11-14-2012

State of New York Public Employment Relations Board Decisions from November 14, 2012

New York State Public Employment Relations Board

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State of New York Public Employment Relations Board Decisions from November 14, 2012

Keywords
NY, NYS, New York State, PERB, Public Employment Relations Board, board decisions, labor disputes, labor relations

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In the Matter of

UNITED PUBLIC SERVICE EMPLOYEES UNION,

Petitioner,

-and-

TOWN OF PINE PLAINS,

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: All full-time Motor Equipment Operators assigned to the Town of Pine Plains Highway Department.

Excluded: All other 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 14, 2012
Albany, New York

Jerome Lefkowitz, Chairman

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

In the Matter of

TEAMSTERS LOCAL 294,

Petitioner,

-and-

TOWN OF MILTON,

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 Teamsters Local 294 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: Full-time employees of the Town Highway Department, including HEOs, MEOs, Mechanics and Laborers.

Excluded: Highway Superintendent, Deputy Highway Superintendent, seasonal and temporary Highway Department employees, Town clerical employees and all others.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Teamsters Local 294. 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 14, 2012
Albany, New York

Jerome Lefkowitz, Chairman

Sheila S. Cole, Member
In the Matter of

EVERETT ROACH,

Petitioner,

-and-

COUNTY OF ONTARIO AND ONTARIO COUNTY
SHERIFF'S OFFICE,

Employer,

-and-

CIVIL SERVICE EMPLOYEES ASSOCIATION, INC.,
LOCAL 1000, AFSCME, AFL-CIO,

Intervenor.

EVERETT ROACH, for Petitioner

JOHN W. PARK, ESQ., for Employer

STEVEN A. CRAIN AND DAREN J. RYLEWICZ, CO-COUNSELS (STEVEN A.
CRAIN of counsel), for Intervenor

BOARD DECISION AND ORDER

On June 1, 2012, the Everett Roach (petitioner) filed a timely petition for
decertification of the Civil Service Employees Association, Inc., Local 1000, AFSCME,
AFL-CIO (intervenor), the current negotiating representative for employees in the
following unit:

Included: All Full-Time and Regularly scheduled part-time employees in the
titles of County Police Officer, County Police Sergeant and Criminal
Excluded: Managerial/Confidential employees and Seasonal Personnel, and all other employees of the Sheriff.

Upon consent of the parties, a mail ballot election was held on September 6, 2012. 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.

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

DATED: November 14, 2012
Albany, New York

[Signature]
Jerome Lefkowitz, Chairman

[Signature]
Sheila S. Cole, Member
In the Matter of

JOHN M. STORER,

Petitioner,

-and-

COUNTY OF ONTARIO AND ONTARIO COUNTY
SHERIFF'S OFFICE,

Employer,

-and-

CIVIL SERVICE EMPLOYEES ASSOCIATION, INC.,
LOCAL 1000, AFSCME, AFL-CIO,

Intervenor.

JOHN M. STORER, for Petitioner

JOHN W. PARK, ESQ., for Employer

STEVEN A. CRAIN AND DAREN J. RYLEWICZ, CO-COUNSELS (STEVEN A.
CRAIN of counsel), for Intervenor

BOARD DECISION AND ORDER

On June 4, 2012, the John M. Storer (petitioner) filed a timely petition for
decertification of the Civil Service Employees Association, Inc., Local 1000, AFSCME,
AFL-CIO (intervenor), the current negotiating representative for employees in the
following unit:

Included: County Police Lieutenant, County Corrections Lieutenant.
Upon consent of the parties, a mail ballot election was held on September 6, 2012. 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.

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

DATED: November 14, 2012
Albany, New York

Jerome Lefkowitz, Chairman

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

In the Matter of

MOHAWK VALLEY COMMUNITY COLLEGE
ADJUNCT AND PART-TIME ASSOCIATION,
NYSUT, AFT, AFL-CIO,

Petitioner,

-and-

MOHAWK VALLEY COMMUNITY COLLEGE
and COUNTY OF ONEIDA,

Respondent.

TRUDY RUDNICK, LABOR RELATIONS SPECIALIST, for Petitioner
GREGORY AMOROSO, ESQ., ONEIDA COUNTY ATTORNEY, for Respondent

BOARD DECISION, CERTIFICATION OF REPRESENTATIVE AND
ORDER TO NEGOTIATE

A representation proceeding was conducted in the above matter by the Public Employment Relations Board in accordance with the Public Employees' Fair Employment Act (Act) and our Rules of Procedure (Rules).

Mohawk Valley Community College and the County of Oneida (Joint Employer) has filed objections to the determination made by the Director of Public Employment Practices and Representation (Director) concluding that the showing of support submitted by the Mohawk Valley Community College Adjunct and Part-Time Association, NYSUT, AFT, AFL-CIO (Association) is sufficient for certification without an election pursuant to §201.9(g)(1) of our Rules.
The Joint Employer objects to certification without an election on the grounds that: a) it was denied a hearing during the investigation into the question of representation to demonstrate that the defined unit does not correspond to a community of interest among the employees; b) the defined unit in the Director's determination is inappropriate; and c) certain employees are casual employees under the Act.

The Joint Employer also asserts that it did not consent to the proposed unit on the ground that one of its components, County of Oneida (County), did not execute the consent agreement, and that the County Attorney representing the Joint Employer "felt compelled" to sign the agreement without consulting with the President of the other component, Mohawk Valley Community College (College). The Association supports the Director's determination.

PROCEDURAL BACKGROUND

On June 14, 2012, the Association filed a petition seeking to represent a unit of employees working at the College. A copy of the petition was sent to the County and the College on June 21, 2012 along with a notice directing that a response be served and filed with ten working days after receipt of the notice. On July 6, 2012, the County Attorney filed a response on behalf of the Joint Employer. In the response, the Joint Employer asserted that there is an insufficient community of interest among employees in the petitioned-for unit, which includes adjunct faculty and part-time employees. In addition, the Joint Employer objected to inclusion of casual employees in the proposed unit.

Thereafter, the Administrative Law Judge (ALJ) assigned to conduct the investigation into the question of representation held a conference call with the parties on July 27, 2012,
seeking, *inter alia*, to resolve the issues related to unit composition raised by the Joint Employer. Following the conference call, the ALJ sent a confirming letter to the Association's representative and the County Attorney, representing the Joint Employer, scheduling a second conference call on August 23, 2012, for the purpose of resolving the remaining differences over unit composition with particular emphasis on the Joint Employer's concerns over inclusion of casual employees. In addition, the letter confirmed that the parties would meet in advance of the next conference call for the purpose of seeking to reach agreement over unit composition.¹

Following the August 23, 2012 conference call, the ALJ sent a letter to the Association's representative and the County Attorney confirming that a third conference call would take place on September 21, 2012. The letter further stated:

The purpose of the conference call is to continue discussions regarding the above-referenced matter and work on agreeing to a unit that is mutually acceptable to both union and employer. Thus far, the union and employer have agreed to several exclusions and now will be focusing on specific job titles/positions that will be included. Finally, the union and employer will work on revising the list of employees with job titles/positions that will be included in the unit.²

After the third conference call, the ALJ faxed a proposed consent agreement

¹ In opposition to the Joint Employer's objections, the Association has submitted emails between the parties dated August 6 and 7, 2012 regarding a scheduled meeting on August 20, 2012, seeking to reach agreement concerning the appropriate unit in advance of the August 23, 2012 conference call with the ALJ. See, Response to Exceptions, Exhibit D.

² Attached to the Association's Response to Exceptions are emails between the parties dated September 18, 19 and 20, 2012 demonstrating an electronic dialogue between the parties aimed at reaching a final agreement on unit composition. See, Response to Exceptions, Exhibits F, G, H, I and J.
to the Association's representative and the County Attorney that included a defined unit of employees working at the College. The defined unit was substantially modified from the proposed unit set forth in the Association's petition. Due to a ministerial error, however, the draft agreement identified the College, rather than the Joint Employer, as the employer. Nevertheless, it is not disputed that the Joint Employer is the public employer under the Act for the employees in the stipulated unit. The representative for each party signed the consent agreement and faxed it back to the ALJ.

On September 25, 2012, the Director approved the consent agreement and sent the parties his determination that, pursuant to §201.9(g)(1) of the Rules, the Association satisfied the requirements for a certification without an election.

DISCUSSION

Pursuant to §201.9(a)(2) of the Rules, a hearing is not required during the course of an investigation into a question of representation. As a result, an investigation can be completed without holding an evidentiary hearing. Under the Rule, whether a hearing is necessary is left to the discretion of the Director.

In the present case, the ALJ conducted three conference calls during the investigation over the appropriate composition of the unit. The record demonstrates that as the result of those calls, along with the direct meetings and communications between the parties, the parties were able to amicably resolve their differences concerning unit

3 State of New York (State University of New York, Stony Brook), 10 PERB ¶3081(1977); City of Amsterdam, 13 PERB ¶3083 (1980).
The steady progress made by the parties is demonstrated by the ALJ’s confirming letters, the emails between the parties, and the terms of the signed consent agreement. Contrary to the Joint Employer’s argument, we find no evidence that the County Attorney was compelled or coerced by the ALJ into signing the consent agreement without consulting with the College President. In fact, the signed agreement was returned by the County Attorney without written objection.

The statutory criteria for determining unit composition are those set forth in §207.1 of the Act. Although the Joint Employer now claims that the unit defined in the consent agreement is inappropriate, it fails to articulate any specific facts to support that argument. A casual employee is, by definition, not a public employee under the Act. Nevertheless, the Joint Employer has not identified a single individual in the stipulated unit who it claims meets the definition of a casual employee.

Therefore, we deny the Joint Employer’s objections centered upon the fact that a hearing was not conducted during the investigation, and its challenge to the appropriateness of the stipulated unit.

Finally, we reject the assertion that the Joint Employer did not consent to the proposed unit because the County did not execute the consent agreement, and that the County Attorney did not consult with the College’s President before signing the consent agreement. The Joint Employer is a single employer under the Act, comprised of the County and College. The County Attorney filed a response and acted on behalf of the Joint

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4 See, State of New York, 5 PERB ¶3022 (1972).
Employer throughout the processing of the petition. The mere existence of a ministerial error in the consent agreement does not demonstrate that the County Attorney was not acting on behalf of the Joint Employer when he executed the consent agreement. The purported lack of consultation by the County Attorney with the College President before signing the agreement might raise a legal ethics issue but such issues are beyond our jurisdiction.\(^5\)

Based upon our review of the record, it appears 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 Mohawk Valley Community College Adjunct and Part-Time Association, NYSUT, AFT, AFL-CIO has been designated and selected by a majority of the employees of the above-referenced Joint Employer in the following unit as their exclusive representative for the purpose of collective negotiations and the settlement of grievances:

Included: Adjunct, Administrative Support Specialist, Advisor, Assistant Coach, CCED Coordinator, Coach, Communications Specialist, Ex-Offender Program Counselor, Fitness Center Coach, Fitness Center Staff, Fitness Center Supervisor, Lab Assistant, Librarian, Licensed Mental Health Counselor, Lifeguard, Part Time Professional, Part Time Professional Child Care, Part Time Professional Media, Part Time Program Specialist--CCED, Part Time Teacher, Professional Tutor, Program Specialist, Student Service Specialist, Technical Assistant, Technical Assistant --Events, Technical Assistant--Video, Technical Assistant--Tool Club and Tutor.

\(^5\) Board of Educ of the City Sch Dist of the City of Buffalo, 24 PERB ¶3033 (1991).
Excluded: All other employees.

FURTHER, IT IS ORDERED that Mohawk Valley Community College and County of Oneida, as a Joint Employer, shall negotiate collectively with the Mohawk Valley Community College Adjunct and Part-Time Association, NYSUT, AFT, 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: November 14, 2012
Albany, New York

Jerome Lefkowitz, Chairperson
Sheila S. Cole, Member
In the Matter of
FEDERATION OF CATHOLIC TEACHERS OFFICE
& PROFESSIONAL EMPLOYEES, OPEIU LOCAL 153

Petitioner,

- and -

CASE NO. CE-6017
CASE NO. CE-6083

MONSIGNOR FARRELL HIGH SCHOOL,

Petitioner-Employer,

-and-

LAY FACULTY ASSOCIATION, LOCAL 255, LIUNA,

Intervenor.

COHEN, LEDER, MONTALBANO & GROSSMAN LLP (BRUCE D. LEDER, ESQ, of counsel), for Petitioner Federation of Catholic Teachers Office & Professional Employees, OPEIU Local 153

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP (JAMES R. HAYS, ESQ of counsel), for Petitioner-Employer Monsignor Farrell High School

ARCHER, BYINGTON, GELNNON & LEVINE LLP (JAMES W. VERSOCKI, ESQ, of counsel) for Intervenor Lay Faculty Association, Local 255; LIUNA

BOARD DECISION AND ORDER

These cases come to the Board on a motion, pursuant to 12 NYCRR §253.6, by the Lay Faculty Association, Local 255, LIUNA (Association) seeking review of a letter decision by an Administrative Law Judge (ALJ) concerning a petition filed by Federation of Catholic Teachers Office & Professional Employees, OPEIU Local 153 (Federation) (CE-6017) and a petition filed by Monsignor Farrell High School (High School) (CE-6083) regarding representation of employees at the High School pursuant to §705 of the State Employment Relations Act (SERA).
In its motion, the Association seeks reversal of the letter decision informing the parties that the Director of Public Employment Practices and Representation (Director) had determined that the Federation's petition should be processed over the Association's objections and that an election be scheduled concerning the two pending representation petitions. In addition, the Association seeks an order dismissing both petitions. The Federation opposes the Association's motion; the High School has not responded to the motion.

Following our review of the arguments made by the Association and Federation, we deny the Association's motion.

FACTS

Prior to September 1, 2009, the employer of the High School employees was the Catholic High School Association of New York (Catholic High School Association). The High School Employees were part of a bargaining unit consisting of employees from ten parochial high schools, which comprised the Catholic High School Association. In January 2009, however, the Board of Trustees of the Catholic High School Association approved a resolution to cease operating the ten high schools at the end of the 2008-2009 academic year, and that each high school become a separate education corporation.

On or about June 30, 2009, the Federation filed a representation petition, supported by a showing of interest, seeking to represent lay faculty employees at the High School.\(^1\) It is undisputed that the Association is the incumbent collective

\(^1\) The Federation's petition was filed with the State Employment Relations Board (SERB). The processing of the petition was held in abeyance based upon the pendency of related unfair labor practice charges, which were subsequently resolved. Effective July 22, 2010, SERB was abolished and the responsibilities of administering
bargaining representative of the at-issue employees at the High School, and was their representative at the time the Federation filed its petition.

On September 1, 2009, the Catholic High School Association dissolved, at which point the High School became the employer of the at-issue employees. On or about September 28, 2011, the High School filed its petition seeking to decertify the Association. The three parties have agreed that the following unit of High School employees is appropriate: all full-time and part-time lay faculty including librarians and guidance counselors, and excluding religious, supervisory and management employees.

On June 22, 2012, the ALJ conducted a conference concerning the two pending petitions. During the conference, the parties stipulated to certain undisputed facts but the Association objected to entering into a consent agreement for the conduct of an election. As a result of the conference, the ALJ granted the parties an opportunity to brief the issues of whether the Federation's petition should be processed and whether the Federation should be permitted to intervene in the representation case filed by the High School. After consideration of the submissions made by the Federation and Association, the ALJ issued his letter decision, dated August 2, 2012. In the letter decision, the ALJ stated that the Director of Public Employment Practices and Representation (Director) had determined that an election should be conducted. The decision also stated that the Director had concluded that the ballot should permit eligible voters to select the Federation, the Association or no representation. In addition, the decision stated that the Director had rejected the Federation's argument that the Association's petition should not be processed.
DISCUSSION

Under SERA, the filing of a representation petition will trigger an agency investigation to determine various issues including whether there is a question or controversy concerning the representation of the at-issue employees, what is the appropriate unit for purposes of collective bargaining, and what procedure should be utilized to determine employee choice.\(^2\)

The conduct of agency investigations into questions of representation under our public sector and private sector jurisdictions is delegated to the Director, who functions on behalf of the Board, and the Director is authorized to assign an ALJ to conduct the investigation.\(^3\) If it is determined during an investigation that the applicable facts are not in dispute, a formal investigatory hearing is unnecessary.

In the present case, the relevant facts and the appropriate unit for collective bargaining were resolved at the June 22, 2011 conference conducted by the assigned ALJ. Therefore, an investigatory hearing was unnecessary. At that time, however, the Association refused to enter into a consent agreement regarding the conduct of an election.

Upon our review of the Association’s motion and the Federation’s response, we deny the motion because the Association has failed to demonstrate extraordinary circumstances warranting the grant of interlocutory relief from the Director’s decision to conduct an election in these cases.

In addition, we find no merit to the Association’s argument that the Federation’s petition should be dismissed as defective because the High School was not the

\(^2\) Lab Law §705; 12 NYCRR §§251.15-18.
employer and the appropriate unit did not exist at the time the Federation filed its petition. It is undisputed that the High School became the successor employer for the at-issue employees on September 1, 2009, and the Federation's pending petition sought to represent a unit composed of those employees.

Questions related to identification of the employer of the at-issue employees, and the definition of the appropriate unit, can arise during the course of a representation investigation. Therefore, the mere fact that the High School succeeded the Catholic High School Association as employer during the pendency of the petition, and the definition of the appropriate unit was not determined until after the petition was filed, are not sufficient bases for the dismissal of the Federation's petition.

In rejecting the Association's arguments, we note that allegations of a petition under SERA are not subject to strict scrutiny, and we will not dismiss one because a petitioner fails to allege all relevant information. Furthermore, unlike our Rules of Procedure (Rules), the current procedural rules applicable to petitions under SERA do not include filing timeframes.

Finally, we find no merit to the Association's assertion that the High School's petition should be dismissed.

Based upon the foregoing, we deny the Association's motion, and conclude that the following unit is the most appropriate:

Included: All full-time and part-time lay faculty including librarians and guidance counselors.

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4 See, Roman Catholic Diocese of Brooklyn, 49 SERB 184 (1995).
6 12 NYCRR §251.4.
7 Compare, Rules 8201.3 with 12 NYCRR §251.4.
Excluded: Religious, supervisory and management employees.

IT IS, THEREFORE, ORDERED that the cases are hereby remanded to the Director for further processing of the representation petitions consistent with our decision.

DATED: November 14, 2012
Albany, New York

Jerome Lefkowitz, Chairperson

Sheila S. Cole, Member
This case comes to the Board on exceptions filed by the Town of Stony Point (Town) to a decision of an Administrative Law Judge (ALJ) on an improper practice charge filed by the Stony Point Policemen's Benevolent Association, Inc. (Association), finding that the Town violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when it unilaterally reassigned to nonunit employees security duties at the Town Court that had been exclusively performed by Association unit members.\(^1\)

In its exceptions, the Town asserts that the ALJ erred in concluding that the parties' past practice demonstrated a discernible boundary between the at-issue work and other similar duties performed by nonunit personnel, and in failing to apply the

\(^1\) 45 PERB ¶4565 (2012).
balancing test under *Niagara Frontier Transportation Authority*\(^2\) (Niagara Frontier) because there has been significant change in job qualifications for the at-issue duties. The Association supports the ALJ's decision.

Based upon our review of the record, we affirm the ALJ's decision, in part, and reverse it in part.

**FACTS**

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

The Association represents a unit comprised of full-time Town police officers. Beginning in February 2006, Association unit employees were assigned to provide security duties during the morning and afternoon sessions of the Town’s Justice Court, when criminal and vehicle and traffic cases are generally heard. Security duties for Justice Court evening sessions, however, were provided by the Town’s part-time police officers, who are not members of the bargaining unit.

In January 2009, the Town reassigned security duties to nonunit Town court security officers for all three sessions of Justice Court. The minimum qualifications for the court security officer position are four years of high school, and a pistol permit. In addition, prior law enforcement experience is desirable. Court security officers are not sworn police officers. The duties reassigned to court security officers during the morning and afternoon court sessions are identical to those that were exclusively performed by Association unit members between February 2006 and January 2009.

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\(^2\) 18 PERB ¶3083 (1985).
DISCUSSION

Under the framework established in *Niagara Frontier*, there are two essential questions that must be determined when deciding whether the transfer of unit work violates §209-a.1(d) of the Act: a) was the at-issue work exclusively performed by unit employees for a sufficient period of time to have become a binding past practice; and b) was the work assigned to non-unit personnel substantially similar to that exclusive unit work. If both these questions are answered in the affirmative, we will find a violation of §209-a.1(d) of the Act unless there has been a significant change in job qualifications. Absent such a change, the loss of the at-issue work to the unit is a sufficient detriment for the finding of a violation. When there has been a significant change in job qualifications, however, we must balance the respective interests of the public employer and the unit employees to determine whether §209-a.1(d) of the Act has been violated.³

In his decision, the ALJ concluded that a discernible boundary exists between the security duties performed by Association unit members during the morning and afternoon court sessions and the similar duties of nonunit employees during the evening sessions. In reaching his conclusion, the ALJ correctly applied the past practice analysis set forth in *Manhasset Union Free School District*.⁴ Among the criteria utilized in determining whether an enforceable past practice has established a discernible boundary are the nature and frequency of the work, the geographic location of the work, the employer’s explicit or implicit rationale for the practice, and other facts establishing

³ *Town of Riverhead*, 42 PERB ¶3032 (2009).

that the at-issue work has been treated distinct from other work performed by nonunit personnel. Based upon our review of the record, we affirm that portion of the ALJ’s decision finding that the parties’ past practice established a discernible boundary concerning the at-issue unit work.

We reach a different conclusion, however, with respect to the ALJ’s failure to apply the balancing test set forth in *Niagara Frontier* in light of the undisputed fact that the at-issue work was transferred from police officers to civilians. Under our precedent, it is well-settled that an employer’s civilianization of uniformed services constitutes a *de facto* change in job qualifications.

In *Fairview Fire District*, we rejected the argument by the charging party that a respondent in a transfer of unit work case must affirmatively plead and prove a change in job qualifications. Nevertheless, the ALJ in the present case chose to avoid determining the issue of a change in job qualifications based on the procedural ground that the Town failed to plead it as an affirmative defense in its answer. Simply put, it was an error under *Fairview Fire District* for the ALJ to fail to determine the issue based upon the Town’s pleading. Furthermore, we find it unnecessary to reexamine the question of whether a change in job qualifications should constitute an affirmative defense. In the present case, the Association’s charge and the evidence demonstrate

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6 Manhasset Union Free Sch Dist, supra, note 2.


7 Supra, note 6.
that both the Association and the Town knew that the at-issue work was transferred from police officers to civilians.⁸

Based upon the undisputed fact that the transfer of unit work went from police officers to civilians, there has been a change in qualifications, which requires the application of the balancing test under Niagara Frontier. We conclude, however, that a remand to the ALJ is unnecessary because both parties were provided with a full and fair opportunity to present evidence and neither party requests a remand to present additional evidence.

The record demonstrates that the only loss to the Association and its members resulting from the Town's unilateral action is the loss of the at-issue work. There is no evidence that the transfer caused the Association to lose members or that Association unit employees were terminated or denied benefits. As a result, we conclude that the Town's interests associated with the civilianization of the at-issue work outweigh the interests of the unit employees, and therefore find that the Town did not violate §209-a.1(d) of the Act.

IT IS, THEREFORE, ORDERED that the Town's exceptions are granted, in part, and the charge is dismissed.

DATED: November 14, 2012
Albany, New York

Jerome Lefkowitz, Chairperson

Sheila S. Cole, Member

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⁸ See, NYCTA, 20 PERB ¶3037 (1987), confirmed sub nom., NYCTA v New York State Pub Empl Rel Bd, 147 AD2d 574, 22 PERB ¶7001 (2d Dept 1989), mot to amend granted, 156 AD2d 689, 23 PERB ¶7002 (2d Dept 1989).
In the Matter of

TEAMSTERS LOCAL 529, INTERNATIONAL BROTHERHOOD OF TEAMSTERS,

Charging Party, CASE NO. U-29869

- and -

TOWN OF TUSCARORA,

Respondent.

JAMES N. McCANLEY, ESQ., for Charging Party

SMITH, SOVIK, KENDRICK & SUGNET, P.C. (PATRICK B. SARDINO of counsel), for Respondent

BOARD DECISION AND ORDER

This case comes to the Board on exceptions filed by Teamsters Local 529, International Brotherhood of Teamsters (IBT) to a decision of an Administrative Law Judge (ALJ) dismissing an improper practice charge alleging that the Town of Tuscarora (Town) violated §§209-a.1(a) and (c) of the Public Employees' Fair Employment Act (Act) when it abolished the Motor Equipment Operator (MEO) position held by Gerald Eccleston, Sr. (Eccleston) because he had engaged in protected activity under the Act.1 In the decision, the ALJ granted the Town's motion to dismiss after IBT rested its case, concluding that IBT failed to present sufficient evidence to establish a \textit{prima facie} case of improper motivation under §§209-a.1(a) and (c) of the Act.

EXCEPTIONS

As part of its exceptions, IBT contends that the ALJ erred by failing to grant all

1 45 PERB ¶4540 (2012).
reasonable inferences to the evidence it presented, and that the ALJ misconstrued or ignored circumstantial evidence in the record. It also objects to the ALJ's reliance upon findings made in a report and recommendation of a Civil Service Law §75 hearing officer concerning misconduct charges against Eccleston. Finally, IBT claims that the ALJ erred by refusing IBT's request to treat Town Supervisor Robert V. Nichols (Nichols) as an adverse witness, and crediting a portion of his testimony. The Town supports the ALJ's decision.

Based upon our review of the record and consideration of the parties' arguments, we reverse the ALJ's decision to dismiss the charge, and remand the case for further processing consistent with our decision.

FACTS

When considering IBT's exceptions challenging the ALJ's grant of the Town's motion to dismiss at the close of IBT's case, we must grant all reasonable inferences to the evidence presented. The following recitation of facts is based upon our de novo application of that liberal standard.

IBT is the recognized exclusive representative for all full-time Town MEO employees. The Town and IBT are parties to a collectively negotiated agreement (agreement), which includes an article concerning discipline and a separate article setting forth a grievance procedure ending in binding arbitration. Under the disciplinary article, an MEO employed after September 1, 1996 who has satisfied probation, is entitled to Civil Service Law §75 rights concerning discharge and/or suspension, and it

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2 Board of Educ of the City Sch Dist of the City of New York (Ruiz), 43 PERB ¶3022 (2010); County of Nassau (Police Dept), 17 PERB ¶3013 (1984).

3 InExhibit 2 §102
states that any "[d]isciplinary action, including discharge or suspension, shall be imposed only for just cause."

Eccleston began working as a full-time Town MEO in 2002; he became an IBT shop steward shortly thereafter. In late August 2008, Town representatives met with Eccleston and IBT representatives about Eccleston's possible misconduct concerning the delivery of gravel to his property in a Town vehicle for alleged personal use. Although Eccleston and IBT believed the Town's concerns were fully addressed at that meeting, Eccleston was served with Civil Service Law §75 disciplinary charges in early October 2008 seeking his termination and suspending him without pay. The disciplinary charges were issued by the Highway Superintendent.

Eccleston was represented by IBT at the Civil Service Law §75 disciplinary hearing, which was conducted by a Town appointed hearing officer. The Town Highway Superintendent testified against Eccleston concerning the merits of the disciplinary charges.

Following the hearing, the hearing officer issued a report and recommendation dated January 30, 2009, finding Eccleston guilty of misconduct and recommending a sixty-day suspension without pay. In the report and recommendation, the hearing officer stated that the record before him demonstrated that the Highway Superintendent considered Eccleston to be a very good employee.

On February 12, 2009, the Highway Superintendent issued a letter terminating Eccleston for the misconduct. In response, IBT processed a February 20, 2009 grievance challenging the discharge under the parties' agreement. After the Town held a grievance hearing on April 24, 2009, at which Eccleston was represented by IBT, Town Supervisor Nichols issued a letter dated May 6, 2009, which stated that the
contractual grievance procedure is inapplicable for reviewing disciplinary action, and stating that the proper procedure for review is an Article 78 proceeding.

Thereafter, IBT served and filed a demand for arbitration with respect to the grievance, and it provided representation to Eccleston in a Civil Practice Law and Rules (CPLR) Article 78 proceeding challenging his termination, which the Town opposed. The Town also commenced a CPLR Article 75 proceeding seeking to stay the arbitration of the disciplinary grievance, and IBT cross-petitioned for an order compelling arbitration pursuant to CPLR Article 75. The special proceedings were consolidated for argument and decision by the court.

In September 2009, Supervisor Nichols began working on the tentative 2010 annual budget and submitted it to the Town Clerk on or before September 30, 2009. In the prior three calendar years, the Town adopted budgets that were generally consistent with the tentative budgets prepared by Nichols. For 2010, Supervisor Nichols proposed the following increases in highway personal service appropriations from the 2009 adopted budget: $2,300 in personal services for general repairs; $700 in miscellaneous personal services; and $1,500 in personal services for snow removal. The tentative budget estimated that the Town's annual highway revenue would be $522,380, which was premised upon expected increases from real property taxes and state aid.

On September 30, 2009, the court issued its written decision and order granting

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4 Transcript, pp. 103-05.

5 Transcript, p. 127.
the Article 78 petition, and annulling the discharge, finding that the Town deprived Eccleston of due process of law because the Highway Superintendent issued the disciplinary charges, testified at the disciplinary hearing, and then made the decision to terminate. The court remitted the matter to the Town for the conduct of a de novo determination by a disinterested person. In addition, the court denied the Town's Article 75 petition and granted IBT's cross-petition to compel arbitration of the grievance, concluding that the parties' agreement did not limit the remedies for challenging a disciplinary action.

The Town Board met on October 14, 2009 and made adjustments in the amounts of the tentative 2010 budget. On the same day, Nichols issued a letter terminating Eccleston, effective February 12, 2009. Nichols' letter is virtually identical to the Highway Superintendent's original February 12, 2009 termination letter.

At a budget meeting on October 19, 2009, the Town Board adopted a preliminary budget reducing the proposed highway appropriations for personal services for general repairs from $74,000 to $64,800, and reduced the appropriations for personal services for snow removal from $47,200 to $43,385. At the same time, the preliminary budget increased miscellaneous personal services from $4,800 to $5,500. As a Town Board member, Nichols voted in favor of adopting the preliminary budget.

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6 Transcript, pp. 106-07.
7 Charging Party Exhibits 3 and 6.
8 Joint Exhibit 11.
Also present at the meeting were the Highway Superintendent and the Deputy Highway Superintendent. 9

A public hearing regarding the preliminary budget was held during a regular Town Board meeting on November 5, 2009. At the beginning of the hearing, Nichols stated that the preliminary budget constituted a 1.3% increase. At the end of the hearing, the Town Board voted 3-2 to pass the 2010 budget, with Nichols in the majority. Although the minutes of that meeting reveal Town Board discussions regarding the budget and certain highway department issues, the minutes do not reflect a decision to abolish Eccleston’s MEO position. 10 On November 15, 2009, however, Eccleston learned from the Highway Superintendent-elect that the Town Board had decided to abolish his MEO position, effective January 1, 2010. The Town did not directly inform IBT of its decision to abolish the position until December 2009. 11 At its December 31, 2009 meeting, the Town Board transferred $40,000 from one Highway Department account to another.

At the time of the decision to abolish Eccleston’s position, Nichols and the Town Board were aware of IBT’s intent to proceed to arbitration regarding the grievance over Eccleston’s discipline. 12

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9 Joint Exhibit 13.

10 Joint Exhibit 13. Similarly, the minutes of the Town Board meetings on December 14 and December 31, 2009 do not reference a decision to abolish the MEO position. Joint Exhibit 13.

11 Transcript, pp. 94-95; Charging Party Exhibit 17.

12 Transcript, p. 97.
Despite the court's annulment of Eccleston's first termination, the Town did not reimburse Eccleston for back wages for the period between the February 12, 2009 and October 14, 2009 letters of termination. Furthermore, the record reveals that following the abolition of Eccleston's MEO position, the Town continued to employ nonunit employees to perform the same or similar duties previously performed by Eccleston.\textsuperscript{13}

The arbitration concerning the disciplinary grievance was heard on March 26, 2010. On June 10, 2010, the arbitrator issued his decision and award concluding that the Town lacked just cause to terminate, and imposed a one-week suspension without pay. In addition, the arbitrator directed the Town to make Eccleston whole for lost salary with interest and contractual benefits for the period October 6, 2008 through December 31, 2009. Finally, the arbitrator ordered:

\begin{quote}
The Town is directed to offer the Grievant reinstatement to his MEO job should that position be restored by PERB, a court, or the Town voluntarily. In that event the back pay and benefits due the Grievant will extend with interest from December 31, 2009 to the date of the Town’s reinstatement offer to the Grievant.\textsuperscript{14}
\end{quote}

Following the arbitral decision, the Town has not offered reemployment to Eccleston but it did hire a nonunit employee to work a full schedule performing the duties previously performed by Eccleston.

**DISCUSSION**

We begin with three procedural issues raised in IBT’s exceptions: the ALJ’s reliance upon findings of fact made by the Civil Service Law §75 hearing officer; the ALJ’s refusal to declare Nichols as an adverse witness; and the ALJ’s crediting a portion of Nichols’

\textsuperscript{13} Joint Exhibits 5, 6 and 17; Transcript, pp. 54-57.

\textsuperscript{14} Joint Exhibit 1.
testimony.

In State of New York (Division of Parole),\textsuperscript{15} we recognized that when the underlying facts in a disciplinary arbitration and a related improper practice charge are the same, it is appropriate to defer to the factual findings previously determined by the disciplinary arbitrator. We noted, however, that §205.5(d) of the Act prohibits a similar deference to findings made by a disciplinary hearing officer selected by the employer pursuant to Civil Service Law §75.\textsuperscript{16}

In light of this statutory restriction, we find that the ALJ erred by deferring to the factual findings and conclusions made in the report and recommendation of the Civil Service Law §75 hearing officer even though the document was introduced by IBT.\textsuperscript{17} Instead, the ALJ should have deferred to the findings of the neutral disciplinary arbitrator concerning the factual predicate for the disciplinary charges, the scope of the misconduct and the appropriate disciplinary penalty.\textsuperscript{18}

We also find merit to IBT's challenge to the ALJ's denial of the request for Nichols to be deemed an adverse witness. When a party calls an adverse party to testify, hostility is assumed, and leading questions are therefore permissible.\textsuperscript{19} In the present case, the ALJ

\textsuperscript{15} 41 PERB ¶13033 (2008).

\textsuperscript{16} See also, Unified Court System (McConnell), 41 PERB ¶13038 (2008).

\textsuperscript{17} Charging Party Exhibit 2. Similarly, we reject IBT's effort to rely upon other aspects of the report and recommendation to support its exceptions. See, IBT Brief in Support of Exceptions, p. 15.

\textsuperscript{18} Joint Exhibit 1.

\textsuperscript{19} Board of Educ of the City Sch Dist of the City of New York (Ruiz), supra, note 2. See also, Becker v Koch, 104 NY 394 (1887); Arlene W v Robert D, 36 AD2d 455 (4th Dept 1971); Jordan v Parrinello, 144 AD2d 540 (2d Dept 1988); Fox v Tedesco, 15 AD3d 538 (2d Dept 2005).
refused to declare Nichols an adverse witness until she made a factual determination that he was hostile while testifying.\textsuperscript{20} While that ruling was in error based upon Nichols's status as Town Supervisor, the record reveals that the ALJ gave IBT wide latitude in questioning Nichols, including the use of leading questions. As a result, we find the ALJ's ruling to be harmless error.

We are not persuaded, however, by IBT's exception challenging the ALJ's crediting of Nichols's testimony concerning his lack of knowledge about an obligation by the Town to pay back wages to Eccleston for the period between February 12, 2009 and October 14, 2009. Substantial deference is generally due to an ALJ's credibility determination, and we find no objective evidence in the record to disturb the ALJ's credibility finding.\textsuperscript{21}

We next turn to IBT's exceptions that claim that the ALJ failed to grant all reasonable inferences to its evidence and misconstrued or ignored circumstantial evidence in the record.

In \textit{County of Nassau (Police Department)}\textsuperscript{22} we articulated the applicable standard when an ALJ is determining a motion to dismiss an improper proper practice at the conclusion of a charging party's case:

\begin{quote}
In our view, a motion made to a hearing officer to dismiss a charge after the presentation of charging party’s evidence should not be granted without careful deliberation. In considering such a motion, a hearing officer must assume the truth of all of charging party’s evidence and give the
\end{quote}

\textsuperscript{20} Transcript, pp. 102-03. The ruling is reaffirmed in the ALJ's decision. \textit{Supra}, note 1, 45 PERB ¶4540 at 4607, n.6.

\textsuperscript{21} \textit{Dansville Support Staff Assn (Johnson)}, 45 PERB ¶3012 (2012).

\textsuperscript{22} \textit{Supra}, note 2.
charging party the benefit of all reasonable inferences that could be drawn from those assumed facts. We would reverse a hearing officer's decision to grant such a motion unless we could conclude that the evidence produced by the charging party, including all reasonable inferences therefrom, is plainly insufficient even in the absence of any rebuttal by the respondent to warrant a finding that the charge should be sustained.\(^\text{23}\)

In applying this standard, an ALJ is required to accept the charging party's evidence as true, and give it the benefit of every reasonable inference that can reasonably be drawn from that evidence.\(^\text{24}\)

To demonstrate that the Town violated §§209-a.1(a) and (c) of the Act, IBT has the burden of demonstrating by a preponderance of evidence that: a) Eccleston engaged in protected activity under the Act; b) such activity was known to the person or persons taking the employment action; and c) the employment action would not have been taken "but for" the protected activity.\(^\text{25}\)

As the ALJ correctly concluded, IBT presented sufficient evidence demonstrating the first two elements of a \textit{prima facie} case of improper motivation under the Act.

Eccleston engaged in protected activity under the Act known to the Town when IBT: vigorously represented him during the Civil Service Law §75 hearing; processed the

\(^{23}\) \textit{Supra}, note 2, 17 PERB ¶3013 at 3029-30.

\(^{24}\) \textit{Board of Educ of the City Sch Dist of the City of New York (Baez)}, 35 PERB ¶3044 (2002); \textit{Bd of Educ of the City Sch Dist of the City of New York (Freedman)}, 34 PERB ¶3036 (2001).

\(^{25}\) \textit{United Fedn of Teachers, Local 2, AFT, AFL-CIO (Jenkins)}, 41 PERB ¶3007 (2008), confirmed sub nom., Jenkins v New York State Pub Empl Rel Bd, 41 PERB ¶7007 (Sup Ct New York County 2008) affd, 67 AD3d 567, 42 PERB ¶7008 (1\textsuperscript{st} Dept 2009), lv denied, 43 PERB ¶7003 (2010); \textit{State of New York (Division of Parole)}, 41 PERB ¶3033 (2008); \textit{County of Wyoming}, 34 PERB ¶3042 (2001); \textit{Stockbridge Valley Cent Sch Dist}, 26 PERB ¶3007 (1993); \textit{County of Orleans}, 25 PERB ¶3010 (1992); \textit{Town of Independence}, 23 PERB ¶3020 (1990); \textit{City of Salamanca}, 18 PERB ¶3012 (1985).
disciplinary grievance; and prosecuted the court litigation concerning the discharge and the arbitrability of the related grievance.

Following our review of the record, however, we reject the ALJ's conclusion that IBT failed to present sufficient evidence to satisfy the third element of a *prima facie* case because the ALJ failed to grant all reasonable inferences to IBT's evidence. For example, the ALJ drew a negative inference against IBT for not questioning Nichols concerning his position on the changes to the tentative budget, concluded that the timing of the decision to abolish was not significant and found "nothing improper" with the Town opposing the arbitrability of the grievance. Therefore, the decision to dismiss the charge at the conclusion of IBT's case must be reversed.

As we recognized in *United Federation of Teachers (Jenkins)*, circumstantial evidence is a common evidentiary tool employed by charging parties to demonstrate improper motivation. This is due to the practical reality that improper motivation is rarely overt, and in "some cases, circumstantial evidence can be more persuasive than direct evidence in establishing unlawful motivation." To meet the relatively low initial threshold for demonstrating a *prima facie* case, a charging party's circumstantial evidence must be sufficient to give rise to an inference that improper motivation under the Act was a factor in respondent's actions. If the circumstantial evidence establishes that inference, the burden of persuasion shifts to the respondent to rebut the inference by presenting evidence demonstrating that its conduct was motivated by a legitimate

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26 *Supra* note 25.

27 *United Fedn of Teachers, Local 2, AFT, AFL-CIO (Jenkins)*, *supra* note 25, 41 PERB ¶3007 at 3043.
non-discriminatory business reason.\textsuperscript{28} At all times, however, the burden of proof remains with the charging party.

Among the most common forms of circumstantial evidence that can create an inference of improper motivation are the timing and context of an adverse employment action, disparate treatment, the resurrection of disciplinary allegations and the pretextual rationale given for the adverse employment action. Temporal proximity of an employer's action is highly probative in determining improper motivation because timing can imply causation.\textsuperscript{29} Similarly, disparate treatment, such as the failure of an employer to terminate a nonunit employee performing similar duties to those previously performed by a laid-off unit employee who engaged in protected activity, can suggest an improper motivation.\textsuperscript{30}

In the present case, the tentative budget prepared by Nichols before the court's decision did not call for the abolition of a position. Two weeks after that decision, however, Nichols issued his termination letter on the same day the Town Board began discussing that tentative budget. Five days later, Nichols voted in favor of a preliminary budget that included a downward adjustment in personal services but included a 1.3% net increase in the overall budget from the prior year. While personal services in other departments may have been lowered as well, the evidence reveals that Eccleston's position was the only position eliminated. Although Nichols testified that the decision to abolish the position was made by the Town Board, the minutes of the Board meetings

\textsuperscript{28} State of New York (Division of Parole), supra, note 15; State of New York (SUNY at Buffalo), 33 PERB ¶3020 (2000).

\textsuperscript{29} Board of Educ of the City Sch Dist of the City of New York (Ruiz), supra, note 2.

\textsuperscript{30} Flwood Union Free Sch Dist. 43 PERB ¶3012 (2010).
are silent concerning that decision, and we do not have any evidence before us explaining Nichols' rationale for supporting the changes contained in the adopted Town budget. Furthermore, there is no clear evidence in the record explaining the Town Board's December 31, 2009 decision to transfer $40,000 from one Highway Department account to another. Finally, the record contains evidence of disparate treatment based upon the Town's continued employment of nonunit employees performing the same or similar duties following abolition of Eccleston's position; along with the Town's decision to hire a nonunit employee instead of rehiring Eccleston following the arbitral decision and award. 31

In light of the liberal standard applicable in the current procedural context, we conclude that IBT has presented sufficient evidence to demonstrate a prima facie case of improper motivation under the Act based upon the timing of the Town's decision, the lack of evidence concerning the Town's decision to target Eccleston's position for abolition, the sudden transfer of Highway Department funds at the end of 2009, and the disparate treatment toward nonunit employees. Although the burden of proof of demonstrating a violation of §§209-a.1(a) and (c) remains with IBT upon remand, the burden of persuasion shifts to the Town to demonstrate a legitimate non-discriminatory business reason for abolition of the position.

Based upon the foregoing, we reverse the ALJ's decision to dismiss the charge at the conclusion of the IBT's case. Nothing in our decision, however, should be construed as constituting a ruling on the merits with respect to IBT's charge or as limiting the ALJ's discretion in developing a more complete record.

31 Supra, note 30.
IT IS, THEREFORE, ORDERED that IBT's charge is reinstated and the case remanded to the ALJ to process the charge consistent with our decision.

DATED: November 14, 2012
Albany, New York

[Signatures]
Jerome Lefkowitz, Chairperson
Sheila S. Cole, Member
In the Matter of

STATEN ISLAND RAPID TRANSIT
OPERATING AUTHORITY,

Charging Party,

- and -

LOCAL 1440, UNITED TRANSPORTATION UNION,
AFL-CIO,

Respondent.

PROSKAUER ROSE, LLP (NEIL ABRAMSON and DANIEL ALTCHEK of counsel), for Charging Party

DAVIS & FERBER, LLP (DAVID A. DAVIS and LLOYD M. BERKO of counsel), for Respondent

BOARD DECISION AND ORDER

This matter comes to the Board on exceptions filed by Local 1440, United Transportation Union, AFL-CIO (Local 1440) to a decision of an Administrative Law Judge (ALJ) on an improper practice charge filed by the Staten Island Rapid Transit Operating Authority (SIRTOA) alleging, inter alia, that Local 1440 violated §209-a.2(b) by submitting its Pension/Retirement proposal to interest arbitration. In the decision, the ALJ concluded that the proposal is nonmandatory and directed Local 1440 to withdraw it from interest arbitration.1 Prior to issuance of the ALJ's decision, the designated interest arbitration panel issued its decision and award, which rejected Local 1440's Pension/Retirement demand.2

1 45 PERB ¶4588 (2012).

Following the filing of the exceptions, Local 1440 and SIRTOA submitted a stipulation to the Board requesting modification of the ALJ’s decision, pursuant to §213.6(a) of our Rules of Procedure (Rules), by deleting that portion of the decision with respect to SIRTOA’s objection to the arbitrability of Local 1440’s Pension/Retirement proposal including the ALJ’s order that the demand be withdrawn. In addition, the parties jointly request that we approve SIRTOA’s request to withdraw that portion of its charge concerning Local 1440’s Pension/Retirement proposal pursuant to §204.1(d) of the Rules.

Based upon our consideration of the ALJ’s decision, and the terms of the parties’ stipulation, we grant the relief sought by the parties.

IT IS, THEREFORE, ORDERED that the ALJ’s decision is modified to delete that portion finding that Local 1440 violated §209-a.2(b) by submitting its Pension/Retirement proposal to interest arbitration and ordering that the demand be withdrawn.

IT IS FURTHER ORDERED, that SIRTOA’s request to withdraw its charge as it relates to Local 1440’s Pension/Retirement proposal is approved pursuant to §204.1(d) of the Rules.

DATED: November 14, 2012
Albany, New York

Jerome Lefkowitz, Chairperson

Sheila S. Cole, Member
State of New York
Public Employment Relations Board

In the Matter of

Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO, The Certified Union by Nassau Local 830,

-Charging Party,

-and-

County of Nassau,

-Respondent.

Case No. U-31022

Steven A. CRAIN and Daren J. RYLEWICZ, Co-Counsels (Steven A. CRAIN of counsel), for Charging Party

Daniel Schor, Esq, Nassau County Office of Labor Relations (Barbara Van Ripper of counsel), for Respondent

Board Decision and Order

This case comes to the Board on exceptions filed by the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO, the Certified Union by Nassau Local 830 (CSEA) to a decision of an Administrative Law Judge (ALJ) dismissing an improper practice charge alleging that the County of Nassau (County) violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when the County Executive refused to submit a signed County-CSEA memorandum of agreement (MOA) dated January 25, 2011, to the County Legislature for further action. At the hearing before the ALJ, the County rested without calling a witness.

1 45 DEPR 4578 (2012)
In his decision, the ALJ concluded that the County did not violate §209-a.1(d) of the Act because the County Executive believed that the County Legislature would not approve the MOA, and therefore, submission would have been a useless act.

In its exceptions, CSEA asserts that the ALJ erred in finding that the County Executive knew that the County Legislature would not, in fact, approve and ratify the MOA, and erred in concluding that the County did not violate §209-a.1(d) of the Act by failing to submit the MOA for ratification and approval. The County has not filed a response to the exceptions.

Based upon our review of CSEA's exceptions, we reverse the ALJ's decision and conclude that the County violated §209-a.1(d) of the Act.

FACTS

After good faith concessionary bargaining between CSEA and the County aimed at alleviating the County's current fiscal crisis, the parties entered into an MOA on January 25, 2011. Prior to signing the MOA, the County determined that its terms would result in net savings for the County of at least seventy million dollars. Although the MOA states that it was subject to "approval" by the County Legislature and "ratification" by the CSEA members in the unit, the record reveals that the parties agreed that the MOA would be submitted for CSEA ratification only after it was ratified and approved by the County Legislature.

Under the MOA, all newly hired CSEA unit employees would be subject to a new graded salary Plan D, resulting in their receiving a lower salary rate in the first nine steps than current unit employees would receive under the preexisting graded salary Plan C. The MOA also provided for an extension of the parties' collectively negotiated agreement for two additional years through December 31, 2017, and provided for 3.25%
salary increase for all employees in graded salary plans effective January 1, 2016 and January 1, 2017. In addition, the MOA provides that the new graded salary Plan D for new employees can be nullified at CSEA's discretion if control over County finances is taken over by the Nassau Interim Finance Authority (NIFA) or any other entity.

Following signing of the MOA on January 25, 2011, the County Legislature Majority Leader told the CSEA Unit President that he would support the agreement. A press release issued by the County the same day, which declared the MOA to be an "historic agreement," generated negative press coverage.

On January 26, 2011, NIFA approved a resolution imposing a control period on the County, pursuant to Public Authorities Law §3669, based upon its determination that there is a substantial likelihood and imminence of the County incurring major operating funds deficit of one percent or more in the aggregate results of operations during its fiscal year assuming all revenues and expenditures are reported in accordance with generally accepted accounting principles.3

Less than a week after the MOA was signed, the County Executive and the Deputy County Executive told the CSEA Unit President that the MOA would not be submitted to the County Legislature because the County Legislature Majority Leader had withdrawn support for it due to media criticism. From his conversations with the County Executive and Deputy County Executive, the CSEA Local President understood that the MOA was not forwarded to the County Legislature for ratification and approval because the County Executive did not believe it would pass.

3 An Article 78 proceeding commenced by the County and the County Executive seeking vacatur of NIFA's imposition of a control period was dismissed. See, County of Nassau v Nassau County Interim Finance Auth, 33 Misc3d 227 (Sup Ct Nassau County 2011).
On March 24, 2011, NIFA issued a resolution imposing a wage freeze upon the County pursuant to Public Authorities Law §3669.3.

DISCUSSION

Under §§201.12 and 204-a.1 of the Act, legislative approval of an agreement is required concerning terms that require statutory amendment or additional funding. In addition, when parties have agreed that a tentative agreement is to be ratified, each side is affirmatively obligated to present it to their ratifying entity and to support its approval.

In the present case, the parties agreed that the MOA would be submitted to the County Legislature for ratification and approval. The failure of the County Executive to submit the MOA for ratification or approval constitute violations of §209-a.1(d) of the Act. The fact that the County Executive may have believed that the agreement would not be legislatively ratified and/or approved does not excuse his legal obligation under the Act to submit and support it before the County Legislature.

Based upon the foregoing, CSEA’s exceptions are granted, and the ALJ’s decision is reversed. Nothing in our decision, however, shall be construed as limiting or affecting the powers, authority and duties vested with NIFA under the Nassau County Interim Finance Authority Act. While the bilateralism central to collective negotiations under the Act can lead to voluntary terms to help stem an employer’s fiscal problems, NIFA is granted certain powers under Public Authorities Law §§3669.2, 3 and 4 as the result of its imposition of a control period.

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4 See, Board of Educ for the City Sch Dist of Buffalo v Buffalo Teachers Fedn, Inc, 89 NY2d 370, 29 PERB ¶7506 (1996).

5 Union Springs Cent Sch Teachers’ Assn, 6 PERB ¶3074 (1973); City of Rochester, 7 PERB ¶3060 (1974).
THEREFORE, IT IS HEREBY ORDERED that the County:

1. Submit the January 25, 2011 County-CSEA memorandum of agreement to the County Legislature for its ratification and approval;

2. Sign and post the attached notice at all physical and electronic locations normally used for communication with unit employees.

DATED: November 14, 2012
Albany, New York

Jerome Lefkowitz, Chairperson

Sheila S. Cole, Member
NOTICE TO ALL EMPLOYEES

PURSUANT TO
THE DECISION AND ORDER OF THE

NEW YORK STATE
PUBLIC EMPLOYMENT RELATIONS BOARD

and in order to effectuate the policies of the

NEW YORK STATE
PUBLIC EMPLOYEES' FAIR EMPLOYMENT ACT

we hereby notify all employees of the County of Nassau, in the unit represented by that Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO, the Certified Union by Nassau Local 830, that the County will:

1. Submit the January 25, 2011 County-CSEA memorandum of agreement to the County Legislature for its ratification and approval.

Dated ............

By ........................................

On behalf of the County of Nassau

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.
This case comes to the Board on exceptions by the County of Monroe and the Sheriff of Monroe County (Joint Employer) to a decision of an Administrative Law Judge (ALJ) on an improper practice charge filed by the Monroe County Deputy Sheriffs' Association, Inc. (Association), finding that the Joint Employer violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when it unilaterally reassigned to nonunit employees security screening on the premises of the Monroe County Jail (Jail) and the Monroe County Correctional Facility (Correctional Facility) that had been exclusively performed by Association unit members.¹

In its exceptions, the Joint Employer asserts that the ALJ erred in defining the at-issue work, and in finding that the Association has exclusively performed that work. In

¹ 15 NFRR §4503 (2012)
addition, the Joint Employer contends that there has been a substantial change in job qualifications, and that the charge should have been dismissed as untimely. The Association supports the ALJ’s decision.

**FACTS**

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

The Association represents a bargaining unit composed of Deputy Sheriffs, Line Deputies and Sergeants working in the Jail located in the City of Rochester, and in the Correctional Facility, which is situated in the Town of Henrietta.

Prior to April 2011, Association unit employees assigned to the central control in the Jail’s lobby were solely responsible for visual and verbal screening of all visitors including attorneys, investigators, probation officers and contract medical staff. Visitors were screened by comparing their identification with security and access information maintained in the computer system. In addition, Association unit employees were solely responsible for screening visitors for contraband by inspecting bags and briefcases, by utilizing a hand held magnetometer, and by directing visitors to place contraband into lockers. Certain familiar visitors, such as attorneys with proper identification, were admitted without screening for contraband.

For two years prior to April 2011, however, visitor access to the Jail visitation area required initial entry through the entrance of the Public Safety Building, a separate building adjacent to the Jail. Upon entering the Public Safety Building, a visitor can proceed to the court building or the visitation area of the Jail. With the exception of attorneys with proper identification, visitors were screened at the entrance to the Public
proceeding to the Jail visitation area were subject to a second screening with a magnetometer and line scanner performed solely by Association unit members.

Beginning in April 2011, the Joint Employer began modifying the Jail's screening procedures in response to an inmate escape. Under the revised procedures, all visitors entering through the Jail lobby are now subject to screening at a post situated in front of central control, which utilizes a magnetometer and line scanner. In addition, visitors may be subject to additional screening with a hand held metal detector. Any contraband discovered must be placed in a locker before a visitor approaches central control, where unit employees continue to check visitor identification and confirm access clearance. The magnetometer screening post in the Jail lobby is staffed by both unit and nonunit employees.

The Joint Employer also implemented modifications in visitor screening procedures at the Correctional Facility in reaction to the inmate escape. Previously, unit employees were solely responsible for screening visitors at that facility's central control, and utilizing a magnetometer, if necessary. In addition, visitors seeking entrance to that facility's visitation room were screened solely by unit employees utilizing a hand held magnetometer. In May 2011, a magnetometer and a line scanner were installed at a post in the Correctional Facility's lobby to screen visitors before they proceed to central control or the visitation room. Both unit employees and nonunit employees are assigned to magnetometer screening post.

**DISCUSSION**

We begin with the Association's argument that the exceptions are deficient because the Joint Employer did not comply with §213.2(b)(3) of our Rules of Procedure
While the exceptions contain only one reference to record evidence, the Joint Employer's thorough brief includes multiple citations to the record. Based upon the content of the brief, we conclude that Joint Employer satisfied the mandate of §213.2(b)(3) of the Rules, and therefore deny the Association's procedural argument.

Similarly, we reject the Joint Employer's procedural claim that the ALJ erred by failing to dismiss the charge as untimely pursuant to §204.1(a) of the Rules. The issue of timeliness was not raised by the Joint Employer in its answer, during the hearing or in its post-hearing brief. While an ALJ has discretion to raise the issue of timeliness based upon facts first revealed during a hearing, the record in this case did not warrant the ALJ's application of that discretion because the alleged untimeliness of the charge did not become apparent at the hearing. In fact, the charge was timely filed under our Rules.

We next turn to the merits of the Joint Employer's substantive exceptions. When deciding whether the transfer of unit work violates §209-a.1(d) of the Act, there are two essential questions that must be resolved: a) was the at-issue work exclusively performed by unit employees; and b) was the work assigned to nonunit personnel substantially similar to that exclusive unit work. If both these questions are answered in the affirmative, we will find a violation of §209-a.1(d) of the Act unless there has been a significant change in job qualifications.3

In determining the related issues of the scope of unit work and exclusivity in transfer of unit work cases, we examine whether an enforceable past practice exists by

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2 See, §212.4(l) of the Rules; City of Elmira, 41 PERB ¶3018 (2008).
3 See, Niagara Frontier Transp Auth, 18 PERB ¶3083 (1985); Town of Riverhead, 42 PERB
applying the following test: whether 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." 

Among the criteria we consider in determining whether a past practice has established a discernible boundary are the geographic location of the work, the nature and frequency of the work, and other facts establishing that the at-issue work has been treated distinct from other work performed by nonunit personnel.

In *City of Rochester* we found that the proper definition of the work in that case was directing traffic at a single location, which had been exclusively performed by unit employees for 13 months. More recently, in *County of Columbia*, we affirmed the definition of unit work as certain duties performed in the non-secure administrative area of a county's Public Safety Building based upon the existence of a discernible boundary between the work performed by the unit employees in the administrative area and the work assigned to inmates in the secure area of the same building. Therefore, we reject the Joint Employer's argument that work location is irrelevant to defining the at-issue

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5 *Manhasset Union Free Sch Dist*, supra, note 4.


8 45 PERB ¶3089 (2010).
Following our review of the record in the present case and the arguments of the parties, we affirm the ALJ’s definition of the at-issue work as security screening of all visitors on the Jail and Correctional Facility premises, which has been exclusively performed by unit employees. Although the reassigned work involves the use of recently installed new magnetometers and line scanners at both facilities, the screening duties performed are substantially similar to the work previously performed exclusively by Association unit members. Contrary to the Joint Employer’s argument, the fact that nonunit employees have conducted security screening of visitors at the magnetometer post at the Public Safety Building entrance does not adversely impact the Association’s exclusivity of the work on the premises of the Jail and the Correctional Facility. The Public Safety Building is a separate building from the Jail and the Correctional Facility and the past practice demonstrates that the screening conducted at the Public Safety Building’s entrance has been treated as distinct from screening exclusively performed by unit personnel on the premises of the Jail and Correctional Facility.

Furthermore, based upon the testimony of the Jail Superintendent, we deny the Joint Employer’s assertion that there has been a significant change in job qualifications.

IT IS, THEREFORE, ORDERED that the County of Monroe and the Sheriff of Monroe County:

1. Cease and desist from assigning the work of security screening of visitors
to the Monroe County Jail and the Monroe County Correctional Facility premises to nonunit employees and restore that work to the bargaining unit of the Monroe County Deputy Sheriffs' Association;

2. Make whole employees in the Monroe County Deputy Sheriffs' Association unit who were affected by the transfer of such work to nonunit employees for any loss of wages and benefits suffered by reason of that transfer of work, with interest at the prevailing maximum legal rate; and

3. Sign, post and distribute the attached notice in all locations normally used to communicate both in writing and electronically with unit employees.

DATED: November 14, 2012
Albany, New York

Jerome Lefkowitz, Chairperson

Sheila S. Cole, Member
NOTICE TO ALL EMPLOYEES

PURSUANT TO
THE DECISION AND ORDER OF THE

NEW YORK STATE
PUBLIC EMPLOYMENT RELATIONS BOARD

and in order to effectuate the policies of the

NEW YORK STATE
PUBLIC EMPLOYEES' FAIR EMPLOYMENT ACT

we hereby notify all employees of the County of Monroe and Sheriff of Monroe County in the unit represented by the Monroe County Deputy Sheriffs' Association that the County of Monroe and Sheriff of Monroe County will:

1. Not assign the work of security screening of visitors to the Monroe County Jail and the Monroe County Correctional Facility premises to nonunit employees and restore that work to the bargaining unit of the Monroe County Deputy Sheriffs' Association;

2. Make whole employees in the Monroe County Deputy Sheriffs' Association unit who were affected by the transfer of such work to nonunit employees for any loss of wages and benefits suffered by reason of that transfer of work, with interest at the prevailing maximum legal rate.

Dated ............

By ..............................................
on behalf of the County of Monroe and Sheriff of Monroe County

This Notice must remain posted for 30 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.
STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

BUFFALO UNITED CHARTER SCHOOL EDUCATION ASSOCIATION, NYSUT/AFT, AFL-CIO,

Petitioner,

- and -

BUFFALO UNITED CHARTER SCHOOL,

Employer.

MICHAEL DEELY, LABOR RELATIONS SPECIALIST, for Petitioner

HISCOCK & BARCLAY, LLP (LAURENCE B. OPPENHEIMER, SCOTT M. PECHAITIS AND NICHOLAS J. DI CESARE of counsel), for Buffalo United Charter School

BOARD DECISION, CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

A representation proceeding has been conducted in the above matter by the Public Employment Relations Board in accordance with the Public Employees' Fair Employment Act (Act) and our Rules of Procedure (Rules).

Buffalo United Charter School (Buffalo United) has filed objections to the determination made by the Director of Public Employment Practices and Representation (Director) concluding that the showing of support submitted by the Buffalo United Charter School Education Association, NYSUT/AFT, AFL-CIO (Association) is sufficient for certification without an election pursuant to §201.9(g)(1) of our Rules. Buffalo United
objects generally to our procedure permitting the certification of an employee organization without a secret ballot election. In addition, it asserts that in certain instances authorization cards submitted by the Association were induced by misleading statements, and obtained by a Buffalo United employee rather than an Association representative.

Since 1967, §207.2 of the Act has evinced a New York public policy preference for administratively certifying employee organizations without an election based upon authorization cards and other documentation demonstrating majority support, as opposed to the results of secret ballot elections.\(^1\) Consistent with §207.2 of the Act and the Rules; our policy and practice has been to certify without an election when an employee organization satisfies our certification requirements. Therefore, we deny Buffalo United’s policy arguments against certifying the Association without an election. In addition, we reject Buffalo United’s challenge to the showing of interest submitted by the Association, which is based upon unsworn conclusory assertions of purported Association misrepresentations. Those assertions lack sufficient probative value to warrant the holding of an election or remanding the matter to the Director for further investigation.\(^2\)

Based upon our review of the record, it appears that a negotiating representative has been selected.

Pursuant to the authority vested in the Board by the Public Employees’ Fair

\(^1\) See, Town of Islip, 8 PERB ¶3049 (1975); Bethlehem Public Library, 23 PERB ¶3009 (1990).

\(^2\) See, Mohawk Valley Gen Hosp, 19 PERB ¶3020 (1986).
Employment Act,

IT IS HEREBY CERTIFIED that the Buffalo United Charter School Education Association, NYSUT/AFT, AFL-CIO has been designated and selected by a majority of the employees of the above-named public employer in the following unit as their exclusive representative for the purpose of collective negotiations and the settlement of grievances:

Included: All instructional staff including teachers, paraprofessionals, long-term substitute teachers, and academic specialists employed at Buffalo United Charter School.

Excluded: Principal and assistant principals, deans, instructional coaches, administrative employees, guards, nurses, family liaisons, confidential and managerial employees, temporary employees and all other employees.

FURTHER, IT IS ORDERED that Buffalo United Charter School shall negotiate collectively with the Buffalo United Charter School Education Association, NYSUT/AFT, 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: November 14, 2012
Albany, New York

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

In the Matter of

SHELDON LAMAR HUNT,

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.

SHELDON LAMAR HUNT, pro se
CHARLES D. MAURER, ESQ., for Respondent
DAVID BRODSKY, DIRECTOR OF LABOR RELATIONS AND COLLECTIVE
BARGAINING (KELLY TERESA WALKER of counsel), for Employer

BOARD DECISION AND ORDER

These matters come to the Board on a pleading filed by Sheldon Lamar Hunt (Hunt), labeled Dialectic Discussion of the Board’s Decision and Order, with respect to the Board’s decision that affirmed the dismissal of five improper practice charges, as amended, filed by Hunt against the United Federation of Teachers, Local 2, American Federation of Teachers, AFL-CIO (UFT) for alleged violations of §209-a.2(c) of the Public Employees’ Fair Employment Act (Act). The Board of Education of the City

1 45 PERB ¶3038 (2012).
School District of the City of New York (District) is a statutory party pursuant to §209-a.3 of the Act.

Following our examination of the discussion contained in Hunt's pleading, we find no basis to disturb our prior decision. Our adjudicatory jurisdiction under §209-a of the Act is limited to determining whether an improper practice has taken place. In his current pleading, Hunt sets forth issues that are, at best, tangential to whether the UFT violated §209-a.2 of the Act.

NOW, THEREFORE, Hunt's pleading is denied.

DATED: November 14, 2012
Albany, New York

Jerome Lefkowitz, Chairperson

Sheila S. Cole, Member