6-9-2009

State of New York Public Employment Relations Board Decisions from June 9, 2009

New York State Public Employment Relations Board

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State of New York Public Employment Relations Board Decisions from June 9, 2009

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STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

COUNCIL 82, NEW YORK STATE LAW
ENFORCEMENT OFFICERS UNION, AFSCME,
AFL-CIO,

Petitioner,

-and-

TOWN OF CAIRO,

Employer,

-and-

UNITED PUBLIC SERVICE EMPLOYEES UNION,

Intervenor/Incumbent.¹

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 Council 82, New York State Law
Enforcement Officers Union, AFSCME, AFL-CIO has been designated and selected by

¹ During the processing of this petition, United Public Service Employees Union
disclaimed any and all interest in representing the unit.
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 police officers employed by the Town of Cairo except the Chief of Police.

Excluded: All other titles.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Council 82, New York State Law Enforcement Officers Union, AFSCME, AFL-CIO. The duty to negotiate collectively includes the mutual obligation to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party. Such obligation does not compel either party to agree to a proposal or require the making of a concession.

DATED: June 9, 2009
Albany, New York

Jerome Lefkowitz, Chairman

Robert S. Hite, Member

Sheila S. Cole, Member
STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

METROPOLITAN TRANSPORTATION AUTHORITY
POLICE DEPARTMENT COMMANDING OFFICERS
ASSOCIATION,

Petitioner,

-and-

CASE NO. C-5825

METROPOLITAN TRANSPORTATION 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 Metropolitan Transportation Authority Police Department Commanding Officers Association has been designated and selected by a majority of the employees of the above-named public employer, in the unit found to be appropriate and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.
Included: Captain, Captain Commander, Deputy Inspector, Inspector and Assistant Deputy Chief.

Excluded: All other employees.

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

DATED: June 9, 2009
Albany, New York

Jerome Lefkowitz, Chairman

Robert S. Hite, Member

Sheila S. Cole, Member
STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN
AND HELPERS OF AMERICA LOCAL NO. 529,

Petitioner,

-and-

TOWN OF URBANA,

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 International Brotherhood of Teamsters,
Chauffeurs, Warehousemen and Helpers of America Local No. 529 has been
designated and selected by a majority of the employees of the above-named public
employer, in the unit agreed upon by the parties and described below, as their exclusive
representative for the purpose of collective negotiations and the settlement of
grievances.

Included: All full-time, part-time and seasonal employees employed in the Town's Highway Department, including the Deputy Highway Superintendent, all Heavy Motor Equipment Operators, Motor Equipment Operator/Mechanics, Town Maintenance Workers, Laborers and all other employees performing such work in the Town's Highway Department.

Excluded: All elected officials, managerial employees, confidential employees, casual employees, and all other employee of the Town.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America Local No. 529. 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: June 9, 2009
Albany, New York

Jerome Lefkowitz, Chairman

Robert S. Hite, Member

Sheila S. Cole, Member
STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

ADIRONDACK COMMUNITY COLLEGE
FACULTY ASSOCIATION,

Petitioner,

-and-

CASE NO. C-5866

ADIRONDACK COMMUNITY COLLEGE,

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 Adirondack Community College Faculty Association has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.
Included: All full-time employees of the College in the academic rank of Instructor, Assistant Professor, Associate Professor, Professor, Distinguished Professor, Technical Instructor, Assistant Instructor, part-time employees entitled Special Adjunct, full-time non-credit faculty, and adjuncts that are scheduled to teach at least one three-credit course in a semester.

Excluded: Adjuncts that are scheduled to teach less than one three-credit course in a semester, part-time Librarians, Clinical Instructors, Non-Faculty Coaches, Technicians, Tutors, Lab Assistants, Lab Supervisors, Lab Coordinators, Radio Manager, Private Music Instructors, confidential employees, managerial employees and all other employees.

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

DATED: June 9, 2009
Albany, New York

Jerome Lefkowitz, Chairman
Robert S. Hite, Member
Sheila S. Cole, Member
This case comes to the Board on exceptions filed by Roland Blowe (Blowe) and Lynox Watson (Watson) to a decision by an Administrative Law Judge (ALJ) dismissing an improper practice charge filed on June 30, 2008, as amended, alleging that District Council 37, American Federation of State, County and Municipal Employees, AFL-CIO, Local 1597 (DC 37), violated §209-a.2(c) of the Public Employees' Fair Employment Act
Following a hearing, the ALJ issued a decision dismissing the charge, concluding that the charging parties had failed to prove that DC 37 had breached its duty of fair representation, in violation of §209-a.2(c) of the Act, by engaging in arbitrary, discriminatory or bad faith conduct when it refused to process their grievance to arbitration following a merits review of the grievance by a DC 37 attorney.

EXCEPTIONS

In their exceptions, Blowe and Watson contend that the ALJ erred in crediting the testimony of the DC 37 attorney with respect to her conclusions stemming from her investigation into the merits of their grievance. In addition, they except to the ALJ’s conclusion that their contractual interpretation of the agreement is not the only possible correct construction. Both DC 37 and CUNY support the decision of the ALJ.

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

FACTS

The relevant facts are set forth in the ALJ’s decision and are repeated here only as they relate to the exceptions filed.

Blowe and Watson were hired by CUNY in February 2006 to work at Medgar Evers College as part-time hourly custodial assistants and were terminated from their positions in August 2007. DC 37 assisted Blowe and Watson in filing a grievance and it processed the grievance at Step I and II of the grievance procedure in the 2002-2006 collectively negotiated agreement (agreement), known as the Blue Collar Contract. The grievance

142 PERB ¶4507 (2009).
asserted that the terminations violated the negotiated disciplinary procedures of the agreement, CUNY's bylaws and a provision of the Education Law. At both steps, CUNY denied the grievance, concluding that Blowe and Watson, as hourly part-time custodial assistants, do not have disciplinary procedural rights under the agreement or the other sources of right cited on their behalf.

Following CUNY's denial of the grievance, DC 37 assigned Senior Assistant General Counsel Robin Roach (Roach) to render a merits-based recommendation with respect to whether the grievance should be processed to arbitration. It is undisputed that, as part of her review, Roach examined both the agreement and Appendix B to the agreement with respect to custodial assistants and she consulted with Senior Assistant Director of Research and Negotiations David Paskin (Paskin), DC 37's negotiator with CUNY. She learned that the custodial assistant position was a successor title to another title from a different unit that did not have disciplinary procedural protections. She also learned that the negotiated due process rights granted to custodial assistants in Appendix B of the agreement were intended, by both CUNY and DC 37, to be limited to full-time employees in that title. Finally, she examined the definition of a grievance under the agreement to determine whether an alleged violation of the Education Law is grievable.

Based upon the information gathered during her review, Roach prepared a memorandum recommending that the grievance not proceed to arbitration. In the memorandum, Roach concluded that based upon the relevant negotiation history, it was highly unlikely that DC 37 would be able to establish that the parties to the agreement

2 Educ Law §6210.

3 Step III is the final step of the grievance procedure under the agreement and provides, in relevant part, that only DC 37 can file for arbitration from an unsatisfactory Step II grievance decision. Respondent Exhibit 2, Article XXVI, §3.
intended hourly part-time custodial assistants to be entitled to the negotiated disciplinary procedures. In addition, she concluded that an alleged violation of the Education Law was not grievable. Based upon Roach's recommendation, DC 37 did not process the grievance to arbitration.

DISCUSSION

In order to establish a violation of the duty of fair representation under the Act, Blowe and Watson have the burden of proving that DC 37's decision not to proceed to arbitration is arbitrary, discriminatory or founded in bad faith.4

It is well settled under the Act that an employee organization is entitled to a wide range of reasonable discretion in the processing of grievances under the Act.5 In the present case, DC 37 prepared and processed the grievance at Step I and II of the negotiated grievance procedure. It made its determination not to proceed to arbitration at Step III only after one of its attorneys, Roach, reviewed the applicable provisions of the agreement and Appendix B, and also examined the relevant negotiations history. Following her review and research, Roach recommended, based upon the merits of the grievance, that it should not proceed to arbitration.

With respect to the exceptions by Blowe and Watson, we find no basis in the record for disturbing the ALJ's crediting of Roach's unrebutted testimony. In addition, the record does not include any evidence demonstrating that DC 37 acted in bad faith or that


5 District Council 37, AFSCME (Gonzalez), 28 PERB ¶3062 (1995); PEF (Frisch), 29 PERB ¶3019 (1996); Rochester Teachers Assn (Danna), 41 PERB ¶3003 (2008); District Council 37, AFSCME (Matlev), 41 PERB ¶3022 (2008).
the contract interpretation presented by Blowe and Watson constitutes the “only possible” one.\(^6\)

Based upon the foregoing, we deny Blowe’s and Watson’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.\(^7\)

DATED: June 9, 2009
Albany, New York

Jerome Lefkowitz, Chairman
Sheila S. Cole, Member

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\(^6\) Hauppauge Schools Office Staff Assn, 18 PERB ¶3029 (1985).

\(^7\) Board Member Hite took no part.
STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

DR. SIMPSON GRAY, Charging Party,

- and -

UNITED FEDERATION OF TEACHERS, LOCAL 2, AMERICAN FEDERATION OF TEACHERS, AFL-CIO,

Respondent,

- and -

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

Employer.

DR. SIMPSON GRAY, pro se

JAMES R. SANDNER, GENERAL COUNSEL (WENDY M. STAR of counsel), for Respondent United Federation of Teachers

ROBERT E. WATERS, ESQ. (KELLIE TERESE WALKER of counsel), for Employer Board of Education of the City School District of the City of New York

BOARD DECISION AND ORDER

This case comes to the Board on exceptions filed by Dr. Simpson Gray (Gray) to a decision by an Administrative Law Judge (ALJ) dismissing an improper practice charge filed by Gray on April 11, 2008, as amended, alleging that the United Federation of Teachers, Local 2, American Federation of Teachers, AFL-CIO (UFT) violated §209-a.2(c) of the Public Employees' Fair Employment Act (Act).
Following a hearing, the ALJ issued a decision dismissing the charge based upon Gray's failure to prosecute the charge by not presenting any evidence at the hearing following his opening statement.

EXCEPTIONS

In his exceptions, Gray contends that the ALJ erred in dismissing his charge on the grounds that §212.4(b) of PERB's Rules of Procedure (Rules) is unconstitutional, overbroad, vague and invalid. In addition, he asserts that the Board exceeded its authority in promulgating §212.4(b) of the Rules and that the ALJ misapplied the Rule in dismissing the charge. Both the UFT and the Board of Education of the City School District of the City of New York (District) support the ALJ's decision.

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

PROCEDURAL BACKGROUND

Gray's charge alleges that the UFT violated §209-a.2(c) of the Act because only two of the fifteen grievances he filed since 2006 have been heard, and decisions have not been issued with respect to those two grievances. After the Director of Public Employment Practices and Representation (Director) informed him that his charge was deficient, Gray filed an amended pleading, which set forth specific allegations against the UFT, sought to add the District as a named respondent, and alleged that the District violated §§202 and 209-a.1(a), (c) and (d) of the Act.

In May 2008, a pre-hearing conference was scheduled before an ALJ with the notice informing Gray that the allegations against the District in his amended pleading would not be processed. Both the UFT and the District filed answers to Gray's
amended charge. Prior to the scheduled conference, Gray filed a second amended pleading, which an ALJ ruled was deficient and, therefore, would not be processed.

In June 2008, a notice was sent to the parties scheduling an evidentiary hearing on Gray's amended charge for October 7, 2008. In July 2008, Gray filed a motion with the Board, pursuant to §212.4(h) of the Rules, seeking leave to file exceptions challenging the pre-hearing ruling that his second amended pleading was deficient. On September 24, 2008, the Board issued a decision denying Gray's motion for leave.¹

One day prior to the scheduled October 7, 2008 hearing, Gray requested an adjournment, which the ALJ granted, and the hearing was rescheduled for November 25, 2008 with the ALJ advising the parties that no further adjournments would be granted.

On October 17, 2008, Gray commenced an Article 78 proceeding seeking judicial review of the Board's decision denying him leave to file exceptions and seeking to enjoin the November 25, 2008 hearing before the ALJ. Following oral argument, Supreme Court Justice Alice Schlesinger issued an order and judgment denying Gray's request for injunctive relief and granting PERB's cross-motion to dismiss the Article 78 proceeding.²

On October 28, 2008, Gray filed a request with the ALJ seeking issuance of subpoenas for seven witnesses to testify on his behalf at the November 25, 2008 hearing. In support of his application, Gray stated only that the testimony of the

¹ UFT (Gray), 41 PERB ¶3025 (2008).
² Gray v New York Pub Empl Rel Bd, 41 PERB ¶7006 (2008). Gray has served a notice of appeal from the order and judgment. At the same time, Gray has pursued other litigation against the District. See, Gray v City of New York, 19 Misc3d 1117(A) (Sup Ct NY County 2008), affd, 58 AD3d 448 (1st Dept 2009), lv den, 12 NY3d 802 (2009).
Case No. U-28282

witnesses is necessary and that the witnesses would not appear voluntarily. On November 6, 2008, the ALJ issued a written ruling denying Gray’s request for subpoenas, which was mailed and faxed to the parties. The ruling stated that Gray’s request was denied because he had failed to set forth facts establishing the relevancy of the testimony to be adduced consistent with §211.3(b)(2) of the Rules. In her ruling, however, the ALJ explained that Gray would have the opportunity to cross-examine witnesses called by a respondent. The day after the ALJ’s ruling, Gray served and filed a motion by regular mail and fax requesting that the ALJ disqualify herself based upon her ruling denying his subpoena requests. Both the UFT and the District opposed Gray’s motion and the ALJ notified the parties that she would address Gray’s disqualification motion at the scheduled hearing.

At the commencement of the November 25, 2008 hearing, the ALJ denied Gray’s disqualification motion on the record and requested that Gray proceed with an opening statement. During his opening statement, rather than state what he intended to prove, Gray renewed his disqualification motion, requested another adjournment of the hearing, renewed his request for subpoenas and declined the opportunity to testify on his own behalf. After Gray rested without presenting any evidence, the UFT and the District moved to dismiss the charge.

DISCUSSION

Gray’s exceptions challenge the legality of §212.4(b) of the Rules, which states:

The hearing will not be adjourned unless good and sufficient grounds are established by the requesting party, who shall file with the administrative law judge an original and three copies of the application, on notice to all other parties, setting forth the factual
circumstances of the application and the previously ascertained position of the other parties to the application. The failure of a party to appear at the hearing may, in the discretion of the administrative law judge, constitute ground for dismissal of the absent party’s pleading.

In addition, he asserts that the ALJ misapplied the Rule in dismissing the charge.\(^3\)

It is well-settled that the failure of a charging party to prosecute a charge constitutes grounds for dismissal.\(^4\) In the present case, the ALJ’s dismissal of the charge for failure to prosecute was based on Gray’s calculated decision at the hearing to rest, following his opening statement, without presenting any evidence in support of the charge. The dismissal was not premised on Gray’s failure to attend the hearing, pursuant to §212.4(b) of the Rules, but his failure to prove his case. Therefore, Gray’s assertion that the ALJ misapplied §212.4(b) lacks any merit. Furthermore, Gray lacks standing to challenge the constitutionality of the Rule because his charge was dismissed based upon a failure of proof; the dismissal was not due to an absence at

\(^3\) Gray has not filed exceptions challenging any of the ALJ’s procedural rulings including the rejection of his second amended pleading, the denial of his request for issuance of subpoenas, the denial of his request for a second adjournment and the denial of his motion for disqualification. Therefore, they are waived. PERB’s Rules, §213.2(b)(4); Town of Orangetown, 40 PERB ¶3008 (2007), confirmed sub nom. Town of Orangetown v New York State Pub Empl Rel Bd, 40 PERB ¶7008 (Sup Ct Albany Co 2007); County of Sullivan and Sullivan County Sheriff, 41 PERB ¶3006 (2008); Town of Wallkill, 42 PERB ¶3006 (2009). Based upon our review of the record, however, we would affirm each of the ALJ’s procedural rulings because they are fully consistent with our Rules and applicable Board precedent.

\(^4\) Board of Educ of the City Sch Dist of the City of New York, 16 PERB ¶3067 (1983); Smithtown Fire Dist, 28 PERB ¶3060 (1995); IBT, Local 237 (Jouldach), 34 PERB ¶3010 (2001).
Case No. U-28282

Alternatively, Gray's contention that §212.4(b) of the Rules violates due process is equally without any merit. The Rule provides parties with notice and an opportunity to be heard, the two essential elements of due process, with respect to a request for an adjournment. The fact that an ALJ is granted discretion with respect to a requested adjournment does not violate due process nor does it render the applicable Rule overbroad, vague and invalid. Similarly, the principles of due process do not prohibit a procedural rule that grants discretion to an ALJ to dismiss a charge when a charging party, after receiving notice and an opportunity to be heard, fails to appear at a hearing or chooses not to present evidence at the hearing. Furthermore, if an ALJ abuses her or his discretion, it can be reviewed through exceptions to the Board.

Finally, we reject Gray's argument that PERB exceeded its authority in promulgating §212.4(b) of the Rules. Pursuant to §§205.5(d) and (l) of the Act, the Board is fully authorized to promulgate rules and regulations establishing the procedures with respect to improper public employer and employee organization practices.

6 See generally, Board of Regents v Roth, 408 US 564 (1972).
7 See, Mera v Tax Appeals Tribunal of State of NY, 204 AD2d 818 (3d Dept 1994); Frederick G. v New York State Cent Register of Child Abuse and Maltreatment, 53 AD3d 1075 (4th Dept 2008).
8 See, Port Jervis Teachers Assn (McAndrew), 22 PERB ¶3021 (1989), confirmed sub nom. McAndrew v Newman, 22 PERB ¶7021 (Sup Ct Orange County 1989).
Based upon the foregoing, we deny Gray'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.

DATED: June 9, 2009
Albany, New York

Jerome Lefkowitz, Chairman
Robert S. Hite, Member
Sheila S. Cole, Member
This case comes to the Board on exceptions filed by Dr. Andrea Staskowski (Staskowski) to a decision of an Administrative Law Judge (ALJ) dismissing an improper practice charge, as amended and clarified, alleging that the Nassau Community College Federation of Teachers, Local 3150, New York State United Teachers, AFL-CIO (Federation) violated §§209-a.2(a) and (c) of the Public Employees’ Fair Employment Act...
Case No. U-26135

(Act) based upon the Federation's refusal to abide by Staskowski's request to bypass Step II of the contract grievance procedure when processing a grievance challenging her suspension by Nassau Community College (College) and based upon the Federation's representation of her at a May 12, 2005 pre-hearing meeting with respect to the College's charges seeking to dismiss Staskowski from her tenured position.

EXCEPTIONS

In her exceptions, Staskowski asserts that the ALJ erred in dismissing her charge at the conclusion of her case in chief, contending that she presented sufficient evidence to demonstrate a prima facie case that the Federation breached its duty of fair representation under the Act. The Federation and the College support the ALJ's decision.

FACTS

The College and Federation are parties to a September 1, 2000-August 31, 2005 collectively negotiated agreement (agreement). The negotiated grievance procedure contains five steps. A grievance may be filed within 90 days of the date of the alleged grievance. At Step II, the written grievance is heard by the College President or his/her designee, and Step III is heard by a tripartite Grievance Board. If either the grievant or Federation is dissatisfied with the Grievance Board's decision, it can be appealed to advisory arbitration at Step IV. Finally, at Step V, an appeal from an advisory arbitrator's decision is determined by the County Executive.

The agreement also contains a negotiated tenure dismissal procedure. Under the tenure dismissal procedure, following an investigation, a formal dismissal proceeding can be commenced against a faculty member through the issuance of a finding of probable cause containing the disciplinary charges. After a faculty member
receives the charges and requests a hearing, the President notifies the Promotion and
Tenure (P & T) Committee, composed of nine elected faculty members, that a hearing is
required. Under the agreement, these nine faculty members serve as the Hearing
Committee (Committee) in a tenure dismissal case with the responsibility of determining
if "adequate and just cause exists to recommend the dismissal of a faculty member."
The agreement outlines a pre-hearing procedure aimed at expediting the hearing
process:

The Committee may, with the consent of the parties concerned, hold joint pre-hearing meetings in order to simplify the issues, effect stipulation of facts, provide for exchange of documentary or other information and achieve such other appropriate pre-hearing objectives as to make the hearing fair, effective and expeditious, or reach settlement.¹

In addition, the agreement outlines the applicable hearing procedures in a tenure
dismissal proceeding.

Staskowski has been a faculty member in the College's Communications
Department since 1996. She was appointed Assistant Professor and granted tenure by the College in 2001.

According to Staskowski's testimony, following her election to the Federation's Executive Board (Board) in 1997, she began to publicly question, on a regular basis, the Federation's leadership over various issues including the structure of the negotiated pay scale, the Federation's use of travel money and the collection and utilization of political action funds. She testified that she regularly raised these issues at Board and membership meetings. In 2004, she supported a candidate in a special Federation

¹ Joint Exhibit 1, §47-5.2.
election who Staskowski describes as being an outsider to the Federation leadership. These activities were known to Federation President Frances Hilliard (Hilliard) and other Federation officials.

After four absences from class in September 2004, Staskowski received a letter from Vice President for Academic Affairs John C. Ostling (Ostling) counseling her about alleged inappropriate absenteeism and informing her that if her attendance did not improve the College may commence the tenure dismissal procedure against her. During a meeting with Federation representatives on September 30, 2004, Staskowski was informed that Ostling's counseling letter was not grievable. The following day, Staskowski received another letter from Ostling informing her that the College was suspending her with pay from her responsibilities and barring her from entering the College campus without authorization. After receiving the suspension letter, Staskowski discussed it with Hilliard who discouraged her from filing an immediate grievance because Staskowski had 90 days to file under the agreement.

In November 2004, following an investigation, Dean Muth (Muth) submitted to College President Sean A. Fanelli (Fanelli) a report recommending the commencement of a formal proceeding seeking to dismiss Staskowski for excessive absences in 2004 and other alleged misconduct in 2001 and 2002. On November 22, 2004, Staskowski received the finding of probable cause from Fanelli. One week later, she met with Federation representatives and filed a grievance alleging that the College violated the agreement when it suspended her and barred her from campus without authorization. The Federation filed the grievance at Step II on November 30, 2004.

In December 2004 and February 2005, Staskowski met with a New York State
United Teachers (NYSUT) attorney assigned, on behalf of the Federation, to represent her in defending against the tenure dismissal proceeding.

By letter dated March 17, 2005, the Federation notified Staskowski that on April 12, 2005, the Step II hearing on her grievance would take place before Fanelli's designee, Director of Governmental Affairs Chuck Cutolo (Cutolo).\(^2\) The letter also confirmed that Staskowski would meet with Federation representatives on March 28, 2005 to prepare for the Step II hearing. Finally, the Federation informed Staskowski that the tenure dismissal charges against her would be officially presented to the P & T Committee on March 30, 2005.

Following the March 28, 2005 preparatory meeting, Staskowski wrote to Hilliard objecting to the Federation’s handling of the grievance. In her letter, Staskowski questioned the neutrality of the Step II procedure because a designee of Fanelli would be hearing the grievance. She also questioned the propriety of proceeding with a Step II hearing based on her claim that the College violated the agreement by failing to schedule the Step II hearing within ten working days after receipt of the grievance. Furthermore, Staskowski expressed her disagreement with the Federation’s strategic advice to proceed with Step II as a means to flesh out the College’s evidence and rationale for its adverse actions against her. Finally, Staskowski rejected the Federation’s analysis that the grievance challenging her suspension was distinct from her defense in opposition to the charges seeking her termination.

On April 5, 2005, the Federation responded by letter to Staskowski informing her

\(^2\) Charging Party Exhibit 27. As the result of the Federation’s advocacy, Muth was replaced by Cutolo as the Step II hearing officer. Charging Party Exhibits 10 and 27; Transcript, p. 55.
that the Federation's Executive Board met to discuss her concerns about the grievance and informed her that if she was dissatisfied with the Federation's representation she was entitled to retain her own personal attorney. In response, Staskowski sent separate but similar letters to NYSUT's General Counsel and the Northeast Regional Office of the American Federation of Teachers (AFT) complaining about the Federation's handling of her grievance as well as the Federation's settlement efforts on her behalf. On April 19, 2005, Staskowski notified the Federation that she no longer wanted its representation. Step II hearing officer Cutolo issued a decision denying her grievance on April 27, 2005.

In the meantime, a pre-hearing meeting with respect to the tenure dismissal charges was scheduled for May 12, 2005. On April 15, 2005, the College's Vice President for Legal and External Affairs Anna Mascolo (Mascolo) sent a memorandum to Dr. Carol Mottola (Mottola), the P & T Committee's Chairperson, stating:

This is to confirm that a meeting is scheduled for Thursday, May 12, 2005, at 1:00 p.m., in CCB 210. This meeting is being held under the terms of Article 47-5.2 of the NCCFT Collective Bargaining Agreement.

During her testimony, Staskowski stated that the memorandum demonstrates that Mascolo, rather than the P & T Committee, scheduled the pre-hearing meeting in violation of the agreement.

3 Charging Party Exhibit 11. During the same period, Staskowski communicated with the NYSUT attorney assigned to represent her in the tenure dismissal proceeding about her dissatisfaction with the Federation's representation. Charging Party Exhibits 12 and 13.

4 Charging Party Exhibit 21. The memorandum indicates that various College representatives and Federation President Hilliard were sent copies of the memorandum. However, Staskowski was not sent the memorandum.
The pre-hearing meeting took place on May 12, 2005 with the following individuals in attendance: members of the P & T Committee, the College's attorney, Staskowski, the NYSUT attorney assigned to represent Staskowski and Federation officers. According to Staskowski's testimony, the College's attorney conducted the meeting and dictated the hearing procedures that would be followed. Staskowski testified that at the meeting, the NYSUT attorney passively agreed to the procedures outlined by the College's attorney.

On May 25, 2005, the College's attorney sent a letter to Mottola memorializing the agreement, reached at the May 12, 2005 pre-hearing meeting, with respect to the hearing dates as well as the procedural rules with respect to evidentiary objections, questioning of witnesses, attendance by P & T Committee members at the hearing and cancellations.

On June 3, 2005, Staskowski sent a letter to NYSUT's General Counsel raising various procedural objections with respect to the scheduling and conduct of the May 12, 2005 meeting. In addition, Staskowski criticized the representation she had received from NYSUT's assigned attorney and requested the reassignment of her case to another NYSUT attorney.

**DISCUSSION**

The Board will affirm an ALJ's decision to grant a motion to dismiss an improper practice charge at the close of the charging party's case when the charging party's evidence in the record, after granting all reasonable inferences, is plainly insufficient to
warrant a finding that the charge should be sustained.\textsuperscript{5} It is well-settled that a charging party has the burden of proof to establish that an employee organization acted in a manner that was arbitrary, discriminatory or in bad faith in order to establish a breach of the duty of fair representation.\textsuperscript{6}

In the present case, Staskowski argues that she presented sufficient evidence to establish a \textit{prima facie} case of a breach of the duty of fair representation, which shifted the burden of persuasion to the Federation to present evidence. Following our examination of the record, and after granting all reasonable inferences to Staskowski's evidence as we must, we affirm the ALJ's dismissal of the charge.

Contrary to Staskowski's claim, we find that she failed to establish a \textit{prima facie} case that the Federation acted in an arbitrary manner by denying her request to bypass Step II. An employee organization is entitled to a wide range of reasonable discretion in the processing of a grievance under the Act and the Federation's decision to proceed with the Step II hearing is well within such discretion.\textsuperscript{7} The fact that a grievance must be presented by the grievant within ten working days after the filing at Step II and that the College President designates the Step II hearing officer does not establish that the Federation acted arbitrarily in proceeding with the Step II hearing. Similarly, Staskowski's disagreement with the Federation's articulated strategy does not constitute

\textsuperscript{5} See, \textit{County of Nassau (Police Dept)}, 17 PERB \textsection 3013 (1984); \textit{Board of Educ of the City Sch Dist of the City of Buffalo}, 24 PERB \textsection 3033 (1991); \textit{Professional Staff Congress (Veira)}, 23 PERB \textsection 3030 (1990); \textit{UFT (Ayazi)}, 32 PERB \textsection 3069 (1999); \textit{UFT (Fearon)}, 37 PERB \textsection 3029 (2004); \textit{UFT (Saidin)}, 40 PERB \textsection 3003 (2007).

\textsuperscript{6} \textit{UFT (Saidin)}, 36 PERB \textsection 3042 (2003); \textit{TWU Local 100 (Brockington)}, 37 PERB \textsection 3002 (2004); \textit{AFSCME Council 66, Local 3933 (Atliert)}, 39 PERB \textsection 3015 (2006); \textit{UFT (Jenkins)} 41 PERB \textsection 3007 (2008), confirmed sub nom. \textit{Jenkins v New York State Pub Empl Rei Bd}, 41 PERB \textsection 7007 (Sup Ct NY County 2008) nor.

\textsuperscript{7} \textit{UFT (Jenkins)}, supra note 5.
We reach a similar conclusion with respect to the Federation's handling of the May 12, 2005 pre-hearing meeting. Contrary to Staskowski's argument, the failure of the Federation to object to the fact that Mascolo sent a memorandum to Mottola confirming the date for the pre-hearing conference does not establish collusion or arbitrariness by the Federation. Furthermore, Staskowski's description of the meeting is insufficient to demonstrate a *prima facie* case of arbitrary conduct by the Federation. The purpose of the meeting was for the parties to resolve preliminary issues including scheduling the hearing and the procedures to be following during the hearing. The letter from the College's attorney, introduced into evidence by Staskowski and relied upon in support of her exceptions, clearly demonstrates that at the pre-hearing meeting the parties entered into various procedural stipulations aimed at expediting the hearing consistent with the terms of the agreement. Contrary to her argument, the evidence in the record does not establish that the Federation colluded with the College in violating the agreement or that there was a violation of the agreement in the conduct of the meeting.

We next turn to Staskowski's distinct claim that the Federation's refusal to bypass Step II and its conduct during the pre-hearing meeting were discriminatory or in bad faith. Granting Staskowski all reasonable inferences, we find that for purposes of establishing a *prima facie* case, the record includes evidence to suggest a possible improper motivation behind the Federation's actions and omissions. During her testimony, Staskowski described conduct which, if true, can be fairly described as dissident behavior toward the Federation's leadership, and her conduct was known by
Hilliard and other Federation officials. However, Staskowski failed to present any evidence, such as temporal proximity or disparate treatment, to suggest a causal connection between her activities and the Federation's actions to establish a prima facie case. In fact, her evidence establishes that since her suspension and the commencement of the tenure dismissal procedure in 2004, the Federation has consistently provided her with representation with respect to her grievance and the tenure dismissal proceeding. A reasonable inference can not be drawn from the evidence in the record that Staskowski's dissatisfaction with that representation, and her disagreement with the Federation's interpretation of the agreement, demonstrate a causal link necessary to establish a prima facie case of the breach of the duty of fair representation. Staskowski’s conclusory assertion of such a causal relationship does not constitute probative evidence.

Based on the foregoing, we deny Staskowski’s exceptions and affirm the decision of the ALJ.

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

DATED: June 9, 2009
Albany, New York

Jerome Lefkowitz, Chairman

Robert S. Hite, Member

Sheila S. Cole, Member
STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

GEORGE ROWE,

Charging Party,

- and -

1199 SEIU UNITED HEALTHCARE WORKERS EAST,

Respondent,

- and -

COUNTY OF ALBANY,

Employer.

GEORGE ROWE, pro se

LEVY RATNER, P.C. (DAVID SLUTSKY and DANA E. LOSSIA
of counsel), for Respondent

KRISTINA A. BURNS, GENERAL COUNSEL (CHRISTINE C. KELLY of
counsel), for Employer

BOARD DECISION AND ORDER

This case comes to the Board on exceptions by George Rowe (Rowe) to a
decision by the Assistant Director of Public Employment Practices and Representation
(Assistant Director) dismissing an improper practice charge filed by Rowe on April 24,
2006, as amended, alleging that 1199 SEIU United Healthcare Workers East (1199
SEIU) breached its duty of fair representation in violation of §§209-a.2(a) and (c) of the
Public Employees' Fair Employment Act (Act).
1199 SEIU filed an answer asserting that it has consistently and fairly represented Rowe and raising various affirmative defenses, including the timeliness of certain allegations in the charge.

Prior to the scheduling of the hearing, the Assistant Director directed Rowe to submit a written submission clarifying his allegations by setting forth each specific violation of the Act by 1199 SEIU, including the date of each occurrence and the names of the individuals involved in the alleged improper practice. In response, Rowe submitted a letter, dated December 8, 2006, setting forth various alleged acts by 1199 SEIU between February 2003 and June 2006. Following the Assistant Director's review of Rowe's written clarification, she notified the parties that the charge would be processed to hearing with respect to 1199 SEIU's alleged failure to fulfill a promise to Rowe to hold a meeting to examine the disciplinary action taken against him by his employer, the Albany County Nursing Home (Nursing Home), and 1199 SEIU's alleged failure to respond to Rowe's telephone calls on specific dates between February 23, 2006 and June 7, 2006.

At the close of Rowe's case during the hearing, the Assistant Director granted 1199 SEIU's motion to dismiss the charge with respect to the allegation that 1199 SEIU violated its promise to hold a meeting to examine the disciplinary action taken against
him. Following the hearing, the Assistant Director issued a decision dismissing the remainder of Rowe's charge.  

EXCEPTIONS

In his exceptions, Rowe contends that the Assistant Director erred in dismissing the charge. He asserts that the Assistant Director should not have limited the issues to be determined at the hearing without providing him with an opportunity to conduct discovery. In addition, Rowe claims that the evidence in the record was sufficient to establish that 1199 SEIU violated §§209-a.2(a) and (c) of the Act. 1199 SEIU supports the Assistant Director's decision.

Based upon our review of the record and consideration of the parties' arguments, we deny Rowe's exceptions and affirm the Assistant Director's dismissal of the charge.

FACTS

At all times relevant, Rowe was a part-time employee at the Nursing Home in the 1199 SEIU collective bargaining unit. Margaret Bachman (Bachman) is an 1199 SEIU vice president in the Albany area with duties that include representing members who work at the Nursing Home. Bachman supervises Phoebe Mackey (Mackey), who is employed as an 1199 SEIU organizer and who is also responsible for representing Nursing Home employees.

1 41 PERB ¶4569 (2008).
After Rowe returned to work in late 2005, the Nursing Home placed him on a new schedule and imposed restrictions on working overtime. 1199 SEIU filed a grievance on Rowe's behalf challenging the schedule change and overtime restrictions. Following a February 16, 2006 grievance hearing, where Rowe was represented by Bachman, his regular evening shift schedule was restored, the overtime restrictions were lifted and he was paid for not working a holiday. Rowe was dissatisfied with that result, however, believing that he was entitled to a substantial monetary settlement. With notice to Rowe, 1199 SEIU filed for a step three grievance hearing.

In February 2006, 1199 SEIU filed another grievance on behalf of Rowe challenging a disciplinary action imposed by the Nursing Home with respect to Rowe's alleged violation of time and attendance rules. Bachman represented Rowe during the grievance hearing, but the grievance was denied.

After Rowe returned to his regular schedule, he requested a change to that schedule because of a conflict caused by his educational course load. Following the Nursing Home's denial of his request, 1199 SEIU filed a grievance on Rowe's behalf. In advance of the grievance hearing, Bachman asked Rowe to bring documentation to demonstrate his course and examination schedule. Instead, Rowe appeared at the grievance hearing with a bag full of books, which he slammed on to a desk. During the grievance hearing, where Rowe was represented by Bachman, the regular evening shift schedule was restored, the overtime restrictions were lifted and he was paid for not working a holiday. Rowe was dissatisfied with that result, however, believing that he was entitled to a substantial monetary settlement. With notice to Rowe, 1199 SEIU filed for a step three grievance hearing.

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2 The precise circumstances of Rowe's absence from work in 2005 are neither clear from the record nor relevant to our determination.

3 The precise nature of the disciplinary action is unclear from the record.
grievance hearing, the Nursing Home agreed to the arrangement requested by Rowe, which included its agreement to assist him in finding other employees to cover Tuesday, Wednesday and Thursday evening shifts until he was able to resume his normal schedule. Bachman memorialized the terms of this resolution in a letter to the Nursing Home with a copy sent to Rowe.

On June 6, 2006, Rowe left a lengthy voice message for Bachman about his treatment by the Nursing Home. The following day, he was terminated and on June 8, 2006, 1199 SEIU filed a grievance challenging his termination.

It is undisputed that during the course of 1199 SEIU's representation of Rowe, between January and June, 2006, Bachman received repeated telephone calls and lengthy messages from Rowe on 1199 SEIU's office telephone and Bachman's cellular telephone, including multiple calls in a single day. With the exception of his June 2006 message with respect to his termination, Rowe was unable to identify the specific substance of his repeated messages.

During her testimony, Bachman acknowledged that, due to other responsibilities, she was not able to respond to each and every call and message from Rowe. Rowe did not rebut her testimony about the enormous amount of time consumed by her numerous conversations and meetings with him.

DISCUSSION

We begin with Rowe's exceptions challenging the Assistant Director's ruling that limited the issues to be determined at the hearing. Upon our review of the record, we
conclude that the Assistant Director's ruling was well within the considerable discretion granted in the processing of a charge.⁴

As we stated in Dutchess Community College,⁵ when an ALJ finds fatal deficiencies in a pleading, following a party's clarification of its factual allegations, she or he may decline to further process the deficient component of the charge. In the present case, the Assistant Director correctly declined to further process Rowe's factual allegations, which were untimely and failed to set forth a comprehensible and cognizable claim under the Act. Furthermore, contrary to Rowe's argument, our Rules of Procedure do not permit the conduct of pre-hearing discovery.

In addition, we deny Rowe's exceptions challenging the Assistant Director's dismissal of the remaining allegations of his charge. A motion to dismiss at the close of a charging party's case will be granted when the evidence produced by the charging party, after granting all reasonable inferences, is plainly insufficient to warrant a finding that the charge should be sustained.⁶ Upon our review of the record, and after granting all reasonable inferences to Rowe, we affirm the Assistant Director's conclusion that Rowe failed to present any material facts to support his claim that 1199 SEIU did not fulfill a purported promise to conduct a meeting to examine disciplinary action taken against him.

⁴ City of Elmira, 41 PERB ¶3018 (2008).
⁵ 41 PERB ¶3029 (2008).
⁶ Lake Mohegan Fire Dist, 41 PERB ¶3001 (2008).
Finally, we affirm the Assistant Director's dismissal of Rowe's remaining claim, which alleges that 1199 SEIU violated the Act when Bachman failed to respond to certain of Rowe's messages.

An employee organization is obligated, in general, to respond to an inquiry from a unit member within a reasonable period of time. The failure to respond to inquiries which are redundant or onerous, however, will not generally constitute a violation of the Act.\(^7\)

In the present case, Rowe failed to identify the specific substance of his messages to Bachman with the exception of his call on June 6, 2006. Furthermore, the record demonstrates that during the applicable period Bachman was in regular contact with Rowe with respect to the workplace issues he raised in his telephone messages and represented him at various grievance hearings. Based upon the totality and regularity of Bachman's communications with Rowe, and the representation provided him, we conclude that 1199 SEIU did not violate §§209-a.2(a) and (c) when Bachman failed to respond to every specific message from Rowe, which were both redundant and onerous.

For the reasons set forth above, we deny Rowe's exceptions and affirm the decision of the Assistant Director.

\(^7\) UFT (Grassel), 23 PERB ¶3042 (1990); DC 37 (Maltsev), 41 PERB ¶3022 (2008).
IT IS, THEREFORE, ORDERED, that the charge must be, and hereby is, dismissed in its entirety.

SO ORDERED.

DATED: June 9, 2009
Albany, New York

Jerome Lefkowitz, Chairman

Robert S. Hite, Member

Sheila S. Cole, Member
STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

ST. PAUL BOULEVARD PROFESSIONAL FIREFIGHTERS ASSOCIATION,

Petitioner,

CASE NO. CP-1110

- and -

ST. PAUL BOULEVARD FIRE DISTRICT,

Employer.

CHAD PENNER and JAMES CHRISTIAN, for Petitioner

HARTER, SECREST & EMERY LLP (DAVID M. KRESOCK of counsel), for Employer

BOARD DECISION AND ORDER

This case comes to the Board on exceptions filed by the St. Paul Boulevard Fire District (District) and cross-exceptions by the St. Paul Boulevard Professional Firefighters Association (Association) to a decision of an Administrative Law Judge (ALJ) granting the unit placement petition filed by the Association to place the position of fire lieutenant in the Association's bargaining unit and dismissing the Association's petition for unit clarification.¹

EXCEPTIONS

In its exceptions, the District asserts that the ALJ made certain factual findings inconsistent with the record and erred in her analysis of the relevant facts and law in

¹ The Association filed a pleading labeled cross-exceptions stating that the Association fully supports the ALJ's decision. The pleading does not articulate any basis for reversing the ALJ's decision. Therefore, the Board has treated the pleading as a response to the District's exceptions rather than as cross-exceptions. See, PERB's Rules of Procedure (Rules), §§213.2 and 213.3.
placing the fire lieutenant in the Association's bargaining unit. It contends that the fire lieutenant does not share a community of interest with members of the Association's bargaining unit and that a conflict of interests exists requiring that the position be excluded from the bargaining unit. The Association supports the ALJ's decision.

Based upon our review of the record and consideration of the respective arguments of the District and Association, we affirm the decision of the ALJ.

FACTS

The relevant facts are set forth in the ALJ's decision.2 They are repeated here only as necessary to address the exceptions.

The District is a local governmental body governed and managed by an elected five member Board of Fire Commissioners (Commissioners) pursuant to New York law.3 The responsibilities of the Commissioners include establishing a budget, collecting taxes, managing and controlling District property, hiring paid firefighters and imposing discipline.4 Each District Commissioner has specifically assigned areas of responsibilities. James Leusch (Leusch) is the Commissioner in charge of District personnel. The District maintains two fire houses, which are staffed by paid firefighters and voluntary firefighters.

The Association is the recognized exclusive representative of a bargaining unit composed of 16 paid firefighters employed by the District.5 The District and Association

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2 41 PERB ¶4014 (2008).

3 See, Town Law §170, et seq.

4 See, Town Law §§176, 176(10), (11), (11-c), (18-a) and (19).

5 In addition, the District has 67 volunteer firefighters who are represented by a separate not-for-profit organization, the St. Paul Boulevard Fire Association, which maintains an office at a District Fire House. The District's volunteers include a fire chief, assistant chief, three captains and six lieutenants.
are parties to a collectively negotiated agreement (agreement) which expires on December 31, 2009.

Under the agreement, firefighters are divided into four groups, with each group working two ten-hour day shifts and two 14-hour night shifts followed by four days off. The minimum salary for a firefighter under the agreement is $30,800, with the maximum base salary ranging from $56,582 to $60,582. Firefighters are entitled to increments, longevity pay and a $1,500 annual payment for obtaining and sustaining certification as an emergency medical technician (EMT). Firefighters earn varying amounts of vacation leave depending on their years of service. The agreement places restrictions on the use of such leave during the summer months, and the Commissioner in charge of personnel has sole authority to approve leave requests for less than a full shift.  

In 2007, the District created a new paid fire lieutenant position to provide day-to-day supervision of paid firefighters in responding to fires and emergencies and to oversee their training. In February, 2007, the District promoted Timothy Kohlmeier (Kohlmeier) from a paid District firefighter to the new fire lieutenant position. Prior to his promotion, Kohlmeier was paid a stipend to train District paid and volunteer firefighters consistent with his certification as the municipal training officer.

During his testimony, Leusch testified that the Commissioners anticipated the fire lieutenant to function as a filter by responding to minor firehouse and equipment problems and by referring other problems to the appropriate Commissioner.  

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6 Joint Exhibit 1, Article XIV and XV.

7 Transcript, pp. 23-24.
Kohlmeier testified that following his promotion he was advised by the Commissioners to use his best judgment in handling certain issues but to refer other issues to them.\textsuperscript{8}

The District and Kohlmeier entered into a written agreement providing that all of the terms and conditions in the District - Association agreement are applicable to Kohlmeier in his new position with four exceptions: the maximum base salary for his position would be $66,582 in 2007, $68,582 in 2008 and $70,582 in 2009; he would work 40 hours per week and an additional 100 hours per year for meetings and training; he would be entitled to two weeks of vacation leave after his first year, three weeks of vacation after 10 years and five weeks of vacation after 20 years; and his vacation leave and longevity payments would be calculated based on his original date of hire.\textsuperscript{9}

In his first year as fire lieutenant, Kohlmeier shared a locked office with the St. Paul Boulevard Fire Association and the volunteers it represents until that organization determined it wanted its own office.\textsuperscript{10} In the office, Kohlmeier maintains a locked filing cabinet which contains files and personal notes with respect to paid and volunteer firefighters. In addition, the District provides him with a private telephone line, a computer and a cell phone.

Kohlmeier works four ten-hour shifts per week. His schedule can be modified only with the permission of Leusch, with whom he interacts on a daily basis. Between shifts, Kohlmeier meets with the firefighters to assign tasks to be performed by the incoming shift. In general, Kohlmeier does not give specific work assignments to individual firefighters, but he has the discretion to change an assignment, if necessary.

\textsuperscript{8} Transcript, p. 66.

\textsuperscript{9} Joint Exhibit 2.

\textsuperscript{10} Transcript, pp. 38-39. The organization moved from the office approximately one week prior to the hearing before the ALJ, but the organization's officers continue to have access to the office. Transcript, p. 38.
Kohlmeier testified that he, along with the paid firefighters, are granted the discretion to deviate or modify standard operating procedures (SOPs) based on experience and judgment in responding to a situation. Although Kohlmeier can not create or change District policies, SOPs or rules and regulations, he has supervisory responsibilities with respect to compliance with District policies, rules and regulations.

Kohlmeier attends Commissioner meetings to answer questions but does not attend executive sessions when personnel matters are discussed. Since his promotion, Kohlmeier has participated in one set of candidate interviews, along with the Commissioners, to fill a vacant paid firefighter position and made a recommendation to the Commissioners with respect to that vacancy. The position was filled following deliberations by the Commissioners in which Kohlmeier did not participate.

Kohlmeier does not conduct evaluations of paid firefighters, and testified that he is unaware whether he has that authority. He testified that he would seek Leusch's opinion before initiating any form of evaluation procedure.

Finally, Kohlmeier testified that, after his promotion, Leusch and he responded to an unspecified personnel matter involving a paid firefighter. After Kohlmeier reported certain information to Leusch, Leusch decided that the issue should be investigated and addressed by both of them. Thereafter, they met with the firefighter and following that meeting Leusch and Kohlmeier collectively decided on an unspecified outcome.

**DISCUSSION**

We commence our discussion with the District's exceptions challenging purported errors of fact made by the ALJ with respect to Kohlmeier's consultation with Commissioners, the nature of Kohlmeier's assignment of work to paid firefighters and the extent of his involvement in the hiring of firefighters. Following our review of the record, we deny the District's exceptions challenging those findings of fact.
According to Leusch, Kohlmeier is expected to respond to minor problems but to refer other problems to the Commissioners. In addition, Kohlmeier testified that it is his practice to assign tasks to an entire shift, rather than individual firefighters, with the expectation that the shift will determine how to complete the tasks. Finally, although Kohlmeier participated in a single set of interviews for a paid firefighter vacancy, he admitted that the Commissioners made the decision to hire following their deliberations in which he took no part.

Next, we turn to the District’s exceptions challenging the ALJ’s legal conclusion that the fire lieutenant shares a community of interest with the paid firefighters and her related conclusion that placing the position in the unit would not create a conflict of interests that outweighs other facts supporting the finding of a community of interest.

In sharp contrast to the provisions of the National Labor Relations Act (NLRA), the Act does not exclude supervisors from the statutory rights to organization and representation, nor does the Act define what constitutes a supervisor. Under the Act, in determining whether an unrepresented supervisor should be placed in a bargaining unit of rank-and-file employees, the Board will apply the community of interest and administrative convenience standards set forth in §207.1 of the Act, with the community of interest given predominant consideration.

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11 29 USC §§152(3) and (11).

12 State of New York (Div of State Police), 1 PERB ¶399.32 (1968); Johnson City Cent Sch Dist, 1 PERB ¶399.55 (1968); Uniondale Union Free Sch Dist, 21 PERB ¶3060 (1988), app withdrawn, 23 PERB ¶7004 (2d Dept 1990) nor; County of Genesee, 29 PERB ¶3068 (1996); New York Power Authority, 38 PERB ¶3003 (2005).

13 Board of Educ of the City Sch Dist of the City of Buffalo, 14 PERB ¶3051 (1981); City of Rye, 33 PERB ¶3035 (2000); NYCTA, 36 PERB ¶3038 (2003).
The factors that are considered in determining whether a community of interest exists include the similarity of the terms and conditions of employment, shared mission and duties, and common work location. The existence of disparities in benefits is not a sufficient basis for the exclusion of an unrepresented employee when other facts, such as shared duties and responsibilities, establish a community of interest. When the uniting question involves an unrepresented supervisor, the Board also examines whether the extent and nature of the assigned supervisory functions create a conflict of interests, thereby outweighing other facts that may support inclusion. Among the significant supervisory duties that may indicate such a conflict of interests is the authority to impose discipline, initiate disciplinary procedures, conduct formal evaluations, render first step decisions on contract grievances and provide supervision over day-to-day operations.

Kohlmeier and paid firefighters share the same work location, as well as the same primary mission and duties: to prevent, control and extinguish fires. They are responsible for responding to fire alarms and emergency calls and maintaining the District’s equipment and property. With a few exceptions, Kohlmeier’s terms and conditions of employment are set by the terms of the District - Association agreement. While Kohlmeier’s salary is higher than the maximum base salary for paid firefighters, he is entitled to the same contractual longevity pay based on his original date of hire as

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14 Board of Educ of the City Sch Dist of the City of Buffalo, supra note 13; Monroe #1 BOCES, 39 PERB ¶3024 (2006); Regional Transit Service, Inc., 39 PERB ¶3027 (2006).

15 Unatego Cent Sch Dist, 15 PERB ¶3097 (1982); County of Genesee, supra, note 12.

16 Board of Educ of the City Sch Dist of the City of Buffalo, supra note 13; County of Genesee, supra note 12; City of Rye, supra note 13; New York Power Authority, supra note 12.
a paid firefighter as well as the annual payment if he maintains an EMT certification. In addition, Kohlmeier's higher salary is inclusive of the extra stipend he formerly received as a paid firefighter for his training duties. Although Kohlmeier's work schedule and vacation rights may be different from the paid firefighters, Leusch has supervisory responsibilities over the work and vacation schedules of Kohlmeier and the paid firefighters.

We do not find Kohlmeier's use of an office, a computer, filing cabinets and a District cell phone to be a sufficient basis for excluding his position from the bargaining unit. With respect to the office, the record establishes that Kohlmeier shared it with the St. Paul Boulevard Fire Association and that organization's officers continue to have access to the office. In addition, Kohlmeier's maintenance of files and personal notes in filing cabinets does not demonstrate a distinction in terms and conditions of employment warranting exclusion.

Based upon the evidence in the record before us, we conclude that Kohlmeier does not have sufficient supervisory duties and responsibilities to demonstrate a conflict of interests requiring the position of fire lieutenant to be excluded from the unit. Unlike the facts in City of Rye,\textsuperscript{17} the record establishes that Kohlmeier does not have the authority to hire, impose discipline, initiate disciplinary procedures, conduct formal evaluations or determine grievances on behalf of the District. Although he participated in a single set of interviews to fill a vacancy, the Commissioners made the decision to hire. His participation, along with Leusch, in the investigation and resolution of the personnel matter does not indicate sufficient supervisory responsibilities to establish a conflict. In fact, the evidence establishes that Leusch made the decision to commence the investigation. Finally, Kohlmeier's supervision over day-to-day operations is subject

\textsuperscript{17} Supra note 13.
to supervision by Leusch, with whom he speaks daily, and Kohlmeier is expected to refer all but minor problems to the appropriate Commissioner.

We accordingly affirm the decision of the ALJ that it is appropriate to place the title of fire lieutenant in the Association's unit.

IT IS, THEREFORE, ORDERED that the Association's unit placement petition is granted.

DATED: June 9, 2009
Albany, New York

Jerome Lefkowitz, Chairman

Robert S. Hite, Member

Sheila S. Cole, Member