJ subsequently dismissing the charge either on the ground that the employer, on a subsequently developed record, has either refuted one or more of the elements of the *prima facie* case, or that it has demonstrated that the employment action or conduct was motivated by a legitimate non-discriminatory business reason. Here, the ALJ found that the evidence, particularly the credited testimony of Principal Rochon and Principal Hilaire, led her to conclude that the "District effectively proved that it acted for legitimate business reasons."[45]

Credibility determinations by an ALJ are generally entitled to "great weight unless there is objective evidence in the record compelling a conclusion that the credibility finding is manifestly incorrect."[46] Here, Elgalad has not provided any such objective evidence that

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[44] *Id*., quoting *Mt Pleasant Cent Sch Dist (Hall)*, 50 PERB ¶ 3019, 3079 (2017) (internal quotations and citations omitted), *see also State of New York (OTDA)*, 51 PERB ¶ 3023, 3094 (2018); *Bellmore-Merrick Cent High Sch Dist*, 48 PERB ¶ 3022, 3976 (2015); *Village of Endicott*, 47 PERB ¶ 3017, 3050 (2014); *UFT, Local 2, AFL-CIO (Jenkins)*, 41 PERB ¶ 3007 (2008), *confd sub nom Jenkins v NYS Pub Empl Relations Bd*, 41 PERB ¶ 7007 (Sup Ct NY Co 2008), *affd*, 67 AD3d 567, 42 PERB ¶ 7008 (1st Dept 2009); *City of Salamanca*, 18 PERB ¶ 3012 (1985).

[45] *Bd of Educ (Elgalad)*, 51 PERB ¶ 4551, at 4710.

[46] *Id*, citing *Bellmore-Merrick Cent Sch Dist*, 48 PERB ¶ 3022, at 3077 (quoting *UFT (Cruz)*, 48 PERB ¶ 3004 (2015)); *see also Village of Scarsdale*, 50 PERB ¶ 3007, 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); *Captain's Endowment Assn*, 10 PERB ¶ 3034 (1977); *see also County of Ulster*, 39 PERB ¶ 3013, at 3045-3046 (citing *Fashion Institute of Technology v Helsby*, 44 AD2d 550, 7 PERB ¶ 7005, 7009 (1st Dept 1974)) (deference due credibility determinations based on observation of witness's demeanor).

establishes that the ALJ manifestly erred.

The ALJ found that Principal Rochon and Principal Hilaire "were clear and specific in describing their concerns with Elgalad's pedagogy and student management."[47] While Elgalad asserts that Rochon's testimony is unreliable, the exceptions do not mention Hilaire's testimony at all, which the ALJ found credible, and which corroborates Rochon's testimony in key parts. As the ALJ found, Hilaire testified that his observation of Elgalad "was accurate and fair, and completely uninfluenced by Rochon (who was not his supervisor) or by Elgalad's grievance activity."[48] Moreover, Elgalad himself corroborates portions of Rochon's testimony; the ALJ noted the "strained relationship between Rochon and Elgalad."[49] Rochon testified to insubordinate and what she deemed aggressive or intimidating conduct, including but not limited to Elgalad and his Union representative's refusal to leave her office at the conclusion of their meeting with her and AP Mbuyi, until she had called security and the arrival of the security personnel. Elgalad admitted this incident, although he testified that it unfolded more swiftly than Rochon testified.[50]

Regarding the attendance issues, Elgalad himself admitted to his latenesses,

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Elgalad's claim that the ALJ's credibility determinations were inconsistent with those in *Bd of Educ* (*Bagarozzi)* are unpersuasive. While in *Bd of Educ* (*Bagarozzi)*, the ALJ found credible the testimony supporting the claim of retaliatory anti-union animus, in this case, the ALJ drew different conclusions from the (footnote con't next page) (footnote con't from previous page) testimony of different witnesses testifying to different circumstances. In both cases, the same analysis was applied, albeit with varying results as to the outcome. However, the ALJ applied similar criteria in applying the analysis and determining credibility in both cases, crediting in both cases the witnesses who were composed, consistent, and corroborated by testimonial or other evidence over those she found unclear, inconsistent, and evasive. *See Bd of Educ (Elgalad),* 51 PERB ¶ 4551, at 4710; *Bd of Educ (Bagarozzi)*, 51 PERB ¶ 4549, 4700-4701 (2018).

[47] 51 PERB ¶ 4551, at 4710.

[48] 51 PERB ¶ 4551, at 4708.

[49] *Id*. Rochon's outburst in cross-examination does not support the characterization in Exception No. 5 that "retaliation against Mr. Elgalad was apparent and virtually conceded." Rather, although Rochon testified that she felt "harassed" and "traumatized" by Elgalad's filings before multiple fora, she repeatedly denied that she had lowered his ratings in retaliation for these filings. Tr, 248-249; 252.

[50] Tr, 287-292 (Rochon); 314-316 (Elgalad).

although, as the ALJ noted, he minimized its importance and impact.[51] Likewise, Elgalad did not deny having a conversation with a student who was a witness in a then-open investigation regarding him, but denied knowledge of the investigation.[52]

Elgalad emphasizes, understandably, the evidence supporting the ALJ's finding that he had established a *prima facie* case.[53] However, he does not adduce persuasive arguments that the ALJ erred in finding that the District carried its burden of establishing that its actions were motivated by a legitimate non-discriminatory business as found by the ALJ. As the ALJ observed, "[e]ven if the District's judgment was wrong in assessing the seriousness of his actions, and I do not find that it was, it had established that it acted out of legitimate business concerns, rather than animus."

In sum, we find that, taken as a whole, "the record adequately supports the ALJ's credibility determinations, as well as the conclusions that the ALJ drew from the testimony."[54]

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

DATED: March 6, 2019
Albany, New York

John F. Wirenius, Chairperson

Anthony Zumbolo, Member

Monte A. Klein, Member

[51] 51 PERB ¶ 4551, at 4710.
[52] *Id*.
[53] Exceptions Nos. 1, 6, and 7.
[54] *State of New York* (*Office of Parks, Recreation & Historic Preservation*), 51 PERB ¶ 3025, 3107 (2018).

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

SANJA DRINKS-BRUDER,

Charging Party, **CASE NO. U-36353**

- and -

NIAGARA FALLS POLICE CLUB, INC.,

Respondent,

- and -

CITY OF NIAGARA FALLS,

Employer.

SANJA DRINKS-BRUDER, *pro se*

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by Sanja Drinks-Bruder, a police officer employed by the City of Niagara Falls (City), to a decision of the Director of Public Employment Practices and Representation (Director) dismissing her amended improper practice charge.[1] Drinks-Bruder's charge alleged that the Niagara Falls Police Club, Inc. (Union) breached its duty of fair representation to her and thus violated § 209-a.2 (c) of the Public Employees' Fair Employment Act (Act). In her original charge, filed on May 1, 2018, Drinks-Bruder alleged that, on December 16, 2017, Drinks-Bruder requested that Union President Michael Lee provide her with a copy of an updated collective bargaining agreement (Agreement) covering the period from January 1, 2011 through December 31, 2018. Lee told Drinks-Bruder that the employer "had yet to

[1] 51 PERB ¶ 4567 (2018).

provide him with a contract that encapsulates all of it together."[2] He provided Drinks-Bruder with "what he had," that is, a Memorandum of Understanding that included the "updated amendments to the contract mentioned above, and nothing more should be there," to his knowledge.[3] On December 17, 2017, Drinks-Bruder requested copies of the complete Agreement from the City pursuant to the Freedom of Information Law (FOIL).[4] The City, in its December 26, 2017 and in its January 2, 2018 email response to Drinks-Bruder's FOIL request and her subsequent appeal provided her with contracts of which she already had copies. On January 3, 2018, Drinks-Bruder "was informed by the [City's] [L]aw [Department] "that the contract had not been completed as it should be."[5]

On June 12, 2018, the Director, pursuant to § 204.2 of our Rules of Procedure (Rules), sent Drinks-Bruder a deficiency notice, noting that the charge was not properly notarized and that the charge appeared to be untimely. Drinks-Bruder filed an amendment to the charge, which was notarized. The amendment, a handwritten addendum, did not allege any new or different facts than those contained in the initial charge, but asserted that the Union had "proved itself negligent in failing to provide a complete and fully updated contract to this member of the union."[6]

The Director in her decision found that the amended charge was fatally deficient for three reasons. First, she found that the amendment was procedurally defective in that Drinks-Bruder failed to submit a properly notarized amended charge form, and that

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[2] Charge Addendum ¶ 5.
[3] Charge Addendum ¶ 5.
[4] Public Officers Law, Art. 6.
[5] Charge, at 2.
[6] Amendment to Charge, ¶ 2.

the notarized handwritten amendment did not cure the deficiency of not having the initial charge notarized. Second, the Director found that the amended charge did not allege a timely claim, as the acts complained of took place on December 16, 2017, and the charge was filed on May 1, 2018—more than four months afterward. Finally, the Director found that the facts alleged in the charge did not establish a breach of the duty of fair representation.

EXCEPTIONS

Drinks-Bruder appears to assert that the charge is timely, based upon the City's not having advised her until January 3, 2018 that the contract "had not yet been updated through the law department."[7] She acknowledges that she is "unhappy with the quality and lacking [*sic*] of their representation."[8] She contends that both the Union and the City acted arbitrarily toward her. The Union "arbitrar[il]y allowed the City to not update and give a signed contract leaving me unprotected and improperly informed."[9] She argues that "it is discriminatory that all those who can assist charging party who is a black female are white."[10] Finally, she asserts that the Union "shows bad faith by not assisting charging party in getting the fully updated signed contract to assist in future court dates" in other litigation brought by Drinks-Bruder.

DISCUSSION

Drinks-Bruder did not except to the Director's finding that the notarization of the

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[7] Exceptions, at 3. Drinks-Bruder's exceptions are in narrative form, and state that the Union has not represented her in other, unspecified, meritorious claims, "and no reason is ever given why."
[8] Exceptions, at 2.
[9] Exceptions, at 4.
[10] *Id*.

amendment did not cure the charge's failure to comply with § 204.1 (a) (3) of our Rules of Procedure (Rules), which requires that a "charge shall be in writing on a form provided by the director and shall be signed and sworn to before any person authorized to administer oaths."[11] Therefore, any such exception to this ruling is waived, and the issue is not properly before us.[12] However, in the interest of clarity, we note that the Director's decision does not hold that the deficient notarization of an amendment consisting solely of argument is so fatal a deficiency as to itself lead to dismissal of an otherwise viable charge. We need not, and do not, decide that question today.

The Director correctly held that the charge was untimely filed. Section 204.1 (a) of our Rules "requires that an improper practice charge to be filed within four months of when the charging party had actual or constructive knowledge of the conduct that forms the basis for the alleged improper practice."[13]

The charge here is solely against the Union, which, by Drinks-Bruder's own allegation, informed her on December 16, 2017 that it had not received an updated Agreement, despite its requests that the City provide one. As May 1, 2018 is more than

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[11] The original charge form bears an illegible signature in the place for the notarization, but does not include the name, commission number, or the expiration date of the purported notary.

[12] Rules § 213.2; *see, eg*, *Bd of Educ, NYC Sch Dist (Smith)*, 51 PERB ¶ 3035, n 16 (2018), citing *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).

[13] *UFT (Martinez)*, 51 PERB ¶ 3021, 3088 (2018), citing *District Council 37 (Bacchus)*, 50 PERB ¶ 3013, 3057-3058 (2017); *see also UFT (Davis)*, 50 PERB ¶ 3014, 3059 (2017); *New York State Thruway Auth*, 40 PERB ¶ 4533, 4595 (2007); *State of New York (Office of Children and Family Services (Leone))*, 50 PERB ¶ 3039, 3163 (2017); *CSEA, Inc., Local 1000, AFSCME, AFL-CIO*, 28 PERB ¶ 3072, 3168, n 4 (1995).

four months after December 16, 2017, the charge is untimely.[14]

Drinks-Bruder contends that the charge is timely, dating the accrual of her claim to January 3, 2018, the date on which she "was advised by the *City* . . . that the contract for [January 1, 2011 through December 31, 2018] had not yet been updated through the [City] [Law [D]epartment."[15] As the Union had already advised her on December 16, 2017 of its failure to obtain an updated Agreement, and had provided her the documents it did have, the City's confirmation that no updated Agreement had been compiled does not in any way extend Drinks-Bruder's time in which to assert a claim against the Union. Although we have found a respondent to be equitably estopped from asserting a timeliness defense where the respondent has, through its conduct, induced the charging party to delay filing a charge until the filing period has passed, that limited exception does not apply here.[16] Simply put, there is no allegation that Drinks-Bruder was detrimentally induced by the Union to delay filing a charge until the appropriate filing period had passed.

In her exceptions, Drinks-Bruder for the first time asserts that the City acted in bad faith. However, neither the charge nor the amendment purports to state a claim

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[14] *Id*.

[15] Exceptions, at 3 (emphasis added).

[16] *District Council 37 (Bacchus)*, 50 PERB ¶ 3013, 3058 (2017), citing *County of Onondaga*, 12 PERB ¶ 3035, 3065 (1979), *confd sub nom County of Onondaga v NYS Pub Empl Relations Bd*, 77 AD2d 783, 13 PERB ¶ 7011 (4th Dept 1980) (finding charge filed 14 months after announcement of change to be timely where employer detrimentally induced employee organization to delay filing a challenge to change pending employer's actions aimed at such revocation); *Great Neck Water Pollution Control District*, 27 PERB ¶ 3057, 3134 (1994) (finding charge filed more than four months after announced change timely where employer led employee organization to believe that that change had been rescinded). *Cf City of Elmira*, 41 PERB ¶ 3018, at 3086 (finding charging party failed to meet burden of demonstrating that respondent was equitably estopped from asserting timeliness defense).

against the City.[17] As we have often held and recently reaffirmed, "it is well established that the Board will not address arguments raised for the first time on exceptions."[18] Because "our review is limited to the record before the ALJ, we do not address" issues that are "impermissibly raised for the first time in [the] exceptions."[19] Accordingly, any such claim against the City is not properly before us.

Similarly, we affirm the Director's finding that, accepting Drinks-Bruder's allegations as true for the purposes of this decision, the allegations do not establish a breach of the duty of fair representation. 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."[20]

As we have previously explained, the courts have

> reject[ed] the standard . . . that "irresponsible or grossly negligent"

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[17] Drinks-Bruder, in filling out the charge form, checked only the column applicable to a violation "by an employee organization," and both the narrative appended to the charge and the amendment reference as wrongful behavior by the Union.

[18] *Bd of Educ, City Sch Dist of City of New York (Bagarozzi)*, 51 PERB ¶ 3032, at 3139, quoting *CUNY (Javed)*, 50 PERB ¶ 3028, 3108, n 25 (2017), citing *New York State Thruway Auth*, 47 PERB ¶ 3032, 3100, at n 25 (2014); *Rochester Teachers Assn (Hirsch)*, 46 PERB ¶ 3035, 3078 (2013); *County of Sullivan and Sullivan County Sheriff*, 41 PERB ¶ 3006, 3038 (2008); *Town of Penfield*, 30 PERB ¶ 3060, 3154 n 7 (1997); *see also City of Cortland*, ("having not raised this argument or factual precedent to the ALJ, the [District] may not raise the issue to us for the first time on exceptions"), 51 PERB ¶ 3014, at 3065 (2018), citing *City of Poughkeepsie*, 33 PERB ¶ 3029, 3079-3080 (2000); *TWU, Local 100 (Guichard)*, 31 PERB ¶ 3066, 3147 (1998); *Town of New Hartford*, 29 PERB ¶ 3076, 3181 (1996); *Mt Markham Cent Sch Dist*, 27 PERB ¶ 3030, 3073 (1994).

[19] *Id*, citing *CUNY (Javed)*, 50 PERB ¶ 3028, at 3106, citing *New York State Thruway Auth*, 47 PERB ¶ 3032, at 3100, n 25.

[20] *UFT (Spaulding)*, 51 PERB ¶ 3022, 3091 (2018), citing *District Council 37 (Fonseca)*, 50 PERB ¶ 3038, 3161 (2017).

> 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.[21]

Moreover, it is "well-settled that an employee organization is entitled to a wide range of reasonable discretion in the processing of grievances under the Act."[22] Additionally, as relevant here, "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."[23]

Application of these requisite elements of the charge to the facts alleged demonstrates that the charge does not arguably establish the breach of the duty of fair representation. In her amendment to the charge, Drinks-Bruder characterizes the Union as "negligent" in its representation of her, an allegation which the courts have found insufficient to establish a violation under the Act.[24] In her exceptions, Drinks-Bruder acknowledges her dissatisfaction with the quality of the Union's representation, which, again, does not establish a violation. She also asserts in her exceptions, for the first time, that the Union's actions were arbitrary, discriminatory, and in bad faith, on the

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[21] *Id*, citing *District Council 37 (Calendario)*, 49 PERB ¶ 3038, 3161 (2016); *see also Cairo-Durham Teachers Assn (DeOliveira),* 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)), *confd sub nom DeOliveira v NYS Pub Empl Relations Bd*, 133 AD3d 1010, 48 PERB ¶ 7006 (3d Dept 2015).
[22] *Id*, citing *District Council 37 (Calendario)*, 49 PERB ¶ 3038, at 3161.
[23] *Id*, quoting *District Council 37 (Fonseca)*, 50 PERB ¶ 3038, at 3161; *Cairo-Durham Teachers Assn (DeOliveira)*, 47 PERB ¶ 3008, 3026 (2014).
[24] Amendment, ¶ 2; *see Diaz*, 132 AD2d 430, at 432.

basis of factual allegations not included in either the original charge or in the amendment. As before, these new claims and factual allegations which appear for the first time in the exceptions are not properly before us, as "our review is limited to the record before the ALJ."[25] Moreover, as the Director correctly held, "the very facts alleged in the charge support that Union President Lee was responsive to Drinks-Bruder and did all that he could to answer her questions and provide her with the most recent version of the contract."[26] Under these circumstances, Drinks-Bruder's contentions that the Union's actions breached its duty of fair representation to her and thus violated the Act are not borne out by the allegations before the Director.

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

DATED: March 6, 2019
Albany, New York

John F. Wirenius, Chairperson

Anthony Zumbolo, Member

Monte A. Klein, Member

[25] *UFT* (*Bagarozzi)*, 51 PERB ¶ 3032, at 3139, quoting *CUNY (Javed)*, 50 PERB ¶ 3028, at 3108, n 25. Moreover, those new factual allegations, not properly before us, are conclusory in nature, and "such conclusory allegations are insufficient to plead, let alone prove, a violation of the duty of fair representation." *CSEA (Metzger)*, 50 PERB ¶ 3026, 3100 (2017).

[26] 51 PERB ¶ 4567, at 4819.