

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

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In the Matter of

**TEAMSTERS LOCAL 456,**

Petitioner,

-and-

**CASE NO. C-6622**

**TOWN OF POUGHKEEPSIE,**

Employer.

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**CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE**

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

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

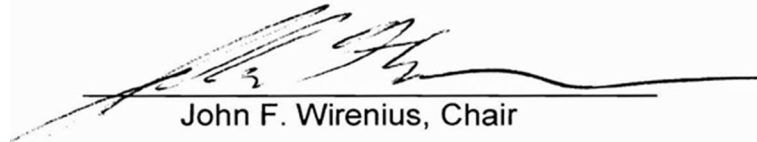
IT IS HEREBY CERTIFIED that the Teamsters Local 456 has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Included: Automotive Mechanic, Heavy Motor Equipment Operator, Laborer, Motor Equipment Operator, Road Maintainer, and Road Maintenance Supervisor.

Excluded: All other titles.

FURTHER, IT IS ORDERED that the above-named public employer shall negotiate collectively with the Teamsters Local 456. The duty to negotiate collectively includes the mutual obligation to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party. Such obligation does not compel either party to agree to a proposal or require the making of a concession.

DATED: August 23, 2021  
Albany, New York



John F. Wirenius, Chair



Anthony Zumbolo, Member



Rosemary A. Townley, Member

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

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In the Matter of

**DISTRICT COUNCIL 37,  
AFSCME, AFL-CIO**

Petitioner,

**CASE NO. C-6634**

-and-

**BATTERY PARK CITY AUTHORITY,**

Employer.

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**CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE**

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

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

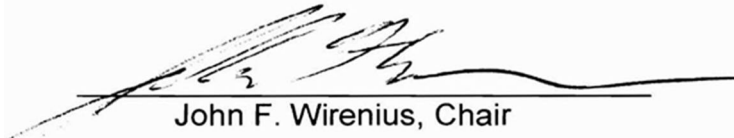
IT IS HEREBY CERTIFIED that District Council 37, AFSCME, AFL-CIO has been designated and selected by a majority of the employees of the above-named public employer, in the unit found to be appropriate and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Included: Lead Maintenance Technician Supervisor, Maintenance Technician Supervisor, Maintenance Technician, Assistant Warehouse Technician, Carpenter, Assistant Carpenter, Senior Horticulturalist and Turf Specialist, Senior Horticulturalist, Horticulturalist, Assistant Horticulturalist, Stone Mason, Assistant Stone Mason, Electrician, Assistant Electrician, Plumber, Assistant Plumber, Auto Mechanic, Assistant Auto Mechanic, Trades Generalist, and Maintenance Metal Worker/Carpenter.

Excluded: All persons designated as confidential or managerial under Civil Service Law § 201.7 (a), and all other employees.

FURTHER, IT IS ORDERED that the above-named public employer shall negotiate collectively with District Council 37, AFSCME, AFL-CIO. The duty to negotiate collectively includes the mutual obligation to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party. Such obligation does not compel either party to agree to a proposal or require the making of a concession.

DATED: August 23, 2021  
Albany, New York



John F. Wirenius, Chair



Anthony Zumbolo, Member



Rosemary A. Townley, Member

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

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In the Matter of

**YONKERS FIRE FIGHTERS, LOCAL 628,  
IAFF, AFL-CIO,**

Charging Party,

**CASE NO. U-36259**

-and-

**CITY OF YONKERS,**

Respondent.

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**ARCHER, BYINGTON, GLENNON & LEVINE LLP (RICHARD S. CORENTHAL  
and PAUL K. BROWN of counsel), for Charging Party**

**COUGHLIN & GERHART, LLP (PAUL J. SWEENEY and STEVEN L. FOSS of  
counsel), for Respondent**

**BOARD DECISION AND ORDER**

This case comes to us on exceptions filed by the City of Yonkers (City) to a decision of an Administrative Law Judge (ALJ), finding that the City violated § 209-a.1 (d) of the Public Employees Fair Employment Act (Act) when it unilaterally transferred to non-unit employees the work of performing “house-watch” duties.<sup>1</sup> The ALJ further found that the work had previously been performed by employees represented by Yonkers Fire Fighters, Local 628, IAFF, AFL-CIO (Local 628).

**EXCEPTIONS**

The City filed four exceptions to the ALJ’s decision. In its first exception, the City contends that the ALJ erred in finding that there was an established past practice of

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<sup>1</sup> 53 PERB ¶ 4541 (2020).

members of Local 628 performing the work at issue here, which it characterizes as “long term, exterior security work.”<sup>2</sup> The City’s second exception asserts that the work at issue (again characterized as “long term, exterior security work”) is not substantially similar to the “short term, interior “house-watch” duties performed by Local 628 members at City-owned active firehouses.”<sup>3</sup> The City’s third exception avers that the ALJ erred in finding that the work at issue was exclusively performed by Local 628 members. Finally, the City’s fourth exception claims that the ALJ erred by finding that the City violated § 209-a.1 (d) of the Act through its actions.

Local 628 supports the ALJ's decision and contends that no basis has been demonstrated for reversal.

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

### FACTS

Local 628 represents all regular, full-time firefighters working for the City’s Fire Department. In addition to 11 active firehouses, the Fire Department maintains a Department Headquarters building and a storage facility (Facility).

The Facility, located at 460 Nepperhan Avenue, across from Department Headquarters, is a large building of approximately 30,000 square feet. The Facility houses Fire Department equipment, including specialized fire equipment, such as a hazardous material trailer, that is used to respond to emergencies.<sup>4</sup> The Facility also houses spare and reserved apparatus; tools and equipment that may be needed to either replace current equipment or issue new equipment; and support and auxiliary

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<sup>2</sup> Respondent’s Exceptions, at 1.

<sup>3</sup> Respondent’s Exceptions, at 3.

<sup>4</sup> Tr, at 48-50 (Kelly); 71 (Kelly); 399 (Ford).

equipment that is used when an on-the-scene commander calls for additional or specialized resources.<sup>5</sup>

The Facility is regularly open weekdays, from 8:00 a.m. to 6:00 p.m., and is otherwise opened only as needed.<sup>6</sup> The Facility also has administrative space where, during normal business hours, two to three firefighters and two to three lieutenants are assigned to work.

Firefighters do not respond to daily calls or to calls of a routine nature from the Facility. Instead, they respond to calls “of a more significant nature,” such as a hazardous material accident, a leak in home heating fuel or a propane gas tank, a leak of chlorine at the reservoir, a multi-vehicle accident, or a water-rescue operation.<sup>7</sup> Fire Commissioner, Robert Sweeney, testified that the Facility provides “support operations in the field. Anything the field units may need during their course of duty they would call the premises and get assistance with that.”<sup>8</sup> During a recent, large general-alarm fire, numerous support resources from the Facility were used; off-duty members responded to the Facility, collected equipment, and responded to the fire scene.<sup>9</sup>

Barry McGoey, a firefighter and the president of Local 628, testified that “house-watch” duty consists of watching, securing, and safeguarding Fire Department property and equipment in any Fire Department facility. McGoey explained that “the most frequent type of house-watch would be when there was a security issue regarding entry or exit. Most common would be [a malfunction in] our large overhead doors.”<sup>10</sup>

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<sup>5</sup> Tr, at 354-55 (Sweeney).

<sup>6</sup> Tr, at 181 (McGoey); 355 (Sweeney).

<sup>7</sup> Tr, at 115-16 (McGoey).

<sup>8</sup> Tr, at 355 (Sweeney).

<sup>9</sup> Tr, at 355-56 (Sweeney).

<sup>10</sup> Tr, at 119 (McGoey).

Firehouses are staffed 24-hours a day, seven days a week. Firehouses have a “watch booth” that is located inside the fire station near the garage and fire engines. Firefighters may remain in the watch booth when performing house-watch duty. They also walk around inside the firehouse and around the outside perimeter of the firehouse, to check that it is secure. McGoey testified that house-watch duty normally lasts from one day and up to one week, but that if major work needs to be performed, it can last a lengthy period.<sup>11</sup> Fire Lieutenant, Eugene Kelly, similarly testified that house-watch duty normally lasts from two to three days, but has lasted as long as two weeks.<sup>12</sup>

Kelly, a member of the Superior Officers Association, is assigned to the Special Operations Unit and works at the Facility during its regular business hours. Kelly has performed house-watch duty as a firefighter and as a lieutenant. When he has performed house-watch duties as a lieutenant, as the assigned superior officer, Kelly is in charge of, and assigns duties to, the firefighters who perform house-watch duties and report to the superior officer.<sup>13</sup> As necessary, a superior officer may contact a firefighter and direct the firefighter to report to a location to perform house-watch duties. The superior officer may direct a firefighter who is performing house-watch duties to walk around the perimeter of a building, patrol inside the building, and check the building’s doors, equipment, vehicles, and water or heating system.<sup>14</sup> The superior officer assures that assigned duties are performed safely and properly. Kelly testified that, as a supervisor, he supervised those performing house-watch at the Facility in response to

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<sup>11</sup> Tr, at 123 (McGoey).

<sup>12</sup> Tr, at 89 (Kelly).

<sup>13</sup> Tr, at 125 (McGoey).

<sup>14</sup> Tr, at 225-26 (Kelly). Kelly provided the names of two firefighters who performed house-watch duties at the Facility. Tr, at 102 (Kelly).

Hurricanes Irene and Sandy and a “microburst” event.<sup>15</sup> Kelly testified that he also performed house-watch duties at the Facility, when he was a firefighter, and its doors were not working.<sup>16</sup>

Before the Fire Department began using the Facility to store equipment, the Fire Department operated a facility at Ridge Hill which served as a repository for Fire Department equipment. Kelly and McGoey testified that firefighters performed house-watch duties at that location also.<sup>17</sup>

Giuseppe Sindova, currently a labor supervisor for the City’s Engineering Department, worked for 20 years as a carpenter with the Department of Public Works (DPW). As a carpenter with DPW, Sindova made repairs in the various buildings used by the City, including in firehouses. He testified that before February 2018, no one from DPW was ever assigned to perform house-watch duties at a Fire Department building. Deputy Fire Chief, Kevin Ford, also testified that the Fire Department had “always secured” its own equipment since 1994.<sup>18</sup>

Sweeney testified that only firefighters, and not superior fire officers, are assigned to perform house-watch duty.<sup>19</sup> He noted that house-watch duty is performed mostly inside a facility.<sup>20</sup> Sweeney agreed that a long-standing practice exists of assigning firefighters to house-watch duty when there is a building security issue in an active firehouse, but asserted that the practice has existed only at active firehouses,

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<sup>15</sup> Tr, at 89 (Kelly); 102 (Kelly).

<sup>16</sup> Tr, at 103-04 (Kelly).

<sup>17</sup> Tr, at 45 (Kelly); Tr, at 111-12 (McGoey). Kelly testified that he performed house-watch duties himself as a firefighter “once or twice” at the Ridge Hill facility. Tr, at 45-46, 83 (Kelly).

<sup>18</sup> Tr, at 402 (Ford).

<sup>19</sup> Tr, at 348, 375 (Sweeney).

<sup>20</sup> Tr, at 346-47 (Sweeney).

and not at the Facility.<sup>21</sup> Sweeney testified that the Facility is not a fire house, that it is normally open only during normal business hours, whereas active firehouses are staffed seven days a week, 24-hours a day, except when the company is responding to an emergency or performing an inspection. The City's active firehouses are listed in the Department's telephone directory, but the Facility is not so listed.<sup>22</sup> Sweeney noted that, in contrast to firehouses, firefighters do not routinely respond from the Facility to typical emergency calls, but only when there is a major emergency that necessitates specialized equipment from the Facility.<sup>23</sup>

Sweeney also testified that "watch duties" are performed when there is no building security issue. A firefighter is assigned to the watch booth to answer telephone calls, attend to the door and to visitors, assure that the firehouse entrance is not blocked, and open the overhead bay doors as needed.<sup>24</sup> This type of duty is not at issue in this matter and, for purposes of this decision, "house-watch duties" means watching, securing, and safeguarding Fire Department property and equipment when there is a security issue regarding entry or exit.

Regarding Hurricane Sandy, Sweeney testified that house-watch duties were not performed at the Facility during that hurricane.<sup>25</sup> He stated that the Department decided to staff the Facility during Hurricane Sandy to assure that the Department would be able to respond, as necessary, to emergency calls. Sweeney noted that no additional staff was assigned during the day tour, when the building is normally staffed, and that the

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<sup>21</sup> Tr, at 347-48, 374-76 (Sweeney).

<sup>22</sup> *Id.* See also Tr, at 354 (Sweeney).

<sup>23</sup> Tr, at 115 (McGoey).

<sup>24</sup> Tr, at 344-46 (Sweeney).

<sup>25</sup> Tr, at 359-60 (Sweeney).

Department only added a night tour.

On February 7, 2018, the Facility's overhead garage door and bricks in the wall near that door were damaged when a Fire Department vehicle slipped on black ice.<sup>26</sup> The damaged door and wall were covered by a tarp. Firefighters were assigned to perform house-watch duties at the Facility on a 24-hour basis for a period of two weeks, until February 22, 2018.<sup>27</sup> During that time, firefighters walked through the Facility to assure it was secure, checked on the building's heating, plumbing and sprinkler system, and ensured that no one entered the Facility through the tarp.<sup>28</sup>

On February 23, 2018, the City stopped assigning Fire Department personnel to house-watch duty at the Facility, although the required repairs had not yet been completed and the building was not yet secure. Instead of assigning firefighters to house-watch duty, the City assigned employees working for DPW to watch the building. Specifically, DPW employees were assigned to sit in a vehicle parked outside the facility.<sup>29</sup> DPW personnel watched the facility in that manner for four weeks, until the garage door was replaced, and the wall was repaired. Until February 23, 2018, only Fire Department personnel performed house-watch duties at any Fire Department building, including the Facility.<sup>30</sup>

Firefighting equipment, including fire trucks, is both temporarily and regularly stored for maintenance and repair at the Service Center, a facility operated by DPW

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<sup>26</sup> Tr, at 55 (Kelly).

<sup>27</sup> Tr, at 59 (Kelly); 136 (McGoey).

<sup>28</sup> Tr, at 60, 62 (Kelly).

<sup>29</sup> Tr, at 62, 66 (Kelly).

<sup>30</sup> Tr, at 52 (Kelly); 117-18 (McGoey); 138 (McGoey).

employees.<sup>31</sup> Security at this location is provided by DPW employees. Other City vehicles are also maintained and repaired at the Service Center.<sup>32</sup> Fire Department vehicles, such as fire engines, have been stationed for repairs at the Service Center for as long as a couple of weeks.<sup>33</sup> Firefighters are not stationed at the Service Center and do not provide security for fire engines while they are at the Service Center, and do not perform security or house-watch duties at the Service Center if there is a problem with the doors to that facility.<sup>34</sup>

### DISCUSSION

It is well established that two essential questions must be addressed when determining whether a transfer of unit work violates § 209-a.1 (d) of the Act: (1) Was the at-issue work exclusively performed by unit employees for a sufficient period of time to establish a binding past practice; and (2) Was the work assigned to non-unit personnel substantially similar to that exclusive unit work.<sup>35</sup> If both these questions are answered in the affirmative, a violation of § 209-a.1 (d) of the Act will be found unless there has been a significant change in job qualifications. When there has been a significant

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<sup>31</sup> Tr, at 301-03 (DPW Deputy Commissioner, Sam Borrelli). A separate section in the Service Center is dedicated to the maintenance and repair of Fire Department vehicles. Tr, at 301 (Borelli). Another section is dedicated to Police Department vehicles and a third area is dedicated to other City vehicles. *Id.*

<sup>32</sup> Respondent's Ex 3; Tr, at 298-99, 302 (Borelli).

<sup>33</sup> Tr, at 309 (Borelli).

<sup>34</sup> Tr, at 310-11 (Borelli).

<sup>35</sup> *Pine Valley Cent Sch Dist*, 51 PERB ¶ 3036, 3159 (2018); *County of Chemung and Chemung Co Sheriff*, 50 PERB ¶ 3022, 3089 (2017); *Cayuga Comm Coll*, 50 PERB ¶ 3003, 3012-3013 (2017); *Greater Amsterdam City Sch Dist*, 49 PERB ¶ 3011, 3046 (2016); *Town of Stony Point*, 45 PERB ¶ 3045, 3115 (2012); *Town of Riverhead*, 42 PERB ¶ 3032, 3119 (2009); *Niagara Frontier Transp Auth*, 18 PERB ¶ 3083, 3182 (1985). See generally *Manhasset Union Free Sch Dist*, 41 PERB ¶ 3005, 3021-3022 (2008), *confd and mod, in part, Manhasset Union Free Sch Dist v NYS Pub Empl Relations Bd*, 61 AD3d 1231, 42 PERB ¶ 7004 (3d Dept 2009), on remand, 42 PERB ¶ 3016 (2009) (hereinafter *Manhasset*).

change in job qualifications, the respective interests of the employer and the unit employees must be balanced to determine whether the Act has been violated.<sup>36</sup>

The ALJ found that the work at issue here is the provision of house-watch duties at “locations from which the [City] Fire Department operates.”<sup>37</sup> The City implicitly excepts to this finding by persistently characterizing the at-issue work as “long term, exterior security work” at the Facility only.<sup>38</sup> The City does not dispute that bargaining unit members have exclusively performed house-watch duties at active firehouses, but asserts that the work at the Facility is distinct and that there has not been a past practice of assigning firefighters to perform house-watch duties at the Facility. For the reasons given below, we find that the proper definition of the at-issue work here is, as characterized by the ALJ, house-watch duties at all locations from which the City Fire Department operates.

There was ample testimony supplied about house-watch duties being performed by bargaining unit members at the Facility and at the Ridge Hill facility, the predecessor location where Fire Department equipment was stored prior to the Facility being used.<sup>39</sup> The testimony from Kelly and McGoey establishes that, when house-watch duties were required at Fire Department facilities, whether it was Ridge Hill, the Facility at issue here, or an active firehouse, those house-watch duties were performed by a firefighter,

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<sup>36</sup> *Pine Valley Cent Sch Dist*, 51 PERB ¶ 3036, at 3159; *Cayuga Comm Coll*, 50 PERB ¶ 3003, at 3012-3013, quoting *State of New York (Div State Police)*, 48 PERB ¶ 3012, 3041 (2015); *Town of Stony Point*, 45 PERB ¶ 3045, at 3115, citing *Town of Riverhead*, 42 PERB ¶ 3032 (2009).

<sup>37</sup> 53 PERB ¶ 4541, at 4723.

<sup>38</sup> See Respondent’s Brief in Support of Exceptions, at 1, 2, 3, 10.

<sup>39</sup> This is true even if Sweeney’s testimony is credited that house-watch duties were not performed at the Facility during Hurricane Sandy.

sometimes supervised by a superior fire officer.<sup>40</sup> Although house-watch duties are not an everyday occurrence, when they are necessary, firefighters perform this duty, both at active firehouses and at the Facility.<sup>41</sup> We do not find the length of time that any specific instance required the performance of house-watch duties to be a salient distinguishing feature. The City did not present any evidence that any other employees had ever performed house-watch duties at a Fire Department facility, for any length of time. Sweeney himself conceded that DPW employees had not performed the security function at issue here in the past.<sup>42</sup>

The evidence presented by Local 628 is sufficient to demonstrate that an enforceable past practice of assigning firefighters to perform house-watch duties existed from at least 1994 to 2018. The practice “was unequivocal and was continued uninterrupted for a period of time sufficient under the circumstances to create a reasonable expectation among the affected unit employees that the [practice] would continue.”<sup>43</sup> The City was not privileged to change this past practice without negotiating with Local 628 unless one of its other defenses has merit.

The City contends that house-watch duties were not exclusively performed by Local 628 bargaining unit members (firefighters), asserting that bargaining unit members represented by the International Brotherhood of Teamsters (Teamsters)

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<sup>40</sup> Tr, at 45-46, 51, 53, 83, 89, 232-33 (all Kelly); 117 (McGoey). See also the testimony of Ford, who testified that the Fire Department had “always secured” its own equipment. Tr, at 405 (Ford).

<sup>41</sup> See *Fashion Institute of Technology*, 41 PERB ¶ 3010, 3066 (2008).

<sup>42</sup> Tr, at 389 (Sweeney).

<sup>43</sup> *Manhasset Union Free Sch Dist*, 41 PERB ¶ 3005, at 3024. See also *Cayuga Comm Coll*, 50 PERB ¶ 3003, at 3013; *Chenango Forks Cent Sch Dist*, 40 PERB ¶ 3012, 3046-3047 (2007), quoting *County of Nassau*, 24 PERB ¶ 3029 (1991) (subsequent history omitted).

performed the same work at other City facilities that house Fire Department equipment and that employees represented by the Uniformed Fire Officers Association (UFOA) also performed the at-issue work.

We affirm the ALJ's finding that firefighters exclusively performed house-watch duties at Fire Department facilities. The work performed by Teamsters' members at other City facilities is easily distinguishable—those duties were not performed at Fire Department facilities from which the Fire Department and its employees operate. That different bargaining-unit members performed a security function over Fire Department equipment when that equipment was being maintained and repaired at non-Fire Department facilities does not destroy exclusivity over the at-issue work which was, as stated above, house-watch duties at all locations from which the City Fire Department operates.

We also note that, although UFOA members are sometimes assigned to house-watch duties at the same time as firefighters, the UFOA members are assigned as superior officers, and their functions are distinct from that of firefighters. Kelly's testimony demonstrates that UFOA members assign firefighters to house-watch duties and supervise them in their tasks. Because the supervisors do not actually perform the house-watch duties at issue here, their presence does not breach Local 628's exclusivity.

We find that the security function performed by DPW employees at the Facility is substantially similar to the house-watch duties performed by Local 628 members. We agree with the ALJ that firefighters and DPW employees performed the same job function—securing the Facility while one of its bay doors and part of its wall were

broken and the building could not be secured by merely locking it. Although firefighters performed additional duties, such as patrolling the perimeter of the building and checking the Facility's equipment, the security function was the same for both firefighters and DPW employees. The work assigned to non-unit employees need not be identical to the work performed by unit employees; "substantial similarity is all that is required."<sup>44</sup>

There is no assertion here that there has been a significant change in job qualifications. Application of a balancing test is therefore not appropriate.<sup>45</sup>

Accordingly, we affirm the ALJ's finding that the City violated § 209-a.1 (d) of the Act by using DPW employees to perform the exclusive bargaining unit work of employees represented by Local 628.

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

1. Return the work of performing house-watch duties at all locations from which the Fire Department operates, including the Facility located at 460 Nepperhan Avenue, to the bargaining unit;


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<sup>44</sup> *State of New York Dept of Correctional Svcs v Kinsella*, 220 AD2d 19, 22-23, 29 PERB ¶ 7008 (3d Dept 1996), citing *Niagara Frontier Transp Auth*, 18 PERB ¶ 3083, at 3182; *Monroe Co v NYS Pub Empl Relations Bd*, 111 AD3d 1342, (4<sup>th</sup> Dept 2013).

<sup>45</sup> Neither party raised before the ALJ nor excepted to her not applying our "civilianization" line of cases whereby transfer of duties from uniformed personnel to civilian personnel involves a *de facto* change in qualifications and is sufficient to trigger the balancing of employer and employee interests under *Niagara Frontier Transportation Authority*, 18 PERB ¶ 3083. See, eg, *Fairview Fire District*, 29 PERB ¶ 3042, 3099 (1996). Per § 213.2 (b) (4) of our Rules of Procedure (Rules), which we have strictly enforced by our case law, any such exceptions are therefore waived, and thus not before us for review. See, eg, *State of New York (Department of Civil Service)*, 51 PERB ¶ 3027, 3115 (2018); *Village of Westhampton Dunes*, 50 PERB ¶ 3035, 3146, n 8 (2017); *County of Chemung and Chemung County Sheriff*, 50 PERB ¶ 3022, 3090 (2017); *Village of Endicott*, 47 PERB ¶ 3017, 3052, n 5 (2014); *NYCTA (Burke)*, 49 PERB ¶ 3021, 3072, n 4 (2016) (citing cases).

2. Cease and desist unilaterally assigning exclusive bargaining unit work to non-unit employees without negotiating with Local 628;
3. Make whole affected employees for loss of wages and benefits, if any, as a result of the transfer of bargaining unit work at the Facility located at 460 Nepperhan Avenue to DPW employees, with interest at the maximum legal rate; and
4. Sign and post the attached notice at all physical and electronic locations customarily used to post notices to unit employees.

DATED: August 23, 2021  
Albany, New York



John F. Wirenius, Chair



Anthony Zumbolo, Member



Rosemary A. Townley, Member

# NOTICE TO ALL EMPLOYEES

PURSUANT TO  
THE DECISION AND ORDER OF THE

NEW YORK STATE  
PUBLIC EMPLOYMENT RELATIONS BOARD

and in order to effectuate the policies of the

NEW YORK STATE  
PUBLIC EMPLOYEES' FAIR EMPLOYMENT ACT

we hereby notify all employees of the City of Yonkers (City) in the unit represented by the Yonkers Fire Fighters, Local 628, IAFF, AFL-CIO (Local 628) that the City will forthwith:

1. Restore the work of performing house-watch duties at all locations from which the Fire Department operates, including the Facility located at 460 Nepperhan Avenue, to the bargaining unit;
2. Stop unilaterally assigning exclusive bargaining unit work to non-unit employees without negotiating with Local 628; and
3. Make whole affected employees for loss of wages and benefits, if any, as a result of the transfer of bargaining unit work at the Facility located at 460 Nepperhan Avenue to DPW employees, with interest at the maximum legal rate.

Dated .....

By .....  
on behalf of the City of Yonkers

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

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

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In the Matter of

**CLAUDIA IMBERT,**

Charging Party,

-and-

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

Respondent,

**CASE NO. U-36526**

-and-

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

Employer.

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**JERALD D. KREPPEL, Esq., for Charging Party**

**ROBERT T. REILLY, GENERAL COUNSEL (ARIANA A. DONNELLAN of  
counsel), for Respondent**

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

**BOARD DECISION AND ORDER**

This case comes to us on exceptions filed by Claudia Imbert to a decision of an Administrative Law Judge (ALJ) dismissing Imbert’s improper practice charge against the United Federation of Teachers, Local 2, AFT, AFL-CIO (UFT) on the UFT’s motion.<sup>1</sup> The ALJ found that Imbert did not plead a viable claim that the UFT violated § 209-a.2 (c) of the Public Employees’ Fair Employment Act (Act) when it declined to take Imbert’s claim for a line of duty injury (LODI) to arbitration. Imbert named the Board of Education of the City School District of the City of New York (District) as a “statutory party”

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<sup>1</sup> 54 PERB ¶ 4505 (2021).

pursuant to § 209-a.3 of the Act.

### EXCEPTIONS

Imbert filed exceptions to the ALJ's decision and a brief in support. Instead of clearly stating her objections to the ALJ's decision, Imbert briefly summarized her exceptions and attached her post-hearing brief, reply memorandum of law, and her request for the ALJ to reconsider her decision denying Imbert's request that the UFT be required to provide certain information. We discourage this type of diffuse pleading, as it does not comply with § 213.2 (b) of our Rules of Procedure (Rules), which requires that exceptions set forth specifically the questions or policy to which exceptions are taken and to state the grounds for exceptions. Nevertheless, in view of our longtime practice, we find that the exceptions are in satisfactory form under our Rules to be considered. As we recently reaffirmed in *State of New York (Office of Temporary and Disability Assistance)*,<sup>2</sup> we will generally consider exceptions where the gravamen of the asserted error is clear; in particular, where we are readily able to discern the basis of the excepting party's arguments and identify the portions of the ALJ's decision that it disagrees with. Imbert's exceptions here meet this standard.

Imbert claims that the ALJ erred in not finding that the UFT's refusal to take Imbert's LODI claim to arbitration was arbitrary, in violation of its duty of fair representation to Imbert. She further asserts that the UFT's decision was premised on a mistaken belief that her grievance would be hard to win. Imbert also avers that the ALJ should have addressed the question of whether a teacher who is injured while

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<sup>2</sup> 54 PERB ¶ 3011 (2021).

returning home from a teaching assignment is injured in the line of duty. Finally, Imbert contends that the ALJ erred in declining her “discovery” request that the UFT be required to provide certain requested information.

The UFT claims that Imbert’s exceptions are deficient under § 213.2 of our Rules and that Imbert improperly raises facts for the first time on exceptions. On the merits, the UFT supports the ALJ’s decision and contends that no basis has been demonstrated for reversal.

The District submitted a response in which it states that it lacks knowledge or information sufficient to form a belief as to the charge or Imbert’s exceptions.

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

### FACTS

Because Imbert’s exceptions seek reversal of the ALJ’s decision granting a motion to dismiss, we “assume the truth of all of the charging party’s evidence and give the charging party the benefit of all reasonable inferences that could be drawn from those assumed facts.”<sup>3</sup>

Imbert worked as teacher for the District for approximately 15 years. In April of 2016, she was working as a teacher for homebound students, a position that required her to travel to her students’ homes to provide instruction.<sup>4</sup> On April 1, 2016, while crossing the street to reach her automobile after leaving her last assignment of the day,

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<sup>3</sup> *County of Chenango and Chenango County Sheriff*, 53 PERB ¶¶ 3006, 3019 (2020), quoting *UFT (Spaulding)*, 51 PERB ¶¶ 3022, 3094 (2018). See also *CSEA (Trowbridge)*, 48 PERB ¶¶ 3024, 3093 (2015); *Town of Tuscarora*, 45 PERB ¶¶ 3044, 3112 (2012); *County of Livingston*, 43 PERB ¶¶ 3018, 3073 (2010); *County of Nassau (Unterweiser)*, 17 PERB ¶¶ 3013, 3030 (1984).

<sup>4</sup> Offer of Proof, at ¶ 1.

Imbert was struck by a vehicle.<sup>5</sup> Imbert filed with the District the requisite paperwork to apply for a LODI claim.<sup>6</sup> The District placed “an administrative bar” on her claim.<sup>7</sup> An administrative bar is a denial of the claim on a ground that prevents the claim from proceeding to the District’s Medical Bureau for a determination regarding the injury and causality.<sup>8</sup> Imbert filed a grievance seeking to have the administrative bar lifted so the Medical Bureau could review her LODI claim.<sup>9</sup>

On March 10, 2017, Imbert’s grievance was scheduled to be heard by a representative of the chancellor.<sup>10</sup> Imbert was unable to attend the hearing for medical reasons. At Imbert’s request, the UFT proceeded with the grievance hearing without her and served as her representative. On March 31, 2017, the hearing officer issued a written grievance decision denying the claim and finding that the imposition of an administrative bar did not violate the collective bargaining agreement. The decision cites to Personnel Memorandum No. 4 (PM 4), which sets forth the District’s policies and procedures pertaining to LODI claims. PM 4 requires that the following “causal factors” be considered in determining whether to grant a LODI claim:

An accident or incident is in the natural, direct, and immediate cause of an injury or disability, that could not have been foreseen or avoided with ordinary care by the injured employee. An employee’s statement that an injury was the result of an untoward incident. . . or that it occurred in the exercise of ordinary care, shall be considered conclusive unless the contrary is proven. The proof must be objective and credible evidence unless the employer can establish

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<sup>5</sup> Offer of Proof, at ¶¶ 3-5.

<sup>6</sup> Offer of Proof, at ¶ 6.

<sup>7</sup> *Id.*

<sup>8</sup> See ALJ letter dated January 18, 2019. See *also* the grievance decision dated March 31, 2017, annexed to the improper practice charge (Charge) as Ex 1.

<sup>9</sup> See Charge, Ex 1.

<sup>10</sup> *Id.*

that the employee has a documented pattern of abuse of injury in the line of duty claims or other substantial evidence which is sufficient to establish an employee's lack of credibility as to this particular claim.<sup>11</sup>

PM 4 also requires employees be "on duty" at the time of their injury and it defines the term "on duty" as including when

1. The employee has officially reported to work.
2. The employee is on school property during lunch period or immediately before or after officially reporting to or from work. (School Property is considered to be the school itself, the surrounding area including the playground fields and/or play areas, the sidewalk outside the school, and the school parking lot.)
3. The employee is not on school property but has approval to work at another site or at an out-of-school assignment such as coaching or field trips.
4. The employee is traveling outside the school pursuant to explicit instructions from a supervisor (e.g. transporting payroll material, or is directly *en route* to or from a meeting or conference.)
5. The employee has an assignment, which requires travel and is injured while performing duties connected with this assignment (e.g. attendance teacher or teacher of the homebound.)<sup>12</sup>

The March 31, 2017 grievance decision held that Imbert did not meet the criteria for a LODI on two grounds. It stated, first, that Imbert did not exercise due care as required by PM 4 because the police accident report indicated that the driver of the vehicle that struck Imbert claims that she "was on the cellphone while crossing the intersection and not attentive to traffic."<sup>13</sup> In addition, the grievance decision found that Imbert was not on duty as defined by PM 4. The decision states:

grievant was not in between assignments and this accident did not occur while the employee was performing duties connected with this assignment. The undersigned ascertained that there is more than one city block between the two locations. There was no claim made that the grievant was travelling between worksites.

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<sup>11</sup> PM 4 is annexed to the UFT's Answer as Ex A.

<sup>12</sup> UFT's Answer, Ex A.

<sup>13</sup> Charge, Ex 1.

Therefore, it follows that [grievant was not on school property as defined by PM4 and the injury sustained does not constitute an injury in the line of duty.<sup>14</sup>

Imbert filed an appeal of the grievance decision with the District, seeking to proceed to arbitration.<sup>15</sup> In her grievance appeal, Imbert denied that she was using a cellphone while crossing the street, and argued that the hearing examiner should not have relied on the driver's contrary statement, noting that the driver was not a disinterested witness and that PM 4 required that her assertion that she exercised ordinary care should be credited.<sup>16</sup> Imbert also argued in her appeal that the hearing examiner erred by finding that she was not "on duty" when the injury occurred. Imbert points to the fact that she had just left her student's home and that she was within one city block from her student's home.<sup>17</sup> She also argues that PM 4 does not include a "one city block" requirement that the grievance decision uses to find that she was not on school property.<sup>18</sup>

After the March 31, 2017 grievance decision was issued, Imbert asked the UFT to proceed to arbitration with her LODI grievance.<sup>19</sup> On January 8, 2018, Imbert appeared before the UFT's Administrative Grievance Committee (Ad Com) and was given an opportunity to present documentary evidence and argue why the UFT should

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<sup>14</sup> *Id.*

<sup>15</sup> Offer of Proof, at ¶ 10.

<sup>16</sup> Imbert's appeal of the grievance decision is annexed to the Offer of Proof as Ex A.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> Offer of Proof, at ¶ 11. The record does not state when Imbert first asked the UFT to take her grievance to arbitration.

take her LODI grievance to arbitration.<sup>20</sup> On January 23, 2018, Imbert sent an email to UFT Special Representative, Ellen Procida, in which she states that she had additional proof for the Ad Com, specifically documentary proof that would support her claim that, as she argued in the Ad Com meeting, she was not more than one block from her student's home when the accident occurred.<sup>21</sup>

On April 25, 2018, the UFT's Director of Staff, Leroy Barr, sent Imbert a letter setting forth the Ad Com's decision regarding her request to proceed to arbitration with her LODI grievance. Barr advised Imbert that her request was denied and that the UFT would not proceed to arbitration. In that letter, Barr sets forth a summary of the arguments that Imbert made to the Ad Com and then responds to those arguments. Barr cites to PM 4 in denying her request. Barr's letter states, in pertinent part:

After carefully considering the facts you presented, the Committee has concluded that your grievance cannot be successfully pursued at arbitration. There is no dispute that you were struck by a car on your way home from your homebound assignment. However, the Union cannot overcome the Department of Education's argument that the injury sustained does not constitute an injury in the line of duty for the following reason:

In accordance with Personnel Memorandum # 4, you were not considered performing duties connected with this assignment as you were not in between assignments. You stated that you had completed your assignment and was [sic] travelling home. Further, it would be difficult for the Union to overcome the driver's account as documented on the police report that you were on your cell phone when you were crossing the street.

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<sup>20</sup> See Charge, Ex A. It is apparent from, although not specifically stated in, the record that the UFT denied Imbert's request to proceed to arbitration sometime before the matter was scheduled before the Ad Com, since Imbert was appealing to Ad Com the UFT's decision not to proceed to arbitration with her grievance.

<sup>21</sup> Offer of Proof, Ex B.

Therefore, we are unable to overcome the Department of Education's argument that administration had ample reason to deny the LODI claim and thus the contract was not violated.<sup>22</sup>

By letter dated May 8, 2018, Imbert's personal attorney, Jerald D. Kreppel, wrote to Barr asking the UFT to reconsider its April 25, 2018 decision and to proceed to arbitration with Imbert's grievance.<sup>23</sup> In that letter, Kreppel argued the reasons why Imbert's LODI claim was meritorious. More specifically, he argued that PM 4 does not require an employee to be "between assignments" to be considered performing her duties, that the driver's statement that Imbert was using her cell phone should not have been credited over Imbert's contrary assertion, and that PM 4 does not require an employee to be within one city block of his or her assignment to be considered on school grounds.<sup>24</sup> The UFT did not reconsider its decision.<sup>25</sup> On June 11, 2018, New York State Assemblyman, Jeffrey Dinowitz, wrote a letter on behalf of Imbert, asking the UFT to reconsider its decision based on the arguments made by Kreppel in his May 8, 2018 letter.<sup>26</sup> Barr responded to Dinowitz in a letter dated July 9, 2018, stating that the circumstances of Imbert's case made it "highly unlikely" that it could be successfully pursued at arbitration."<sup>27</sup> Barr further states in that letter:

DOE Personnel Memorandum #4 makes clear that the accident "must have occurred while the employee is on duty." As relevant here, the memorandum makes clear that an employee is on duty when:

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<sup>22</sup> Charge, Ex 2.

<sup>23</sup> See Charge, Ex 3.

<sup>24</sup> *Id.*

<sup>25</sup> Offer of Proof, at ¶ 18.

<sup>26</sup> See Charge, Ex 4.

<sup>27</sup> See Charge, Ex 5.

- The employee is “on school property. . . immediately before or after officially reporting to work.” School property is considered to stop at the “sidewalk outside the school.”
- The employee has an assignment, which requires travel and is injured while performing duties connected with this assignment.

To briefly review the individual circumstances of this case, Ms. Imbert is a special education teacher for the homebound who was struck by a motor vehicle some distance from her final assignment for the day and on her way home.

Had she been travelling between assignments, an argument could be made that she was injured while performing her duties, but her situation is far more analogous to a school-based employee who parked on the street away from the school and was injured walking to her car. Such an employee would not be eligible for a Line of Duty Injury finding because she would have been off school property when the injury occurred.<sup>28</sup>

Barr sent a copy of that letter to both Imbert and Kreppel.

Kreppel responded to the UFT by letter dated July 13, 2018, acknowledging receipt of Barr’s letter to Dinowitz, and again arguing the merits of Imbert’s grievance.<sup>29</sup>

In his letter, Kreppel cites to PM 4 and argues that there is no distinction between a teacher being struck by a car crossing the street on her way to a student’s home, as opposed to being struck while returning to her car.<sup>30</sup>

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<sup>28</sup> *Id.*

<sup>29</sup> See Charge, Ex 6.

<sup>30</sup> *Id.*

We do not consider facts regarding Imbert’s current status raised in her exceptions but not set forth and thus not considered by the ALJ. Our review is limited to the record as it existed before the ALJ. *TWU (Mooney)*, 51 PERB 3001, 3002 (2018); *TWU (Ayala)*, 50 PERB 3017, 3074 (2017); *CSEA (Brewster)*, 50 PERB ¶¶ 3027, 3102 (2017); *Mt Pleasant Cottage UFSD*, 50 PERB ¶¶ 3002, 3009, n 12 (2017); *CSEA (Josey)*, 49 PERB ¶¶ 3022, 3072 (2016); *Smithtown Fire District*, 28 PERB ¶¶ 3060, 3135 (1995); *State of New York (Rockland Psychiatric Center)*, 25 PERB ¶¶ 3012, 3031 (1992); *Board of Cooperative Educational Services of Sullivan County*, 14 PERB ¶¶ 3101, 3170-3171 (1981).

### DISCUSSION

To establish a breach of the duty of fair representation under the Act, a charging party has the burden of proof to demonstrate that an employee organization's conduct or actions are arbitrary, discriminatory or founded in bad faith.<sup>31</sup> As we have previously explained, the courts have:

reject[ed] the standard . . . that “irresponsible or grossly negligent” conduct may form the basis for a union's breach of the duty of fair representation as not within the meaning of improper employee organization practices set forth in Civil Service Law § 209. 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.<sup>32</sup>

Under this standard, “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.”<sup>33</sup> A union “has a wide range of reasonableness regarding the filing and prosecution of grievances, and we will not substitute our judgment for that of a union in this regard.”<sup>34</sup> In this matter, we agree with the ALJ that, even granting Imbert the benefit of all reasonable inferences that can be

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<sup>31</sup> *Transportation Communications Union/IAM (Shah)*, 53 PERB ¶¶ 3016, 3081 (2020); *Professional Staff Congress of the City University of New York (Giammarella)*, 51 PERB ¶¶ 3010, 3048 (2018); *District Council 37 (Fonseca)*, 50 PERB ¶¶ 3038, 3161 (2017), *District Council 37 (Calendario)*, 49 PERB ¶¶ 3015, 3060 (2016).

<sup>32</sup> *Id.*; see also *Cairo-Durham Teachers Assn*, 47 PERB ¶¶ 3008, 3026 (2014) (quoting *CSEA, L 1000 v NYS Pub Empl Relations Bd (Diaz)*, 132 AD2d 430, 432, 20 PERB ¶¶ 7024, 7039 (3d Dept 1987), *affd on other grounds*, 73 NY2d 796, 21 PERB ¶¶ 7017 (1988)).

<sup>33</sup> *Transportation Communications Union/IAM (Shah)*, 53 PERB ¶¶ 3016, at 3081; *Niagara Falls Police Club, Inc (Drinks-Bruder)*, 52 PERB ¶¶ 3011, 3055 (2019).

<sup>34</sup> *Id.* See also *AFSCME, Council 66, Local 3933 (Altieri)*, 39 PERB ¶¶ 3015, 3051 (2006); *TWU, Local 100 and NYCTA (Ruse)*, 34 PERB ¶¶ 3018, 3040 (2001); *District Council 37, AFSCME (Gonzalez)*, 28 PERB ¶¶ 3062, 3138 (1995).

drawn from the pleaded facts, Imbert has not pleaded facts from which we could infer that the UFT has acted in a manner that was arbitrary, discriminatory, or founded in bad faith. While Imbert's plight compels our sympathy, the factual allegations do not arise to the level of arbitrariness as defined under the caselaw, nor is there any allegation to support bad faith or discriminatory intent in the UFT's actions.

The ALJ found that there were no allegations or evidence that the UFT acted discriminatorily or in bad faith. Imbert did not file exceptions to these findings. Any exceptions are therefore waived, and these findings are not before us for review.<sup>35</sup>

Imbert asserts that the UFT's decision not to submit her grievance to at least one level of review by an impartial arbitrator was arbitrary. Imbert contends that the UFT (and the District's) interpretation of PM 4 is incorrect and that Imbert properly qualifies for a LODI. Further, Imbert claims that judicial precedent from the Appellate Division, Third Department supports her argument that she was "on duty" at the time she was injured.<sup>36</sup>

To be labeled as arbitrary, an action must be so far outside a wide range of

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<sup>35</sup> Rules § 213.2 (b) (4); see, eg, *City of Niagara Falls*, 54 PERB ¶ 3003, 3018, n 35 (2021); *State of New York (Department of Civil Service)*, 51 PERB ¶ 3027, 3115 (2018); *Village of Westhampton Dunes*, 50 PERB ¶ 3035, 3146, n 8 (2017); *County of Chemung and Chemung County Sheriff*, 50 PERB ¶ 3022, 3090 (2017); *Village of Endicott*, 47 PERB ¶ 3017, 3052, n 5 (2014); *NYCTA (Burke)*, 49 PERB ¶ 3021, 3072, n 4 (2016) (citing cases).

<sup>36</sup> Imbert cites to *Marciniak v Berlitz School of Languages*, 43 AD2d 509 (3d Dept 1974), appeal dismissed 34 NY2d 843 (1974); see also *Bendarek v Caring Profls, Inc*, 111 AD3d (3d Dept 1997). In *Marciniak*, the court, reviewing a decision of the New York Workmen's Compensation Board, held that a teacher who was assigned to teach an evening class at a hospital and was injured when he was struck by a taxicab on a public street after he had completed his teaching assignment and was on his way home, was injured "within the course of his employment." *Id.*, at 511.

reasonableness that it is wholly irrational.<sup>37</sup> Although Imbert disagrees with the UFT's interpretation of PM 4, her interpretation is not the only possible one, and does not of its own weight show that the UFT's decisions in regard to processing her grievance were arbitrary.<sup>38</sup> While the decision cited by Imbert and its progeny are salient to the underlying issues, those cases arise under the New York Worker's Compensation Laws, which do not directly apply to Imbert.<sup>39</sup> These cases also do not, of their own weight, demonstrate that the UFT's decisions were arbitrary. More to the point, Imbert's allegations that the UFT's decision not to pursue her grievance to arbitration was arbitrary is the issue before us, and not the merits of the case that could have been submitted to arbitration.<sup>40</sup> Simply put, Imbert's pleaded allegations, taken as true for the purposes of this decision, simply fail to assert any basis on which we could find that the UFT acted in a manner that was arbitrary.<sup>41</sup>

We also find that the ALJ did not abuse her discretion in declining to require the UFT to provide certain information requested by Imbert. Specifically, Imbert requested information concerning the number of arbitration slots allotted to the UFT in the years

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<sup>37</sup> *Grassel v PERB*, 34 PERB ¶ 7035 (Sup Ct Kings County 2001), *affd*, 301 AD2d 522, 36 PERB ¶ 7002 (2d Dept 2003); *United Univ Professions (Yoonessi)*, 29 PERB ¶ 3075, 3179 (1996).

<sup>38</sup> *See UFT (Spaulding)*, 51 PERB ¶ 3022, 3094 (2018); *State University College at Buffalo Local 640 (Owens)*, 27 PERB ¶ 3004, 3010 (1994).

<sup>39</sup> *See Worker's Compensation Law, § 3 (Group 22)*.

<sup>40</sup> *See Professional Staff Congress of the CUNY (Giammarella)*, 51 PERB ¶ 3010, 3048 (2018); *Cairo-Durham Teachers Assn*, 47 PERB ¶ 3008, at 3027; *Ahrens v NYS Public Employees Federation*, 203 AD2d 796, 798 (3d Dept 1994).

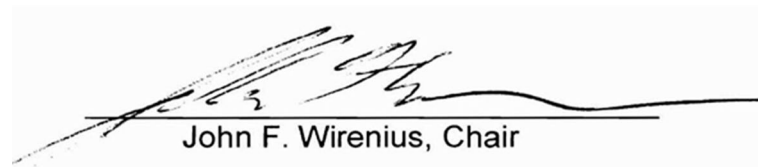
<sup>41</sup> *See TWU (Mooney and Burke)*, 51 PERB ¶ 3001, 3003 (2018); *affd* 53 PERB ¶ 7002 (1<sup>st</sup> Dept 2020); *Council of Supervisors and Administrators of the City of New York (Legrand)*, 33 PERB ¶ 3052, 3142 (2000); *United Univ Professions (Yoonessi)*, 29 PERB ¶ 3075, at 3179.

2015, 2016, and 2017; the number of UFT member requests to proceed to arbitration during those years; and the number of requests that were granted and denied during those years. First, to the extent that Imbert characterizes this request as a “discovery request,” the tools of discovery are not available in PERB proceedings.<sup>42</sup> Second, the ALJ acted within her discretion in determining that the requested information was not relevant to the claim in front of her, which was that the UFT’s actions were arbitrary, discriminatory, or taken in bad faith.

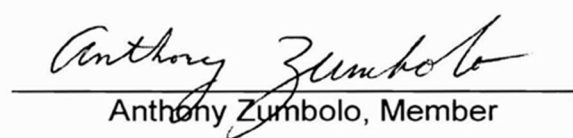
Based on the foregoing, the exceptions filed by Imbert are denied, and the ALJ’s decision is affirmed.

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


DATED: August 23, 2021  
Albany, New York



John F. Wirenius, Chair



Anthony Zumbolo, Member



Rosemary A. Townley, Member

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<sup>42</sup> See *Rochester Teachers Assn*, 45 PERB ¶¶ 3033, 3079 (2012); *UFT (Tulloch)*, 45 PERB ¶¶ 3035, 3083 (2012).

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

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In the Matter of

**ITHACA POLICE BENEVOLENT  
ASSOCIATION, INC.,**

Charging Party,

-and-

**CASE NO. U-35760**

**CITY OF ITHACA,**

Respondent.

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**MARILYN D. BERSON, ESQ., for Charging Party**

**ROEMER, WALLENS, GOLD & MINEAUX, LLP (EARL T. REDDING  
and NATHANIEL J. NICHOLS of counsel), for Respondent**

**BOARD DECISION AND ORDER**

This case comes to us on exceptions filed by the Ithaca Police Benevolent Association, Inc. (PBA) to a decision of an Administrative Law Judge (ALJ).<sup>1</sup> In her decision, the ALJ found that the City of Ithaca (City) did not violate § 209-a.1 (d) of the Public Employees' Fair Employment Act (Act) when it unilaterally subcontracted fleet maintenance work to a non-unit, civilian employee.

**EXCEPTIONS**

The PBA filed eight exceptions to the ALJ's decision which advance three claims. The PBA asserts that the ALJ erred in finding a "de facto" change in qualifications under our "civilianization" line of cases here because the civilian to which duties were

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<sup>1</sup> 54 PERB ¶ 4507 (2021).

transferred was a retired police officer who had the specialized training, skills, and employment qualifications of a uniformed officer.<sup>2</sup> The PBA next contends that it established an unlawful transfer of unit work and was not required to show a detriment to unit employees.<sup>3</sup> Finally, assuming that a balancing test between employee interests and the City's interests was required, the PBA avers that the balance tilts in favor of employee interests and a violation of the Act should be found.<sup>4</sup>

The City argues that no transfer of unit work took place here. Additionally, the City supports the ALJ's decision and contends that no basis has been demonstrated for reversal.

For the reasons given below, we affirm the ALJ's dismissal of the charge, but on different grounds.

### FACTS

The facts are set forth fully in the ALJ's decision and are repeated here only as necessary to decide the exceptions. The PBA's bargaining unit is comprised of all the police officers, sergeants, lieutenants, and captains employed by the City.<sup>5</sup> There are approximately 63 bargaining unit members.

Since at least the 1990s, fleet management has been assigned to a patrol officer who is designated the fleet manager.<sup>6</sup> Prior to 2013, the fleet manager role was a full-time position; however, after 2013, it became a part-time "auxiliary assignment."<sup>7</sup>

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<sup>2</sup> PBA's Exceptions Nos 2-4.

<sup>3</sup> PBA's Exceptions Nos 1, 5-6.

<sup>4</sup> PBA's Exception No 7.

<sup>5</sup> Tr, at 17 (Joly).

<sup>6</sup> Tr, at 24 (Joly).

<sup>7</sup> Tr, at 19 (Joly).

According to an April 10, 2017 posting for the position of fleet manager, the duties are as follows:

- Complete a budget for: Patrol, Investigations, SIU
- Complete a budget for Patrol PC's
- Compare budgets for and make educated decisions regarding new vehicle equipment purchases v[ersu]s old equipment transfer
- Order new vehicles based on budget once approved by Common Council
- Winter tire change over/summer tire change over
- Maintain an IPD Fleet Inventory
- Ensure the fleet receives periodic maintenance
- Facilitate warranty claims/repairs
- Facilitate non-warranty claims/repairs at DPW/local repair shops
- Maintain and repair the electronics in the fleet (Computers, charge guard, ram hubs, etc)
- Trouble shoot basic electronic issues (computer/Verizon MiFi)
- IPD Verizon Phone Admin Backup [sic]
- Maintain Fleet Vehicle Supplies
- Coordinate with City and County IT for computer repairs
- Spillman Administrator
- Tracs Administrator
- LPR Administrator
- Follow up on IPD Fleet MVAs – facilitate repairs, work with insurance company and Clerk's Office

- Issue Patrol Vehicle assignments for each bid
- School Car/outside training vehicle assignments
- Manage Department EZ Pass Account
- Manage Department Gas Cards
- Manages [Department] fleet repair reports including electronic Dossier system hosted by DPW
- Patrol Rifle assignments/ensures they are safely removed/replaced when vehicle is taken for repairs
- Maintain professional relationships with multiple vendors (DPW, Koskinen's, Hunts, Good Year, Accu Fab, Bush Electronics to name a few)
- Provide reports and data to Chief's Office on request
- Constantly looking for ways to update the technology in the fleet that will make personnel safer and or [sic] their job easier
- Keep the fleet looking professional
- Maintain current registrations and inspections for IPD Vehicles
- Oversee and coordinate with any Fleet related to contractor/s or agreements.<sup>8</sup>

John Arsenault was employed by the City as a police officer beginning in 1997 until his retirement on April 30, 2017. Arsenault began performing fleet maintenance duties alongside Police Officer Rich Cotton in 2007 or 2008. Cotton was the primary fleet manager at that time. Arsenault took over as primary fleet manager in 2009 or 2010, when Cotton retired.<sup>9</sup> When Arsenault began as primary fleet manager, the

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<sup>8</sup> Joint Ex 3.

<sup>9</sup> Tr, at 175 (Arsenault).

position was full-time. Arsenault performed fleet manager duties full-time until 2013, when the duties were reduced to part-time. Arsenault continued performing fleet maintenance as a part-time, auxiliary duty from 2013 until his retirement in 2017.

After his retirement, Arsenault was employed by the City as a civilian to perform fleet maintenance duties pursuant to a contract for the term of May 1, 2017 through December 31, 2017.<sup>10</sup>

John Joly has been employed by the City since 2005. He was a police officer for nine years, a sergeant for three years, and currently holds the rank of lieutenant. Joly is also president of the PBA, a position he had held for approximately seven years at the time of the hearing.

Joly testified that Chief John Barber approached him at some point between December of 2016 and February of 2017 with a proposed contract between the City and Arsenault that would allow Arsenault to continue performing fleet maintenance part-time after retirement, as a civilian.<sup>11</sup> Joly stated that Barber asked him to look at the contract and “have the Union look at it.”<sup>12</sup> Joly recalled receiving an e-mail from Arsenault on February 24, 2017, subsequent to his conversation with Barber, announcing Arsenault’s retirement.<sup>13</sup>

Joly testified that after he received the proposed contract from Barber, he discussed it with the bargaining unit members at a PBA meeting in March of 2017. He stated that the PBA “unanimously decided that we were not supportive of the contract

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<sup>10</sup> Joint Ex 1.

<sup>11</sup> The term of the contract was from May 1, 2017 to December 31, 2017. Joint Ex 1.

<sup>12</sup> Tr, at 32 (Joly).

<sup>13</sup> Joint Ex 8.

and outsourcing the work.”<sup>14</sup> Joly testified that he communicated the PBA’s decision to Barber, who was “disappointed.”<sup>15</sup> According to Joly, Barber stated that he would continue with the contract despite the PBA’s objection, and the parties “would just have to fight it out.”<sup>16</sup> Joly testified that when the PBA voted whether to agree to the contract, it was its understanding that a PBA member would not be simultaneously appointed to perform fleet maintenance alongside Arsenault. He stated that after further conversations with Barber, he later came to the understanding that a bargaining unit police officer would still be hired to perform fleet maintenance, but that Arsenault would be retained under contract “to train and get somebody up to speed . . . so the fleet doesn’t deteriorate.”<sup>17</sup>

The fleet manager position was posted on April 10, 2017, by Chief of Police, Peter Tyler.<sup>18</sup> At least two people applied for the position, including Police Officer George DuPay.<sup>19</sup>

DuPay has been employed by the City as a police officer since October of 2015. DuPay was appointed to the position of fleet manager and Police Officer Jack Powers was named assistant fleet manager after interviews were completed in May 2017.<sup>20</sup> DuPay and Powers began performing their fleet maintenance duties on May 11, 2017.<sup>21</sup>

When DuPay began as fleet manager, Arsenault also returned to perform fleet maintenance duties as a civilian employee. DuPay was directed to work alongside

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<sup>14</sup> Tr, at 36 (Joly).

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

<sup>16</sup> *Id.*

<sup>17</sup> Tr, at 87 (Joly).

<sup>18</sup> Tyler became chief of police on March 10, 2017, upon Barber’s retirement.

<sup>19</sup> Tr, at 47-48 (Joly).

<sup>20</sup> Joint Ex 7.

<sup>21</sup> Tr, at 104 (DuPay).

Arsenault and learn as much as he could about performing fleet maintenance duties. If DuPay and Arsenault had a disagreement about a fleet management issue, DuPay had the final say. DuPay currently performs all of the fleet maintenance duties listed in the April 10, 2017 posting for the position, except that he had not yet performed the duty of spillman administrator at the time of the hearing.<sup>22</sup>

Arsenault was also performing the same duties as DuPay from May 2017 until December 31, 2017.<sup>23</sup> Arsenault worked approximately three days per week, for four hours each day. DuPay and Arsenault worked as a team to perform the fleet maintenance duties that needed to be completed each day. Arsenault testified that after he returned to perform fleet maintenance as a civilian employee, he worked with DuPay to coordinate their schedules so that DuPay could learn “how to handle specific situations” and how to “g[e]t things completed in the best efficiency.”<sup>24</sup>

Arsenault testified that the first time that a non-unit member had performed fleet maintenance was when he began performing those duties as a civilian.<sup>25</sup> Arsenault’s contract with the City expired on December 31, 2017 and was not extended or renewed.<sup>26</sup> After December 31, 2017, DuPay and Powers performed all of the fleet maintenance duties.

Tyler has been employed by the City for approximately 28 years and has held the title of chief of police since March 10, 2017. Tyler testified that when Arsenault retired

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<sup>22</sup> Joint Ex 3.

<sup>23</sup> Tr, at 112, 169 (DuPay).

<sup>24</sup> Tr, at 193 (Arsenault).

<sup>25</sup> Tr, at 201 (Arsenault). Arsenault testified that when he was performing fleet management duties as a police officer, no one performed the duties on his behalf when he was on vacation except that sometimes he would allow a sergeant to transport vehicles for repair. Tr, at 241 (Arsenault).

<sup>26</sup> Joint Ex 1.

from his position as a police officer, “my understanding is [Arsenault] would continue to perform the [fleet maintenance] duties that he had been doing with the additional idea that he would be cross-training [DuPay] and to some degree Officer Powers who would be eventually taking over the fleet program.”<sup>27</sup> When asked why Arsenault was hired to perform those duties after his retirement, Tyler stated:

I was notified in early . . . [20]17 that Officer Arsenault had decided that he wanted to retire. During that time period we went through a massive changeover, meaning that several people retired. Several people had to be promoted and put into different positions, which made that whole aspect of him retiring very challenging. We realized that we needed to keep the fleet program status quo. He had the expertise. He had the subject matter expertise in that area, and I think Chief Barber had spoken to him about that, and they had agreed to do a contract to extend his services as far as it related to fleet management so that that level of service, if you will, was not going to be dropped after he retired.<sup>28</sup>

Tyler further testified that when he was advised that Arsenault was going to retire in February 2017, he was not aware of anyone within the police department who had Arsenault’s capabilities at that time.<sup>29</sup> Tyler testified that the position of fleet manager was posted internally once it became apparent that Arsenault was going to retire. He testified:

I don’t know what the communications [were] with outgoing Chief Barber, but . . . I was aware that the PBA felt that it should be a position that was within the PBA structure. They felt that it had been a PBA position and should remain that. So I had the balance [sic] and the decision to make. I didn’t feel that there was anybody in that position that had the knowledge and ability at that time, but I understand the position of the PBA. So I felt that we could do essentially both. So we posted the position with the idea that we would have PBA members that would be filling that function, but we wouldn’t drop the level of

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<sup>27</sup> Tr, at 255 (Tyler).

<sup>28</sup> Tr, at 255-56 (Tyler).

<sup>29</sup> Tr, at 256 (Tyler). Tyler testified that he knew prior to February 2017 that there was a possibility that Arsenault might retire, but that he did not know for sure until February 2017.

service that we currently had. That was how I ran with it from March 10th forward.<sup>30</sup>

Tyler testified that there was a great need for Arsenault to continue to perform fleet maintenance after his retirement to maintain the condition of the police vehicles. He stated that he was concerned that, without Arsenault's experience level, the condition of the fleet would decline and it would take the City a very long time to recover.<sup>31</sup>

Tyler testified that he was not involved in the negotiation of the contract between the City and Arsenault; however, upon becoming chief he "evaluated" the contract and "felt there was a need to have [Arsenault] continue in that position."<sup>32</sup>

### DISCUSSION

It is well established that two essential questions must be addressed when determining whether a transfer of unit work violates § 209-a.1 (d) of the Act: (1) was the at-issue work exclusively performed by unit employees for a sufficient period of time to establish a binding past practice; and (2) was the work assigned to non-unit personnel substantially similar to that exclusive unit work.<sup>33</sup> If both these questions are answered in the affirmative, a violation of § 209-a.1 (d) of the Act will be found unless there has been a significant change in job qualifications. When there has been a significant

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<sup>30</sup> Tr, at 257 (Tyler).

<sup>31</sup> Tr, at 258-59 (Tyler).

<sup>32</sup> Tr, at 284 (Tyler).

<sup>33</sup> *Pine Valley Cent Sch Dist*, 51 PERB ¶ 3036, 3159 (2018); *County of Chemung and Chemung Co Sheriff*, 50 PERB ¶ 3022, 3089 (2017); *Cayuga Comm Coll*, 50 PERB ¶ 3003, 3012-3013 (2017); *Greater Amsterdam City Sch Dist*, 49 PERB ¶ 3011, 3046 (2016); *Town of Stony Point*, 45 PERB ¶ 3045, 3115 (2012); *Town of Riverhead*, 42 PERB ¶ 3032, 3119 (2009); *Niagara Frontier Transp Auth*, 18 PERB ¶ 3083, 3182 (1985). See generally *Manhasset Union Free Sch Dist*, 41 PERB ¶ 3005, 3021-3022 (2008), *confd and mod, in part, Manhasset Union Free Sch Dist v NYS Pub Empl Relations Bd*, 61 AD3d 1231, 42 PERB ¶ 7004 (3d Dept 2009), on remand, 42 PERB ¶ 3016 (2009).

change in job qualifications, the respective interests of the employer and the unit employees must be balanced to determine whether the Act has been violated.<sup>34</sup>

The ALJ found that fleet maintenance duties were exclusively performed by unit members and that the transferred work was substantially similar to exclusive unit work. There are no exceptions to these findings. Any exceptions are therefore waived, and these findings are not before us for review.<sup>35</sup>

The ALJ found that there was a change in qualifications here because the work was transferred from Arsenault, as a police officer, to Arsenault, as a civilian. The ALJ found that this transfer implicated our “civilianization” line of cases whereby transfer of duties from uniformed personnel to civilian personnel involves a *de facto* change in qualifications and is sufficient to trigger the balancing of employer and employee interests under *Niagara Frontier Transportation Authority*.<sup>36</sup>

We find it unnecessary to determine whether our civilianization line of cases privileges the City’s actions because we agree with the City that no transfer of unit work took place here; that is, there has been no breach of the PBA’s exclusivity over the at-issue work.

It is well-established that “a practice of limited and incidental use of nonunit

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<sup>34</sup> *Pine Valley Cent Sch Dist*, 51 PERB ¶ 3036, at 3159; *Cayuga Comm Coll*, 50 PERB ¶ 3003, at 3012-3013, quoting *State of New York (Div State Police)*, 48 PERB ¶ 3012, 3041 (2015); *Town of Stony Point*, 45 PERB ¶ 3045, at 3115, citing *Town of Riverhead*, 42 PERB ¶ 3032 (2009).

<sup>35</sup> Rules § 213.2 (b) (4); see, eg, *State of New York (Department of Civil Service)*, 51 PERB ¶ 3027, 3115 (2018); *Village of Westhampton Dunes*, 50 PERB ¶ 3035, 3146, n 8 (2017); *County of Chemung and Chemung County Sheriff*, 50 PERB ¶ 3022, 3090 (2017); *Village of Endicott*, 47 PERB ¶ 3017, 3052, n 5 (2014); *NYCTA (Burke)*, 49 PERB ¶ 3021, 3072, n 4 (2016) (citing cases).

<sup>36</sup> 18 PERB ¶ 3083, 3182 (1985). See *Fairview Fire District*, 29 PERB ¶ 3042, 3099 (1996); *State of New York (DOCS)*, 27 PERB ¶ 3055, 3125 (1994), *aff'd*, 220 AD2d 19, 29 PERB ¶ 7008 (3d Dep't 1996).

personnel to perform tasks also performed by unit employees will not breach exclusivity otherwise maintained over the unit work.”<sup>37</sup> Inroads into bargaining unit work do not destroy exclusivity when they are limited in time and scope when compared to the manner in which unit employees perform unit work.<sup>38</sup> We find under the circumstances here that Arsenault’s performance of unit work was limited enough in both time and scope as to not breach the PBA’s exclusivity over fleet management work.

Arsenault’s performance of unit work was limited in time from May until December 2017. The contract was for a limited duration, and there was no intent to use Arsenault’s services on a long-term, ongoing basis. Moreover, DuPay performed fleet maintenance duties alongside Arsenault. The City intended for Arsenault to train and work with DuPay, and DuPay had ultimate authority over any disputes between him and Arsenault. We find that Arsenault’s performance of unit work was sufficiently temporary and restricted so as to be considered “limited and incidental” pursuant to our precedent.<sup>39</sup> We see no evidence that the City was attempting to undermine unit employees’ exclusive performance of fleet maintenance duties. Rather, the City was

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<sup>37</sup> *Manhasset Union Free Sch Dist*, 41 PERB ¶ 3005, at 3024. See also *Greater Amsterdam Sch Dist*, 49 PERB ¶ 3011, 3048 (2016) (“incidental use of nonunit personnel to perform tasks is insufficient to defeat exclusivity”); *Cayuga Community College*, 50 PERB ¶ 3003, at 3027-3028 (“limited and incidental” performance of unit work does not breach exclusivity).

<sup>38</sup> See *Honeoye Cent Sch Dist*, 39 PERB ¶ 3003, 3011-3012 (2006).


<sup>39</sup> See *County of Westchester*, 38 PERB ¶ 3032, 3110 (2005) (“It is only when the use of nonunit personnel to perform unit work is limited and incidental and occurs on a significantly small number of occasions . . . that such incursions into the performance of unit work is insufficient to defeat the unit’s claim of exclusivity.”); *City of Rochester*, 27 PERB ¶ 3031, 3075 (1994) (finding that temporary use of nonunit employees did not destroy exclusivity). Compare *State of New York (Division of Military and Naval Affairs)*, 27 PERB ¶ 3027 (1994), where we found that a one-year open assignment of unit duties with no specified endpoint was sufficient to destroy exclusivity. By contrast, here the assignment was limited in time and intended to train the unit members who were taking over the duties at issue.

providing additional support for DuPay, a unit employee, on a temporary basis as he learned fleet maintenance duties. Arsenault's performance of fleet maintenance duties did not take work away from the unit and did not breach the exclusivity that the PBA maintains over this work.


In the absence of a finding that the PBA's exclusivity over fleet management work was breached, we cannot find an unlawful transfer of unit work in violation of § 209-a.1 (d) of the Act.

IT IS, THEREFORE, ORDERED that the ALJ's decision is affirmed on the grounds given above, and the charge must be, and hereby is, dismissed.


DATED: August 23, 2021  
Albany, New York



John F. Wirenius, Chair



Anthony Zumbolo, Member



Rosemary A. Townley, Member

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

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**SANJA DRINKS-BRUDER,**

Charging Party,

- and -

**NIAGARA FALLS POLICE CLUB, INC.,**

**CASE NO. U-37512**

Respondent,

- and -

**CITY OF NIAGARA FALLS,**

Employer.

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**SANJA DRINKS-BRUDER, *pro se***

**THE TUTTLE LAW FIRM (JAMES B. TUTTLE of counsel),  
for Respondent**

**CHRISTOPHER M. MAZUR, CORPORATION COUNSEL,  
for Employer**

**BOARD DECISION AND ORDER**

This case comes to us on exceptions filed by Sanja Drinks-Bruder to a decision of an Administrative Law Judge (ALJ), dismissing a charge filed by Drinks-Bruder alleging that the Niagara Falls Police Club, Inc. (Union) violated § 209-a.2 (c) of the Public Employees' Fair Employment Act (Act) when it failed to represent her in connection with a January 10, 2020 employer-mandated meeting and with related subsequent suspension meetings.<sup>1</sup> The ALJ dismissed the charge pursuant to § 212.4 (b) of our Rules of Procedure (Rules)

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<sup>1</sup> 54 PERB ¶ 4508 (2021). The City of Niagara Falls (City) was named as a "statutory party" pursuant to § 209-a.3 of the Act.

because Drinks-Bruder failed to appear at the hearing on this matter and failed to show good cause for not appearing.

### EXCEPTIONS

Drinks-Bruder filed eight pages of unnumbered exceptions to the ALJ's decision. The majority of Drinks-Bruder's exceptions address the merits of her improper practice charge, and she asserts that she was never given proper representation at the meetings with the City.<sup>2</sup> To the extent Drinks-Bruder addresses her failure to attend the hearing, it appears that she believes that she "has provided sufficient evidence to prove her case."<sup>3</sup> Drinks-Bruder also asserts that PERB's Rules do not require that her charge be dismissed due to her failure to appear at the hearing.<sup>4</sup>

The Union claims that Drinks-Bruder's exceptions are deficient under § 213.2 of our Rules. On the merits, the Union supports the ALJ's decision and contends that no basis has been demonstrated for reversal.

Subsequent to the Union's filing of its Response to Drinks-Bruder's Exceptions, Drinks-Bruder filed a document labelled "Cross Exceptions" and a brief. Sections 213.2 and 213.3 of our Rules do not permit a party to file both Exceptions and Cross Exceptions. Drinks-Bruder's filing is, in any event, more accurately characterized as a reply brief to the Union's Response to Drinks-Bruder's Exceptions. Section 213.3 of our Rules does not allow for the filing of reply briefs unless requested by the Board or filed with the Board's

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<sup>2</sup> See Exceptions, at 1-7.

<sup>3</sup> Exceptions, at 1-2. See *also* Exceptions, at 7.

<sup>4</sup> Exceptions, at 7-8.

authorization. As the Board neither requested nor authorized Drinks-Bruder's additional filing here, we have not considered it.<sup>5</sup>

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

### FACTS

The facts are set forth fully in the ALJ's decision and are included here only as necessary to decide the exceptions. Drinks-Bruder attended a mandatory meeting with the City on January 10, 2020, at which she was directed to submit to a Civil Service Law (CSL) § 72 mental health examination. On January 13, 2020, at a meeting with a City representative, and with her union representative present, Drinks-Bruder refused to submit to the CSL § 72 examination, and she was suspended for insubordination until February 22, 2020.

On February 12, 2020, the Union retained Robert Boreanaz, Esq. via letter as outside counsel to represent Drinks-Bruder in connection with the CSL § 72 proceedings. In relevant part, the letter directs Boreanaz as follows:

It is my understanding that Sanja Drinks-Bruder has selected you from the two names the union offered her as outside counsel as a result of a conflict of interest on my part that precludes me from representing her in the [CSL] Section 72 proceedings that she now faces. The purpose of this letter is to authorize you to proceed on her behalf as you deem appropriate.<sup>6</sup>

The retainer letter does not address representation related to the improper practice charge.

On June 6, 2020, Drinks-Bruder filed the improper practice charge at issue here, which alleges that the Union breached its duty of fair representation by not representing

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<sup>5</sup> *Niagara Falls Police Club, Inc (Drinks-Bruder)*, 52 PERB ¶¶ 3011, 3052 (2019); *Amalgamated Transit Union*, 32 PERB ¶¶ 3053, 3126, n 2 (1999).

<sup>6</sup> ALJ Ex 32.

Drinks-Bruder adequately at the meetings held on January 10, 2020 and January 13, 2020.<sup>7</sup>

The ALJ held a conference regarding the improper practice charge on September 23, 2020, using Cisco WebEx (WebEx). The Union's and City's respective representatives were present, but Drinks-Bruder was not. The improper practice charge identified Boreanaz as Drinks-Bruder's representative; thus, it was Boreanaz to whom the Notice of Conference had been forwarded.<sup>8</sup> Boreanaz attended, as the Union's witness, to explain that he had been retained to represent Drinks-Bruder only in connection with her CSL § 72 proceedings and not with respect to the improper practice charge.<sup>9</sup>

Following the conclusion of the conference, Drinks-Bruder was sent a letter summarizing the September 23, 2020 meeting, which states in relevant part:

A Cisco Webex conference was held on Thursday, September 23, 2020 attended by Respondent Union's President, Michael Lee, and his representative, James Tuttle, Esq.; and by Respondent Employer's Corporation Counsel, Christopher Mazur, Esq. The conference also was attended by Robert Boreanaz, Esq., whom the Charging Party identified on the improper practice charge as her representative. The Charging Party, Sanja Drinks-Bruder, was not present.

At the conference, Mr. Tuttle stated, and Mr. Boreanaz confirmed, that Mr. Boreanaz has not been retained by the Union to act as Ms. Drinks-Bruder's representative in this matter. Thus, the conference was adjourned in order to re-schedule the conference when Ms. Drinks-Bruder could be present.<sup>10</sup>

A second WebEx conference took place on November 25, 2020.<sup>11</sup> Drinks-Bruder

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<sup>7</sup> The ALJ's decision contains the full details of the charge. 54 PERB ¶ 4508, at 4549.

<sup>8</sup> ALJ Ex 1.

<sup>9</sup> ALJ Ex 8.

<sup>10</sup> ALJ Ex 7.

<sup>11</sup> ALJ Ex 9.

attended, as did representatives for the Union and the City. At the conference, Drinks-Bruder reviewed the basis of her charge against the Union. The parties did not reach resolution at the conference, additional information was requested, and a follow-up conference was scheduled.<sup>12</sup>

The ALJ held a third WebEx conference on January 27, 2021. The Union's and City's representatives were present, but Drinks-Bruder did not attend. By email to the ALJ and telephone call to PERB's Buffalo office, Drinks-Bruder advised that she would participate in the conference only if she received confirmation from Boreanaz that he was representing her at the improper practice conference. At the conference, Boreanaz affirmed that he had advised Drinks-Bruder in multiple emails that he does not represent her in connection with the improper practice charge.

Based on the allegations in the improper practice charge regarding disputed material facts related to the Union's representation at the January 10, 2020, and subsequent discipline meetings, and the failure of the parties to resolve the charge, an in-person hearing was directed for February 25, 2021.<sup>13</sup>

On January 29, 2021, by email to the ALJ and the parties, Drinks-Bruder wrote, in relevant part:

This is why I did or do not attend your scheduled phone conference. What I mean by this is that I am told that I had representation, but when the need arises at important times such as the conferences (improper practice charge or application for injunctive relief) my representation by the union that allows Tuttle to make this decision [*sic*].

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<sup>12</sup> ALJ Ex 14.

<sup>13</sup> ALJ Ex 22.

I will not attend the February 25<sup>th</sup> hearing because it went from being represented to not on 1/27/21 to you represented on 1/28/21.<sup>14</sup>

On February 11, 2021, in a letter from the ALJ to all parties, the ALJ advised the parties, in relevant part:

**The hearing will proceed as scheduled. I urge Ms. Drinks-Bruder to attend the hearing**, since it is her opportunity to present sworn testimony and evidence, and any arguments in support of her charge against the Niagara Falls Police Club. Her failure to do so may result in a decision based solely on the testimony and evidence submitted by the Respondent, or a default decision [emphasis in original].<sup>15</sup>

On February 23, 2021, by email, Drinks-Bruder advised in relevant part:

First I must say that I am sorry but I want it known that I will not attend the scheduled hearing on February 25th 2021 at 9am. The main reason is that I was told in February 2020 by both the union president Michael Lee and the union attorney James Tuttle that an attorney Robert Boreanaz had been retained for me to represent me for [CSL] Section 72 proceedings . . . .<sup>16</sup>

Subsequently, on February 23, 2021, in a letter from the ALJ to all parties, the ALJ advised Drinks-Bruder, in relevant part:

The sole matter under review, as alleged by you, is whether your Union representatives failed to represent your interests at the time that the City issued its order as you claim. The standard of review is whether the Union's representation in connection with the City's directive [regarding the CSL § 72 mental health evaluation] was arbitrary, discriminatory, or founded in bad faith. As in the many improper practice hearings that you have attended previously, you are not required to be represented by an attorney.

**The hearing will proceed as scheduled. I urge you to attend the hearing**, since it is your opportunity to present sworn testimony and evidence, and any arguments in support of your charge against the Niagara Falls Police Club. Your failure to do so may result in a decision based solely on the testimony and evidence submitted by

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<sup>14</sup> ALJ Ex 23.

<sup>15</sup> ALJ Ex 24 (emphasis in original).

<sup>16</sup> ALJ Ex 25.

the Respondent, or in a default decision [emphasis in original].<sup>17</sup>

By email, dated February 24, 2021, Drinks-Bruder sent notice to the ALJ and all parties, stating in full:

The [CSL] Section 72 proceedings does have to do with this case as well as the unwarranted suspensions otherwise I would not be filing charges against the union for not giving me representation and it was not given due to discriminatory, arbitrary, and in bad faith [sic]. I was going to use attorney Boreanaz as he knows to represent me in showing this as the union uses Tuttle in trying to show it is not. This happens even when there is proof on my side and Tuttle is supposedly my attorney even though he has admitted to a conflict of interest as the union knows. Yes[,] Judge Scott, you are right about me never having an attorney previously with other cases. This is only because the union did not provide me with one as they should have because they had one which was also my attorney I am told. This time I am told that Robert Boreanaz was retained to represent me for section 72 proceedings. The union always had an attorney (Tuttle) who was always against me and allowed the union to act in bad faith, arbitrary and discriminatory against me. Again I cannot attend this hearing on 2/25/21. You have the letters from Tuttle and the statements from Robert Boreanaz about representation for me. It is February 24, 2021. Representation is over a year with no actions in defense for someone meaning me for [CSL] section 72 proceedings and unwarranted suspensions.<sup>18</sup>

Again, later, on February 24, 2021, by email to all parties, Drinks-Bruder stated that she would not attend the hearing because she did not have legal representation at no cost to her, provided by the Union, in connection with the improper practice charge.<sup>19</sup>

The hearing took place on Thursday, February 25, 2021. Representatives for the Union and the City were present. Boreanaz appeared as a witness for the Union. Drinks-Bruder did not appear, nor did she communicate with the ALJ or PERB's Buffalo office after her email dated February 24, 2021. The record was opened to note appearances and to

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<sup>17</sup> ALJ Ex 26 (emphasis in original).

<sup>18</sup> ALJ Ex 27.

<sup>19</sup> ALJ Ex 28.

accept ALJ exhibits, but no testimony was taken.

On February 25, 2021, the ALJ sent a letter to Drinks-Bruder that ordered her to provide a written explanation, with any supporting documentation, that shows good cause why she failed to appear at the hearing, and as to why the improper practice charge should not be dismissed.<sup>20</sup>

By email sent to all parties dated March 3, 2021, Drinks-Bruder merely restated the basis of her charge. She failed to offer any material reason for her failure to appear on February 25, 2021.<sup>21</sup>

### DISCUSSION

We first address the Union's claim that Drinks-Bruder's exceptions are deficient under § 213.2 of our Rules. We agree that many of Drinks-Bruder's exceptions do not "set forth specifically the questions or policy to which exceptions are taken," "identify that part of the decision . . . to which exceptions are taken," "designate . . . the portion of the record relied upon," or "state the grounds for exceptions," as required by our Rules. However, we are mindful that Drinks-Bruder is unrepresented and that her exceptions should be liberally construed.<sup>22</sup> Moreover, as we recently reaffirmed in *State of New York (Office of Temporary and Disability Assistance)*,<sup>23</sup> we will consider exceptions where the gravamen of the asserted error is clear; in particular, where we are able to discern the basis of the excepting party's arguments and identify the portions of the ALJ's decision that it disagrees with. Drinks-Bruder's exceptions here meet this standard.

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<sup>20</sup> ALJ Ex 30.

<sup>21</sup> ALJ Ex 31.

<sup>22</sup> *State of New York (New York State Police) (Oliver)*, 51 PERB ¶¶ 3037, 3166 (2018); *UFT (Leon)*; 48 PERB ¶¶ 3016, 3055 (2015); *UFT (Pinkard)*, 47 PERB ¶¶ 3020, 3061 (2014).

<sup>23</sup> 54 PERB ¶ 3011 (2021).

Section 212.4 (b) of our Rules provides that the “failure of a party to appear at the hearing may, in the discretion of the administrative law judge, constitute grounds for dismissal of the absent party' s pleading.” We have stated that a charging party' s “unexcused failure to appear at a scheduled PERB proceeding constitutes a failure to prosecute a charge which is grounds for dismissal.”<sup>24</sup>

We find that the ALJ did not abuse her discretion in dismissing Drinks-Bruder's charge here. The record establishes that Drinks-Bruder was well aware of the scheduled hearing. A party who chooses not to attend scheduled PERB proceedings does so at their peril because such an action constitutes a failure to prosecute the charge and may result in the dismissal of the charge.<sup>25</sup> Drinks-Bruder appears to believe that her attendance at a conference provided a sufficient basis upon which to decide the charge. Attendance at a pre-hearing conference, however, is no substitute for attendance at the hearing, as evidence is not introduced into the record at a conference. By failing to attend the hearing, Drinks-Bruder waived her opportunity to introduce her evidence into the record and to provide testimony under oath, subject to cross-examination and counter-arguments made by the Union and the City. Both the meaning of the hearing and the consequences of failing to appear were clearly explained to Drinks-Bruder, and she has presented no basis on which we could find that the ALJ abused her discretion in dismissing the charge.

To the extent that Drinks-Bruder asserted that she was not attending the hearing because Boreanaz was not representing her, we find that this also does not provide good

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<sup>24</sup> *Intl Brotherhood of Teamsters, Local 237 (Jouldach)*, 34 PERB ¶ 3010, 3020 (2001). See also *City of Mount Vernon*, 54 PERB 3010 (2021); *UFT (Goldstein)*, 42 PERB ¶ 3035, 3129 (2009).

<sup>25</sup> *UFT (Armatas)*, 31 PERB ¶ 3042 (1998).

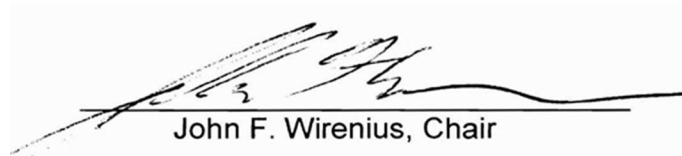
cause for not attending the hearing. Drinks-Bruder was informed well in advance of the hearing that Boreanaz was retained to represent Drinks-Bruder with respect to the CSL § 72 proceedings against her, and not with respect to her improper practice charge against the Union.<sup>26</sup> More to the point, Drinks-Bruder could have represented herself at the hearing, rather than simply failing to appear.

We cannot, and do not, address the merits of Drinks-Bruder's charge, as she did not attend the hearing to introduce supporting evidence.

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

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

DATED: August 23, 2021  
Albany, New York



John F. Wirenius, Chair



Anthony Zumbolo, Member



Rosemary A. Townley, Member

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<sup>26</sup> Contrary to Drinks-Bruder's suggestion, the duty of fair representation does not include an obligation on the Union's part to provide free representation to her in a proceeding brought against the Union itself. The duty of fair representation does not include an obligation by an employee organization to pursue a non-contractual legal claim on behalf of a unit member unless that employee organization has represented other unit members in similar proceedings. *UFT (West)*, 51 PERB ¶¶ 3002, 3005 (2018); *UFT (Morrell)*, 44 PERB ¶¶ 3030, 3107 (2011); *United Steelworkers (Buchalski)*, 43 PERB ¶¶ 3002, 3008 (2010). Drinks-Bruder has not alleged that the Union has represented other unit members in proceedings for a breach of the duty of fair representation.

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

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In the Matter of

**SANJA DRINKS-BRUDER,**

Charging Party,

**CASE NO. U-37470**

- and -

**CITY OF NIAGARA FALLS and  
NIAGARA FALLS POLICE CLUB, INC.,**

Respondents.

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**SANJA DRINKS-BRUDER, *pro se***

**BOARD DECISION AND ORDER**

This case comes to us on exceptions filed by Sanja Drinks-Bruder to a decision of the Director of Public Employment Practices and Representation (Director) dismissing her amended improper practice charge.<sup>1</sup> Drinks-Bruder's charge alleged that her employer, the City of Niagara Falls (City) violated § 209-a.1 (g) of the Public Employees' Fair Employment Act (Act) when it told her that she did not need union representation at a meeting with the chief of police on December 5, 2019. When Drinks-Bruder insisted on union representation, she was allowed to have Michael Lee, President of the Niagara Falls Police Club, Inc. (Union), attend the meeting with her.

Drinks-Bruder's charge also alleged that the Union breached its duty of fair representation to her and thus violated § 209-a.2 (c) of the Act. In her original charge, Drinks-Bruder alleged that Lee "did not speak up for her defense," at the December 5, 2019 meeting, but told her that he "would forward all to [the union attorney] on this day." According to Drinks-Bruder, she was not contacted by the attorney. The charge also alleged that, at the December 5, 2019 meeting, an individual identified as "Deputy Faso"

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<sup>1</sup> 54 PERB ¶ 4511 (2021).

told Drinks-Bruder that the mental health evaluation was needed “because I file many grievances and I never win.” Drinks-Bruder alleges that her grievances “have merit and were never frivolous,” and that the Union “breached their duty and acted in bad faith and has arbitrarily ignored facts and has acted in concert with the Niagara Falls Police Dept. and the City of Niagara Falls against me.”

On September 3, 2020, the Director, pursuant to § 204.2 of our Rules of Procedure (Rules), sent Drinks-Bruder a deficiency notice, noting that the charge failed to identify both respondents on the face of the improper practice charge form and that there were no facts alleged that would arguably establish a violation of either §§ 209-a.1 (g) or 209-a.2 (c) of the Act.<sup>2</sup>

On January 5, 2021, Drinks-Bruder filed a five-page, handwritten “amendment” to her charge that was not notarized.<sup>3</sup> In the amendment, Drinks-Bruder stated that the § 209-a.1 (g) allegation against the City is supported by the fact that the City “did not want me to have representation and told me it was not needed when having a meeting with the Chief . . .” on December 5, 2019. Drinks-Bruder also averred that the fact that she was told she did not need representation, “when disciplinary actions were to occur,” is the violation.

Regarding the Union’s alleged violation of § 209-a.2 (c) of the Act, Drinks-Bruder’s amendment states that Union President Lee “was present but did not represent me and did not act in my defense and in fact spoke not a word” at the December 5, 2019 meeting with the police chief. Drinks-Bruder also referenced subsequent meetings on January 10, 2020 and January 13, 2020. Drinks-Bruder complains that

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<sup>2</sup> The Union filed an answer on July 23, 2020. The Director did not consider the answer because it was prematurely and improperly filed.

<sup>3</sup> Drinks-Bruder obtained an extension of time in which to file an amended improper practice charge.

Lee “continually side[s] with the City” and does not “back her up” with her grievances. Finally, Drinks-Bruder claims that the Union “allowed” an “unlawful section 72 proceeding” to take place on January 10, 2020, without representation being given to her, and that she is currently suspended for her refusal to follow a direct order and submit to medical and mental evaluations/examinations.

The Director in her decision found that the amended charge was fatally deficient for two reasons. First, she found that the amendment was procedurally defective in that Drinks-Bruder failed to submit a properly notarized amended charge form curing the deficiencies. Second, even if not procedurally defective, the Director found that the facts alleged in the amended charge did not establish a violation of either §§ 209-a.1 (g) or 209-a.2 (c) of the Act.

### EXCEPTIONS

Drinks-Bruder filed 12 pages of exceptions to the Director’s decision, with a seven page supporting brief. Much of the information contained in Drinks-Bruder’s exceptions consists of new allegations that were not made in front of the Director. In reviewing the Director’s decision, we consider only the facts alleged in Drinks-Bruder’s charge and her amendment. We do not consider facts alleged by Drinks-Bruder for the first time in her exceptions, as our review is limited to the record as it existed before the Director.<sup>4</sup>

Drinks-Bruder asserts that her failure to submit a notarized amended improper practice charge should be excused because she did not have knowledge of that

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<sup>4</sup> *CSEA (Sainpaulin)*, 51 PERB ¶¶ 3011, 3051 (2018); *TWU (Ayala)*, 50 PERB 3017, 3074 (2017); *CSEA (Brewster)*, 50 PERB ¶¶ 3027, 3102 (2017); *Mt Pleasant Cottage UFSD*, 50 PERB ¶¶ 3002, 3009, n 12 (2017); *CSEA (Josey)*, 49 PERB ¶¶ 3022, 3072 (2016); *Smithtown Fire Dist*, 28 PERB ¶¶ 3060, 3135 (1995); *State of New York (Rockland Psychiatric Center)*, 25 PERB ¶¶ 3012, 3031 (1992); *Board of Coop Educ Services of Sullivan Cnty*, 14 PERB ¶¶ 3101, 3170-3171 (1981).

requirement. She contends, in essence, that her charge establishes that the Union violated § 209-a.2 (c) of the Act when Lee did not speak up on her behalf in meetings with the City and that the Union had foreknowledge of the Civil Service Law (CSL) § 72 proceeding brought against her.

Drinks-Bruder's exceptions do not mention the Director's dismissal of the allegation that the City violated § 209-a.1 (g) of the Act.

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

### DISCUSSION

We need not address whether an unrepresented party's failure to notarize an amendment to an improper practice charge is so fatal a deficiency as to itself lead to dismissal of an otherwise viable charge. The Director's examination of the merits of both the original and amended charge is properly before us.

Because Drinks-Bruder did not except to the Director's dismissal of the allegation that the City violated § 209-a.1 (g) of the Act, any such exceptions are waived and this finding is not before us for review.<sup>5</sup> Were this finding before us, we would affirm the Director's decision.

Section 209-a.1 (g) provides that it is an improper practice for an employer:

to fail to permit or refuse to afford a public employee the right, upon the employee's demand, to representation by a representative of the employee organization, or the designee of such organization, which has been certified or recognized . . . when at the time of questioning by the employer of such employee it reasonably appears that he or she may be the subject of a potential disciplinary action.

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<sup>5</sup> Rules § 213.2 (b) (4); see, eg, *City of Niagara Falls*, 54 PERB ¶¶ 3003, 3013 (2021); *State of New York (Department of Civil Service)*, 51 PERB ¶¶ 3027, 3115 (2018); *Village of Westhampton Dunes*, 50 PERB ¶¶ 3035, 3146, n 8 (2017); *County of Chemung and Chemung County Sheriff*, 50 PERB ¶¶ 3022, 3090 (2017); *Village of Endicott*, 47 PERB ¶¶ 3017, 3052, n 5 (2014); *NYCTA (Burke)*, 49 PERB ¶¶ 3021, 3072, n 4 (2016) (citing cases).

Ultimately, Drinks-Bruder was not denied representation at the December 5, 2019 meeting, and thus no violation of this subsection of the Act can be found.

We affirm the Director's finding that, accepting Drinks-Bruder's allegations as true for the purposes of this decision, her allegations do not establish an arguable 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."<sup>6</sup>

As we have previously explained, the courts have

reject[ed] the standard . . . that "irresponsible or grossly negligent" conduct may form the basis for a union's breach of the duty of fair representation as not within the meaning of improper employee organization practices set forth in Civil Service Law § 209-a. An honest mistake resulting from misunderstanding or lack of familiarity with matters of procedure does not rise to the level of the requisite arbitrary, discriminatory or bad-faith conduct required to establish an improper practice by the union.<sup>7</sup>

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<sup>6</sup> *UFT (Spaulding)*, 51 PERB ¶¶ 3022, 3091 (2018), citing *District Council 37 (Fonseca)*, 50 PERB ¶¶ 3038, 3161 (2017).

In the interest of clarity, we note that "discriminatory" means that similarly-situated employees are treated differently. See, eg, *TCU (Shah)*, 53 PERB ¶¶ 3016, 3082 (2020). However, this Board does not have jurisdiction over allegations that an employer has discriminated against individuals because of their race or their membership in another protected class; such allegations are within the jurisdiction of the State Division of Human Rights. See *Board of Educ of the City Sch Dist of the City of New York (Zarinfar)*, 44 PERB ¶¶ 3012, 3044 (2011); *CSEA (Reese)*, 25 PERB ¶¶ 3012, 3031 (1992). While treating members differently based on race or membership in another protected class could violate a union's duty of fair representation, Drinks-Bruder does not allege any facts which would support finding such a violation. See *Long Beach Administrators' Union (Fail-Maynard)*, 43 PERB ¶¶ 3024, 3091 (2010); *PEF (Goonewardena)*, 27 PERB ¶¶ 3006, 3013 (1994); *United Univ Professions (Garvin)*, 21 PERB ¶¶ 3052, 3112 (1988).

<sup>7</sup> *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).

As particularly 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.”<sup>8</sup>

Application of these requisite elements of the charge to the facts alleged demonstrates that the charge does not arguably establish a breach of the duty of fair representation. Drinks-Bruder’s allegations that the Union acted in bad faith, “arbitrarily ignored facts”, and acted in concert with the City,<sup>9</sup> are conclusory and unsupported by specific facts which would tend to show a violation of the Act.<sup>10</sup> While Drinks-Bruder is clearly unhappy with the quality and extent of representation provided by Lee, such unhappiness alone does not tend to show that Lee acted arbitrarily, discriminatorily, or in bad faith. Further, the facts alleged are insufficient to show that the Union “allowed” an unlawful CSL § 72 proceeding.

Finally, we address Drinks-Bruder’s assertion that the Director evidenced bias against her and took statements made by the Union “as gospel.”<sup>11</sup> We see no support in the record for Drinks-Bruder’s allegations. The Director’s decision does not rely upon any statements made by the Union in her consideration of Drinks-Bruder’s charge. Rather, pursuant to § 204.2 of our Rules, the Director reviewed the instant charge to determine whether the facts alleged, if proven, might establish an improper practice as set forth in § 209-a of the Act. When, as here, the facts alleged are not sufficient to support a finding that the Act may have been violated, the Director does not err in

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<sup>8</sup> *Id.*, quoting *District Council 37 (Fonseca)*, 50 PERB ¶ 3038, at 3161; *Cairo-Durham Teachers Assn (DeOliveira)*, 47 PERB ¶ 3008, at 3026.

<sup>9</sup> Drinks-Bruder’s Exceptions, at 5.

<sup>10</sup> See *UFT (Konteye)*, 53 PERB ¶ 3010, 3047 (2020); *CSEA (Metzger)*, 50 PERB ¶ 3026, 3100 (2017).


<sup>11</sup> Drinks-Bruder’s Brief, at 5.

dismissing the charge, rather than assigning it to an Administrative Law Judge.


Accordingly, we affirm the Director's decision finding that the facts alleged, taken as true, do not make out a claim for a possible violation of either §§ 209-a.1 (g) or 209-a.2 (c) of the Act.

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


DATED: August 23, 2021  
Albany, New York



John F. Wirenius, Chair



Anthony Zumbolo, Member



Rosemary A. Townley, Member

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

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In the Matter of

**LAVERNE COLEMAN,**

Charging Party,

**CASE NO. U-37824**

- and -

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

Respondent.

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**LAVERNE COLEMAN, *pro se***

**BOARD DECISION AND ORDER**

This case comes to us on exceptions filed by Laverne Coleman to a decision of the Director of Public Employment Practices and Representation (Director) dismissing her amended improper practice charge.<sup>1</sup> In her charge, Coleman alleged that her employer, the Board of Education of the City School District of the City of New York (District) violated § 209-a.1 (d) of the Public Employees' Fair Employment Act (Act). According to the charge, on December 28, 2020, Coleman was "deemed unfit to work." Coleman alleged that her badge, handcuffs, and I.D. were taken from her because, on November 5, 2020, she stated in an email that her chair caused her discomfort due to a pinched nerve in her back. Coleman further alleged that, in December of 2019, she was

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<sup>1</sup> 54 PERB ¶ 4515 (2021).

asked to submit a doctor's note for her back injury, which she provided on January 7, 2021. The charge stated that the Employer's medical department cleared her for work and provided her with a light-weight utility belt and suspenders to help relieve the pressure on her back. Coleman further alleged that the District "imposed on [her] HIPPA<sup>2</sup> privacy rights by requesting [x-rays] and diagnosis of [her] condition," and that she was not allowed to return to work until January 15, 2021. Finally, Coleman alleged in her charge that the District had abused its authority by showing no concern for employees' stress due to the COVID-19 pandemic, and demanded that Coleman's used sick leave be restored to her.

Pursuant to the initial investigation required by § 204.2 of PERB's Rules of Procedure (Rules), the Director advised Coleman by notice dated March 11, 2021, that the charge was deficient because, among other reasons, individuals lack standing to allege a violation of § 209-a.1 (d) of the Act. Further, the Director found that the factual allegations of the charge did not support any violation of the Act.

On March 15, 2021, Coleman filed an amended charge, which again alleged a violation of § 209-a.1 (d) of the Act and, in sum and substance, alleged the same set of facts in support of the violation. There were no new or different facts provided in support of the charge.

The Director issued a decision finding that the amended charge did not address the deficiencies identified in her initial deficiency letter, and dismissing the charge.

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<sup>2</sup> The correct acronym is HIPAA, which stands for the Health Insurance Portability and Accountability Act of 1996.

### EXCEPTIONS

Coleman filed one exception to the Director's decision, asking that she be given another chance to submit a corrected improper practice charge "due to the lack of my understanding [how] to submit the violation charge information properly."<sup>3</sup> In a document labelled "Brief in support," it appears that Coleman asserts that she would file an improper practice charge form alleging a violation of § 209-a.1 (g) of the Act, stating

On or prior to December 28, 2020, I, Laverne Coleman did not attend a meeting, or was notified by my union Local 237, regarding me being unfit to work, and the confiscation of my badge, hand cuffs and ID. As well as a medical request of my x-rays, MRI, reports of my spine etcetera, upon return back to work, which is also a violation of my [HIPAA] rights.<sup>4</sup>

### DISCUSSION

Initially, we emphasize that we cannot consider new allegations made in Coleman's exceptions. Our review is limited to the record as it existed before the Director.<sup>5</sup> Therefore, we examine the allegations in Coleman's charge and amended charge to determine whether the Director erred in dismissing the charge.

We find no error by the Director. In her original charge, Coleman alleged a violation of § 209-a.1 (d) of the Act. Despite being informed that individuals lack standing to allege a violation of this subsection, Coleman again alleged only a violation of § 209-a.1 (d) of the Act on her amended improper practice charge form. As the

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<sup>3</sup> Coleman's Exceptions, at 1.

<sup>4</sup> Coleman's Brief in support, at 1.

<sup>5</sup> *CSEA (Sainpaulin)*, 51 PERB ¶¶ 3011, 3051 (2018); *TWU (Ayala)*, 50 PERB 3017, 3074 (2017); *CSEA (Brewster)*, 50 PERB ¶¶ 3027, 3102 (2017); *Mt Pleasant Cottage UFSD*, 50 PERB ¶¶ 3002, 3009, n 12 (2017); *CSEA (Josey)*, 49 PERB ¶¶ 3022, 3072 (2016); *Smithtown Fire Dist*, 28 PERB ¶¶ 3060, 3135 (1995); *State of New York (Rockland Psychiatric Center)*, 25 PERB ¶¶ 3012, 3031 (1992); *Board of Coop Educ Services of Sullivan Cnty*, 14 PERB ¶¶ 3101, 3170-3171 (1981).

Director correctly found, individuals lack standing to allege violations of § 209-a.1 (d) of the Act because the duty to negotiate in good faith runs between public employers and employee organizations.<sup>6</sup>

We also agree with the Director that Coleman's allegations in her charge and amended charge did not implicate any rights protected by the Act.<sup>7</sup>

This finding remains true even were we to consider the allegations raised for the first time in Coleman's exceptions. Section 209-a.1 (g) of the Act provides that it is an improper practice for an employer:

to fail to permit or refuse to afford a public employee the right, upon the employee's demand, to representation by a representative of the employee organization, or the designee of such organization, which has been certified or recognized . . . when at the time of questioning by the employer of such employee it reasonably appears that he or she may be the subject of a potential disciplinary action.

Coleman's exceptions do not allege that she made a request for representation by an employee organization or that she was denied representation at the time of any questioning by the District. Her exceptions in fact state that she did not attend a meeting or hearing. Therefore, the provisions of § 209-a.1 (g) of the Act are simply not implicated.

Accordingly, the exceptions are denied, the Director's decision is affirmed, and

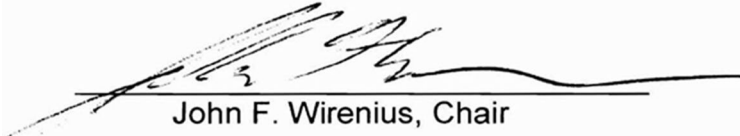
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<sup>6</sup> See *Transportation Communications Union (Shah)*, 53 PERB ¶¶ 3016, 3080-3081 (2020); *Board of Educ of the City Sch Dist of the City of New York (Jenkins)*, 38 PERB ¶¶ 3012, 3040 (2005), citing *New York City Transit Auth*, 32 PERB ¶¶ 3061, 3149-3150 (1999); *Hauppauge Union Free Sch Dist*, 32 PERB ¶¶ 3027, 3058 (1999); *Queens College of the City University of New York (Soffer)*, 21 PERB ¶¶ 3024, 3055 (1988).


<sup>7</sup> In this regard, we note that we lack jurisdiction to decide alleged violations of HIPAA.

the charge must be, and hereby is, dismissed.

DATED: August 23, 2021  
Albany, New York



John F. Wirenius, Chair



Anthony Zumbolo, Member



Rosemary A. Townley, Member

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

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In the Matter of

**LOCAL 32 INTERNATIONAL ASSOCIATION OF  
FIREFIGHTERS, AFL-CIO, UTICA PROFESSIONAL  
FIREFIGHTERS ASSOCIATION,**

**CASE NO. U-35101**

Charging Party,

-and-

**CITY OF UTICA,**

Respondent.

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

**WILLIAM M. BORRILL, CORPORATION COUNSEL (ARMOND J.  
FESTINE and JOSEPH V. MCBRIDE of counsel), for Respondent**

**BOARD DECISION AND ORDER**

This case comes to us on exceptions filed by the City of Utica (City) to a decision of an Administrative Law Judge (ALJ) granting, in part, a charge filed by Local 32 International Association of Firefighters, AFL-CIO, Utica Professional Firefighters Association (Association), finding that the City violated §§ 209-a.1 (a) and 209-a (1) (d) of the Public Employees' Fair Employment Act (Act).<sup>1</sup> The ALJ found that the City violated these sections of the Act by excluding the Association's president and secretary from representing bargaining unit members during disciplinary interrogations and unilaterally altering past practices with respect to disciplinary interrogations. The ALJ dismissed the charge to the extent that it alleged violations under § 209-a.1 (b) of the Act, based on the City's allegedly seeking to control the Association's selection of

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<sup>1</sup> 53 PERB ¶ 4539 (2020).

representatives, and § 209-a.1 (c) of the Act, based on alleged threats of retaliation for being represented by the Association's president.

### EXCEPTIONS

The City filed exceptions to the ALJ's decision, comprised of two distinct claims. First, the City contends that the ALJ erred in declining to consider the October 2017 decision of the Court of Appeals in *City of Schenectady v NYS Public Employment Relations Board (Schenectady v PERB)*, issued after the hearing in this matter but before the ALJ's decision was released.<sup>2</sup> The City asserts that the Court's decision renders the City's abrogation of "certain past practices pertaining to disciplinary interrogations of its Firefighters" as "not mandatory subjects of bargaining," and that, "as such PERB lacks jurisdiction over these claims."<sup>3</sup>

The City also excepts to the ALJ's finding that the City violated § 209-a.1 (a) of the Act when it restrained or coerced Thomas Carcone, Russell Tinker, or other Association members in the exercise of their rights under § 202 of the Act. The City contends that the ALJ's decision is not supported by substantial evidence.<sup>4</sup>

The Association responded to the City's exceptions, asserting that the ALJ correctly rejected the applicability of *Schenectady v PERB*, arguing that the rationale of the decision and its progeny [sic] have never been, and should not be in this first instance, applied to firefighters."<sup>5</sup> In particular, the Association urged that *Schenectady v PERB* represented a "narrow public policy exception" that "only applies to police

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<sup>2</sup> 30 NY3d 109, 50 PERB ¶ 7006 (2017). The ALJ declined to address this claim, stating that "the decision cited pertains to police disciplinary procedures, which are not at issue in this charge." 53 PERB ¶ 4539, at n 166.

<sup>3</sup> City Exceptions, No 1.

<sup>4</sup> City Exceptions, No 2.

<sup>5</sup> Association Response, at 1.

because of their unique status in dealing with the public on civil rights issues and because of their particular paramilitary nature.”<sup>6</sup>

The Association also contends that the City only provided a copy of the decision in *Schenectady v PERB* on October 25, 2017, “six weeks *after* the post-hearing briefs had been submitted.”<sup>7</sup> The Association faults the City for failing to raise the decision as an affirmative defense or to amend its answer, or even to submit evidence supporting the question of whether the City’s actions were within the ambit of *Schenectady v PERB*. The Association asserts that any defense based on *Schenectady v PERB* has been waived by the City’s continued adherence to negotiated procedures. Additionally, the Association notes that, unlike the issue in *Schenectady v PERB*, the case at bar involves pre-discipline procedures pertaining to discipline investigations and an employee organization’s right to have the representative of its choosing in discipline investigations as well as the right of its members to have their representational rights guaranteed under the Act not interfered with in these investigations.<sup>8</sup>

The Association supports the ALJ’s decision finding that the City restrained or coerced Carcone, Tinker, and other Association members in the exercise of their rights under § 202 of the Act, arguing that the ALJ’s credibility determinations are entitled to great weight and, in the absence of any objective evidence compelling a finding that her credibility findings are manifestly in error, should be affirmed.<sup>9</sup>

The Association cross-excepts to the ALJ’s conclusion that the City’s refusal to allow Carcone or Tinker to represent employees during the investigation did not violate

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<sup>6</sup> *Id.*, at 1-2.

<sup>7</sup> *Id.*, at 2.

<sup>8</sup> *Id.*

<sup>9</sup> Association Response, at 1.

§ 209-a.1 (b) of the Act. The ALJ found that the exclusion did not amount to attempting to select the Association's representatives.

The Association similarly cross-excepts to the ALJ's finding that § 209-a.1 (c) of the Act was not violated by the City's threatening the Association's membership with disciplinary action for using either Carcone or Tinker as a representative at the disciplinary interrogations. Finally, the Association excepts to the ALJ's determination that § 209-a.1 (d) was not violated by the City's utilizing police officers for the disciplinary interrogations rather than the fire chief or staff within the Fire Department, and her finding that the selection of who conducts such interrogations is a managerial prerogative.

The City responded to the cross-exceptions, asserting that the Court of Appeals' decision in *Schenectady v PERB* is controlling with respect to the entirety of the disciplinary process over firefighters in a city as defined in the New York State Second Class Cities Law, and thus outside of the scope of collective bargaining. The City defends its submission of the decision in *Schenectady v PERB* to the ALJ, noting that the decision was issued in October 2017. The City contends that the decision did not create an affirmative defense, but is "a holding of law whereby a disciplinary process, previously assumed to be a mandatory subject of negotiation under the Act, is no longer such."<sup>10</sup>

Finally, the City asserts that the ALJ's dismissal of the alleged violations of §§ 209-a.1 (b), (c), and (d) of the Act were correctly decided, based on substantial evidence, and correct under precedents under the Act.

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<sup>10</sup> City Response to Cross-Exceptions, at 2.

Because the question of the applicability to fire department employees of a city subject to the Second Class Cities Law of the public policy at issue in *Schenectady v PERB*, and the cases leading up to that decision, raises a novel and important issue, we ordered the parties to submit supplemental briefing on the issue.

### FACTS

The facts in this matter are fully set forth by the ALJ in her meticulous opinion, and are only referred to here to the extent necessary to decide the exceptions and cross-exceptions. On June 1, 2016, the Association filed an improper practice charge alleging that the City violated §§ 209-a.1 (a), (b), (c), (d), and (g) of the Act by unilaterally altering its procedures for conducting disciplinary interrogations and excluding the Association's president and secretary from representing bargaining unit members during disciplinary interrogations.<sup>11</sup>

On March 27, 2016, Thomas Carcone, Association President, and an employee in the title firefighter paramedic, was informed by Fire Chief, Russell Brooks, that Brooks had ordered bargaining unit members Milton Reeves and Dan Taurisani to fill out a questionnaire regarding the disposal of an unknown white powdered substance found (and, according to Brooks, disposed of) by them. Reeves and Taurusani complied and filed the form with Brooks on March 29, 2016. After these forms were submitted, Brooks informed Carcone that the investigation had been transferred, by order of the City's mayor, to the City Police Department's Internal Affairs Division (IAD). Carcone asked Chief of Police, Mark Williams, to contact the Association before any bargaining unit members were interviewed, and Williams agreed.

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<sup>11</sup> The allegation that the City violated § 209-a.1 (g) of the Act was withdrawn by the Association in its post-hearing brief. 53 PERB ¶ 4539, n 1.

Initially, IAD requested Carcone, Reeves, and Taurisani to report to the police station on April 19; they declined, and Brooks requested that the interviews be held at the fire station. The IAD Investigators, Sergeant Hiram Rios and Investigator Trevisani, agreed to do so, and arrived at the fire station. Carcone requested, and received, an opportunity to speak to the Association's Counsel, Ron Dunn, of Gleason, Walsh, Dunn & O'Shea. Subsequently, Dunn participated by phone in a conversation between the IAD employees and Carcone, Taurisani, and Reeves. In this conversation, Rios contended that the City had concerns that certain Association representatives might be "conflicted out" of providing representation during the investigation. Carcone in turn raised concerns that another bargaining unit member, Captain Noon, had been interviewed without being "offered his Taylor Act rights."

Rios refused to allow Carcone to represent the Association members, and sought to exclude him from the interviews. The meeting was ended by Rios. Based on a possible conflict, Dunn was replaced as counsel, with Nathaniel G. Lambright, of Blitman & King, representing the Association and its members.

A series of interrogations took place from May 4 (Taurisani and Reeves) through June 16, 2016 (Noon, second interrogation). Neither Carcone nor Association Treasurer, Russell Tinker, who had previously provided representation when Carcone was unavailable, was permitted to represent the bargaining unit members in these interrogations.

During Carcone's interrogation, the following exchange took place:

Carcone: If the member chooses who he wants as his representation...

Rios: The member is gonna be compelled to show up. Period.

Carcone: ...which is his right.

Rios: He is gonna be compelled to show up. Period. If he chooses to show up with Mr. Lambright, that's fine. If he chooses to show up with another representative, that's fine too. You [Carcone] cannot participate.

\* \* \*

Rios: No, you're out of it and so is Tinker. He's got two people or Mr. Lambright. He's got three, I'm sorry.

Lambright: Well he can. They can select whoever they want. I guess the question is...

Rios: We will not allow it.

Lambright: Then you won't...

Rios: And then they will be charged with insubordination, that's the bottom line.

Carcone: Who will be charged with insubordination?

Lambright: Who, the member?

Rios: The member who refuses to show up without representation.

Lambright: The member who chooses to exercise his rights.

Rios: Well that will be up to you guys.<sup>12</sup>

According to the Association's witnesses, the interviews or interrogations of bargaining unit members did not comport with the City's past practice regarding disciplinary investigations.

The ALJ found incredible the City's evidence that Carcone was excluded from interrogations of bargaining unit members because he became hostile and interfered with the investigation during the initial meeting, based on the recording of the meeting,

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<sup>12</sup> Joint Ex 15, part 3, at 12-13; Joint Ex 9.

which established that it was Rios, not Carcone, who became agitated and angry and abruptly ended the meeting by storming out when the president inquired about rights that would be afforded to Association members during the investigation.

The ALJ found that this evidence and the City's shifting reasons for excluding Carcone—his status as a person of interest in the investigation and his working the shift before the substance was discovered—were merely a pretext for interfering with Association members' rights under § 202 of the Act.

It is undisputed that the parties had negotiated disciplinary procedures for firefighters, which were incorporated into the parties' collective bargaining agreement. Further, the Association alleged that the parties had an established past practice for the conduct of disciplinary investigations that the City violated. Specifically, the Association allege as past practices that

[D]isciplinary investigations are performed 'in house' by the Fire Chief or his designee; the Association receives 24-hours' notice of a scheduled interrogation of a bargaining unit member; interrogations are not recorded in any manner; interrogations take place within an office at the Fire Department; and "members [are] treated with respect" during interrogations and are not yelled at, called liars or subject to other offensive interrogation tactics.<sup>13</sup>

The ALJ found the first of these unilateral changes, the designation of the investigator(s), to not involve a mandatory subject, on the basis that selection of the investigator is a managerial prerogative.<sup>14</sup> The remaining unilateral changes were found by the ALJ to have affected mandatory subjects of bargaining—the provision of 24 hours notice to the Association prior to a bargaining unit member's interrogation; the

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<sup>13</sup> 53 PERB ¶ 4539, 4702 (2020) (citing Association's Brief, at 19-20).

<sup>14</sup> *Id.*, citing *City of Schenectady*, 21 PERB ¶ 4605 (1988), *affd*, 22 PERB ¶ 3018 (1989).

practice of not recording interrogations; conducting disciplinary interrogations in an office at the Fire Department; and “treating bargaining unit members with civility and respect during disciplinary interrogations.”<sup>15</sup>

### DISCUSSION

As a threshold matter, we find that the City’s submission to the ALJ of the Court of Appeals’ decision in *Schenectady v PERB* was neither untimely nor waived. As the Court of Appeals has recently reaffirmed, “a decisional change in the common law . . . typically but not invariably applies to all cases still in the normal litigating process.”<sup>16</sup> The Court of Appeals’ decision in *Schenectady v PERB* was rendered while this matter was still pending before the ALJ, and thus, by any definition, “still in the normal litigating process.”

Therefore, we cannot fault the City for advising the ALJ, and subsequently us through its exceptions, of that decision, and the impact the City claims that it has on the matter before us. A ruling by the Court of Appeals, the State’s highest Court, is binding on this Board. Thus, we are constrained to consider the effect of *Schenectady v PERB* on the already convoluted question of the negotiability of discipline for police and, by extension, firefighters.

More specifically, this particular case largely turns on the purported applicability

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<sup>15</sup> 53 PERB ¶ 4539, at 4702-4703 (citing, *inter alia*, *Patchogue-Medford Union Free Sch Dist*, 30 PERB ¶ 3041 (1997); *Amherst Police Club*, 12 PERB ¶ 3071 (1979). In particular, the ALJ viewed the recorded interrogations and found that Brooks’s testimony that he “always treated the firefighters with respect and dignity” was sufficient to establish the past practice, and that the recordings substantiated that Rios “utilized abusive interrogation practices” in violation of past practice. *Id.*, at 4703.

<sup>16</sup> *Regina Metropolitan Co, LLC v New York State Div of Housing & Community Renewal*, 35 NY3d 332, 370 (2020), quoting *Gurney v Aetna Life & Cas Co*, 55 NY2d 184, 191 (1982).

of the Court of Appeals' decision in *Schenectady v PERB* to the firefighters represented by the Association, and, if it is deemed to apply to them, the extent of the preclusive effect of that decision to the negotiability of the disciplinary process at issue.

Our decision cannot be made in a vacuum; *Schenectady v PERB* is not what we have previously described as a “solitary island[] in a stream of contrary opinion.”<sup>17</sup> Rather, the status of police discipline as a mandatory or prohibited subject of bargaining has been significantly reshaped by the Court of Appeals in a series of decisions rendered over the last 15 years, which has impacted the negotiability of discipline of firefighters and fire department employees.

Originally, in *Auburn Police Local 195 v Helsby (Auburn v Helsby)*,<sup>18</sup> a case involving police discipline, the Court of Appeals affirmed without opinion the Appellate Division's order finding the subject negotiable. That result stood, as to police officers, until 2006, when the Court of Appeals issued its decision in *Patrolmen's Benevolent Association of the City of NY v NYS Public Employment Relations Board (PBA v PERB)*, which sharply limited *Auburn v Helsby's* holding:

In general, the procedures for disciplining public employees, including police officers, are governed by Civil Service Law §§ 75 and 76 which provide for a hearing and an appeal. In *Auburn*, a case involving police discipline, the Appellate Division rejected the argument that these statutes should be interpreted to prohibit collective bargaining agreements “that would supplement, modify or replace” their provisions (62 A.D.2d at 15,), and we adopted the Appellate Division's opinion (46 N.Y.2d at 1035–1036, 416 N.Y.S.2d 586,). Thus, where Civil Service Law §§ 75 and 76 apply, police discipline may be the subject of collective bargaining.

But Civil Service Law § 76(4) says that sections 75 and 76 shall not

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<sup>17</sup> *City of Long Beach*, 51 PERB ¶ 3005, 3022 (2018) quoting *Nanopierce Techs, Inc v Southridge Capital Mgmt LLC*, 2003 WL 22052894, at \*4 (SDNY Sept 2, 2003) (Sand, D.J.).

<sup>18</sup> 46 NY2d 1034, 1035-1036 (1979).

“be construed to repeal or modify” preexisting laws, and among the laws thus grandfathered are several that, in contrast to sections 75 and 76, provide expressly for the control of police discipline by local officials in certain communities.<sup>19</sup>

The Court held that collective bargaining over police discipline was not only not a mandatory subject of bargaining, but that for such officers bargaining over discipline was prohibited.<sup>20</sup>

Moreover, the Court found in *City of New York v Patrolmen’s Benevolent Association of City of New York, Inc.*, (*City of New York*) that “[t]he Police Commissioner’s authority under [the New York City Charter] is not limited to the formal disciplinary process; *i.e.*, situations where allegations of misconduct have been made or are being adjudicated against identified officers.”<sup>21</sup> Indeed, the Court in *City of New York* pointed out that “two of the five subjects covered by the expired collective bargaining agreement at issue in *PBA v PERB*—the length of time a police officer could confer with counsel before being questioned in a departmental investigation and guidelines for interrogation of police officers—preceded the lodging of any charges.”<sup>22</sup> The Court also described “the detection and deterrence of wrongdoing within the [Department]” as a “crucial component of the Police Commissioner’s responsibility to maintain discipline within the force.”<sup>23</sup>

*PBA v PERB* was not, however, the first such analysis by the Court of Appeals. In 1999, the Court decided *Montella v Bratton*, which it later summarized as holding “that §§ 75 and 76 of the Civil Service Law did not apply to Police Department discipline

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<sup>19</sup> 6 NY3d 563, 573 (2006).

<sup>20</sup> *Id.*, at 572.

<sup>21</sup> 14 NY3d 46, 59 (2009).

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

because we found in provisions of the New York City Charter and Administrative Code a legislative direction that such discipline be left to the discretion of the Police Commissioner, subject only to review by the courts under article 78.”<sup>24</sup>

In 2005, on very similar logic, the Court in *Von Essen v NYC Civil Service Commission* extended to employees of the New York City Fire Department a prior decision finding “in provisions of the New York City Charter and Administrative Code a legislative direction that police discipline be left to the discretion of the Police Commissioner, subject only to review by the courts under article 78 of the Civil Practice Law and Rules.”<sup>25</sup> Describing the City Charter provision at issue as “even more strongly worded” than that with respect to police discipline, the *Von Essen* Court bluntly stated that “[e]ven without corresponding confirmatory evidence, we reach the same conclusion with respect to the Fire Department” as to the police department.

Following *Von Essen*, the Appellate Division, First Department, has found that “the same policy concerns that guided the Court of Appeals’ decisions in [*PBA v PERB*] and [*City of New York*] apply with equal force here. FDNY, like the police department, is a quasi-military organization demanding strict discipline of its workforce.”<sup>26</sup>

In *Town of Wallkill v Civil Service Employees Association, Inc.*,<sup>27</sup> the Court of Appeals “extended [*PBA v PERB*] to a local law regarding police discipline, where the local law was adopted pursuant to authority granted by Town Law § 155, itself a general

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<sup>24</sup> *Von Essen v NYC Civil Service Commn*, 4 NY3d 220, 223-224 (2005), citing and summarizing *Montella v Bratton*, 93 NY2d 424 (1999).

<sup>25</sup> *Id.*

<sup>26</sup> *Roberts v NYC Office of Collective Bargaining*, 113 AD3d 97, 103, 47 PERB ¶ 7503 (1<sup>st</sup> Dept 2013), citing *Matter of Gallagher v City of New York*, 307 AD2d 76, 82, *lv denied*, 1 NY3d 503 (2003); *PBA v PERB*, 6 NY3d, at 576.

<sup>27</sup> 19 NY3d 1066 (2012).

law enacted prior to Civil Service Law §§ 75 and 76.”<sup>28</sup>

Most recently, and specifically invoked before us in this matter, in *Schenectady v PERB* the Court found that “[t]he Taylor Law's general command regarding collective bargaining is not sufficient to displace the more specific authority granted by the Second Class Cities Law,” and “[t]hus, our decisions in *Matter of Patrolmen's Benevolent Assn* and *Matter of Town of Wallkill* control, and police discipline is a prohibited subject of bargaining in *Schenectady*.”<sup>29</sup> The Court specifically found that, despite its express supersession clause, “[t]he Second Class Cities Law has not been expressly repealed or superseded by the legislature nor was it implicitly repealed by the enactment of the Taylor Law in 1967.”<sup>30</sup>

Our analysis is constrained by this line of cases, especially, but not exclusively, *Schenectady v PERB*. It is undisputed that the City of Utica is a city of the Second Class, and thus subject to the strictures of the Second Class Cities Law. Section 131 of the Second Class Cities Law, the very provision at issue in *Schenectady v PERB*, like the New York City Charter provisions in *Von Essen*, embraces both the fire and the police departments, providing that:

The commissioner of public safety shall have cognizance, jurisdiction, supervision and control of the government, administration, disposition and discipline of the police department, fire department, . . . and of the officers and members of said departments, and shall possess and exercise fully and exclusively all powers and perform all duties pertaining to the government, maintenance and direction of said departments . . . .

The Court of Appeals found that this precise statutory language, enacted prior to

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<sup>28</sup> *City of Schenectady v NYS Pub Empl Relations Bd*, 30 NY3d 109, 115 (2017) (characterizing *Wallkill*).

<sup>29</sup> *City of Schenectady*, 30 NY3d, at 115-116.

<sup>30</sup> *Id.*, at 116-117.

the passage of the Act, prevailed over the Act, stating that “[t]he Taylor Law's general command regarding collective bargaining is not sufficient to displace the more specific authority granted by the Second Class Cities Law.”<sup>31</sup> Moreover, as was the case in *Von Essen*, so too here the Second Class Cities Law specifically commits the discipline of firefighters to the commissioner. There is no allegation or evidence that the Second Class Cities Law has been expressly repealed or superseded by the Legislature in the City of Utica. We are therefore constrained to apply these decisions, and find that the holding of *Schenectady v PERB* must apply to prohibit the negotiation of discipline of firefighters as well as that of police officers.

Although we find ourselves thus constrained in our holding, we cannot help but note that the public policy favoring local control of police discipline found by the Court in the cases discussed above has significantly undermined the Court's own decision in *Auburn v Helsby*, finding police discipline to be negotiable, and has taken on a life of its own, upending long-settled expectations in municipalities, towns, and cities throughout the State.

With respect, we take this opportunity to urge the Court to consider that the judicial creation of a body of public policy that is neither express nor implicit in statutory language presents at a minimum the appearance that the Court is disregarding Statutes § 73, providing that “[t]he courts in construing statutes should avoid judicial legislation; they do not sit in review of the discretion of the Legislature or determine the expediency, wisdom, or propriety of its action on matters within its power.”

The enactment of the Act established collective bargaining between public

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<sup>31</sup> *Id.*, at 115.

employers and their employees, including police and firefighting employees. Such bargaining swiftly established the norm from the Act's effective date in 1967 until 2006, strongly suggesting that the Court's line of decisions represents a solution in search of a problem that did not exist. The Court's repeated invocations of the "strong and sweeping policy of the State to support collective bargaining under the Taylor Law" would ring more true if the Court did not grant itself the power to thwart that policy at will.<sup>32</sup>

We further note that the Court's reliance on the "savings clauses" of §§ 75 and 76 of the Civil Service Law in creating a public policy strong enough to outweigh the Legislature's explicitly declared policy supporting collective bargaining does not logically cohere; those sections by their terms have no bearing on the existence or scope of collective bargaining. Indeed, the Act was enacted over a decade subsequent to these sections, and was a remedial statute intended to import collective bargaining broadly throughout the State. The Court of Appeals has long acknowledged that "[t]he issue is not that these enactments were intended by their authors to create an exception to the Taylor Law; obviously they were not, since they were passed decades before the Taylor Law existed."<sup>33</sup> Nonetheless, the result of this line of decisions is to use a pre-Act statute that does not address collective bargaining to insulate still earlier laws that never contemplated collective bargaining. These decisions effectively circumscribe the Legislature's mandates in the Act, which establish the public policy of this State.

Regardless of our objections to the reasoning of these decisions, we are bound by them, and therefore find that discipline and disciplinary procedures for firefighters is a

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<sup>32</sup> *PBA v PERB*, 6 NY3d 563, at 571; *Schenectady v PERB*, 30 NY3d 109, at 114.

<sup>33</sup> *PBA v PERB*, 6 NY3d 563, at 576.

prohibited subject for firefighters under the Second Class Cities Law, including investigative procedures antecedent to the filing of formal charges.<sup>34</sup>

Constrained as we are by the binding holdings of the Court of Appeals, we are bound to reverse the ALJ's findings that the City's unilateral changes to past practices regarding procedures with respect to disciplinary interrogations for firefighters in the City affected a mandatory subject of bargaining, and thus violated § 209-a.1 (d) of the Act.

The ALJ's finding with respect to the exclusion of Carcone and Tinker is based on her credibility finding that the inconsistent and shifting grounds proffered by the City for their exclusion were pretextual, supporting a finding that the City violated § 209-a.1 (a) of the Act. As we have often stated, "[c]redibility determinations by an ALJ are generally entitled to great weight unless there is objective evidence in the record compelling a conclusion that the credibility finding is manifestly incorrect."<sup>35</sup> Here, the City here has not presented any objective evidence that the ALJ erred in her credibility determination. Accordingly, we see no basis to overturn the ALJ's credibility finding, and affirm her finding that the City violated § 209-a.1 (a) of the Act in excluding Carcone and Tinker.

With respect to the alleged violation of § 209-a.1 (b) of the Act, we affirm the ALJ's dismissal of this allegation. Section 209-a.1 (b) of the Act declares it improper for a "public employer or its agents deliberately to dominate or interfere with the formation

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<sup>34</sup> *City of New York v Patrolmen's Benevolent Assn of City of New York, Inc.*, 14 NY3d 46, at 59.

<sup>35</sup> *Buffalo City Sch Dist*, 53 PERB ¶¶ 3015, 3074 (2020); *Pine Valley Cent Sch Dist*, 51 PERB ¶¶ 3036, 3160 (2018), quoting *Village of Scarsdale*, 50 PERB ¶¶ 3007, n 51 (2017). See also *Rochester Housing Authority*, 52 PERB ¶¶ 3014, 3061 (2019); *Pleasantville Union Free Sch Dist*, 51 PERB ¶¶ 3024, 3100 (2018); *Village of Endicott*, 47 PERB ¶¶ 3017, 3051 (2014).

or administration of any employee organization for the purpose of depriving [public employees] of [their rights guaranteed in § 202 of the Act].”<sup>36</sup> We have long held that the term “interference” in subsection (b) is “designed to prevent a public employer from meddling in the internal affairs of the organization or trying to control it.”<sup>37</sup> Moreover, “the prohibition in [§ 209-a.1 (b)] is directed to conduct by a public employer which would compromise the independence of an employee organization that represents or seeks to represent its employees.”<sup>38</sup> An attempt by one party to control the selection of the other party’s representative, whether successful or not, might constitute a violation of § 209-a.1 (b) of the Act.<sup>39</sup>

Although the City excluded Carcone and Tinker from consideration as representatives for firefighters subject to interrogation, firefighters were not compelled to use any particular representative. There remained other options for firefighters, and the City did not attempt to specifically select any employee’s representative. We find that the exclusion of Carcone and Tinker was not an attempt to compromise the independence of the Association. As a result, we dismiss the alleged violation of § 209-a.1 (b) of the Act.

Finally, the alleged violation of § 209-a.1 (c) of the Act is also based on the

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<sup>36</sup> *State of New York (Dept of Corrections and Community Supervision)*, 50 PERB ¶ 3037, 3157 (2017), quoting *Monroe BOCES No. 1*, 28 PERB ¶ 3068, 3157 (1995).

<sup>37</sup> *Pleasantville Union Free School District*, 51 PERB ¶ 3024, at 3024-3025; *State of New York (Dept of Corrections and Community Supervision)*, 50 PERB ¶ 3037, at 3159; quoting *County of Rockland (Rockland County Community College)*, 13 PERB ¶ 3089, 3143 (1980).

<sup>38</sup> *Id.* See also *County of Rockland (Rockland County Community College)*, 13 PERB ¶ 3089, 3143 (1980).

<sup>39</sup> *State of New York (Dept of Corrections and Community Supervision)*, 50 PERB ¶ 3037, at 3157, citing *Erie County Water Auth*, 25 PERB ¶ 3030, 3063 (1992); *Village of Malone*, 23 PERB ¶ 3019, 3036 (1990); *City of Newburgh*, 16 PERB ¶ 3081 (1983).

exclusion of Carcone and Tinker as possible representatives for unit employees. The Association asserts that the City violated § 209-a.1 (c) of the Act when it “threatened the Union’s membership with retaliation if a member utilized either President Carcone or Secretary Tinker as their representative during the discipline interrogations.” The ALJ dismissed this allegation because she found that no bargaining unit member was actually subject to discipline. We find that this is not an adequate basis for dismissing the allegation.<sup>40</sup> A threat of adverse employment consequences for engaging in activity protected under the Act is enough to sustain a charge pursuant to § 209-a.1 (c) of the Act, due to the chilling effect such a threat has on protected activity.<sup>41</sup>

Although we disagree with the ALJ’s analysis, we affirm her ultimate finding dismissing the allegation. No threat was made to bargaining unit members themselves, and there is no evidence that any bargaining unit members requested Carcone as their representative. In the absence of evidence that bargaining unit members were aware of Carcone’s exclusion, we find that there was no unlawful threat to bargaining unit members’ protected activity, and we dismiss the alleged violation of § 209-a.1 (c) of the Act.

For the foregoing reasons, we reverse the ALJ’s finding as to the past practice claims, affirm her finding of managerial prerogative with respect to the selection of the investigator, and affirm her determination that the City violated § 209-a.1 (a) of the Act

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<sup>40</sup> The case the ALJ relied on is *Village of Hempstead*, 21 PERB ¶ 4582 (1988), a decision by a different ALJ. ALJ decisions are non-precedential and not binding on the Board in any way. *City of Yonkers*, 53 PERB ¶ 3014, 3067 (2020); *Central New York Regional Transportation Auth*, 52 PERB ¶ 3008, 3036, n 50 (2019); *State of NY (SUNY Buffalo)*, 50 PERB ¶ 3001, 3006, n 43 (2017); *County of Nassau*, 48 PERB ¶ 3023, 3089, n 89 (2015); *Westchester County Department of Correction Superior Officers ’ Assn*, 26 PERB ¶ 3077 (1993).

<sup>41</sup> See *Pleasantville Union Free School District*, 51 PERB ¶ 3024, at 3103.

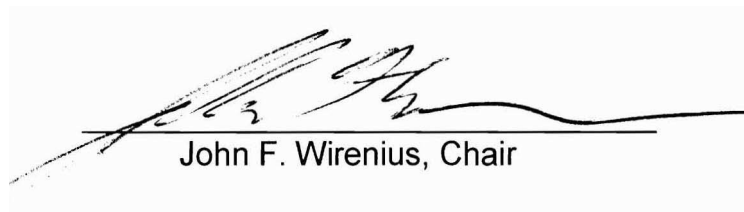
in excluding specific Association officials from the interviews. We also affirm the ALJ's finding that the City did not violate §§ 209-a.1 (b) or 209-a.1 (c) of the Act.

Accordingly, we affirm the ALJ's decision in part and reverse in part. We dismiss the charge to the extent that it pleads violations of §§ 209-a.1 (b), (c), and (d) of the Act, and sustain the charge to the extent that it pleads a violation of § 209-a.1 (a).<sup>42</sup>

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

1. Not interfere with, restrain, or coerce Thomas Carcone, Russell Tinker, or other Association unit members, in the exercise of their rights guaranteed in § 202 of the Act;
2. Sign and post the attached notice at all physical and electronic locations customarily used to post notices to unit employees.

DATED: August 23, 2021  
Albany, New York



John F. Wirenius, Chair



Rosemary A. Townley, Member

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<sup>42</sup> Member Anthony Zumbolo recused himself from consideration of this case.

# NOTICE TO ALL EMPLOYEES

PURSUANT TO  
THE DECISION AND ORDER OF THE

NEW YORK STATE  
PUBLIC EMPLOYMENT RELATIONS BOARD

and in order to effectuate the policies of the

NEW YORK STATE  
PUBLIC EMPLOYEES' FAIR EMPLOYMENT ACT

**we hereby notify all employees of the City of Utica (City) in the bargaining unit represented by the Local 32 International Association of Firefighters, AFL-CIO, Utica Professional Firefighters Association (Association) that the City will:**

1. Not interfere with, restrain, or coerce Thomas Carcone, Russell Tinker, or other Association unit members, in the exercise of their rights guaranteed in § 202 of the Act.

Dated . . . . .

By . . . . .  
on behalf of City of Utica

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