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State of New York Public Employment Relations Board Decisions from November 26, 2008

New York State Public Employment Relations Board

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State of New York Public Employment Relations Board Decisions from November 26, 2008

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This case comes to the Board on exceptions filed by the North Colonie Teachers Association, NYSUT/AFT/NEA/AFL-CIO (Association) to a decision by an Administrative Law Judge (ALJ) dismissing a charge filed by the Association alleging that the North Colonie Central School District (District) violated §209-a.1(d) of the Public Employees Fair Employment Act (Act) when the District adopted a school calendar for the 2007-08 school year requiring Association bargaining unit members to work 188 days. The ALJ concluded that the Association had failed to demonstrate that the District had changed an unequivocal past practice.

EXCEPTIONS

In its exceptions, the Association asserts that the ALJ made a number of interpretative errors of fact and errors of law in concluding that the Association had failed to prove an unequivocal District past practice. The District supports the ALJ's decision.
Based upon our review of the record and consideration of the parties' arguments, we affirm the ALJ's decision.

FACTS

The 2003-07 agreement (agreement) between the District and the Association does not define the length of the District's instructional school year or the specific number of work days for bargaining unit members each school year.

The consistent long-term practice in the District is for the Association bargaining unit's school year to commence in September, on the Tuesday immediately following Labor Day, and end on the Regents rating day, when Regents testing concludes. During prior negotiations in the late 1990s, the District initially proposed and then withdrew a negotiation demand to extend the bargaining unit's 1998-99 school year by two days either before Labor Day or after the Regents rating day.

Each year, the District develops a school calendar for the following year after it has received the regional school year calendar approved by BOCES. The annual BOCES regional school calendar identifies, for the following year, instructional days, staff development days, holidays, as well as, periods for a December recess, a winter recess and a spring recess. The annual District school calendar contains a similar breakdown of information but not necessarily the same instructional days, staff development days, holidays and recess periods as the BOCES regional calendar.

According to District Assistant Superintendent Joseph Corr (Corr), the BOCES calendar is utilized as a guide by all BOCES component districts. He explained that the number of bargaining unit work days in the District for a particular school year is impacted by objective factors such as the days of the week that holidays fall on, the length of the December recess and the date set for Regents rating day. He noted that
other Districts, in contrast, have negotiated language in agreements that set a specific number of work days for each school year.

Pursuant to the parties' agreement, the Association is provided with an opportunity to comment on the following year's school calendar while it is being developed by the District. Article XXVI, §G of the agreement states:

In developing the annual school calendar, the Superintendent shall submit the annual calendar to the Executive Committee of the Association, through the President, prior to February 15. The Association shall have the right to make recommendations to the Superintendent by March 1 for consideration in the finalizing of the calendar.

As part of the parties' practice under the agreement, after the Association receives a proposed calendar from the District, the Association will either respond affirmatively or make suggestions aimed at improving the calendar. Following such input, the Association receives notification of the final calendar only after it has been approved by the Board of Education (Board).

During the hearing, the parties stipulated to the admission of annual District school calendars for the 1963-64 through 2006-07 school years which set forth the number of work days in each year starting with the day after Labor Day and ending with the Regents rating day in late June. From year to year, the actual start and end date for the school year, as well as the number of work days, vary depending on the day of the week that Labor Day and Regents rating day fall. In addition, the number of work days

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1 Although we construe the District’s fourth affirmative defense as constituting a duty satisfaction defense to the charge, we are constrained by our Rules of Procedure (Rules), §213.2(b)(4) from ruling on that defense because of the failure of the District to file a cross-exception to the ALJ’s ruling that the District had waived the defense. 41 PERB ¶4550, note 3 (2008). See, Town of Orangetown, 40 PERB ¶3008 (2007).

2 The joint exhibit does not include calendars for two school years: 1966-67 and 1983-84.
varies from year to year based on the number of days within each calendar month as well as the days when Christmas and New Years fall.

According to the school calendars in evidence, from 1963-64 through 2006-07 school years, the number of work days, including staff development days, has been between 184 and 187: three school years had 184 work days, 23 school years had 185 work days, 14 school years had 186 work days and two school years had 187 work days. In each school year prior to 1995-96, the District scheduled three, rather than four, staff development days.

The 2007-08 BOCES regional school calendar includes 188 work days including three staff development days. In March 2007, Assistant Superintendent Corr informed Association President Rodney Wheeler of the District's intention to propose to the Board, for its approval, a 2007-08 calendar containing 188 work days with four days set aside for staff development. The Association objected to the proposed calendar and suggested that the number of work days be reduced to 185 or 186 work days.

Following the Board's approval of the proposed 2007-08 calendar, the Association filed a grievance asserting that the calendar violates a 40-year past practice of the District adopting calendars with 185 or 186 work days. The grievance was later withdrawn prior to the filing of the present charge.⁴

³ In 2000-01, grades 7-12 had 186 work days while grades K-6 had 185 work days.

⁴ The record contains factual assertions by both parties at variance with the information gleaned from the school calendars in evidence. In a letter denying the Association's grievance challenging the 2007-08 calendar, Superintendent of Schools Randy A. Ehrenberg stated that over the past four decades, the District had four school years with 184 work days, 21 school years with 185 work days, 16 school years with 186 work days and two school years with 187 work days. In challenging the denial of the grievance, however, the Association argued before the Board of Education that during the prior 40 years there were five school years with 184 work days, 20 school years with 185 work days, 14 school years with 186 work days and 3 school years with 187 work days.
DISCUSSION

In its exceptions, the Association contends the ALJ erred in concluding that the Association had failed to prove an unequivocal 40-year past practice that was unilaterally changed by the District in 2007-08 with respect to the number of work days for bargaining unit members. According to the Association, in 41 out of the 43 school years, prior to 2007-08, the number of work days was less than 186.

It is well-established that an expansion of a school year to include additional work days for a bargaining unit constitutes a mandatory subject of negotiations under the Act. At the same time, a charging party has the burden of proof to establish an enforceable past practice in an improper practice charge alleging a unilateral change in the number of work days within a school year.

Under the applicable test for an enforceable past practice, restated in Chenango Forks Central School District (hereinafter Chenango Forks), a charging party has the initial burden of establishing a prima facie case showing that the "practice was unequivocal and was continued uninterrupted for a period of time under the circumstances to create a reasonable expectation among the affected unit employees that the [practice] would continue." In addition, in Chenango Forks we emphasized that the facts and circumstances of each case must be examined to determine whether an enforceable past practice has been established.

5 City Sch Dist of the City of Oswego, New York, 5 PERB ¶3011 (1972), confirmed sub nom., City Sch Dist of the City of Oswego, New York v Helsby, 42 AD2d 262, 6 PERB ¶7008 (3d Dept 1973); Addison Cent Sch Dist, 17 PERB ¶3076 (1984); see also, Vil of Mamaroneck PBA, 22 PERB ¶3029 (1989).


7 40 PERB ¶3012 (2007).

8 Quoting County of Nassau, 24 PERB ¶3029 at 3058 (1991).
Based on the facts in the present case, we conclude that the Association fails to establish an unequivocal past practice that creates a reasonable expectation by bargaining unit employees with respect to a maximum number of work days in each school year that the District unilaterally changed. Rather, the evidence demonstrates a District past practice of applying a consistent methodology for determining the number of work days in each school year which it utilized for the 2007-08 school year calendar.

First, the Association's argument that, under the past practice, bargaining unit members have worked less than 186 work days in 41 out of 43 school years is directly contradicted by the school calendars in evidence. The District calendars establish that in at least 16 school years during the four decade period relied upon by the Association, bargaining unit members worked 186 or 187 days.

In addition, although the record does establish an unequivocal practice of the District commencing the school year on the Tuesday following Labor Day and ending it on Regents rating day in June, it does not establish a similar unequivocal practice limiting or setting a particular number of work days within each school year. Instead, the record demonstrates that the Association did not rebut the District's evidence establishing that the District applies consistent objective factors that result in a fluctuation in the respective number of work days that are set forth in the District calendars in evidence. These

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9 Second Exception; Memorandum on Behalf of Association, p. 5.

10 The Association's claim is further contradicted by its earlier contention, in support of its grievance, that in three prior school years there were 187 work days.

11 State law does set a statutory minimum number of instructional days for each school district. Pursuant to Educ Law §3204(4), a full time day school must be in session for instructional purposes for not less than 190 days each year inclusive of legal holidays. In general, Educ Law §3604(7) requires a District, in order to be eligible for State financial aid, to demonstrate that in the preceding school year it provided 180 days of instruction.
Case No. U-27717

objective factors are annual variables that are linked to the general calendar year including the number of work days in each calendar month as well as the days of the week when certain holidays fall. The number of work days listed in each school calendar is also controlled by the date set for the Regents rating day in June.

Finally, the Association's reliance on an ALJ's decision in Town of Webb Union Free School District\textsuperscript{12} (hereinafter Town of Webb) is misplaced. The mere fact that an enforceable past practice was established in Town of Webb, with respect to the number of instructional days in a school year, does not demonstrate that the facts and circumstances in the present case are sufficient to establish an enforceable practice regarding the number of work days in a school year.

WE, THEREFORE, ORDER that the improper practice charge must be, and hereby is, dismissed in its entirety.

DATED: November 26, 2008
Albany, New York

\textit{Signature}

Robert S. Hite, Member

\textsuperscript{12} 25 PERB ¶4548 (1992).
STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

DUTCHESS UNITED EDUCATORS,

Charging Party,

- and -

DUTCHESS COMMUNITY COLLEGE,

Respondent.

JOSEPH P. CAREY, P.C. (JOSEPH P. CAREY of counsel), for Charging Party

ROEMER WALLENS & MINEAUX LLP (WILLIAM M. WALLENS of counsel), for Respondent

BOARD DECISION AND ORDER

These cases come to the Board on exceptions filed by the Dutchess United Educators (DUE) to a decision by an Administrative Law Judge (ALJ) dismissing two improper practice charges filed by DUE against Dutchess Community College (College). The first charge alleges that the College violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) by failing to negotiate, upon a demand, the impact of an academic assessment plan and by engaging in conduct that DUE claims constitutes improper direct dealing with its bargaining unit members. In the second charge, DUE alleges that the College violated §§209-a.1(a) and (d) of the Act by engaging in direct dealing through other communications with bargaining unit members.

EXCEPTIONS

In its exceptions, DUE challenges the ALJ's decision to dismiss its direct dealing claim on both procedural and substantive grounds. DUE asserts the ALJ lacks authority,
under the Rules of Procedure (Rules), to dismiss a charge for failing to state a violation under the Act, following the initial review by the Director of Public Employment Practices and Representation (Director). It also challenges the ALJ's dismissal of its direct dealing claim on the grounds that the ALJ failed to apply the proper legal standard and deprived it of procedural due process. In addition, it asserts that the ALJ erred by limiting the hearing and excluding evidence because there are purported disputes of material facts relating to its direct dealing claim.

DUE excepts to the ALJ's conclusion that the charges did not include a claim that the College engaged in bad faith impact negotiations as well as the ALJ's exclusion of evidence in support of that claim.

Finally, DUE excepts to the ALJ's dismissal of its claim that the College refused to engage in impact negotiations following a demand to do so. It also challenges various factual and legal conclusions reached by the ALJ in dismissing the claim.

The College supports the ALJ's decision.

Based upon our review of the record and our consideration of the exceptions and the response, we affirm the ALJ's dismissal of the charges.

PROCEDURAL BACKGROUND

In order to determine DUE's exceptions, we begin with a review of the pre-hearing processing of the improper practice charges.

On October 26, 2006, DUE filed an amended improper practice charge (U-27107) supplementing the allegations contained in its original charge alleging that the College violated §209-a.1(d) of the Act. Following the filing, DUE received a pre-conference notification, dated November 2, 2006, stating that the Director had concluded that the sole claim in the amended charge is the College's alleged failure to
negotiate impact upon a demand in violation of §209-a.1(d) of the Act. However, DUE was granted the opportunity to clarify whether the amended charge was intended to include any other claims. In addition, DUE was requested to identify the allegations in the amended charge that stated a violation of the Act which occurred within four months of the original charge being filed.

In response, DUE, through counsel, advised the assigned ALJ that the amended charge was intended to allege both a failure by the College to negotiate impact along with a claim that the College violated the Act by negotiating directly with individual bargaining unit members. In support of both claims, DUE referenced the allegations contained in five specific paragraphs of the amended charge.

Following a second pre-conference request by the ALJ for clarification, DUE submitted a letter, dated December 11, 2006, that again referenced the same five paragraphs, along with the content of certain exhibits attached to the amended charge, as stating a claim for direct dealing. The referenced paragraphs allege that the College has engaged in various communications with DUE bargaining unit members. With respect to its claim that the College failed to engage in impact negotiations, DUE referenced allegations contained in other paragraphs of the amended charge, as well as other exhibits, as supporting that claim.

On February 8, 2007, DUE filed a second charge (U-27371) which it later acknowledged was intended to be a further amendment to U-27107. The new charge, U-27371, alleges that the College violated §§209-a.1(a) and (d) of the Act by engaging certain other alleged communications with bargaining unit members.

Following a pre-hearing conference, the ALJ sent a letter, dated July 26, 2007, to the parties confirming the status of both charges. The letter stated that U-27107 would
be processed only as stating a claim for the College's alleged failure to negotiate impact. In the letter, the ALJ stated that DUE's allegations are insufficient to state an independent violation of the Act for direct dealing. With respect to U-27371, the ALJ stated that the new charge both repeated and supplemented DUE's allegations of direct dealing contained in U-27107 and was equally deficient because it failed to allege sufficient facts to state a claim.

DUE submitted a responsive letter, dated August 6, 2007, objecting to portions of the ALJ's letter of confirmation. In its letter, DUE asserted that U-27107 should be further processed as alleging claims for both a failure to negotiate impact and direct dealing. Moreover, DUE asserted that U-27371, as an amendment to U-27107, alleges both claims as well. With respect to the pleading deficiencies identified by the ALJ regarding the direct dealing claim, DUE contended that it should be granted the opportunity to present evidence on that claim at a hearing.

Following reassignment of the charges by the Director, the ALJ assigned to conduct the hearing notified the parties in writing that the charges would be consolidated for a hearing on the allegation that the College failed to negotiate impact. In her letter, the ALJ reaffirmed that DUE's charges are insufficient to state a claim for direct dealing.

At the commencement of the hearing, the ALJ ruled that the hearing would be limited to the issue of whether the College violated §209-a.1(d) of the Act by failing to negotiate impact upon demand. With respect to DUE's direct dealing claim, the ALJ concluded that even if DUE proved the facts as alleged in the pleadings and correspondence, it would be insufficient to establish a violation of the Act. Furthermore, the ALJ sustained evidentiary objections by the College by excluding evidence DUE
sought to introduce with respect to the College’s actions during and after two impact negotiation sessions held in November and December 2006.

FACTS

Following an April 2005 accreditation review by the Commission on Higher Education of the Middle States Association, the College was mandated to establish, by April 1, 2007, an academic assessment plan to improve teaching and learning on campus. Consistent with that mandate, in February 2006, the Professional Staff Organization (PSO) established an Ad Hoc Assessment Committee (Committee) with the responsibility of recommending to PSO, prior to its next meeting in fall 2006, a framework for the College to conduct such an assessment. The PSO is the College’s campus governance organization which is comprised of College administrators, including College President Dr. D. David Conklin (Dr. Conklin), along with chairpersons, faculty members and other staff, some whom are in the DUE bargaining unit.

Prior to September 2006, the Committee prepared and circulated a draft report proposing a three-year transitional academic assessment plan ending in fall 2009.

Dr. Joseph Norton (Dr. Norton) is the president of DUE and has held that position for over 11 years. On August 24, 2006, Dr. Conklin sent Dr. Norton an e-mail stating that College Dean of Academic Affairs Carl Denti (Dean Denti) would be willing to meet with Dr. Norton and DUE Treasurer Johanna Halsey (Halsey) to discuss how to successfully implement an academic assessment plan. On September 5, 2006, Dr. Norton e-mailed Dean Denti requesting such a meeting, and the meeting took place three days later. On September 12, 2006, Dr. Norton sent an e-mail to Dean Denti, Dr. Conklin and others objecting to what transpired at the meeting. In his e-mail, Dr. Norton stated:

The President of DCC was formally notified in two letters that DUE wanted to negotiate contractual issues which DUE
believes are inherent in the work laid out in the draft of the Academic Assessment Plan – specifically in the areas of commencement and allocation of resources to DUE members. The President directed us to your office to discuss these issues. We came to that meeting as representatives of DUE and were therefore surprised when you repeated several times that you were not acting as the authorized representative of the College.¹ (Emphasis added)

In addition, Dr. Norton reiterated DUE's position that:

the latest draft of the Academic Assessment Plan demonstrates DUE's position that a significant amount of new work is being proposed. Therefore, there are contractual implications that must be resolved by the College and DUE. Many our concerns are similar to the ones we raised last February and March 2006 which the College said we would negotiate. We withdrew our improper practice [sic] because the College resumed discussion and negotiation. (Emphasis added)

Furthermore, Dr. Norton's e-mail objected to the College's distribution of a letter from an ALJ in an earlier improper practice charge filed by DUE that was ultimately withdrawn.

College Director of Human Resources Management Paul Higgins (Higgins) responded to Dr. Norton's e-mail with a memorandum that stated, in pertinent part:

In your e-mail, you assert DUE's claim that the draft of the academic assessment plan has contractual implications that must be resolved between the College and DUE. DUE does not have the right to negotiate the substance of the academic assessment plan. After an academic assessment plan is in place, DUE has the right to represent its members by filing a grievance if provisions of the academic assessment plan violate the existing contract or to seek redress from PERB if the College has unilaterally changed terms and conditions of employment.²

Following a short meeting on October 2, 2006 between Dr. Conklin, Dean Denti,

¹ Charging Party Exhibit 6.
² Charging Party Exhibit 6.
Dr. Norton and Halsey, Dr. Norton and Dr. Conklin exchanged e-mails with respect to what transpired at that meeting. Dr. Norton's e-mail stated that at the meeting, DUE sought to "negotiate contractual issues regarding assessment that pertain to the DUE membership" but the College refused.\(^3\) Dr. Conklin did not dispute that Dr. Norton had demanded to negotiate but noted that the parties "differ in regard to what form [sic] discussions regarding academic assessment should take."\(^4\)

On October 4, 2004, one day prior to the Committee presenting its final report to PSO, Dr. Norton sent a memorandum to DUE bargaining unit members announcing that an improper practice charge had been filed alleging that the College had failed to negotiate "over proposed changes of wages, hours and conditions of employment related to the conduct of assessment activities and with conducting private negotiations."\(^5\) In addition, the memorandum outlined four options available to PSO members following the presentation of the final Committee report. One of those options was for the PSO members to treat the report as being filed for potential later consideration so as to avoid approving or disapproving the report. On October 5, 2006, PSO voted to treat the final report as having been filed, rather than approving or disapproving it.

On October 11, 2006, in response to PSO's decision to treat the final report as filed, Dr. Conklin sent a lengthy memorandum to the College's professional staff, including members of the DUE bargaining unit. The memorandum stated, in part:

> Academic assessment will be considered an inherent job responsibility of full-time faculty. Position descriptions and the assignment of responsibilities are not a term and

\(^3\) Charging Party Exhibit 7.

\(^4\) Charging Party Exhibit 8.

\(^5\) Charging Party Exhibit 9.
condition of employment, but the assigned duties must be inherent in the position.\(^6\)

Dr. Norton sent an e-mail to Dr. Conklin, on October 16, 2006, demanding that the College commence impact negotiations as quickly as possible with respect to the College's announced plan to treat academic assessment as an inherent job responsibility for DUE bargaining unit members: "[t]he proper term, utilized by PERB, is that DUE is issuing its 'demand for negotiations' on this matter."\(^7\) The following day, Dr. Conklin responded with an e-mail to Dr. Norton acknowledging the College's duty to negotiate impact but stating that such negotiations cannot take place until the academic assessment plan has been approved.

On October 24, 2006, the College Board of Trustees (Board) issued a resolution directing Dr. Conklin to review the Committee’s final report and develop an action plan, including a timetable, to implement the report’s major recommendations. The following day, Dr. Conklin issued a memorandum to the professional staff advising them of the Board’s action and announcing a plan to implement the report’s recommendations. In response to the memorandum, Dr. Norton sent an e-mail to Dr. Conklin on October 25, 2006 reiterating DUE’s demand to commence impact negotiations and Dr. Conklin e-mailed Dr. Norton back stating that the College was prepared to commence impact negotiations. Dr. Conklin requested that DUE contact the College’s labor counsel to schedule the impact negotiations.

The record reveals that following DUE’s filing of its amended charge in U-27107, the parties engaged in impact negotiations in November and December 2006 without

\(^6\) Charging Party Exhibit 10.

\(^7\) Charging Party Exhibit 11.
reaching an agreement leading to the filing of a declaration of impasse.

**DISCUSSION**

We begin with DUE's exceptions challenging the ALJ's dismissal of its direct dealing claim.

Contrary to DUE's contention, an ALJ has the authority to dismiss a claim based upon the sufficiency of factual allegations even after the Director has conducted an initial review pursuant to §204.2 of the Rules. An ALJ’s authority to dismiss a pleading before a hearing is fully consistent with the scope of discretion granted an ALJ in the processing of improper practice charges. Although the Director has the initial responsibility to weed out facially deficient improper practice charges, the pleading deficiency may not become apparent until a party has clarified its allegations in writing or during a pre-hearing conference.

Prior to the hearing in the present case, DUE received explicit notice that its direct dealing claim was deficient and that it would not be processed. After being provided with multiple opportunities to clarify its direct dealing claim, and after it filed U-27371, DUE received two pre-hearing letters from an ALJ stating that the direct dealing claim would not be processed because the charges failed to allege sufficient facts. Therefore, we reject any contention by DUE that it was deprived of procedural due process when its claim was dismissed.

We next turn to DUE's contention that the ALJ did not apply the correct legal standard when dismissing the direct dealing claim. Prior to dismissing a claim based on

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8 *Professional Fire Fighters Assoc, Local 274, IAFF, 23 PERB ¶3021 (1990); Chenango Forks Cent Sch Dist (Allen), 32 PERB ¶3060 (1999).*

9 *City of Elmira, 41 PERB ¶3018 (2008).*
the sufficiency of a pleading, the allegations must be deemed true with the charging party being given every reasonable inference that can be drawn from the alleged facts.\textsuperscript{10} In the present case, the ALJ's decision does not state explicitly whether she granted all reasonable inferences to DUE's allegations. Despite that omission, we do not reverse and remand. Following our review of the allegations contained in U-27107 and U-27371, the multitude of exhibits attached thereto, DUE's letters of clarification and after applying the proper demurrer standards, we conclude that the ALJ correctly determined that DUE fails to state a claim for a violation of §§209-a.1(a) and (d) of the Act for direct dealing.

In order to state a claim for direct dealing, an employee organization must allege sufficient facts that an employer impermissibly bypassed the employee organization for the purpose of negotiating or attempting to negotiate with an employee or a group of employees aimed at reaching an agreement on the subject under discussion.\textsuperscript{11}

Accepting DUE's allegations as being true and granting it all reasonable inferences, its direct dealing claim is premised upon the following communications between the College and bargaining unit members: a) the College distributed an ALJ's letter to members of the bargaining unit and subsequently sent an e-mail to the bargaining unit responding to DUE's objection to the distribution of the ALJ's letter; b) a College representative told DUE representatives during a meeting that he was not authorized to negotiate on behalf of the College; c) Dr. Conklin spoke with two bargaining unit members requesting that they advise DUE that the College has made its final and best offer about academic assessment issues; d) Dr. Conklin spoke with

\textsuperscript{10} \textit{Professional Fire Fighters Assoc, Local 274, IAFF, supra, note 8.}

\textsuperscript{11} \textit{County of Cattaraugus, 8 PERB ¶3062 (1975); City of Schenectady, 26 PERB ¶3047 (1993); Town of Huntington, 26 PERB ¶3034 (1993); CUNY, 38 PERB ¶3011 (2005).}
another bargaining member about the PSO meeting on the academic assessment issue and told her that “you will not get what you deserve—you will have to do it (academic assessment) for nothing”; and e) the College provided bargaining unit members with information about their assessment duties.\(^{12}\)

A reasonable inference cannot be drawn from these alleged communications that the College negotiated with or attempted to negotiate directly with members of the DUE bargaining unit with the aim of reaching an agreement. An employer's duty to negotiate with the exclusive bargaining agent does not, in general, prohibit that employer from disseminating information and documents to members of a bargaining unit so long as it is not aimed at impeding negotiations or subverting the fundamental rights of employees to organization and representation under the Act.

Based upon our denial of DUE's exceptions challenging the ALJ's dismissal of the direct dealing claim, DUE's exceptions challenging the ALJ's exclusion of evidence relevant to that claim are also denied.

Next, we examine DUE's exceptions challenging the ALJ's rulings excluding evidence with respect to its claim that the College engaged in bad faith impact negotiations at two sessions held in November and December 2006. Although those negotiation sessions took place prior to DUE filing U-27371, the allegations in that charge cannot be reasonably interpreted to include an independent §209-a.1(d) claim of bad faith negotiations. In fact, DUE's August 6, 2007 letter states explicitly that its two charges allege only two distinct claims: the College engaged in direct dealing and refused to bargain impact. Contrary to DUE's argument, its claim that the College failed

\(^{12}\) In its exceptions, DUE references additional alleged communications by the College that took place more than four months prior to the filing of its initial charge and, therefore, are untimely pursuant to §204.1(a)(1) of the Rules.
to engage in impact negotiations does not put into issue whether the College's subsequent conduct during impact negotiations was in bad faith. Additional allegations must have been plead in order to state that independent and distinct claim. Therefore, we deny the exceptions challenging the ALJ's refusal to hear DUE's claim that the College engaged in bad faith impact negotiations and the ALJ's exclusion of evidence related to that claim.

Finally, we consider the exceptions challenging the ALJ's dismissal of DUE's claim that the College refused to negotiate the impact of the academic assessment. In New York City Transit Authority, we recently reiterated that the duty to engage in impact negotiations "arises only upon a valid request."

In the present case, we reject DUE's exceptions contending that the e-mail exchanges between Dr. Norton and the College in August and September 2006 establish that DUE requested impact negotiations and that the College refused that request. Read together, the substance of the e-mails reveals that the College was willing to meet to discuss the draft academic assessment plan prepared by the Committee while DUE wanted to engage in negotiations over mandatory subjects.

For example, Dr. Norton's September 12, 2006 e-mail to Dean Denti states that DUE seeks to negotiate over compensation as well as other contractual issues. The e-mail cannot reasonably be interpreted to constitute a request to negotiate the impact of a managerial decision or action that is not a mandatory subject. In fact, Dr. Norton's October 4, 2004 memorandum to the membership makes clear that DUE objected to the College's refusal to negotiate over "proposed changes of wages, hours and

\[13\] 41 PERB ¶3014 at 3077 (2008); City of Rochester, 17 PERB ¶3082 (1984).
conditions of employment."14

As the ALJ correctly determined, the first time DUE requested impact negotiations was in Dr. Norton's October 16, 2006 e-mail to the College wherein he requested to commence such negotiations as quickly as possible.

We also deny DUE's exceptions challenging the ALJ's conclusion that the College's delay in the commencement of impact negotiations constituted a failure to negotiate in violation of §209-a.1(d) of the Act. Although the College delayed agreeing to negotiate impact for eight days, following receipt of DUE's initial request, we agree with the ALJ that, under the totality of the circumstances, the delay did not constitute a violation of the College's duty to negotiate. At the time of the initial request for impact negotiations, there had not been a College managerial decision or action on the Committee's report that impacted the bargaining unit's terms and conditions of employment.15 However, one day following the Board's directive to implement the report, the College met its statutory obligation by agreeing to commence impact negotiations.16 Under these facts, we conclude that the College did not refuse to negotiate impact upon DUE's request in violation of the Act.

14 Charging Party Exhibit 9.


16 In light of our affirmance of the ALJ's dismissal, we do not reach DUE's exception challenging the ALJ's alternative rationale for dismissing its failure to negotiate claim: mootness. Our precedent is clear, however, that the commencement of negotiations does not render moot a charge alleging a refusal to negotiate; but, it is relevant in determining the appropriate remedy. CSEA, 25 PERB ¶3057 (1992); Town of Huntington, 27 PERB ¶3039 (1994).
WE, THEREFORE, ORDER that the improper practice charges must be, and hereby are, dismissed in their entirety.

DATED: November 26, 2008
Albany, New York

Jerome Leffkowitz, Chairman

Robert S. Hite, Member
STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

DANIEL FARREY,

Charging Party,

CASE NO. U-27677

-and-

DISTRICT COUNCIL 37, AFSCME, AFL-CIO,

Respondent.

DANIEL FARREY, pro se

EDDIE M. DEMMINGS, GENERAL COUNSEL (STEVEN SYKES of counsel), for Respondent

BOARD DECISION AND ORDER

This case comes to the Board on exceptions filed by Daniel Farrey (Farrey) to a
decision by an administrative law judge (ALJ) dismissing an improper practice charge,
as amended and clarified, filed by Farrey that alleges District Council 37, AFSCME,
AFL-CIO (DC 37) violated §209-a.2(a) of the Public Employees' Fair Employment Act
(Act) when it entered into a 2005-2008 negotiated agreement with the New York City
School Construction Authority (SCA) modifying a compensatory time program for the
SCA-DC 37 bargaining unit which includes Farrey's title, project officer level I (PO I),
and when DC 37 entered into a side letter, dated June 20, 2007, with SCA in which DC
37 agreed that it would not pursue legal claims for overtime compensation for hours
worked by PO I employees in excess of 40 hours per week.

At the hearing before the ALJ, following the stipulated admission of various
exhibits, both parties rested after making opening statements and without calling any
witnesses. Based on a review of the exhibits admitted into evidence, the ALJ dismissed
the charge concluding that Farrey had failed to prove that DC 37 had violated §209-
a.2(a) of the Act.

EXCEPTIONS

Farrey’s exceptions challenge the ALJ’s decision to dismiss the charge
contending that the ALJ made various errors of fact and law. Specifically, Farrey
asserts that the ALJ erred by: a) failing to consider a provision in the 1995-2000
collectively negotiated agreement, and subsequent SCA-DC 37 agreements, which
states that employees in the PO I title are exempt from the Fair Labor Standards Act of
1938\(^1\) (FLSA); b) failing to find that the FLSA provision with respect to PO I employees
constitutes a violation of §209-a.2(a) of the Act; c) failing to find that the negotiated
compensatory time program in the 2005-2008 SCA-DC 37 agreement demonstrates a
violation of §209-a.2(a) of the Act because it adversely impacts the monetary
compensation for members of the bargaining unit; d) failing to find that the terms of the
June 20, 2007 side letter, along with DC 37’s failure to present the side letter for
ratification, demonstrates a violation of §209-a.2(a) of the Act; and e) concluding that
DC 37 successfully negotiated a decrease in the number of hours that bargaining unit
employees are required to work without pay.

DC 37 filed a response to the exceptions supporting the decision of the ALJ.\(^2\)

\(^1\) 29 USC §201, et seq.

\(^2\) Farrey was notified that the Board would not consider his pleading labeled cross-
extceptions, filed in reply to DC 37’s response to his exceptions, because §213.3 of
PERB’s Rules of Procedure (Rules) does not permit such pleading.
Based upon our review of the record and consideration of the parties' arguments, we affirm the ALJ's decision.

**FACTS**

Farrey is employed by SCA as a PO I; that title, along with the titles of assistant project officers levels I and II (APO I and APO II), is in a SCA-DC 37 bargaining unit referred to as Unit C. PO I's regularly work in excess of 37 ½ hours each week and can be recalled to work in the event of an emergency.\(^3\) In addition to Unit C, DC 37 represents a separate bargaining unit known as Unit A composed of other SCA employees.

Since 1995, Article I, §2 of the Unit C negotiated agreements between SCA and DC 37 has stated:

> As Project Officers Level I are employed in an executive, administrative, or professional capacity, they are exempt from the maximum hours minimum wage provisions of the Fair Labor Standards Act.

In contrast, the SCA-DC 37 negotiated agreements for Unit A provide that employees are paid overtime in accordance with the FLSA.

In June 2007, SCA and DC 37 entered into a stipulation of settlement memorializing a tentative 2005-2008 agreement for Unit C. The stipulation provides that in a new agreement the PO I compensatory time program contained in the expired Unit C agreement will be modified. The stipulation states:

*Project Officer I Compensatory Time Program – Final contract language will be drafted to reflect the parties' agreement that a Project Officer I will be entitled to receive one (1) hour of compensatory time for every additional hour*

\(^3\) Transcript, p. 10.
worked beyond eighty (80) work hours in a two (2) week pay period. The Project Officer I will be able to bank on an annual basis up to a maximum of 112.5 compensatory time hours, equivalent to fifteen (15) days. SCA management must direct and authorize in advance all hours worked beyond the regular work day. In addition, SCA management must approve the scheduled use of compensatory time in advance. Any compensatory time hours not used by the end of each calendar year (December 31) shall be forfeited. Compensatory hours earned in the month of December may be carried over for up to three (3) months into the next calendar year, ending on March 31, and if not used by that time shall be forfeited.4

In a side agreement, dated June 20, 2007, SCA and DC 37 agreed to the following:

This is to confirm our mutual understanding and agreement that, based on the contract settlement between the parties for the duration of the agreement, October 1, 2005 through June 2, 2008, District Council 37 and Local 375 shall not bring claims in any forum against the NYC School Construction Authority or Department of Education, or their employees or agents concerning the alleged right of employees in the Project Officer I title to overtime compensation for hours worked in excess of 40 per week.

The parties have agreed through the stipulation of settlement that contract language will be written to establish a Project Officer I Compensatory Time Program.5

DISCUSSION

To establish a violation of the duty of fair representation under the Act, a charging party has the burden of proof to demonstrate that an employee organization's

4 Charging Party Exhibit 4.

5 Charging Party Exhibit 6.
conduct or actions are arbitrary, discriminatory or founded in bad faith. A mere assertion that the negotiated terms of an agreement are not advantageous to the bargaining unit membership is insufficient to state a claim of a breach of the duty of fair representation. Similarly, without proof of improper motivation by an employee organization, the fact that the terms of a negotiated agreement are more favorable to some bargaining unit members is insufficient to establish a breach of the duty of fair representation. Finally, the failure of an employee organization to conduct a ratification vote with respect to an agreement is insufficient to establish a breach unless the charging party presents evidence establishing that the failure was arbitrary, discriminatory or in bad faith.

In his exceptions, Farrey contends DC 37 violated §209-a.2(a) of the Act by entering into agreements for Unit C dating back to 1995 that include Article I, §2 which states that the PO I title is not covered by the FLSA while the SCA-DC 37 Unit A agreements during the same period recognize FLSA coverage for employees in that separate bargaining unit.

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7 O'Riordan v Suffolk Chapter, Local No. 852, 95 AD2d 800, 16 PERB ¶7511 (2d Dept 1983), lv denied, 60 NY2d 559 (1983); CUNY (Soffer), 20 PERB ¶3051 (1987), app dismissed, 21 PERB ¶7004 (Sup Ct NY Co 1988), mot for lv to app denied, 21 PERB ¶7011 (1st Dept 1988) (subsequent history omitted).

8 Plainview-Old Bethpage Cent Sch Dist, 7 PERB ¶ 3058 (1974); UFT (Kauder), 18 PERB ¶3048 (1985); State of New York and PEF, 14 PERB ¶3043 (1981); Gambardella v County of Nassau, 168 AD2d 421, 24 PERB ¶7553 (2d Dep't 1990); Litman v Bd of Educ of the City Sch Dist of the City of New York, 170 AD2d 194, 25 PERB ¶7504 (2d Dep't 1991).

9 CUNY (Soffer), supra, note 7.
We deny Farrey's exceptions premised on Article 1, §2 for several reasons. His attack on Article 1, §2 is outside the scope of the allegations in his charge, as clarified before the ALJ, and the claim is otherwise untimely under §204.1(a) of our Rules of Procedure (Rules) which requires a charge to be filed within four months. The documentary evidence establishes that DC 37 negotiated the FLSA provision over a decade ago. Also, the record lacks any evidence of improper motivation by DC 37 when it negotiated different provisions in the Unit C and Unit A agreements with respect to FLSA applicability for the respective unit employees.

We also deny Farrey's exceptions premised on the modified negotiated compensatory time program which he asserts is disadvantageous to employees in the PO I title because it negatively impacts their level of monetary compensation. As stated above, in order to establish a violation of the duty of fair representation, a charging party must prove more than dissatisfaction with a negotiated provision. Farrey has failed to present any evidence demonstrating that DC 37 acted arbitrarily, discriminatorily or in bad faith when it negotiated a modification to the PO I compensatory time program in the 2005-2008 agreement. Furthermore, he has not proven that the modified compensatory program results in a PO I not being paid when SCA requires a PO I to work more than 37 1/2 hours but less than 40 hours in a week. To the extent that his exceptions assert that DC 37 violated the Act by entering into earlier agreements containing the original PO I compensatory time program, such a claim is outside the

10 Administrative Law Judge Exhibit 10.

11 The FLSA specifically permits a collectively negotiated agreement for employees of political subdivisions of a State to include a provision granting compensatory time off in lieu of overtime compensation. 29 CFR §553.21, §7(o).
scope of his charge, as clarified, and is untimely under §204.1(a) of the Rules.

Finally, we conclude that Farrey's exceptions premised on the June 20, 2007 side letter, in which DC 37 agreed that it would not pursue FLSA litigation on behalf of PO employees, are not supported by the record. Farrey failed to establish that DC 37’s failure to submit the letter for ratification was arbitrary, discriminatory or in bad faith. An employee organization has the discretion under the Act to agree not to pursue particular statutory or contractual claims against an employer so long as the employee organization is not improperly motivated. In the present case, the SCA-DC 37 side letter does not prohibit or limit the ability of bargaining unit members to pursue their own individual FLSA claims.¹²

For the reasons set forth above, we deny Farrey's exceptions and affirm the decision of the ALJ. We, therefore, find that DC 37 did not violate §209-a.2(a) of the Act.

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

SO ORDERED.

DATED: November 26, 2008
Albany, New York

Jerome Lefkowitz, Chairman

Robert S. Hite, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

MARY LOU HILOW,

Charging Party,

- and -

ROME CITY SCHOOL DISTRICT,

Respondent.

In the Matter of

MARY LOU HILOW,

Charging Party,

- and -

ROME TEACHERS ASSOCIATION, INC.,

Respondent.

In the Matter of

MARY LOU HILOW,

Charging Party,

- and -

NEW YORK STATE UNITED TEACHERS,

Respondent.

MARY LOU HILOW, pro se

BOARD DECISION AND ORDER

These cases come to the Board on exceptions filed by Mary Lou Hilow (Hilow) from a decision by the Director of Public Employment Practices and Representation (Director)
Case Nos. U-28316, U-28317 & U-28818

- dismissing three improper practice charges filed on April 26, 2008. The charges allege that the Rome Teachers Association, Inc. (Association) and the New York State United Teachers (NYSUT) violated §§209-a.2(a), (b) and (c) of the Public Employees' Fair Employment Act (Act) and that the Rome City School District (District) violated §§209-a.1(a), (b), (c), (d) and (g) of the Act.

The Director's decision was issued following his initial review, pursuant to §204.2(a) of the Rules of Procedure (Rules), and after providing Hilow with an opportunity to amend her charges to allege facts that constitute a violation of the Act that did not occur more than four months prior to the filing of the charges. Following receipt of Hilow's amendments, the Director dismissed the charges because the relevant alleged conduct that may have constituted a violation of the Act occurred more than four months before she filed her charges; he also dismissed the charge against NYSUT because it is not an employee organization under the Act.

EXCEPTIONS

In her exceptions, Hilow asserts that the Director erred in dismissing her charges because the respondents violated the Act when the District laid her off in 1989, and the Association, in conjunction with NYSUT, allegedly breached its duty of fair representation at an arbitration, held on December 14, 1989, with respect to a grievance challenging the District's recall of some, but not all, of the teachers laid off in 1989. In addition, she asserts that the Director erred because she claims that since 1989, the respondents have violated her rights under the Racketeer Influenced and Corrupt Organizations Act\(^1\) and other federal and state laws.

\(^{1}\) 18 USC §§1961-1968.
laws. In addition, she alleges that she has been the victim of legal malpractice by a private attorney. Finally, she claims that her charges are timely because she has previously filed employment discrimination charges and complaints with federal and state agencies and commenced an unsuccessful federal gender discrimination lawsuit against the District.²

Following our review of Hilow's exceptions and after consideration of her arguments, we deny the exceptions and affirm the decision of the Director.

**DISCUSSION**

Section 204.1(a) of the Rules requires an improper practice charge to be filed within four months of when the charging party had actual or constructive knowledge of the conduct that forms the basis for the alleged improper practice.³ The time for filing a charge is not tolled because of the pendency of other related claims such as a grievance.⁴

In the present case, Hilow has not been employed by the District since her 1989 layoff. Her allegations that relate to her lay-off by the District, as well as the quality of the representation provided by her employee organization representative in response to her layoff took place 19 years ago and, therefore, involve conduct that is well beyond the filing period set by our Rules. Hilow's pursuit of other statutory and administrative remedies since 1989 and her current claims of federal law violations and alleged legal malpractice by her private attorney during the past 19 years do not toll the four-month period for the filing of an improper practice charge under the Act.

We have considered Hilow's other assertions in support of her exceptions and find

³ Inc Vill of Rockville Centre, 28 PERB ¶3056 (1995); Otsellic Valley Cent Sch Dist, 29 PERB ¶3005 (1996).
⁴ New York State Thruway Auth, 40 PERB ¶3014 (2007).
them to be equally without merit.

Based upon the foregoing, we deny Hilow's exceptions and affirm the decision of the Director.

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

DATED: November 26, 2008
Albany, New York

[Signatures]

Jerome Lefkowitz, Chairman

Robert S. Hite, Member
This case comes to the Board on exceptions filed by Levi McIntyre (McIntyre) to a decision of an Administrative Law Judge (ALJ) dismissing an improper practice charge, as amended, filed on January 27, 2007, alleging that the Middle Island Administrators Association (Association) violated §209-a.2(c) of the Public Employees' Fair Employment Act (Act) when it entered into a collectively negotiated agreement with the Longwood Central School District (District), placing McIntyre at the highest step of the salary schedule thereby depriving him of step increases and resulting in him receiving the smallest annual salary increase among employees in the bargaining unit.
The Association and the District filed answers to the charge denying the allegations and raising various affirmative defenses, including the timeliness of the charge.

Following a hearing, the ALJ issued a decision dismissing the charge on the ground that it was filed more than four months after McIntyre had actual knowledge of the terms of the agreement and the disparities resulting from those negotiated terms.¹

EXCEPTIONS

In his exceptions, McIntyre contends that the ALJ erred in concluding that his charge is untimely and in dismissing the charge. Both the Association and the District support the ALJ's decision.

Based upon our review of the record and our consideration of the exceptions, we affirm the ALJ's dismissal of the charge as untimely.

FACTS

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

In 2006, the Association and the District reached a tentative five-year collectively negotiated agreement (agreement) for the period of July 1, 2007 through June 30, 2011. The Association's membership ratified the agreement on February 6, 2006 and the parties signed it on April 4, 2006. The agreement includes both negotiated annual percentage increases as well as the establishment of a new 12 step salary schedule. Under the agreement, bargaining unit members receive yearly percentage increases. In addition, they receive step increases until they reach the twelfth and final step. Once a

¹ 41 PERB ¶4569 (2008).
bargaining unit member reaches the twelfth step, he or she is entitled to receive only the annual percentage increase.

After receiving a copy of the agreement, McIntyre learned that the Association and District had agreed to place him at the twelfth step of the salary schedule. On April 18, 2006, McIntyre wrote Association President Kathleen Brennan (Brennan) complaining that the agreement denies him step increases while other bargaining unit employees would receive both annual percentage increases and step increases. He requested that Brennan provide him with information about the step placement of all other bargaining unit employees. In addition, McIntyre stated that he intended to commence litigation to enjoin the enforcement of the agreement and to pursue an employment discrimination claim.

On May 5, 2006, McIntyre sent a second letter to Brennan requesting a response to his April 18, 2006 correspondence and requesting additional information. In his letter, McIntyre set forth his analysis of the agreement including his conclusion that he and one other bargaining unit member would be receiving the lowest annual salary increases of the employees in the 34 member unit. Ten days later, the Association’s counsel sent McIntyre a letter informing him that based on seniority and experience, both he and Association President Brennan had been placed at the top step of the salary schedule.

In early January 2007, McIntyre learned from the minutes of a District school board meeting that Brennan had given the District notice of her intent to retire effective July 1, 2007. According to McIntyre, this was the first time that he learned of Brennan’s intention to retire.

In April 2007, the Association and District entered into a memorandum of agreement, ratified by the Association’s membership, modifying the agreement with
Case No. U-27349

respect to the disbursement of deferred compensation upon retirement. McIntyre
asserts that the April 2007 agreement benefits Brennan. Immediately following
Brennan's retirement, effective July 1, 2007, the District rehired her to her former
position on a per diem basis for a total of 10 days.

DISCUSSION

In his exceptions, McIntyre contends that the ALJ erred in concluding that his
charge was untimely based upon her conclusion that McIntyre was aware, as early as
May 5, 2006, of the salary disparities under the agreement between himself and other
employees in the bargaining unit. McIntyre asserts that his claim against the
Association for the alleged breach of its duty of fair representation accrued in early
January 2007 after he learned that Brennan had announced her planned retirement.
According to McIntyre, it was Brennan's retirement announcement that purportedly led
him to conclude that Brennan had engaged in bad faith conduct when she participated
in the negotiations on behalf of the Association leading to the 2006 agreement.

Following our review of the exceptions, the responses and the record, we deny
McIntyre's exceptions.

It is well-settled that in determining the commencement of the four-month filing
period under the Rules of Procedure, we consider when the charging party had actual
or constructive knowledge of the act or acts that form the basis for the alleged violation
of the Act. In the present case, we agree with the ALJ that McIntyre's duty of fair
representation claim accrued on or before May 5, 2006 when he sent his letter to

2 Inc Vill of Rockville Centre, 28 PERB ¶3056 (1995); Otselic Valley Cent Sch Dist, 29
PERB ¶3005 (1996); New York State Thruway Auth, 40 PERB ¶3014 (2007).
Brennan setting forth his analysis of the salary disparities resulting from the recently ratified agreement. This letter, along with McIntyre's earlier letter to Brennan threatening to commence litigation challenging the disparities in the agreement, clearly establish that McIntyre had actual knowledge of the act or acts that form the basis of his claim against the Association more than four months prior to filing his charge. The act that forms the basis for his claim is the Association entering into the agreement with the new 12-step salary schedule. Contrary to McIntyre's argument, Brennan's retirement announcement, at best, may constitute additional proof of improper motivation but does not establish the accrual date for his charge. Similarly, the April 2007 agreement between the Association and District and the short term rehiring of Brennan are facts that may have had some relevancy to McIntyre's claim but do not impact when his claim against the Association accrued under the Act.

Based on the foregoing, we deny McIntyre's exceptions and affirm the decision of the ALJ.

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

SO ORDERED.

DATED: November 26, 2008
Albany, New York

Jerome Lefkowitz, Chairman

Robert S. Hite, Member
STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

RONALD GRASSEL,

Charging Party,

and

CASE NO. U-28124

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

Respondent.

RONALD GRASSEL, pro se

DAVID BRODSKY, DIRECTOR OF LABOR RELATIONS (RUSSELL J. PLATZEK, of counsel), for Respondent

BOARD DECISION AND ORDER

This case comes to the Board on motions filed by Ronald Grassel (Grassel) and the Board of Education of the City School District of the City of New York (District) for leave to file exceptions, pursuant to §212.4(h) of the Rules of Procedure (Rules), challenging certain pre-hearing rulings of an Administrative Law Judge (ALJ), dated August 27, 2008.

PROCEDURAL BACKGROUND

On January 22, 2008, Grassel filed an improper practice charge alleging that the District violated §§209-a.1(a) and (c) of the Public Employees' Fair Employment Act (Act) when it issued disciplinary charges, dated December 17, 2007, seeking his termination pursuant to Educ Law §3020-a. The present charge was filed by Grassel
after his motion to amend an earlier related charge to allege that the District had issued new disciplinary charges, and to reopen the record with respect to that earlier charge, was denied.¹

Prior to the scheduling of a hearing in the present case, Grassel filed an application seeking issuance of agency subpoenas *ad testificandum* and *duces tecum* pursuant to §211.3 of the Rules. In his application, Grassel requested 14 subpoenas *ad testificandum* and a subpoena *duces tecum* for e-mails, photographs and other documents related to the Educ Law §3020-a disciplinary charges. The District objected to Grassel’s request on substantive and procedural grounds.

The hearing was scheduled to commence on June 13, 2008. Before the hearing, the ALJ engaged in off-the-record discussions with the parties about the documents that would be received into evidence on consent, as well as, a discussion with respect to the allegations in the charge. Following those discussions, the hearing commenced with various ALJ exhibits being placed into evidence. In addition, a clarification of the charge’s allegations was placed on the record by the ALJ followed by a colloquy during which Grassel made various factual and legal arguments in support of the charge. Following the colloquy, the ALJ granted a District request for leave to file a motion to dismiss, a briefing schedule for the motion was established and the hearing adjourned.

During the June 13, 2008 hearing, Grassel did not object to the ALJ’s conduct before or during the hearing. Later in the day, however, Grassel filed a motion requesting the ALJ to recuse himself from presiding over the processing of the charge.

¹ In *Bd of Educ of the City Sch Dist of the City of New York (Grassel)*, 41 PERB ¶3024 (2008), the Board recently affirmed the ALJ’s denial of Grassel’s motion to amend, as well as, the merits dismissal of that charge.
At the same time, Grassel filed a motion with the Board for leave to file exceptions seeking to disqualify the ALJ. On July 3, 2008, the Board denied Grassel's motion concluding that it was premature and that he failed to demonstrate extraordinary circumstances warranting the granting of leave. 

On July 17, 2008, the District filed an amended answer adding a third affirmative defense, along with a memorandum of law, asserting that the charge should be dismissed on the grounds that PERB lacks subject matter jurisdiction. A motion for particularization was filed by Grassel with respect to the amended answer. The District opposed Grassel's motion for particularization; Grassel opposed the District's motion to dismiss.

In a ruling, in letter form, dated August 27, 2008, the ALJ denied Grassel's motions for recusal and particularization as well as his application for issuance of agency subpoenas. In addition, the ALJ denied the District's motion to dismiss. Both parties now seek leave to file exceptions challenging aspects of the ALJ's pre-hearing rulings.

MOTIONS FOR LEAVE TO FILE EXCEPTIONS

Grassel's motion seeks leave to file exceptions to the ALJ's denial of his motion for recusal and, in the alternative, requests the Board to remove the ALJ for cause and have the charge reassigned to another ALJ. In addition, Grassel requests leave to file exceptions to the denial of his motion for particularization and his application for subpoenas. Finally, both the District and Grassel seek leave to file exceptions to the denial of the District's motion to dismiss the charge.

2 Bd of Educ of the City Sch Dist of the City of New York (Grassel), 41 PERB ¶3024 (2008).
Based upon our review of the record and consideration of the parties' arguments, we deny the respective motions by Grassel and the District for leave to file exceptions.

**DISCUSSION**

Section 212.4(h) of the Rules states, in relevant part, that:

> All motions and rulings made at the hearing shall be part of the record of the proceeding, and unless expressly authorized by the board, shall not be appealed directly to the board, but shall be considered by the board whenever the case is submitted to it for decision.

The Board will not grant leave to file exceptions to non-final rulings and decisions unless the moving party demonstrates extraordinary circumstances. The reasoning underlying this standard is our recognition that it is more efficient to await a final disposition of the merits of a charge before we examine interim determinations. The improvident grant of leave can result in unnecessary delays in the processing of improper practice charges.

In the present case, we conclude that extraordinary circumstances do not exist warranting the granting of leave to file exceptions to the rulings of the ALJ.

1. **Motion to Recuse the ALJ**

   Section 212.4(g) of the Rules permits a party to make a motion to an assigned ALJ requesting recusal from continuing to process a charge or petition. The Board will grant a party leave to file exceptions to the denial of such a motion when the alleged

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3 *Mt Morris Cent Sch Dist,* 26 PERB ¶3085 (1993); *Greenburgh No 11 Union Free Sch Dist,* 28 PERB ¶3034 (1995); *Town of Shawangunk,* 29 PERB ¶3050 (1996); *New York State Housing Finance Agency,* 30 PERB ¶3022 (1997); *Council 82, AFSCME,* 32 PERB ¶3040 (1999); *Watertown City Sch Dist,* 32 PERB ¶3022 (1999); *UFT (Grassel),* 32 PERB ¶3071 (1999); *City of Newburgh,* 33 PERB ¶3031 (2000); *State of New York (Division of Parole),* 40 PERB ¶3007 (2007); *Bd of Educ of the City Sch Dist of the City of New York (Grassel),* supra, note 2; *UFT (Gray),* 41 PERB ¶3025 (2008).
facts and circumstances warrant the ALJ's disqualification. As the Board stated in [State of New York (Bruns):]

We are not inclined to give interlocutory review of an ALJ's refusal to recuse him or herself from a proceeding on a party's allegations of bias except in circumstances in which those allegations set forth facts upon which the ALJ's disqualification would be required.

A party seeking leave to file exceptions to the denial of a recusal motion has the burden of presenting facts and circumstances that demonstrate the ALJ has a personal bias or is otherwise incapable of processing the matter in an impartial manner.

Objections to procedural and evidentiary rulings will rarely, if ever, constitute legitimate grounds for recusal or constitute extraordinary circumstances warranting the grant of leave for interlocutory review of an ALJ's denial of a party's motion seeking such relief.

In the present case, Grassel argues that the Board should grant leave to review the ALJ's denial of the motion for recusal and to consider whether the ALJ should be removed from the case. We disagree because Grassel fails to demonstrate extraordinary circumstances warranting the granting of such relief under §212.4(h) of the Rules.

Grassel's recusal motion was premised on purported pre-hearing statements by the ALJ with respect to the charge and the delays in acting upon Grassel's application for issuance of subpoenas. Grassel's allegations, even if true, are insufficient to be the

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5 25 PERB at 3022.
6 SAPA §303; Chenango Forks Cent Sch Dist, 29 PERB ¶3058 (1996); Town of Penfield, 30 PERB ¶3060 (1997).
7 ALJ Exhibit 12.
basis for the Board to grant leave to file exceptions because the purported statements by the ALJ and the delay in ruling on the application for subpoenas do not demonstrate a personal bias against Grassel or establish that the ALJ is incapable of processing the improper practice charge in an impartial manner. The pre-hearing efforts by the ALJ to clarify the charge, and to discuss other preliminary matters with the parties before going on the record, are consistent with his quasi-judicial responsibilities and do not constitute a basis for recusal.

We next examine Grassel's request that the Board grant leave to consider his request that the ALJ be removed for cause and the case be reassigned to another ALJ. An ALJ, in general, is granted considerable discretion with respect to the processing of an improper practice charge including the conduct of a hearing.\(^8\) Except in extraordinary circumstances, the Board will review allegations that an ALJ's conduct creates a reasonable appearance or perception that he or she favors a particular party only in the context of a full record following the ALJ's merits decision and proposed order.\(^9\) A request to the Board for the extraordinary relief of removal of an ALJ from a pending case will be granted only in the most extreme situations after a party has identified specific and objective evidence demonstrating that the ALJ favors one party over another, and is incapable of presiding over the case in an impartial manner.

Grassel does not identify any facts and circumstances that establish extraordinary circumstances warranting the grant of leave to consider his request that the ALJ be removed. Our review of the transcript of the June 13, 2008 hearing reveals that the ALJ treated both parties in an impartial manner and provided Grassel with a full

\(^8\) City of Elmira, 41 PERB ¶3018 (2008).

\(^9\) Chenango Forks Cent Sch Dist, supra, note 6.
and fair opportunity to clarify his factual claims and legal arguments. The ALJ’s subsequent denial of the District’s pre-hearing motion to dismiss belies Grassel’s claim that the ALJ is biased against him.

Therefore, we deny Grassel’s motion for interlocutory review with respect to his efforts to disqualify or remove the ALJ.

2. Motion for Particularization of District’s Amended Answer

Grassel requests that the Board grant him leave to review the ALJ’s denial of his motion for particularization of the District’s amended answer.

Pursuant to §204.3 of the Rules, a charging party may make a motion, within ten working days after receipt of an answer, seeking particularization with respect to an affirmative defense when the answer is so vague and indefinite that the charging party cannot reasonably be expected to address the affirmative defense in a timely manner. Interim rulings with respect to pleadings will rarely create extraordinary circumstances justifying the grant of leave to file interlocutory exceptions unless failure to consider the exceptions would result in prejudice to a party that cannot be remedied upon review of the ALJ’s final decision and proposed order.\(^\text{10}\)

In the present case, we conclude that extraordinary circumstances do not exist to grant Grassel leave to file exceptions to the ALJ’s denial of his motion for particularization. The ALJ concluded that Grassel’s motion seeks particularization of the District’s responses to the allegations of the charge; it does not seek particularization of the District’s affirmative defenses. Grassel will not be prejudiced if the Board’s review of the ALJ’s denial of his motion is determined upon exceptions as he may file following the final disposition of the charge.

\(^{10}\) See, State of New York (Bruns), note 4; UFT (Gray), supra note 3.
3. Denial of Grassel's Application for Subpoenas

In *Triborough Bridge and Tunnel Authority*, we recently denied motions for leave to file exceptions with respect to the denial of requests for subpoenas reiterating that an ALJ is granted discretion, pursuant to §211.1 of the Rules, to grant or deny a request for the issuance of an agency subpoena.

In the present case, the ALJ denied Grassel's request for the issuance of multiple agency subpoenas on the grounds that Grassel's request fails to sufficiently establish the relevancy of the testimony and documents sought. We conclude that the ALJ’s denial of the request for subpoenas do not constitute extraordinary circumstances, at this junction in the present case, for the granting of interlocutory review. This is especially true in light of the overbroad and vexatious nature of Grassel's request for subpoenas.

Next, we turn to the respective motions by the District and Grassel for leave to file exceptions challenging the ALJ’s denial of the District’s motion to dismiss the charge.

4. Denial of District’s Motion to Dismiss

Both the District and Grassel seek leave to file exceptions to the denial of the District’s motion to dismiss the charge on the grounds that PERB lacks subject matter jurisdiction. Neither party has demonstrated facts and circumstances that establish extraordinary circumstances warranting interlocutory Board review of the ALJ’s pre-hearing ruling on the District’s motion to dismiss.

Pursuant to §§209-a.1(a) and (c) of the Act, PERB has subject matter jurisdiction to determine whether the District retaliated against Grassel based on protected

11 41 PERB ¶3021 (2008).
activities when it acted, pursuant to Educ Law §3020-a, in issuing disciplinary charges against him in December 2007. Under the Act, PERB has jurisdiction to determine whether an employer's invocation of a statutory procedure is unlawfully motivated.\textsuperscript{12}

Nevertheless, in light of our recent affirmance\textsuperscript{13} of the merits dismissal of Grassel's earlier related charge, nothing in this decision shall preclude the District from renewing its motion to dismiss, on other grounds, before the ALJ.

Based upon the foregoing, we deny the motions by Grassel and the District for leave to file exceptions and remand the case to the ALJ for further processing consistent with this decision.

SO ORDERED.

DATED: November 26, 2008
Albany, New York

Jerome Lefkowitz, Chairman

Robert S. Hite, Member

\textsuperscript{12} See, City of Albany v Pub Empl Rel Bd, 57 AD2d 374, 10 PERB ¶7012 (3d Dept 1977), aff'd 43 NY2d 954, 11 PERB ¶7007 (1978); CSEA v Pub Empl Rel Bd 267 AD2d 935, 32 PERB ¶7027 (3d Dept 1999) (subsequent history omitted).

\textsuperscript{13} Supra, note 1.
This case comes to the Board on exceptions filed by the New York State Correctional Officers and Police Benevolent Association, Inc. (NYSCOPBA) and a cross-exception by the State of New York (Division of Parole) (Division) from a decision by an Administrative Law Judge (ALJ) on an improper practice charge filed by NYSCOPBA, finding the Division violated §§209-a.1(a) and (c) of the Public Employees' Fair Employment Act (Act) by issuing and pursuing a sixth disciplinary specification against Jeffrey H. Levy (Levy), a NYSCOPBA chief sector steward, in retaliation for the content of an e-mail Levy sent to other bargaining unit members, but dismissing all other aspects of NYSCOPBA's charge.

The ALJ's proposed order directs the Division to refrain from disciplining Levy for communicating with bargaining unit members concerning his interpretation of the parties' collective bargaining agreement.
NYSCOPBA excepts to the ALJ's conclusion that, other than the sixth specification, it failed to meet its burden of proof demonstrating that the notice of discipline issued to Levy was in retaliation for his e-mail, and therefore, violated §§209-a.1(a) and (c) of the Act. NYSCOPBA also challenges the proposed order contending that the ALJ erred in failing to order the Division to withdraw the entire notice of discipline and to vacate the five week suspension without pay penalty imposed by the disciplinary arbitrator who determined Levy's guilt and innocence with respect to the specifications contained in the notice of discipline. However, NYSCOPBA supports the ALJ's conclusion that the Division violated §§209-a.1(a) and (c) of the Act by seeking to discipline Levy for his e-mail.

In the Division's cross-exception, it contends that the ALJ erred by purportedly granting deference to the disciplinary arbitrator on the question of Levy's motivation in sending the e-mail and the protected nature of its content. The Division also asserts that the ALJ erred in concluding that Levy's e-mail constitutes protected activity under the Act. The Division supports the ALJ's dismissal of the remainder of the charge.

Based upon our review of the record and consideration of the parties' arguments, we grant NYSCOPBA's exceptions, in part, deny the Division's cross-exception and affirm the ALJ's decision in all other respects.

FACTS

For over a decade, Levy has been employed by the Division in the title of warrant and transfer officer (WTO). The Division employs approximately 14 WTOs who work primarily from their respective homes. The work week for a WTO is Monday-Friday and their work day is 8:30 am-4:30 pm. Their duties include the interstate custodial
extradition of parole violators, apprehended outside of New York State, to a New York correctional facility.

When a WTO is not assigned to an interstate extradition, he or she is required to report to a Division office to perform other assigned WTO duties. Such offices are located in various parts of the State including Albany and Buffalo. Levy and another WTO are assigned to the warrant bureau office in Albany, and their immediate supervisor is Christine Bianco (Bianco). Over the years, there have been labor-management discussions and disagreements between the Division and NYSCOPBA concerning WTO office work and time and attendance while in the office.

The WTO title is the sole Division title in the Security Services Unit (SSU) represented by NYSCOPBA. For over seven years, Levy has been NYSCOBa’s chief sector steward representing WTO employees. His duties as chief sector steward include advising members of their contractual rights, advocating for members, filing contract grievances, filing improper practice charges and participating in labor-management meetings. In his role as chief sector steward, Levy frequently interacts with the Division’s Director of Human Resource Management Jose Burgos (Burgos).

During his tenure with the Division, Levy has received positive work performance evaluations along with commendations. Prior to December 2005, Levy had not been the subject of discipline; he did receive, however, written counseling memoranda with respect to his job performance. In addition, Levy's time and attendance has been the subject of supervisory concerns for many years.

In August 2005, the area supervisor of the Division’s warrant bureau, Michael DePietro (DePietro), issued a memorandum to all WTOs, including Levy, reiterating prior directives with respect to WTO time and attendance. DePietro’s memorandum
Case No. U-26734 was issued in response to the continuing problem of WTO non-compliance with Division time and attendance rules when assigned to office duties. The memorandum states:

This is a reminder with respect to a prior directive to you that on days that you are not scheduled for an extradition trip, that you have the responsibility of reporting to the area/bureau office to which you are assigned by 08:30 a.m., and that the expectation is that you are to remain at that location until the end of the workday (4:30 p.m.), unless authorization for time off has been authorized by this office. You are to report to the area supervisor or his designee fully prepared, with all agency issued equipment necessary to perform any and all duties you may be assigned by the Area Supervisor or his designee.

Election Day is defined as a holiday in Article 16.5 of the parties’ collectively negotiated agreement (agreement). Pursuant to §16.1 of the agreement, an employee who is “scheduled or required to work on a holiday” is entitled to choose between premium pay for the holiday worked or a compensatory day in lieu of the holiday worked.

According to Levy’s interpretation of the agreement, when State offices are open on a week day holiday, the day constitutes a regularly scheduled work day. However, when Division offices are closed on a week day holiday, WTOs are not scheduled for work. Levy testified to a practice of WTOs working Election Day as a regularly scheduled work day unless the Division provided advanced notification that a WTO would not be scheduled for work that day.

In contrast, Burgos testified that in 2002, 2003 and 2004, he had conversations with Levy’s supervisors regarding whether WTOs work on Election Day. According to Burgos, he directed the supervisors to relay to Levy that unless there was an operational need to schedule a WTO for an extradition on Election Day, the WTO should not report to work.
Prior to Election Day, November 8, 2005, the Division asked all WTOs whether they wanted to work on that holiday with some responding in the affirmative. Levy stated that two weeks before Election Day he had a conversation with his immediate supervisor Bianco. During their conversation, Levy told Bianco that he wanted to work on Election Day and also informed Bianco about the past practice in which a WTO worked the holiday unless informed by the Division that he or she was not scheduled to work that day. It is undisputed that Bianco never informed Levy that he was not scheduled to work on Election Day.¹

After learning of specific Election Day assignments given to some bargaining unit members, while others had not received any notification about working on Election Day, Levy sent an e-mail on November 5, 2005 to members of the bargaining unit. The electronic message was sent, while Levy was off-duty, from his home computer utilizing a NYSCOBA e-mail account to the personal e-mail addresses of bargaining unit members. The e-mail states in relevant part:

Article 16.1 of our contract requires that a NYSCOPBA-represented employee will be paid ‘one-tenth of his biweekly rate of compensation’ if we are scheduled to work on a holiday. Election Day is defined by Article 16.5 of our contract as a holiday. As you know, Election Day is this Tuesday which is a regularly scheduled work day. Except for those of us who are approved for time-off on Tuesday, we should claim Holiday Pay.

To claim Holiday Pay, complete one section on the overtime sheet using the overtime code that is appropriate for the type of work you performed and include the words ‘Holiday Pay’ in that section. (For your convenience, a copy of the new overtime codes that must be used beginning with this pay period is included below.) The number of hours you should claim is 7.5 hours. If you work any overtime on Tuesday, that time should be claimed by completing an additional

¹ Although Bianco testified at the disciplinary arbitration, the Division did not call her as a witness during the hearing before the ALJ.
At this time it is my understanding that the four of the five Warrant Officers who have specific work assignments for Election Day (this Tuesday) are at the bottom of our seniority list. Three WO's have training assignments and two WO's have out-of-state return assignments. Two PO's have out-of-state return assignments. A few WO's requested to be off Tuesday. The rest of us should report to our offices as we always do on regularly scheduled workdays.

For bargaining unit members without a personal e-mail address, such as Buffalo based WTO Armando Russi, Levy faxed a hard copy of the e-mail. In response to the fax, Russi called Levy. During their conversation, Levy reiterated the substance of his e-mail and his intention to report to work on Election Day.

On Election Day, Levy and Russi went to work in their respective offices in Albany and Buffalo. Both offices were open with other employees, including Bianco, at work. After Levy reported to work, Bianco sent an e-mail to Burgos, DePietro and other supervisors stating, *inter alia*, that Levy was in the office and that she learned informally that Levy had sent a written communication to other bargaining unit members about reporting to work on Election Day. It is undisputed that Levy and Russi were not directed to leave work that day nor was Bianco directed by her supervisors to order Levy to leave the Albany office.

Two days later, Bianco sent a memorandum requiring the WTOs who reported for work on Election Day to submit a detailed accounting of their work activities that day. Exempted from the directive were two WTOs who were scheduled for training on Election Day and five WTOs who advised Bianco that they were unavailable to work on that holiday. Levy and Russi each responded in writing to Bianco delineating their respective work activities on Election Day.
On November 18, 2005, Russi sent a follow-up memorandum to Deputy Director of Operations William Barhold (Barhold) waiving any claim to premium pay for Election Day and stating:

After speaking with my Head Union Steward, Jeff Levy, it was my impression that under union contract rules, I was to report to the office for work that day as I did not request the time off nor was I scheduled for a trip.

Although Levy did not work on November 18, 2005, he submitted a time sheet for the applicable period indicating that he worked on that day. After being confronted with this discrepancy at a disciplinary interrogation on December 7, 2008, Levy informed the Division that the discrepancy was the result of an error when he prepared the time sheet from his own records. According to Levy's testimony, in the past, when the Division found similar discrepancies in a WTO's time sheet, it had permitted the employee to correct the time sheet and use accrued leave without the Division imposing a disciplinary sanction.

In late November, 2005, Levy and another WTO were assigned to an extradition of a parolee apprehended in Tennessee. As part of their assignment, Levy and his co-worker were expected, upon arriving at Albany International Airport, to transfer the parolee to two Division parole officers for transport to Schoharie County jail. At the airport, after leaving two voice messages on Levy's state-owned cell phone, parole officer Mary Kopp (Kopp) telephoned the Division's warrant bureau to advise them that Levy was not reachable. Later, when Levy and the other WTO transferred the parolee to the custody of the parole officers, Levy did not have the required certified warrant and other paperwork. This resulted in Kopp calling the warrant bureau again requesting the preparation of the necessary form. Subsequently, Bianco directed Kopp by telephone to take custody of the parolee and return to the Division office for the necessary
paperwork before transporting the parolee to the county jail. The following day, at the request of DePietro and Bianco, Kopp and the other parole officer prepared a written memorandum describing Levy’s conduct and comments at the airport including Levy questioning the assignment of parole officers to transport a parolee from the airport.

On December 7, 2005, Burgos conducted a disciplinary interrogation of Levy. During the interrogation, Burgos attempted to question Levy with respect to the content of his November 5, 2005 e-mail to bargaining unit members. Following an assertion of privilege by Levy’s NYSCOPBA attorney as to the e-mail’s content, Levy acknowledged sending an e-mail. The record reveals that during the interrogation Levy was questioned about other issues, including his time and attendance. Following the interrogation, Burgos notified Levy that until the Division’s disciplinary investigation was completed, his assignment would be limited to working in the warrant bureau office in Albany.

On December 12 and 21, 2005, Levy was late for work without authorization. In his time sheet for December 12, 2005, he stated that he had arrived at work at 9:30 am instead of his actual later time of arrival.

After completion of the Division’s investigation, Burgos issued a notice of discipline seeking Levy’s termination, along with a notice of suspension without pay, on December 27, 2005. The notice of discipline includes nine specified accusations against Levy:

1) On December 1, 2005 you violated Employee Manual Article 17, item #9 and Article 6, item #5 when you falsified your Time and Accrual Sheet and reported that you worked on November 18, 2005 when, in fact, you did not.

2) On November 18, 2005 you violated Employee Manual Article 6, item #3 when you failed to report for duty as scheduled and failed
to secure the approval of your supervisors for your absence as required.

3) On November 23, 2005 at approximately 4:15 p.m. while at the Albany County Airport you deliberately interfered with the operations of the Warrant and Transfer Unit when you failed to turn over the warrant, the 9011 and the Violation of Release Report to P.O. Kopp and Carey.

4) On November 23, 2005 you failed to turn on your state issued cell phone upon arrival at the Albany County Airport at approximately 4:00 p.m. thereby interfering with P.O. Kopp’s ability to contact you.

5) On November 8, 2005 you reported to the Warrant Unit at Russell Road Albany, NY when you had not been scheduled or required to work in order to declare yourself eligible for Holiday pay. You subsequently submitted a claim for Holiday pay on November 18, 2005 that you were not entitled to make.

6) On November 5, 2005 you interfered with the operation of the Warrant and Transfer Unit when you provided other Warrant and Transfer officers erroneous instructions indicating that November 8, 2005 was a regularly scheduled work day for which a claim for Holiday pay should be made.

7) On December 12, 2005 you violated Employee Manual Article 6, item #3 when you failed to report for duty at 8:30 a.m. as scheduled and failed to secure advance authorization for your absence between the hours of 8:30 a.m. and 10:00 a.m.

8) On December 12, 2005 you violated Employee Manual Article 17, item #9 when you falsified your Time and Accrual sheet and reported your start time on December 12, 2005 at 9:30 a.m.

9) On December 21, 2005 you violated Employee Manual Article 6, item #3 when you failed to report for duty at 8:30 a.m. as scheduled and failed to secure advance authorization for your absence between the hours of 8:30 and 10:00 a.m.

It is undisputed that the Division did not seek to discipline Russi for coming to work on Election Day. During his testimony, Burgos testified that Russi was not disciplined because Russi informed the Division that he went to work on Election Day based on Levy’s contractual advice and because Russi, unlike Levy, voluntarily agreed not to seek premium pay for working on Election Day.
Consistent with a negotiated State of New York-NYSCOPBA expedited disciplinary arbitration procedure, the merits of the notices of discipline and suspension, along with the proposed penalty of termination, were scheduled to be heard by a disciplinary arbitrator. In preparation for the arbitration, NYSCOPBA vice-president of law enforcement Keith Zulko (Zulko) met with Burgos in his office for the purpose of obtaining Levy's personnel file and other documents. During the meeting, Burgos, in a frustrated manner, told Zulko that NYSCOPA and its membership would be better off without Levy as its chief sector steward.

During the course of the arbitration, the arbitrator issued an interim decision finding that the Division lacked probable cause to suspend Levy and ordered his reinstatement, pending the outcome of the arbitration, with two caveats: Levy would work only in the Division's Albany office and he would not be eligible for overtime during the period that he is “grounded.”

On April 12, 2006, the disciplinary arbitrator issued a 12 page opinion and award containing various findings of relevant facts and conclusions. The arbitrator found Levy guilty of the five disciplinary specifications which alleged time and attendance misconduct and the arbitrator imposed a five week suspension without pay. The arbitrator found Levy not guilty of the four remaining specifications in the notice of discipline.

**DISCUSSION**

We commence our discussion with the Division's cross-exception because, if we sustain the Division's cross-exception, NYSCOPBA's exceptions become moot. The Division contends that the ALJ erred in deferring to the disciplinary arbitrator's decision with respect to Levy's intent and the protected nature of his e-mail. It also asserts that
the ALJ erred in concluding that Levy’s e-mail constitutes protected activity under the Act.

A(1). Deferral to the Disciplinary Arbitration Decision and Award.

Our focus in an improper practice charge under §§209-a.1(a) and (c) of the Act, challenging disciplinary actions taken against an employee is determining whether the initiation, pursuit or imposition of the discipline is improperly motivated. In contrast, in most disciplinary cases, the issues to be determined are whether the employee is guilty of the alleged misconduct or incompetence and, if so, what is the appropriate disciplinary penalty. In some disciplinary cases, however, the parties may choose to present to the arbitrator a stipulated issue for arbitral determination as to whether the employer was improperly motivated under the Act, or other laws in pursuing the disciplinary charges.

In State of New York (ben Aaman) the Board held that when a charge alleges that an employer is improperly motivated under the Act in pursuing discipline against an employee, it is appropriate for the ALJ to admit into evidence a related disciplinary arbitration decision and defer to arbitral findings so long as the issues were fully litigated in the arbitration, the arbitration was not tainted by serious procedural irregularities and the decision and award are not repugnant to the purposes and policies of the Taylor

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3 See, Civ Serv Law §75-b.3(a); Matter of Obot, 89 NY2d 883 (1996).

4 11 PERB ¶3084 (1978).
However, in Schuyler-Chemung-Tioga BOCES, the Board held that a conditional deferral dismissal of a charge alleging violations of §§209-a.1(a) and (c) of the Act to await arbitral findings is inappropriate. In its cross-exception, the Division contends that the ALJ inappropriately deferred to the disciplinary arbitrator’s conclusions with respect to Levy’s e-mail when the ALJ concluded that the e-mail is protected under the Act. We disagree.

First, the grant of deference by the ALJ on those issues would have been inappropriate in the present case because they were not included in the stipulated issues presented to the arbitrator and, therefore, were not fully litigated. The stipulated arbitral issues were limited to traditional questions of guilt or innocence, probable cause to suspend and the appropriate penalty, if any. Furthermore, the Division’s sixth disciplinary specification did not call upon the arbitrator to determine whether Levy deliberately intended to provide members of the bargaining unit with false information or to maliciously injure the employer, standards applicable under the Act. The specification alleged only that the information provided by Levy was “erroneous” and that his off-duty communication itself allegedly interfered with operations.

Upon our review of the record and the ALJ’s decision, we conclude that the ALJ did not grant deference to the arbitrator’s decision on Levy’s motivation in sending the e-mail or whether such conduct is protected under the Act, although the ALJ did properly grant deference to the arbitrator’s findings of fact relevant to determining

5 In significant contrast, §205.5(d) of the Act explicitly prohibits such issue preclusion to findings of fact or law made by a disciplinary hearing officer appointed pursuant Civ Serv Law §75.

6 34 PERB ¶3019 (2001).

7 NYCTA (Bordansky), 4 PERB ¶3031 (1971).
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whether Levy was guilty of the disciplinary allegations. The administrative record establishes that the ALJ permitted both parties to present proof related to Levy's motivation in sending the e-mail. In concluding that the e-mail is protected, the ALJ relied upon the record before him to find that the Division did not meet its burden of persuasion by demonstrating that the e-mail is outside the scope of protected activities under the Act. When setting forth his rationale, the ALJ did not cite to the arbitrator's findings of fact or law with respect to Levy's e-mail.

Therefore, we deny the Division's cross-exception asserting that the ALJ improperly deferred to the arbitrator's decision and award.

A(2). Levy's E-mail is Protected Activity under the Act

We next consider the Division's argument that Levy's e-mail constitutes unprotected activity under the Act and, therefore, that the ALJ erred in finding a violation of §§209-a.1(a) and (c) of the Act. The Division asserts the e-mail is unprotected because the content encouraged bargaining unit members to report to work on Election Day as a protest for extradition assignments to less senior bargaining unit members for Election Day.

As we reiterated in *United Federation of Teachers (Jenkins)*,\(^8\) a charging party in an improper practice charge, alleging unlawfully motivated employer conduct in violation of §209-a.1(a) and (c) of the Act, has the burden of proving by a preponderance of evidence that: a) the charging party engaged in protected activity under the Act; b) such activity was known to the person or persons taking the employment action; and c) the

\(^8\) 41 PERB ¶3007 (2008).
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employment action would not have been taken "but for" the protected activity.\(^9\)

Therefore, as an initial matter, we must determine whether Levy's e-mail constitutes protected activity under the Act.

Mere inaccurate statements by an employee are protected under the Act, regardless of whether an employer or its representatives are disturbed by the inaccuracies unless the employer establishes that the employee's comments were deliberately intended to falsify or were maliciously aimed at injuring the employer.\(^{10}\)

Employee grievances and contract claims are also protected under the Act unless an employer demonstrates that they are undeniably frivolous.\(^{11}\) Finally, an otherwise protected activity may be found to be unprotected under the Act when, under the totality of the circumstances, the conduct is found to be impulsive, overzealous, confrontational or disruptive.\(^{12}\)

In the present case, we reject the Division's argument that Levy's e-mail is deliberately false or maliciously aimed at causing harm to the Division by encouraging an improper bargaining unit protest. The Division's argument is inconsistent, if not contradicted, by its sixth disciplinary specification. The notice of discipline issued to

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\(^{10}\) *Plainedge Public Schools*, 13 PERB ¶3037(1980); *Binghamton City Sch Dist*, 22 PERB ¶3034 (1989); *Walls Mfg Co v NLRB*, 321 F2d 753 (DC Cir 1963), cert denied, 375 US 923 (1963).

\(^{11}\) *NYCTA*, 37 PERB ¶3013 (2004).

Levy alleged only that Levy’s communication contained erroneous information and the off-duty distribution of the information interfered with Division operations. The notice did not allege that Levy’s purpose was to encourage an improper and unprotected protest over assignments to less senior employees.

In addition, upon our review of the record, we agree with the ALJ that the evidence establishes that the e-mail constitutes protected activity under the Act. While the Division presented evidence as to its own interpretation of the applicable contract language, it has not demonstrated that Levy’s e-mail discussion of the contract is intentionally false, maliciously aimed at injuring the Division or that it is undeniably frivolous. We conclude that, at best, the record is ambiguous with respect to whether a WTO is to work on Election Day and is, thereby, entitled to premium pay under the agreement.

Moreover, there is insufficient evidence for us to conclude that Levy or NYSCOBPA previously agreed with the Division’s contract interpretation and that Levy sent the e-mail for an illegitimate purpose. Burgos testified to receiving annual requests for clarification from Levy’s supervisors as to whether a WTO had a contract right to work on Election Day. In response to these inquiries, Burgos asked the supervisors to relay to Levy and other WTOs the Division’s view that Election Day is a fixed holiday and only WTOs assigned to extraditions should report to work. The evidence does not establish what information, if any, was relayed to Levy or that Levy fully or partially concurred with the Division’s view. Indeed, Levy’s annual inquiries support the conclusion that he did not agree with the Division. Moreover, the failure of supervisor Bianco to send Levy or Russi home on Election Day, along with the request that all WTOs prepare a memorandum describing the work he or she performed on Election Day, supports the conclusion that the on-going contract issue is unresolved.
We also conclude that the context and content of Levy's e-mail establishes that it does not constitute impulsive, overzealous, confrontational or disruptive behavior which would render it unprotected under the Act. The off-duty e-mail merely encourages bargaining unit members to engage in a concerted activity by asserting an alleged contract right to report to work on Election Day and seek premium pay. Such advice and advocacy by Levy, on its face, cannot be reasonably construed as being intended to cause a disruption, confrontation, or to instigate an unprotected protest by the bargaining unit over less senior employees receiving an assignment. Finally, the Division failed to present any evidence establishing that the content of the off-duty e-mail interfered, in any manner, with Division operations as alleged in the sixth disciplinary specification.\(^{13}\)

It is undisputed that Burgos, the Division representative who conducted the disciplinary investigation and issued the notice of discipline, was aware of Levy's e-mail, attempted to interrogate Levy over the content of the e-mail and took adverse action against Levy by charging him, in the sixth specification, with misconduct for the e-mail.

Based upon the foregoing, we deny the Division's cross-exception and affirm the ALJ's conclusion that the Division violated §§209-a.1(a) and (c) by initiating and pursuing disciplinary charges against Levy for his e-mail.

A. NYSCOPBA's Exceptions

We now examine NYSCOPBA's exceptions claiming that it met its burden of proving that "but for" the e-mail, the Division would not have issued and pursued the eight other disciplinary specifications against Levy.

\(^{13}\)We would reach a different result, in the present case, if Levy's contract interpretation led him and other WTOs to refuse to report to work on the holiday despite a prior Division notice stating that the holiday would be a regular work day. See, *Farmingdale Union Free Sch Dist*, 11 PERB ¶3055 (1978); *Island Trees Public Schools*, 14 PERB ¶3020 (1981).
If a charging party does not present direct evidence of improper employer motivation, it must present sufficient circumstantial evidence to create an inference that the employer was improperly motivated. If such an inference is established, the burden of persuasion shifts to the respondent to rebut the inference by presenting evidence establishing that its actions were motivated by a legitimate non-discriminatory business reason. If the respondent establishes a legitimate non-discriminatory reason, then the burden shifts back to the charging party to establish that the articulated non-discriminatory reason is pretextual. At all times, the charging party has the burden of proof to establish the requisite causation by a preponderance of evidence.\(^\text{14}\)

Upon our review of the record, we grant NYSCOPBA's exceptions, in part, and reverse the ALJ's decision to the extent that it dismissed the charge's allegation that the Division's fifth specification is improperly motivated. In the fifth specification, the Division sought to discipline Levy for reporting to work on Election Day and seeking premium pay for working that day.

NYSCOBBA presented sufficient circumstantial evidence to create an inference that the fifth specification is improperly motivated and the Division failed to establish a non-discriminatory reason for issuing and pursuing that specification. The fifth specification alleges that Levy engaged in the exact conduct he recommended to the bargaining unit in his e-mail. Therefore, it is directly intertwined with the sixth specification that we have concluded is improperly motivated. In addition, the fifth specification attempts to discipline Levy for seeking to establish a necessary precondition for pursuing a contract remedy based on his understanding of the parties' agreement. Notably, the Division did not allege in the disciplinary specification that

\(^\text{14}\) Supra, notes 8 and 9.
Levy disrupted Division operations by reporting to work and it did not prove at the hearing that Levy's actions on Election Day were disruptive or confrontational.

In addition, NYSCOPBA presented evidence of the Division's disparate treatment of Russi and Levy along with evidence of Burgos' animus toward Levy as a NYSCOPBA representative. Like Levy, Russi reported to work on Election Day and provided a memorandum to Bianco outlining his activities on that holiday. Nevertheless, Russi was not disciplined. The explanation given by Burgos for the disparate treatment only reinforces the evidence of the Division's improper motivation. According to Burgos, Russi was not disciplined because he relied on Levy's advice and Russi, unlike Levy, agreed to waive a claim for premium pay. Based upon the protected nature of Levy's communication to the bargaining unit and the facts and circumstances of the present case, we do not find Burgos' explanation to constitute a legitimate non-discriminatory explanation for the Division's disparate treatment. Furthermore, during his testimony Burgos did not rebut or explain his undisputed comment to NYSCOPBA representative Zulko that the bargaining unit members would be better off without Levy as chief sector steward. 15

With respect to the five disciplinary specifications issued to Levy alleging time and attendance abuse, we conclude that NYSCOPBA did not meet its burden of proof of establishing improper motivation. Although NYSCOPBA established an inference of improper motivation with respect to those specifications, it failed to rebut the non-discriminatory explanation provided by the Division.

15 While we agree with the ALJ that Burgos' comment to NYSCOPBA representative Zulko constitutes only circumstantial evidence of animus, we disagree with the ALJ's conclusion as to the probative value of the comment. We draw a negative inference against the Division based upon Burgos' failure, during his testimony, to refute or explain his comment to Zulko. Cf, Village of New Paltz, 25 PERB ¶3032 (1992).
The record establishes that, in the past, the Division was lax in strictly enforcing the WTO time and attendance rules. In addition, the lack of prior discipline against Levy, along with the timing of the notice of discipline, is suggestive of an improper Division motive for the time and attendance specifications. However, the Division met its burden of persuasion by presenting sufficient evidence establishing a legitimate non-discriminatory explanation for the specifications: the August 2005 memorandum to all WTOs reiterating prior time and attendance directives along with prior persistent supervisory concerns over Levy's time and attendance. NYSCOPBA failed to demonstrate that those non-discriminatory reasons are pretextual.

We reach a similar conclusion with respect to the two disciplinary specifications about Levy's conduct at the airport in November 2005. Although the timing of the specifications are suggestive of an improper motivation, the evidence establishes that the Division pursued the specifications as the direct result of the verbal and written reports from two parole officers about Levy's behavior and comments and the fact that Levy's conduct resulted in an unnecessary delay in the transport of a parolee to a county jail.

Finally, consistent with our findings as to the merits of the charge, we deny NYSCOPBA's claim that the ALJ erred in not ordering the Division to withdraw the notice of discipline and vacate the penalty imposed by the disciplinary arbitrator. An order requiring the withdrawal of the fifth and sixth specification is unnecessary in light of the disciplinary arbitrator's earlier dismissal of those specifications. Similarly, an order requiring the vacatur of the five week disciplinary penalty, imposed by the arbitrator, is inappropriate in light of our conclusion that the Division was not improperly motivated in pursuing the time and attendance specifications. However, we have
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modified the proposed order consistent with our decision that the sixth as well as the
fifth specifications in the notice of discipline are improperly motivated.\textsuperscript{16}

Based upon the foregoing, we grant the NYSCOPBA's exceptions, in part, deny
the Division's cross-exception and modify the remedial order.

IT IS, THEREFORE, ORDERED that the Division of Parole shall:

1. cease and desist from disciplining or seeking to discipline NYSCOPBA
   chief sector steward Jeffrey H. Levy for communicating with bargaining
   unit members concerning his interpretation of the parties' collective
   bargaining agreement;

2. cease and desist from disciplining or seeking to discipline NYSCOPBA
   chief sector steward Jeffrey H. Levy for working on Election Day, 2005
   and seeking premium pay for working on that day;

3. sign and post the attached notice at all locations customarily used to
   post notices to employees of the Division of Parole in the NYSCOPBA
   represented bargaining unit.

DATED: November 26, 2008
Albany, New York

\textbf{Jerome Lefkowitz, Chairman}

\textbf{Robert S. Hite, Member}

\textsuperscript{16} Our decision and order, however, should not be construed as finding that Levy is
entitled, under the parties' agreement, to premium pay for working on Election Day.
NOTICE TO ALL EMPLOYEES

PURSUANT TO
THE DECISION AND ORDER OF THE

NEW YORK STATE
PUBLIC EMPLOYMENT RELATIONS BOARD

and in order to effectuate the policies of the

NEW YORK STATE
PUBLIC EMPLOYEES' FAIR EMPLOYMENT ACT

we hereby notify all employees of the State of New York (Division of Parole) represented by the New York State Correctional Officers and Police Benevolent Association, Inc. (NYSCOPBA) that the State of New York (Division of Parole) will:

1. Refrain from disciplining or seeking to discipline NYSCOPBA chief sector steward Jeffrey H. Levy for communicating with bargaining unit members concerning his interpretation of the parties' collective bargaining agreement; and

2. Refrain from disciplining or seeking to discipline NYSCOPBA chief sector steward Jeffrey H. Levy for working on Election Day, 2005 and seeking premium pay for working on that day.

Dated . . . . . . . By . . . . . . . . . . . . . . . . . . . . . . . . . . . . .
(Representative) (Title)

State of New York (Division of Parole)

This Notice must remain posted for 30 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.
On July 14, 2008, Thomas DiNardo, Jr. (petitioner) filed a timely petition for decertification of District Council 37, Local 983, American Federation of State, County, and Local Municipal Employees, AFL-CIO, (intervenor), the current negotiating representative for employees in the following unit:

Included: High pressure plant tenders and plant maintainer tenders.

Excluded: All other employees.
Upon consent of the parties, a mail ballot election was held on October 23, 2008. The results of this election show that the majority of eligible employees in the unit who cast valid ballots no longer desire to be represented for purposes of collective negotiations by the intervenor.¹

THEREFORE, IT IS ORDERED that the intervenor be, and it hereby is, decertified as the negotiating agent for the unit.

DATED: November 26, 2008,
Albany, New York

Jerome Lefkowitz, Chairman

Robert S. Hite, Member

¹ Of the 25 ballots cast, 3 were for representation and 22 against representation. There were no challenged ballots.
In the Matter of

UNITED PUBLIC SERVICE EMPLOYEES UNION,

Petitioner,

-and-

TOWN OF COLONIE,

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 of the Board, and it appearing that a negotiating representative has been selected,

Pursuant to the authority vested in the Board by the Public Employees' Fair Employment Act,

IT IS HEREBY CERTIFIED that the United Public Service Employees Union 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: See attached list of included titles.

Excluded: All other employees including the specific titles on the attached list of excluded employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the United Public Service Employees Union. 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: November 26, 2008
Albany, New York

Jerome Lefkowitz, Chairman

Robert S. Hite, Member
Included:

Administrative Aide (Except HR & Comptroller)
Application Analyst
Application Network Specialist
Assessment Clerk
Assistant Chief Water Treatment Plant Operator
Assistant Golf Course Manager
Assistant Golf Course Superintendent
Assistant Library Director
Assistant Recreation Maintenance Supervisor
Building Inspector
Building Maintenance Technician
Buyer
Chief Commercial Building Inspector
Chief Residential Building Inspector
Chief Sewer Treatment Plant Operator
Chief Water Treatment Plant Operator
Child Care Supervisor
Civil Engineer Technician
Clerical Aide
Clerk to Town Justice
Code Enforcement Officer
Computer Network Specialist
EMS Assistant Chief
EMS Billing Clerk
EMS Captain
Environmental Engineer
Environmental Services Landfill Operations Manager
Evidence Clerk
Facilities Operation Manager
Fire Inspector
Fire Protection Specialist
GIS Specialist Coordinator
Golf Course Equipment Operator
HVAC Technician
Information Support
Instrumentation Technician
Legal Secretary (Except Town Attorney)
Library Aide
Library Assistant
Library Clerk
Library Page
Librarian I
Librarian II
Municipal Training Center Operator
Network Administrator
Paralegal (Except Town Attorney)
Paralegal Assistant (Except Town Attorney)
Payroll Assistant (Except Comptroller)
Personnel Assistant (Except HR)
Personnel Clerk (Except HR)
Personnel Clerk/Recreation Planner
Planning Aide
Police Comm Assistant
Principal Account Clerk
Principal Assessment Clerk
Principal Clerk
Principal Fleet Maint Clerk
Principal Library Clerk
Principal Police Record Clerk
Principal Water Account Billing Clerk
Public Works Operating Technician
Purchasing Clerk
Receptionist
Records Management Coordinator
Real Property Appraiser
Sanitary Engineer
Sewer Inspector
Sewer Maintenance Supervisor
Sr Account Clerk Typist (Except Comptroller)
Sr Buyer
Sr Civil Engineer
Sr Civil Engineering Technician
Sr Clerk to Town Justice
Sr Environmental Engineering Technician
Sr Planner
Sr Public Works Operating Technician
Sr Real Property Appraiser
Sr Resources Case Worker
Sr Resources Specialist
Sr Typist
Sr Youth Services Specialist
Sewer Treatment Plant Maintenance Supervisor
Sewer Treatment Plant Operations Supervisor
Storm Water Management Inspector
Typist (Except Town Attorney)
Victim Service Specialist
Water Account Billing Clerk
Water Chemist
Water Construction Inspector
Water Engineer
Water Meter Serviceman Spvr
Water Maintenance Supervisor
Weigh Station Attendant
Utility Locator
Youth Employment Advocate
Excluded:

COMPTROLLER OFFICE
Accounting Assistant
Administrative Aide
Accounting Supervisor
Payroll Assistant
Principal Accounting Assistant
Senior Account Clerk Typist

HUMAN RESOURCES
Human Resources Personnel Clerk
Personnel Clerk
Personnel Assistant
Benefits Coordinator

TOWN ATTORNEY
Legal Secretary
Paralegal
Paralegal Assistant
Typist
STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

UNITED STEEL, PAPER AND FORESTRY,
RUBBER, MANUFACTURING, ENERGY,
ALLIED INDUSTRIAL AND SERVICE
WORKERS INTERNATIONAL UNION, AFL-CIO,
CLC,

Petitioner,

-and-

CASE NO. C-5799

DUNKIRK HOUSING AUTHORITY,

Employer.

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

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

Pursuant to the authority vested in the Board by the Public Employees' Fair
Employment Act,

IT IS HEREBY CERTIFIED that the United Steel, Paper and Forestry, Rubber,
Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-
CIO, CLC 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 Office and Maintenance Employees in the following titles:
Occupancy Specialist, Account-Clerk Typist, Tenant Service
Specialist-Spanish Speaking, Clerk II-Spanish Speaking, Senior
Maintenance Mechanic, Maintenance Mechanic, Maintenance
Worker, Utility Worker.

Excluded: All Managerial and Confidential Employees including the Executive
Director.

FURTHER, IT IS ORDERED that the above named public employer shall
negotiate collectively with the United Steel, Paper and Forestry, Rubber, Manufacturing,
Energy, Allied Industrial and Service Workers International Union, AFL-CIO, CLC. 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: November 26, 2008
Albany, New York

Jerome Lefkowitz, Chairman

Robert S. Hite, Member