STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

TEAMSTERS LOCAL 264,

Petitioner,

-and- **CASE NO. C-6594**

TOWN OF NORTH COLLINS,

Employer.

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

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

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

IT IS HEREBY CERTIFIED that the Teamsters Local 264 has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Included: All Town of North Collins Highway Department employees including all full-time and part-time Machine Operators and Deputy Highway Superintendent.

Excluded: Highway Superintendent.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Teamsters Local 264. The duty to negotiate collectively includes the mutual obligation to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party. Such obligation does not compel either party to agree to a proposal or require the making of a concession.

DATED: December 14, 2020
Albany, New York

John F. Wirenius, Chairperson

Anthony Zumbolo, Member

Monte A. Klein, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

LIVINGSTON COUNTY DEPUTY SHERIFF'S COALITION,

Petitioner,

-and- **CASE NO. C-6598**

COUNTY OF LIVINGSTON and LIVINGSTON COUNTY SHERIFF,

Employer,

-and-

LIVINGSTON COUNTY DEPUTY SHERIFF'S ASSOCIATION, LOCAL 9050/2379, COUNCIL 82, AFSCME, AFL-CIO,

Intervenor/Incumbent.

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

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

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

IT IS HEREBY CERTIFIED that the Livingston County Deputy Sheriff's Coalition has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their

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

Included: All titles within the Livingston County Sheriff's Office which are not classified as managerial or confidential.

Excluded: Sheriff, Undersheriff, Confidential Secretary to the Sheriff, Majors, Captains, Deputy Sheriff/Communications Officer, all Road Patrol job titles, and Physicians.

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

DATED: December 14, 2020
Albany, New York

John F. Wirenius, Chairperson

Anthony Zumbolo, Member

Monte A. Klein, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

SONAL SHAH,

Charging Party,

-and-

TRANSPORTATION COMMUNICATIONS UNION/IAM, AFL-CIO, CLC,

CASE NO. U-36689

Respondent,

-and-

METROPOLITAN TRANSPORTATION AUTHORITY,

Employer.

SONAL SHAH, *pro se*

EMILY K. PANTOJA, ESQ., for Respondent

PROSKAUER ROSE LLP (ROSANNE FACCHINI and ERIN CONROY of counsel), for Employer

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by Sonal Shah to a decision by an Administrative Law Judge (ALJ) dismissing her improper practice charge alleging that the Transportation Communications Union/IAM, AFL-CIO, CLC (TCU) violated § 209-a.2 (c) of the Public Employees' Fair Employment Act (Act).[1] Shah alleged that the TCU violated the Act by failing to assist her with wage payment issues, negotiating an extension of her probationary period, and participating in, and improperly declining to grieve, her termination by her employer, the Metropolitan Transportation Authority (MTA). The ALJ, granting all reasonable inferences to Shah, found that she alleged no

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[1] 53 PERB ¶ 4517 (2020).

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

Shah had originally also alleged that the MTA violated §§ 209-a.1 (d) and (g), as well as § 209-a.2 (b) of the Act. These allegations were dismissed in the first instance by the Director of Public Employment Practices and Representation (Director) and affirmed by the ALJ on the compiled record.

EXCEPTIONS

Shah essentially excepts to the ALJ's rulings on four grounds. First, she contends that the MTA and the TCU violated their duty to negotiate in good faith pursuant to §§ 209-a.(1) (d) and (g), as well as § 209-a.2 (b) of the Act. Shah asserts that the MTA and the TCU violated their duty to negotiate by not taking any action to assist her when she was subjected to mistreatment by her manager, and that, subsequently, when TCU did not represent her in good faith, it also violated its duty to negotiate.

Second, Shah asserts that the TCU did not represent her in good faith, but rather took no concrete action with regard to her complaints and gave her a false sense of security that it was acting on her behalf while asking her to "just wait and watch" as to both her wage claims and her desire to work remotely or change her hours until her extended probation had elapsed.

Third, Shah claims that the ALJ erred in finding that her allegations, taken as true, did not establish either that Michael Sanchez, who represented her, or the TCU itself, did not communicate with her, and that her claims of arbitrary, discriminatory, and/or bad faith representation of her were based purely on conclusory allegations.

Finally, Shah maintains that the ALJ erred in finding her claim that the extension of her probation was untimely, as Sanchez led her to believe that all of her issues would be addressed.

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

FACTS

The facts are fully set forth in the ALJ's decision and are discussed here only as far as is necessary to address the exceptions. Sonal Shah was a probationary Application Developer, Level 5 in the MTA's Office of Enterprise Applications from June 29, 2017 through September 28, 2018.

Shah's original period of probation was to be for one year from the date of her hire; that is, until June 29, 2018. On June 20, 2018, the MTA extended Shah's probationary period to September 30, 2018. The MTA subsequently terminated Shah's employment on September 28, 2018.

Several TCU officials were contacted by Shah, and aware of her issues with the MTA, specifically, Michael Sanchez, Local Chairman, Local Lodge 982; William DeCarlo, National Representative for Unit 167 at TCU; and Steven Wilhelm, Executive Director, Constitution and Law at TCU/IAM.[2]

Shah's performance reviews for the first three quarters after her hire were satisfactory. She alleges that her manager began "harassing" her during April and May of 2018, and that when she complained to Sanchez, Sanchez referred her to MTA Human Resources (HR), which in turn referred her to

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[2] *See* ALJ Ex 2.

"MTA-EEO," with whom Shah filed a complaint against her manager on July 3, 2018.[3] Shah alleges that, in retaliation for the EEO complaint, her manager began assigning her work to other employees and consultants, and disapproving her timesheets.

Shah states that she was not paid properly for work-related hotel stays in September of 2017,[4] and for various unapproved timesheets and requests for overtime in August, October, November, and December of 2017, and January, March, April, and June of 2018.[5] Emails from July and August of 2018 indicate that Shah asked for Sanchez's assistance with these concerns, and that Sanchez replied that he would inquire with the MTA and inform her when the inquiry was complete. Sanchez provided Shah with status updates regarding his attempts to discuss the matters with the MTA labor relations personnel. Sanchez informed Shah that he left a voicemail for the MTA Labor Counsel, Rich Cairns, on August 17, 2018, and he emailed Shah on August 27, 2018 about his conversation with Cairns.[6] Shah asserts that Sanchez told her that he would resolve her pay and timesheet issues, taking "small steps at a time," and that she should "wait and watch" until after she completed probation.[7]

On June 20, 2018, Shah's probationary period was extended, "citing time

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[3] Amended Charge, at 1-2.
[4] Ex G, annexed to Offer of Proof.
[5] Attachment to the Charge, at 15; Amended Charge, at 2; Ex C, annexed to Offer of Proof.
[6] Amended Charge, at 8-12.
[7] Amended Charge, at 1.

issues"[8] and in order to "watch [her] schedule."[9] Shah alleges that TCU discriminated against her when she sought to accuse another employee, Aureliya Shmeriga, also a TCU member, of "stealing time." Shah maintains that Sanchez prevented her from raising "this time theft" in meetings with HR and from filing a grievance with regard to it despite her emails seeking to grieve the issue with HR. She also asserts that TCU did not act on her complaints or in preventing the extension of her probation. In sum, Shah contends that the TCU chose to protect Shmeriga rather than Shah, despite Shmeriga's alleged misconduct.[10]

On July 19, 2018, while Shah was on extended probation, she emailed Sanchez a draft email to send to the MTA management, and asked Sanchez for feedback. In the draft, Shah sought to request a schedule change from 9:00 am to 5:00 pm "to 8.10 – 4.40 PM."[11]

Approximately two hours later, Sanchez replied, urging Shah to not send the email or "ask for time change until after probation"; he also wrote "Stop bringing up Shmeriga…it looks like you have a vendetta. Looks very bad towards you," adding "I have been talking to MTA about your time. I will let you know when it is complete."[12] The following day, Shah replied to Sanchez that she would like him to try to speak to her supervisor about changing her schedule.

Sanchez was present at the September 28, 2018 meeting, during which Shah

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[8] Amended Charge, at 8.
[9] Offer of Proof, at 3.
[10] Offer of Proof, at 4.
[11] Amended Charge, at 8.
[12] Id.

was informed by the MTA that she was being terminated immediately for "performance issues."[13] Shah asserts that she was given no prior warnings by the MTA about her performance. Shah alleges that, during the meeting, Sanchez did not speak at all and "silently let [her] get terminated."[14] Shah asked to speak with Sanchez during the termination meeting, but he told her that he would speak with her later on. When she was able to reach him by phone later that evening, he told her that there was nothing that he could do about her termination because she was a probationary employee. Shah reminded him that the reason for her probation extension had been to "watch [her] schedule," and she asserted that she should not have been terminated for performance.[15] Sanchez stated that he understood her frustration, but could not do anything more; he also told Shah to "reach out to external agencies for help."[16]

On October 22, 2018, Shah called DeCarlo's office. Shah alleges that the next day, DeCarlo called Shah and informed her that "he talked to Mike [Sanchez] and since [Shah] was on probation," she was "not protected and couldn't be helped."[17] DeCarlo also told Shah that Sanchez told him that he had asked Shah to remain "low-key" during her extended probationary period, but she did not; therefore, her manager terminated her.

Shah asserts that Sanchez, DeCarlo, and Wilhelm all refused to accept and pursue her grievance, which sought to challenge her probation extension and

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[13] Ex I, annexed to Offer of Proof.
[14] Offer of Proof, at 3.
[15] *Id*.
[16] *Id*.
[17] Offer of Proof, at 5.

termination, because she was a probationary employee.[18] She spoke with Wilhelm on October 23, 2018, who informed her that he would "look into the matter" and call her back.[19] On October 24, 2018, Shah emailed Wilhelm that she had not yet received a return phone call, and asking for guidance on any forms she needed to fill out to challenge her termination. Approximately 20 minutes later, Wilhelm replied that her matter was being reviewed and that someone would contact her soon.

On October 25, 2018, Shah emailed Wilhelm again, stating that she had found a grievance form online, and would forward it to him if she did not hear from him; she then sent the filled out form to Wilhelm,[20] who responded via email approximately ten minutes later.

In his email, Wilhelm stated that Shah's probation had been extended "in a settlement that was worked out by Mike Sanchez," who had "successfully secured 75 hours of unauthorized overtime for you."[21] Wilhelm further stated that the MTA had concluded that Shah "failed to change [her] behavior/continued to break the rules," and terminated her on the last day of her extended probation. Wilhelm further stated that the TCU had declined to file a grievance "as you were an at-will employee at the time of your termination."[22] He further stated that Sanchez had put her in touch with the MTA's EEO office to file a claim, and that he "can't find any other recourse within the CBA that

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[18] *Id*.
[19] Id.
[20] Amended Charge, at 5.
[21] ALJ Ex 1.
[22] *Id*.

we could provide for you."[23]

DISCUSSION

As a threshold matter, Shah's exceptions are deficient under § 213.2 (b) of our Rules of Procedure (Rules) because the "exceptions do not set forth specifically the questions or policy to which exceptions are taken, identify that part of the decision to which exceptions are taken, or state the grounds for exceptions."[24]

As was the case in *UFT (Pinkard)*, "[w]hile we are mindful that [Shah] is unrepresented, and that her exceptions should be liberally construed, we note that she has simply reasserted her factual contentions, both timely and time-barred, as exceptions."[25] Where, as here, exceptions do not comply with § 213.2 (b) of our Rules through overbroad statements absent specificity, "[w]e have often held that such blunderbuss exceptions do not comport with the Rules, and do not preserve arguments not expressly made in the exceptions."[26]

In *Churchville-Chili Central School District*, we declined to review exceptions where the party appealing "has not, however, stated the grounds for its exception or presented any arguments for finding the ALJ's analysis to be incorrect," and thus "[w]e are simply unable to discern any arguably meritorious basis asserted to support the [appellant's] challenge to the ALJ's decision."[27] To the extent that such is the case

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[23] *Id*.
[24] *District Council 37*, 50 PERB ¶ 3038, 3161 (2017).
[25] *UFT (Pinkard),* 47 PERB ¶ 3020, at 3061.
[26] *Board of Educ of the City Sch Dist of the City of New York (Cohn)*, 53 PERB ¶ 3011, 3053 (2020).
[27] 51 PERB ¶ 3003, 3010 (2018).

here, "we limit our review of the exceptions here to those arguments expressly made, and thus properly before us."[28]

The ALJ rightly confirmed the Director's dismissal of Shah's claims as an individual pursuant to § 209-a.1 (d) of the Act against the MTA, and § 209-a.2 (b) of the Act against the TCU. "[I]t is well-settled that an individual lacks standing to pursue such an alleged violation."[29] That is because § 209-a.1(d) of the Act "makes it an improper practice for a public employer to refuse to negotiate in good faith with the duly recognized or certified representatives of its public employees."[30] As we have long held, "[u]nder the Act, the District owes its duty to bargain to [the union] and it is [the union], not [Shah], who has standing to bring such a charge against the District."[31]

Section 209-a.2 (b) of the Act "is the corollary to § 209-a.1 (d), making it an improper practice for a public employee organization to refuse to negotiate collectively in good faith with a public employer."[32] Here, too, "the standing to charge a violation

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[28] *Board of Educ of the City Sch Dist of the City of New York (Cohn)*, 53 PERB ¶ 3011, at 3053.
[29] *State of New York (Dept of Correctional Svcs)*, 42 PERB ¶ 3013, 3042 (2009); citing *Bd of Educ of the City Sch Dist of the City of New York (Jenkins)*, 38 PERB ¶ 3012 (2005).
[30] *Board of Educ of the City Sch Dist of the City of New York (Jenkins)*, 38 PERB ¶ 3012, at 3040, citing *New York City Transit Auth*, 32 PERB ¶ 3061 (1999); *Hauppauge Union Free Sch Dist*, 32 PERB ¶ 3027 (1999); *Bd of Educ of the City Sch Dist of the City of New York (McLaughlin)*, 22 PERB ¶ 3012 (1989).
[31] *Id*.
[32] *Id*.

clearly belongs to the public employer and not to an individual employee."[33]

The ALJ correctly dismissed Shah's claim that the MTA violated § 209-a.1 (g) of the Act. We emphasize that Shah has standing to bring this claim; probationary employees such as Shah "are fully covered by § 209-a.1 (g) of the Act."[34] However, the charge and the record before us do not contain any allegation that the MTA "denied a request by [Shah] for [TCU] representation during questioning in which it reasonably appeared that [s]he might be subject to disciplinary action."[35] Although § 209-a.1 (g) of the Act "is entitled to a liberal construction, the amended charge fails to include any of the necessary elements to state a timely and meritorious [claim of a] violation of that provision."[36]

The sole charge outstanding is Shah's claim that the ALJ erred in dismissing her claim that the TCU breached its duty of fair representation to her in violation of § 209-a.2 (c) of the Act. Shah contends that the ALJ erred in finding untimely her claim that the TCU breached its duty of fair representation to her with respect to the extension of her probation.

Section 204.1 (a) (1) of our Rules sets forth that an improper practice charge

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[33] *Id*. Additionally, we note that the amended charge could be read to assert this claim against the MTA as well as against the TCU. As § 209-a.2 (b) of the Act provides only for a claim an employer can assert against an employee organization, any such attempt to assert the claim against the MTA must be dismissed as futile, as well as for lack of standing.

[34] *State of New York (Dept of Correction & Community Svcs)*, 50 PERB ¶ 3037, 3154 (2017); see also *State of New York (Department of Correctional Services)*, 43 PERB ¶ 3031, 3119-3120 (2010); *State of New York (Department of Correctional Services)*, 43 PERB ¶ 3039, 3149, n 2 (2010).

[35] *State of New York (Dept of Correctional Svcs*), 42 PERB ¶ 3013, at 3042.

[36] *Id*.

must be filed "within four months of when the charging party first knew, or reasonably should have known, of the alleged improper practice." The improper practice charge was filed on December 8, 2018. Therefore, any conduct that occurred prior to August 8, 2018 is untimely. As such, Shah's allegation that the TCU failed in its duty to fairly represent her by negotiating the extension of her probationary period, on or about June 20, 2018, is untimely.

The ALJ correctly found that Shah's allegation that she was unaware of Sanchez's improper motivation until October 2018 did not extend her time in which to file. As we have held, under § 204.1 (a) (1) of our Rules, "the four-month time period for filing a charge commences when a charging party had actual or constructive knowledge of the act or acts that form the basis for the charge."[37] Shah does not contend that she was not made aware of the extension of her probation contemporaneously, and thus the limitations period in our Rules applies.

Finally, we affirm the ALJ's dismissal of the timely pleaded claims that the TCU breached its duty of fair representation to her, in violation of § 209-a.2 (c) of the Act. 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."[38] As we have previously explained, the courts have:

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[37] *Town of Tuxedo*, 53 PERB ¶ 3003, 3006-3007 (2020). *See also State of New York (Office of Children and Family Services) (Leone)*, 50 PERB ¶3039, 3161 (2017).
[38] *Professional Staff Congress of the City University of New York (Giammarella)*, 51 PERB ¶ 3010, 3048 (2018); see also *District Council 37 (Fonseca)*, 50 PERB ¶ 3038, 3161 (2017), quoting *District Council 37 (Calendario)*, 49 PERB ¶ 3015, 3060 (2016).

> 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.[39]

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."[40] 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."[41] In this matter, we agree with the ALJ that, even granting Shah the benefit of all reasonable inferences that can be drawn from the pleaded facts, Shah has not demonstrated that the TCU has acted in a manner that was arbitrary, discriminatory, or in bad faith.

Nothing in Shah's charge, exceptions, or offer of proof provides anything other than vague conclusory allegations that the TCU's conduct was arbitrary, discriminatory, or motivated by bad faith. Such "conclusory allegations are insufficient to plead, let alone prove, a violation of the duty of fair representation."[42]

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[39] *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)).

[40] Id. at 3048; see also *Niagara Falls Police Club, Inc (Drinks-Bruder)*, 52 PERB ¶ 3011, 3055 (2019).

[41] *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).

[42] *City of Niagara Falls (Drinks-Bruder)*, 52 PERB ¶ 3002, 3010 n 25 (2019), citing *CSEA (Metzger)*, 50 PERB ¶ 3026, 3100 (2017).

The ALJ did not err in concluding that the documentary evidence offered by Shah indicates that Sanchez responded to her inquiries and updated her on his progress.[43] Moreover, Shah's offer of proof and supporting documents support the ALJ's finding that Sanchez told her that he wanted to work on her behalf in a moderate, gradual fashion, because Shah was still on probation, and could be terminated without effective recourse. The ALJ likewise relied on Shah's own allegations that Sanchez told her to refrain from asking the MTA to change her schedule, or allow her to work from home, until after she had completed probation. Finally, the ALJ cited Shah's allegations that Sanchez also told her to keep a low profile and allow the investigation of her EEO complaint to proceed, and that she should not reach out again to that office until the investigation was complete.

Although Shah clearly disagrees with the TCU's decisions, those decisions have been rational, reasonable, and communicated to her promptly. There is also no showing that the TCU has treated similarly situated unit members differently from Shah. Nor is there any showing that the TCU's decisions have been made in bad faith.

For these reasons, we find that Shah has failed to allege facts which, if proven, would support a finding that the TCU breached its duty of fair representation in violation of § 209-a.2 (c) of the Act.

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[43] *DC 37 (Maltsev)*, 41 PERB ¶ 3022, 3102 (2008) ("An employee organization is obligated, under the Act, to respond to a request for information within a reasonable period of time under the facts and circumstances of each particular case.").

Accordingly, the charge must be, and hereby is, dismissed.

DATED: December 14, 2020
Albany, New York

John F. Wirenius, Chairperson

Anthony Zumbolo, Member

Monte A. Klein, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

USHER Z. PILLER,

Charging Party,

CASE NO. U-35830

-and-

STATE OF NEW YORK (OFFICE OF TEMPORARY AND DISABILITY ASSISTANCE),

Respondent.

USHER Z. PILLER, *Pro Se*

MICHAEL N. VOLFORTE, ACTING GENERAL COUNSEL (LYNN HOMES LYON of counsel), for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions to a decision of an Administrative Law Judge (ALJ) granting a motion to dismiss an improper practice charge claiming that the State of New York (Office of Temporary and Disability Assistance) (State or OTDA) violated §§ 209-a.1 (a) and (c) of the Public Employees' Fair Employment Act (Act) by retaliating against Usher Z. Piller for protected activity under the Act.[1] The ALJ found that Piller failed to establish a *prima facie* case that the State's interrogation, suspension, and issuance of a Notice of Discipline (NOD) were in retaliation for his filing an improper practice charge with PERB, sending two union-related emails, and attending a union protest. The ALJ also found that the State established that it had a legitimate business reason to discipline Piller, assuming that Piller established a *prima facie* case of retaliation.

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[1] 53 PERB ¶ 4522 (2020).

EXCEPTIONS

Piller filed five exceptions to the ALJ's decision.[2] In his first exception, Piller asserts that the ALJ erred by finding that Piller had not established who was responsible for the disciplinary actions taken against him. Similarly, Piller's second exception contends that the ALJ erred by not finding that he had established that OTDA Associate Counsel, Wendy Phillips, was responsible for his interrogation. Piller's third exception avers that the ALJ erred in reaching a decision on the motion to dismiss without considering the contents of the NOD issued against him, which was not introduced into evidence until after Piller rested his case-in-chief. Piller's fourth exception maintains that the ALJ should have found that the State disciplined him because of the content of his union business-related emails. Finally, Piller's fifth exception contends that he established that he was punished more aggressively than other similarly-situated employees.

The State filed a response contending that the ALJ correctly found that Piller failed to establish a *prima facie* case. In the alternative, the State argues that it

[2] In the introduction to his exceptions, Piller states that he is excepting to "each and every aspect of the Decision finding that Piller . . . was not discriminated against . . . ." Exceptions, at 1. Such an overarching, generalized exception does not comply with § 213.2 of our Rules of Procedure (Rules), which requires that exceptions set forth specifically the questions or policy to which exceptions are taken, identify that part of the decision to which exceptions are taken, and state the grounds for exceptions. Piller's statement does not preserve any arguments not expressly made in the exceptions, and we do not consider it. *See Town of Tuxedo*, 53 PERB ¶ 3003, 3006 (2020). *See also Board of Educ, City Sch Dist City of New York*, 52 PERB ¶ 3001, 3004 (2019), quoting *District Council 37*, 50 PERB ¶ 3038, 3161 (2017); *Village of Saranac Lake*, 51 PERB ¶ 3034, n 4 (2018).

demonstrated a legitimate business reason for disciplining Piller and that there is no showing that its legitimate business reason was pretextual.

For the reasons given below, we affirm the ALJ's grant of the motion to dismiss.

FACTS

The facts are set forth fully in the ALJ's decision and are included here only as necessary to decide the exceptions. Piller has worked for OTDA since September 6, 1979. At the time of his testimony, he had been suspended without pay for nearly a year.

At the time of his testimony, Piller was chief steward for Division 191 of the New York State Public Employees Federation (PEF) and had previously held other elected PEF offices since 1987. Division 191 represents members working at OTDA, the Office of Children and Family Services (OCFS), and the Office of Medicaid Inspector General (OMIG).

On or about December 21, 2016, Piller filed an improper practice charge (Case Number U-35461) alleging that OTDA had retaliated against him for his representation of a PEF member.[3] A prehearing conference was held in that matter on March 10, 2017.

On February 3, 2017, Piller sent an email to OMIG Director of Labor Relations, John Burrows, from his OTDA email address, the subject of which is "PEF and Management." The email reads:

> Good morning, John,

[3] Charging Party's Ex 1.

> First, congratulations on your assuming the labor-relations responsibilities.
>
> As you know, PEF had a very fine relationship with your predecessor, Matt Chiesa, so we in the Union look forward to more of the same with you at the helm of this important position.
>
> Please let me know next time you come to Manhattan so I can arrange to meet you and discuss our mutual interests in advancing workplace harmony and cooperation. Thank you.
>
> Usher Piller
> Council Leader
> PEF Division 191[4]

On February 15, 2017, Piller emailed Burrows again, stating that since he had not heard back from Burrows in response to the February 3rd email, he would call Burrows. A few hours later, Burrows sent a reply email to Piller, stating, in full, "Given the slanderous and uncivil statements you have made about the leadership of this Agency I feel there would be no productive outcome to meeting with you."[5] One hour later, Piller sent a reply email to Burrows and 15 other email addresses, which reads:

> It is your statement, Mr. Burrows, that is "slanderous and uncivil."
>
> As you only recently began employment in OMIG as its Director of Labor Relations, I extended to you my hand in friendship, hoping we could work together for the betterment of all employees, including those in the management aisle.
>
> Now, in our very first exchange, you saw fit to respond to my overture by spitting at me, and by extension—at the union members I represent.
>
> I don't intend to stoop to the gutter or roll with you in the mud.

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

> Neither shall the stewards and council members of PEF Division 191.
>
> Nonetheless, I challenge you to cite even one example of slander or uncivility, as you so insolently alleged.
>
> Fortunately, the missive you hurled enables us to understand perspicaciously your concept and philosophy of labor relations.
>
> For that we express appreciation.[6]

On March 2, 2017, Piller sent the above email thread to Burrows as a new email, titled "An Olive Branch," and copied the email to the agency-wide, all-OMIG staff email list, with the following message:

> Dear Mr. Burrows:
>
> As the email exchange (below) indicates, the relationship between Management and Labor at OMIG has not yet achieved the optimal level.
>
> And when assistant council leader Glendon Griffith stopped by recently by [sic] to introduce himself, you blasted off with the fury of a little sputnik sprinkled with [A]lka-[S]eltzer for added zest.
>
> In fairness, we attribute this rather juvenile manifestations [sic] to the agency's deep embarrassment over its handling of the Harvey Brody debacle.
>
> Therefore, I suggest we meet somewhere, and clear the air. Forget about the proverbial glass of beer, as that would run counter to OMIG's zero tolerance policy of alcohol in the workplace. I think coffee would suffice, preferably of the decaf variety, to dampen the excitability level.
>
> Look, your title at OMIG is *Director of Labor Relations*.

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[6] *Id*. There is only one OTDA-email address on the email, and no information in the record as to whether the addressee, Patrick Villarruel, plays a material role in the alleged events.

> If there are no meaningful relations to speak of, then you've essentially been rendered superfluous (aka dead wood), so how in the world can you or OMIG justify your continued employment at the agency?
>
> We're trying to help you, but you must also want to help yourself.[7]

Piller testified that he wrote a report titled "The Strange Case of OCFS Associate Commissioner Brian Daniels: Ineptitude, Malfeasance and Reign of Terror," which he then emailed from his OTDA email address to Daniels on March 1, 2017. Piller sent a copy of that email to many, if not all, OCFS employees, some OMIG employees, and a small number of personal, OTDA, and PEF email addresses.[8]

The text of the email that Piller sent on March 1, 2017, to which the report was attached, reads as follows:

> Dear Associate Commissioner Daniels:
>
> As a public service, I am pleased to present and disseminate your OCFS biographical report, the first in a series, representing a critical study of your activities at the agency.
>
> The time has arrived for your multi-faceted history and behavior to be shared with State employees and, indeed, the citizenry at large.
>
> I have no doubt that, at least to yourself, you will concur with the incontrovertible accuracy of the attached report. (Should you feel that anything in the report is inaccurate or even embellished in the slightest, please feel free to contact me, and if confirmed upon investigation the report shall be revised accordingly.)
>
> This project relied upon extensive conversations with numerous

[7] *Id* (emphasis in original).
[8] Charging Party's Ex 4. The only two OTDA email addresses were Piller's and Leah Cooper's, and there is no information in the record as to whether Cooper played any role in the alleged events.

> OCFS employees, both current and former, interviewed on and off the record.
>
> The result is an ominous portrait of an OCFS administrative hierarchy that condones, cultivates and inspires managerial abuse of authority and the deplorable suffering of the agency's own employees.
>
> Admittedly, your public unmasking may garner you some whiffs of sympathy from certain quarters. However, all of that pales when compared with the vicious harassment, bullying, cruelty and diabolical behavior we have documented.
>
> Although it is dubious that your leopard spots will ever change, the blotches of dishonor you've painted on the OCFS canvass [sic] are simply too grave to ignore.
>
> Usher Piller
> Council Leader
> PEF Division 191[9]

Piller testified that on March 8, 2017, he participated in a protest at OCFS headquarters that decried the OCFS Commissioner's changes to the agency's time and leave policy as having negatively impacted PEF members. Piller also submitted in evidence an article from the "Capitol Confidential" blog of the Albany Times Union newspaper, which includes the text of a letter that he wrote to the OCFS Commissioner on the issue.[10] Piller stated that "the blog is sent as it happens to the [email] subscribers, and then the next morning is published in the actual print edition of the Albany Times Union."[11]

Piller testified that he first received a Notice of Interrogation on March 13, 2017

[9] Charging Party's Ex 4.
[10] Charging Party's Ex 6.
[11] Tr, at 45.

and that, due to a scheduling issue, he subsequently received an amended notice on March 16, 2017. Wendy Phillips, John Nieckarz, and Peter Sinclair conducted the interrogation on March 20, 2017. Immediately following the end of the interrogation, Phillips handed Piller a Notice of Suspension (NOS) without pay. In mid-April, Piller received the NOD, which was dated March 23, 2017 and proposed the penalty of termination. Because OTDA did not timely serve the NOD, the agency served him an Amended Notice of Suspension on April 20, 2017.

DISCUSSION

We have long held that:

> When an improper practice charge alleges retaliation in violation of §§ 209-a.1 (a) and (c) of the Act, the charging party has the burden of demonstrating three elements by a preponderance of the credible evidence: a) that the affected individual engaged in protected activity under the Act; b) that such activity was known to the person or persons taking the employment action; and c) that the employment action would not have been taken "but for" the protected activity.[12]

These elements establish a *prima facie* case and give rise to an inference of improper motivation.[13] The initial burden of proof to establish a *prima facie* case is relatively low; the ALJ is required to accept the charging party's evidence as true and

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[12] *UFT (Konteye)*, 53 PERB ¶ 3010, 3046 (2020); *New York City Transit Auth*, 52 PERB ¶ 3017, 3072 (2019); *Mt Pleasant Cottage Union Free Sch Dist*, 50 PERB ¶ 3002, 3008 (2017); *Bellmore-Merrick High Cent Sch Dist*, 48 PERB ¶ 3022, 3976 (2015); *Village of Endicott*, 47 PERB ¶ 3017, 3050 (2014); *UFT, Local 2, AFL-CIO (Jenkins)*, 41 PERB ¶ 3007 (2008), confd sub nom *Jenkins v NYS Pub Empl Relations Bd*, 41 PERB ¶ 7007 (Sup Ct NY Co 2008), affd, 67 AD3d 567, 42 PERB ¶ 7008 (1st Dept 2009); *State of New York (SUNY Buffalo)*, 46 PERB ¶ 3021 (2013); see also *City of Salamanca*, 18 PERB ¶ 3012 (1985).

[13] *Id*.

give it the benefit of every inference that can reasonably be drawn from that evidence.[14] Only "if the charging party can establish such an inference, does the burden of production shift to the respondent to present evidence demonstrating that its conduct was not improperly motivated."[15] The employer "can dispel the *prima facie* case, and defeat the charge, by rebutting any of the three prongs of the *prima facie* case or through the presentation of evidence demonstrating that the employment action or conduct was motivated by a legitimate non-discriminatory business reason."[16] If the "respondent establishes a legitimate non-discriminatory reason, then the burden, shifts back to the charging party to establish that the articulated non-discriminatory reason is pretextual."[17] When a charging party "fails to meet its burden, a charge of improper motivation must be rejected and the charge dismissed."[18]

The ALJ here assumed that Piller's filing of improper practice charge Number U-35461 and participation in the related pre-hearing conference on March 10, 2017, Piller's emails sent on March 1 and 2, 2017, and his March 8, 2017 participation in a demonstration at OCFS all constitute protected activity under the Act. No exceptions were filed to the ALJ's finding. Any exceptions have therefore been waived, and this

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[14] *Id*.
[15] *Town of Tuscarora*, 48 PERB ¶ 3011, 3037 (2015).
[16] *Board of Educ of the City Sch Dist of the City of New York (Bagarozzi)*, 51 PERB ¶ 3032, 3140 (2018); *Mt Pleasant Cent Sch Dist (Hall)*, 50 PERB ¶ 3019, 3079 (2017); *Town of Tuscarora*, 48 PERB ¶ 3011, at 3037; *Dutchess Community College*, 47 PERB ¶ 3018, 3056 (2014).
[17] *Id*.
[18] *Id*., citing *Catskill Housing Auth (Biegel)*, 49 PERB ¶ 3025, 3081 (2016).

finding is not before us for review.[19] As a result, we find that Piller has met the first prong of his *prima facie* burden—showing that he engaged in protected activity.

The ALJ also assumed that Phillips, Nieckarz, Sinclair, former OTDA Director of Human Resources, Donna Faresta, and/or Kevin Kuhma, Director of Audit and Quality Control, were responsible for taking the disciplinary action against Piller. In his exceptions, Piller asserts that Phillips was responsible for his interrogation, but that Faresta ultimately ordered the interrogation and issued both the NOS and NOD.[20] We find it unnecessary to resolve precisely who was responsible for the disciplinary actions taken against Piller because we find that Piller waived any exceptions to the ALJ's finding that none of these actors had knowledge of the specific union activity that allegedly triggered Piller's interrogation, suspension, and NOD.

In compliance with our Rules, Piller's exceptions clearly identify the portions of the ALJ's decision that he disagrees with.[21] Piller did not, however, file any exceptions to the ALJ's finding that he failed to produce evidence of knowledge of his protected activity on the part of OTDA decision makers, nor does he assert any basis on which we

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[19] Rules § 213.2 (b) (4); *see, eg*, *State of New York (State University of New York – Upstate Medical University)*, 53 PERB ¶ 3013, 3062 (2020)*; 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).

[20] Exceptions, at 3-4.

[21] Section 213.2 of our Rules requires that exceptions set forth specifically the questions or policy to which exceptions are taken, identify that part of the decision to which exceptions are taken, designate by page citation the portions of the record relied upon, and state the grounds for exceptions. The Rules also provides that any exception not specifically urged is waived.

could reverse the ALJ's finding on this dispositive issue. Under these circumstances, our Rules and precedent provide that Piller has waived any exceptions to the ALJ's finding.[22] In the absence of any exceptions, we affirm the ALJ's finding that Piller has failed to establish a *prima facie* case of retaliation because he has not established that the OTDA decision makers who took the adverse actions against him here had knowledge of the union activity that allegedly triggered the actions.

In sum, we affirm the ALJ's finding that the motion to dismiss should be granted because Piller has failed to establish a *prima facie* case of retaliation.

Accordingly, the exceptions are denied, the ALJ's granting of the motion to dismiss is affirmed, and the charge must be, and hereby is, dismissed.

DATED: December 14, 2020
Albany, New York

John F. Wirenius, Chairperson

Anthony Zumbolo, Member

Monte A. Klein, Member

[22] Rules § 213.2 (b) (4); *see* cases cited in n 19.