9-10-2015

State of New York Public Employment Relations Board Decisions from September 10, 2015

New York State Public Employment Relations Board

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State of New York Public Employment Relations Board Decisions from September 10, 2015

Keywords
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In the Matter of

UNITED PUBLIC SERVICE EMPLOYEES UNION,

Petitioner,

-and-

TOWN OF NEW PALTZ,

Employer,

-and-

LOCAL 445, INTERNATIONAL BROTHERHOOD
OF TEAMSTERS,

Intervenor.

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

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

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

IT IS HEREBY CERTIFIED that the 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: The Highway Department, Transfer Station/Recycling Center, Water, Sewer Building and Ground and full-time employees of the Recreation Department.

Excluded: Superintendent of Highways, Recycling Coordinator and Clerical 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: September 10, 2015
Albany, New York

[Signatures]
STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

FRANK SHAFFER,

Petitioner,

- and -

INCORPORATED VILLAGE OF PORT JEFFERSON,

Employer,

-and-

CIVIL SERVICE EMPLOYEES ASSOCIATION, INC., LOCAL 1000, AFSCME, AFL-CIO, LOCAL 852,

Intervenor/Incumbent.

__________________________________________________________

FRANK SHAFFER, for Petitioner

GERARD GLASS, ESQ., for Employer

STEVEN A. CRAIN, ESQ., for Intervenor

BOARD DECISION AND ORDER

On April 6, 2015, Frank Shaffer (petitioner) filed, in accordance with the Rules of Procedure of the Public Employment Relations Board, a timely petition for decertification of the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO, Local 852 (intervenor), the current negotiating representative for employees of Incorporated Village of Port Jefferson.
Thereafter, the parties executed a consent agreement in which they stipulated that the following negotiating unit was appropriate:

**Included:**  
Port Jefferson Code Enforcement Officers, Constables, Appearance Ticket Officers and Sergeants.

**Excluded:**  
All other employees.

Pursuant to that agreement, a secret-ballot election was held on July 20, 2015, at which a majority of ballots were cast in favor of the intervenor.

Inasmuch as the results of the election indicate that a majority of the eligible voters in the unit who cast ballots desire to be represented by the intervenor for the purpose of collective negotiations, the incumbent remains the exclusive representative of the unit employees and IT IS ORDERED that the petition is dismissed.

DATED: September 10, 2015  
Albany, New York

Seth H. Agata, Chairperson

Allen C. DeMarco, Member

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

In the Matter of
WESTHAMPTON DUNES POLICE CONSTABULARY ASSOCIATION,

Petitioner,

-and-

VILLAGE OF WESTHAMPTON DUNES,

Employer.

_______________________________________________

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

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

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

IT IS HEREBY CERTIFIED that the Westhampton Dunes Police Constabulary 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 Constables.
Excluded: All other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiatecollectively with the Westhampton Dunes Police Constabulary 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: September 10, 2015
Albany, New York

Seth H. Agata, Chairperson
Allen C. DeMarco, Member
Robert S. Hite, Member
CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

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

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

IT IS HEREBY CERTIFIED that the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO 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 School Crossing Guards, Parking Enforcement Officer/School Crossing Guards and Parking Enforcement Officer/Code
Enforcement Officers.

Excluded: All other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Civil Service Employees Association, Inc., Local 1000, 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: September 10, 2015
Albany, New York

Seth H. Agata, Chairperson

Allen C. DeMarco, Member

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

In the Matter of

POLICE BENEVOLENT ASSOCIATION OF NEW YORK STATE, INC.,

Charging Party,

CASE NO. U-29495

- and -

STATE OF NEW YORK (STATE UNIVERSITY OF NEW YORK AT BROCKPORT),

Respondent.

________________________________________

GLEASON, DUNN, WALSH & O’SHEA (RONALD G. DUNN and PETER N. SINCLAIR of counsel) for Charging Party

MICHAEL N. VOLFORTE, Acting General Counsel (RONALD S. EHRLICH of counsel), for Respondent

BOARD DECISION AND ORDER

This matter comes to us on exceptions filed by the Police Benevolent Association of New York State, Inc. (PBA) to a decision of an Administrative Law Judge (ALJ) finding that the State of New York (State University of New York at Brockport) (Brockport) did not violate § 209-a.1(d) of the Public Employees’ Fair Employment Act (Act) when it reinstated a practice and procedure for staffing that had been in effect before it had rescinded an agreement between the parties that had been in place for eight years (Holiday Staffing Agreement).¹

EXCEPTIONS

The PBA takes exception to the ALJ’s “finding that the ‘status quo’ was the

¹ 47 PERB ¶ 4588 (2014).
practice at [Brockport] immediately prior to the [Holiday Staffing] Agreement. It breaks down this general exception into the following findings by the ALJ with which it disagrees: (1) “the record supports the State’s position”; (2) “[w]hile the Holiday Staffing Agreement is silent as to what follows in the event of a rescission of that agreement, in light of the record evidence on the genesis of the agreement and. . . testimony on the practice that preceded it, I find that as to the holiday scheduling procedures, the parties intended to revert to the previous practice as the status quo in the event that the Holiday Staffing Agreement was rescinded”; (3) “[f]ollowing the rescission of the Holiday Staffing Agreement, the State was privileged to revert to the status quo — i.e., the enforceable practice that had been in place at Brockport prior to the parties’ labor-management agreement”; (4) “there has been no unilateral change in a mandatory subject of negotiations, and, thus, no violation [of the Act]”; and (5) “[a]s a result, the instant charge must be, and hereby, is dismissed.”

Brockport filed papers opposing the aforementioned exception and its constituent parts.

FACTS

A hearing was held on April 5, 2012, at which both parties were represented by counsel. The parties do not dispute the terms of the practices and procedures at issue, including those practices in place before they executed the Holiday Staffing Agreement.

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2 Exceptions, p. 3.
3 Id., pp. 3-5.
4 Following a pre-hearing conference, the conferencing ALJ denied Brockport’s request to conditionally dismiss the charge pursuant to the Board’s deferral policies. No exception is taken to that ruling. 47 PERB ¶ 4588, at 4835, and ALJ Exhibit 12.
Brockport provides police coverage 24 hours a day, 7 days per week, including holidays on its campus. At the end of each calendar year, it posts a shift assignment preference sign-up sheet,\(^5\) which unit police officers have approximately 30 days to review and bid upon, based on seniority\(^6\), for a shift assignment for the coming year — i.e., the day, evening or midnight shift — as well as regular days off.\(^7\) These sheets do not reference designated holidays.\(^8\) Officers work a shift that consists of five consecutive eight-hour workdays, followed by two consecutive days off.\(^9\) Minimum police staffing levels vary at Brockport, depending on the shift and whether classes are in session.\(^10\) Chief of Police Robert J. Kehoe testified that from 1996 to 2009, when class was in session, the minimum staffing level for the day shift was two officers, while the minimum staffing level for the evening and night shifts was three officers. In contrast, when classes were not in session, the minimum staffing level for all three shifts was two officers.\(^11\)

When the instant charge was filed, the parties were operating under the terms of an expired collective bargaining agreement.\(^12\) The agreement designated 12 holidays\(^13\) and under section 16.1 of the agreement, an employee:

> who is entitled to time off with pay on days observed as holidays by the State who is scheduled or required to work on a holiday shall receive at his option

\(^5\) Joint Exhibit 2.
\(^6\) Transcript (Tr), p. 137.
\(^7\) Tr, pp. 25-6; 115 and Joint Exhibit 2.
\(^8\) Tr, p. 116-7; Joint Exhibit 2.
\(^9\) Tr, p. 24.
\(^10\) Tr, pp. 113-4.
\(^11\) Tr, p. 114.
\(^12\) ALJ Exhibits 6 and 7.
\(^13\) ALJ Exhibit 4, Attachment B.
either (a) additional compensation for each holiday worked at the rate of one-tenth of his bi-weekly rate of compensation or (b) a compensatory day off in lieu of such holiday worked.\textsuperscript{14}

Officers elect either additional pay or a compensatory day off in lieu of a worked holiday in April or May of each year.\textsuperscript{15} Since at least 1996, based on seniority, the most senior officer on each shift would be asked if he/she wanted to work on a particular holiday.\textsuperscript{16} That procedure was followed until a “sufficient number of officers indicated that they would work on the holiday.” Once the minimum staffing level had been met, “then any remaining officers on that shift were given the day off as a state recognized holiday.”\textsuperscript{17}

This practice changed in July 2001 when union representative John J. Armitage approached Kehoe and asked if it was possible to give officers the opportunity to work on a holiday and receive compensatory time for working that shift.\textsuperscript{18} Kehoe and Armitage agreed to allow officers to choose to come to work on designated holidays in lieu of taking the day off, and accrue eight hours of compensatory time for future use. For those officers who had less seniority and were effectively excluded from receiving this benefit because more senior officers would bid ahead of them, they were given the option of working on the holiday and receiving what was termed “unofficial comp time” which was kept locally and not officially considered compensatory time.\textsuperscript{19} They memorialized their understanding in the “Holiday Staffing Agreement” that became

\textsuperscript{14} Id.
\textsuperscript{15} Id.
\textsuperscript{16} Tr, p. 120.
\textsuperscript{17} Tr, pp. 119-20.
\textsuperscript{18} Tr, p. 118-9.
\textsuperscript{19} Tr, pp. 44-6.
effective August 9, 2001.  

Under the Holiday Staffing Agreement, at least 10 days before each holiday, the lieutenant assigned to a shift would poll the officers assigned to that shift, in order of seniority, regarding their desire to work on the upcoming holiday. Those polled officers who chose to work would receive their elected contractual benefit — i.e., either holiday pay or a compensatory day off. Once a sufficient number of officers indicated their intent to work on the holiday so that the required minimum staffing level had been reached, all remaining scheduled officers would then choose to either take the holiday off or work on the holiday and acquire eight hours of “unofficial” compensatory time to be used on a future date. The “unofficial comp time” that an officer earned for working on a holiday pursuant to the Holiday Staffing Agreement was tallied and maintained at the local level in a book kept by a department secretary.

Police officer Michael Johnson filed a grievance on May 30, 2009, alleging that on May 21, 2009, he received an email advising him of his work schedule for the upcoming Memorial Day holiday, which fell on Monday, May 25, 2009. According to the grievance, Johnson was informed that due to his seniority status, he had two options for the Memorial Day holiday: (1) work Memorial Day and receive “unofficial” compensatory time, or (2) observe the holiday as a paid day off. Johnson alleged that his lieutenant had polled him just four days prior to the holiday — not 10 days, as set forth in the Holiday Staffing Agreement — and that as a result, he had presumed he would be

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20 ALJ Exhibit 4, Attachment E.
21 Tr, p. 122.
22 Tr, p. 123.
23 Tr, pp. 44-6.
working on Memorial Day and receiving holiday pay. However, since minimum staffing levels had been met by the more-senior officers who had been polled before Johnson, he was precluded from receiving holiday pay. He alleged that this violated the Holiday Staffing Agreement.\textsuperscript{24}

Adrienne Collier was the interim director of human resources when Johnson filed his grievance.\textsuperscript{25} Collier testified that she only first learned of the Holiday Staffing Agreement upon receipt of that grievance.\textsuperscript{26} She then told Kehoe that he was not authorized to enter into such an agreement.\textsuperscript{27} Collier testified that on June 3, 2009, she met with Kehoe, Debra Toms from payroll, and union representative David Malsegna.\textsuperscript{28} During this meeting, among other things, Collier stated that the agreement could not be permitted to continue because it contradicted attendance and leave rules.\textsuperscript{29}

Kehoe testified that he told Malsegna that “we could no longer continue with the process of offering officers the opportunity to work on a holiday and accrue comp time....”\textsuperscript{30} Kehoe further testified that he informed Malsegna that the department would be “reverting back to the holiday staffing provisions that existed prior to the 2001 agreement being generated.”\textsuperscript{31} When asked about the union response, Kehoe said, “I don't believe they were happy about it.”\textsuperscript{32}

\textsuperscript{24} ALJ Exhibit 4, Attachment D.
\textsuperscript{25} Tr, p. 149.
\textsuperscript{26} Id.
\textsuperscript{27} Tr, pp. 150-1.
\textsuperscript{28} Tr, p. 152.
\textsuperscript{29} Tr, pp. 151-3.
\textsuperscript{30} Tr, p. 127.
\textsuperscript{31} Tr, p. 140.
\textsuperscript{32} Id.
rotating schedule had been discussed, so he asked the union representative to come up with a proposal, but he never received anything.\textsuperscript{33}

On June 4, 2009, Kehoe issued a memorandum entitled “Holiday Staffing.” The memorandum stated that, “[a]s a result of a grievance that was recently filed concerning our holiday staffing policy, Human Resources has directed that we must terminate the local agreement under which we have operated since August, 2001.”\textsuperscript{34} Going forward, the following procedure regarding holiday work schedules would govern:

1. The shift Lieutenant will poll the personnel assigned to his shift, in order of seniority, concerning their desire to work on an upcoming holiday.
2. Once the minimum required staffing level has been reached, all other personnel assigned to that shift will take the holiday off.
3. If a sufficient number of personnel do not express a desire to work, the shift Lieutenant will direct personnel to work, in reverse order of seniority, until the minimum required staffing is attained.
4. When the determination has been made regarding which personnel will be scheduled to work, the shift Lieutenant will post this information on the master work schedule board in the Dispatch Office.
5. This process should be completed at least ten (10) days prior to a holiday unless extenuating circumstances exist.

Kehoe explained that consistent with this memorandum, the procedure at Brockport is to establish the minimum staffing level required for the holiday, and then poll the officers, ten days before a holiday and in order of seniority, to determine who would like to work on that holiday. If an insufficient number of officers agree to work, then the shifts are filled on the basis of reverse seniority. Those who work on the holiday are entitled to either holiday pay or a compensatory day off, at the officer’s annual election as per the parties’ collectively negotiated agreement, while those who

\textsuperscript{33} Tr, p. 128.
\textsuperscript{34} ALJ Exhibit 1, Attachment A.
do not work are, in effect, observing the holiday as a paid day off. Johnson testified that he understood the 2009 memorandum to mirror the Holiday Staffing Agreement, “with the exception that you could no longer come in and receive the comp time.”

On September 24, 2009, the PBA filed a grievance under the expired collective bargaining agreement alleging that the June 4, 2009 memorandum violated Articles 16 and 27 of the parties' collectively negotiated agreement. The grievance claimed that “[m]anagement does not have the right to force members to take off Holidays,” and does not have the right “to implement new policies that contradict our Collective Bargaining Agreement.” Among other remedies sought, the PBA demanded rescission of Kehoe's June 4, 2009 memorandum.

**DISCUSSION**

Preliminarily, we note that the parties agree that Brockport was empowered to unilaterally rescind the Holiday Staffing Agreement. As was stipulated by counsel for PBA on the record before the ALJ:

Q (Counsel for Brockport): . . . Ultimately, the state's going to argue that they properly withdrew from the local agreement pursuant to Article 25 [of the collective bargaining agreement].

A (Counsel for the PBA): I agree that the state properly withdrew. They had the right under the contract to withdraw from the local agreement. There is no dispute about that. We will not argue otherwise. They had the legal right to withdraw from the local agreement.

* * *

A (Counsel for the PBA): I stipulate that the state had the legal right to withdraw

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35 Tr, p. 126.
36 ALJ Exhibit 6, Attachment B.
37 ALJ Exhibit 6, Attachment B.
Neither party filed an exception with respect to this finding nor the ALJ’s finding that the Holiday Staffing Agreement addresses a mandatory subject of negotiation. Thus, the single issue raised in the PBA’s exception and its constituent parts is whether the parties’ reversion to the practice in place before the execution of the Holiday Staffing Agreement violated § 209-a.1 (d) of the Act. We affirm the ALJ’s finding that it did not.

As noted by the ALJ, the Holiday Staffing Agreement “contradicted attendance and leave rules” which are governed by the State rather than by the individual unit. Regardless, however, of the reasons for terminating the agreement, the parties agree that the State was within its rights to rescind the Holiday Staffing Agreement.

The crux of the issue presented, therefore, is defining the status quo that governs after the collapse of the Holiday Staffing Agreement. The ALJ found that the origin of the Holiday Staffing Agreement was a request by the PBA to allow officers the chance to work on holidays and receive compensatory time for working those shifts. The Holiday Staffing Agreement merely afforded officers who were less senior the opportunity to work and receive “unofficial comp time”. The essential elements of the practice in place before the implementation of the Holiday Staffing Agreement were continued with the agreement and after its rescission.

Once it has been acknowledged that Brockport could unilaterally rescind the

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38 Tr, pp. 67-8.
39 47 PERB ¶ 4588, at 4834; Tr, pp. 151-3 (In addition, there was uncontradicted testimony that not only did the Holiday Staffing Agreement violate New York State Attendance and Leave Rules” but that it also violated the governing collective bargaining agreement. In addition, evidence was presented that the Kehoe was not authorized to enter into any such agreement).
Holiday Staffing Agreement – as the parties have so stipulated – it is sophistry to then argue that the same agreement is still binding on the parties and governs the assignment of holiday work.\(^{40}\) Rather, upon its rescission, the agreement and its terms disappeared.\(^{41}\) What is left, based on the bargaining history of these parties, is their binding past practice.

In *Chenango Forks Central School District*, we reaffirmed what we described as:

our most authoritative statement regarding the applicable test for the establishment of a binding past practice: the practice was unequivocal and was continued uninterrupted for a period of time sufficient under the circumstances to create a reasonable expectation among the affected unit employees that the practice would continue.\(^{42}\)

In this matter, the practices and procedures in place before the implementation of the Holiday Staffing Agreement contain all of the earmarks and indicia of a binding past practice. Kehoe’s uncontradicted testimony described the practice that was in place before the Holiday Staffing Agreement: In advance of an upcoming holiday, the officers on each shift would be asked, in order of seniority, if they wanted to work on that

\(^{40}\) The PBA argues in its Brief on Behalf of Charging Party in Support of Exceptions (p. 8) that Brockport “could unilaterally rescind the 2001 Agreement [citations omitted], [but] could not. . . unilaterally change the underlying practice, because that practice was the unequivocal and long-standing ‘status quo’ [citing County of Nassau (CSEA), 24 PERB ¶ 3029 (1991)].” In Nassau, we were not faced with a concession that the agreement in question could be and was properly rescinded; and an agreement is no more than the sum of its terms and conditions.

\(^{41}\) See *American Home Assurance Co. v. Nausch, Hogan & Murray, Inc.*, 71 AD3d 550, 552 (1st Dept 2010) (wherein the court held that as a general rule, “rescission merely returns the parties to the status quo.”).

\(^{42}\) 40 PERB ¶ 3012, 3046-3047 (2007), on remand, 42 PERB ¶ 4527 (2009), aff’d, 43 PERB ¶ 3017 (2010), confirmed sub nom. *Chenango Forks Cent Sch Dist v New York State Pub Empl Relations Bd*, 95 AD3d 1479, 45PERB ¶ 7006 (3d Dept 2012), conf’d, 21 NY3d 255, 46 PERB ¶ 7008 (2013).
holiday; once the minimum staffing level had been met, any remaining officers on that shift were given the day off as a State-recognized holiday. Kehoe testified that this practice had been in place at least as long as he had been the Chief at Brockport — since 1996.

Thus, this practice was unequivocal and continued uninterrupted for a period of time, five years, which was sufficient under the circumstances to create a reasonable expectation among the affected unit employees that the practice would continue. As such, it became a practice binding on both parties, the alteration of which could be the subject of further negotiations. In the absence of or upon rescission of the Holiday Staffing Agreement, this practice governed the parties’ relationship.

In this matter, prior past practice is definite, discrete and “reasonably clear on the specific subject at issue” and not susceptible of more than one interpretation.

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

DATED: September 10, 2015
Albany, New York

Seth H. Agata, Chairperson
Allen C. DeMarco, Member
Robert S. Hite, Member
In the Matter of

TEAMSTERS LOCAL 529, INTERNATIONAL BROTHERHOOD OF TEAMSTERS,

Charging Party,

- and -

TOWN OF TUSCARORA,

Respondent.

CASE NO. U-29869

JAMES N. McCALLEY, ESQ., for Charging Party

SMITH, SOVIK, KENDRICK & SUGNET, P.C. (KAREN GUYDER FELTER of counsel), for Respondent

BOARD DECISION AND ORDER

This matter comes to the Board on exceptions filed by the Town of Tuscarora (Town) to a decision of an Administrative Law Judge (ALJ) finding,\(^1\) on a matter remanded by the Board\(^2\) that the Town violated §§ 209-a.1(a) and (c) of the Public Employees’ Fair Employment Act (Act). The ALJ found that the Town terminated Gerald Eccleston, Sr. (Eccleston) in retaliation for Eccleston seeking representation from Teamsters Local 529, International Brotherhood of Teamsters (IBT) in proceedings under Civil Service Law (CSL) §75 and Civil Practice Law and Rules (CPLR) Article 78 and a grievance.

The ALJ held a hearing on February 8, 2011 (Day 1 at which IBT called five witnesses to testify. Following that hearing, by decision dated March 21, 2012, the ALJ dismissed IBT’s case for its failure to establish a prima facie case that the Town’s actions were improperly motivated. The ALJ found that IBT failed to demonstrate that Eccleston would not have been terminated and his position eliminated “but for”

\(^1\) 47 PERB ¶ 4511 (2014).
\(^2\) 45 PERB ¶ 3044 (2012), remanding for further proceedings 45 PERB ¶ 4540 (2012).
engaging in protected activity, one of three elements necessary to establish a *prima facie* case.

IBT filed exceptions to the ALJ’s ruling and by decision dated November 14, 2012, we reversed, reinstated the charge, and remanded the case for further proceedings by the ALJ. We found that the ALJ had correctly concluded that IBT had presented sufficient evidence to establish the first two elements of a *prima facie* case of improper motivation (the employee had engaged in protected activity and such activity was known to the persons taking the employment action). However, we found that although the ALJ correctly assumed the truth of the alleged facts, she had failed to give IBT “the benefit of all reasonable inferences that could be drawn from” those facts including circumstantial evidence with respect to the third element (the employment action would not have been taken “but for” the protected activity). If she had done so, we decided, then she would have found that IBT had presented a *prima facie* case for the third element.

We noted that temporal proximity of an employer’s action is “highly probative” in determining improper motivation as is 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.” We found that the circumstantial evidence developed in the record before the ALJ was sufficient to establish the third element of *prima facie* case of improper motivation. Therefore, we concluded that IBT had demonstrated a *prima facie* case of improper motivation, and

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3 45 PERB ¶ 3044, at 3111.
4 *Id.* at 3112.
5 We did not find that IBT had only presented the minimal facts necessary and nothing more. We merely found that the Charging Party had satisfied a lesser burden of proof. We made no findings as to whether there was or was not on the record a preponderance of the evidence supporting IBT’s charge.
the burden of persuasion had shifted to the Town to demonstrate a legitimate non-discriminatory business reason for abolishing the position and terminating the employee. We remanded the matter to the ALJ with “discretion” to develop a more complete record.

Upon remand, the ALJ conducted a hearing on April 11, 2013 (Day 2) at which she took additional testimony. Noting our decision, the Town presented evidence including the testimony of Town Supervisor Robert Nichols (Nichols) and Stirl Brad Tucker. IBT called Eccleston to testify. All three witnesses had also been called on Day 1.

The ALJ subsequently found the Town had not met its burden of persuasion and failed to rebut IBT’s case, resulting in IBT proving improper motivation by the Town in firing Eccleston and eliminating his position. The ALJ found that the reasons posited by the Town for its business justification were pretextual and not credible. But for his protected activity, the ALJ found, the Town would not have terminated his employment and eliminated the MEO position.

EXCEPTIONS

The Town filed exceptions to the ALJ’s decision. It first alleges that the ALJ “utterly mischaracterized, misapprehended, misread and misunderstood the Town’s 2010 budget as ‘hyperinflated’ . . . ”6. Second, it takes exception to the ALJ’s finding that its cutting of the budget was simply a pretext for eliminating Eccleston’s position. Third, it challenges the ALJ’s finding that no evidence supported Nichols’ testimony that the position at issue was historically expendable and not regularly funded by the Town. Fourth, the Town takes exception to the ALJ’s finding that the Board, in remanding the matter, had determined conclusively that IBT had established animus. It argues that the

6 Exceptions at p. 8.
Board had only determined that the Town had “established circumstantial evidence giving rise to an inference that improper motivation was a factor in the Town’s actions,” not a legal conclusion that animus had been proven.  

Finally, the Town avers that it had established legitimate, non-discriminatory reasons for eliminating the MEO position. The Town took no other exceptions to the ALJ’s determination. IBT responded to each exception in support of the ALJ’s findings of fact and decision.

Based upon our review of the record and consideration of the parties’ arguments, we reverse the ALJ’s ultimate decision and remand this matter for further factual development of the record.

**DISCUSSION**

The ALJ expressly relied on our findings of fact in 45 PERB ¶ 3044 as well as on testimony presented on Day 2. For purposes of the instant decision and its resolution, we will not repeat our previous findings or those of the ALJ based on further testimony she took on Day 2.

When an improper practice charge alleges unlawfully motivated interference or discrimination in violation of §§209-a.1 (a) and (c) of the Act, the charging party has the burden of demonstrating three elements: a) the affected individual 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. The ultimate burden of proof always remains with the charging party.

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7 Id. at 14 (emphasis in Town’s exception).

8 Hudson Valley Community College, 47 PERB ¶ 3007 (2014); City of Troy, 46 PERB ¶ 3021 (2013); UFT, Local 2, AFT, AFL-CIO (Jenkins), 41 PERB ¶ 3007 (2008)(subsequent history omitted); County of Wyoming, 34 PERB ¶ 3042 (2001); Stockbridge Valley Cent Sch Dist, 26 PERB ¶ 3007 (1993); County of Orleans, 25 PERB ¶ 3010 (1992); Town of Independence, 23 PERB ¶ 3020 (1990); City of Salamanca, 18 PERB ¶ 3012 (1985).
The initial threshold on demonstrating a *prima facie* case (an inference of improper motivation) is relatively low. The “ALJ is required to accept the charging party’s evidence as true, and give it the benefit of every reasonable inference than can reasonably be drawn from that evidence.”

Only if the charging party can establish such an inference, does the burden of production shift to the respondent to present evidence demonstrating that its conduct was not improperly motivated. At all times, however, the burden of proof rests with the charging party to prove all three elements by a preponderance of the evidence. When a charging party fails to meet its burden, a charge of improper motivation must be rejected.

Thus, we must first address the Town’s exception to the ALJ’s reliance upon our purported finding that animus existed, which the Town characterizes as a finding by the ALJ that such animus existed “as a matter of law.” The Town avers that rather than having found animus, we had only determined that the Town had “established circumstantial evidence giving rise to an *inference* [emphasis in Town’s original exception] that improper motivation was a factor in the Town’s actions.”

The Town correctly characterizes our holding in 45 PERB ¶ 3044. We made it abundantly clear that there is a “relatively low initial threshold for demonstrating a *prima facie* case,” and that a “liberal standard” of proof is applied to a motion to dismiss for a

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9 *City of Troy*, supra note 44; *UFT, Local 2, AFT, AFL-CIO (Jenkins)*, supra note 44; *Bd. of Educ. of the City Sch. Dist. of the City of New York (Grassel)*, 43 PERB ¶ 3010 (2010); *Town of Tuscarora*, 45 PERB ¶ 3044 (2012); *Bd. of Educ. of the City Sch. Dist. of the City of New York (Guttmann)*, 46 PERB ¶ 3008 (2013).
10 45 PERB ¶ 3044, 3012 citing *Board of Ed. of the City Sch. Dist. of the City of New York (Baez)*, 35 PERB ¶ 3044 (2002) and *Board of Ed. of the City Sch. Dist. of the City of New York (Freedman)*, 34 PERB ¶ 3036 (2001).
11 *Town of Tuscarora*, supra note 45.
13 *City of Troy*, supra note 44; *County of Tioga*, 44 PERB ¶ 3016 (2011).
party's failure to proffer such case.\textsuperscript{14} We found in reviewing the record that the IBT had satisfied the minimal threshold but also clearly stated that "[n]othing 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."\textsuperscript{15}

Thus, we agree with the Town that the ALJ erred when she found that we conclusively established animus in our prior decision and made a finding on that issue. The level of proof sufficient to establish a \textit{prima facie} case of animus is less than that required of a charging party to prove a case of animus.\textsuperscript{16} Rather than perform the required analysis on remand, the ALJ erred by refusing to make independent findings of fact and mischaracterizing our prior holding as one in which we found that animus had been demonstrated.\textsuperscript{17} Indeed, we made no conclusive findings of fact on that issue.

In sum, we agree with the Town that the ALJ erred by mischaracterizing our previous decision in this matter as a finding on the merits. To support such findings as the ALJ made below, it is incumbent on the ALJ to make express findings of fact on the ultimate issues and not simply rely on our findings on the motion to dismiss.

Accordingly, for the reasons set forth above, we need not address the Town’s other exceptions and the ALJ’s decision is reversed and remanded for further development of a record.

\textbf{IT IS, THEREFORE, ORDERED} that the ALJ’s findings are reversed in part and

\textsuperscript{14} 45 PERB ¶ 3044, 3112-3.
\textsuperscript{15} \textit{id.}, at 3113.
\textsuperscript{16} To be clear, we also did not find that IBT had \textit{only} presented enough evidence to satisfy that minimal threshold. We did not need to address the issue of whether the record, as developed at that time, contained a preponderance of evidence to support IBT’s charge; that was the issue before the ALJ on remand and before us in this matter. We did not comment on the quantity of proof other than to find that the minimum had been established at the hearing held on Day 1.
\textsuperscript{17} 47 PERB ¶ 4511 at 4533.
remanded to the ALJ to process the charge consistent with this decision.

DATED:  September 10, 2015
        Albany, New York

[Signatures]

Seth H. Agata, Chairperson

Allen C. DeMarco, Member

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

In the Matter of

NEW YORK STATE CORRECTIONAL OFFICERS AND
POLICE BENEVOLENT ASSOCIATION, INC.,

Charging Party,

- and -

STATE OF NEW YORK (DIVISION OF STATE
POLICE),

Respondent,

- and -

POLICE BENEVOLENT ASSOCIATION OF THE NEW
YORK STATE TROOPERS, INC.,

Intervenor.

SHEEHAN, GREENE, GOLDERMAN & JACQUES LLP (WILLIAM F.
SHEEHAN of counsel), for Charging Party

MICHAEL N. VOLFORTE, Acting General Counsel (CLAY J. LODOVICE of
counsel), for Respondent

BOARD DECISION AND ORDER

This matter comes to the Board on exceptions filed by the State of New York,
Division of State Police (NYSP or State) to a decision of an Administrative Law Judge
(ALJ) finding that NYSP violated §§ 209-a.1(d) of the Public Employees' Fair
Employment Act (Act) by unilaterally transferring the screening responsibilities of the
Security Screening Technicians (SST) in the Security Services Unit (SSU) of State
employees represented by New York State Correctional Officers and Police Benevolent
Association, Inc. (NYSCOPBA) to nonunit personnel in the titles of trooper and
The State filed nine exceptions to the ALJ’s decision. First, the State alleges that the ALJ erred by failing to properly consider the State’s “mission” defense. As a separate exception, the State avers that the ALJ erred by dismissing the mission defense based on our decision in City of Rochester. Third, the State takes exception to the ALJ’s finding that the State did not argue that there had been a change in qualifications, thereby limiting her findings to whether the work in question was exclusive to NYSCOPBA. Fourth, it objects to the ALJ’s failure to apply the balancing test mandated by Niagara Frontier Transportation Authority. Fifth, the State alleges the ALJ erred by finding that the work in question was exclusively performed by NYSCOPBA members. Sixth, the State takes exception to the ALJ’s finding that the State did not expect Troopers to operate “the various machines at the checkpoint.” As a seventh exception, the State rejects the ALJ’s conclusion that the fact that Troopers operated x-ray machines on four-hour shifts as an accompaniment to their training did not defeat exclusivity. Finally, the State objects to the breadth of the ALJ’s remedial order.

NYSCOPBA has responded to each of these exceptions.

Upon review of the record and the papers filed herein, we affirm the ALJ’s

1 47 PERB ¶ 4567 (2014).
2 Intervenor Police Benevolent Association of the New York State Troopers, Inc. appeared by counsel and indicated that it would not respond to the State’s exceptions or otherwise take any formal position but instead, would monitor the matter to preserve such rights as its members might have.
3 27 PERB ¶ 3031 (1994).
4 18 PERB ¶ 3083 (1985).
findings in part, reverse them in part, and remand this matter for further proceedings.

**FACTS**

Hearings were held at which the parties were represented by counsel.\(^5\)

As a result of the events of September 11, 2001, the State established three security check points around the Capitol Building and the Empire State Plaza to prevent the entrance into these areas of weapons or materials that could be used as weapons.\(^6\)

The security equipment at the Washington Avenue entrance of the Capitol consists of two x-ray machines designed to show the contents of bags and boxes, a magnetometer which a visitor walks through to detect metal and hand-held wands to more specifically locate metal on visitors.\(^7\) There are also turnstiles designed to allow State employees access by swiping identification cards. The State Street entrance to the Capitol has one x-ray machine, a magnetometer and a turnstile. The third check point, known as “Times Square” is located on the concourse level of the Empire State Plaza from which there is access to the Legislative Office Building, the Justice Building and the tunnel to the Capitol. Multiple x-ray machines and magnetometers are located in Times Square, as are a number of turnstiles.\(^8\)

Initially, these check points were staffed by a combination of troopers and correction officers.\(^9\) Beginning in 2004, the State established the formal security

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\(^5\) The first day of hearings was held November 29, 2011 in conjunction with Case No. U-30898 involving the same core issues, facts, and parties. Following that hearing, the parties settled that charge. (ALJ Exhibit No. 6). They and the ALJ agreed testimony taken that day would nonetheless be part of the proceedings held in this matter. A second and final day of hearings was held July 18, 2012.

\(^6\) Transcript (Tr), pp. 164, 169.

\(^7\) Tr, p. 200.

\(^8\) Tr, pp. 23-4.

\(^9\) Tr, p. 164.
screening unit staffed with SSTs, who are members of the SSU represented by NYSCOPBA.\textsuperscript{10} In addition to SSTs, State troopers were also assigned to the checkpoints at Times Square, the State Street entrance to the Capitol, and the Washington Avenue entrance to the Capitol on a regular basis.\textsuperscript{11}

What occurs at these checkpoints is similar to what happens when flying commercially. A visitor seeking entry into the Capitol is greeted by security personnel and asked to place his or her belongings in a bin. The bins are sent through the x-ray machine and the visitor goes through the magnetometer. If nothing is detected by the x-ray or the magnetometer, the visitor proceeds about his or her business. If something is found on the x-ray, a decision is made whether to allow the item into the building. If the magnetometer locates metal, security personnel use hand-held wands to locate the metal and determine if it is safe. The turnstiles are used by State employees showing appropriate identification.\textsuperscript{12}

Beginning in September 2007, the regular assignment of troopers to these three checkpoints was changed in an effort to reduce public perception of the amount of security deployed.\textsuperscript{13} Troopers were actually assigned to the three checkpoints only on lobby days, generally Tuesdays, Wednesdays or Thursdays when the legislature is in session, or whenever else a high volume of traffic was expected. At other times, troopers were assigned to a post which included the checkpoint and was part of the patrol.

As of 2007, troopers as well as members of the SSU had been trained to use x-

\textsuperscript{10} Tr, p. 165.
\textsuperscript{11} Tr, pp. 165-6, 170, 172.
\textsuperscript{12} Tr, p.167.
\textsuperscript{13} Tr, pp. 202-5.
rays and magnetometers.\(^{14}\) In addition, troopers served as trainers on the equipment.\(^ {15}\) There were also other checkpoints at which troopers assigned to the Protective Services Unit operated hand-held wands and magnetometers located at 633 Third Avenue in New York City and at the Governor’s Mansion.\(^ {16}\) However, at certain events in the Capital, such as the Governor’s State of the State address or budget presentation, troopers and SSTs operated the machines.\(^ {17}\)

Before January 1, 2011, the troopers assigned to a checkpoint were there to respond, as needed, and to exercise their police powers as required. SST Alfred Christian testified that:

[troopers] would respond to a need on a post. If I had an item, as in a gun or something in the machine, we are not allowed to take a weapon of that manner. So I would have to call for a trooper. So if there was a reason to have a trooper on the scene, we would call for it. If there were brass knuckles or something in there, we would point on the screen to where the item was in the bag, have the trooper go into the bag and remove that item so it was out of the person’s accessibility, but that was the role they played.

NYSCOPBA’s witnesses, all of whom were SSTs, testified that while assigned to a checkpoint troopers did not operate the x-ray machine and only on high volume days monitored the magnetometer, used the wands or conducted pat frisks. The SSTs agreed that the troopers were consulted when an SST saw something on the x-ray that was questionable, requiring the trooper to view the item but not to actually operate the machine. The SSTs all testified that the troopers, when there was high volume, “ran the bins,” meaning moving the containers containing the x-rayed objects from the x-ray

\(^{14}\) Tr, p. 206.
\(^{15}\) Tr, p. 173.
\(^{16}\) Tr, pp. 67, 207-8.
\(^{17}\) Tr, pp. 208-9.
table to the visitor to whom they belong.\textsuperscript{18}

The troopers, according to former detail commander Lieutenant Colonel Patricia Groeber and detail commander John Kowalewski, were charged with overseeing the overall operation of the checkpoint, to assess staffing levels, and had the final say in whether a given object would be allowed into the building. In order to do that, troopers would be required to use the x-ray machines.\textsuperscript{19} Troopers were trained in the use of all of the equipment used at a checkpoint. Both Groeber and Kowalewski testified that the employees working at a checkpoint worked as a team and that the assignment was to the checkpoint and not to a specific component of the process.\textsuperscript{20}

Groeber also testified that there “was a distinction of what SSTs could not do, but as far as what troopers were capable of, they should have been able to step in on any aspect of the checkpoint.”\textsuperscript{21} When asked whether troopers operated the screening equipment the same amount as SSTs, she said:

No, because the screeners had a more limited ability to do other things. That was their primary role. It would be—it wouldn't be the best use of an asset of a uniform State Police member to be restricted to one specific role for an eight-hour period. So they had a higher level of responsibility I would say.\textsuperscript{22}

Kowalewski testified that the role and responsibility of a trooper at a checkpoint was:

their primary role, it's a checkpoint that [is] searching for guns, knives or explosives, and it really isn't the best security practice not to staff it with an individual who is armed. So

\textsuperscript{18} Tr, pp. 74-76.
\textsuperscript{19} Tr, pp. 172, 205.
\textsuperscript{20} Tr, pp. 168, 210.
\textsuperscript{21} Tr, p. 190.
\textsuperscript{22} id.
they’re there in case the— the screeners locate something and it— and it could escalate the process or escalate into needing to arrest someone.\textsuperscript{23}

Kowalewski also testified that the training of troopers, sergeants, and lieutenants in using screening machines at the checkpoints was not because they were expected to operate them but because they had to understand how the equipment worked in order to properly supervise those who were operating the machines.\textsuperscript{24}

On December 31, 2010 the State laid off a number of SSTs and Supervising Security Screening Technicians (SSST). As of December 1, 2010, the combined number of SSTs and SSSTs was 72. By March 1, 2011, the combined number was 32, and by June 1, 2011, it was 28.\textsuperscript{25}

Beginning in October 2010, the State increased the presence of troopers at the three checkpoints, and troopers were being assigned to run the x-ray machines for four-hour time periods in conjunction with training on the various machines. Following the January 1, 2011 layoffs, troopers continued to be assigned, in four hour shifts, to monitor the x-ray machines while SSTs handled the other parts of the screening process.\textsuperscript{26}

**DISCUSSION**

The ALJ expressly rejected the State’s contention that its mission of providing security at various checkpoints trumped the well-founded and long established policy in New York State of requiring public employers to negotiate decisions to transfer

\textsuperscript{23} Tr, p. 205.  
\textsuperscript{24} Tr, pp. 214-5.  
\textsuperscript{25} Joint Exhibit No. 1; Tr, p. 26.  
\textsuperscript{26} Tr, p. 48.
otherwise exclusive unit work. Instead, she found that there had been an impermissible transfer of unit work. In so deciding, she correctly relied upon Town of Riverhead in which we held:

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 work at-issue exclusively performed by unit employees for a sufficient period of time to have become binding; and b) was the work assigned to non-unit personnel substantially similar to the 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 is a significant change in job qualifications. Where there is a significant change in job qualifications 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.

The factors to be considered include:

the nature and frequency of the work performed by unit members, the geographic location where the work is performed, the employer's rationale for the practice, an explicit or implicit recognition that the at-issue work is distinct, and other facts that have set the claimed unit work apart from work performed by non-unit personnel.

The ALJ found that while all employees assigned to a checkpoint are able to use equipment, only troopers have police powers. She accepted NYSCOPBA's arguments, based on the record, that regular and routine operation of the screening equipment is exclusive to its members, and any such use of the equipment by troopers was limited and incidental. As such, she found that there was a discernible boundary around the

28 42 PERB ¶ 3032 (2009).
29 Id. at 3022.
“routine assignment of SSTs to work all of the screening equipment associated with entrance to the Capitol.”

She noted that between September, 2007 and January, 2011, troopers only utilized the equipment to back up SSTs when a checkpoint became busy during lobbying and other special days or when they were conducting training.

There is no material factual dispute as to functions performed by members of the NYSCOPBA unit and those performed by troopers. As the ALJ found:

NYSCOPBA’s witnesses testified that troopers would participate on busy days in the actual security screening by, on occasion, running the bins, operating a wand, operating a magnetometer or conducting pat searches. NYSCOPBA’s witnesses also testified that troopers would view suspicious items through the x-ray machine in the course of deciding whether to allow it to be brought into the Capitol but were not routinely assigned to run the x-ray machines prior to the January 1, 2011 layoffs.

The State’s witnesses testified that running the various machines at a checkpoint was the primary responsibility of the SSTs, not the troopers. The primary duty of the troopers at the security checkpoints was to be alert for situations in which their police powers needed to be used. The fact that troopers, sergeants and lieutenants were trained in the use of this equipment did not mean that they were expected to operate it. They were expected, however, to supervise those who were operating the equipment. That troopers, between October 2010 and January 2011, operated the x-ray machines on four-hour shifts as an accompaniment to their training does not destroy exclusivity.

We affirm the ALJ’s finding insofar as she found that the work in question was exclusively performed by unit employees for a sufficient period of time to have become binding and such work as was assigned to non-unit personnel (troopers) was substantially similar to the exclusive unit work.

32 47 PERB ¶ 4567 at 4767 (citation omitted).
If the only issue before us could be resolved by relying solely on this portion of the ALJ’s findings, then we also find that the remedy imposed by the ALJ is too sweeping and does not comport with her findings. We agree with the State that the remedy would bar troopers from not only routinely operating x-ray machines and magnetometers, but would bar them completely from operating those machines even at such times as they did before the alleged transfer of such work, in toto, to them. Before such time, troopers assisted on busy days (so-called “lobby days”) and at other times. The remedy, as ordered by the ALJ is too broad and would effectively bar a return to the status quo ante. To that extent, the ALJ’s order must be modified if it becomes a final order. However, our inquiry and review does not end at this juncture.

The ALJ found that the “State does not argue that there has been any change in the qualifications for doing the screening work or that there has been any change in the work itself. The issue is, therefore, whether the work is exclusive to the unit.” The State takes exception to this finding.

NYSCOPBA, in essence, argues that there was no change in qualifications necessary to perform that job and in any event, the cases relied upon by the State (principally Town of Stony Point) and cases cited therein address civilianization – that is to say, instances where work performed by uniformed personnel was transferred to civilian, nonunit employees. NYSCOPBA argues that those cases do not apply where work flows from civilian employees to nonunit uniformed personnel; it avers that “[b]ecause the duties transferred do not require the exercise of police powers or police training to perform, we submit that the de facto rules cited by the Board in Stony Point is

33 Id.
34 45 PERB ¶ 3045 (2012).
inapposite.” We disagree.

The fundamental focus of our prior holdings was the transfer of work between civilians and uniformed personnel regardless of the direction in which work flows between such personnel. We recognized “the fact that civilians lack the ‘special employment qualifications’ required of and possessed by police officers or firefighters.” 35 We continue to recognize that “uniformed personnel are ‘fundamentally different from everyone else.’” 36

The substitution of civilians for police officers or fire fighters to deliver services previously performed by those uniformed personnel necessarily reflects an employer’s determination that the specialized training and skills of the uniformed officer are not necessary to the performance of a given set of tasks, e.g., dispatch. It is the employer’s determination to substitute positions having fundamentally different qualifications which has always been held to embrace the managerial right to establish qualifications even when specific tasks are unchanged. Therefore, it is not material that one or more civilians may be as capable objectively of performing certain tasks as one or more of the uniformed officers they replaced. 37

Consistent with precedent, and as a logical and predictable corollary to this proposition, when an employer has determined that the skills of a civilian employee are not necessary to perform a given set of tasks but that different qualifications are better suited for such tasks, especially tasks that are also performed by uniformed personnel and were so performed before being assigned to civilians, there has been a de facto change in qualifications for performing those tasks.

The ALJ’s finding that the State failed to invoke the magic words “change in job

35 Fairview Fire District, 29 PERB ¶ 3042, 3098 (1996). See also County of Suffolk, 12 PERB ¶ 3123 (1979).
36 Fairview Fire District, 29 PERB ¶ 3042 at 3098.
37 Id. (emphasis added).
qualifications” does not obviate a finding of a *de facto* change in qualifications. It is beyond cavil that the better pleading practice would have been for the State to have pleaded, or at least mentioned, this issue in its brief below.

But here, as in *Town of Stony Point*, we reject the argument that a respondent in a transfer of unit work case must affirmatively plead and prove a change in job qualifications – especially when there has been a change as a matter of uncontested fact. As in *Town of Stony Point*, NYSCOPBA’s “charge and the evidence demonstrate that both [NYSCOPBA and the State] knew that the at-issue work was transferred” from civilians to uniformed personnel. It would elevate form over substance to require that such an obvious state of facts be affirmatively mentioned when they are so clearly established by the record.

Our inquiry, however, does not end here. The finding of a *de facto* change in qualification triggers the balancing test established in *Niagara Frontier Transportation Authority* and does not of itself mandate in every case a finding that the matter is not a mandatory subject of bargaining. As we found in *Stony Point*:

> 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 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. Absent such a change, the loss of the at-issue work to the unit is a sufficient detriment for the finding of a

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38 45 PERB ¶ 3045 (2012).
39 45 PERB ¶ 3045, at 3115.
40 18 PERB ¶ 3083 (1985).
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.41

The balancing test, as we articulated in *Niagara Frontier* and its progeny, consists of essentially the following:

Even if no individual employees suffer a direct, immediate and specifically identifiable detriment to their terms and conditions of employment, their rights of organization and representation may be diminished if the scope of the negotiating unit is reduced. There may be a qualitative difference between individual detriments that are direct and immediate, and group benefits. The former may be more consequential, but the Taylor Law is clearly concerned with the latter as well. Thus, if a balancing test is required, the nature of the detriment would be taken into consideration.42

Among the factors to be considered when balancing interests is whether the employer has determined to redeploy uniformed personnel to take better advantage of their specialized training and status as police officers43 and whether members of a unit have lost employment or benefits.44 The State’s mission should also be taken into consideration in this context.

Our analysis in *Fairview Fire District*, a case addressed at civilianization of tasks otherwise assigned to uniformed personnel, is equally applicable to the transfer of functions from civilians to uniformed personnel:

As *State DOCS* demonstrates, although a change in qualifications is present in a civilianization case to a degree

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41 45 PERB ¶ 3045, 3114-5 (2012). [emphasis added]
43 *State (DOCS)*, 27 PERB ¶ 3055 (1994).
44 *Id.; Stony Point*, 45 PERB ¶ 3045, at 3115.
sufficient to trigger a balancing, the changes in level of service or other matters affecting managerial prerogatives effected by the civilianization may, in fact, not be significant, and they may not be sufficient on balance to outweigh the employees' interests in a given case. The balance of interests on the facts of the case may reveal, for example, as it did in State DOCS, that there is not and was never intended to be any substantial change in the services actually delivered. If that be so, then that fact is as much properly considered in a balance of interests as any other relevant to that balance. The extent of the change in qualifications and services and the detriment to the unit and its employees will weigh heavily in making the necessary balance. The less the change in the former and the greater in the latter, the more likely the balance will favor negotiability of the decision to transfer the work. Conversely, the balance will tend to favor a determination that the civilianization is not mandatorily negotiable when the change in qualifications and services is substantial and the detriment to the unit employees is minimal. 45

Although neither party requests a remand to present additional evidence, we believe the ALJ must be given the opportunity to make further findings of fact on the issues necessary to conduct the balancing mandated by law. The record is void of such findings. If necessary, the ALJ may request such further evidence as she deems necessary to address the issue of change of qualifications and balancing the interests of the parties.

IT IS, THEREFORE, ORDERED that the ALJ's findings are affirmed in part,

45 Fairview Fire District, 29 PERB ¶ 3042, 3099 (1996).
reversed in part, and remanded to the ALJ to process the charge consistent with our decision.

DATED: September 10, 2015
Albany, New York
This case comes to us on exceptions filed by the County of Nassau (County) to a decision of an Administrative Law Judge (ALJ). The ALJ dismissed the charge in part, but found that the County violated §209-a.1(d) of the Public Employees’ Fair Employment Act (Act) when it unilaterally required some unit officers to take their meal breaks one to two hours later than they had previously been scheduled.

EXCEPTIONS

The County asserts that the ALJ erred in not crediting the testimony of its witness that the meal relief officer was not required to perform all assigned meal relief for other officers before taking a meal break, and that the meal relief officer received a meal break between 6:40 p.m. to 7:30 p.m. The County further contends that the ALJ erred in crediting the evidence submitted by the Nassau County Sheriff’s Correction Officers Benevolent Association (COBA) and finding that it established a practice for 13 years.

1 47 PERB ¶ 4523 (2014).
2 Exception No. 1.
prior to January 6, 2012 pursuant to which the last meal period was scheduled for 6:40 p.m. The County excepts to the ALJ’s finding that the addition of two meal periods in the evening shift made possible the assignment of five meal reliefs to a given officer, two more than the previous maximum assignment of three meal reliefs prior to January 6, 2012.

The County asserts that the ALJ erred in finding that the addition of two later meal periods, resulting in later meal breaks for some officers, constituted a unilateral change to a mandatory subject of bargaining, and was not precluded by the employer’s right to determine its own staffing needs. The County further contends that the ALJ erred in declining to find that the provision of the collective bargaining agreement (agreement) regarding free meals or meal stipend, taken in conjunction with the agreement’s management rights provision established duty satisfaction, waiver, or both.

The County further argues that the record does not establish that the change in time that officers take their lunch requires the County to have more or fewer officers working at any given time, or that it affected anything other than the work schedule of the meal relief officers.

Finally, the County objects to the ALJ’s finding of a violation of the Act, and to the remedial component of her order.

FACTS

COBA represents a unit within the Department that includes correction officers, corrections sergeants, correction corporals, correction lieutenants and correction

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3 Exception Nos. 2, 12, 13, 14, 15.
4 Exception Nos. 3, 4, 5, 8.
5 Exception Nos. 6, 7, 9 (seeking to distinguish Town of Clarence, 30 PERB ¶ 3011 (1997)), 10, 11 (applying balancing test), 17.
6 Exception Nos. 18, 19, 20, 22, 23, 24.
7 Exception Nos. 16, 21.
captains (collectively, officers). At issue in the charge are officers working in security
during the evening tour, from 3:30 p.m. to midnight.

Most security officers directly oversee prisoners and must be relieved by another
officer to take a meal break, for which 50 minutes are allotted. These officers work in
the “Core Building,” adjacent to the “E-Building,” which contains the officers’ mess hall;
officers assigned to the E-Building are allotted 40 minutes for their lunch break.

Prior to January 6, 2012, the officer’s mess hall was open from 11:00 a.m. to
7:30 p.m. and officers working the evening tour in the Core Building were assigned one
of the following four meal periods: 4:00 p.m. to 4:50 p.m., 4:55 p.m. to 5:45 p.m.,
5:50 p.m. to 6:40 p.m., or 6:40 p.m. to 7:30 p.m. COBA witness and delegate
Correction Officer Dennis Maurus testified that the practice of scheduling officers to one
of these four set meal periods had existed for the entire 13 years that he had then
worked for the Department and continued unbroken until January 6, 2012.

The mess hall’s hours of operation and each relief officer’s meal break effectively
limited each officer to providing no more than three meal reliefs in the Core Building
during the evening shift. When the number of relief officers scheduled to work an
evening shift are inadequate to cover all of the needed meal reliefs, the Department
assigns officers overtime to fill the gap. Under the parties’ collective bargaining
agreement, when the County assigns an officer overtime to cover two meal relief
periods, that officer is entitled to take a meal period, resulting in the officer earning
overtime for three meal periods.

On January 6, 2012, Captain William F. Smith, III issued a memorandum stating

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8 At the time of filing the improper practice charge, COBA was known as the Sheriff’s
Officers Association; it changed its name during the pendency of this matter.
9 Transcript, pp. 29-30.
that the officers’ mess hall would, from that date forward, remain open until 10:00 p.m.\textsuperscript{10}

The Department added two new time slots to the meal period schedule (from 7:40 p.m. to 8:30 p.m. and from 8:30 p.m. to 9:20 p.m.) and began scheduling Core Building officers to take their meals breaks throughout the five meal periods. The addition of two meal periods allows the Department to assign officers to provide meal relief coverage, without paying overtime, during the evening shift for up to five meal periods, instead of the prior maximum of three meal reliefs.

COBA’s witnesses testified that meal relief officers must perform all assigned meal relief periods before their own meal break, requiring officers assigned five such relief periods to take their own meal break in the last period, from 8:30 p.m. to 9:20 p.m. Captain Smith testified to the contrary, stating that the meal relief officer may take a meal break during any of the assigned meal periods, as long as all the assigned meal reliefs are completed within the required time period. The ALJ determined that she did not need to resolve this dispute, “since it is clear that, since January 6, 2012, some unit officers are required to take their meal breaks during the two new meal periods.”\textsuperscript{11}

Smith testified that the extended mess hall hours and additional meal periods were intended to save money by reducing overtime, although he could not testify as to the amount of money that had been saved.

Section 28 of the parties’ 1998-2004 collectively negotiated agreement, entitled “Meal Money,” provides:

1. Any employee who actually works the employee’s complete regular daily work schedule shall receive meal money in accordance with the following:

2. An employee who works the employee’s entire workday, and works an additional two (2) hours or more (either two hours immediately before, or two hours immediately after,

\textsuperscript{10} Joint Exhibit 3.
\textsuperscript{11} 47 PERB ¶ 4523, at 4580.
but combining time worked before and after) shall receive a stipend in the amount of fifteen ($15.00) unless a meal is provided by the County.\footnote{12 Joint Exhibit 1, p. 27.}

The parties’ 2005 to 2012 memorandum of agreement increases the amount of meal money paid pursuant to §28 of the agreement from $15 to $25, but does not otherwise change the provisions of §28.\footnote{13 Joint Exhibit 2.}

Section 4 of the parties’ agreement,\footnote{14 Sections 4 and 5 are set forth in the parties’ 1998-2004 agreement and continued unchanged by the parties’ 2005 to 2012 memorandum of agreement.} entitled “Management Rights,” as here relevant, states that the County “reserves the right to... regulate work schedules.”

Section 5 of the parties’ agreement, entitled “Waiver-Zipper,” states:

The County and the Union for the life of this Agreement, each voluntarily and unconditionally agree that the other shall not be obligated to negotiate collectively with respect to any subject or matter referred to or covered in this Agreement, or with respect to any subject or matter not specifically referred to or covered in this Agreement, even though such subject or matter may not have been within the knowledge or contemplation of either or both of parties at the time they negotiated or signed this Agreement.\footnote{15 Joint Exhibit 1, p. 3.}

\section*{DISCUSSION}

We do not treat with all of the exceptions because we find the County’s contractual defenses sounding in waiver and duty satisfaction to be dispositive.\footnote{16 We note that the sufficiency of the pleading of waiver and duty satisfaction was not disputed either before the ALJ or before us, but was addressed on the merits at both stages. We therefore do not address the questions of whether the pleading was sufficient, and, if not, whether the record before the ALJ and before us sufficed to bring the matter properly before us. See County of Dutchess, 46 PERB ¶ 3009, 3016 (2013).} In our recent decision in \textit{Orchard Park Central School District}, we clarified the distinction between the two:

Duty satisfaction occurs when a specific subject has been negotiated to fruition and may be established by contractual terms that either expressly or implicitly demonstrate that the
parties had reached accord on that specific subject.

In contrast to duty satisfaction, waiver involves either the express relinquishment of specified rights or the use of language that establishes "a clear, intentional, and unmistakable relinquishment of the right to negotiate the particular subject at issue" by relieving the other party of the duty to negotiate on that subject.

In short, duty satisfaction is found when the duty to negotiate the specific subject at issue has been in fact satisfied, while waiver relieves the beneficiary of the specified statutory duties, including the duty to negotiate under the Taylor Law. ¹⁷

Here, as in Orchard Park, "we find that the provisions relied upon establish a knowing and intentional relinquishment of the right to negotiate over a specified set of otherwise mandatory subjects for the duration of the Agreement," including specifically the "right to negotiate those subjects not covered by the Agreement."¹⁸

As we explained in Sachem Central School District:

However, if an employee organization has the authority to waive its Taylor Law right to bargain concerning a specific term and condition of employment, it follows that it must also have the authority to waive the right to bargain concerning any and all terms and conditions of employment not addressed in the collective bargaining agreement.¹⁹

In the instant case, the parties did just that, each agreeing that "the other shall not be obligated to negotiate collectively with respect to any subject or matter referred to or covered in this Agreement, or with respect to any subject or matter not specifically referred to or covered in this Agreement."

COBA contends that, even where the parties have agreed to forego mid-term bargaining, our cases do not support allowing a unilateral change to a mandatory subject of bargaining, in the absence of "specific reservation of right" to make such

¹⁸ Id.
¹⁹ 21 PERB ¶ 3021, 3042 (1988).
changes.\textsuperscript{20} However, we have previously found just such a reservation of right in the specific management rights provision at issue here, which “reserves the right to...regulate work schedules,” which read in conjunction with the waiver-zipper clause at issue, “allows [the County] to set schedules and to determine how many employees are to be on duty and how many can use leave of any kind at any time.”\textsuperscript{21} Consistent with our prior holdings as to this language, we find the parties’ agreement sufficed to waive the statutory duty to bargain over such changes.

In reaching this conclusion, we are mindful of our prior decisions holding that in a collectively bargained management rights clause, where the “language is too broad to be considered to be a clear, unmistakable and unambiguous waiver, no such waiver will be found.”\textsuperscript{22} However, we are also aware that “[s]tare decisis should be most stringently applied in cases involving contract" rights,”\textsuperscript{23} because “[p]arties who engage

\textsuperscript{21} County of Nassau, 32 PERB ¶ 3052, 3122-3123 (1999) (finding no duty to bargain over unilateral change in use of non-vacation leave by same unit at issue here); citing County of Nassau, 13 PERB ¶ 3053, 3088 (1980) (finding waiver in same language negotiated by prior representative of officers, but in contract involving different unit). Recently, in County of Nassau, 46 PERB ¶ 3014 (2013), we withdrew our decision in County of Nassau, 46 PERB ¶ 3002 (2013), in which we had found a violation of the Act by the County’s unilateral change to the ability of members of the same unit at issue here, represented by COBA, to voluntarily exchange shifts, after the County moved for reconsideration on the basis of County of Nassau, 32 PERB ¶ 3052. We deemed our 1999 decision to be “more directly relevant to determining the merits of the County’s contractually based defense” having previously “rejected reliance upon precedent interpreting contract language from agreements involving other County collective bargaining units.” 46 PERB ¶ 3014, at 3030. As the parties’ expectations have been settled by our prior interpretation of the agreement for a lengthy period of time, we are loath to upset well-settled precedent.

We likewise acknowledge that our prior decisions have not been univocal in what constitutes a waiver and what duty satisfaction. For the reasons stated in the text, we find that the provisions here establish a waiver.

\textsuperscript{22} City of Yonkers, 40 PERB ¶ 3001 (quoting Civil Service Employees Assn, Inc., et al. v Newman, 88 AD2d 685, 15 PERB ¶ 7011 (3d Dept 1982), appeal dismissed, 57 NY2d 775, 15 PERB ¶ 7020 (1982).
\textsuperscript{23} Eastern Consol Props v Adelaide Realty Corp, 95 NY2d 785, 788 (2000) (Kaye, CJ, concurring).
in transactions based on prevailing law must be able to rely on the stability of such precedents." In view of our multiple decisions construing this exact language involving these parties or their predecessors-in-interest, including cases involving the very unit at issue here over a period spanning decades, we are loathe to disrupt the settled expectations of the parties. Even so we emphasize that "our conclusion in the present case is predicated upon our interpretation of the negotiated terms in the County-Association agreement. Prior Board decisions interpreting other contract language is generally not probative to determining a duty satisfaction, contract reversion or waiver defense in a subsequent case involving different parties and contracts." 

We note, as we did in Orchard Park and Sachem, that this reasoning does not govern general management rights provisions and zipper clauses as "the language in this case, unlike those, evidences an intention to waive the statutory right to bargain mid-contract term." 

Accordingly, we reverse the ALJ's decision and dismiss the charge.

DATED: September 10, 2015
Albany, New York

25 County of Nassau, 46 PERB ¶ 3014, 3030 n. 2.
26 Orchard Park, 47 PERB ¶ 3029, at 3090, quoting Sachem, 21 PERB ¶ 3021, at 3042; citing Profi Staff Congress-City University of New York v NYS Pub Empl Relations Bd, 7 NY3d 458, 466, 39 PERB ¶ 7010, 7021-7022 (2006) (affg, 37 PERB ¶ 3006 (2004)) (citing Sachem with approval).
STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

JAMES BARNES, JR.,

Charging Party,

-and-

UNITED FEDERATION OF TEACHERS, LOCAL 2,

Respondent,

-and-

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

Employer.

CASE NO. U-32081

JAMES BARNES, Jr., pro se

RICHARD E. CASAGRANDE, GENERAL COUNSEL (STEVEN A. FRIEDMAN of counsel), for Respondent

DAVID BRODSKY, DIRECTOR OF LABOR RELATIONS AND COLLECTIVE BARGAINING (DIMITRIOUS J. GOUNELAS of counsel), for Employer

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by James Barnes, Jr. to a decision of an Administrative Law Judge (ALJ) dismissing an improper practice charge against the United Federation of Teachers, Local 2, (UFT). The charge alleged that the UFT violated § 209-a.2 (c) of the Public Employees' Fair Employment Act (Act) by refusing to pursue arbitration of his grievance arising out of the termination of his employment by

1 48 PERB ¶ 4527 (2015).
the Board of Education of the City School District of the City of New York (District).

After a two day hearing, the ALJ dismissed the charge in its entirety.

EXCEPTIONS

Barnes excepts to the ALJ’s finding that the UFT did not breach its duty of fair representation in declining to take his grievance to arbitration. He asserts that the disciplinary process had been unfairly administered and that the evidence supporting the termination was not credible, and had in fact been discredited at an unemployment insurance hearing. Barnes contends that the UFT erred in basing its decision, in part, on an assumption that the arbitrator would not consider evidence not presented to the District, which the arbitrator could have done under the rules of the American Arbitration Association. Barnes further claims that the evidence of his alleged inappropriate relationship with a 20 year old Special Education student was flawed, and that no written rule specifically prohibited him from making telephone calls to her. Additionally, Barnes asserts that the ALJ did not require production of a UFT witness he wished to examine, and understated the number of times the UFT reviewed his case, as well as relying on a statement from a witness who did not testify. Finally, Barnes contends that the UFT acted in an arbitrary, bad faith or discriminatory manner in not taking his case to arbitration, as the weakness of the evidence shows that the District did have “good and sufficient reason” to terminate his employment.

The UFT contends that the exceptions were untimely served and filed, and that, in any event, the ALJ’s decision is correctly reasoned as to both the findings of fact and conclusions of law.
Upon our review of the exceptions, we affirm the ALJ decision.

FACTS

The underlying facts are set out in the ALJ’s decision, and are only summarized here to the extent necessary to address the exceptions. Barnes was employed by the District as a crisis paraprofessional in District 75, which “provides citywide educational, vocational, and behavior support programs for students who are on the autism spectrum, have significant cognitive delays, are severely emotionally challenged, sensory impaired and/or multiply disabled.” Barnes’s employment was terminated effective October 19, 2010, after an investigation conducted by the District’s Office of the Special Commissioner of Investigations (SCI) substantiated a complaint against him that he was engaged in inappropriate interactions with a 20 year old student and recommended that Barnes’ employment with the District be terminated.

The collective bargaining agreement between the UFT and the District applicable to paraprofessionals (Agreement) states:

It is the policy of the Board that the discharge of an employee must be based on good and sufficient reason and that such action be taken by the supervisor having authority only after he/she has given due consideration to the matter.

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2 The mission of District 75 is not in dispute; we take administrative notice of its description on the District’s website, which is available at http://schools.nyc.gov/academics/specialEducation/D75/default.htm (visited July 3, 2014).
3 Respondent’s Exhibit 5, Art. 23.
Pursuant to the Agreement, the UFT filed a disciplinary grievance challenging Barnes’s termination, and represented him at the step one hearing held on or about October 7, 2010.

Barnes and his UFT representative were provided with a copy of the SCI report before the step one hearing was held and, during the conference, Barnes was given an opportunity to respond to the allegations. Barnes submitted a packet of documents to the Superintendent’s representative, Susan Holtzman, including telephone records differing from those relied on by SCI. Holtzman denied the grievance, upholding the termination based on SCI’s investigation and report, after due consideration.

On October 19, 2010, the superintendent of District 75 terminated Barnes’s employment by letter, effective that date. The UFT advanced the grievance and a step 2 conference was held on January 7, 2011. On January 21, 2011, the step two hearing officer issued a decision finding that Barnes was “properly terminated after due consideration based on good and sufficient reason” and denying the grievance on the ground that the UFT had not proven a violation of the agreement.

Subsequently, Barnes asked the UFT to file a request for arbitration of his grievance. Ellen Gallin Procida, the Director of the UFT’s Grievance Department, declined Barnes’s request in a May 25, 2011 letter explaining that the Grievance

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4 Respondent’s Exhibit 4.
5 Charging Party’s Exhibit 15.
Department had investigated his grievance and had concluded that his case could not be successfully pursued at arbitration.\(^6\)

After his termination, Barnes filed for unemployment insurance benefits. After initially denying the claim, the New York State Department of Labor, Unemployment Insurance Department (UID), held a three day hearing, resulting in a June 9, 2011 decision reversing the initial determination and finding Barnes was entitled to benefits.\(^7\)

In its June 9, 2011 decision, the UID found that the telephone records relied upon by the District in its investigation were not reliable, that the investigator had admitted altering the telephone records and that Barnes had credibly denied the allegations against him.

Barnes appealed the UFT’s decision not to arbitrate his grievance to its Administrative Committee for Appeals (Ad Com) and met with it on March 5, 2012. The Ad Com met twice to review the appeal, a departure from its usual procedure, to review Barnes’s documentation, including the UID transcripts and decision.

The ALJ credited the testimony of the UFT’s witness, David Campbell, that, even after reviewing Barnes’s documents, the Ad Com believed that the UFT could not prevail in arbitration. Campbell cited the “due consideration” standard, which is more deferential to the employer’s findings than that applicable under other agreements. Campbell also pointed to the District’s reliance on four witnesses against Barnes and his own telephone records, which established that he had made calls to the student. Campbell further stated that the UID transcripts would have been inadmissible in

\(^6\) Respondent’s Exhibit 1.
\(^7\) Charging Party’s Exhibit 7.
arbitration because they post-dated the superintendent’s decision and did not bear upon “due consideration.” Finally, the absence of a Wendy’s restaurant near the address where Barnes was said to have been seen did not negate the District’s other evidence. Accordingly, Barnes received a letter dated June 8, 2012, on behalf of Ad Com, advising that the UFT would not appeal his grievance to arbitration.

**DISCUSSION**

As a threshold matter, we are constrained to dismiss Barnes’s exceptions because they were untimely filed. Section 213.2 of our Rules of Procedure (Rules) “requires exceptions to be filed within fifteen working days after receipt of an ALJ’s decision.”

Moreover, pursuant to § 213.2 (a) of the Rules, “[t]imely service of exceptions upon all other parties is a necessary component for the filing of exceptions under the Rules, and this timeliness requirement is strictly applied.”

Rule 200.10 of our Rules defines both “filing” and “service” as being “the act of mailing . . . , or deposit of the papers enclosed in a properly addressed wrapper into the custody of an overnight delivery service . . . ,” addressed to the Board or party, respectively.

United States Postal Service records establish that Barnes received the ALJ’s

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8 UFT (Jenkins), 28 PERB ¶ 3058, 3132 (1995).
9 UFT (Hunt), 48 PERB ¶ 3005, 3012 (2015), citing State of New York (Commission of Correction), 47 PERB ¶ 3019, at 3058 (2014); UFT (Pinkard), 44 PERB ¶ 3011, at 3042 (2011); UFT, Local 2, AFT, AFL-CIO (Elgalad), 43 PERB ¶ 3028 (2010); Honeoye Falls-Lima Cent. Sch Dist (Malcolm), 41 PERB ¶ 3015 (2008); Town/City of Poughkeepsie Water Treatment Facility, 35 PERB ¶ 3037 (2002); Yonkers Fedn of Teachers (Jackson), 36 PERB ¶ 3050 (2003).
10 Rule 200.10 (a) and (b).
decision on May 9, 2015; and therefore his exceptions were required to be filed and served by May 29, 2015. However, as the postmarks on both the exceptions filed with us and the service copy, as submitted by the UFT as Exhibit B to its response to exceptions, demonstrate, the exceptions were mailed on May 30, 2015, thus “making them late by one day,” as was the case in Jenkins.\(^\text{11}\) Here, as in \textit{Jenkins} and Hunt, we must be guided by our consistent precedents holding that “[o]ur filing rules have been strictly construed. When raised by a party, noncompliance with the time limits for filing has resulted in a dismissal of exceptions.”\(^\text{12}\) As the UFT has raised the late service upon it and the late if only by one day, we must dismiss the exceptions as we did in Jenkins.

Even if we were to consider the merits, we would affirm the ALJ’s decision. As we have recently reaffirmed, “[i]t is well-settled that an employee organization is entitled to a wide range of reasonable discretion in the processing of grievances under the Act.”\(^\text{13}\) In particular, “an employee’s mere disagreement with the tactics utilized or dissatisfaction with the quality or extent of representation does not constitute a breach of the duty of fair representation.”\(^\text{14}\)

\(^{11}\) \textit{UFT (Jenkins)}, 28 PERB ¶ 3058, at 3132.
\(^{12}\) \textit{Id.}, citing \textit{City of Albany}, 23 PERB ¶ 3027 (1990), confd sub nom \textit{City of Albany v Newman}, 181 A.D.2d 953, 25 PERB ¶ 7002 (3d Dept l992); see also \textit{UFT (Hunt)}, 48 PERB ¶ 3005, at 3012 (citing cases).
\(^{13}\) \textit{CSEA (Munroe)}, 47 PERB ¶ 3031, 3095 (2014) confd sub nom \textit{Munroe v Pub Employ Rel Bd}, 48 PERB 7002 (Sup Ct NY CO 2015), citing \textit{Amalg Transit Union, Local 1056 (Lefevre)}, 43 PERB ¶ 3027, 3104 (2010).
\(^{14}\) \textit{Id.}, citing \textit{Transport Workers Union, Local 100 (Brockington)}, 37 PERB ¶ 3002, 3006 (2004) (quotation marks omitted); \textit{Civ Serv Empl Assn (Smulyan)}, 45 PERB ¶ 3008, 3017 (2012).
On the record before us, we cannot say that anything more has been pleaded by Barnes. Contrary to his assumption, the mere fact that the Ad Com did not choose to take his grievance to arbitration does not, of itself, establish that the UFT’s actions were "arbitrary, discriminatory or founded in bad faith" as required to establish a breach of the Act.\(^\text{15}\) The ALJ credited Campbell’s testimony that the Ad Com considered Barnes’s appeal on two separate occasions, and that it evaluated the strengths and weaknesses of the case, reaching a decision based on that assessment. We have long held that “[c]redibility determinations by an ALJ are generally entitled to ‘great weight unless there is objective evidence in the record compelling a conclusion that the credibility finding is manifestly incorrect.”\(^\text{16}\) In the instant case, no such objective evidence demonstrating that the ALJ’s credibility determinations are manifestly incorrect has been adduced, and we therefore decline to reverse them.\(^\text{17}\)

While Barnes does not agree with the Ad Com’s assessment of the viability of his case at arbitration, he has not established that it was arbitrary, discriminatory or reached in bad faith. At most, the Ad Com may have been in error as to the

\(^{15}\) Id., citing Bienko (CSEA), 47 PERB ¶ 3027, at 3082-3083, quoting District Council 37, AFSCME, AFL-CIO (Farrey), 41 PERB ¶ 3027, at 3119 (2008).

\(^{16}\) Village of Endicott, 47 PERB ¶ 3017, 3051 (2014), quoting Manhasset Union Free Sch Dist, 41 PERB ¶ 3005, at 3019 (2008); citing County of Tioga, 44 PERB ¶ 3016, at 3062 (2011); Mount Morris Cent Sch Dist, 41 PERB ¶ 3020 (2008); City of Rochester, 23 PERB ¶ 3049 (1990); Hempstead Housing Auth, 12 PERB ¶ 3054 (1979); Captain’s Endowment Assn, 10 PERB ¶ 3034 (1977).

\(^{17}\) The ALJ’s attribution of uncontroverted testimony to an individual who did not appear at the hearing does not establish the sort of objective evidence of error required to reverse a credibility determination, in view of the non-controversial nature of the testimony at issue, and the significant likelihood, from the context of the statement, that the attribution was a typographical error, as the erroneous statement falls within a summary of Campbell’s testimony.
admissibility of the UID decision and transcript. Even were that demonstrated to be the case, Barnes "would have at most asserted 'an honest mistake resulting from misunderstanding,' insufficient to constitute a breach of the duty of fair representation." 18

Based upon the foregoing, we deny Barnes's charge and affirm the decision of the ALJ.

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

DATED: September 10, 2015
Albany, New York

18 CSEA (Munroe), 47 PERB ¶ 3031, at 3096, quoting Cairo-Durham Teachers Assn, 47 PERB ¶ 3008 at 3026; citing CSEA (Kandel), 13 PERB ¶ 3049 (1980).
This case comes to us on exceptions filed by Natasha Gibson to a decision of an Administrative Law Judge (ALJ) dismissing an improper practice charge against the United Federation of Teachers, Local 2, American Federation of Teachers, AFL-CIO (UFT).¹ The charge alleged that the UFT breached its duty of fair representation in violation of §§ 209-a.2 (a) and (c) of the Public Employees’ Fair Employment Act (Act) by refusing to take her grievance to arbitration. At a pre-hearing conference, UFT

¹ 48 PERB ¶ 4513 (2015).
moved to dismiss the charge for failure to present a *prima facie* case. On January 9, 2015, Gibson filed an offer of proof and written argument opposing the motion, and the UFT filed a brief in support of the motion.

**EXCEPTIONS**

Gibson excepts to the ALJ’s finding that the charge was facially insufficient as it failed to allege that the UFT’s decision not to pursue her grievance to arbitration was impermissibly motivated. Gibson asserts that the principal’s decision to terminate her was malicious, based on retaliation for her whistleblowing activity of exposing improper practices. Gibson further contends that the UFT’s rejection of the recommendation of her grievance representative to take the matter to arbitration was wholly irrational, because it represented the UFT “turning on itself.”

**FACTS**

The underlying facts are set out in the ALJ’s decision, and are only summarized here to the extent necessary to address the exceptions. Gibson was employed by the District as a paraprofessional. On December 21, 2012, Gibson’s employment was terminated by the District for an alleged violation of Chancellor’s Regulation A-420, relating to corporal punishment.

The UFT unsuccessfully represented Gibson at both the school and the Chancellor’s level. Gibson requested the UFT to pursue arbitration on her behalf, but the UFT’s grievance arbitration department refused her request, stating in a letter dated October 21, 2013, that “[a]s a result of a further investigation of your case, we still believe that your grievance cannot successfully be pursued to arbitration.”

Gibson exercised her right to appeal that decision to the UFT’s Administrative

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2 48 PERB ¶ 4513, at 4548.
Committee (Ad Com). On December 9, 2013, the Ad Com met and reviewed Gibson’s appeal, with her present. Gibson asserts at the Ad Com meeting, the UFT representative who had appeared for Gibson at the first two steps urged the Ad Com to file an arbitration on the ground that the penalty of termination was “harsh and unusual and did not allow for improvement.” On April 22, 2014, the Ad Com advised Gibson that it had reviewed her case and determined that she did not have a meritorious claim for arbitration.

**DISCUSSION**

Gibson’s exceptions were dated March 25, 2015, and postmarked March 26, 2015, and thus were timely filed. However, no proof of service upon the other parties was provided. A letter was sent to Gibson dated May 1, 2015, pointing out this omission and giving her an opportunity to provide the requisite proof of service. Gibson did not reply. Pursuant to §213.2 (a) of our Rules of Procedure (Rules), “[t]imely service of exceptions upon all other parties is a necessary component for the filing of exceptions under the Rules, and this timeliness requirement is strictly applied.” Thus, on the record before us, Gibson’s exceptions were not timely served and therefore must be denied.

Even if the record before us established timely service of the exceptions, we would affirm the ALJ’s decision on the merits. The original charge, the amended charge, and the offer of proof submitted by Gibson before the ALJ do not include any

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3 *State of New York (Commission of Correction)*, 47 PERB ¶ 3019, at 3058 (2014) (citing *UFT (Pinkard)*, 44 PERB ¶¶ 3011, 3042 (2011); *UFT (Elgalad)*, 43 PERB ¶ 3028 (2010)); see generally *UFT (Hunt)*, 48 PERB ¶ 3005 (2015); *Honeoye Falls-Lima Cent Sch Dist (Malcolm)*, 41 PERB ¶ 3015 (2008); *Town/City of Poughkeepsie Water Treatment Facility*, 35 PERB ¶ 3037 (2002); *Yonkers Fedn of Teachers (Jackson)*, 36 PERB ¶ 3050 (2003).

4 *UFT (Hunt)*, 48 PERB ¶ 3005, at 3012.
allegation of retaliation for any whistleblowing activity by Gibson, or of impermissible motivation on the part of the UFT in declining to take her grievance to arbitration.

Section 213.2 of our Rules "limits our review of the ALJ's determination to the record before him or her." These belated factual claims are, therefore, not properly before us. Nor would these contentions justify reversing the ALJ's decision, even if they were properly considered. Gibson's asserted whistleblowing is alleged to have led to retaliation from the employer, not the UFT. However, the employer is named here solely as a statutory party, with no independent claim having been raised against it. The only concrete allegation against the UFT in the exceptions is that the Ad Com rejected the recommendation of the UFT representative who had appeared for Gibson at the first two steps that an arbitration be filed, because the penalty of termination was "harsh and unusual and did not allow for improvement." As we have recently reaffirmed, "[i]t is well-settled that an employee organization is entitled to a wide range of reasonable discretion in the processing of grievances under the Act." In particular, "an employee's mere disagreement with the tactics utilized or dissatisfaction with the quality or extent of representation does not constitute a breach of the duty of fair representation."

On the record before us, we cannot say that anything more has been pleaded by Gibson; contrary to her assumption, the mere fact that the Ad Com did not agree with

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5 Civil Ser Employ Ass'n (Bienko), 47 PERB ¶ 3027, 3082 (2014); NYS Thruway Authority, 47 PERB ¶ 3032, 3100, at n 25 (2014); CSEA (Paganini), 36 PERB ¶ 3006, 3019 (2003), citing Margolin v Newman, 130 AD2d 312, 20 PERB ¶ 7018 (3d Dept 1987), affd other grounds, 73 NY2d 796, 21 PERB ¶ 7017 (1988); see also Town of Blooming Grove, 47 PERB ¶ 3010 (2014).
6 CSEA (Munroe), 47 PERB ¶ 3031, 3095 (2014), citing Amalg Transit Union, Local 1056 (Lefevre), 43 PERB ¶ 3027, 3104 (2010).
7 Id., citing Transport Workers Union, Local 100 (Brockington), 37 PERB ¶ 3002, 3006 (2004) (quotation marks omitted); Civ Serv Empl Assn (Smulyan), 45 PERB ¶ 3008, 3017 (2012).
the grievance representative's recommendation of arbitration does not, of itself, establish that the UFT's actions were "arbitrary, discriminatory or founded in bad faith" as required to establish a breach of the Act.\(^8\)

Based upon the foregoing, we deny Gibson's charge and affirm the decision of the ALJ.

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

DATED: September 10, 2015
Albany, New York

\(^8\) Id., citing CSEA (Bienko), 47 PERB ¶ 3027, at 3082-3083, quoting District Council 37, AFSCME, AFL-CIO (Farrey), 41 PERB ¶ 3027, 3119 (2008).
This case comes to us on exceptions to a decision of an Administrative Law Judge (ALJ) dismissing an improper practice charge alleging that the United Federation of Teachers, Local 2, American Federation of Teachers, AFL-CIO (UFT) violated §§ 209-a.(2) (a) and (c) of the Public Employees’ Fair Employment Act.  

The charge contended that the UFT breached its duty of fair representation to Alvin C. Leon by holding a recall election against Leon, a UFT chapter leader, and by not defending him adequately in disciplinary proceedings under § 3020-a of the Education Law. After the UFT moved at the conference to dismiss the charge, the ALJ allowed the UFT to file a brief in support of its motion, and allowed Leon to file written argument in opposition to the motion as well as an offer of proof, which the ALJ presumed to be true for purposes of deciding the motion.

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1 47 PERB ¶ 4521 (2015).
2 We commend the ALJ’s use of an offer of proof in conjunction with the motion to clarify the lack of any material issue of disputed fact warranting a hearing.
DISCUSSION

The facts in this matter are stated in the ALJ’s decision, and we only address them here to the extent necessary to discuss the sufficiency of the claims in light of the exceptions.

During the relevant time period, Leon was employed by the Board of Education of the City School District of the City of New York (District) as a guidance counselor, and served as a UFT chapter leader for the school in which he was employed, PS 30 M. On February 28, 2014, he was served with disciplinary charges pursuant to Education Law § 3020-a, and was, pending disposition of the charges, assigned to a different location.\(^3\) Subsequent to this reassignment, a vote to recall Leon from his union office was held on April 21, 2014, and failed. On May 2, 2014, Leon alleges, UFT special representative Dwayne Clark urged the members of the chapter to recall him, on the ground that a reassigned teacher could not effectively represent the members.\(^4\) A second recall vote, on May 21, 2014, was successful and Leon was ousted.

Leon contends that the UFT’s representation was deficient in that, despite “hostilities displayed upon [him] by the principal,” he “did not receive support and the protection of the union before or after the charges,” and that he was “abandoned.”\(^5\)

As a threshold matter, we note that the exceptions in this matter are deficient under § 213.2(b) of our Rules of Procedure (Rules) “because they do not specify the grounds for the exceptions, the questions or policy issues [he] wants the Board to consider, the portion of the ALJ’s decision [he] is challenging and the sections of the

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\(^3\) Leon Opposition to Motion to Dismiss, at p. 6-7, 18.
\(^4\) Id. at 15.
\(^5\) Exceptions, at p. 10.
Here, as was the case in *UFT (Pinkard)*, "while we are mindful that Leon is unrepresented, and that his exceptions should be liberally construed, we note that he has simply reasserted [his] factual contentions," as exceptions. We reiterate that "such blunderbuss exceptions do not comport with the Rules." In view of Leon’s pro se status, we have examined the exceptions and the record, and we are unable to discern an arguably meritorious basis for his challenge to the ALJ’s decision.

In *UFT (Asamoah)*, we recently reaffirmed our decisions that “have repeatedly refused to entertain complaints about internal union discipline or other internal affairs which neither affect an employee’s terms and conditions of employment nor violate any fundamental purposes of the Act.” In so doing, we have “long acknowledged the distinction between actions taken by an employee organization to discipline a member, and action taken against that member as an employee which would have an adverse effect upon the terms and conditions of his employment or upon the nature of the representation afforded him.”

Thus, where deprivation of union membership would affect an employee’s seniority, and thus the employee’s assignment to overtime, we have found that a breach of the duty of fair representation could be established.

Here, by contrast, as the ALJ properly found, Leon’s “claim is not that the UFT breached its duty to him as a public employee under the Act, but that it undermined him

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6 *UFT (Pinkard)*, 47 PERB ¶ 3020, 3061 (2014) (quotation marks and citation omitted); Rules § 213.2(b) (1)-(4).
7 Id.
8 Id.
10 Id., citing *Civil Service Empl Assn (Bogack)*, 9 PERB ¶ 3064, 3110 (1976).
11 *UFT (Asamoah)*, 47 PERB ¶ 3034, 3102 (2014).
as a union representative and urged his replacement."\textsuperscript{12} Thus, we affirm the ALJ's dismissal of this claim.\textsuperscript{13}

With respect to UFT's representation of him in the disciplinary case, Leon only asserts before us that, in the face of "hostilities displayed upon me by the principal," he "did not receive support and the protection of the union before or after the charges," and that he was "abandoned."\textsuperscript{14} To establish a breach of the duty of fair representation under the Act, a "charging party 'has the burden of proof to demonstrate that an employee organization's conduct or actions are arbitrary, discriminatory or founded in bad faith.'"\textsuperscript{15}

In determining whether such a breach has been established, we are constrained in our analysis by the fact that the courts have:

rejected the standard that "irresponsible or grossly negligent" conduct may form the basis for a union's breach of the duty of fair representation as not within the meaning of improper employee organization practices set forth in Civil Service Law § 209-a. An honest mistake resulting from misunderstanding or lack of familiarity with matters of procedure does not rise to the level of the requisite arbitrary, discriminatory or bad-faith conduct required to establish an improper practice by the union.\textsuperscript{16}

\textsuperscript{12} 48 PERB ¶ 4521, at 4584.
\textsuperscript{13} Were we to address the claim on the merits, we would affirm the ALJ's findings, including that the UFT provided a reasoned, non-discriminatory basis for supporting a recall of Leon—that Leon's reassignment away from the school pending resolution of the § 3020-a charges against him prevented his effectively performing his duties as a chapter leader for the school. 48 PERB ¶ 4521, at 4585.
\textsuperscript{14} Exceptions, at p. 10.
\textsuperscript{15} UFT (Arredondo), 48 PERB ¶ 3010, 3033 (2015) (quoting UFT (Munroe), 47 PERB ¶ 3031, 3095 (2014); contd sub nom Munroe v NYS Pub Employ Rel Bd, 48 PERB 7002 (Sup Ct NY Co 2015); CSEA (Bienko), 47 PERB ¶ 3027, 3082-3083 (2014)); citing District Council 37, AFSCME, AFL-CIO (Farrey), 41 PERB ¶ 3027, 3119 (2008).
\textsuperscript{16} Id. at 3033-3034 (quoting UFT (Monroe), 47 PERB ¶ 3031, 3095 (editing marks omitted)); Cairo-Durham Teachers Assn, 47 PERB ¶ 3008, 3026 (2014); see Civ Serv Empl Assn, Local 1000 v NYS Pub Empl Relations Bd (Diaz), 132 AD 2d 430, 432, 20 PERB ¶ 7024, 7039 (3d Dept 1987), affd on other grounds, 73 NY2d 796, 21 PERB ¶ 7017 (1988)).
It is “well-settled that an employee organization is entitled to a wide range of reasonable discretion in the processing of grievances under the Act.” In particular, “an employee’s mere disagreement with the tactics utilized or dissatisfaction with the quality or extent of representation does not constitute a breach of the duty of fair representation.”

Leon has not identified any specific error or alleged deficiency in the UFT’s representation of him in his exceptions, response to the motion to dismiss, or offer of proof, let alone one alleged to be arbitrary, discriminatory or sufficiently egregious or irrational or in bad faith. Rather, the gravamen of the charge is what the ALJ aptly characterized as “[v]ague, undated claims of collusion with the District.” We have repeatedly declined to hold that such “conclusory allegation[s] of collusion without any factual predicate suffice to state a claim.” We adhere to those holdings, and, accordingly, deny the exceptions and affirm the ALJ’s decision.

DATED: September 10, 2015
Albany, New York

17 Amalg Transit Union, Local 1056 (Lefevre), 43 PERB ¶ 3027, 3104 (2010).
18 UFT (Arredondo), 48 PERB ¶ 3010, at 3034 (quoting Transport Workers Union, Local 100 (Brockington), 37 PERB ¶ 3002, 3006 (2004) (quotation marks omitted).
19 Id. UFT (Munroe), 47 PERB ¶ 3031, at 3095, citing PEF (Goonewardena), 27 PERB ¶ 3006 (1994)); UFT (Cruz), 48 PERB ¶ 3004, at 3011, n. 18 (2015).