State of New York Public Employment Relations Board Decisions from September 23, 2005

Keywords
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On February 11, 2005, the Amalgamated Transit Union, Local 282 filed, in accordance with the Rules of Procedure of the Public Employment Relations Board, a timely petition seeking certification as the exclusive representative of certain employees of the Seneca Transit Service.

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

Included: Drivers.

Excluded: All others.

Pursuant to that agreement, a secret-ballot election was held on June 1, 2005, at which a majority of ballots were cast against representation by the petitioner.

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

DATED: September 23, 2005
New York, New York

Michael R. Cuevas, Chairman

John T. Mitchell, Member
In the Matter of

NELSON C. PEREZ,

Charging Party,

- and -

SUBWAY SURFACE SUPERVISORS ASSOCIATION,

Respondent,

-and-

NEW YORK CITY TRANSIT AUTHORITY,

Employer.

NELSON C. PEREZ, pro se

STUART SALLES, ESQ. for Respondent

MARTIN B. SCHNABEL, VICE PRESIDENT AND GENERAL COUNSEL (JOYCE R. ELLMAN of counsel), for Employer

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by Nelson Perez to a decision of an Administrative Law Judge (ALJ) dismissing the improper practice charge, as amended, in which Perez alleged that the Subway Surface Supervisors Association (SSSA) had violated §209-a.2(c) of the Public Employees’ Fair Employment Act (Act) when one of its representatives gave Perez arbitrary advice about his seniority rights. The New York City Transit Authority (Authority), Perez’ employer, was made a statutory party pursuant to §209-a.3 of the Act.
EXCEPTIONS

Perez filed exceptions to the ALJ’s decision, arguing that the ALJ erred in dismissing his charge. The Authority and SSSA have filed responses to the exceptions arguing that the exceptions are untimely and should be dismissed, but otherwise supporting the ALJ’s decision.

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

FACTS

The facts are set forth in the ALJ’s decision and are repeated here only as necessary to decide the exceptions.¹

Perez filed an improper practice charge on December 6, 2004, alleging that the SSSA representative had given him advice about his seniority rights that Perez believes is incorrect and self-serving. A pre-hearing conference was held and the charge was clarified to state:

that on November 30, 2004, Mr. James Cassino, an SSSA representative, gave Mr. Perez advice that was arbitrary, discriminatory and/or in bad faith. The advice in question is Mr. Cassino’s alleged statement that if Mr. Perez stayed in the Brooklyn Division instead of returning to Staten Island Division, once a Staten Island position was offered to him, he would be placed at the bottom of the Brooklyn Division’s seniority list.²

¹ 38 PERB ¶4534 (2005).

²The Authority asserts in its answer that Perez was initially assigned as a Surface Line Dispatcher to the Brooklyn Division in July 2000. In July 2003, Perez was assigned to the Staten Island Division of the Authority. In July 2004, he was reassigned to the Brooklyn Division due to a limited number of available budgeted positions in Staten Island and because of his seniority. In January 2005, Perez was reassigned to Staten Island due to vacancies in that Division and with his seniority intact.
In the charge, Perez acknowledges that Cassino advised him that if he believed Cassino was mistaken to stay in Brooklyn with his seniority, then Cassino would “fight this”. Perez was unhappy with the response. Cassino advised him that SSSA would proceed further and hoped to be successful. Perez did not file a grievance or request SSSA to do so. Perez asserts in his original charge that, while he was involuntarily transferred to Brooklyn in 2004, with his seniority from Staten Island, even though positions have opened up in Staten Island, he would prefer to stay in Brooklyn and retain his seniority. He argues that he should not have to give up his preferred position in Brooklyn just because his former position is now available in Staten Island.

The conference ALJ gave permission to SSSA to file a motion to dismiss and to the Authority to file a motion to be removed as a statutory party. Such motions were thereafter filed and Perez was given the opportunity to file papers in opposition to the motions, but he did not do so.

By decision dated June 16, 2005, both motions were granted: the Authority was released as a statutory party and the charge was dismissed. The ALJ found that the Authority was not a statutory party because the charge did not allege a breach of the duty of fair representation “in the processing of or failure to process a claim that the public employer has breached its agreement with such employee organization.”3 The charge was dismissed as against the SSSA for failure of proof that Cassino’s advice to Perez was arbitrary, discriminatory or made in bad faith.

The Authority asserts that it received, by certified mail, its copy of the ALJ’s decision on June 21, 2005. The first time the decision was sent to Perez via certified

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3 Act, §209-a.3.
mail, it was returned as undelivered. The ALJ’s decision was sent again via certified mail on July 21, 2005, and Perez received it on July 27, 2005. Perez’ exceptions, sworn to on August 15, 2005, were received by the Board on August 16, 2005, and by the Authority on August 17, 2005.

**DISCUSSION**

Section 204.10 of PERB’s Rules of Procedure (Rules) requires that exceptions to an ALJ’s decision be filed within fifteen working days after the party’s receipt of the decision. Perez received the ALJ’s decision on July 27, 2005, therefore, his exceptions would be timely if filed by August 17, 2005. Perez’ exceptions were received by the Board on August 16, 2005, and are, therefore, timely.

Perez disagrees with Cassino’s assessment of Perez’ right to retain his seniority if he remained in Brooklyn. Cassino’s offer to take the matter further was not pursued by Perez. Perez did not file a grievance, instead he filed the instant improper practice charge. However, that Cassino’s advice was not consistent with Perez’s understanding of his seniority rights does not constitute a breach of the duty of fair representation by SSSA.5

Based upon the foregoing, we deny Perez’ exceptions and affirm the decision of the ALJ.

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4 To the extent that Perez disputes in his exceptions the statements in Cassino’s affadavits, as Perez did not respond to the motions to dismiss, he is now precluded from raising this issue on appeal.

5 See New York State Court Clerks Ass’n (Janay), 36 PERB ¶3041 (2003); Oneida County Deputy Sheriff’s Benevolent Ass’n (Kulesa), 33 PERB ¶3037 (2000).
IT IS, THEREFORE, ORDERED that the charge is hereby dismissed in its entirety.

DATED: September 23, 2005
New York, New York

Michael R. Cuevas, Chairman

John T. Mitchell, Member
STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

BARBARA MALONEY-BELTON,

Charging Party,

- and -

ROSLYN UNION FREE SCHOOL DISTRICT and
ROSLYN CUSTODIAL, BUS DRIVERS AND
MAINTENANCE ASSOCIATION,

Respondents.

WOLIN & WOLIN (ALAN E. WOLIN of counsel), for Charging Party

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by Barbara Maloney-Belton to a decision of the Director of Public Employment Practices and Representation (Director), dismissing her charge which alleged that the Roslyn Union Free School District (District) violated §§209-a.1(a) and (c) of the Public Employees’ Fair Employment Act (Act) when, subsequent to her retirement as a bus attendant, the District discontinued her health insurance coverage in retaliation for her friendship with the former president of the Association. As to the Association, Maloney-Belton alleged that it violated §209-a.2(a) of the Act by not permitting her to be included in its bargaining unit.

By letter dated May 12, 2005, the Director informed Maloney-Belton that her charge was deficient because she failed to allege a violation against the Association
within four months of the date of the filing of the charge; because she was never included in the bargaining unit and because she was not and is not a public employee. She was advised that, unless corrected by May 27, 2005, the charge would be dismissed. In response, Maloney-Belton informed the Director that she intended to file exceptions to his deficiency determination.

EXCEPTIONS

Maloney-Belton contends in her exceptions that the Director’s deficiency determination is in error because, as a lunch monitor, she remains a public employee of the District and, as such, is still covered by the Act, and that the charge is timely.

The District and the Association have not responded to the exceptions.

Based upon our review of the record and consideration of Maloney-Belton’s arguments, we affirm the decision of the Director.

FACTS

Maloney-Belton disputes the Director’s finding that she was a retiree and, therefore, not entitled to the protections of the Act. The facts as we find them to be established in the record are set forth below.

On May 10, 2005, Maloney-Belton filed an improper practice charge in which she states that she began her employment with the District in 1993 as a part-time bus attendant and part-time lunch monitor. From 2001 to the present, she has been a part-time lunch monitor at the Roslyn Heights Elementary School. By letter dated August 23, 2004, Maloney-Belton informed the District that she was retiring “as of September 1, 2004,” from her bus attendant position. Following her retirement, she received health

1 38 PERB ¶4535 (2005).
insurance coverage from the District. At the January 13, 2005 school board meeting, the District passed a resolution discontinuing health insurance coverage for retired part-time bus attendants and bus drivers. The retirees' health insurance coverage was provided through the New York State Health Insurance Program (NYSHIP). The NYSHIP administrative manual, §245, ¶(a)(3) authorized participating members to discontinue health insurance coverage for “all employees or a class of employees whose most recent date of employment with the employer is after April 1, 1977.”

Maloney-Belton received a letter, dated January 19, 2005, from Fino M. Celano, Assistant Superintendent for Human Resources, advising her that, pursuant to NYSHIP’s health insurance manual, her retiree health insurance coverage would cease as of February 1, 2005. She has alleged, in substance, that because of her friendship with the former president of the Association, the District retaliated against her. She contends that the former president had a contentious relationship with the District and sought, unsuccessfully, to have the part-time bus drivers and monitors included in the bargaining unit. Maloney-Belton was viewed as her ally.

As to the charge against the Association, Maloney-Belton has alleged that she was not permitted to be a member of the unit represented by the Association. If she were a member of the unit, she would have been contractually entitled to retiree health coverage.

By letter dated May 12, 2005, the Director informed Maloney-Belton that her charge against the Association was untimely because no acts or omissions occurring within four months of the charge were alleged, nor were any facts alleged to support a finding of a violation of §209-a.2(a). As to the District, since Maloney-Belton was never
included in the bargaining unit, she was advised that she had failed to allege facts that would support finding violations of §§209-a.1(a) and (c). As to both the District and the Association, the Director advised her that the charge was deficient because she was not, and is not, a public employee.

On May 27, 2005, in response to the Director’s deficiency letter, counsel for Maloney-Belton informed the Director that she would be filing exceptions to the Director’s deficiency determination. The Director thereafter dismissed the charge finding that Maloney-Belton, as a retiree, cannot file a charge under the Act and also, as against the Association, the charge was untimely.

DISCUSSION

Maloney-Belton has charged the District with violating §§209-a.1(a) and (c) of the Act. The Director found that the improper practice charge is deficient. We agree.

Maloney-Belton contends that the Director erred in concluding that she is no longer a public employee because she remains employed by the District as a part-time lunch monitor. She also argues that the charge against the Association is timely because the District passed its resolution on January 13, 2005, and the Association’s failure to include her in its bargaining unit continued throughout the limitation period.

Maloney-Belton’s charge focuses on an action by the District taken against her as a retiree. She was afforded medical insurance coverage as a part-time bus attendant retiree, and those benefits ceased because she was a retiree. The discriminatory act is alleged to have been taken as a result of her activities as a school bus monitor, the position she is retired from. Maloney-Belton makes no connection between her present employment as a school lunch monitor and the alleged discriminatory act. Retirees
cannot file improper practices because as retirees they are not public employees within the meaning of the Act.\(^2\) The Director correctly dismissed the charge against the District and the Association on this basis.

While Maloney-Belton correctly asserts that she is still employed as a part-time lunch monitor, this status does not change the result in this case. Section 201.7(a) of the Act defines a public employee as a person holding a position by appointment or employment in the service of a public employer. If the charging party’s part-time status raised an issue as to her status as a public employee, the details of her charge are sufficient to establish that she would at least meet the alternate definition in §201.7(f).

However, even if we were to assume that she had standing based on her current employment to file the charge, Maloney-Belton has failed to plead facts sufficient to support a finding of a violation of §§209-a.1(a) and (c) of the Act. Our Rules of Procedure (Rules), §204.3(b), require a charging party to submit a charge that contains:

\begin{quote} a clear and concise statement of the facts constituting the alleged improper practice, including the names of the individuals involved in the alleged improper practice, the time and place of occurrence of each particular act alleged, and the subsections of section 209-a of the act alleged to have been violated. \end{quote}

A fair reading of the facts alleged in the charge demonstrates a failure to meet the pleading standard set forth in our Rules. Maloney-Belton has alleged in conclusory form that the District passed a resolution denying her retiree health insurance as a former part-time bus attendant because of her friendship with the past president of the Association. This is mere speculation which does not make out a *prima facie* case.

Maloney-Belton alleged that the District has always had a policy that all retirees receive health insurance coverage and the only condition to receipt of this benefit was ten years’ of employment. She has failed, however, to make a nexus between the resolution passed by the District on January 13, 2005 and any protected activity under the Act. Her only connection to protected activity under the Act is her friendship with the former president of the Association. A similar argument was advanced in *City of Rochester*\(^3\) and rejected by us. The charging party there alleged, in part, retaliation by the employer because of his friendship with the union president. We rejected that argument because the facts disclosed the employee’s conduct to be the cause of the employer’s critical action taken against him. "The Act \(\S209-a\) ensures that employees are not interfered with, discriminated against or improperly advantaged in their employment relationship because of their decisions with respect to union membership, office or participation."\(^4\)

Maloney-Belton alleged in substance that she was denied the opportunity to secure contractual rights to the retiree health benefit under the parties’ collective bargaining agreement because she was not permitted to be a member of the Association. Again, however, she makes this conclusory statement without providing any factual basis. Without additional facts as to why she was not permitted to join the Association and when this might have occurred, we may not speculate as to whether such an allegation arguably supports a timely violation of the Act by the Association.

\(^3\) 36 PERB ¶3025 (2003).

\(^4\) See *County of Nassau*, 27 PERB ¶3011, at 3022 (1994).
Maloney-Belton has not alleged in her improper practice charge a protected activity covered by §209-a.1(a) and (c) of the Act. Furthermore, she has not alleged facts that would arguably support a timely charge against the Association. Finally, the actions, by the District, she complains of affect her in her retiree status and are not cognizable under the Act.

Based upon the foregoing, we deny the exceptions filed by Maloney-Belton and affirm the Director's decision to dismiss the charge.

IT IS, THEREFORE, ORDERED that the charge must be, and it hereby is, dismissed in its entirety.

DATED: September 23, 2005
New York, New York

Michael R. Cuevas, Chairman

John T. Mitchell, Member
5. ARTICLE 13 – HOLIDAYS: (pp. 10-11)

(NEW) 13.4 Add a new section to read as follows:

An employee shall be entitled to accumulate and carry over from year to year, any unused Holiday compensatory days, including floating Holidays. Any Holiday compensatory days off elected not to be used shall be placed in that employee’s health insurance on retirement account for additional coverage as set forth in Article 23, Pension, Group Health and Life Insurance, Section 23.4. However, in the event an employee uses all of his/her accumulated sick leave, he/she shall be entitled to use all or part of his/her accumulated Holiday compensatory days in the health insurance on retirement account to insure a paycheck for that period of time for which the Holiday compensatory days cover. However, in the event of a disability retirement as set forth in Article 23, Pension, Group Health and Life Insurance, Section 23.4, all unused Holiday compensatory days in the employee’s health insurance on retirement account shall be forfeited and returned to the Employer.

6. ARTICLE 14 – SICK LEAVE: (pp. 11-12)

14.2 Amend to read as follows:

All employees shall be entitled to unlimited accumulation of sick leave. All unused accumulated sick leave shall be carried over from year to year. Upon retirement, the employee shall be entitled to apply all or any part of his/her unused accumulated sick leave for additional health insurance on retirement as set forth in Article 23, Pension, Group Health and Life Insurance, Section 23.4. However, in the event of a disability retirement as set forth in Article 23, Pension, Group Health and Life Insurance, Section 23.4, all unused sick leave in the employee’s health insurance on retirement account shall be forfeited and returned to the Employer.

14.3 Delete in its entirety.

10. ARTICLE 18 – WORK DAY AND WORKWEEK: (pp. 14-15)

(NEW) 18.9 Add a new section to read as follows:

An employee shall be entitled to accumulate and carry over from year to year, any unused compensatory time. Any compensatory time elected not to be used shall be placed in that employee’s health insurance on retirement account for additional coverage as set forth in Article 23, Pension, Group Health and Life Insurance, Section 23.4. However, in the event an employee uses all of his/her accumulated sick leave, he/she shall be entitled to use all or part of his/her accumulated compensatory time in the health insurance on retirement account to insure a paycheck for that period of time for which the vacation time covers. However, in the event of a disability retirement as
set forth in Article 23, Pension, Group Health and Life Insurance, Section 23.4, all unused compensatory time in the employee’s health insurance on retirement account shall be forfeited and returned to the Employer.

12. ARTICLE 23 – PENSION, GROUP HEALTH AND LIFE INSURANCE PLANS:
(pp. 18-19)

23.4 Amend to read as follows:

An employee who retires shall be provided with the same level of benefits contained in the Core Plus Medical and Psychiatric Enhancements Plan as described in the New York State Insurance Plan (known as the Empire Plan) provided to active employees, or if elected, the HMO MVP 10+. The Employer shall contribute towards the premium cost of 50% for individual and an additional 35% of the difference for dependent coverage without returning any paid leave accumulation set forth below. The Employer shall provide additional contribution towards the premium cost of health insurance based on the following schedule for the return of paid leave:

Unused Sick Leave, Compensatory Time,
Chart Days, Vacation, Holidays and/or Percent of Health Insurance
Personal Leave Days_______________ Premium Paid by the Employer

<table>
<thead>
<tr>
<th>Individual</th>
<th>Dependent</th>
</tr>
</thead>
<tbody>
<tr>
<td>105-114</td>
<td>65%    65%</td>
</tr>
<tr>
<td>115-124</td>
<td>70%    70%</td>
</tr>
<tr>
<td>125-134</td>
<td>75%    75%</td>
</tr>
<tr>
<td>135-144</td>
<td>80%    80%</td>
</tr>
<tr>
<td>145-154</td>
<td>85%    85%</td>
</tr>
<tr>
<td>155-164</td>
<td>90%    90%</td>
</tr>
<tr>
<td>165-174</td>
<td>95%    95%</td>
</tr>
<tr>
<td>175</td>
<td>100% 100%</td>
</tr>
</tbody>
</table>

An employee who receives a disability retirement from the New York State Police and Fire Retirement System shall receive individual and/or dependent health insurance with the Employer paying one hundred percent (100%) of the premium cost without returning any accumulation as set forth above.

In the event an employee does not return any accumulation, as set forth above, for additional percent of health insurance premium paid by the Employer, that accumulation shall be paid to the employee in the first (1st) pay period following separation or retirement. However, in the event that an employee exceeds 175 days, he/she would be paid for all accumulated paid leave not returned.
STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

SARA-ANN P. FEARON,

Charging Party,

- and -

UNITED FEDERATION OF TEACHERS,

Respondent,

- and -

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

Employer.

SHELLMAN D. JOHNSON, for Charging Party

JAMES R. SANDNER, GENERAL COUNSEL (MARIA ELENA GONZALEZ of
counsel), for Respondent

DALE C. KUTZBACH (MICHELE A. BAPTISTE of counsel), for Employer

BOARD DECISION ON MOTION

This matter comes to us on a motion by Sara-Ann P. Fearon for reconsideration of the Board's Decision and Order, dated September 30, 2004, on the grounds of

1 37 PERB ¶3029 (2004). See also UFT (Fearon), 37 PERB ¶3007 (2004); UFT (Fearon), 36 PERB ¶3023 (2003).
newly-discovered evidence. The Board of Education of the City School District of the City of New York (District) opposes the motion.²

FACTS

The Board rendered a Decision and Order, dated September 30, 2004, dismissing Fearon’s improper practice charge alleging that the United Federation of Teachers, Local 2, AFT, AFL-CIO (UFT) violated §209-1.2(c) of the Public Employees’ Fair Employment Act (Act) when it refused to take a grievance she had filed to step three of the grievance procedure.

On July 10, 2005, Fearon, through her representative, Shellman Johnson, moved this Board to reconsider its prior decision on the grounds of newly-discovered evidence. In the motion papers, Johnson refers only to statements and exhibits that were offered in the improper practice hearing, as well as his legal argument in support of reconsideration.

DISCUSSION

We have followed the rationale articulated by the Court of Appeals in Evans v. Monaghan, 306 NY 312, 326 (1954), in cases where the party moves to reopen proceedings on the basis of newly-discovered evidence.³ The Court imposed two limitations: the first is to refuse to reopen proceedings when, with due diligence, the new evidence was obtainable before the close of the original trial, and the second is that the

² The District is made a statutory party pursuant to §209-a.3 of the Public Employees’ Fair Employment Act.

³ See UFT (Zito), 35 PERB ¶3015 (2002).
movant must demonstrate that the evidence, if introduced at a trial, would probably have produced a different result.\textsuperscript{4}

Applying these two limitations to the allegations in support of the motion requires a denial of Fearon’s motion. Johnson simply reargues the issues raised in the improper practice charge by contending that UFT disregarded a stipulated settlement of Fearon’s 1998 grievance and thereby breached its duty of fair representation to Fearon. He concludes that the ALJ’s decision to deny UFT’s motion to dismiss at the close of Fearon’s direct case supports his theory that Fearon proved a \textit{prima facie} case and that the ALJ’s subsequent decision to reverse her earlier ruling denying the motion to dismiss, absent a motion for reconsideration, was reversible error. Lastly, Johnson argues that an action for violation of a union’s duty of fair representation will lie whenever an employee is solely dependent on a union to process a grievance and the union’s actions wrongfully prejudice the grievant.

Although Johnson has zealously advocated for his client, he has made no showing that any evidence was newly discovered. Rather, he argues that he offered certain amendments to the charge that were not considered relevant or timely by the ALJ.\textsuperscript{5} Consequently, he has not demonstrated any grounds for reconsideration, nor has he adequately explained the delay in making the instant motion for reconsideration. We also find that there are no extraordinary circumstances that merit consideration of this

\textsuperscript{4} Id.

\textsuperscript{5} See \textit{UFT (Fearon)}, 37 PERB ¶3029 (2004), \textit{supra}, note 1
Having reviewed the record in this case, we are not persuaded that we have overlooked or misapprehended any material fact or misapplied any controlling principle of law in our original decision. For these reasons, we deny the motion for reconsideration of our September 30, 2004 decision in this matter.

SO ORDERED.

DATED: September 23, 2005
New York, New York

Michael R. Cuevas, Chairman

John T. Mitchell, Member

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STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

TRANSPORT WORKERS UNION, LOCAL 106 -
TRANSIT SUPERVISORS ORGANIZATION,

Charging Party,

- and -

NEW YORK CITY TRANSIT AUTHORITY,

Respondent,

- and -

TRANSPORT WORKERS UNION,
LOCAL 100, AFL-CIO

Intervenor.

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Transport Workers Union, Local 106, Transit Supervisors Organization (TSO) to a decision of an Administrative Law Judge (ALJ) dismissing its improper practice charge, which alleged that the New York City Transit Authority (Authority) had violated §209-a.1(d) of the Public Employees’ Fair Employment Act (Act) when it unilaterally transferred exclusive bargaining unit work to
Station Agents, represented by the Transit Workers Union, Local 100, AFL-CIO (TWU). TWU intervened in the proceeding. The Authority has filed cross-exceptions to the ALJ’s decision.

EXCEPTIONS

TSO excepts to the ALJ’s decision, arguing that the ALJ erred when he found that the work in question was not exclusive to TSO’s bargaining unit work. The Authority cross-excepts to the ALJ’s decision, asserting that the ALJ erred by failing to dismiss the improper practice charge as untimely filed, failing to find that TSO was collaterally estopped from filing the instant charge and by allowing TSO to expand the scope of the improper practice charge to include the Authority’s pilot customer service program.

Based upon our review of the record and our consideration of the parties’ arguments, we modify and, as modified, affirm the decision of the ALJ.

FACTS

The facts are fully set forth in the ALJ’s decision\(^1\) and are set forth here only as necessary to address the exceptions and cross-exceptions.

In 1985, a re-organization occurred at the Authority in the Station Department,\(^2\) which resulted in a two-level station supervisor title, Station Supervisor I (SSI) and Station Supervisor II (SSII). The SSII title is represented by TSO; employees in the SSI title are represented by the Subway-Surface Supervisors Association (SSSA).\(^3\) SSII's

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1. 38 PERB ¶4523 (2005).

2. The Station Department (Station) has jurisdiction over the operation of the subway token booths and the physical appearance of the Authority's subway stations. See New York City Transit Auth., 26 PERB ¶4595 (1986).

3. Although afforded the opportunity to do so, SSSA did not intervene in this proceeding.
supervise SSIs and employees in that title, in turn, supervise hourly employees, including Station Agents.

SSIIs are responsible for the inspection of certain areas at each station, including: outside areas, stairways and railings; mezzanines and platforms; booths, turnstiles and exit gates; toilets, rooms and offices; signs, windows, tiles and walls; refuse areas, solar cans and canisters; lights and concessionaires; elevators and escalators, and personnel on duty. When an SSI is promoted to the SSII title, he or she receives training regarding these tasks.

SSIIs are assigned to mobile wash teams or heavy duty cleaning teams and are responsible for supervising the hourly employees assigned to them to accomplish those tasks. Employees in the SSI title who are assigned to field work are responsible for supervising Station Agents and for investigations, inspections and booth audits.

As we found in an earlier decision involving these titles, SSIs and SSIIs perform many of the same tasks.\(^4\) We have found previously that the SSIs exercise supervisory responsibility over employees working at groups of one or more subway stations or "zones"; conduct revenue or "booth" audits in station booths manned by station clerks located at subway stations throughout the subway system; and conduct investigations of operational/mechanical problems with subway turnstiles and gates and of passenger accidents. In confirming our decision that the SSIIs did not have exclusivity over those three areas, the Appellate Division noted that "there was significant overlap between the tasks performed by Level I and Level II supervisors, with each essentially performing

\(^4\) NYCTA, 35 PERB ¶3028 (2002), confirmed sub nom. Romaine v Cuevas, 305 AD2d, 36 PERB ¶7010 (3d Dep't 2003)
the same functions”, finding that “[t]his significant overlap...goes beyond sporadic episodes of Level I supervisors ‘helping out’ Level II supervisors and, hence, negates any claim of exclusivity [citations omitted].”

Rule 166 of the Rules and Regulations Governing Employees Engaged in the Operation of the New York City Transit Authority (Rules) sets forth the SSIs’ job duties as conducting inspections and recommending appropriate action on the condition of stations and station equipment. The duties of the SSIs include conducting inspections and taking appropriate action on the condition of stations and station equipment. SSIs fill out a narrative form, detailing any defects they observe while supervising employees and conducting inspections. SSIs complete a nine-point inspection list that includes both checking boxes for completion of specific tasks and a narrative.

With respect to the instant charge, by letter dated January 12, 2004, the Authority transmitted to TSO President Robert Romaine a new edition of the Rules that would be distributed to all employees later that month. TSO alleges that the duties and responsibilities of Station Agents set forth in Rule 15.02 includes inspection duties that had previously been exclusively performed by the SSIs. Rule 15.02 states, in relevant part, that the Station Agents conduct: “Station inspections (light outages, elevator/escalator service, reporting unsanitary conditions, structural defects, hazardous conditions, public telephones); and provides emergency assistance to customers as directed by management.”

While not included in the original charge or the particularization of the charge, TSO introduced evidence at the hearing, over the Authority’s objection, about additional

5 Romaine v. Cuevas, 305 AD2d 968, 970 (3d Dep’t 2003).
inspection duties being assigned to non-unit employees. The Authority initiated a pilot program in May 2004 in which Station Agents are designated as Station Customer Assistants to spend time outside the toll booth providing more direct customer service. The Station Customer Assistants are responsible for the station environment, which includes inspecting for graffiti, defects, and vandalism in several areas within each station.

DISCUSSION

The Authority asserted in its answer and in its cross-exceptions that the charge was untimely filed and that TSO was collaterally estopped from litigating the charge because of our finding in the previous case involving the inspection and investigation duties of the SSIs. The ALJ did not reach either of these two defenses because he dismissed the charge on the merits.

We address the timeliness defense raised by the Authority first. The Authority argues that the instant charge is untimely because as far back as May 2001, TSO knew that other employees were performing inspection duties, as is evidenced by the charge it filed in New York City Transit Authority, supra, note 4. As noted earlier, that charge involved the assignment of inspection duties to SSIs, not Station Agents. While we found in the earlier decision that inspection duties had not been exclusively performed by SSIs, that charge did not involve the assignment of inspection duties to Station Agents, but to SSIs. TSO did not receive notice of the assignment of inspection duties to Station Agents inherent in Rule 15.02 until the Authority’s transmittal of the new rules.

\[6\] Supra, note 4.
to TSO in January 2005. The charge alleging that the assignment of those duties to Station Agents was timely filed in May 2005.

The Authority also argues that TSO’s introduction of evidence dealing with the Authority’s pilot customer service program at the second day of hearing in the instant charge was improper because the Authority had no notice that TSO intended to do so and that any allegations that the program involved the unilateral transfer of TSO bargaining unit work were untimely. The ALJ allowed the evidence about the pilot program into the record, finding that it was within the scope of the improper practice charge. We disagree and reverse the ALJ’s ruling.

The pilot customer service program was initiated in May 2004, after the date the instant charge was filed. TSO thereafter, pursuant to the ALJ’s order, particularized the charge in June 2004. In neither the original charge nor the response to the order for particularization did TSO include the pilot customer service program. Its attempt to introduce evidence about the program at the second day of hearing on November 30, 2004, improperly sought to amend the charge to include an allegation that the pilot customer service program was an additional unilateral assignment of duties of the SSIs to Station Agents. Such an allegation should have been the subject of a proper amendment to the charge or a new improper practice charge. In addition, allegations about the program, made six months after the initiation of the program, are untimely.

We next address whether the exclusivity issue raised in the instant charge is the same as the issue decided by us in 2002, in order to reach the collateral estoppel defense raised by the Authority.

7 Id.
TSO argues that there is a discernible boundary that can be drawn around the nine-point inspections performed by the SSIIs that is not affected by the general inspections performed by the SSIs in the course of the performance of their duties. In doing so, TSO asserts that the work in-issue in the instant case is not the same as the duties that were in-issue in the prior case. We find that the duties that were in issue in 2002 are the same duties that are raised in the instant case.

In *Town of West Seneca*, where we first articulated the concept of discernible boundary, we held that the exclusivity of unit work is not lost if the practice of utilizing nonunit employees is one which is clearly circumscribed.\(^8\) A charging party must establish a discernible boundary to the claimed unit work which would set it apart from work done by non-unit personnel.\(^9\) Here, TSO has failed to do so. The record establishes that SSIs perform inspections in both single stations and zones, the nature of the inspections is substantially similar to those performed by SSIIs and the reports completed by both SSIs and SSIIs are similar. The distinctions between the work performed by the two titles are not sufficient to establish a discernible boundary around the nine-point inspections performed by the SSIIs.

In our earlier decision dealing with the job duties of SSIIs and SSIs, we affirmed the decision of the ALJ which found that:

> Lastly, regarding the issue of investigating mechanical problems and passenger accidents, exclusivity was again not convincingly established. The TSO attempted to characterize the work of the SSIs in this area as performing only inspections, compared to the investigative role of the

\(^8\) 19 PERB ¶3028 (1986).

\(^9\) *County of Nassau*, 21 PERB ¶3038 (1988).
SSIIs. Indeed, one document offered into evidence identifies "inspections" as being within the duties of the SSIs, with "investigations" delegated to the higher rank. However, Glasgow [Director of Labor Relations-Station Divisions] characterized the distinction as meaningless in practice. He countered that investigation is necessary to perform the type of "inspections" of a problem site that are required of the SSIs and that the report which the SSI compiles is dependent upon thorough investigation and not different from that produced by an SSII.¹⁰

Based on that decision, the Authority argues that TSO is collaterally estopped from litigating whether inspections are exclusively the work of SSIIIs. The doctrine of collateral estoppel precludes parties from relitigating, in a subsequent proceeding, issues of fact or law clearly raised in a prior action or proceeding and decided against that party or those in privity, whether or not the causes of action are the same. Its basic requirements are that the issues be identical, that there was an opportunity to litigate the issue,¹¹ that it was essential to the determination and that it was ultimate or material in both actions.¹² The inquiry here asks whether there is a factual finding in the prior case on the job duties of SSIs and SSIIIs which was both necessary to that case's determination and relevant in this action. The ALJ noted our prior decision and found that it was supportive of his finding that the work here in-issue is not exclusive to SSIIIs, although not dispositive of the issue.

But we find that the requirements necessary to establish collateral estoppel in the instant case have been met. The dispositive issue in both cases is the same: whether

¹⁰ NYCTA, 35 PERB ¶4526, at 4610, aff'd, 35 PERB ¶3028 (2002), confirmed sub nom. Romaine v. Cuevas, 305 AD2d 968 (3d Dep't 2003).


the performance of inspections in the stations or zones is exclusively the work of SSIIs.
In the previous decision we found that it is not. The issue of inspections was fully
litigated in the prior case. Indeed, TSO conceded that inspections had been performed
by both SSIIs and SSIs after the Authority’s reorganization. The determination that
inspections are not the exclusive bargaining unit work of SSIIs is essential to the
decision in both matters and is material and dispositive. Finally, the parties (TSO and
the Authority) in both cases are identical. The fact that TSO here complains that the
exclusive bargaining unit work of inspections has been assigned to Station Agents and
in the prior case it asserted that the work of investigations (a natural corollary to
inspections\(^{13}\) had been improperly assigned to SSIs does not warrant a contrary
conclusion. The dispositive issue is the same: inspections have not been exclusively
performed by the SSIIs in TSO’s bargaining unit.

We find, therefore, that TSO is collaterally estopped from asserting exclusivity
over inspections conducted by SSIIs and that the charge alleging that the Authority
violated §209-a.1(d) of the Act when it listed inspections as one of the job
responsibilities of Station Agents in Rule 15.02 sent to TSO in January 2004, must be
dismissed.

For the reasons set forth above, we deny TSO’s exceptions, grant the cross-
exceptions of the Authority as to the pilot customer service program and collateral
estoppel, and, as modified, affirm the decision of the ALJ dismissing the charge.

\(^{13}\) Supra, note 10.
IT IS, THEREFORE, ORDERED, that the charge is dismissed in its entirety.

DATED: September 23, 2005
New York, New York

Michael R. Cuevas, Chairman

John T. Mitchell, Member
This case comes to us on exceptions filed by Mohammad Saidin to a decision of an Administrative Law Judge (ALJ) dismissing his improper practice charge. The charge alleged that the United Federation of Teachers, NYSUT, AFT, AFL-CIO (UFT) violated §209-a.2(c) of the Public Employees’ Fair Employment Act (Act) when it failed to file a grievance on his behalf following the denial of Saidin’s license reapplication as an elementary school teacher by the Board of Education of the City School District of
the City of New York (District), which is made a statutory party pursuant to §209-a.3 of the Act.

EXCEPTIONS

Saidin excepts to the ALJ's decision on the grounds that the ALJ erred on the law and the facts. Saidin contends that the ALJ excluded from the record decisions of independent arbitrators that supported his position. UFT submitted a response in opposition to the exceptions. Saidin subsequently submitted a document labeled cross-exceptions. UFT objects to PERB's consideration of the cross-exceptions.

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

FACTS

The facts are fully set forth in the ALJ's decision and are repeated here only as necessary to decide the exceptions.

On July 15, 2004, Saidin filed an improper practice charge that alleged, as amended, that UFT failed to prosecute the grievance that he filed pursuant to Article 20 of the collective bargaining agreement between the UFT and the District, over the District's refusal to re-license him as an elementary school teacher because of his Muslim first name and failed to demonstrate to the District that there were mitigating factors to consider. A hearing on the improper practice charge was scheduled for March 8, 2005, at which time the parties agreed to submit a stipulation of facts. On March 30, 2005, the parties submitted to the ALJ a stipulation of facts consisting of:

1. A copy of the collective bargaining agreement.

1 38 PERB ¶4545 (2005).
2. Chancellor’s Regulation C-105.
3. Chancellor’s Regulation C-205.
5. Arbitration decision regarding Article 20 is covered in paragraphs 3 and 9 of the Solomon affidavit.
6. An affidavit of Lucille Swein was not submitted by UFT because it would be duplicative of the information in the Solomon affidavit.

The stipulation was signed by Saidin as well as the representatives of the other parties.

Solomon’s affidavit states that he is the Director of UFT’s grievance department; that on December 12, 2003, Saidin’s application for a license was denied by the District’s Office of Personnel Investigation (OPI); that Saidin was informed of his right to appeal the decision within 30 days to the Director of Human Resources; and that his subsequent appeal was denied on February 13, 2004.

The Chancellor’s Regulation C-105 vests with the District’s Chancellor “the power and duty to ensure compliance with qualifications established for all personnel employed in the city district.” Regulation C-105 also establishes procedures for background investigations conducted by the OPI within the Division of Human Resources (DHR). At the conclusion of such investigation, the OPI may approve the application for licensure or recommend that it be denied. Any recommendation to deny licensure is referred to DHR’s Chief Executive who has the authority to make the final decision to approve or deny the application.

Following the February 13, 2004 denial of his license reapplication, Saidin requested that UFT file a grievance on his behalf under Article 20 of the parties’ collective bargaining agreement. Article 20, entitled “Matters Not Covered”, concerns
matters not covered by the agreement about which the District agreed to consult with UFT prior to making changes. Article 20 also states that:

All existing determinations, authorizations, by-laws, regulations, rules, rulings, resolutions, certifications, orders, directives and other actions, made, issued or entered into by the Board of Education governing or affecting salary and working conditions of the employees in the bargaining unit shall continue in force during the term of this Agreement, except insofar as change is commanded by law.

Saidin was informed that the parties' collective bargaining agreement does not provide a grievance mechanism for the denial of a license application. UFT informed Saidin that Chancellor's Regulation C-105 provides for only an administrative review by DHR's Chief Executive.

UFT offered Saidin assistance with regard to the evidence to be presented during the administrative review. Solomon's staff, however, could not find any grievances under Article 20 related to Saidin's situation.

On April 28, 2005, UFT moved to dismiss Saidin's improper practice charge. Saidin opposed the motion to dismiss, referencing newspaper articles describing various issues unrelated to the charge in the New York City schools in an attempt to argue that he should not have been denied a license.

**DISCUSSION**

Saidin's cross-exceptions are in the nature of a reply to UFT's response. However, PERB's Rules of Procedure (Rules) do not provide for a reply to a response to exceptions and filings that the Rules do not specifically allow must be authorized or
requested by the Board. In this case, they were not and consequently, they will be not considered.\(^2\)

In order to establish a breach of the duty of fair representation, a charging party must prove that the employee organization acted in a manner that was arbitrary, discriminatory or in bad faith.\(^3\) In deciding UFT’s motion to dismiss, the facts alleged in the pleadings and stipulated record must be viewed in a light most favorable to Saidin and every reasonable inference must be given to the facts that he alleged.\(^4\) Here, the facts pled by Saidin do not establish a breach of the duty of fair representation in violation of §209-a.2(c) of the Act, only dissatisfaction with UFT’s strategy in handling Saidin’s grievance, which does not establish a violation of the Act.\(^5\)

UFT explained to Saidin that Article 20 of the collective bargaining agreement, was not relevant to his case. Even if UFT had been incorrect in its analysis of Saidin’s grievance, a violation of the Act is not established because mere error in judgment does not breach the duty of fair representation.\(^6\)

Saidin’s allegations that UFT representatives discriminated against him because of his Muslim first name, that UFT had processed other employees’ grievances differently in circumstances similar to his, and that UFT had conspired with the District

\(^2\) Section 213 of PERB’s Rules.

\(^3\) Civil Service Employees Ass’n, Inc. v. PERB and Diaz 132 AD2d 430, 20 PERB ¶7024 (3d Dep’t 1987), affirmed on other grounds, 73 NY2d 796, 21 PERB ¶7017.

\(^4\) County of Nassau (Police Dep’t) (Unterweiser), 17 PERB ¶3013 (1984).


against him are conclusory and cannot be the basis of a violation because they are unsupported by the stipulation of facts.\footnote{Civil Service Employees Ass’n, Inc., Local 1000, AFSCME, AFL-CIO, 32 PERB ¶3044 (1999).}

Lastly, the ALJ correctly excluded the newspaper articles because they were not part of the stipulated record and, therefore, could not be considered on the motion to dismiss.\footnote{Board of Educ. of the City Sch. Dist. of the City of New York, 32 PERB ¶3069 (1999).}

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

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

DATED: September 23, 2005
New York, New York

\textit{Michael R. Cuevas, Chairman}

\textit{John T. Mitchell, Member}