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State of New York Public Employment Relations Board Decisions from April 13, 2016

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State of New York Public Employment Relations Board Decisions from April 13, 2016

Keywords

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

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**STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD**

In the Matter of

**INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
LOCAL 693/317,**

Petitioner,

-and-

CASE NO. C-6310

VILLAGE OF DEPOSIT,

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 International Brotherhood of Teamsters, Local 693/317 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: Water/Waste Water Maintenance Crew Chief, Water/Waste Water Maintainer, and full-time and part-time Laborer.

Excluded: Town Supervisor, Highway Superintendent, Clerks, and all other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the International Brotherhood of Teamsters, Local 693/317. 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: April 13, 2016
Albany, New York


Allen C. DeMarco, Member


Robert S. Hite, Member

**STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD**

In the Matter of

LOCAL 342, UMD, ILA, AFL-CIO,

Petitioner,

-and-

CASE NO. C-6338

**NASSAU COUNTY VOCATIONAL EDUCATION &
EXTENSION BOARD,**

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;

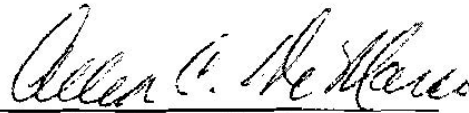
IT IS HEREBY CERTIFIED that the Local 342, UMD, ILA, AFL-CIO has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Included: Part-time per diem 2nd Deputy Instructors Nassau County Vocational Education & Extension Board.

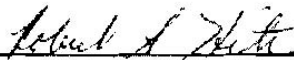
Excluded: All other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Local 342, UMD, ILA, 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: April 13, 2016
Albany, New York



Allen C. DeMarco, Member



Robert S. Hite, Member

**STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD**

In the Matter of

**TRANSPORT WORKERS UNION OF AMERICA,
LOCAL 100,**

Petitioner,

-and-

CASE NO. C-6352

**MANHATTAN and BRONX SURFACE TRANSIT
OPERATING AUTHORITY,**

Employer.

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

A representation proceeding having been conducted in the above matter by the Public Employment Relations Board in accordance with the Public Employees' Fair Employment Act and the Rules of Procedure, 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 Transport Workers Union of America, Local 100 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 Computer Aides¹, Computer Aides 2, Computer Associates 1, Computer Associates 2, Computer Associates 3, Computer

Specialists 1, Computer Specialists 2, Computer Specialists 3, Computer Specialists 4, Telecommunications Associates 1, Telecommunications Associates 2, Telecommunications Associates 3, Telecommunications Specialist 1, Telecommunications Specialists 2, Telecommunications Specialists 3, Computer System Managers, Computer Program Analysts 1, and Computer Program Analysts 2 employed by the Manhattan and Bronx Surface Transit Operating Authority.

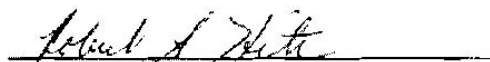
Excluded: Employees who the parties have agreed, in their Agreement dated January 8, 2016, perform confidential and/or managerial duties and all other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Transport Workers Union of America, Local 100. 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: April 13, 2016
Albany, New York



Allen C. DeMarco, Member



Robert S. Hite, Member

**STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD**

In the Matter of

UNITED PUBLIC SERVICE EMPLOYEES UNION,

Petitioner,

- and -

CASE NO. C-6363

BRENTWOOD UNION FREE SCHOOL DISTRICT,

Employer,

-and-

**CITY EMPLOYEES UNION LOCAL 237, INTERNATIONAL
BROTHERHOOD OF TEAMSTERS,**

Intervenor/Incumbent.

**KOEHLER & ISSACS LLP (JULIE PEARLMAN SCHATZ, ESQ., of Counsel),
for Petitioner**

**LAMB & BARNOSKY, LLP (RICHARD K. ZUCKERMAN, ESQ., of Counsel),
for Employer**

**ARCHER, BYINGTON, GLENNON & LEVINE, LLP (JAMES W. VERSOCKI,
ESQ, of Counsel), for Intervenor**

BOARD DECISION AND ORDER

On November 3, 2015, the United Public Service Employees Union (petitioner) filed, in accordance with the Rules of Procedure of the Public Employment Relations Board, a timely petition seeking certification as the exclusive representative of certain employees of the Brentwood Union Free School District (employer).

Thereafter, the parties executed a consent agreement in which they stipulated

that the following negotiating unit was appropriate:

- Included: All permanent Custodial Worker I, Groundskeeper I, Custodial Worker II, Driver Messenger, Maintenance Mechanic I, Audio Visual Aide, Head Custodian, Maintenance Mechanic II, Chief Custodian, Audio Visual Technician, Automotive Mechanic III, Maintenance Mechanic III (carpenter, electrician, electronic technician, heating and refrigeration, locksmith, plumber), Groundskeeper II, Head Maintenance, Stock Clerk, Storekeeper, Guard, Senior Guard, Food Service Worker, Cook and Substitute Guard (also known as Call-In Guard) employed by the Board of Education.
- Excluded: Substitute part-time employees, clerical employees and all other employees.

Pursuant to that agreement, a secret-ballot election was held on March 18, 2016, at which a majority of ballots were cast against representation by the petitioner.

Inasmuch as the results of the election indicate that a majority of the eligible voters in the unit who cast ballots do not desire to be represented for the purpose of collective negotiations by the petitioner, the incumbent remains the exclusive representative of the unit employees and IT IS ORDERED that the petition is dismissed.

DATED: April 13, 2016
Albany, New York


Allen C. DeMarco, Member


Robert S. Hite, Member

**STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD**

In the Matter of

UNITED PUBLIC SERVICE EMPLOYEES UNION,

Petitioner,

- and -

CASE NO. C-6364

MIDDLE COUNTRY CENTRAL SCHOOL DISTRICT,

Employer,

-and-

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

Intervenor/Incumbent.

JULIE PEARLMAN SCHATZ, ESQ., for Petitioner

THOMAS M. VOLZ, ESQ., for Employer

ERIC WILKE, ESQ., for Intervenor

BOARD DECISION AND ORDER

On November 3, 2015, the United Public Service Employees Union (petitioner) filed, in accordance with the Rules of Procedure of the Public Employment Relations Board, a timely petition seeking certification as the exclusive representative of certain employees of the Middle Country Central School District (employer).

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

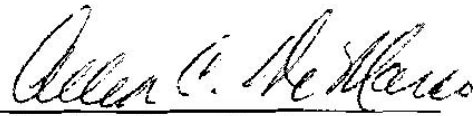
Included: All employees in the titles of Bus Driver Mechanic; Material Control Clerk 1, 2 and 3; Bus/Auto Mechanic 1, 2 and 3; Maintenance Mechanic 2, 3 and 4; Head Bus Driver; Groundsperson; and Head Groundsperson (Grounds Foreman).

Excluded: All other employees.


Pursuant to that agreement, a secret-ballot election was held on February 19, 2016, at which a majority of ballots were cast against representation by the petitioner.

Inasmuch as the results of the election indicate that a majority of the eligible voters in the unit who cast ballots do not desire to be represented for the purpose of collective negotiations by the petitioner, the incumbent remains the exclusive representative of the unit employees and IT IS ORDERED that the petition is dismissed.

DATED: April 13, 2016
Albany, New York



Allen C. DeMarco, Member



Robert S. Hite, Member

**STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD**

In the Matter of

UNITED PUBLIC SERVICE EMPLOYEES UNION,

Petitioner,

- and -

CASE NO. C-6365

MIDDLE COUNTRY CENTRAL SCHOOL DISTRICT,

Employer,

-and-

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

Intervenor/Incumbent.

JULIE PEARLMAN SCHATZ, ESQ., for Petitioner

THOMAS M. VOLZ, ESQ., for Employer

ERIC WILKE, ESQ., for Intervenor

BOARD DECISION AND ORDER

On November 3, 2015, the United Public Service Employees Union (petitioner) filed, in accordance with the Rules of Procedure of the Public Employment Relations Board, a timely petition seeking certification as the exclusive representative of certain employees of the Middle Country Central School District (employer).

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

Included: All supervisory employees of the Buildings and Grounds Department whose titles are Chief Custodians and Head Custodians shall be a part of and included in this bargaining unit.

Excluded: All other employees.

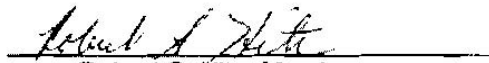
Pursuant to that agreement, a secret-ballot election was held on February 19, 2016, at which a majority of ballots were cast against representation by the petitioner.

Inasmuch as the results of the election indicate that a majority of the eligible voters in the unit who cast ballots do not desire to be represented for the purpose of collective negotiations by the petitioner, the incumbent remains the exclusive representative of the unit employees and IT IS ORDERED that the petition is dismissed.

DATED: April 13, 2016
Albany, New York



Allen C. DeMarco, Member



Robert S. Hite, Member

**STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD**

In the Matter of

**CIVIL SERVICE EMPLOYEES ASSOCIATION, LOCAL
1000, AFSCME, AFL-CIO,**

Petitioner,

-and-

CASE NO. C-6372

AVERILL PARK CENTRAL SCHOOL DISTRICT,

Employer,

-and-

UNITED PUBLIC SERVICE EMPLOYEES UNION,

Intervenor/Incumbent.

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, 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 full-time and part-time employees in the titles listed to be included in the negotiating unit: 12-month Mechanic, Account Clerk, Assistant Cook, Building Maintenance Mechanic, Bus Attendant, Bus Driver, Cook, Custodial Worker, Custodians, Dispatcher, Food Service Helper, Groundskeeper, Head Groundskeeper, Messenger, School Monitor, Senior Typist, Teacher Aide, Typist, Typist assigned to a Principal and Typist assigned to an Admin/Supervisor.

Excluded: All other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Civil Service Employees Association, 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: April 13, 2016
Albany, New York



Allen C. DeMarco, Member



Robert S. Hite, Member

**STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD**

In the Matter of

VILLAGE OF SCARSDALE,

Petitioner,

CASE NO. CP-1352

- and -

**UNIFORMED FIREFIGHTERS ASSOCIATION OF
SCARSDALE, LOCAL 1394, IAFF, AFL-CIO,**

Employer.

**BOND, SCHOENECK & KING, PLLC (TERRY O'NEIL of counsel), for
Petitioner**

**MEYER, SOUZZI, ENGLISH & KLEIN, P.C. (RICHARD S. CORENTHAL of
counsel), for Employer**

BOARD DECISION AND ORDER

This comes to us on exceptions by the Village of Scarsdale (Village) to a decision of an Administrative Law Judge (ALJ) dismissing the Village's unit placement petition filed pursuant to § 201.2(b) of our Rules of Procedure (Rules) asking that the newly-created title of Fire Lieutenant be included in the pre-existing bargaining unit represented by the Uniformed Firefighters Association of Scarsdale, Local 1394, IAFF, AFL-CIO (UFA).¹ For the reasons stated herein, we affirm the ALJ's decision, deny the exceptions, and dismiss the petition.

EXCEPTIONS

We characterize the Village's eight exceptions as follows: (1) the Village excepts to the ALJ's factual findings and conclusions that the vacancy in the Fire Lieutenant position cannot be said to be "temporary" because it had never been filled, that there

¹ 48 PERB ¶ 4001 (2015).

was no date certain when the Village would fill the position, and indeed, the Village had never made any efforts to fill the position;² (2) the Village excepts to the ALJ's findings that "it cannot 'be said that the duties of the position [at issue herein] are known in this matter";³ and (3) the Village generally excepts to the ALJ's dismissal of the petition and application of case law to the facts before her.⁴

FACTS

The parties asked the ALJ to determine this matter on a stipulated record in lieu of a hearing;⁵ therefore these facts are not at issue. The ALJ incorporated the relevant facts from that record into her decision, and we restate them as necessary to determine the exceptions before us.

UFA represents a unit of six Fire Captains and thirty-nine Firefighters employed in the Village's Fire Department (Department). The most recent collective bargaining agreement between the parties runs from June 1, 2013 through May 31, 2017 and contains the following recognition clause:

This Agreement shall apply to permanent, paid, full time Fire Captains and Fire Fighters of the uniformed force of the Fire Department of the Village, Probationary Fire Captains and to Probationary Firefighters upon their successful completion of fire academy training and their passing the Candidate Physical Ability Test (collectively "Employees"). ***This Agreement shall not apply to the Fire Chief and all others not contained in this paragraph.***⁶

The Westchester County Department of Human Resources (DHR) certified a job

² Exceptions, ¶¶ 3, 6, and 7.

³ Exceptions, ¶ 4.

⁴ Exceptions, ¶¶ 1, 2, and 5.

⁵ Response of UFA to Exceptions, Ex. A (Stipulation of Facts or SOF) which contain as exhibits all of the documents referred to herein.

⁶ SOF, ¶¶ 1 and 2 (emphasis added).

description for a newly-created title of Fire Lieutenant on or about April 27, 2012.⁷ On May 3, 2012 and June 4, 2013, the Village posted memoranda, referred to as “vacancy notices,”⁸ announcing the creation of the provisional Fire Lieutenant position and DHR’s intent to eliminate the Administrative Fire Captain/Staff Officer position.⁹

The May 3, 2012 notice was addressed to all personnel and stated:

The Staff Officer position will become vacant on May 28, 2012 when Captain Mann moves to the Training Officer position. Based on a comprehensive review of the organizational structure of this department, along with the operating budget and current economic climate, I’ve decided to eliminate the Captain/Staff Officer position and create a new Lieutenant/Staff Officer position. The duties and schedule will remain the same - only the rank will change.

The creation of a new rank of Lieutenant has been authorized by the Westchester County Department of Human Resources based on the proposed job description that we provided. The job description (attached) describes the distinguishing features of the new class, examples of work, required knowledge, skills, abilities and attributes, and minimal acceptable training and experience. The salary rate for the position of Fire Lieutenant will be 15% above First Grade Firefighter.

I anticipate promoting one firefighter to the rank of Lieutenant in June 2012, and this new Lieutenant will serve in the Staff Officer position. Since we do not currently have a Civil Service eligibility list for Lieutenant the new appointments will be made provisionally and will be open to any career member meeting the minimum requirements. We will then request to participate in the next Civil Service test for the position of Fire Lieutenant whenever it is offered, and the member appointed provisionally now will receive a permanent appointment assuming he finishes in the top

⁷ SOF, ¶ 5.

⁸ SOF, ¶ 6.

⁹ SOF, ¶ 3 which contains the collective bargaining agreement. Article XIV, §W of the agreement specifically refers to the position of “Administrative Captain” which is also called “Staff Officer.”

three on the new eligibility list.¹⁰

The UFA filed an improper practice on or about June 14, 2012 alleging that the announced plans to transfer duties to the Fire Lieutenant title violated § 209-a.1(d) of the Act. By decision dated February 4, 2015, the ALJ dismissed the charge as being premature.¹¹

The Village filed the instant unit placement petition on October 15, 2012. On May 31, 2013, the Fire Chief rescinded his May 3, 2012 notice stating, in relevant part, that “[t]he Village represents that the position of Lieutenant/Staff Officer will perform the duties and work exclusively being performed by the bargaining unit position of Administrative Captain/Staff Officer if it is filled. The Village represents that it shall not fill the lieutenant position until a decision is reached on the Petition and improper practice charge.”¹²

The June 4, 2013 notice of vacancy, also addressed to all personnel, advised that the Fire Department anticipated filing the “vacant Staff Officer position” by promoting one Firefighter to the rank of Fire Lieutenant, that the DHR approved the position of Fire Lieutenant noting that the pay for position would be 15% above First Grade Firefighter, that an initial provisional appointment would be made and that Firefighters interested in applying for the position should submit a resume and a letter of interest no later than June 25, 2013.¹³

On August 14, 2012, the Village’s Board of Trustees adopted a resolution stating

¹⁰ SOF, ¶ 7.

¹¹ *Village of Scarsdale*, 48 PERB ¶ 4510 (2015).

¹² SOF, ¶ 13.

¹³ SOF, ¶ 6.

that the Village's budget for the fiscal year 2012-2013 would fund seven Captain positions, including one Staff Captain, one Scheduling Captain, four Fire Suppression Captains and one Training Captain, and that the Village Manager and the Fire Chief decided to eliminate the Staff Officer position and to authorize, instead, a Fire Lieutenant position. That resolution further stated that "[t]he duties of the Administrative Fire Captain/Staff Officer position have been distributed among and are being performed by the remaining Fire Captains in the unit."¹⁴

The job specifications for Firefighter contain the following "distinguishing features":

This work is of a hazardous nature, involving responsibility for fire fighting and prevention, salvage and rescue operations and requires mental acuity and physical stamina in the performance of duties. Fire fighting and fire prevention duties are performed under the direct supervision of superior officers. Routine maintenance work and custodial work on the station house and equipment is performed under general supervision and inspected upon completion. Does related work as required.¹⁵

Included among the illustrative examples of Firefighter work are:

- Responds to fire alarms and emergency calls with a fire company;
- Lays and connects hose lines and nozzles, turns water on and off;
- Holds fire hose and directs stream;
- Erects and climbs ladders to enter burning buildings when necessary;
- Makes openings in burning buildings for ventilation and entrance;
- Removes persons from burning buildings;
- Performs salvage operations at scenes of fire, such as covering furniture with tarpaulins and cleaning away

¹⁴ SOF, ¶ 9.

¹⁵ SOF, Ex. 1 at p 20.

debris.¹⁶

The job specifications for Fire Captain contain the following “distinguishing features” of that title:

Under general supervision, an incumbent in this class has responsible charge of a fire station or stations on an assigned shift, and directs the work of a company at fires, other emergencies or in the station or stations. In the absence of or, pending the arrival of a superior officer, a Fire Captain assumes responsibility for the protection of life and property. Supervision is exercised over a number of subordinate paid and volunteer personnel. Does related work as required.¹⁷

Included among the various examples of Fire Captain work are:

Directs the work of firefighters assigned to a fire station or of a department pending the arrival of a superior officer, both in the quarters and at the scene of the fires and emergency;
Directs the housekeeping of quarters and the care of apparatus, equipment and supplies;
Responds to all alarms while on duty;
Assigns firefighters to lay out and connect hose lines, turn water on and off, raise ladders and ventilate buildings;
Inspects property at scene of a fire to prevent re-ignition;
Directs the mechanical operation of apparatus and equipment at the scene of a fire or an emergency call;
Supervises and assists in salvage and cleanup after extinguishment of a fire;
Inspects equipment, grounds and station to insure proper order and condition;
Maintains discipline and enforces rules and regulations;
Inspects buildings and premises for fire hazards or supervises such inspections;
Makes reports of personnel and activities;
Trains and drills subordinates;
Uses computer applications or other automated systems such as spreadsheets, word processing, calendar, e-mail and database software in performing work assignments.¹⁸

¹⁶ *Id.*

¹⁷ SOF, Ex. 1 at p. 21.

¹⁸ *Id.*

The specifications for the title of Fire Lieutenant contain the following “distinguishing features”:

Incumbents in this class are responsible for supervising the activities of a group of Firefighters at the scene of fires and in the fire station or stations. A Lieutenant is under direct supervision of a superior officer; however, they have complete charge of operations at the scene of a fire in the absence of, or pending the arrival of a superior officer, and the Lieutenant assumes responsibility for the protection of life and property. A Lieutenant also has complete charge of Firefighters in a fire station or stations in the absence of a superior officer. Supervision is exercised over a number of subordinate paid and volunteer personnel. A Lieutenant is also responsible for any number of administrative tasks related to this position. Does related work as required.¹⁹

Included among other examples of Fire Lieutenant work are:

- Supervises a crew of Fire Fighters in the housekeeping, care of apparatus, equipment and supplies at a fire station or stations;
- Assigns work to Fire Fighters directly under his command, at the scene of fires, in emergencies and in the station or stations;
- Leads crew or crews in responding to all alarms assigned while on duty;
- Supervises the mechanical operation of apparatus and equipment at the scene of a fire or an emergency call;
- Assigns personnel to lay out and connect hose lines and nozzles, turn water on and off, raise ladders and ventilate buildings;
- Inspects property at scene of fire to prevent re-ignition;
- Supervises and assists in salvage and cleanup operations after extinguishment of a fire;
- Supervises the cleaning, checking and replacement of tools and equipment on return to station;
- Inspects buildings and premises for fire hazards or supervises such inspections;
- Maintains discipline and enforces rules and regulations;
- Makes reports on personnel and activities;

¹⁹ SOF, Ex. 2.

Trains and drills subordinates;
Uses computer applications and other automated systems such as spreadsheets, word processing, calendar, e-mail and database software in performing work assignments;
Performs administrative functions and is responsible for administrative projects and tasks.²⁰

DHR conducted a civil service examination for the position of Fire Lieutenant on June 15, 2013. The Village has not requested a copy of the list containing the names of the members of the unit, if any, who passed the examination.²¹

As of the date of the stipulation of facts, no one had applied for the position of provisional Fire Lieutenant; the title was vacant throughout the proceedings below.²²

DISCUSSION

The essence of the question before us is whether, given the facts, we should place a newly-created yet vacant title into an existing unit. We find that the answer to that question is no.

Based on the parties' Stipulation of Facts, it is undisputed that the "Village posted vacancies for the provisional lieutenant position in May, 2012, and June 2013, but "[t]he Lieutenant position has not been filled," that "[n]o one applied for the provisional lieutenant position as of the date of this Stipulation," and such position "is now, and has always been, vacant."²³

It is also beyond dispute that the Village has affirmatively represented that the

²⁰ *Id.*

²¹ The Village argues that it has not filled the position pending the determination of the petition and in an attempt it characterizes, "to avoid an unlawful unilateral transfer of work." The Village also states that no person has applied for the position. SOF, 11; Village's Brief in Support of Exceptions, at p.16.

²² SOF, ¶ 15.

²³ SOF, ¶¶ 6 and 15.

newly-created position “will perform the duties and work exclusively performed by [another bargaining unit position] if it is filled.”²⁴ The parties also do not disagree on the wording and substance of job descriptions for the newly-created position or those of the other positions cited.²⁵

The Village correctly posits that the job description is evidence which could bolster its request that the position of Fire Lieutenant be included in the UFA’s bargaining unit because the position shares a “community of interest” with the unit. But the inquiry into this matter must go behind and beyond the face of job descriptions and into the actual duties performed. However, the factual record is void of any other substantive evidence of duties actually performed by any employee in that title. The Board has held, as the ALJ found, that a vacant position—especially one for which no individual can even testify as to past duties performed, much less a position for which there is no current incumbent who can testify about duties currently performed—cannot be placed in an existing bargaining unit.

The Board’s reasoning on this issue is manifest, and its decision in *Union-Endicott Central School District (Union-Endicott)*²⁶ is controlling. The Board in that decision was unable to find that a “community of interest” existed between the title of physical therapist and other titles represented by an employee organization. The existence of a “community of interest” which is the *sine qua non* for placement in or creation of a unit is vociferously posited by the Village in its memorandum in support of its exceptions. In *Union-Endicott*, as here, a position was vacant at the time of the

²⁴ SOF, ¶ 11.

²⁵ SOF, Exs. 2 and 3.

²⁶ 28 PERB ¶ 3029 (1995).

hearing before the ALJ and was vacant when the Board decided the case. Indeed, in contrast to the matter here, the Board found that the employer in *Union-Endicott* actively sought to fill that position. It did not preclude a future petition seeking placement of the title in a unit, but held that there was “no reasonably current evidence of the duties of the position which can be evaluated to determine whether the position is appropriately placed in the unit represented by the [employee organization].”²⁷

The Board expressly found, and the Village urges on us, that a temporary vacancy “is not, *per se*, always a ground for dismissal of a petition;”²⁸ we agree. Here, however, the petition does not present a mere lapse in incumbency in a title where there has been some history of prior performance in that title. Even in the case before the ALJ in *Union-Endicott*, there was not only a “job description of the previous incumbent,” but the testimony of a speech and language therapist who worked with the previous incumbent.²⁹ The Village has only presented the written job description of a position with no prior history of incumbency. As the ALJ whose findings were upheld by the Board in *Union-Endicott* found, “[a] unit placement petition for a vacant position is not granted as there are *no duties actually being performed which can be assessed to determine the position’s appropriate placement.*”³⁰

Indeed, findings must be based on the “duties actually being performed.” We cannot rely only upon a hypothetical description of work performed, but rather must depend on the duties actually undertaken by an individual in a specific title. This is

²⁷ *Id.* at 3070.

²⁸ 28 PERB ¶ 3029, at note 3.

²⁹ *Id.*

³⁰ 27 PERB ¶ 4077, at 4144 (emphasis added) (citation omitted).

consistent with the manner in which the Board reviews other placement-related issues such as determining whether a title is managerial or not. For example, in *Matter of Lippman v. Public Employment Relations Board*,³¹ the Appellate Division upheld the Board's determinations on whether certain titles should be considered managerial, based upon "nature of the subject employees' duties and responsibilities," as established by testimonial and documentary evidence of the actual duties performed by the employees in the titles at issue.³²

That is not to say that a stipulated record without oral testimony could never form the basis for our finding that a position should be placed in a unit.³³ However, in a case where there is no evidence of duties *actually performed* because those duties are *not being performed* and have *never been performed*, the ALJ properly dismissed the petition before her.³⁴

As the Village correctly points out, the controlling description of the unit placement process is set forth in *Weedsport Central School District*.³⁵

A unit placement petition commences a representation proceeding limited to determining whether an unrepresented position should be accreted to a pre-existing unit based upon

³¹ 263 AD2d 891 (3rd Dept 1999).

³² 263 AD2d at 897.

³³ See e.g., *Weedsport Central Sch Dist*, 46 PERB ¶ 4007, affd 46 PERB ¶ 3030 (2013) (a unit placement petition with incumbents in title was granted based on stipulated facts.).

³⁴ See *City of New York v. Board of Certification of the City of New York*, 2011 WL 5240150 (S Ct NY Co 2011) (instructive case where the court upheld the Board of Certification's findings on unit placement rejecting claims by the City that the Board of Certification "did not give enough credence to employees' in-house titles" because the Board made "individual determinations as to each employee, as it should have. . . [and its] decision was evidence based, as is shown by its citations to individual surveys and specific pages of the transcript of testimony before the Board.").

³⁵ 46 PERB ¶ 3030, at 3066 (2013).

the statutory criteria in §207.1 of the Public Employees' Fair Employment Act (Act). We conduct a nonadversarial investigation and apply the statutory uniting criteria in determining a unit placement petition. The most important criterion under §207.1 of the Act for determining a unit placement petition is the community of interest standard. Among the factors we consider in determining whether a community of interest exists are similarities in terms and conditions of employment, shared duties and responsibilities, qualifications, common work location, common supervision, and an actual or potential conflict of interests between the members of the proposed unit.³⁶

The bulk of the Village's argument on behalf of its exceptions is that the totality of the record before the ALJ, without testimony of the actual duties performed, establishes enough to place the title into a particular unit. We reject that contention. Shared duties, as those at issue in *Weedsport*, are presented when there are incumbents in the title who can offer evidence as to those duties performed.³⁷

The Village takes specific exception to the ALJ's finding that "there is no date certain when, if at all, the Village will fill" the position as well as to her findings that the Village had no efforts to fill it. The fact remains that the position—regardless of the Village's efforts to fill the vacancy—is vacant. The ALJ, in her decision "note[d]" that there was no date certain for filling the vacancy, but she did not base her decision on that alone. The date of filling a vacancy is not a determinative factor in this matter although it places the facts in context; the fact that the position is vacant is determinative in the context before us.

As far as the Village's concern over its exposure to an improper practice charge,

³⁶ *Id.* (citations omitted).

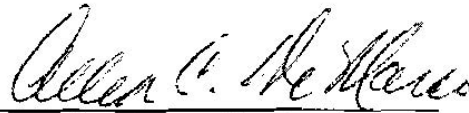
³⁷ See, e.g., *Weedsport Central School Dist*, 46 PERB ¶ 4007 (2013) (the decision of the ALJ that the Board upheld recited the fact that there were two incumbents in the positions at issue).

our dismissal of this petition does not foreclose either party from filing a new petition for the position should it be filled nor both parties from agreeing on unit placement.

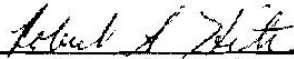
Based upon the foregoing, we deny the Village's petition and affirm the decision of the ALJ.

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

DATED: April 13, 2016
Albany, New York



Allen C. DeMarco, Member



Robert S. Hite, Member

**STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD**

In the Matter of

**CITY OF RENSSELAER POLICE OFFICERS
UNION, INC.,**

Petitioner,

- and -

**CASE NOS. – M2014-095/
IA2015-018**

CITY OF RENSSELAER,

Respondent.

JOHN M. CROTTY, ESQ., for Petitioner

**HANCOCK ESTABROOK, LLP (JOHN F. CORCORAN of counsel),
for Respondent**

BOARD DECISION AND ORDER

This matter comes to us on exceptions filed by the City of Rensselaer Police Officers Union, Inc. (Union) to a letter ruling of the Director of Conciliation (Director) nullifying the Union's petition for interest arbitration and dissolving the designated interest arbitration panel after discovering that the petition contained proposals on behalf of civilian dispatchers, who are not eligible for compulsory interest arbitration.

We have considered the exceptions on an expedited basis.

EXCEPTIONS

The Union alleges in its exceptions that the Director exceeded his authority and/or erred when he addressed issues concerning the Union's petition for interest arbitration after the compulsory interest arbitration panel had been designated, nullified the Union's petition for interest arbitration, and dissolved the designated interest arbitration panel.

The City of Rensselaer (City) filed a response to the exceptions arguing that the

Director did not exceed his authority by addressing issues regarding the Union's petition after the interest arbitration panel had been designated.

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

FACTS

On or about December 8, 2015, the Union filed a petition for compulsory interest arbitration. The cover letter accompanying the petition indicated a joint selection of an interest arbitration neutral. On December 15, 2015, the Office of Conciliation designated a public interest arbitration panel including the jointly selected neutral member, pursuant to § 209.4 of the Public Employees' Fair Employment Act (Act) and notified the panel members, the Union, and the City of the designation.¹ After the panel had been designated, the City filed a response to the petition.

By letter dated February 9, 2016 to both the Union and the City, the Director advised that the City's response to the Union's petition for compulsory interest arbitration indicated that an improper practice charge had been filed "simultaneously."²

The Director's letter thereafter advised the following, in relevant part:

In its [improper practice] charges the City challenges arbitrability on procedural grounds that the union petition improperly includes proposals for terms and conditions of employment for civilian dispatchers long held to be excluded from compulsory interest arbitration.

Statutory compulsory interest arbitration under CSL §209.4, is a measure of last resort. Its application is specifically limited regarding eligibility, scope and duration which are established by statute and case law.

The immediate issue for consideration is whether the union's

¹ Exhibits to Union's brief.

² Response to Exceptions, Ex A.

petition containing proposals on behalf of civilian dispatchers is valid in the first instance. The requisite determination in this matter is the exclusive responsibility of the Director of Conciliation in furtherance of his processing of interest arbitration petitions subject to review by the Board (see PERB Rules of Procedure, Part 213—*Exceptions to the Board*). In conclusion, clearly civilian dispatchers are not eligible for compulsory interest arbitration. Therefore, the petition received on December 11, 2015 on behalf of the Rensselaer Police Officers Union is hereby nullified and the arbitration panel designated by this office on December 15, 2015 is dissolved. Further proceedings under CSL §209.4 should cease until such time as a revised or otherwise permissible petition is filed with this office.

Should there be any question about the appropriate statutory impasse procedure governing the terms and conditions of civilian dispatchers, either party may seek the appointment of a fact finder pursuant to CSL §209.3(b)³

DISCUSSION

The Union first alleges in its exceptions that the Director erred and/or exceeded his authority by exercising jurisdiction over the Union's petition for compulsory interest arbitration after the panel had been designated by nullifying the petition. This exception objects to the timing of the Director's decision, rather than the decision itself. Accordingly, we will first address that specific issue.

For the reasons that follow, we are not persuaded by the Union's assertion that the mere designation of the interest arbitration panel extinguishes the Director's authority and discretion to make decisions related to the processing of petitions, including decisions concerning eligibility of employees for compulsory interest arbitration. No source for this purported limitation has been identified by the Union, and we decline to create such a limitation here, where the Director merely acted to correct

³ *Id.*

an erroneous designation of a panel made in good faith reliance on the Union's petition.

There is no question that we have delegated discretion to the Director in order for him to make necessary determinations involving the dispute resolution provisions of the Act and Rules, subject to our review of those determinations.⁴ A determination concerning the processing of a petition for compulsory interest arbitration is one specific example of such delegated discretion. In particular, the Board has expressly reaffirmed its delegation, subject to review, to the Director of "determinations on jurisdictional questions such as whether an impasse in negotiations exists and substantive questions such as whether a petitioning party is entitled to interest arbitration," as well as "procedural disputes regarding the striking procedure."⁵

Although the Union repeatedly states in its brief that the Director was not empowered to act after the compulsory interest arbitration panel had been designated, its argument is unsupported by any relevant section(s) of the Act, or of our Rules of Procedure (Rules), nor by any case law.⁶ The Union has cited no relevant legal authority. We held that there is no limitation regarding, specifically, *when* the Director can exercise his discretion to rectify a processing error.

To the extent that the Union relies upon §§ 205.7 and 205.8 of the Rules, there is

⁴ Act, §§ 205.4 (a) and 205.5(k). See also *Board of Educ of the City Sch Dist of the City of New York*, 34 PERB ¶ 3016 (2001); *Patrolmen's Benevolent Assn of the City of New York, Inc.*, 40 PERB ¶ 3010 (2007).

⁵ *Patrolmen's Benevolent Assn of the City of New York, Inc.*, 40 PERB ¶ 3010, at 3033; see also *County of Monroe*, 39 PERB ¶ 3018 (2006) (affirming Director's ruling that specific employees were ineligible for compulsory interest arbitration); *Yates County*, 16 PERB ¶ 8001 (1982) (same).

⁶ The Union's reliance on *Caso v Coffey*, 41 NY2d 153, 9 PERB ¶ 7026 (1976), is misplaced, because the Director's disputed action had nothing to do with an attempt to exercise power or control over an arbitration proceeding. There is no record evidence or assertion by the Union that the Director issued his ruling when the arbitration was underway, thus interfering with the proceeding.

no support in the plain language of those sections for the notion that the Director may no longer act once the panel has been designated, or that the Director is divested of his discretionary authority at a particular point in the process. Section 205.7 states that the board shall designate the public arbitration panel and “refer the dispute to such panel.” Section 205.8 states that the “conduct of the arbitration panel shall be under the exclusive jurisdiction and control of the arbitration panel.” Thus, these rules simply refer to the exclusivity of the conduct of the panel, which relates to the panel’s role in resolving the dispute—not processing the petition. The Union’s strained interpretation of the Rules confuses and conflates the respective roles of the Director and the arbitration panel. As clarified by the Board in *Town of New Windsor, Inc.*, the Director has exclusive jurisdiction relating to panel appointment; the panel has exclusive jurisdiction relating to the conduct of the arbitration proceeding.⁷

The panel has no part in the pre-dispute resolution processing of the petition and, therefore, cannot compete with the Director’s role in that area. Since the Director’s disputed ruling herein made an eligibility determination and then addressed the propriety (or lack thereof) of the panel appointment, it was within his purview.

Our finding is supported by *Patrolmen’s Benevolent Assn of the City of New York, Inc.*,⁸ in which the Board rejected a similar attempt to read our Rules to support a claim that the Director had not been delegated discretion to make a specific determination. Here, as there, the Director acted within his discretion.

We turn next to the second question presented by the Union’s exceptions, which is whether the Director erred when he “nullified” the petition and dissolved the

⁷ 31 PERB ¶ 3061, 3033 (1998).

⁸ 40 PERB ¶ 3010, at 3033.

designated panel. While the previously addressed exception related to the timing of the Director's ruling, this exception concerns the merit and/or scope of his decision. Since we have reaffirmed that the Director has Board-delegated authority to process interest arbitration petitions and make decisions related thereto, and have found that there is no constraint limiting the timeframe within which he may issue such decisions, the only question remaining is whether the Director abused his discretion when he issued the disputed letter ruling and took the actions referenced therein. We find that he did not.

As the Board has previously explained, our Rules require that:

...the Director [of Conciliation] examine the facts and circumstances of the dispute and apply the judgment he has gained through experience in such matters to those facts and circumstances. In such instances, we choose to defer to the judgment of the Director, unless the objections of a party are compelling.⁹

Thus, we must examine the objective criteria that the Director applied, as well as the surrounding facts and circumstances. In so doing, we conclude that the Director did not abuse his discretion in taking the action that he did.

It is undisputed that the Union's petition improperly included proposals on behalf of a group of employees, civilian dispatchers, who are not statutorily entitled to compulsory interest arbitration. There is no evidence on the record before us, nor does the Union argue, that the interest arbitration proceedings had even been scheduled, let alone commenced. On these particular facts, we conclude that the Director acted within a reasonable time after the petition was filed, and after discovering that the petition was improper, even though he had designated the panel and notified the parties. Since the Director acted in a timely fashion after discovering the mistake, and before the

⁹ *Manhattan and Bronx Surface Transit Operating Auth*, 39 PERB ¶ 3006 (2006).

proceedings had commenced, we find that he did not abuse his discretion.

As for the Director's decision to "nullify" the petition and dissolve the panel, we likewise do not find that he abused his discretion. Given the point in time at which he discovered the petition's deficiency, he chose to attempt to rectify the situation by simply undoing his previous processing of the petition, rather than have an improper petition proceed to interest arbitration. Since the Director also indicated in his ruling that the process would be discontinued "until such time as a revised or otherwise permissible petition is filed," it is clear that the Director contemplated that the Union would simply correct its petition and re-file upon receipt of his ruling. Any delay in obtaining an interest arbitration award occasioned by the Union's decision to appeal the Director's decision rather than simply re-filing an appropriate petition excluding positions that are not entitled to interest arbitration cannot be attributed to the Director. Nor can it be said that the Union was materially prejudiced by the Director's decision.

Furthermore, we reject the Union's argument that the Director interfered with the judicial function of either the agency's administrative law judges, or the Board. It is well-settled that the necessary eligibility determination is within the exclusive province of the Director, subject to the Board's review.¹⁰

Finally, we address the Union's assertion that the Director improperly became the City's "agent and advocate"¹¹ when he took the actions set forth in his letter ruling. Such assertions are serious in nature as they challenge the Director's neutrality and should not, therefore, be made in the absence of manifest evidentiary support. Here,

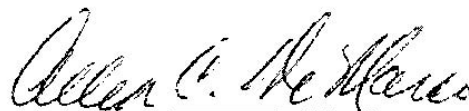
¹⁰ *Patrolmen's Benevolent Assn of the City of New York, Inc.*, 40 PERB ¶ 3010, at 3033-3034; see also *County of Monroe*, 39 PERB ¶ 3018; *Yates County*, 16 PERB ¶ 8001.

¹¹ Union's brief, at p. 12.

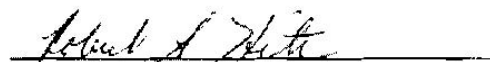
the Union has offered no facts to support its allegation of bias. The petition did not put the Director on notice that the dispatchers were civilian employees, and thus not entitled to compulsory interest arbitration. Rather, he only became aware of this fact through the City's related improper practice charge.¹² The Director acted to cure this error, and to ensure that only claims properly subject to interest arbitration would be submitted to interest arbitration. This falls far short of the proof required to support an allegation of bias and, therefore, we dismiss it without further discussion. Although the City does not object to the Union's suggestion that the Board effectively redraft the petition to eliminate demands relating to civilian dispatchers by dismissing such claims, we decline to do so, as the framing of proper proposals for interest arbitration is the duty of the parties, and not of the Board.

Accordingly, we affirm the letter ruling of the Director, without prejudice to the filing of a second petition, limited to those employees entitled to compulsory interest arbitration.

DATED: April 13, 2016
Albany, New York



Allen C. DeMarco, Member



Robert S. Hite, Member

¹² Notably, the Director candidly discloses the source of his knowledge, expressly referencing the City's improper practice charge in his letter ruling. Nor do we find it unlikely that the Director would have exposure to a charge that was filed with his own agency.

**STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD**

In the Matter of

**COUNCIL OF SCHOOL SUPERVISORS AND
ADMINISTRATORS,**

Charging Party,

CASE NO. U-28607

- and -

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

Respondent.

BRUCE K. BRYANT, ESQ., for Charging Party

**DAVID BRODSKY, DIRECTOR OF LABOR RELATIONS AND COLLECTIVE
BARGAINING (DIMITRIOS J. GOUNELAS of counsel), for Respondent**

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Board of Education of the City School District of the City of New York (District) to a decision of an Administrative Law Judge (ALJ) finding that the District violated § 209-a.1 (d) of the Public Employees' Fair Employment Act (Act).¹ The ALJ found that the District impermissibly "reduced the number of parking permits available to unit employees and changed the procedures by which such permits are granted," and refused to negotiate the reduced availability of parking with the Council of School Supervisors and Administrators (CSA).²

¹ 47 PERB ¶ 4610 (2014).

² *Id.* at 4921.

EXCEPTIONS

The District contends that the ALJ erred in not dismissing the case on the basis that the District did not cause or authorize the changes complained of, nor did it change working conditions affecting unit employees.³ The District further asserts that the ALJ erred in failing to balance the parties' case-specific interests and instead found that the issuance of a parking permit is a mandatory subject of bargaining in all circumstances.⁴ Next, the District argues that the ALJ exceeded her power and authority "in that the decision would reverse the City's governance of its own streets," and violated public policy.⁵ Finally, the District maintains that the ALJ's remedial order erred to the extent that she did not consider the changed circumstances since the filing of the charge due to the collateral litigation resulting from her prior deferral of the matter to arbitration.⁶

DISCUSSION

The facts are stated in the ALJ's decision. We do not fully address each exception separately because, as explained below, the exceptions have already been the subject of authoritative determinations by the Board and by the courts reviewing the Board's prior decision.⁷ To the extent that these determinations do not preclude the positions asserted by the District, we adhere to our prior decision and adopt that of the Appellate Division, Third Department, as dispositive of the arguments contained in the

³ Exceptions Nos. 2.1-2.2.

⁴ Exceptions No. 2.3.

⁵ Exceptions Nos. 2.5, 2.4.

⁶ Exception No. 2.6.

⁷ 44 PERB ¶ 3003 (2011), *confd*, *City of New York v NYS Pub Empl Relations Bd*, 47 PERB ¶ 7007 (Sup Ct Alb Co 2011) (Zwack, J.), *affd*, 103 A.D.3d 145, 46 PERB ¶ 7001 (3d Dept 2012).

exceptions.

As a threshold matter, we note that the District has not excepted to the ALJ's dismissal of its notice of claim defense and its defenses of *res judicata* and collateral estoppel. Accordingly, those defenses are waived, and not properly before us.⁸

Nor has the District addressed the ALJ's decision's reliance on the Board's prior ruling in an improper practice proceeding involving the same transaction and issues, *Board of Education of the City School District of the City of New York (BOE I)*.⁹ In that case, the Board found that the District had violated the Act and sustained a charge brought by Local 891, International Union of Operating Engineers (Local 891). The District's omission of this decision, and of the judicial decisions confirming it, is particularly glaring in view of the parties' express stipulation before the ALJ that:

The events leading to the instant CSA charge, the CSA grievance resulting in the . . . arbitration award and the Local 891 charge all stem from the same determination regarding distribution of parking permits and the procedures for distribution of permits was similar for employees represented by CSA and Local 891.¹⁰

During a subsequent conference, the parties clarified that the Stipulation represented their agreement that "the facts pertaining to the unit employees in that matter [BOE I] are applicable to this matter and that the facts pertaining to the [District's]

⁸ *City University of New York*, 48 PERB ¶ 3021, 3071 (2015) (citing Rules of Procedure § 213.2 (b) (4); *Village of Endicott*, 47 PERB ¶ 3017, 3052, n. 5 (2014)); *City of Schenectady*, 46 PERB ¶ 3025, 3056, at n. 8 (2013), *confd sub nom Matter of City of Schenectady v NYS Pub Empl Relations Bd*, 47 PERB ¶ 7004 (Sup Ct Albany Co 2014), *affd*, 136 AD3d 1086 (3d Dept 2016); *Town of Orangetown*, 40 PERB ¶ 3008 (2007), *confd sub nom Matter of Town of Orangetown v NYS Pub Empl Relations Bd*, 40 PERB ¶ 7008 (Sup Ct Albany Co 2007); *Town of Walkill*, 42 PERB ¶ 3006 (2009).

⁹ 44 PERB ¶ 3003.

¹⁰ Stipulation of Facts ¶ 29.

actions in that matter are the same as in this matter.”¹¹

Despite this agreement, the District fails to in any way distinguish the claims before the ALJ and those the Board and the courts authoritatively determined in *BOE I*. Indeed, the District’s brief in support of its exceptions never mentions *BOE I*, but rather argues from a *mélange* of decisions, mostly from the 1970s and 1980s, that the ALJ: (1) should have found that the District had not effectuated any unilateral change, (2) erred in finding that that the parking permits at issue did not equate to a free parking space, and thus the ALJ should have conducted an independent weighing of the interests of the parties under the facts at issue; and (3) exceeded her jurisdiction and issued a ruling that violated public policy by infringing on the interests of the City of New York.¹² The Board and the courts have already considered each of these claims in *BOE I* and rejected them.¹³

As the sole respondent before the Board in *BOE I*, and the only petitioner recognized to have a cognizable interest before the courts in the subsequent proceedings under Article 78 of the Civil Practice Law and Rules,¹⁴ the District clearly

¹¹ ALJ letter to parties, August 7, 2014. The ALJ’s letter puts the parties on notice to “consider this letter as part of the record in this matter,” and urges them to contact her “immediately” with any questions regarding the letter memorializing the conference. *Id.*

¹² Brief in Support of Exceptions at pp 8-10; 10-13; 13-16.

¹³ *BOE I*, 44 PERB ¶ 3003, at 3031-3033 (Board decision); *City of New York*, 44 PERB ¶ 7007, at 7013-7014 (Supreme Court decision); *City of New York*, 103 AD3d at 149-152, 46 PERB ¶ 7001, at 7002-7005.

¹⁴ Supreme Court found that “[t]he City of New York was not a party to the administrative process [before PERB] and pursuant to statute has no standing to bring this proceeding,” and thus dismissed the City’s petition, leaving the District as the only petitioner. *City of New York*, 44 PERB ¶ 7007, at 7013. The Appellate Division affirmed Supreme Court’s holding on that point. *City of New York*, 103 AD3d at 149, 46 PERB ¶ 7001, at 7002.

was a party to those matters, had a full and fair opportunity to litigate these issues, so that collateral estoppel, or issue preclusion, bars the District from contesting the material facts and legal issues necessarily decided adverse to it in those proceedings.¹⁵

Moreover, even if we were to find that collateral estoppel did not apply to the facts and legal issues actually determined by our decision and those of the courts in *BOE I*, those cases are governing precedent which the District never even attempted to address or distinguish. Rather, the District has treated this matter as if there were no binding precedent construing the Act and expressly governing the issues here, instead arguing solely from general principles. Accordingly, we find that the District has proffered no reason for us to vary from our decision in *BOE I*, especially in light of the Appellate Division's binding and authoritative findings as to the identical claims raised by the District in objecting to that decision, which we adopt. In its decision, the Appellate Division rejected the claims pursued in the exceptions, and we reject them for the reasons stated by the Court in its opinion.¹⁶

Accordingly, we affirm the decision and order of the ALJ.

IT IS, THEREFORE, ORDERED the District will forthwith:

1. Make available to CSA unit employees free parking, upon request, on a first come, first served basis, as was available before the fall of 2008;

¹⁵ Collateral estoppel applies where “(1) the issue sought to be precluded is identical to a material issue necessarily decided by the administrative agency in a prior proceeding; and (2) there was a full and fair opportunity to contest this issue in the administrative tribunal.” *Jeffreys v Griffin*, 1 N.Y.3d 34, 39 (2003); *Kaufman v Eli Lilly & Co.*, 65 NY2d 449, 455-456 (finding collateral estoppel applicable to subsequent suit against tortfeasor brought by unrelated plaintiff); *Vega v Metro Trans Auth*, 133 AD3d 518, 519 (1st Dept 2015) (following *Kaufman*).

¹⁶ 107 AD3d at 149-152, 46 PERB ¶ 7001, at 7003-7005.

2. Make whole, with interest at the statutory judgment rate, CSA bargaining unit members who, upon a showing of reasonable documentary evidence and/or affidavits, incurred parking expenses that they would not have incurred but for the elimination of the availability of free parking on a first served basis from September 2008 until the free parking benefit provided by paragraph 1 is restored;
3. Negotiate, upon the CSA's demand, with the CSA regarding the availability of free parking for members of the CSA bargaining unit; and
4. Sign and post the notice prescribed by the ALJ in her decision at all physical and electronic locations customarily used to post notices to unit employees.

DATED: April 13, 2016
Albany, New York



Allen C. DeMarco, Member



Robert S. Hite, Member

NOTICE TO ALL EMPLOYEES

PURSUANT TO
THE DECISION AND ORDER OF THE
NEW YORK STATE
PUBLIC EMPLOYMENT RELATIONS BOARD

and in order to effectuate the policies of the

NEW YORK STATE
PUBLIC EMPLOYEES' FAIR EMPLOYMENT ACT

we hereby notify all employees of the Board of Education of the City School District of the City of New York (District) in the unit represented by the Council of School Supervisors and Administrators (CSA) that the District will forthwith:

1. Make available to CSA unit employees free parking, upon request, on a first come, first served basis, as was available before the fall of 2008;
2. Make whole CSA bargaining unit members who, upon a showing of reasonable documentary evidence and/or affidavits, incurred parking expenses that they would not have incurred but for the elimination of the availability of free parking on a first served basis from the fall of 2008 until the free parking benefit provided by paragraph 1 is restored; and
3. Negotiate, upon the CSA's demand, with the CSA regarding the availability of free parking for members of the CSA bargaining unit.

Dated

By

on behalf of the Board of Education of the City School
District of the City of New York

This Notice must remain posted for 30 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

**STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD**

In the Matter of

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

Charging Party,

CASE NO. U-29510

- and -

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

Respondent.

**RICHARD E. CASAGRANDE, GENERAL COUNSEL (STEVEN A. FRIEDMAN
of counsel), for Charging Party**

**DAVID BRODSKY, DIRECTOR OF LABOR RELATIONS AND COLLECTIVE
BARGAINING (KAREN SOLIMANDO of counsel), for Respondent**

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the United Federation of Teachers, Local 2, AFL-CIO (UFT) to a letter decision (Decision) of the Director of Public Employment Practices and Representation (Director) declining the UFT's application to reopen the improper practice charge which had been withdrawn pursuant to a stipulation of settlement (Stipulation).¹ The UFT asserts that the Board of Education of the City School District of the City of New York (District) failed to comply with a material condition for the withdrawal of the charge, and that the Stipulation's provision that, under such circumstances, an application to reopen the charge would not be opposed

¹ Exceptions, Exhibits A (Decision) and C (Stipulation).

by the District should be given effect. Because we find that the District in fact did fail to perform the narrow and concrete material conditions in return for which the UFT agreed to withdraw the charge, we hereby reopen the charge and remand to the Director for further proceedings consistent with this decision and order.

EXCEPTIONS

The UFT excepts to the Director's finding that the UFT did not establish that the District "failed to comply with narrow and concrete conditions of a material nature, which were the sole consideration for withdrawal of the [charge]," pursuant to the Stipulation.²

FACTS

The original charge in this matter alleged that the District violated §§ 209-a.1 (a) and (d) by failing to provide information regarding, among other items, pre-qualification solicitations issued by the District inviting proposals from any potential vendors "for the provision of any services that are, or have been in part provided by UFT-represented employees."³

By January 6, 2015, the parties had agreed upon, and both parties executed,⁴ the Stipulation, which provides, in pertinent part, as follows:

1. The [District] represents that it will provide the UFT with access to a [District] website that provides vendors' descriptions of the type of services offered by the vendors, and which are responsive to the information requests contained in the Charge, no later than 30 calendar days after the execution of this agreement. The parties

² Exceptions ¶ 2.

³ Exceptions, Exhibit B, ¶ 9 (b). The information request additionally sought information regarding a specific pre-qualification solicitation at issue in a separate then-pending charge, and any responses thereto, provided specific examples of such solicitations of which the UFT was aware, and sought information regarding responses to any responsive solicitations. *Id.* ¶ 9 (a)-(c).

⁴ The UFT executed the Stipulation on December 23, 2014; the District on January 6, 2015. (Stipulation at 2).

agree that if this obligation is not satisfied, the UFT may reopen the Charge and the [District] will not oppose.

2. The [District] represents that the documents provided to the UFT (both in hard copy as well as via electronic access and those that the UFT will have access to electronically pursuant to paragraph 1 above) are the only documents that are available in the [District's] regular business records that are provided by each vendor and describe the services provided by each vendor and which are responsive to the Charge. This representation does not include documents that are created at the school-level.

3. The UFT agrees to withdraw, with prejudice, [the charge] subject to the provisions of paragraph 1 above.⁵

At 2:48 p.m. on October 1, 2014, Karen Solimando, the District's Deputy Director for Labor Relations, emailed two links to Steven Friedman, counsel for the UFT in this matter.⁶ At 3:05 p.m., Solimando sent an additional email, which stated:

Originally, the DOE offered limited access to the MTAC system for the purpose of viewing the vendor description; however, this information is available in another format (i.e., the [District's] website) and therefore limited access is not necessary and no longer part of the [District's] offer. I will investigate why the link is not working for you[;] however in the meantime attached is a sample of what is available.⁷

On October 8, 2014, Solimando forwarded to Friedman via email a copy of a proposed draft of a stipulation of settlement. The cover email stated that:

Regarding the website with the description of vendor services, at the moment this site cannot be accessed externally [;] however, I can arrange for you to view/print all of the documents on this website in my offices at your convenience. I am also in the process of

⁵ Exceptions, Exhibit C, at ¶¶ 1-2. The remaining portions of the Stipulation provide that the agreement shall not constitute a precedent for other disputes, and that the UFT waives all other claims arising out of this matter, other than the underlying charge for which the UFT sought the information, and "with regard to the information provided pursuant to paragraphs 1 and 2 of the" Stipulation. *Id.* at ¶ 2.

⁶ Exceptions, Exhibit F, attachment.

⁷ *Id.*

determining when external access will be available.⁸

On January 6, Solimando informed Friedman in an email that she had signed the Stipulation, and inquired if Friedman was “available Friday at 3 or 4 to view the [District] website per the stipulation.”⁹ Solimando followed up with additional requests on January 8 and 9 to set up a meeting.¹⁰ On January 20, 2015, Solimando forwarded a copy to Friedman of the October 8, 2014 email sent at 5:22 pm, adding to it: “Please see below. Let me know if you would like to set up a date/time to view/print documents from the [District] website.”¹¹

The next day, Friedman responded, asking Solimando “Is there any way we can arrange for remote access so that someone from the UFT can look at the vendor descriptions? You did send me some links a while ago but we were unable to open them. Thanks.”¹² Solimando replied “No—the site is not available [except] on a [District] computer. Please let me know if you and someone from the UFT are available to meet in my office tomorrow.”¹³ On January 28, 2015, Solimando wrote to Friedman, stating “I have made many requests to set up a time for review in my office,” and asking him to select from one of several proposed dates.¹⁴

On February 23, 2015, the UFT requested that the charge be reopened, invoking the language in the Stipulation that the District would not oppose such a motion.¹⁵

⁸ Respondent’s Memorandum of Law in Opposition to Charging Party’s Exceptions (Opp Memo), Exhibit C.

⁹ Opp Memo, Exhibit D, at 9.

¹⁰ *Id.*

¹¹ *Id.* at 8.

¹² *Id.* at 6.

¹³ Opp Memo, Exhibit D, at 6.

¹⁴ *Id.*

¹⁵ Exceptions, Exhibit D.

DISCUSSION

The Board has long held that “this Board has authority to permit rescission of the withdrawal of an improper practice charge,” although “such discretion should be exercised only in extremely rare and limited circumstances.”¹⁶ The Board explained that “a mere difference between the parties in interpretation of a settlement agreement or a difference of opinion concerning the extent to which compliance has been achieved is insufficient to warrant the reopening of a settled improper practice charge.”¹⁷ Rather, “only under circumstances in which there is no colorable claim of compliance with the settlement agreement or in which it can be shown that the noncomplying party has otherwise repudiated the agreement that a charge will be reopened.”¹⁸

In explicating this standard, the Board relied on and applied its prior decision in *Public Employees’ Federation (Farkas)*.¹⁹ In *Farkas*, the Board exercised jurisdiction to reopen a settlement agreement where the conditions for the withdrawal of a charge “were sufficiently narrow and concrete for the question [of violation of such conditions]

¹⁶ *State of New York (SUNY Potsdam)*, 22 PERB ¶ 3045, 3103 (1989).

¹⁷ *Id.*

¹⁸ *Id.* We are not persuaded by that portion of *State of New York (SUNY Potsdam)* that analogizes the burden of proving a breach of a stipulation of withdrawal with the burden of proving the repudiation of a private agreement. That analysis presumes that conditional withdrawal of improper practice charges fall within the proscription of § 205.5 (d) of the Act that “[t]he board shall not have authority to enforce an agreement between an employer and an employee organization.” Reading this language to preclude our reopening improper practice charges upon an appropriate showing is not compelled by the Act, as § 205.5 (d) also expressly confers upon the Board “exclusive non-delegable jurisdiction” over improper practices. Moreover, such a reading of the Act not only artificially narrows the Board’s jurisdiction, but also creates a perverse incentive for parties to willfully flout the stipulated conditions for the withdrawal, as no other recourse would exist. Although the Director properly honored this reasoning, we decline to follow it.

¹⁹ 15 PERB ¶ 3020, 3033 (1982).

to be readily susceptible to answer.”²⁰ The Board found that “[w]here a charge is withdrawn upon a written understanding that such narrow and concrete conditions be met by a respondent and the conditions are of a material nature, the failure of the respondent to perform those acts may nullify the withdrawal of the charge.”²¹ These decisions have not been found inconsistent as evidenced by the Board’s continued reliance on *Farkas* as setting forth one prong of the applicable standard.²²

Here, the District undertook two obligations in the Stipulation, to “provide the UFT with access to a [District] website that provides” the requested information within 30 days of the execution of the Stipulation, and, in the event that “this obligation is not satisfied,” to not oppose a motion by the UFT to reopen. Because the record establishes that the District willfully did not comply with either of the two conditions in the Stipulation for withdrawal without any colorable claim of right we find that the UFT has met its burden to justify reopening of the withdrawn charge.

Where the Board has been required to interpret an agreement as part of deciding a charge, it has held that

we apply standard principles of contract interpretation focused on discerning the parties’ intent by giving a practical interpretation to the language utilized. If the contract language is reasonably clear but susceptible to more than one interpretation, we will consider parol evidence in the record to determine the parties’ intent.²³

²⁰ *Id.*

²¹ *Id.*

²² See, e.g., *PEF (Stewart)*, 45 PERB ¶ 3005, 3009 & n. 6 (2012); *UFT (Fearon)*, 33 PERB ¶ 3003, 3010, & n. 6 (2000).

²³ *Town of Fishkill*, 44 PERB ¶ 3013, 3049 (2011), citing *County of Columbia*, 41 PERB ¶ 3023 (2008); see generally *Monroe Co. v NYS Pub Empl Relations Bd*, 263 AD3d 885, 1441, 44 PERB ¶ 7006 (3d Dept 2011) (deferring to and upholding Board’s contractual interpretation and exclusion of parol evidence where contractual terms were unambiguous).

The Stipulation provides that the District will provide access to a “District website,” and subsequently describes the documents to be provided as “those that the UFT will have access to electronically pursuant to paragraph 1.” The plain meaning of these provisions supports the contention that the parties’ understood that the District would supply access via a District-operated website that could be accessed by the UFT electronically. Nothing in the language supports the District’s contention that the Stipulation required it only to provide access by an intranet that required the physical presence of a UFT representative at the District’s offices, thereby limiting access to the business hours and convenience of the District.²⁴

Moreover, even treating the language of the Stipulation as susceptible to the interpretation urged by the District, the parol evidence of the parties’ correspondence prior to the execution of the Stipulation negates such a reading. Solimando initially emailed Friedman two links, which ostensibly could be used by the UFT from their own offices, and subsequently emailed him that “I will investigate why the link is not working for you.”²⁵ A week later, Solimando emailed Friedman stating that “[r]egarding the website with the description of vendor services, *at the moment* this site cannot be accessed externally,” and offered access at her office.²⁶ Solimando’s email then states

²⁴ The District’s contention in opposing the exceptions that “[t]he Union . . . failed to offer any exception whatsoever as to why reviewing this information on a [District] computer—*which is exactly what the Settlement Agreement states*—was unacceptable” is nowhere supported by the text of the Stipulation, and no citation is provided. Opp Memo at 1 (emphasis added). The only use of such language in the parties’ correspondence or elsewhere in the record is in Solimando’s January 22, 2015 email. (Opp Memo Exhibit D, at 6). This email, sent almost exactly a month after the UFT executed the Stipulation, does not reflect the course of negotiations between the parties as shown by the emails prior to execution.

²⁵ Exceptions, Exhibit F.

²⁶ Opp Memo, Exhibit C (emphasis added).

“I am also in the process of determining when external access will be available.”²⁷ In context, the offer of access at the District’s office was a makeshift expedient offered on an interim basis.²⁸

Thus, the pre-execution correspondence unequivocally supports the UFT’s contention that the parties’ expressed intent was that the website would be accessible externally. Indeed, we find that, between the language of the Stipulation, and Solimando’s provision of links for external use, and her repeated assurances that she was endeavoring to resolve the problem with external use, the evidence establishes that “there is no colorable claim of compliance with the settlement agreement.”²⁹

Despite this, the District did not comply with its other obligation under the Stipulation, that it would not oppose a motion to reopen in the event it did not timely comply with its obligation to provide electronic access. Whether characterized as a readily ascertainable material failure of the condition for the charge’s withdrawal (as in *Farkas*) or as a breach, absent any colorable claim of right, of the Stipulation (as in *State of New York (SUNY Potsdam)*), the District has acted to deprive the UFT from receiving the fruits of its bargain while retaining the benefit of the withdrawal. Accordingly, the Director’s Decision is reversed, and the charge must be reopened.

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

²⁷ *Id.*

²⁸ We note that the District, in quoting the October 8, 2014 email, to demonstrate that remote access “is not possible” leaves out the immediately preceding critical phrase “at this moment.” (Opp Memo at 6). Nor does the District address Solimando’s immediately following statement in the email that she was “determining when external access will be available.” Opp Memo, Exhibit C. The argument, more ingenious than ingenuous, is belied by the very document it relies upon. The paucity of the District’s argument is underscored by its selective and misleading quoting of the correspondence.


²⁹ *State of New York (SUNY Potsdam)*, 22 PERB ¶ 3045, at 3103.

reopened, and the matter remanded to the Director for further proceedings consistent with this decision.

DATED: April 13, 2016
Albany, New York



Allen C. DeMarco, Member



Robert S. Hite, Member

**STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD**

In the Matter of

**AMSTERDAM TEACHERS ASSOCIATION, NYSUT,
AFT, AFL-CIO,**

Charging Party,

CASE NO. U-31433

- and -

GREATER AMSTERDAM CITY SCHOOL DISTRICT,

Respondent.

DEREK J. LEWIS, for Charging Party

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Amsterdam Teachers Association, NYSUT, AFT, AFL-CIO (ATA) to a decision of an Administrative Law Judge (ALJ) dismissing its charge that the Greater Amsterdam City School District (District) violated § 209-a.1 (d) of the Public Employees' Fair Employment Act (Act) when it assigned and permitted nonunit employees to perform tasks related to student attendance.¹ For the reasons stated herein, we affirm that decision and order.

EXCEPTIONS

The ATA filed nine exceptions to the ALJ's determination, seven of which collectively object to the ALJ's reliance on the testimony of each of the District's witnesses,² and two of which except to the factual and legal conclusions drawn by the

¹ 48 PERB ¶ 4522 (2015).

² Those witnesses were Michele Downing, Eric McClary, Thomas Perillo, Charles Myers, Donna Decker, Rick Potter and Christin Pietro. Exceptions, "second" through "eighth."

ALJ from that testimony.³

FACTS

The ALJ conducted three days of hearings during which both parties called witnesses and after which both filed post-hearing briefs. Peter Greco, the teacher at issue who was laid off and the individual who the ATA alleges exclusively performed the tasks that are now performed by nonunit employees, was employed by the District in the title of Attendance Teacher from September, 2003 until the District laid him off in June, 2011.⁴ Kenneth Engle, who was the attendance teacher before Greco, testified that the position was first created in 1989 and through Greco's departure⁵ he and Greco were the only two to hold that title. Therefore, the relevant facts and testimony before us are only those related to tasks and duties performed before Greco's departure.⁶

The parties atomized the duties of an attendance teacher into a number of constituent tasks. The ALJ heard testimony and received evidence set against a framework based on a written job description containing those particular 20 tasks. There was disagreement as to whether the first sixteen of those tasks were the only relevant tasks (as they were the only ones included in the job description promulgated by the District during Greco's tenure) or whether the other additional four tasks listed were also at issue. The ALJ took testimony on all 20 tasks and for purposes of our factual discussion, we rely on the list of 20 tasks before the ALJ, although not all tasks

³ Exceptions, "first" and "ninth".

⁴ The State Education Department permanently certified him as a "School Attendance Teacher" in 2004. Tr, at p. 181.

⁵ Charging Party Ex. 2.

⁶ The District moved before the ALJ to dismiss the instant claim as being untimely. The ALJ denied the motion, and the District did not take exception to that finding. Therefore, the question of whether the charge is time-barred is not before us. See, eg, *Local 158, IUOE (Jones)*, 48 PERB ¶ 3019 (2015), citing *City of Lockport*, 47 PERB ¶¶3030, 3093, at n. 8 (2014), quoting *Village of Endicott*, 47 PERB ¶¶3017, at 3052, at n. 5 (2014) (citing § 213.2 (b) (4) PERB Rules of Procedure).

bear upon our decision.⁷

Below, we discuss the tasks ostensibly assigned to Greco and the evidence marshalled as to who performed those tasks.⁸ With respect to task numbers 3⁹, 8¹⁰, 9¹¹, 11¹², 12¹³, 13¹⁴ 14¹⁵, 15¹⁶ and 19¹⁷, either Greco admitted he did not exclusively perform such functions or those functions were eliminated or not yet sufficiently implemented during his tenure so that we do not consider them in the context of this

⁷ See 48 PERB ¶ 4522, at n. 9.

⁸ The testimony we consider is related exclusively to tasks performed before the District laid off Greco. We are not considering testimony concerning practices after such period, or testimony for which a time frame cannot reasonably be ascertained, unless such testimony relates to work that was performed by a unit member but is no longer being performed by a unit member.

⁹ (3) Participating in the District's student referral system regarding attendance. (Perillo testified that he was actively involved in the student referral system as a building principal and as superintendent, and Greco acknowledged that teachers and nonunit administrators participated in this process and such meetings); Tr, at pp. 63, 67, 274-276.

¹⁰ (8) Assisting in the processing of annual health and welfare reports (eliminated); Tr, at p. 175-176.

¹¹ (9) Conducting a biennial citywide census of all children ages birth to 21 and preparing all local and state-required reports (eliminated); Tr, at pp. 39, 205.

¹² (11) Compiling birth rate data from appropriate sources to aid in the development of annual planning documents (eliminated); Tr, at pp. 93, 287.

¹³ (12) Preparing reports for the Director of Pupil Services and building Principals regarding kindergarten registration (Greco testified that he did not actually prepare reports and that other nonunit personnel did follow-up visits, although he was the only individual to make home visits); Tr, at p. 98, 288.

¹⁴ (13) Preparing and distributing the 40-week attendance card to all public school buildings and responsibility for all monthly enrollment reports; Tr, at pp. 205, 253 (although Greco testified he prepared these cards (TR, at p. 30-32), the testimony of current school personnel that those cards are no longer being used is uncontradicted. Given their knowledge of current practices, they are more credible on this issue.)

¹⁵ (14) Preparing the monthly average daily attendance report and filing the SA 129, along with related reports, with the Director of Finance (Greco testified he did not prepare them); Tr, at p. 102.

¹⁶ (15) Coordinating all activities surrounding PL 874, including the preparation of reports (Greco not familiar with this task); Tr, at pp. 34, 39, 104.

¹⁷ (19) Assisting and maintaining all records and letters pertaining to the Attendance Truancy Program established during the 2009-2010 school year (not implemented until the 2009-2010 year so that there could not have been any true past practice of exclusivity in the performance of such duties); Charging Party Ex. 3.

charge.

There were contested questions of fact with respect to the remaining 11 tasks:¹⁸

(1) Investigating and reporting on the absences of students who are referred or known to the District as truants. Greco testified that he alone was responsible for investigating truants and absences. But he also testified that “[a]ny teacher could” confer with students and parents on these issues as could building principals.¹⁹ The District contended that because members of a bargaining unit represented by the Civil Service Employees Association performed support functions, such as generating attendance numbers and related material, that Greco had no exclusive role in this process.²⁰

Perillo, the District’s superintendent, testified that when he was a building principal for the elementary school and later for the middle school as well as superintendent,²¹ before Greco’s appointment as attendance teacher when Engle was attendance teacher and after his appointment (and Perillo was not a member of the bargaining unit), he was actively involved in investigating and reporting student absences.²²

(2) Conferring with students and parents regarding poor school attendance and making referrals to the Department of Probation where necessary or appropriate. Greco testified that he exclusively met with students and parents and made home visits regarding student absences.²³ He also testified that other, nonunit

¹⁸ We have kept the numbering of each task as they appear on Charging Party Ex. 3 which is more inclusive than Resp. Ex. 1.

¹⁹ Tr, at p. 52.

²⁰ Tr, at p. 49.

²¹ Tr, at pp. 266-267.

²² Tr, at p. 268.

²³ Tr, at pp. 12-13, 19, 76.

members such principals and assistant principals, could meet with parents and students regarding attendance.²⁴ Perillo testified that as a building principal, he made home visits and conferred by letter with students and parents. He would refer matters to Greco but would also undertake these activities, at times, independent of and without contacting Greco.²⁵

In addition, Myers testified that during Greco's tenure, Potter, who was the alternative education principal, also conducted home visits regarding attendance issues.²⁶

(4) Representing the District at hearings in Family Court, along with the school attorney, regarding truancy and related problems. This task involves the New York State's Person In Need of Supervision (PINS) program which the family court administers. Greco testified that he was the only individual tasked with meeting with students and parents on attendance issues that could form the basis for a PINS petition. He also testified that he alone was responsible for preparing the attendant paper work for those petitions.²⁷

Perillo testified that he, too, was called as a witness and represented the District in PINS matters in family court in his capacity as building principal.²⁸ He did not testify about the completion of the paperwork associated with such a proceeding. Downing testified that other nonunit administrators went to family court and participated in PINS

²⁴ Tr., at p. 52.

²⁵ Tr, at pp. 270, 300.

²⁶ Tr, at pp. 349-350.

²⁷ Tr, at pp. 20-21, 24, 57. Greco also testified that that there were between 300 and 400 such petitions filed while he was employed by the District. (Tr, at p. 53). This was contested by the District where a number of eight such proceedings was proffered by the District as being more realistic. (Tr, at p. 172-173). The resolution of the true number is irrelevant to our discussion.

²⁸ Tr, at p. 276.

proceedings but she offered no time frame as to when those tasks were performed by such nonunion administrators.²⁹

(5) Establishing and maintaining a liaison relationship with local agencies regarding issues germane to school attendance. Greco testified that he routinely met with a variety of local government social welfare agencies and the county's probation department and that he was their source for information and the one responsible for responding to subpoenas for information.³⁰

Perillo, on the other hand, testified that he was actively involved with and acted as a liaison to outside local government agencies including the district attorney's office (although there was a dispute as to whether such liaison with the district attorney occurred after Greco's termination) with respect to attendance issues.³¹

(6) Keeping current on all New York State and Federal regulations governing school attendance and advising the Director of Pupil Services on such regulations. Greco testified that he was the only individual employed by the District who attended "attendance themed conferences . . . to keep current in such matters."³² Perillo contradicted this assertion in full and categorically testified that he and many others in administration kept current on regulations and law as they had to and attended conferences.³³

(7) Coordinating all activities in the District related to child labor laws and the issuance of working papers. Greco proffered that he was the sole employee responsible for coordinating the issuance of working papers, although he worked with

²⁹ See Tr, at pp. 198-199.

³⁰ Tr, at p. 24.

³¹ Tr, at pp. 277-279, 284.

³² Memorandum in Support of Exceptions, at p. 4; Tr, at pp. 78-79.

³³ Tr, at pp. 284-285.

support staff to carry out that task.³⁴ In contradiction, Perillo testified that Greco was not the only person involved with coordinating this function; when students came by his office as middle school principal, he “or one of the other administrators or secretaries brought the student and their parents down to the Guidance Office and hooked them up with the Guidance secretary, and the secretary is the one who walked them through and gave their papers.”³⁵

(10) Coordinating the immigration/naturalization program regarding school attendance for students living in the District with temporary visas. Greco claimed that he was the only District employee assigned to check students who were residing in the United States on a temporary visa.³⁶ Specifically, he testified that he visited the stated residences of such students to confirm they were living within the District. However, he failed to offer evidence as to any activity or “coordination” with the federal Immigration and Naturalization Service.³⁷ Perillo testified generally that he and other nonunit administrators were involved with the general function of establishing the residency of students on temporary visas.³⁸

(16) Performing other activities properly within the scope of the position or as requested by the Director of Pupil Services. Greco’s testimony on this general, catchall task, was that he essentially performed “any duties” related to attendance under the supervision of the Director of Pupil Services including home visits and representing the District in court.³⁹ However, Myers, who was assistant principal during Greco’s tenure, testified that individuals other than Greco raised attendance issues at various

³⁴ Tr, at pp. 39-40, 84-88.

³⁵ Tr, at pp. 285-286.

³⁶ Tr, at p. 91.

³⁷ Tr, at p. 92.

³⁸ Tr, at pp. 286-287.

³⁹ Tr, at pp 34-35.

meetings to Myers. In addition, Myers initiated calls without Greco's input regarding attendance concerns.⁴⁰

Tasks numbered 17 through 20 do not appear on the job description formally promulgated by the District during Greco's tenure. However, there was extensive testimony that these were tasks associated with school attendance, and the ATA alleges they were exclusively performed by Greco. Therefore, we will examine them as the ALJ also considered them below.

(17) Delivering all out of school suspension (OSS) letters to student residences, within 24 hours of suspension, when directed by a school administrator. Greco testified that the District Superintendent's secretary would coordinate the delivery of OSS letters, but he exclusively delivered those letters to student residences during his tenure.⁴¹ Perillo categorically testified that he, as an elementary school and middle school principal during Greco's tenure, delivered OSS letters.⁴²

(18) Delivering all superintendent hearing letters to appropriate residences as directed by the Superintendent's office. As with (17) above, Greco maintains that he exclusively delivered the superintendent's letters,⁴³ which Perillo disputed and testified that he, too, personally delivered such letters.⁴⁴

(20) Representing the District in all matters involving Child Protective Services (CPS) regarding attendance issues within the District. Greco testified that only he filed educational neglect charges against parents which were registered with

⁴⁰ Tr, at pp. 346-347.

⁴¹ Tr, at p.106-108.

⁴² Tr, at pp. 291-292, 293-294.

⁴³ Tr, at p. 36.

⁴⁴ Tr, at pp. 291-294.

CPS.⁴⁵ Perillo testified that as a principal during Greco's tenure, he was involved in representing the District in CPS matters and that Greco was not the only person providing such services.⁴⁶ Although the time frame is not as clear, Rick Potter, an alternative education principal/dean of students during Mr. Greco's tenure also testified that he would make calls, as needed, to CPS to report educational neglect arising out of poor student attendance.⁴⁷

DISCUSSION

The standard for analyzing whether the transfer of unit work should be subject to negotiations could not be more established:

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.⁴⁸

The factors we consider when determining if there is a "discernible boundary" around unit work to establish exclusivity 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

⁴⁵ Tr, at pp. 38-39, 112-116.

⁴⁶ Tr, at p. 294.

⁴⁷ Tr, at p. 402.

⁴⁸ *Town of Riverhead*, 42 PERB ¶ 3032, 3022 (2009); *Niagara Frontier Transportation Authority*, 18 PERB ¶ 3083 (1985) and its progeny including one of our most recent decisions, *State of New York (Division of State Police)*, 48 PERB ¶ 3012 (2015) have conclusively established this as the appropriate standard.

distinct, and other facts that have set the claimed unit work apart from work performed by non-unit personnel.⁴⁹

Thus, the issue presented to us is whether the ALJ erred in finding that the at-issue work was not exclusively performed by unit employees. It is undisputed that the work in question was performed by Greco but is now being performed by nonunit members. Thus, if the charging party fails to satisfy the first prong of this test, we need not make further inquiry.

Some further legal context is warranted. As we found in *Manhasset Union Free School District*, “incidental use of nonunit personnel to perform tasks is insufficient to defeat exclusivity.”⁵⁰ Thus, we reject the contention posited by the District below that the mere fact that clerical and other support staff aided Greco in performing his duties, such as providing him with statistics or data with respect to task (1), or aided him in filling out forms would, in and of itself, lessen the exclusivity of work performed. We also reject that, in and of itself, the participation of other nonunit members in joint decision making committees and similar bodies along with layers of review and approvals by outside entities, necessarily deprives work of its exclusive, unit character.⁵¹ Each of these, taken alone, will not necessarily undermine a claim of exclusivity. Moreover, the transfer of incidental tasks from unit to nonunit members, taken with other factors, may contribute to a finding that exclusive work has been moved.⁵²

⁴⁹ *Manhasset Union Free Sch Dist*, 41 PERB ¶3005, 3021-22 (2008), *confirmed and mod in part, sub nom. Manhasset USFD v NYS Pub Empl Relations Bd*, 61 AD3d 1231, 42 PERB ¶ 7004 (3d Dept 2009), *on remittur*, 42 PERB ¶ 3016 (2009). We rely explicitly on the Board’s discussion, at length in that decision, on the concept of “discernible boundaries.”

⁵⁰ 41 PERB ¶ 3005, at 3024.

⁵¹ *Seaford Union Free Sch Dist*, 47 PERB ¶ 3034, 3106 (2014).

⁵² *Id.*

However, we are not presented with a record, as whole, that would warrant reversing the ultimate determination made by the ALJ. The record supports the ALJ's findings with respect to tasks described above over which there is no true factual dispute. We find that those particular tasks—numbers 3, 8, 9, 11, 12, 13, 14, 15 and 19—were not exclusively performed by Greco nor could they be based on the evidence submitted.

The main thrust of the exceptions is the ALJ's reliance on and crediting of the testimony of the District's witnesses. In this matter, as in all others where the ALJ's findings are based on conflicting testimony, "[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."⁵³

Some of the evidence is not clearly apposite, as possibly not relating to the relevant time period. Thus, the testimony of Downing, Myers, Decker, and Pietro may not relate to the time at issue, and thus may be of little to no probative value. We therefore have limited our findings to that evidence which unambiguously pertains to the relevant time frame, although, if we were also to take into account the other testimony, as the ALJ may have, we would still affirm his findings.

There are distinct questions of fact regarding the boundaries surrounding the duties performed by Greco. While the record and the ALJ's findings support the assertion that he performed the various tasks at issue, the record also reveals strong disagreements as to whether he exclusively performed such tasks. Those issues are

⁵³ *Village of Sag Harbor*, 49 PERB ¶ 3006 (2016), citing *County of Clinton*, 47 PERB ¶ 3026, at 3079 (2014) (quoting *Manhasset Union Free Sch Dist*, *supra* note 18, at 3019); 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)).

raised, at the very least, by Perillo's testimony. The ALJ chose to credit his testimony and if the record were based on that alone, that would be enough to sustain the ALJ's findings that "tracking, monitoring, reporting on and addressing student attendance was often a joint effort undertaken by both unit members and nonunit personnel in their various roles."⁵⁴ Here, unlike in *Manhasset Union Free School District*, there has been a "wholesale commingling of unit" with nonunit members.⁵⁵ The record reveals that the boundaries were murky, and not merely "*de minimis* exceptions"⁵⁶ to discernible boundaries, and that any such boundaries were not clearly maintained by all parties in practice over many years.

The ATA has argued that some of the individuals who testified did not have direct knowledge of matters and that the credibility of witness Perillo was "strained" when he testified regarding truancy "but could not provide specifics."⁵⁷ It also objects to testimony based on hearsay and characterizes Greco's testimony as "clear and forthright."⁵⁸ It raises general concerns that the ALJ based his decision on "administrators who had general conversations and meetings about attendance."⁵⁹

Our rules governing the admission of hearsay are clear: "Except as to the rules of privilege recognized by law, compliance with the technical rules of evidence shall not be required."⁶⁰ Indeed, "hearsay is admissible in an administrative hearing and it can form the sole basis for an administrative determination."⁶¹

⁵⁴ 48 PERB ¶ 4522, at 4592.

⁵⁵ 41 PERB ¶ 3005, at 3027.

⁵⁶ 41 PERB ¶ 3005, at 3026-3027.

⁵⁷ Charging Party's Brief in Support of Exceptions, at p. 21.

⁵⁸ *Id.*, at pp. 17, 24.

⁵⁹ *Id.*, at p. 15.

⁶⁰ Rules of Procedure, § 212.4(e).

⁶¹ *County of Erie*, 43 PERB ¶ 3016, 3062 (2010) citing *Gray v. Adduci*, 73 NY2d 741 (1988).

In rejecting similar claims raised by a litigant regarding the acceptance of hearsay, the Court of Appeals noted:

The District protests that the testimony of the Union's witnesses was incredible and consisted entirely of inadmissible hearsay; however, credibility determinations are the province of the ALJ, in the first instance, and PERB, not us. And the testimony was not hearsay because, as the Board observed in its final decision and order, "it relates to [the witnesses'] awareness of the practice, rather than the truth of the matter asserted" [citation omitted]. Moreover, the ALJ was not bound by the rules of evidence, and hearsay evidence may properly inform PERB's decisions.⁶²

We are not faced with a record totally reliant upon hearsay. The witness Perillo and others testified on personal knowledge and the other witnesses, should their testimony be credited, bolster that testimony. The quality of the evidence and other issues raised by the ATA go to the credibility of the witness, matters to which we defer to the ALJ in the absence of any objective evidence compelling a contrary finding.

Finally, we note that as to the preparation of PINS petitions (number 4), the District did not contradict that Greco alone performed that task when attendance issues were raised. However, his exclusive performance of that task alone, when weighed against and in the context of all the other shared duties, does not establish a discernible

⁶² *Chenango Forks Central Sch Dist v. Pub Empl Rel Bd*, 21 NY3d 255, 267 (2013) in which it affirmed the Board's decision in *Chenango Forks Central Sch Dist*, 43 PERB ¶ 3017, 3069 (2010) in which we rejected the "contention that the testimony is not reliable or probative because the Association failed to present corroborating documentation or testimony" and found:

. . . to the extent that the testimony might constitute hearsay, pursuant to § 212.4(e) of our Rules of Procedure (Rules), compliance with the technical rules of evidence are not required except as those rules apply to evidentiary privileges. In any event, hearsay is admissible during our administrative hearings and, under appropriate circumstances, it can form the sole basis for our decision as long as it is sufficiently relevant and probative to constitute substantial evidence.

boundary between the work performed by the attendance teacher as a unit member and the work performed by nonunit employees in the area of student attendance. We have no reason to disturb the ALJ's conclusions.

Based upon the foregoing, we deny the charge and affirm the decision and order of the ALJ.

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

DATED: April 13, 2016
Albany, New York


Allen C. DeMarco, Member


Robert S. Hite, Member

**STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD**

In the Matter of

**NASSAU COUNTY SHERIFF'S CORRECTION
OFFICER'S BENEVOLENT ASSOCIATION, INC.,**

Charging Party,

CASE NO. U-31793

- and -

COUNTY OF NASSAU,

Respondent.

**KOEHLER & ISAACS, LLP (LIAM L. CASTRO of counsel), for Charging
Party**

**BEE READY FISHBEIN HATTER & DONOVAN, LLP (ANDREW K. PRESTON
of counsel), for Respondent**

BOARD DECISION AND ORDER

This matter comes to us on a request to “rescind or otherwise recall” our decision in this matter (Decision)¹ filed by the Nassau County Sheriff’s Correction Officer’s Benevolent Association (COBA).² COBA contends that the Decision “should not have issued” on the grounds that the parties had, before we issued our Decision, settled the dispute “as part of a more global resolution” of issues between the parties.³ The County of Nassau (County) questions whether COBA’s charge can be withdrawn after the issuance of a decision by an Administrative Law Judge (ALJ), and notes that our

¹ 49 PERB ¶ 3001 (2016).

² Letter on behalf of COBA (Reconsideration Letter), February 12, 2016 at 1.

³ *Id.*

Decision has been relied upon in a contemporaneously issued decision.⁴ For the reasons given below, we deny the request as moot.

BACKGROUND

According to COBA, the parties reached a “more global resolution” of issues not only between themselves but also with the Nassau Interim Finance Authority (NIFA), pursuant to which a wage freeze imposed by NIFA would be lifted as to COBA. On September 11, 2014, COBA sent, through its counsel, a letter addressed to the Board, and copied to the Director of Public Employment Practices and Representation (Director), as well as adverse counsel. The letter stated that “[t]oday, our client asked that we seek permission to withdraw the above Charge, which is now before the Board, with prejudice. This matter has been resolved between the parties.”⁵

Although the County does not deny receiving the September 2014 Withdrawal Request, neither the Office of the Chair nor the Director received it.⁶ Counsel for COBA has produced photocopies of the postmarked envelopes in which copies were sent to counsel for the County, COBA’s second vice president, and the Director.⁷ However, a diligent search by PERB staff of the files both in the Office of the Chair (which handles all correspondence directed to the Board) and the Office of Public Employment

⁴ Letter on behalf of the County, February 16, 2016 (County Response), citing *County of Suffolk*, 49 PERB ¶ 3005 (2016).

⁵ Letter on behalf of COBA, September 11, 2014 (Withdrawal Request), attached to Reconsideration Letter.

⁶ In December 2014, a similar request to withdraw pending exceptions to an ALJ’s decision in an improper practice charge, *County of Nassau*, No. U-30864, was sent via email to the Deputy Chair as well as by United States mail. The Withdrawal Request in this case could not be located in either paper or electronic form.

⁷ As explained in the Reconsideration letter, “[s]ince [the] negotiations were extraordinarily sensitive at the time, as the wage freeze would not have been lifted without full compliance, we photocopied the envelopes within which we mailed the letter to this Board. Those and the [Withdrawal Request] letter are attached.” The only attached copy of an envelope mailed to the agency is that addressed to the Director.

Practices and Representation (which handles all correspondence addressed to the Director) has proven unavailing. The Board did not respond to the Withdrawal Request, and the case was listed on the publicly available agenda for our January 25, 2016 meeting, at which it considered and decided the case.

COBA contacted the Office of the Chairperson through the Deputy Chair on February 1, 2016, and, pursuant to the Deputy Chair's request, memorialized its grounds for the request in writing on February 12, 2016. COBA explained that it "is very concerned that the value placed on the resolution of this proceeding in those broader negotiations will be called into question by NIFA, or otherwise complicate that broader agreement."⁸

The County responded on February 16, 2016,⁹ taking no position on the merits, but questioning if the charge can be withdrawn after the decision of an ALJ has issued and pointing out that we relied on the Decision in *County of Suffolk*,¹⁰ decided the same day. At no time did the County seek to withdraw its exceptions to the ALJ's decision.

DISCUSSION

Pursuant to § 204.1 of our Rules of Procedure (Rules), when a charge is pending before an ALJ, the "charge may be withdrawn by the charging party before the issuance of the dispositive decision and recommended order based thereon upon approval by the director."¹¹ Thereafter, "the improper practice proceeding may be discontinued only with the approval of the board."¹² The Rule further provides that requests "to

⁸ Reconsideration Letter at 2.

⁹ County Response.

¹⁰ 49 PERB ¶ 3005 (2016).

¹¹ Rules § 204.1.

¹² *Id.*

discontinue an improper practice proceeding will be approved unless to do so would be inconsistent with the purposes and policies of the act or due process of law.”¹³

As the Board held in *State of New York (State Insurance Department)*, by “its explicit terms, § 204.1(d) of the Rules limits the right of a charging party to unilaterally withdraw a charge. Under the Rule, all withdrawal requests are subject to approval and will not be approved if it is determined that the withdrawal would be inconsistent with the policies of the Act or due process.”¹⁴ Moreover, “the Rule does not dictate when a charging party must request to withdraw a charge.”¹⁵ Thus, as a general matter, the Board does have the authority to grant a request for withdrawal after the issuance of an ALJ’s decision.

However, in this case, the Board did not receive COBA’s letter, and accordingly did not decide whether or not to approve the Withdrawal Request. Rather, we issued the Decision in which we reversed the ALJ’s decision, granted the County’s exceptions, and dismissed the charge. We are, therefore, confronted with the question of whether we should retroactively allow a withdrawal after the issuance of a Board decision.

As noted above, § 201.4 “does not dictate when a charging party must request to withdraw a charge.”¹⁶ Moreover, in deciding whether to grant a request to withdraw a charge, we favor such withdrawals unless the result would be “inconsistent with the purposes and policies of the act or due process of law.”¹⁷

We accept that COBA endeavored in good faith to mail its Withdrawal Request to the Board, especially as contemporaneous receipt of a copy is not denied by the

¹³ *Id.*

¹⁴ 45 PERB ¶ 3005, 3009 (2012).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

County. However, COBA did not follow up when it received no response to the request for over a year, and never alerted the Board to its having mailed the request when the matter appeared for decision on the Board's calendar. Neither of these acts is dispositive of our decision, but weigh in the balance. While we do not categorically rule out the possibility that vacatur of an issued decision based on a withdrawal request received after the decision has issued can ever be appropriate, we are, for obvious reasons, loath to grant such requests. We do not believe that the purposes and policies of the Act are served by undermining the final and binding nature of our decisions, as established by § 213 (a) of the Act. Therefore, the Board will not lightly vacate an issued decision based upon a settlement by the parties. At a minimum, a significant showing of cognizable prejudice must be established, which has not been demonstrated here.¹⁸

Pursuant to § 213 (a) of the Act, our Decision dismissing the charge is “conclusive against all parties to its proceedings and persons who have had an opportunity to be parties to its proceedings.”¹⁹ Similarly, COBA's request for withdrawal specified that it sought to withdraw the charge “with prejudice.” A “with prejudice” withdrawal constitutes an adjudication on the merits, and, as such, is likewise final and

¹⁸ We note that, in the instant case, our reasoning for dismissing the charge cannot constitute prejudice to COBA, as it is essentially identical to that in *County of Nassau*, 48 PERB ¶ 3014 (2015), applying the same contractual provision at issue here to a similar claim, which COBA itself sought to have dismissed “with prejudice” in its Withdrawal Request. Thus, neither the outcome nor the reasoning has materially changed the legal landscape from that which would pertain if the Withdrawal Request had been received and acted upon.

¹⁹ Act, § 213 (a); see, e.g., *Allied Chemical v Niagara Mohawk Power Corp*, 72 NY2d 271, 278-279 (1988) (“conclusive and final disposition” of claim by administrative agency entitled to preclusive effect; collateral estoppel applied); *Ryan v NY Tel Co*, 62 NY2d 494 (1984) (same; claim preclusion or *res judicata*); *Jeffreys v. Griffin*, 1 N.Y.3d 34, 39 (2003) see generally *Heller v Bedford Cent Sch Dist*, ___F Supp 3d ___, 2015 WL 7288650, at *10 (S.D.N.Y. Nov. 17, 2015) (collecting cases).

binding on the parties, just as is a dismissal on the merits.²⁰ In sum, COBA seeks to substitute one form of a “with prejudice” disposition of its claim for another, and has been therefore in no way prejudiced by the issuance of the Board’s Decision, which reversed that of the ALJ.²¹

The Board has “long held that where the issues raised by improper practice charges are academic, we do not consider that the policies of the Act would be served by our consideration of the charges.”²² Analogously, COBA has raised only academic

²⁰ *Town of Scriba*, 35 PERB ¶ 3011 (2002); see generally *Starla D v Jeremy E*, 121 AD3d 1221, 1223 (3d Dept 2014) (“a dismissal ‘with prejudice’ indeed constitutes an adjudication on the merits”; subsequent claim precluded) (internal quotation marks and citations omitted); *Trapani v. Squitieri*, 107 A.D.3d 696, 696-697 (2013) (same); *Liberty Assocs v Etkin*, 69 A.D.3d 681, 683 (2d Dept 2010); *Jericho Group, Ltd. v. Herzfeld & Rubin, P.C.*, 35 Misc.3d 1225(A), 953 N.Y.S.2d 550 (2012).

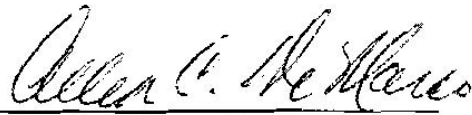
We note that in *MABSTOA*, 40 PERB ¶ 3023, 3095 & n. 16 (2007), the Board stated that “strict application of New York or federal civil practice precedent may be inappropriate due to the distinct procedures in the Rules along with the public policy underlying the Act,” and declined to blanketly apply *Scriba* as governing all circumstances, while also allowing that “[u]nder appropriate circumstances, *res judicata* and collateral estoppel may constitute appropriate bases for dismissing a charge. Either doctrine may be applied to a prior quasi-judicial determination when a party has had a full and fair opportunity to litigate the issues before the administrative agency and the agency utilizes procedures that are substantially similar to those used in a court of law.” *Id.*, (internal quotation marks and citations omitted). We agree with these statements, and note that we do not determine to what extent and under what circumstances any given voluntary withdrawal “with prejudice” will be given *res judicata* and/or collateral estoppel effect in future improper practice cases. We merely note that here COBA, by requesting a “with prejudice” withdrawal, sought the functional equivalent of a final and binding decision dismissing its claims.

²¹ We note that COBA’s expressed concern that NIFA or the County might claim that COBA has failed to live up to its obligations under the “more global resolution” that prompted the Reconsideration Letter, and seek to abrogate that agreement on such grounds. The County’s response does not take any such position, and indeed, implicitly acknowledges that COBA complied with its obligations under “the written agreement of the parties.” We therefore make this determination on the basis that neither the County nor NIFA will use this determination as a basis for a claim of breach on the part of COBA. Should such a claim be raised, COBA may seek to renew the request.


²² *East Meadow Union Free School Dist*, 48 PERB ¶ 3006, 3018-3019 (2015), quoting *City of Peekskill*, 26 PERB ¶ 3062, 3109 (1993).

issues in its Withdrawal Request, and the policies of the Act are not served by undermining the finality of our decisions in order to make a purely academic finding. The request to vacate or annul our Decision in the Reconsideration Letter is therefore denied as moot, and as undermining the finality of our decisions, and thus as inconsistent with the purposes and policies of the Act.

DATED: April 13, 2016
Albany, New York



Allen C. DeMarco, Member



Robert S. Hite, Member

**STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD**

In the Matter of

ARELIS CANDELARIO,

Charging Party,

-and-

CASE NO. U-33108

**LOCAL 372, DISTRICT COUNCIL 37, AFSCME,
AFL-CIO,**

Respondent,

-and-

**BOARD OF EDUCATION OF THE CITY SCHOOL
DISTRICT OF THE CITY OF NEW YORK.**

Employer,

ARELIS CANDELARIO, *pro se*

**ROBIN ROACH, GENERAL COUNSEL (JESSE GRIBBEN of counsel), for
Respondent**

**KAREN SOLIMONDO, INTERIM ACTING DIRECTOR OF LABOR RELATIONS
AND COLLECTIVE BARGAINING (LUCY LEE of counsel), for Employer**

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by Arelis Candelario to a decision by an Administrative Law Judge (ALJ) dismissing her charge that Local 372, District Council 37, AFSCME, AFL-CIO (DC 37) violated § 209-a.2 (c) of the Public Employees' Fair Employment Act (Act) by declining to pursue to arbitration her termination by the Board of Education of the City School District of the City of New York (District) and by not responding in a timely manner to her requests.¹ Candelario requests as relief that

¹ 48 PERB ¶ 4571 (2015).

DC 37 be directed to take her grievance to arbitration. For the reasons stated herein, we affirm the ALJ's decision, deny the exceptions, and dismiss the charge.

EXCEPTIONS

Candelario excepts to the ALJ's decision on the grounds that DC 37's decision not to take her case to arbitration was "without merit."² She further contends that DC 37's "staff did not handle my case in a timely and effective manner," and asserts that were her case to proceed to arbitration, she believes that the termination of her employment would be reversed.³ In particular, Candelario asserts that "at no point did the [District] accuse [her] of wrongdoing," characterizing the issue as "strictly one that involves communication."⁴

FACTS

The facts in this matter are more fully stated in the ALJ's decision, and are only set forth here to the extent necessary to resolve the issues raised by the exceptions. Candelario was employed by the District in the title school aide and, at the relevant times had been assigned to Progress High School for Professional Careers (Progress) for approximately eleven years. In June 2011, three 15-year old female students complained of having been subjected to sexual harassment by Assistant Principal William Abreu, in the form of inappropriate sexual remarks and questions regarding the students' sexual histories, and of conditioning summer jobs on their provision of sexual

² Exceptions, at 1.

³ Exceptions, at 1-2.

⁴ Exceptions, at 2.

favours to him.⁵

According to the three students, Candelario, a worker in the school cafeteria, approached them as they were leaving the cafeteria, and asked if they were interested in obtaining summer jobs.⁶ The students reported that Candelario had told them that Juan Martinez, the founder of the high school and the president of Progress Inc., a non-profit corporation that shared space with the high school, “had asked her to find three girls who wished to work.”⁷ The students stated that Candelario brought them to Martinez’s office. Martinez, who “appeared to be expecting the students,” spoke of summer work, and directed the students to each write an autobiographical essay.⁸ The next day, the three students returned to Martinez’s office, and were directed to interview with Abreu. Abreu met with the students separately, and, the students reported, sexually harassed them in the guise of interviewing them.⁹

Subsequently, one of the three students reported the incidents to a school safety supervisor, who reported it to an Associate Supervisor of School Security, who in turn referred the matter to the District’s Special Commissioner of Investigation (SCI). SCI opened an investigation, and interviewed each student three times, as well as Martinez, Abreu, and Candelario, among other witnesses.

⁵ Report of the Special Commissioner of Investigation for the New York City School District (SCI Report), Joint Exhibit 2, at 1, 2-5. Abreu’s termination was upheld against a challenge pursuant to Article 75 of the Civil Practice Law and Rules. *Abreu v NYC Dept of Education*, 43 Misc3d 1215(A), 2014 NY Slip Op 50647(U) (Sup Ct NY Co 2014) (Lobis, J).

⁶ SCI Report at 2.

⁷ *Id.*; see also *Abreu v NYC Dept of Education*, 43 Misc3d 1215(A) at *1.

⁸ *Id.* at 4, 2.

⁹ *Id.* at 2.

The three students reported to SCI that in September 2011, Candelario approached them. One stated that Candelario “approached her and asked whether she had spoken to her parents or told anybody about what Abreu had said to her [the student].”¹⁰ This student, denominated Student A in the SCI’s June 20, 2012 report to the Chancellor (SCI Report), told one of the other students (Student B in the SCI Report) about Candelario’s inquiry and warned her not to speak to Candelario. Student B reported to SCI that Candelario had also “asked her what had happened with Abreu and tried to get information concerning their meeting” from her, as well as telling Student B that the job prospects were for the students’ parents, not the students themselves, contrary to Student B’s understanding.¹¹ The third student (Student C) likewise told SCI that in September 2011, Candelario “approached her as she held a mobile telephone in her hand and asked ‘What happened with Abreu? What happened with the investigation?’”¹²

According to the SCI Report, Martinez in his interview stated that Candelario referred the three students to him. Martinez stated to investigators that he asked if the students were interested in summer jobs, and when they said that they were, referred them to Abreu for interviews.

The SCI Report described the investigators’ interactions with Candelario:

After interviewing Martinez, SCI investigators returned to Candelario, who previously told them that she did not recall

¹⁰ SCI Report at 3 (internal quotation marks omitted).

¹¹ *Id.* at 5. Student A recalled Student B describing such a conversation with Candelario the day after Student A warned her not to talk with her. *Id.* at 4.

¹² *Id.*

discussing summer jobs with Student A, Student B, or Student C, and that she was unaware of such job possibilities. In the second interview, Candelario said that she “now recall[ed]” discussing summer jobs with the students in the cafeteria. However, Candelario claimed that Student A, Student B, and Student C came to her and inquired about jobs, contrary to their accounts that Candelario initiated the discussion. Candelario acknowledged that she directed the students to Martinez, whom she knew hired students for summer jobs. In a third interview with investigators, Candelario continued to maintain that the students approached her about jobs, rather than the reverse. She acknowledged that she escorted the students to Martinez’s office. Candelario told investigators that she “misspoke” when she previously stated that Martinez hired students for summer jobs, and that she meant to say that “kids go [to Martinez] to get applications for jobs.”

.....

Contrary to the accounts of Student A, Student B, and Student C, Candelario claimed that she did not speak with any of these students in September 2011 regarding Abreu.¹³

Citing these discrepancies, the SCI Report concluded that Candelario “lied to investigators and sought to mislead them concerning her communications with the three students, whose accounts flatly contradict Candelario,” and recommended the termination of her employment.¹⁴ Effective June 20, 2012—the date of the SCI Report—the District suspended Candelario without pay, and, for the first time, she contacted DC 37 about the matter. DC 37 filed a grievance challenging Candelario’s suspension on June 22, 2012.¹⁵

After a Step II grievance hearing held on September 19, 2012, at which DC 37

¹³ SCI Report at 6 (editing marks other than ellipses in original).

¹⁴ *Id* at 8.

¹⁵ Joint Exhibit 3.

represented her, the principal issued a letter bearing that date, which did not adopt the SCI Report's recommendation, but instead concluded that: "in light of your limited English speaking ability, your failure to secure union representation and a translator, and your inability to adequately defend yourself during multiple questionings, that you not be dismissed from you employment and be made ineligible to work."¹⁶ The principal's letter added that SCI had recommended termination, and that, "as such, the [District] retain[ed] the right to further disciplinary action."¹⁷ The principal made no other finding as to the appropriate penalty, and Candelario continued on suspension without pay.

DC 37 pursued the matter on behalf of Candelario and represented her through the October 11, 2012 step III decision finding that the principal had properly suspended Candelario without pay during the investigation and dismissing the grievance.¹⁸ After the step III decision, the DC 37 representative who had represented Candelario informed her that her case would be assessed by an attorney to determine if it would be taken to arbitration. On October 17, 2012, DC 37 timely filed a request for arbitration.¹⁹

On February 28, 2013, after she had repeatedly enquired as to the status of her case, Candelario met with Robin Roach, at that time an Assistant General Counsel for DC 37. Roach and Candelario reviewed the SCI Report, and Candelario had the

¹⁶ Charging Party Exhibit 1, at 2.

¹⁷ *Id* (editing marks added).

¹⁸ Joint Exhibit 7.

¹⁹ Joint Exhibit 6.

chance to provide her account of the events, along with supporting evidence.²⁰

In late August 2013, Candelario returned to DC 37's offices where Roach told her that DC 37 would not pursue her case to arbitration. Subsequently, Candelario received a letter dated September 12, 2013, from Myrna Cabranes, DC 37's Assistant Director for Schools Division, confirming that DC 37's "General Council has concluded that your case will not proceed to arbitration."²¹ Cabranes' letter enclosed an August 29, 2013 memorandum by Roach explaining the reasons why DC 37 declined to pursue arbitration of Candelario's grievance. In particular, the memorandum stated:

While Ms. Candelario did not participate in the "interviews" Abreu conducted with each student, her reaction to the SCI investigators' visit do not correspond to her request for union representation. It is inexplicable that despite the fact that she asserted her right to union representation on more than one occasion, she failed to reach out to her union representative at any time. She informed counsel that she went about her affairs after each visit from the investigator.

The grievant's memory lapse with respect to the second visit strains credulity. Asked by this counsel whether she had any prior disagreements with any of the students, Ms. Candelario denied any such occurrence, but was unable to give a reason for the students to implicate her in allegations if inappropriate student contact.

The grievant relied upon the decision of the principal who cites her limited ability to communicate in English, and the fact that she was not [re]presented by Union as reasons for her to retain her position. However, given the thoroughness of the SCI investigations (including interviewing each complaining students three times) and the grievant's failure to contact the Union, as well as the inconsistencies between her statements and the students, the employer would be

²⁰ Tr, at pp. 50-51.

²¹ Joint Exhibit 5.

able to meet its burden of proving good and sufficient reason to discipline her.²²

Candelario testified that she “felt discriminated [against] because [she] didn’t know English,”²³ and that DC 37 had taken too long to advise her that it would not proceed to arbitration.

On November 18, 2013, the principal held another meeting with Candelario, at which DC 37 represented her. On December 6, 2013, the principal terminated Candelario’s employment by letter.²⁴ On February 17, 2014, DC 37 filed a step II grievance challenging Candelario’s termination, and represented her at the March 36, 2014 step II hearing.²⁵ On March 31, 2103, the step II hearing officer grievance denied the grievance.

DISCUSSION

The Board has often reaffirmed that “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.”²⁶

As we recently pointed out, the courts have:

²² Joint Exhibit 4.

²³ Tr, at pp. 28-29.

²⁴ Charging Party Exhibit 5.

²⁵ Charging Party Exhibit 4.

²⁶ *UFT (Cruz)*, 48 PERB ¶ 3004, 3010, *petition denied*, *Cruz v NYS Pub Empl Relations Bd*, 48 PERB ¶ 7003 (2015) (internal quotation and editing marks omitted), quoting *UFT (Munroe)*, 47 PERB ¶ 3031, 3095 (2014), *petition denied*, 48 PERB ¶ 7002 (Sup Ct NY Co 2015) (quoting *CSEA (Bienko)*, 47 PERB ¶ 3027, 3082-3083 (2014)); see *District Council 37, AFSCME, AFL-CIO (Farrey)*, 41 PERB ¶ 3027, 3119 (2008).

reject[ed] 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.²⁷

Moreover, 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.”²⁸ 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.”²⁹

Candelario has not provided any basis upon which we could conclude that the representation was tainted by any “arbitrary, discriminatory or bad-faith conduct” sufficient to violate the duty of fair representation. Here, Candelario claims that DC 37 breached its duty of fair representation to her by declining to proceed to arbitration on her behalf, and that it delayed too long in making the decision not to do so.

To take the latter claim first, as the ALJ correctly noted, DC 37’s filing a request for arbitration preserved its ability to pursue arbitration on her behalf after it completed its evaluation. Therefore, DC 37’s delay in responding to Candelario’s request that it

²⁷ *Id.*, quoting *Cairo-Durham Teachers Assn*, 47 PERB ¶ 3008, 3026 (2014) (quoting *CSEA, L 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)).

²⁸ *UFT (Gibson)*, 48 PERB ¶ 3015 (2015) (quoting *CSEA (Munroe)*, 47 PERB ¶ 3031, at 3095, citing *Amalg Transit Union, Local 1056 (Lefevre)*, 43 PERB ¶ 3027, 3104 (2010).

²⁹ *Id.*

bring her grievance to arbitration has not been shown to have had prejudiced her interests in any way.

Likewise, the record does not support a finding that the decision to not advance Candelario's grievance to arbitration breached the duty of fair representation. DC 37's Legal Department evaluated Candelario's grievance, and found that Candelario's own inconsistent statements to investigators, and the fact that her account of events was inconsistent with that of multiple other witnesses meant that "the employer would be able to meet its burden of proving good and sufficient reason to discipline her."

Moreover, DC 37 found Candelario's own credibility questionable, pointing to the disjuncture between her repeated invocation to investigators of her right to union representation and her failure to contact the union and exercise that right. Here, as was the case in *UFT (Barnes)*, while Candelario does not agree with DC 37's "assessment of the viability of [her] case at arbitration, [she] has not established that it was arbitrary, discriminatory or reached in bad faith."³⁰ Indeed, Candelario does not address, let alone dispute, the factors relied upon by DC 37 in assessing the merits of her grievance, and whether it should be advanced to arbitration. Rather, she has asserted only that the principal's initial letter declining to terminate her employment based on her difficulties in representing herself in multiple meetings with the investigators from SCI would provide a potential basis upon which the case against her could be undermined. Assuming that such is the case, and that rationale could outweigh the concerns raised by Roach in her memorandum, Candelario "would have at most asserted 'an honest

³⁰ 48 PERB ¶ 3017, 3059 (2015).

mistake resulting from misunderstanding,' insufficient to constitute a breach of the duty of fair representation."³¹

Likewise, the ALJ acted within her discretion in rejecting Candelario's claim that DC 37 discriminated against her based upon her lack of English language proficiency. As the ALJ correctly found, this allegation was entirely conclusory in nature, and was "insufficient to plead, let alone prove, a violation of the duty of fair representation."³² Indeed, the fact that DC 37 provided Candelario with a translator at her meeting with Roach runs contrary to her claim, and no evidence to support the claim was adduced.

Based upon the foregoing, we deny Candelario'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: April 13, 2016
Albany, New York



Allen C. DeMarco, Member



Robert S. Hite, Member

³¹ *Id.*, quoting *CSEA (Munroe)*, 47 PERB ¶ 3031, at 3096; see also *Cairo-Durham Teachers Assn*, 47 PERB ¶ 3008 at 3026, citing *CSEA (Kandel)*, 13 PERB ¶ 3049 (1980).

³² *Elwood Teachers Alliance (Neithardt)*, 48 PERB ¶ 3020, text at n. 31 (2015) (quoting *UFT (Leon)*, 48 PERB ¶ 3016, at 3056 (quoting *UFT (Munroe)*, 47 PERB ¶ 3031, at 3095 (citing *PEF (Goonewardena)*, 27 PERB ¶ 3006 (1994)); see also *UFT (Arredondo)*, 48 PERB ¶ 3010, 3034 (2015) (same).

**STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD**

In the Matter of

JONATHAN SCOTT HARPER,

Charging Party,

CASE NO. U-33970

- and -

COUNTY OF NIAGARA,

Employer,

- and -

**CIVIL SERVICE EMPLOYEES ASSOCIATION,
LOCAL 1000, AFSCME, AFL-CIO,**

Respondent.

JONATHAN SCOTT HARPER, Pro Se

**JAECKLE FLEISCHMANN & MUGEL, LLP (MELINDA G. DISARE., of counsel),
for Employer**

**STEVEN A. CRAIN & DAREN J. RYLEWICZ, GENERAL COUNSEL (LESLIE C.
PERRIN, of counsel), for Respondent**

BOARD DECISION AND ORDER

This case comes to us on a motion filed by charging party Jonathan Scott Harper, proceeding *pro se*, in which he seeks leave to file an interlocutory appeal to a ruling by an Administrative Law Judge (ALJ) that effectively dismissed a portion of his amended improper practice charge against Civil Service Employees Association, Local 1000, AFSCME, AFL-CIO (CSEA). The amended charge asserts that CSEA violated § 209-a (2) of the Public Employees' Fair Employment Act (Act) by breaching its duty of fair representation to Harper.

At the hearing, before Harper began presenting his direct case, the ALJ informed the parties that “in light of the four month statute of limitations, as set forth in [our Rules of Procedure (Rules)], I’m unable to find a violation regarding events that occurred” more than four months prior to the filing of the charge.¹ Accordingly, the ALJ requested that Harper “focus his testimony on that aspect of the charge that would, in fact, be timely.”² The ALJ further stated that testimony regarding actions on the part of CSEA that took place outside of the four-month statute of limitations would be admitted as background information, bearing upon the history between the parties.³ Harper did not at that time object to the ALJ’s direction.⁴

Harper’s proposed interlocutory exceptions contend that the ALJ erred in implicitly dismissing his claims based on acts or omissions by CSEA which took place more than four months prior to the filing of the charge. Harper argues that, pursuant to § 212.4 (l) of our Rules, the ALJ can dismiss a charge on the basis of timeliness at the hearing “only if the failure of timeliness was first revealed during the hearing.”⁵

DISCUSSION

We find that Harper has not established extraordinary circumstances warranting consideration by this Board of an appeal of a non-final ruling, and deny the request to file exceptions without prejudice to Harper’s bringing the issues raised therein before the Board in an appeal from a final order of the ALJ.

¹ Tr, at p 22; see *generally* Rules §204.1 (a)(1).

² *Id.*

³ Tr, at pp 23-24.

⁴ *Id.*

⁵ Request for Exceptions, at 1, quoting Rules § 212.4 (l). The Rule continues to state that “An objection to the timeliness of the charge, if not duly raised, shall be deemed waived.” *Id.* CSEA in its answer did assert as its first defense that the charge was, at least in part, untimely. Ans, ¶¶ 29-30.

The Board has consistently held that “leave to file interlocutory exceptions to non-final rulings and decisions, pursuant to § 212.4 of the Rules,” will only be granted “in situations where the moving party demonstrates extraordinary circumstances.”⁶ As the Board explained in *CSEA (Arredondo)*:

It is more efficient for us and the parties to await a final disposition of the merits of a charge before examining interim determinations. The grant of interlocutory exceptions results in delays in the final resolution of the factual and legal issues raised by an improper practice charge or representation petition. Therefore, we have rejected most requests for permission to file exceptions, especially motions seeking review of interim rulings in improper practice cases.⁷

Here, Harper has not established extraordinary circumstances. Indeed, he has not established prejudice, as the ALJ has allowed him to submit evidence regarding the events outside of the limitations period, nor has he as yet preserved the issue for appeal by raising the issue before the ALJ. Accordingly, we deny the request to file exceptions without prejudice to Harper’s bringing the issues raised therein before the Board in an appeal from a final order of the ALJ.

DATED: April 13, 2016
Albany, New York


Allen C. DeMarco, Member


Robert S. Hite, Member

⁶ *Bd of Educ, City Sch Dist City of NY (Grassel)*, 41 PERB ¶ 3016, 3080 (2008), citing *State of NY (Division of Parole)*, 40 PERB ¶ 3007 (2007); *UFT (Grassel)*, 32 PERB ¶ 3071 (1999).

⁷ 43 PERB ¶ 3021, 3080-3081 (2010).