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State of New York Public Employment Relations Board Decisions from August 31, 2017

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State of New York Public Employment Relations Board Decisions from August 31, 2017

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

In the Matter of

**TRANSPORT WORKERS UNION, LOCAL 106 (TRANSIT
SUPERVISORS ORGANIZATION),**

Petitioner,

-and-

CASE NO. TIA2017-012

MTA BUS COMPANY,

Respondent.

**COLLERAN, O'HARA & MILLS, LLP (DENIS ENGEL, ESQ., of counsel) for
Petitioner**

**PROSKAUER ROSE, LLP (NEIL H. ABRAMSON, ESQ., of counsel) for
Respondent**

BOARD DECISION AND ORDER

This matter comes to us by reason of a report and recommendation of the Director of Conciliation (Director) regarding a petition for interest arbitration filed by the Transport Workers Union, Local 106, Transit Supervisors Organization (TSO) under §209.5 of the Public Employees' Fair Employment Act (Act) and §205.15 of our Rules of Procedure (Rules) with respect to an impasse in contract negotiations between TSO and the MTA Bus Company (MTA).

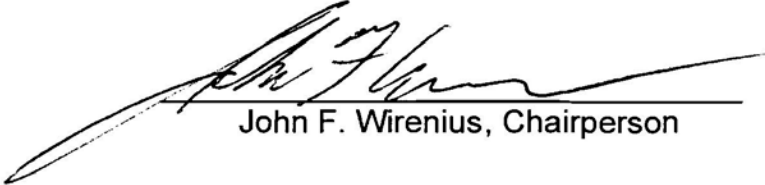
In his report and recommendation, the Director concludes that a voluntary resolution of the contract negotiations between TSO and the MTA cannot be effected and recommends that the impasse be referred to a public interest arbitration panel.

The MTA has not filed an objection to the Director's report and recommendation pursuant to §205.15(b) of the Rules.

Following our review of the Director's report and recommendation, we hereby certify that a voluntary resolution of the contract negotiations between TSO and the MTA cannot be effected and we, therefore, refer the impasse involving these parties to a public interest arbitration panel.

SO ORDERED.

DATED: August 31, 2017
Albany, New York



John F. Wirenius, Chairperson



Robert S. Hite, Member

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

In the Matter of

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

Charging Party,

CASE NO. U-31734

-and-

**STATE OF NEW YORK (OFFICE OF PARKS,
RECREATION AND HISTORIC PRESERVATION),**

Respondent.

**SHEEHAN, GREENE, GOLDBERMAN & JACQUES, LLP (ERIN N. PARKER of
counsel), for Charging Party**

**MICHAEL N. VOLFORTE, GENERAL COUNSEL (LYNN HOMES LYON of
counsel), for Respondent**

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the New York State Correctional Officers and Police Benevolent Association, Inc. (NYSCOPBA), and a cross-exception filed by the State of New York (Office of Parks, Recreation and Historic Preservation) (State), to a decision and order of an Administrative Law Judge (ALJ).¹ In her decision, the ALJ dismissed NYSCOPBA's improper practice charge, which alleged that the State violated § 209-a.1 (d) of the Public Employees' Fair Employment Act (Act) by unilaterally ceasing to provide Forest Ranger Michael Carlson with a State-owned take-home vehicle.

¹ 48 PERB ¶ 4545 (2015).

EXCEPTIONS

NYSCOPBA filed three exceptions to the ALJ's decision. First, NYSCOPBA argues that the ALJ erroneously found that the assignment of a take-home vehicle was a conditional benefit. Second, even assuming that the assignment was a conditional benefit, NYSCOPBA argues that the State did not demonstrate that its actions were consistent with the stated conditions. Finally, NYSCOPBA argues that the ALJ erroneously imputed knowledge of a document entitled "Overnight Vehicle Assignment agreement" to it.

The State requests that the Board affirm the ALJ's decision but, in the alternative, argues that the charge should be dismissed as untimely filed.

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

FACTS

The facts are fully set forth in the ALJ's decision, and are discussed here only as far as is necessary to address the exceptions. The State assigned a State-owned vehicle to Carlson in 1999, when Carlson was assigned to Minnewaska State Park. The vehicle was used in the performance of Carlson's job duties, and Carlson was permitted to take the vehicle home so that he could return to the Park in the event of emergencies after hours.²

On or about December 14, 2011, Carlson was notified by David Herrick, Major of the Hudson Valley District Park Police, that he would no longer be assigned a take-home vehicle, and Carlson has not been assigned such a vehicle since January 1,

² Joint Exhibit 1.

2012.³

A document entitled “Overnight Vehicle Assignment agreement,” signed by Carlson on April 9, 2008, was introduced into evidence.⁴ The document included provisions stating, “I acknowledge that the State has made the vehicles [sic] available for my use for the performance of my official duties only and that the subject vehicle may not be used for personal business,” “I acknowledge that the vehicle has been made available to me to assist me in the performance of my duties and to enable me to respond to emergency calls,” and “I acknowledge that the State may at any time elect to terminate this agreement. The State will provide me with notice of this determination.”

Carlson testified the “Overnight Vehicle Assignment agreement,” was left in his work mailbox in April of 2008.⁵ Upon receipt, Carlson spoke to his supervisor, Park Manager Eric Humphrey, about the document and asked whether Humphrey had received it as well.⁶ According to Carlson, Humphrey’s response was that he had also received the document and that Carlson needed to “sign it and send it back.”⁷ Carlson stated that he also asked Humphrey where the document came from and Humphrey indicated that he did not know.⁸

After his conversation with Humphrey, Carlson filled out the document and signed it with a “UD” initialed next to his signature to indicate that he was signing the document “under duress” because he did not agree with the terms of the vehicle use

³ *Id.*

⁴ *Id.*, Exhibit A.

⁵ Transcript, p. 27.

⁶ Transcript, p. 28.

⁷ *Id.*

⁸ *Id.*

articulated therein.⁹ According to Carlson, the terms were different than those he agreed to in 1999, when he received the vehicle.¹⁰ Carlson never received an executed copy of the agreement.¹¹

Carlson's title, Forest Ranger, is included in the Securities Services Unit, represented by NYSCOPBA. Since 2002, Carlson has been chief sector steward of the NYSCOPBA bargaining unit.¹² As chief sector steward, Carlson testified that his "position is to represent the park rangers, conservation park workers, park security officers and forest rangers" of the State's Department of Environmental Conservation.¹³ He also testified that as chief sector steward he could be involved in improper practice charges, the contract grievance process, and discussions of labor-management issues in labor-management meetings.¹⁴ Carlson never notified any other officials of NYSCOPBA of the "Overnight Vehicle Assignment agreement" that he signed in April 2008.¹⁵ Discontinuing the take-home status of the vehicle assigned to Carlson was not negotiated with NYSCOPBA.¹⁶

DISCUSSION

The Court of Appeals has recently acknowledged and endorsed our decisions holding that "employee use of an employer-owned vehicle for transportation to and from work is an economic benefit and a mandatorily negotiable term and condition of

⁹ *Id.*

¹⁰ Transcript, p. 29.

¹¹ Transcript, pp. 30, 40.

¹² Transcript, p. 38.

¹³ Transcript, p. 39.

¹⁴ Transcript, pp. 39-40.

¹⁵ Transcript, pp. 30, 40.

¹⁶ *Id.*

employment; therefore a public employer may not unilaterally discontinue a past practice of providing its employees with this benefit.”¹⁷ In order to establish an enforceable past practice, the charging party must demonstrate that the practice was unequivocal and continued uninterrupted for a period of time sufficient under the circumstances to give rise to a reasonable expectation among the affected unit members that the practice would continue.¹⁸

We agree with the ALJ that the State’s revocation of Carlson’s vehicle in 2012 was consistent with its right to “at any time” terminate the assignment pursuant to the 2008 “Overnight Vehicle Assignment agreement,” and we find that NYSCOPBA failed to demonstrate that revocation of the vehicle was inconsistent with an enforceable past practice.

Like the ALJ, we do not treat the 2008 document as an agreement cognizable under the Act.¹⁹ Rather, the 2008 document changed the terms of the vehicle assignment practice as it related to Carlson. The 2008 document clearly and unequivocally stated that the State could “at any time elect to terminate this agreement” and hence to revoke Carlson’s vehicle assignment. The 2008 document did not impose

¹⁷ *Town of Islip v Pub Empl Relations Bd*, 23 NY3d 482, 491, 47 PERB ¶ 7002 (2014). The Board has long held that the provision of employer-owned vehicles to employees for personal use is an economic benefit and, therefore, a mandatory subject of negotiation. See, e.g., *County of Nassau*, 38 PERB ¶ 3005, 3014 (2005), citing *County of Nassau*, 35 PERB ¶ 3036 (2002), *County of Monroe and Sheriff*, 33 PERB ¶ 3044, 3118 (2000), and *County of Nassau*, 26 PERB ¶ 3040, 3068 confirmed sub nom. *County of Nassau v PERB*, 215 AD2d 381, 28 PERB ¶ 7011 (2d Dept 1995).

¹⁸ *Chenango Forks Cent School Dist*, 40 PERB ¶ 3012, 3046-3047 (2007), confirmed sub nom. *Chenango Forks Cent Sch Dist v New York State Pub Empl Relations Bd*, 95 AD3d 1479, 45 PERB ¶ 7006 (3d Dept 2012), *confd*, 21 NY3d 255, 46 PERB ¶ 7008 (2013).

¹⁹ 48 PERB ¶ 4545, at 4650 n. 43.

any substantive or procedural requirements on the State prior to revoking Carlson's vehicle assignment, but instead allowed the State to withdraw the benefit of a take-home vehicle at any time and without any justification. Given the terms of the "Overnight Vehicle Assignment agreement," we agree with the ALJ that, after receiving and signing the document in April of 2008, Carlson could not have had a reasonable expectation that he would always be assigned a take-home vehicle.²⁰

We note that the State's unilateral change to the terms of the vehicle assignment to Carlson in 2008 appear to have been made in violation of the State's obligation to negotiate prior to changing this mandatory subject of bargaining. However, neither Carlson nor NYSCOPBA filed an improper practice charge or otherwise formally challenged the imposition of new terms in 2008. The State's actions in 2008 took place well outside the four-month limitations period set forth in § 204.1 (a) of our Rules of Procedure and, thus, the lawfulness of the State's action in imposing the "Overnight Vehicle Assignment agreement" is not before us.²¹

²⁰ See *Bd of Ed of City School District of City of New York*, 42 PERB ¶ 3019, 3069 (2009) ("[w]here . . . there is evidence establishing that the contours of the practice include an employer's unfettered discretion to continue or to modify the practice consistent with a prior explicit written reservation . . . there would be no enforceable practice").

Given that Carlson could not have had a reasonable expectation of being assigned a take-home vehicle since April 2008, it is immaterial whether the vehicle assignment was conditional prior to that time.

²¹ NYSCOPBA has not presented any evidence that the State, through its conduct, induced it to delay filing a charge until the filing period has passed. See, e.g., *County of Onondaga*, 12 PERB ¶ 3035, 3065 (1979), *confirmed sub nom. County of Onondaga v New York State Pub Empl Relations Bd*, 77 AD2d 783, 13 PERB ¶ 7011 (4th Dept 1980); *Great Neck Water Pollution Control District*, 27 PERB ¶ 3057, 3134 (1994).

An improper practice charge alleging a unilateral change in a policy of practice in violation of § 209-a.1 (d) of the Act can be filed either within four months of notification of the change or within four months of implementation of the change. *County of*

NYSCOPBA argues that the State never informed it of the change that occurred in April 2008 when the “Overnight Vehicle Assignment agreement” was given to Carlson and, therefore, that NYSCOPBA never had notice of the change. We affirm the ALJ’s finding that Carlson’s knowledge of the 2008 document was properly imputed to NYSCOPBA.

As the ALJ found, Carlson was a chief sector steward at the time he received the 2008 document. Carlson testified that his duties in that position included representing other employees in the unit, and that he also had labor relations responsibilities for NYSCOPBA that included involvement in labor-management meetings, contract grievances, and improper practice proceedings. We agree with the ALJ that Carlson had sufficient representational duties and responsibilities to impute knowledge of the 2008 document to NYSCOPBA itself.²² Moreover, Carlson was clearly aware that the 2008 document changed the terms of his vehicle assignment. Carlson expressly testified that he wrote “UD” next to his signature to indicate that he signed the document “under duress” because he believed it was different from the terms he agreed to when he was first assigned a vehicle in 1999.

In sum, we find that the State’s revocation of Carlson’s vehicle in 2012 was consistent with its practice, as set forth in the 2008 “Overnight Vehicle Assignment

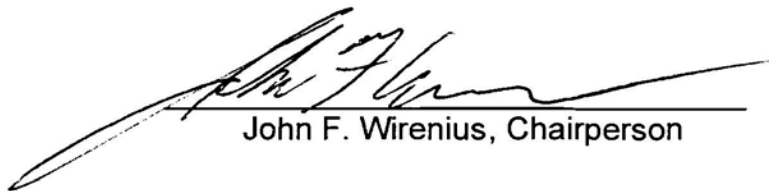
Livingston, 43 PERB ¶ 3018, 3072 (2010); *Middle Country Teachers Assn*, 21 PERB ¶ 3012, 3025-3026 (1988). Here, the new policy was not merely announced but implemented in 2008, as Carlson, both the chief sector steward and the affected employee, was required to acknowledge the newly discretionary nature of the condition upon which he received the vehicle. See, eg, *City of Oswego*, 23 PERB ¶ 3007, 3018 (1990).

²² *Board of Ed of the City Sch Dist of the City of New York*, 42 PERB ¶ 3026, 3104 (2009); *Ganada Cent Sch Dist*, 17 PERB ¶ 3095, 3147 (1984).

agreement.” Accordingly, we affirm the ALJ’s decision to dismiss NYSCOPBA’s charge alleging that the State violated § 209-a.1 (d) of the Act. We find it unnecessary to address the State’s exceptions concerning the timeliness of the charge.

IT IS, THEREFORE, ORDERED that the improper practice charge is dismissed.

DATED: August 31, 2017
Albany, New York



John F. Wirenius, Chairperson



Robert S. Hite, Member

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

In the Matter of

**NEW YORK STATE PUBLIC EMPLOYEES FEDERATION,
AFL-CIO,**

Charging Party,

- and -

**STATE OF NEW YORK
(OFFICE OF MEDICAID INSPECTOR GENERAL),**

Respondent.

**CASE NOS.
U-33471 & U-33999**

BARRY MARKMAN, for Charging Party

**MICHAEL N. VOLFORTE, ACTING GENERAL COUNSEL (TERESA A.
NEWCOMB of counsel), for Respondent**

BOARD DECISION AND ORDER

These cases come to us on exceptions filed by the New York State Public Employees Federation, AFL-CIO (PEF) to a decision and order of an Administrative Law Judge (ALJ) dismissing PEF's improper practice charge.¹ PEF's dismissed charge alleged that the State of New York (Office of Medicaid Inspector General) (State or OMIG) violated § 209-a.1 (d) of the Public Employees' Fair Employment Act (Act) by failing to issue parking placards in 2014 to Investigators represented by PEF and by issuing a new policy regarding the use of parking placards.

EXCEPTIONS

PEF filed five exceptions to the ALJ's decision arguing, in essence, that the provision of parking placards was an economic benefit and a mandatory subject of bargaining and that OMIG's unilateral decision to cease issuing placards to

¹ 49 PERB ¶ 4517 (2016).

Investigators violated the Act. OMIG supports the decision of the ALJ and contends that no basis has been demonstrated for reversal.

Based on our review of the record and our consideration of the parties' arguments, we affirm the ALJ's decision and dismiss the charge.

FACTS

The facts are fully set forth in the ALJ's decision and are discussed here only as far as is necessary to address the exceptions. Prior to 2014, it was the policy of OMIG to annually provide Investigators in its Division of Medicaid Investigations (DMI) with New York City parking placards for use in conducting investigations in the field. The placards could be placed in Investigators' personal vehicles when they were conducting field work.² The placards were to be used for official OMIG business only, and the policy governing their use stated that the placards were "not for personal benefit, including, but not limited to, securing a parking spot close to OMIG's NYC offices on days when the staff member assigned the placard does not intend to go into the field."³ The parking placards remained in the possession of Investigators once they were distributed to them.⁴

On February 19, 2014, Nancy Conroy, OMIG Director of Bureau Operations Management, sent an e-mail that stated that she would be distributing parking placards for use in 2014 on February 25 and 26, 2014.⁵ The distribution did not take place on those days, however, and on March 5, 2014, Anna Coschignano, then OMIG's Director of the Division of Medicaid, sent an e-mail to DMI staff that read, in relevant part, "[a]gency 2014 placards will not be issued until a policy is approved which takes into

² Tr, at pp. 15, 30, 73-75.

³ Charging Party's Ex 3.

⁴ Tr, at pp. 27, 32, 81-82.

⁵ Charging Party's Ex 1.

account monitoring of the placards, internal controls and the usage of government vehicles with agency placards.”⁶ According to Coschignano, the reason for developing the new policy was that she was advised that three employees were improperly using the placards for commuting purposes.⁷

On October 6, 2014, OMIG amended its policy governing the use of parking placards.⁸ Investigators were no longer to be issued a parking placard to permanently keep in their possession. Instead, Investigators may be issued a parking placard only when a state vehicle is not available, and the parking placard must be returned to the Parking Placard Administrator promptly upon completion of the assignment for which it was signed out.⁹ OMIG did not negotiate with PEF prior to issuing the new policy, and Investigators never received a 2014 parking placard to keep in their permanent custody.

Two Investigators testified that having a permanent parking placard for use in their personal vehicles was useful for their job because it made it easier to find parking, avoided the need to “feed the meter,” and sometimes shortened the time spent driving to and from investigations.¹⁰

DISCUSSION

Free parking is a mandatory subject of negotiation because it is an economic benefit to employees.¹¹ PEF relies on this well-established principle to argue that provision of the parking placards to Investigators here was a mandatory subject that

⁶ Charging Party’s Ex 4.

⁷ Tr, at p. 201.

⁸ Charging Party’s Ex 6.

⁹ *Id.*

¹⁰ See Tr, at pp. 26-28, 31 (Doran); pp. 73, 75-79, 95 (Murphy).

¹¹ *Board of Educ of the City Sch Dist of the City of New York*, 44 PERB ¶ 3003, 3031 (2011), *confirmed sub nom. City of New York v New York State Pub Empl Relations Bd*, 103 AD3d 145, 46 PERB ¶ 7001 (3d Dept 2012); *County of Nassau (Dept of Drug and Alcohol Addiction)*, 14 PERB ¶ 3083, 3144 (1981), *affirmed sub nom. County of Nassau v New York State Pub Empl Rel Bd*, 87 AD2d 1006, 15 PERB ¶ 7025 (2d Dept 1982); *State of New York*, 6 PERB ¶ 3005, 3021 (1973).

could not be unilaterally changed by OMIG. We, like the ALJ, reject this argument.

It is undisputed that the parking placards were issued to Investigators to assist in their performance of their job duties when Investigators conducted investigations in the field. Unlike the parking permits at issue in *Board of Educ of the City Sch Dist of the City of New York*,¹² parking placards here were not a personal benefit that allowed employees the opportunity to park near the buildings where they worked. Nor were Investigators permitted to use the parking placard for other personal use, such as parking their personal vehicles near their homes when not on duty.

Prior to 2014, when Investigators traveled into the field, they always had the option of taking their personal vehicle and using the parking placard to gain access to restricted parking spaces and to avoid paying meter fees. Investigators could also travel to and from field sites directly from their home, without the need to first travel to the office. After OMIG changed its parking placard policy, Investigators no longer had permanent custody of a parking placard. Investigators could still receive the parking privileges, but only if they used one of the fleet vehicles owned by the State.¹³ Thus, Investigators no longer had the option of using their personal vehicles or traveling directly to and from field sites.¹⁴ Employees testified that this made their jobs harder to do and increased the time spent performing investigations.

We find that the provision of parking placards in these circumstances is not a mandatory subject of bargaining because the placards involve the manner and means

¹² 44 PERB ¶ 3003, at 3031.

¹³ Investigators could receive a parking placard for their personal vehicles, but only if a fleet vehicle was not available, and Investigators had to return the placard immediately after finishing their assignment.

¹⁴ This description of the new policy is somewhat simplified. OMIG's new policy did provide that Investigators could receive a placard for their personal vehicles if a State vehicle was not available. However, Investigators could not keep these placards permanently and still had to travel to the office to receive the placard.

by which OMIG renders services to the public and the equipment that Investigators will utilize in performing their job functions. The parking placards do not provide an economic benefit to employees – Investigators were not responsible for paying for parking while working in the field either before or after the change in OMIG's policy. Unlike in *Board of Educ of the City Sch Dist of the City of New York*,¹⁵ Investigators did not previously receive a personal benefit from the authorized use of the placards, such as the opportunity to park their personal vehicles near their office for free. The placards instead were only to be used while Investigators were performing official job duties away from the office. The sole purpose of the placards was to facilitate the performance of Investigators' jobs, and OMIG did not encourage or condone the use of placards for personal use.¹⁶ Indeed, the change to the placard policy came about when OMIG discovered that some Investigators may have been improperly using the placards to obtain a personal benefit.

Investigators may have found it more efficient and/or convenient to perform their job duties when they had a permanent placard in their possession for use in their personal vehicles. However, the decision not to provide placards but to instead require Investigators to use fleet vehicles owned by the State in performing their job functions is fundamentally a decision about the manner in which OMIG provides services to the public and about the equipment that Investigators will utilize in performing their job functions. An employer has a managerial prerogative to determine the manner and means by which services are provided. Because the selection of equipment "involves

¹⁵ 44 PERB ¶ 3003, at 3031.


¹⁶ *Compare Town of Islip*, 44 PERB ¶ 3014, 3051-3052 (2011) (finding town could not discontinue past practice of allowing personal use of assigned cars where town knew of practice, even though such use was inconsistent with preexisting rule), *confirmed and remanded as to remedy sub nom. Matter of Town of Islip v Pub Empl Relations Bd*, 23 NY3d 482, 47 PERB ¶ 7006 (2014), *remanded to ALJ*, 48 PERB ¶ 3002 (2015).

the manner and means by which [an employer] serves its constituency,” a determination as to the equipment to be used in the course of an employee’s job duties is not mandatorily negotiable under the Act.¹⁷ As a result, we find that OMIG did not violate the Act by failing to issue 2014 parking placards and issuing a new policy regarding the use of parking placards.

We make no findings on whether OMIG had a duty to bargain over the impact of the changes to its parking placard policy. Neither of the charges filed by PEF allege that OMIG has refused an impact bargaining demand from PEF, and no facts were introduced that pertain to this issue.¹⁸

IT IS, THEREFORE, ORDERED that the improper practice charge is dismissed.

DATED: August 31, 2017
Albany, New York



John F. Wirenius, Chairperson



Robert S. Hite, Member

¹⁷ *City of New Rochelle*, 10 PERB ¶ 3042, 3079 (1977). See also *Incorporated Village of Rockville Centre*, 43 PERB ¶ 3030, 3112 (2010) (“an employer has the prerogative under the Act to determine the manner and means by which services are provided”); *County of Nassau*, 38 PERB ¶ 3030, 3101 (2005) (“As a general principle, a public employer need not bargain about the manner in which it provides services to the public or about the equipment that its employees will utilize in performing their job functions”); *City Sch Dist of the City of New Rochelle*, 4 PERB ¶ 3060, 3706 (1971) (“the public employer . . . must determine the manner and means by which [] services are to be rendered”).

¹⁸ See, eg, *Lackawanna City Sch Dist*, 28 PERB ¶ 3023, 3055 (1995).

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

In the Matter of

SUSAN METZGER,

Charging Party,

CASE NO. U-35549

- and -

**CIVIL SERVICE EMPLOYEES ASSOCIATION, INC.,
LOCAL 1000, AFSCME, AFL-CIO, LOCAL 830,**

Respondent.

SUSAN METZGER, *pro se*

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by Susan Metzger to a decision of the Director of Public Employment Practices and Representation (Director) dismissing her improper practice charge.¹ In her initial charge, Metzger alleged that the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO, Local 830 (CSEA) violated § 209-a.2 (c) of the Public Employees' Fair Employment Act (Act) when, in September 2015, she converted from a part-time position to a full-time position at Nassau Community College (College) and did not receive the salary she was expecting because she was considered a "new hire." Specifically, Metzger alleged:

I believe my union (CSEA 830 Local) has been irresponsible in protecting my interests with the modification to our contract . . . in April 2014. This change has resulted in a financial hardship for me since September 18, 2015.

Finally, Metzger's charge states that CSEA pursued clarification of how the

¹ 50 PERB ¶ 4521 (2017).

contract would be applied to her with the employer after the contract was negotiated and prior to her taking the full-time position, resulting in a January 9, 2015 "MOA" that failed to remedy her concerns.

Metzger was advised that her charge was deficient because, *inter alia*, it appeared to be untimely.

In response, Metzger filed an amended charge with the Director on March 7, 2017 which, with respect to the timeliness deficiency, states:

I would...like to file a request for an exception in reference to one of the deficiencies.

While the situation (contract modification) originally occurred in April 2014 and didn't affect me financially until Sept. 2015 when I accepted a full-time position at Nassau Community College, I have been working continuously since April 2014 within the system with my union in an effort to rectify this situation. However, at this point, I'm not confident the union will remedy it.

Metzger than reiterates the same information concerning the January 9, 2015 MOA and states that, in December 2015, CSEA attempted to convince the College to "put [her] on higher step (sic) [in] the new schedule," but those efforts were unsuccessful. Finally, Metzger alleges that, in October 2016, she "thought [she] would try again" because the College had a different president. According to Metzger, the College's president denied her request via a letter, which she forwarded to CSEA. On October 22, 2016, she received a responsive email from CSEA informing her that "there is really nowhere else to go with [her] situation."

The Director found that Metzger's amended charge failed to correct the deficiencies in her earlier charge, and she dismissed Metzger's charge in full.

EXCEPTIONS

Metzger filed exceptions to the Director's decision. Metzger argues that she has been "working within the system" with CSEA "in the hope" that CSEA "would be able to rectify my difficult financial situation caused by the April 1, 2014 contract modification"² Metzger argues that she promptly filed her charge after CSEA told her that, "as it stands, we have nowhere to go with this."³

Based on our review of the record and our consideration of Metzger's arguments, we affirm the Director's decision and dismiss the charge.

DISCUSSION

Section 204.1 (a) of our Rules of Procedure (Rules) requires an improper practice charge to be filed within four months of when the charging party had actual or constructive knowledge of the conduct that forms the basis for the alleged improper practice.⁴ Here, Metzger's allegation is that the terms of the contract have affected her adversely since September 2015. We agree with the Director that Metzger knew by December 2015 that CSEA had attempted, unsuccessfully, to obtain an increase in Metzger's salary. Thus, Metzger's charge, filed on February 6, 2017, concerns conduct that occurred well beyond the filing period set by our Rules. We also agree with the Director that the fact that Metzger renewed her request to the College and to CSEA in

² Exceptions, at 1.

³ *Id.*

⁴ See, eg, *District Council 37 (Bacchus)*, 50 PERB ¶ 3013, 3057-3058 (2017); *UFT (Davis)*, 50 PERB ¶ 3014, 3059 (2017); *New York State Thruway Auth*, 40 PERB ¶ 4533, 4595 (2007); *Civil Service Employees Assn, Inc., Local 1000, AFSCME, AFL-CIO*, 28 PERB ¶ 3072, 3168, n. 4 (1995).

October 2016 does not extend the filing period or revive her charge.⁵

Although the Board has found a respondent to be equitably estopped from asserting a timeliness defense where the respondent has, through its conduct, induced the charging party to delay filing a charge until the filing period has passed, that limited exception does not apply here, where there is no evidence that Metzger was detrimentally induced to delay filing a charge until the appropriate filing period had passed.⁶

Moreover, even if the charge were timely filed, we would affirm the Director's dismissal of the charge on the merits. 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

⁵ See, eg, *NYCTA (Rosado)*, 37 PERB ¶ 3036, 3108 (2004); *UFT (Paul)*, 23 PERB ¶ 3038, 3077 (1990).

With her exceptions, Metzger filed a detailed timeline of her dealings with CSEA and the College. Because these asserted facts were not presented to the Director, we do not consider them. Our review of the Director's decision is limited to the record as it existed before her. *Mt. Pleasant Cottage UFSD*, 50 PERB ¶ 3002, 3009, n. 12 (2017); *CSEA (Josey)*, 49 PERB ¶ 3022, 3072 (2016); *Smithtown Fire District*, 28 PERB ¶ 3060, 3135 (1995). While in extraordinary circumstances such as the discovery of new evidence which could not reasonably have been discovered in proceedings before the Director, that principle may give way, no such extraordinary circumstances are present here. *CSEA (Reese)*, 25 PERB ¶ 3012, 3032, n. 1 (1992); *New York City Transit Auth*, 23 PERB ¶ 3016, 3034 (1990); *Buffalo Professional Firefighters Assn, Inc (Summers)*, 22 PERB ¶ 3040, 3094 (1989).

⁶ *UFT (Davis)*, 50 PERB ¶ 3014, (2017); *DC 37 (Bacchus)*, 50 PERB ¶ 3013 (2017), citing *County of Onondaga*, 12 PERB ¶ 3035, 3065 (1979), *confirmed sub nom. County of Onondaga v New York State Pub Empl Relations Bd*, 77 AD2d 783, 13 PERB ¶ 7011 (4th Dept 1980) (finding charge filed 14 months after announcement of change to be timely where employer detrimentally induced employee organization to delay filing a challenge to change pending employer's actions aimed at such revocation); *Great Neck Water Pollution Control District*, 27 PERB ¶ 3057, 3134 (1994) (finding charge filed more than four months after announced change timely where employer led employee organization to believe that that change had been rescinded). Cf. *City of Elmira*, 41 PERB ¶ 3018, at 3086 (finding charging party failed to meet burden of demonstrating that respondent was equitably estopped from asserting timeliness defense).

arbitrary, discriminatory or founded in bad faith.”⁷

As we have previously explained, the courts have:

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.⁸

Thus, “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.”⁹

Metzger has neither expressly alleged nor 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, either when it agreed to the contract modification in April 2014 or in its subsequent dealings with Metzger as to how the contract was applied to her. In her exceptions, Metzger argues that the 2014 contract modification adversely affected existing part-time employees planning to convert to full-time status. Metzger states that the contract modification is

⁷ *District Council 37 (Calendario)*, 49 PERB ¶ 3015, 3060 (2016), quoting *UFT (Cruz)*, 48 PERB ¶ 3004, 3010, *petition denied*, *Cruz v NYS Pub Empl Relations Bd*, 48 PERB ¶ 7003 (Sup Ct NY Co 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).

⁸ *Id.*; see also *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)).


⁹ *Id.*

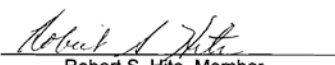
“especially unjust” for these employees and that “[o]ne group should not have to bear such a large burden,”¹⁰ but such conclusory allegations are “insufficient to plead, let alone prove, a violation of the duty of fair representation.”¹¹ Moreover, a bargaining agent does not breach its duty of fair representation by its good-faith agreement to terms in a collective bargaining agreement that benefit one group of members and not another.¹²

The charge does not set forth a claim that CSEA’s conduct was arbitrary, discriminatory or in bad faith as required to establish a breach of the Act.¹³ Accordingly, even if the improper practice charge were timely, it would be dismissed for failure to allege facts indicating a violation of the Act. Based upon the foregoing, we deny the exceptions, affirm the decision of the Director, and dismiss the charge.

IT IS, THEREFORE, ORDERED that the improper practice charge is dismissed.

DATED: August 31, 2017
Albany, New York


John F. Wrenius, Chairperson


Robert S. Hite, Member

¹⁰ Exceptions, at 1 & 2.

¹¹ *TWU (Waters)*, 49 PERB ¶ 3026, 3083 (2016), citing *Elwood Teachers Alliance (Neithardt)*, 48 PERB ¶ 3020, 3067 (2015); *UFT (Leon)*, 48 PERB ¶ 3016, 3056 (2015), (quoting *UFT (Munroe)*, 47 PERB ¶ 3031, 3095 (2014)); confirmed sub nom. *Munroe v NYS Pub Empl Relations Bd*, 48 PERB ¶ 7002 (Sup Ct NY Co 2015) (citing *PEF (Goonewardena)*, 27 PERB ¶ 3006 (1994)); see also *UFT (Arredondo)*, 48 PERB ¶ 3010, 3034 (2015).

¹² *Elwood Teachers Alliance (Neithardt)*, 48 PERB ¶ 3020, at 3068; *CSEA (Bienko)*, 47 PERB ¶ 3027, 3082-3083 (2014); *Tompkins County Dep Sheriff's Assn, Inc.*, 44 PERB ¶ 3024, 3087 (2011); *Teamsters Local 264 (Penna)*, 27 PERB ¶ 3081, 3187 (1994).

¹³ See *TWU (Waters)*, 49 PERB ¶ 3026, at 3083; *CSEA (Bienko)*, 47 PERB ¶ 3027, at 3082-3083; *CSEA (Smulyan)*, 45 PERB ¶ 3008, 3017 (2012).

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

In the Matter of

ROBERT W. BREWSTER,

Charging Party,

CASE NO. U-35480

- and -

**SULLIVAN COUNTY, SULLIVAN COUNTY SHERIFF,
AND CIVIL SERVICE EMPLOYEES ASSOCIATION,
INC., LOCAL 1000, AFSCME, AFL-CIO,**

Respondents.

ROBERT W. BREWSTER, *pro se*

DAREN J. RYLEWICZ, GENERAL COUNSEL, for Respondents

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by Robert W. Brewster (Brewster) to a decision of the Director of Public Employment Practices and Representation (Director) dismissing his improper practice charge.¹

In his initial charge, Brewster alleged that Sullivan County and the Sullivan County Sheriff (Employer) violated §§ 209-a.1 (a), (b) and (d) of the Public Employees' Fair Employment Act (Act) and that the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO (CSEA) violated §§ 209-a.2 (a), (b) and (c) of the Act. The charge alleged that, on or about September 7, 2016, Brewster read the Taylor Law and "discovered" that he "was never advised or instructed of his 'Right of Organization' pursuant to Taylor Law section 202," and that CSEA "has breached its duty of [f]air [r]epresentation commencing 1991, by not...instructing [him] on his rights" pursuant to that section. In the charge, Brewster also asserted that CSEA is the "union of choice of

¹ 50 PERB ¶ 4527 (2017).

the [C]ounty and the Sheriff,” and asked that PERB remove CSEA “as the recognized union representative.”

Brewster was advised that his charge was deficient because, *inter alia*, only CSEA was identified as a respondent on the charge form and there are no facts alleged to arguably establish a violation of §§ 209-a.1 (a) and (b), or §§ 209-a.2 (a) and (c) of the Act.

In response, Brewster filed an amendment on January 20, 2017, alleging only a violation of § 209-a.2 (a) of the Act by CSEA, and adding in the “details of charge” that “by not providing ‘[f]air [r]epresentation’ in addressing, and instructing [him] of his right of choice, CSEA is ‘restraining’ [him] from pursuing such right of choice.”

The Director found that Brewster’s amended charge failed to correct the deficiencies of the earlier charge, and she dismissed his charge in full.

EXCEPTIONS

Brewster filed exceptions to the Director’s decision. Brewster again argues that CSEA violated its duty of fair representation by failing to inform him of his rights under the Act. Brewster also appears to challenge the validity of the Employer’s recognition of CSEA as the exclusive bargaining representative of a unit of correction officers in 1990.

CSEA filed a response to Brewster’s exceptions, in which it supports the decision of the Director.

Based on our review of the record and our consideration of the parties’ arguments, we affirm the Director’s decision and dismiss the charge.

DISCUSSION

We affirm the Director’s decision. As she found, there is no provision of the Taylor Law that imposes a legal duty upon the incumbent employee organization to

inform or instruct its members regarding their organizational rights. Moreover, we agree that an improper practice proceeding is not the proper forum to challenge CSEA's recognition. Part 201 of the Board's Rules of Procedure provides rules for filing a petition alleging that an employee organization which has been certified or is being currently recognized should be deprived of representation status as to all or part of a unit ("petition for decertification").

Finally, we note that Brewster's exceptions contain asserted facts and documents that were not presented to the Director, primarily concerning a representation proceeding for a unit of deputy sheriffs employed by the Employer. Our review of the Director's decision is limited to the record as it existed before her.² Only in extraordinary circumstances such as the discovery of new evidence which could not reasonably have been discovered in proceedings before the Director would we consider such evidence or arguments. No such extraordinary circumstances are present here.³ Therefore, we do not consider the facts and documents presented by Brewster for the first time on exceptions.

IT IS, THEREFORE, ORDERED that the improper practice charge is dismissed.

DATED: August 31, 2017
Albany, New York



John F. Wirenius, Chairperson



Robert S. Hite, Member

² *Mt. Pleasant Cottage UFSD*, 50 PERB ¶ 3002, 3009, n. 12 (2017); *CSEA (Josey)*, 49 PERB ¶ 3022, 3072 (2016); *Smithtown Fire District*, 28 PERB ¶ 3060, 3135 (1995).

³ *CSEA (Reese)*, 25 PERB ¶ 3012, 3032, n. 1 (1992); *New York City Transit Auth*, 23 PERB ¶ 3016, 3034 (1990); *Buffalo Professional Firefighters Assn, Inc (Summers)*, 22 PERB ¶ 3040, 3094 (1989).

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

In the Matter of

SYED W. JAVED,

Charging Party,

-and-

CASE NO. U-34342

**DISTRICT COUNCIL 37, AFSCME, AFL-CIO,
LOCAL 2627,**

Respondent,

-and-

CITY UNIVERSITY OF NEW YORK,

Employer.

SYED W. JAVED, *Pro Se*

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

**FREDERICK P. SCHAFFER, GENERAL COUNSEL (HILARY B. KLEIN of
counsel), for Employer**

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by Syed W. Javed (Javed) to a decision and order of an Administrative Law Judge (ALJ) dismissing his improper practice charge, in which he alleged that District Council 37, AFSCME, AFL-CIO, Local 2627 (DC 37) violated §§ 209-a.2 (a) and (c) of the Public Employees' Fair Employment

Act (Act).¹ The charge alleged that DC 37 breached its duty of fair representation when it refused to file a grievance on Javed's behalf challenging the termination of his employment. The ALJ granted DC 37 and the City University of New York (CUNY)'s motion to dismiss the charge for failure to present sufficient evidence to establish a *prima facie* case.

EXCEPTIONS

Javed filed wide-ranging exceptions. Javed essentially argues that DC 37 failed in its duty of fair representation by failing to be more aggressive in representing Javed in disciplinary proceedings after Javed was placed on administrative leave with pay in May 2014, and by failing to file a grievance challenging Javed's termination in February 2015. Javed excepts to the ALJ's ruling on the timeliness of certain allegations and to the ALJ's ruling that Javed would not be allowed to testify by telephone.

DC 37 supports the decision of the ALJ and contends that no basis has been demonstrated for reversal. DC 37 also argues that certain of Javed's exceptions should not be considered because they make factual assertions that were not raised at the hearing before the ALJ.

Based on our review of the record and our consideration of the parties' arguments, we affirm the ALJ's decision and dismiss the charge.

FACTS

The facts are fully set forth in the ALJ's decision, and are discussed here only as far as is necessary to address the exceptions. DC 37 represents a unit of white collar

¹ 49 PERB ¶ 4573 (2016).

employees who work for CUNY, including, among other titles, that of Information Technology (IT) Assistant III.

In April 2001, Javed was hired to work at Medgar Evers College (College), a constituent college of CUNY. Javed was initially hired to work as an IT Assistant III in the office of information technology. In April 2012, he was provisionally appointed to the position of IT Security Manager, also referred to as a Computer System Manager (CSM) Level III, a managerial position that is not represented by DC 37.

On May 21, 2014, the College terminated Javed from his provisional CSM position, returned him to his permanent position of IT Assistant III. On the same day, the College served him with disciplinary charges pertaining to both his CSM and IT Assistant III positions, and placed him on administrative leave with pay.

On June 10, 2014, a step 1 hearing was held in the disciplinary charges that pertained to Javed's CSM position. Javed was represented during that hearing by DC 37, even though the allegations pertained to his conduct as a CSM, a position not represented by DC 37. To rebut the allegations made against him, Javed submitted a detailed statement with attached documents, which totaled more than 100 pages.

A step 1 hearing was scheduled for June 11, 2014 to address the disciplinary charges that pertained to Javed's IT Assistant III position, but the hearing was cancelled when DC 37 informed CUNY that it would rest based upon the evidence submitted the prior day.² On June 11, 2014, Robert Ajaye, the local unit president, and Dana Tilghman, a DC 37 representative, met with Javed and advised him that DC 37 would

² Javed's Affidavit at ¶ 8, ALJ Ex 5.

wait for CUNY to issue a determination regarding his disciplinary proceedings before taking any further action.³

Javed's affidavit shows that DC 37 made certain efforts on Javed's behalf in or about August 2014. Because Javed needed to renew his work permit by February 6, 2015, to continue working within the United States, a DC 37 representative contacted Counsel for the College and asked the College to support Javed's request to renew his work permit.⁴

Javed alleges that he complained to Tilghman and Ajaye that he feared that the College was taking too long to determine his disciplinary cases and that his work permit was going to expire. According to Javed, they told him that DC 37 would wait for the College to issue a step 1 decision.⁵ Nonetheless, in or about August 2014, DC 37 contacted CUNY's Director of Labor Relations and asked the College to either promptly proceed to arbitration or dismiss the disciplinary charges pending against Javed.

On January 21, 2015, Javed asked DC 37 to file a grievance regarding CUNY's failure to determine his disciplinary cases, but DC 37 told him that they could not file a grievance because he was on full pay status and, therefore, there was no violation of the collective bargaining agreement.⁶

The College took no further action in the disciplinary charges it initiated against Javed and never issued a step I decision. Javed remained on paid administrative leave

³ *Id.*

⁴ Javed's Affidavit at ¶ 10, ALJ Ex 5.

⁵ Javed's Affidavit at ¶¶ 11-12, ALJ Ex 5.

⁶ Javed's Affidavit at ¶ 15, ALJ Ex 5.

until February 6, 2015. The College terminated his employment on February 7, 2015, citing the expiration of his immigration status as the basis for the termination.⁷

Javed called DC 37 numerous times after his February 7, 2015 termination and also sent emails to DC 37 representatives when his calls were not returned. The record shows that Javed sent emails to Ajaye and other DC 37 representatives on February 11, 13, and 18, 2015, advising them of the termination letter he received and asking for assistance.⁸ On February 18, 2015, Tilghman advised Javed that his case had been referred to DC 37's Legal Department for review.⁹

On February 23, 2015, an attorney from DC 37's Legal Department sent Tilghman a memorandum stating that CUNY had refused to provide the federal government with information establishing that Javed's position is difficult to recruit. The memorandum further states that Javed's work visa had expired on February 6, 2015; and that the work visa was a qualification for employment. The memorandum also explains that, because Javed was terminated for failure to meet an employment qualification, his termination could not be challenged as a wrongful disciplinary action. The memorandum notes that DC 37 does not provide representation regarding immigration matters.¹⁰

On March 10, 2015, Javed sent another email to Ajaye noting that thirty days had passed since his termination and requesting that DC 37 initiate a grievance to contest

⁷ Exhibit C annexed to DC 37's answer, ALJ Ex 3.

⁸ Charging Party's Exs 2 and 3.

⁹ Charging Party's Ex 3.

¹⁰ Exhibit F annexed to ALJ Ex 3.

his termination. Ajaye responded by email dated March 11, 2015:

Mr. Javed I discussed your issue with the attorneys at DC 37. I was told the CUNY has no obligation to sponsor you. Unfortunately CUNY has used this against you. I have been advised that there is nothing we can do.¹¹

DC 37 never filed a grievance challenging Javed's February 7, 2015 termination.

At the start of the hearing on this matter before the ALJ, Javed's counsel moved for permission to allow Javed to testify by telephone, stating that Javed could not be present and was out of the country due to his immigration status.¹² The respondents opposed the motion. The ALJ denied the motion on the grounds that PERB has not previously allowed telephone testimony, that granting the motion would deprive the ALJ of the ability to judge the credibility of the witness and would impair the respondents' ability to cross-examine the witness, and because the request was belatedly made at the commencement of the hearing. The ALJ did allow Javed's wife, Anella Wasif, who was present at the hearing, to testify on Javed's behalf.

Wasif testified that, after Javed received the March 11, 2015 email from Ajaye, Javed spoke with Ajaye and Tilghman, but they failed to assist him. Wasif further testified that, after March 11, 2015, Javed continued to ask Ajaye and Tilghman to file a grievance or proceed to arbitration on his behalf, but they repeatedly told him that there

¹¹ Charging Party's Ex 5.

¹² At the time of the hearing, Javed was represented by counsel. After the hearing, the Board received a letter from Javed's counsel stating that he and Javed "have agreed that, going forward, I will no longer be representing him." The Board requested from counsel confirmation that his attorney-client relationship with Javed has been terminated, such as a termination agreement, a disengagement letter, or a letter from Javed. Although no such confirmation has been received by PERB to date, we shall treat Javed as a *pro se* charging party for purposes of deciding his exceptions.

was nothing DC 37 could do on his behalf.

DISCUSSION

Testimony by telephone

In his exceptions, Javed argues that he was out of the country in order to comply with United States' immigration laws but that he was available to testify via telephone or Skype, and that the ALJ erred in refusing to allow such testimony. Javed also argues that, in the alternative, "Javed should have been given time to be physically present if virtual presence wasn't allowed." Under the circumstances here, we find that the ALJ's granting of one of the two modes of compiling a complete record proposed by Javed's counsel (i.e., allowing his wife to testify) renders Javed's exception unpreserved as waived.

As a threshold matter, we agree with the ALJ that it was not appropriate for Javed to make this request, for the first time, on the first day of the hearing. Javed made no attempt to seek the consent of the other parties or to make a motion that could be reviewed by the ALJ prior to the start of the hearing. Because alternative modes of testimony may require technology and/or arrangements and accommodations that are not present when witnesses are testifying in person, as at a standard hearing, such a motion should be made well in advance of the initial hearing date.

The ALJ did not simply refuse Javed's request, relayed by counsel, that Javed be permitted to testify via telephone. Rather, the ALJ granted Javed's alternative

proposition that his wife be permitted to testify in his stead.¹³ The ALJ also admitted Javed's affidavit, setting forth his version of the facts, into evidence.¹⁴ Having affirmatively proposed these two suggestions as acceptable alternatives, Javed cannot be heard to complain that the ALJ accepted one of them, here, the suggested mode that allowed for live, in person testimony.¹⁵

In so deciding, the ALJ correctly pointed out the fundamental flaw of testimony via telephone: that the witnesses' demeanor cannot be evaluated. As the ALJ explained, granting the motion, over the opposition of the respondents, would impair the ability of the respondents to cross-examine Javed, and would deprive the ALJ of the ability to gauge the demeanor and credibility of Javed.¹⁶ While some courts do allow testimony by telephone, these courts do so under statutory schemes that, unlike the

¹³ Tr, at 4-6, 12.

¹⁴ Tr, at 13, 16.

¹⁵ It is well established that the Board will not address arguments raised for the first time on exceptions. *See, eg, New York State Thruway Assn*, 47 PERB ¶ 3032, 3100, at n. 25 (2014); *Rochester Teachers Assn (Hirsch)*, 46 PERB ¶ 3035, 3078 (2013); *County of Sullivan and Sullivan County Sheriff*, 41 PERB ¶ 3006, 3038 (2008); *Town of Penfield*, 30 PERB ¶ 3060, 3154 n. 7 (1997).

¹⁶ *See Hughes v Elliot*, 768 NYS2d 74 (Sup Ct, 9th and 10th Judicial Districts 2003) ("Testimony by telephone prevents effective evaluation of demeanor as well as effective cross-examination simply because the witness cannot be seen."); *Van Dyke v Jefferson Anesthesiology Svcs, P.C.*, Index No. 98-0070 (Sup Ct Jefferson Cty Sept 6, 2001) (denying untimely request to take trial testimony by telephone deposition because "Court cannot devise an Order which would allow telephone testimony to be used at trial in a manner which sufficiently protects the plaintiff's right to ascertain the witness's identity and to be present at the site of the witness's testimony if the Plaintiff chooses.").

Act, provide for such a procedure in particular circumstances.¹⁷

Under these circumstances, the ALJ's refusal to grant Javed's request that he be allowed to testify via telephone did not constitute an abuse of discretion. We find that the ALJ did not err by refusing to grant Javed's request that he be allowed to testify via phone.

Because our review is limited to the record before the ALJ, we do not address alternative methods of addressing Javed's legal unavailability impermissibly raised for the first time in his exceptions,¹⁸ such as employing Skype or similar methods of remote testifying that allow for the evaluation of demeanor. We do note that such methodologies have, on specific and compelling occasions, been approved by the courts, and we neither mandate nor foreclose the employment of such methods in cases of genuine unavailability and compelling need.¹⁹

Timeliness of charge

Section 204.1 (a) of the Rules requires an improper practice charge to be filed

¹⁷ For example, the Family Court Act provides that "the court may permit a party or a witness to be deposed or to testify by telephone, audio-visual means, or other electronic means at a designated family court or other location" in certain circumstances. See §§ 433, 531-a, and 580-316. See also 22 CRR-NY 205.44 (2017). Telephone testimony is also allowed in hearings before the Unemployment Insurance Appeal Board. See 12 NYCRR 461.7 [c] [2]; *Matter of Rothstein [Commissioner of Labor]*, 306 AD2d 789, 790, (3d Dept 2003).

¹⁸ *New York State Thruway Assn*, 47 PERB ¶ 3032, at 3100, n. 25.

¹⁹ The Court of Appeals has found that it was within a trial court's discretion to permit live, two-way televised testimony following a finding of necessity in a criminal trial. *People of the State of New York v Wrotten*, 14 NY3d 33 (2009) (finding), *cert denied* 560 U.S. 959 (2010). The Court has also held that courts have discretion to utilize live, two-way video testimony in civil proceedings, but only where exceptional circumstances require or when all parties consent. *State of New York v Robert F.*, 25 NY3d 448 (2015). Because Javed failed to preserve this argument for review, we make no finding on whether his circumstances would qualify as exceptional circumstances justifying the use of live, two-way video testimony.

within four months of when the charging party had actual or constructive knowledge of the conduct that forms the basis for the alleged improper practice.²⁰ We agree with the ALJ that the charge's allegation that DC 37 failed in its duty of fair representation by failing to take action from May 22, 2014 until February 6, 2015 is untimely. Like the ALJ, we presume the truth of the facts pled in the charge and in Javed's supporting affidavit dated August 21, 2015. These facts demonstrate that Javed knew, as early as June 11, 2014, that DC 37 had decided not to take further action regarding the disciplinary charges filed against Javed until CUNY issued step 1 decisions in those matters.

Although Javed knew by June 11, 2014 that DC 37 was not going to take further action until CUNY issued step 1 decisions, he did not file his charge until June 1, 2015, beyond the four months set forth in the Rules.²¹ While Javed asserts that DC 37 "misled" him "about the procedure," all of DC 37's actions and statements to Javed were consistent with their position that no action would be taken until step 1 decisions issued. It is clear that Javed disagreed with DC 37's position, but if he wished to challenge DC 37's position as a violation of its duty of fair representation under the Act, he had a four-month time period in which to do so.

²⁰ See, eg, *District Council 37 and Bd of Ed of the City Sch Dist of the City of New York (Bacchus)*, 50 PERB ¶ 3013, 3057-3058 (2017); *UFT and Bd of Ed of the City Sch Dist of the City of New York (Davis)*, 50 PERB ¶ 3014, 3059 (2017); *New York State Thruway Auth*, 40 PERB ¶ 4533, 4595 (2007); *Civil Service Employees Assn, Inc., Local 1000, AFSCME, AFL-CIO*, 28 PERB ¶ 3072, 3168, n. 4 (1995).

²¹ As the ALJ found, even if the time period for filing was considered from January 21, 2015, when DC 37 told Javed that it would not file a grievance on his behalf, the charge was still filed more than four months later and was therefore untimely.

Merits of the pre-termination aspects of the charge

Although the ALJ found the allegations with respect to DC 37's conduct from May 22, 2014 until February 6, 2015 to be untimely, she nevertheless assessed Javed's allegations on the merits and found that Javed failed to establish a *prima facie* case.

We agree.

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.”²²

As we have previously explained, the courts have:

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.²³

Thus, “an employee's mere disagreement with the tactics utilized or

²² *TWU Local 100 and NYCTA (Waters)*, 49 PERB ¶ 3026, 3083 (2016); *District Council 37 (Calendario)*, 49 PERB ¶ 3015, 3060 (2016), quoting *UFT (Cruz)*, 48 PERB ¶ 3004, 3010, petition denied, *Cruz v NYS Pub Empl Relations Bd*, 48 PERB ¶ 7003 (Sup Ct NY Co 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).

²³ *Id.*; see also *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), affirmed on other grounds, 73 NY2d 796, 21 PERB ¶ 7017 (1988)).

dissatisfaction with the quality or extent of representation does not constitute a breach of the duty of fair representation.”²⁴

The Board has also long held that employee organizations are entitled to a wide range of reasonable discretion in the processing of grievances under the Act and that it will not substitute its judgment for that of an employee organization.²⁵ Thus, an employee organization “does not have the duty to take every grievance presented to it or to process every grievance through the grievance procedure as long as its decision is promptly communicated to the employee and is not arbitrary, discriminatory or made in bad faith.”²⁶ Therefore, an employee organization’s mere refusal to file a grievance, without more, is insufficient to support a violation of the Act.²⁷

Like the ALJ, we assume the truth of Javed’s factual contentions and give Javed the benefit of all reasonable inferences that can be drawn from those facts, as is appropriate when deciding a motion to dismiss for failure to establish a *prima facie* case.²⁸ Nevertheless, we agree with the ALJ that Javed failed to present sufficient facts which, if true, would establish that DC 37 acted arbitrarily, discriminatorily, or in bad faith during the time period from May 22, 2014 until February 6, 2015.

²⁴ *Id.*

²⁵ *UPSEU (Brewster Phillips)*, 32 PERB ¶ 3027, 3058 (1999). See also *District Council 37 (Calendario)*, 49 PERB ¶ 3015, at 3060; *UFT (Gibson)*, 48 PERB ¶ 3015, 3054 (2015) *United Steelworkers, Local 9434-00 (Buchalski)*, 43 PERB ¶ 3002, 3008 (2010); *Public Employees Fedn, AFL-CIO (Reese)*, 29 PERB ¶ 3027, 3062 (1996); *Faculty Assn of Hudson Valley Comm Coll (Dansereau)*, 15 PERB ¶ 3080, 3124 (1982).

²⁶ *American Fedn of State, County and Municipal Employees, Local 650*, 43 PERB ¶ 3019, 3078 (2010); *United Public Service Employees Union (Phillips)*, 32 PERB ¶ 3027, 3058 (1999).

²⁷ *UPSEU (Phillips)*, 32 PERB ¶ 3027, at 3058.

²⁸ *Town of Tuscarora*, 45 PERB ¶ 3044, 3112 (2012).

As the ALJ found, the facts as asserted by Javed in the charge and in his affidavit do not support Javed's allegation that DC 37 failed to take action on Javed's behalf during this time frame. DC 37 represented Javed at the step 1 hearing to address the disciplinary charges on June 11, 2014, contacted the College's counsel to advocate that the College support Javed's application to renew his work permit, and contacted CUNY's Director of Labor Relations and argued that the College should either promptly proceed to arbitration or dismiss the disciplinary charges pending against Javed. Although DC 37 refused Javed's request that it file a grievance challenging the College's inaction in January 2015, DC 37 advised Javed that it could not do so because Javed was on full pay status and there was, therefore, no violation of the collective-bargaining agreement. As the ALJ explained, that Javed disagreed with DC 37's interpretation of the contract is not a basis to find a violation of the Act.²⁹ As explained above, an employee organization's decision not to file a grievance is insufficient to support a violation of the Act, without evidence that the decision is arbitrary, discriminatory, or made in bad faith. We find no such evidence on the record before us.

We note that portions of Javed's exceptions suggest an argument that the CUNY and DC 37 colluded together to terminate Javed's employment because of Javed's ethnicity, race, and/or national origin. We note that the Employer's actions are not under review in the case here. In any event, Javed's assertions of collusion and

²⁹ See *CSEA (Trowbridge)*, 48 PERB ¶ 3024, 3093 (2015); *UFT (Hunt)*, 45 PERB ¶ 3038, 3094 (2012); *Nassau Community College Federation of Teachers*, 42 PERB ¶ 3007, 3021-3022 (2009).

discrimination are entirely conclusory and are insufficient to prove a violation of the duty of fair representation.³⁰ Javed also makes a number of factual assertions in his exceptions brief that were not presented at the hearing, in the charge, or in Javed's supporting affidavit. We disregard these assertions. The Board has long held that "we will not consider allegations of fact made for the first time in exceptions when reviewing an ALJ's decision because our review is limited to the record as it was developed before the ALJ."³¹

Javed clearly disagreed with DC 37's decision to await the College's decision after the step 1 hearing before taking further action. However, DC 37's decision is the type of tactical decision that employee organizations are entitled to make under the Act, and it cannot support a violation of DC 37's duty of fair representation in the absence of evidence that the decision was arbitrary, discriminatory, or made in bad faith.³² Again, we find no such evidence on the record before us.

Merits of the charge with respect to Javed's termination on February 7, 2015

We agree with the ALJ, for the reasons she stated, that Javed has not established that DC 37 violated its duty of fair representation by failing to file a

³⁰ See *District Council 37 and Bd of Ed of the City Sch Dist of the City of New York (Candelario)*, 49 PERB ¶ 3015, 3062 (2016); *UFT (Leon)*, 48 PERB ¶ 3016, 3056 (2015); *UFT (Cruz)*, 48 PERB ¶ 3004, at 3011, n. 18 (2015); *UFT (Arredondo)*, 48 PERB ¶ 3010, at 3034 (quoting *Transport Workers Union, Local 100 (Brockington)*, 37 PERB ¶ 3002, 3006 (2004)); *UFT (Munroe)*, 47 PERB ¶ 3031, at 3095, citing *PEF (Goonewardena)*, 27 PERB ¶ 3006 (1994).

³¹ *CSEA (Josey)*, 49 PERB ¶ 3022, 3072 (2016) (quoting *Smithtown Fire District*, 28 PERB ¶ 3060, 3135 (1995)).

³² See *CSEA (Smulyan)*, 45 PERB ¶ 3008, 3017 (2012); *ATU (Lefevre)*, 43 PERB ¶ 3027, 3104 (2010).

grievance challenging Javed's termination.

As explained above, an employee organization does not have the duty to take every grievance presented to it or to process every grievance through the grievance procedure as long as its decision is promptly communicated to the employee and is not arbitrary, discriminatory or made in bad faith. DC 37 made a decision that Javed's termination could not be grieved as a wrongful disciplinary action because Javed was terminated for failure to meet an employment qualification (possession of a valid work visa), and DC 37 communicated this decision to Javed. DC 37 conducted an individualized assessment of the merits of a possible grievance, and there is no evidence that DC 37's decision was arbitrary, discriminatory or made in bad faith. Rather, DC 37 had a good-faith belief that a grievance challenging Javed's termination was without merit. Again, Javed disagreed with DC 37's decision. Even if Javed were correct, however, he would have, at most, asserted "an honest mistake resulting from misunderstanding," insufficient to constitute a breach of the duty of fair representation.³³

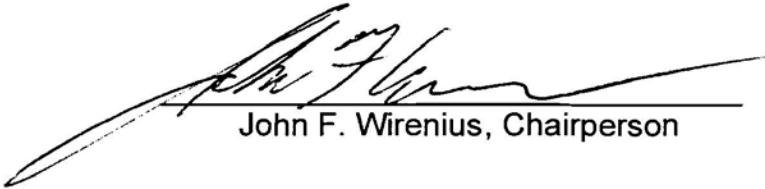
Based upon the foregoing, we deny Javed's exceptions and affirm the decision of the ALJ.

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

³³ See *District Council 37 (Candelario)*, 49 PERB ¶ 3015, at 3062, quoting *CSEA (Munroe)*, 47 PERB ¶ 3031 (2014); *Intl Union of Operating Engineers*, 48 PERB ¶ 3019, 3063 (2015).

dismissed in its entirety.

DATED: August 31, 2017
Albany, New York



John F. Wirenius, Chairperson



Robert S. Hite, Member

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

In the Matter of

**COUNTY OF MONTGOMERY and MONTGOMERY
COUNTY SHERIFF,**

Charging Party,

CASE NO. U-34642

- and -

**MONTGOMERY COUNTY DEPUTY SHERIFF'S
POLICE BENEVOLENT ASSOCIATION,**

Respondent.

**ROEMER WALLENS GOLD & MINEAUX LLP (ELENA P. PABLO of counsel)
for Charging Party**

JOHN M. CROTTY, ESQ., for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions to a decision of an Administrative Law Judge (ALJ) finding that the Montgomery County Deputy Sheriff's Police Benevolent Association (Association) violated § 209-a.2 (b) of the Public Employees' Fair Employment Act (Act).¹ The ALJ found that the Association violated the Act by submitting to compulsory interest arbitration certain proposals that are not arbitrable under § 209.4 (g) of the Act.

EXCEPTIONS

The Association excepts to the ALJ's findings that four of its proposals were not arbitrable. The Association argues that Proposal No. 10, Section 1 (Intent) was not in issue for decision. With respect to the remaining three proposals, the Association

¹ 49 PERB ¶ 4568 (2016).

argues that the proposals are directly related to compensation and are therefore arbitrable. For the following reasons, we affirm the ALJ's decision, in part, and remand, in part.

DISCUSSION

Section 209.4 (g) of the Act limits the availability of interest arbitration to “members of any organized unit of deputy sheriffs who: (1) are engaged directly in criminal law enforcement activities that aggregate more than” 50% of their service, and (2) are encompassed within the definition of “police officers” pursuant to § 1.20 (34) of the Criminal Procedure Law, with certification requirements for both qualifications. For such employees, inclusive of the unit members at issue here, interest arbitration:

shall only apply to the terms of collective bargaining agreements directly relating to compensation, including, but not limited to, salary, stipends, location pay, insurance, medical and hospitalization benefits; and shall not apply to non-compensatory issues including, but not limited to, job security, disciplinary procedures and actions, deployment or scheduling, or issues relating to eligibility for overtime compensation which shall be governed by other provisions [prescribed] by law.

In construing this language, the Board has repeatedly reaffirmed the test for determining whether a particular demand is directly related to compensation, and therefore arbitrable under § 209.4 (g) of the Act, first articulated in *New York State Police (State Police)*:

The degree of a demand's relationship to compensation is measured by the characteristic of the demand. If the sole, predominant or primary characteristic of the demand is compensation, then it is arbitrable because the demand to that extent *directly* relates to compensation. A demand has compensation as its sole, predominant or primary characteristic only when it seeks to effect some change in amount or level of compensation by either payment from the

State to or on behalf of an employee or the modification of an employee's financial obligation arising from the employment relationship (e.g., a change in an insurance copayment). If the effect is otherwise, then the relationship of the demand becomes secondary and indirect and the subject is, therefore, excluded from the scope of compulsory arbitration under the language of § 209.4 [g].²

As the Board further explained in *County of Orange*:

Under that test, each proposal must be examined separately to discern whether its sole, predominant or primary characteristic is a modification in the amount or level of compensation. Consistent with *State Police*, in applying that test, we will compare a proposal with the subjects specifically identified by the Legislature as being arbitrable: “salary, stipends, location pay, insurance, medical and hospitalization benefits.” In addition, we will compare the proposal with those subjects declared by the Legislature to be nonarbitrable: “job security, disciplinary procedures and actions, deployment or scheduling, or issues relating to eligibility for overtime compensation.”³

Where a bargaining proposal contains two or more inseparable elements, i.e., a unitary demand, at least one of which is nonmandatory, the entire proposal is deemed nonmandatory.⁴

In the instant case, the Association challenges the ALJ’s ruling that four of its proposals were not “directly related to compensation” and thus not arbitrable under §

² 30 PERB ¶ 3013, 3028 (1997), *confirmed sub nom. New York State Police Investigators Assn v NYS Pub Empl Relations Bd*, 30 PERB ¶ 7011 (Sup Ct Albany County 1997) (emphasis in original); see also *Chenango County Law Enforcement Assn, Inc.*, 50 PERB ¶ 3005, 3024 (2017); *Madison County Deputy Sheriff’s PBA*, 49 PERB ¶ 3029, 3090-3091 (2016); *County of Broome*, 44 PERB ¶ 3046, 3137 (2011).

³ 44 PERB ¶ 3023, 3080 (2011).

⁴ *Id.*, at 3081. See also *Chenango County Law Enforcement Assn, Inc.*, 50 PERB ¶ 3005, at 3027, n. 6; *Madison County Deputy Sheriff’s PBA*, 49 PERB ¶ 3029, at 3091; *County of Broome*, 44 PERB ¶ 3046, at 3137; *City of White Plains*, 33 PERB ¶ 3051, 3138 (2000).

209.4 (g) of the Act.⁵ We address each proposal in turn.

Proposal No. 4, Section 2 (work day and work week)

The Association's Proposal No. 4, Section 2 seeks to add the following provisions to the CBA:

Effective July 1, 2015, overtime for patrol coverage shall be offered, by seniority, to all full time employees, as follows:

- By volunteers from those employees assigned to and scheduled to patrol coverage (Criminal Division), including building security employees; and
- In the event there are insufficient volunteers, then Investigators shall be entitled to volunteer for patrol coverage (Criminal Division), as long as it does not overlap their working hours; and
- In the event there are still insufficient volunteers, then other employees shall be entitled to volunteer for patrol coverage (Criminal Division), as long as it does not overlap their working hours (example: Lieutenant, etc.).

The overtime list for emergencies, specialized units or specialized training shall not be applicable (Example: K-9, breathalyzer, etc.). The overtime list for Investigators shall be a separate rotating overtime list.⁶

The ALJ found that all aspects of Proposal No. 4, Section 2 regulate "who among" the unit employees will be given an overtime opportunity and that the proposal was therefore nonarbitrable pursuant to the Board's decision in *State Police*.⁷ We agree.

⁵ The County also challenged the arbitrability of the Association's Proposal No. 10, Section 5. The ALJ found that this proposal was arbitrable, and the County has not filed any exceptions to this finding. As a result, any exceptions to the ALJ's finding have been waived. Rules of Procedure § 213.2 (b) (4); see, eg, *Village of Endicott*, 47 PERB ¶¶3017, 3052, n. 5 (2014); *NYCTA (Burke)*, 49 PERB ¶ 3021, 3072, n. 4 (2016) (citing cases).

⁶ Improper Practice Charge U-34642, Ex. A, p. 2.

⁷ 30 PERB ¶ 3013, at 3030.

In *State Police*, the Board found that the words “eligibility for,” as set forth in the Act, plainly refer to “who among” the unit employees would be eligible for or entitled to overtime pay, issues which are noncompensatory and therefore nonarbitrable. The Association’s proposal here exclusively relates to overtime procedures which determine “who among” the unit employees would be eligible for overtime. While the proposal would have an effect on the overtime compensation certain employees earned, that effect is nevertheless indirect. The proposal itself effects no change in the amount or level of compensation and, unlike in *State Police*, the proposal does not deal “with how much those unit employees who are determined to be eligible for overtime compensation under applicable law will be paid” or “the point at which their entitlement to overtime will attach.”⁸

Proposal No. 10, Section 1 (intent)

The Association’s Proposal No. 10 seeks to amend the contractual procedures for the administration of Section 207-c of the General Municipal Law for the County of Montgomery. Section 1 of the proposal seeks to insert “Deputy Sheriff” where “Correction Officers” appears; insert definition of a working day, and insert title of who the application for 207-c benefits submitted to.⁹

The ALJ found that Section 1 of the Association’s Proposal 10 was not arbitrable. The Association argues that this proposal was not in issue for decision, pointing to a letter from conferencing ALJ Alicia McNally to the parties.¹⁰ ALJ McNally’s letter, dated March 1, 2016, was sent to all of the parties and listed the Association’s proposals that

⁸ *Id.*

⁹ Improper Practice Charge U-34642, Ex. A, p. 5.

¹⁰ The case was subsequently reassigned to a different ALJ to issue the decision.

remained at issue. The letter listed the Association's Proposal No. 4, Section 2 and Proposal No. 10, Sections 2, 5, and 9, but there was no mention of Proposal No. 10, Section 1. The letter then stated, "If I do not receive notice from the parties by March 7, 2016 that any of the above is inaccurate, I will assume that this letter accurately reiterates the only at-issue proposals." The letter then concluded by giving the parties the opportunity to file briefs.

The Association sent a letter to ALJ McNally, dated March 2, 2016, pointing out that one sentence in Proposal No. 4 was missing. Neither the County of Montgomery nor the Montgomery County Sheriff responded to the ALJ's letter. In its response to the Association's exceptions, the County argues that Proposal No. 10, Section 1 was still at issue in these proceedings and that it was improperly excluded from ALJ McNally's March 1, 2016 statement of the open issues.

From our review of the record,¹¹ we find that the record is insufficiently clear for us to determine whether the allegation that the Association violated § 209.4 (g) of the Act by submitting Proposal No. 10, Section 1 to compulsory interest arbitration remained active before the ALJ. Because of the ambiguity of the record, we cannot determine whether the ALJ properly made a finding on the arbitrability of this proposal.

¹¹ In addition to ALJ McNally's March 1, 2016 letter, the record also includes the improper practice charge in Case No. U-34642 with Exhibit A attached thereto (the Association's Petition for Compulsory Interest Arbitration, dated October 26, 2015, with Attachment 1 containing the Association's proposals); the Association's answer in case No. U-34642; the improper practice charge in Case No. U-34670 with Exhibit A attached thereto (the parties' 2009-2012 CBA), and Exhibit B attached thereto (the Joint Employer's response to the Association's Petition for Compulsory Interest Arbitration, dated November 4, 2015, with Exhibit A containing the Joint Employer's proposals); a December 30, 2015 letter from the Joint Employer's attorney to ALJ McNally; a January 27, 2016 letter from ALJ McNally to the parties; a February 19, 2016 letter from the Joint Employer's attorney to ALJ McNally; and the March 2, 2016 letter from the Association's attorney to the conferencing ALJ mentioned above.

Accordingly, we remand this portion of the charge to the ALJ for further processing, including the filing of supplemental briefs, aimed at clarifying the record with regard to whether the County's allegation regarding Proposal No. 10, Section 1 remained in issue before the ALJ and, if so, what the parties' respective positions are in regard to that issue. Nothing in our decision precludes the ALJ, at his discretion, from reopening the record for purposes of receiving offers of proof and/or additional evidence from the parties with respect to the remanded issue.

Proposal No. 10, Section 2 (notice of disability or need for medical or hospital treatment)

Section 2 of the Association's Proposal No. 10 provides that "[medical] release is limited to the injury and/or illness claim pursuant to 207-c."¹²

We find that this proposal is nonarbitrable. The proposal seeks to narrow the scope of information subject to medical release under the GML § 207-c procedures and is not directly related to compensation.¹³

Proposal No. 10, Section 9 (continuation of contractual benefits)

Section 9 of the Association's Proposal No. 10 relates to the continuation of contractual benefits to employees while on leave pursuant to GML § 207-c. The proposal states:

all contractual benefits to be continued for up to one (1) year. Thereafter, provided with Base Wage (salary), longevity, shift differential, holidays, one-half (½) accumulation of sick leave, health insurance, dental insurance and vision

¹² Improper Practice Charge U-34642, Ex. A, p. 5.

¹³ See *Chenango County Law Enforcement Assn, Inc*, 50 PERB ¶ 3005, 3025 (2017) ("Because the proposal addresses subjects that are not directly related to compensation (such as the content of the medical information release form), it is nonarbitrable."); *County of Tompkins and Tompkins County Sheriff*, 44 PERB ¶ 3024, 3088 (2011) (same).

insurance.

We find that this proposal is not arbitrable. The proposal contains components that are directly related to compensation as well as components that do not directly relate to compensation. The first sentence of the proposal states that “all” contractual benefits are to be continued for up to one year. This proposal, on its face, includes benefits beyond those directly related to compensation such as, for example, the accumulation of sick leave. It is well-established that proposals for time off without a reduction in pay, such as the accumulation of sick leave, are not arbitrable.¹⁴ The second portion of the Association’s proposal also contains a demand for accumulation of sick leave. Thus, even if we treat the two sentences of Proposal No. 10, Section 9 as separate demands, both contain elements that are not directly related to compensation and are thus not arbitrable.¹⁵ Because the proposal contains inseparable nonarbitrable components, Proposal No. 10, Section 9 does not satisfy the arbitrability test under § 209.4 (g) of the Act.¹⁶

The Association argues that “all contractual benefits” should be read to mean “all

¹⁴ *State Police*, 30 PERB ¶ 3013, at 3029. Although the Association urges us to revisit this portion of *State Police*, the Board has reaffirmed the principle that leave accumulation does not satisfy the arbitrability test under *State Police* on a number of occasions, and we see no reason to deviate from these prior holdings. See, eg, *County of Orange*, 44 PERB ¶ 3023, at 3081; *County of Tompkins*, 44 PERB ¶ 3024, at 3088; *Madison County Deputy Sheriff’s PBA*, 49 PERB ¶ 3029, at 3092.

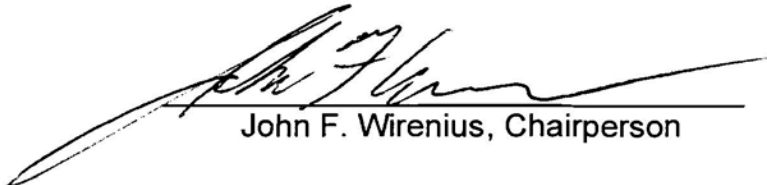
¹⁵ The Association makes a cursory argument that, to whatever extent we find any of the Association’s demands to be unitary in nature, we should reexamine and reverse our “unitary demand” doctrine. We decline the Association’s invitation to revisit and/or reverse the “unitary demand” doctrine. As explained in *County of Tompkins*, 44 PERB ¶ 3024, at 3088, such an approach is necessitated by the Legislature’s public policy choice of dividing the subject matter of proposals for deputy sheriffs into two classes with distinct impasse procedures. See also *County of Chenango*, 50 PERB ¶ 3005, at 3027 n. 10; *County of Tompkins*, 44 PERB ¶ 3024, at 3088.

¹⁶ *County of Orange*, 44 PERB ¶ 3023, at 3088; *County of Madison and Madison County Sheriff*, 44 PERB ¶ 3035, 3117 (2011).

economic contractual benefits.” We see no basis for the Association’s reading. The language of the proposal is clear, unambiguous, and subject to only one reasonable reading. The Association also argues that the Board should read the second sentence of Proposal No. 10, Section 9 as a separate demand and should strike any portions of the sentence that relate to items that are not directly related to compensation. We reject the Association’s argument. The arbitrable subjects within this proposal are inextricably intertwined with nonarbitrable subjects (at a minimum, the accumulation of sick leave). It is, therefore, a nonarbitrable demand under § 209.4 (g) of the Act.

In sum, we affirm the ALJ’s finding that the Association violated § 209-a.2 (b) of the Act by submitting Proposal No. 4, Section 2 and Proposal No. 10, Sections 2 and 9 to compulsory interest arbitration. We remand the allegation concerning Proposal No. 10, Section 1 for further processing consistent with this decision.

DATED: August 31, 2017
Albany, New York



John F. Wirenius, Chairperson



Robert S. Hite, Member

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

In the Matter of

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

Charging Party,

CASE NO. U-29549

- and -

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

Respondent.

**ADAM S. ROSS, GENERAL COUNSEL (ORIANA VIGLIOTTI of counsel), for
Charging Party**

**KAREN SOLIMONDO, INTERIM ACTING DIRECTOR OF LABOR RELATIONS
AND COLLECTIVE BARGAINING (KELLIE TERESE WALKER of counsel),
for Respondent**

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the United Federation of Teachers, Local 2, AFT, AFL-CIO (UFT) to a decision and order of an Administrative Law Judge (ALJ) dismissing an improper practice charge under the Public Employees' Fair Employment Act (Act).¹

In 2012, after a hearing, the ALJ initially dismissed the charge in full.² Upon review, the Board remanded for clarification of the factual record to determine whether the Board of Education of the City School District of the City of New York (District) failed

¹ 48 PERB ¶ 4607 (2015).

² 45 PERB ¶ 4574 (2012).

to bargain over the impact of its decision to impose new standards of practice, known as the Speech and Language Standards of Practice, on speech and language teachers employed by the District and represented by the UFT.³ The Board also remanded for a determination of whether the District's unilateral action significantly increased the workload of unit employers or, alternatively, extended their workday in violation of the § 209-a.1 (d) of Act.

After the remand, the ALJ reopened the record and gave the parties the opportunity to file supplemental briefs on all issues raised by the Board's decision. The ALJ then issued the decision under review, finding that the UFT failed to establish that the imposition of the standards of practice increased the length of speech teachers' work day or significantly increased speech teachers' workload.⁴

The ALJ found that the District violated § 209-a.1 (d) of Act when it refused to negotiate the impact of the new standards of practice with the UFT.⁵ Neither party excepted to the ALJ's finding concerning impact bargaining. As a result, any exceptions to that determination have been waived.⁶

EXCEPTIONS

In its exceptions, the UFT argues that the ALJ erred by not finding that the new standards of practice significantly increased the work hours and workload of speech and language teachers. The UFT also argues that, if necessary to sustain the charge, the

³ 46 PERB ¶ 3031 (2013).

⁴ 48 PERB ¶ 4607, at 4894-4897.

⁵ *Id.*, at 4894.

⁶ Rules of Procedure § 213.2 (b) (4); *see, eg, Village of Endicott*, 47 PERB ¶3017, 3052, n. 5 (2014); *NYCTA (Burke)*, 49 PERB ¶ 3021, 3072, n. 4 (2016) (citing cases).

Board should adopt a new standard to analyze alleged workload improper practice charges and should find that an overall increase in work is a mandatory subject of bargaining.

Based on our review of the record and our consideration of the parties' arguments, we affirm the ALJ's decision and dismiss the charge.

FACTS

The facts are fully set forth in the ALJ's decisions, and are discussed here only as far as is necessary to address the exceptions. The District employs approximately 2,100 speech teachers who provide speech and language instruction to students who have communication disorders or delays. These services are provided by the District pursuant to an individualized education plan ("IEP") that is created for each student.

Speech teachers generally provide instruction in groups of three to eight students. Speech teachers teach five to eight classes daily, and are contractually entitled to one daily duty-free lunch period. The number of hours that speech teachers are required to work each week is contractually defined. Speech teachers' workday includes 6 hours and 20 minutes of regular time and an additional 150 minutes per week, referred to as extended time.

Speech teachers' work includes preparing annual IEP reviews for each student on their caseload. Generally, several IEPs may be due each month. Annual reviews identify the progress a student has made towards reaching his or her annual IEP goals, determine whether the student continues to require speech services, and identify the services the student will require and the student's annual goal for the following year.

Students who have received services for three years receive a triennial review, which is similar to an annual review but requires an assessment of the student's performance over three years. Requested reviews are in-depth reviews that are performed if a speech teacher deems it necessary or at the request of a parent, teacher, or other IEP team member.

The only time available to speech teachers to perform the tasks required to prepare an IEP review is their unassigned time, when they are not teaching. Speech teachers are contractually entitled to six unassigned periods each week. Five of those weekly unassigned periods are daily preparation periods and the sixth is a weekly professional period.⁷ Although speech teachers primarily perform class preparation during their daily preparation periods and primarily write reports during their professional period, those tasks may be performed during any of the six weekly periods, as time permits.

Sometime prior to the spring of 2009, the District created the standards of practice. They are set forth in two manuals issued by the District, the "Middle School and High School Speech Standards of Practice Manual" (hereafter, "MHS manual")⁸ and the "Elementary School Manual" (hereafter, the "ES manual").⁹ The ES and MHS manuals both require speech teachers to follow "RIOT" procedures, an acronym for "Review, Interview, Observe and Test," in connection with annual, triennial and requested reviews. The District created the standards of practice to deemphasize the

⁷ Joint Ex 1, p. 24.

⁸ Joint Ex 2.

⁹ Joint Ex 3.

use of a medical model when evaluating students' needs in favor of an educational model and to impose uniformity and consistency throughout the District in speech teachers' practices. It is the performance of the RIOT procedures to evaluate students and produce IEP reviews that is alleged to have increased speech teachers' workload and workday.

Mindy Karten Bornemann, a speech teacher who also serves as the UFT Speech Teachers Chapter Leader, testified that, before the standards of practice were implemented, speech teachers' unassigned time was fully occupied and none of the tasks they performed were flexible or optional. She further testified that, since the imposition of RIOT, the time during speech teachers' scheduled workday has been insufficient to accomplish all the tasks added by RIOT, and speech teachers must work during their duty free lunch and past their scheduled workday to accomplish those tasks. In contrast, Judith Manning, Central Office Speech Supervisor and the Director of the Center for Assistive Technology, testified that speech teachers performed most of the tasks required by RIOT before the standards of practice made those practices required and that the standards of practice do not significantly increase speech teachers' workload or extend their workday.

DISCUSSION

The Board has held that an increase in workload may, in certain circumstances, be a mandatory subject of bargaining. In *New Rochelle Housing Authority*, the Board held that:

if increase in workload means that bargaining unit members are required to accomplish significantly more work in the

course of a workday, a change in terms and conditions of employment may have taken place, and the balancing test between employer mission and employer interest in terms and conditions of employment enunciated by this Board in a number of cases might apply.¹⁰

The Board has also held that an employer is obligated to negotiate a decision to assign new duties to unit employees that results in the lengthening of the employees' workday or scheduled hours of work, even though those duties are inherently a part of the employees' occupation.¹¹

The ALJ found that the evidence was insufficient to support a finding either that speech teachers were required to accomplish significantly more work in the course of a workday or that employees' workdays (i.e. their scheduled hours of work) had been lengthened.

In her initial decision, the ALJ reviewed each aspect of the RIOT procedures to determine the extent to which the new standards of practice added to speech teachers' workload and workday. While the ALJ found that each of the RIOT elements may have added new tasks to speech teachers' workday, and thus increased speech teachers' workload to some extent, she found that the record was insufficient to quantify how much additional time is required to complete the additional tasks.¹²

In the decision under review, the ALJ found that some of the tasks that speech teachers previously performed during unassigned time, such as administering

¹⁰ 21 PERB ¶ 3054, 3116 (1988). See also *Edgemont Union Free Sch Dist at Greenburgh*, 21 PERB ¶ 3067 (1988); *Capital Region BOCES*, 36 PERB ¶ 3004 (2003).

¹¹ *South Jefferson Cent Sch Dist*, 13 PERB ¶ 3066 (1980); *Sackets Harbor Cent Sch Dist*, 13 PERB ¶ 3058 (1980).

¹² 45 PERB ¶ 4574, at 4698.

standardized tests, were reduced, that Bornemann's testimony regarding the practices of speech teachers before and after the new standards of practice were implemented is insufficient to demonstrate that those practices existed throughout the District, and that the record is insufficient to demonstrate that the tasks required by RIOT were all new tasks.¹³ The ALJ also found that the UFT's time estimates for each of the tasks required by RIOT unreliable, as based on inaccurate information and thus insufficient as the basis for a finding.¹⁴

The UFT's main argument on exceptions is that the ALJ erred in finding that the record before her was not sufficient to show that speech teachers were required to accomplish significantly more work in the course of a workday or that employees' workdays (i.e. their scheduled hours of work) had been lengthened in order to perform the new expected tasks.

Having carefully reviewed the record, we find that the ALJ has provided a thorough and accurate recitation and analysis of all relevant facts in her decisions, and we conclude that there is no basis on which to reverse the ALJ's finding that the District did not violate the Act when it unilaterally implemented the new standards of practice. The District did not mandate that speech teachers work additional hours and did not change speech teachers' scheduled hours of work.¹⁵

To the extent that the UFT argues that the ALJ erred by failing to credit Bornemann's testimony over Manning's testimony in all respects, we see no reason to

¹³ 48 PERB ¶ 4607, at 4895-4896.

¹⁴ *Id.*, at 4896-4897.

¹⁵ *Cf. South Jefferson Cent Sch Dist*, 13 PERB ¶ 3066 (1980); *Sackets Harbor Cent Sch Dist*, 13 PERB ¶ 3058 (1980).

disturb the ALJ's credibility resolutions. Credibility 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.¹⁶ The UFT has not provided any objective evidence that establishes that the ALJ manifestly erred here, and our examination of the record reveals no such evidence.

The credited testimony shows that not all of the RIOT procedures were new or needed to be performed for each student and, further, that speech teachers were able to reduce the amount of time they spent performing other tasks in order to perform the new requirements imposed by RIOT. In this respect, we affirm the ALJ's finding that Bornemann's testimony was not sufficient to demonstrate speech teachers' practices pursuant to RIOT throughout the District or to demonstrate the specific amount of time that performing each new task imposed by RIOT took, because the ALJ also credited Manning's testimony that other teachers already performed some of these tasks and that not all of the RIOT procedures needed to be completed for each student on a speech teacher's caseload.

In sum, we find that the ALJ did not err in finding that the record evidence does not support a finding either that speech teachers were required to accomplish

¹⁶ *Bellmore-Merrick Cent Sch Dist*, 48 PERB ¶ 3022, 3077 (2015) (quoting *UFT (Cruz)*, 48 PERB ¶ 3004 (2015)); see also *Catskill Housing Auth*, 49 PERB ¶ 3025, 3081 (2016); *County of Clinton*, 47 PERB ¶ 3026, 3079 (2014) and *Manhasset Union Free Sch Dist*, 41 PERB ¶ 3005, at 3019 (2008); citing *County of Tioga*, 44 PERB ¶ 3016, 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); see also *County of Ulster*, 39 PERB ¶ 3013, at 3045-3046 (citing *Fashion Institute of Technology v Helsby*, 44 AD2d 550, 7 PERB ¶ 7005, 7009 (1st Dept 1974)).

significantly more work in the course of a workday or that speech teachers' workdays/scheduled hours of work had been lengthened.¹⁷ In the absence of such a finding, there is no basis to conclude that the District's implementation of the new standards of practice violated § 209-a.1 (d) of the Act.¹⁸

Finally, the UFT argues that, if necessary to sustain the charge, PERB should adopt a new standard to analyze alleged workload improper workload charges. We decline to do so. Our current standard makes an increase in workload mandatorily negotiable only when bargaining-unit members are required to accomplish significantly more work in the course of a workday, but not where additional work may be distributed over a longer time frame, with no change in the amount or scope of work required on a day-to-day basis.¹⁹ We find that this approach strikes an equitable balance between an employer's interest in fulfilling its mission and employees' interest in their terms and conditions of employment and effectuates the purposes of the Act.

IT IS, THEREFORE, ORDERED that the District forthwith:

1. Negotiate with the UFT the impact upon the speech teachers of the unilateral implementation of the Speech and Language Standards of Practice; and

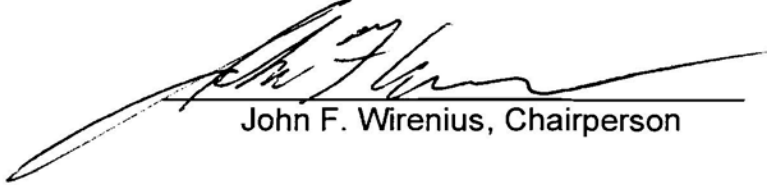
¹⁷ *Capital Region BOCES*, 36 PERB ¶ 3004, at 3012-3013.

¹⁸ We note that, because a contract was in effect at the time the District implemented the new standards of practice and because the number of hours that speech teachers are required to work each week is contractually defined, the allegation that the District increased employees' workday or scheduled hours of work arguably should have been conditionally dismissed and deferred to the grievance-arbitration provisions of the parties' agreement, pursuant to *Herkimer County BOCES*. 20 PERB ¶ 3050 (1987). See Joint Exhibit 1, Article 22, for the parties' agreed-upon dispute resolution mechanism.

¹⁹ *New Rochelle Housing Auth*, 21 PERB ¶ 3054, at 3116.

2. Sign and post the attached notice in all physical and electronic locations normally used to communicate with unit employees.

DATED: August 31, 2017
Albany, New York



John F. Wirenius, Chairperson



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 United Federation of Teachers, Local 2, AFT, AFL-CIO (UFT), that the District will

forthwith negotiate with the UFT the impact upon the speech and language teachers of the unilateral implementation of the Speech and Language Standards of Practice.

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

Charging Party,

CASE NO. U-34058

- and -

**STATE OF NEW YORK (DEPARTMENT OF
CORRECTIONS AND COMMUNITY
SUPERVISION),**

Respondent.

**LIPPES MATHIAS WEXLER FRIEDMAN LLP (SARAH M. COLIGAN, ESQ. of
counsel), for Charging Party**

**MICHAEL N. VOLFORTE, ESQ. (RONALD S. EHRLICH, ESQ. of counsel), for
Respondent**

BOARD DECISION AND ORDER

This case comes to us on exceptions by the State of New York (Department of Corrections and Community Supervision-Albion Correctional Facility) (State or DOCCS) to a decision of an Administrative Law Judge (ALJ) finding that the State violated § 209-a.1 (d) of the Public Employees' Fair Employment Act (Act).¹ The ALJ found that the State violated its duty to negotiate in good faith when it refused to provide the New York State Correctional Officers and Police Benevolent Association, Inc. (NYSCOPBA) a copy of a videotape capturing the alleged misconduct of a member whose disciplinary grievance was pending, but prior to the filing of a demand for arbitration.

EXCEPTIONS

The State excepts to the ALJ's finding of a violation of the Act.² More

¹ 49 PERB ¶ 4536 (2016).

² Exception No 1.

specifically, the State excepts to the ALJ's finding that the decision of the Appellate Division, Third Department in *Pfau v. New York State Public Employment Relations Board*, 69 AD3d 1080, 43 PERB ¶ 7001 (3d Dept 2010) and its progeny, were not dispositive of the issues in this matter.³ The State further contends that the ALJ erred by declining to find compliance with the Act in that the State's long-standing practice in similar cases was to produce a copy of a surveillance tape only after the filing of a demand for arbitration.⁴ Additionally, the State argues that the ALJ erred in finding that it was required to provide the videotape to NYSCOPBA despite the lack of an express requirement that it do so under the disciplinary provisions contained within the parties' negotiated collective bargaining agreement.⁵ The State asserts that the ALJ erred in not finding the requested disclosure to be unduly burdensome. The State also argues that "the Taylor Law contains no enabling statute language that requires the disclosure of the video demanded."⁶ Finally, the State excepts to the ALJ's finding that the dispute was not moot.

NYSCOPBA filed a response supporting the ALJ's decision.

For the reasons stated below, we affirm the ALJ's decision in part but vacate her conclusion finding a violation of the Act.

FACTS

At all relevant times, the parties were governed by a collective bargaining agreement (Agreement). Section 7.1 of the Agreement states that "[f]or the purposes of this Agreement, all disputes shall be subject to the grievance procedure as outlined

³ Exception Nos 2, 5.

⁴ Exception No 3.

⁵ Exception No 4

⁶ Exception No 6.

below.”⁷ Two distinct procedures are relevant here. First, the Agreement provides that a “dispute concerning the application and/or interpretation of this Agreement, which is subject to all steps of the grievance procedure including arbitration, except those provisions which are specifically excluded.”⁸ Second, the Agreement provides that “[a] claim of improper or unjust discipline against an employee shall be processed in accordance with Article 8 of this Agreement.”⁹

Article 8 of the Agreement begins by stating that:

Discipline shall be imposed upon employees otherwise subject to the provisions of Sections 75 and 76 of the Civil Service Law only pursuant to this Article, and the procedure and remedies herein shall apply in lieu of the procedure and remedies prescribed by such sections of the Civil Service Law which shall not apply to employees.¹⁰

Under Article 8, a notice of discipline detailing the alleged offense and proposed penalty must be served upon the employee, the appropriate Union grievance representative, and the president of NYSCOPBA.¹¹ The penalty proposed may not be implemented unless the employee “(1) fails to file a disciplinary grievance within 14 days of service of the notice of discipline; (2) having filed a grievance, fails to file a timely appeal to disciplinary arbitration, or (3) having appealed to disciplinary arbitration, until and to the extent that it is upheld by the arbitrator, or (4) the matter is settled.”¹²

Article 8 expressly states that the “notice of discipline may be the subject of a disciplinary grievance,” and provides for pre-arbitration efforts to meet in order to settle

⁷ Jt Ex 3, § 7.1.

⁸ Id, §7.1(a).

⁹ Id, §7.1(c).

¹⁰ Ans, Ex A, § 8.1.

¹¹ Ans, Ex A, § 8.2(a) & (b).

¹² Ans, Ex 4 § 8.2 (c).

the grievance, with the employer required to give its final position in writing.¹³ If the “disciplinary grievance is not settled or otherwise resolved, it may be appealed to disciplinary arbitration,” which is governed by an agreement between the parties and the Public Employment Relations Board.¹⁴ While the arbitrator’s determinations as to guilt or innocence and the appropriateness of proposed penalties, “[d]isciplinary arbitrators shall neither add to, subtract from, nor modify the provisions of this Agreement.”¹⁵

Article 8 of the Agreement further provides a right for an employee to union representation “at a disciplinary meeting or arbitration by a chief sector steward or designee.”¹⁶ Union representatives shall not suffer loss of earnings or be required to charge leave credits “as a result of processing or investigating disciplinary grievances” during work hours. Rather, “[r]easonable and necessary time processing and investigating grievances” shall be considered time worked, as long as it falls within the representative’s normal working hours.¹⁷

On November 10, 2014, DOCCS served a correction officer at Albion Correctional Facility with a Notice of Discipline claiming that the officer “used unnecessary physical force against an inmate” and “failed to report a use of physical force against an inmate,” seeking a penalty of 60 days’ suspension without pay.¹⁸ On November 14, 2014, NYSCOPBA timely filed a disciplinary grievance in accordance with Article 8.2 (d) of the Agreement seeking dismissal of the charges alleged and the

¹³ Ans, Ex 4 § 8.2 (d).

¹⁴ Ans, Ex 4 § 8.2 (e) & (f).

¹⁵ Ans, Ex 4 § 8.2 (h).

¹⁶ Ans, Ex 4 § 8.5.

¹⁷ *Id.*

¹⁸ Jt Ex 4.

penalty sought in the Notice of Discipline.¹⁹

On or about December 8, 2014, NYSCOPBA Business Agent Joe Miano spoke to DOCCS Labor Relations Representative David Gallagher via telephone regarding the disciplinary grievance. In that conversation, the parties discussed potential settlement of the grievance, and Miano requested a copy of the video recording of the alleged incident that gave rise to the November 10, 2014 Notice of Discipline. Miano testified that, prior to going to arbitration, NYSCOPBA investigates as much as possible to attempt resolution of a grievance without arbitration.²⁰

In a December 18, 2014 email, Miano again requested a copy of the video recording of the alleged incident that gave rise to the Notice of Discipline and the grievance. In the email, Miano stated that the “video is needed for preparation for an agency level hearing.”²¹

Labor Relations Representative David Gallagher replied to Miano in an email the next day, stating that DOCCS Director of Labor Relations, John Shipley, had directed that “we will release a copy of the video to the attorney of record, should the case reach that point.”²²

On or about December 22, 2014, NYSCOPA Counsel, William Golderman, telephoned Shipley, reiterating the prior requests for a copy of the video. According to Golderman’s testimony, Shipley again denied the request for a copy of the video at that time, but said that it would be made available if the grievance was appealed and an

¹⁹ DOCCS objected to the mischaracterization of this item in the improper practice charge as a “contract grievance.” Both parties thereafter agreed that it was a “disciplinary grievance.” See ALJ Ex 6, 9.

²⁰ Tr, at pp 20-21.

²¹ Jt Ex 2.

²² *Id.*

attorney appointed to take the matter to arbitration. Golderman testified that Shipley never informed him that anyone would be permitted to view the video in person.²³

Miano testified that it was not until April of 2015, that he was informed that he could come to the facility to review the video.²⁴ Miano noted that viewing a video with the grievant was helpful because he could ask the individual what he was doing and why he was doing it, which allowed Miano to determine whether NYSCOPA should settle the matter or go to arbitration.²⁵

Shipley testified that he had told Golderman that there was “[n]o right to discovery,” but that the union could make an appointment to view the video, and, further, that he had instructed Gallagher to convey to Miano that DOCCS “would not disseminate a copy of the video to him, that if he wanted to make an appointment to come to Labor Relations and review the video, we would do that.”²⁶ According to Shipley, videos relevant to grievances have been viewed by NYSCOPBA attorneys and labor representatives at the offices of DOCCS Office of Labor Relations since at least 2002.²⁷

Shipley testified that DOCCS’s position with respect to releasing the video was based on security and patient privacy concerns.²⁸ In particular, he testified that the video showed entrances and exits into secure areas of the facility,²⁹ locking mechanisms on the secure doors,³⁰ and areas that were not visible in surveillance

²³ Tr, at pp 118-119.

²⁴ Tr, at pp 22-23.

²⁵ Tr, at p 27.

²⁶ Tr, at pp 54; 48.

²⁷ Tr, at p 53.

²⁸ Tr, at p 51.

²⁹ Tr, at p 52.

³⁰ *Id.*

footage.³¹ Further, because the at-issue area of the facility housed inmates being treated for mental health disorders Shipley was concerned about violating the Health Insurance Portability and Accountability Act (HIPAA) and the Mental Hygiene Law by identifying an inmate receiving treatment.³² Assistant Commissioner James O’Gorman corroborated Shipley’s security concerns.³³

DOCCS submitted, in rebutting a proposed factual finding of the ALJ, that it “has provided DVD copies of video recordings to attorneys representing Charging Party’s members in disciplinary arbitrations subsequent to a demand for arbitration in advance of such proceeding.”³⁴ In the same letter, DOCCS stated that, after its receipt of the January 29, 2015 notice of appeal to disciplinary arbitration in the underlying matter “DOCCS was then willing to provide a copy of the video to Charging Party’s attorneys.”³⁵

On May 12, 2015, the parties fully settled the disciplinary proceeding.

DISCUSSION

The State argues that the ALJ erred in not dismissing the charge as moot upon being informed that the video at issue was provided to counsel for NYSCOPBA after it filed the demand for arbitration. 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.”³⁶ And, as we have previously stated, the production of information requested in order to process a

³¹ Tr, at 62.

³² Tr, at pp 52, 69, 71.

³³ Tr, at pp 96-98.

³⁴ ALJ Ex 9.

³⁵ These facts were corroborated by testimony. Tr, at pp 23-25.

³⁶ *State of New York (OTDA)*, 50 PERB ¶ 3009, 3042 (2017).

grievance and prepare for a hearing or an arbitration, would, in normal circumstances, most likely render the charge moot.³⁷

However, the issue here, whether the refusal to provide requested information in the generally abbreviated time period between the service of disciplinary charges and service of the notice of appeal to disciplinary arbitration, falls “under the exception to the mootness doctrine applicable to matters of public importance capable of repetition yet evading review.”³⁸ Accordingly, under the facts and the procedural posture here, the policies of the Act are best served by addressing the substantive issues of law raised by the exceptions.³⁹

The State contends that “neither sections 209-a.1 (a) and (d), nor any other section of the Act, expressly obligate a public employer to furnish any information to an employee organization, in disciplinary proceedings or otherwise.”⁴⁰ The State then asserts that “PERB cannot create rights not contemplated by the statute.”⁴¹

However, the very decision relied upon by the State in making this sweeping statement, *Pfau v NYS Public Employment Relations Board*, found that the right of a public employee organization, upon request, to information normally maintained in the regular course of business *is* contemplated by the Act; the *Pfau* Court, reaffirming

³⁷ *Id.*

³⁸ *City of New York*, 50 PERB ¶ 6501, n. 8 (2017), *citing City of New York v NYS Pub Empl Relations Bd*, 54 AD3d 480, 41 PERB ¶ 7004 (3d Dept 2008), *lv denied*, 12 NY3d 701 (2009).

³⁹ *Id.* We note that exception number 1 does not raise any specific claim of error, but appears to be a boilerplate exception to the ALJ’s ultimate conclusion. This exception, to the extent that it seeks to raise any claim not asserted in the remaining exceptions numbered 2 through 7, is denied as deficient pursuant to 213.2(b) of PERB’s Rules of Procedure. *See generally UFT (Leon)*, 48 PERB ¶ 3016 (2015); *UFT (Pinkard)*, 44 PERB ¶ 3011 (2011).

⁴⁰ *Br in Support of Exceptions*, at 22.

⁴¹ *Id.* at 23 (quoting *Pfau v NYS Pub Empl Relations Bd*, 69 AD3d 1080, 1081, 43 PERB ¶ 7001 (3d Dept 2010)).

several of its own precedents, expressly held that:

Civil Service Law § 209–a.1, together with Civil Service Law §§ 202 and 203, provide firm footing for the recognized right of an employee organization to obtain information relevant to a potential contractual grievance about the interpretation, application or alleged violation of a provision of a collective bargaining agreement.⁴²

Indeed, *Pfau* has been cited for this very proposition.⁴³ We are unaware of any decision holding to the contrary, and the State has cited none.⁴⁴

The statutory language relied on by the *Pfau* Court to find a “firm footing” for the right to request and receive information expressly provides for the right to “form, join, and participate in . . . employee organizations of their own choosing,” and, with even more obvious salience here, “the right to be represented by employee organizations, to negotiate collectively with their public employers in the determination of their terms and conditions of employment, *and the administration of grievances arising thereunder.*”⁴⁵

The Board has long held that these provisions contemplate effective representation,

⁴² 69 AD3d at 1081-1082, following *Hampton Bays Union Free Sch Dist v Pub Empl Relations Bd*, 62 AD3d 1066, 1068 (3d Dept 2009)), *lv denied*, 13 NY3d 711 (2009); *CSEA v New York State Pub Empl Relations Bd*, 46 AD3d 1037, 1037-1038, 40 PERB ¶ 7009 (3d Dept 2007); *County of Erie*, 14 AD3d 14, 17-18 (3d Dept 2004). See, eg, *County of Erie and Erie County Medical Center Corp (New York State Nurses Assn)*, 45 PERB ¶ 3036 (2012); *City of Rochester*, 29 PERB ¶ 3070 (1996); *Hornell Cent Sch Dist*, 9 PERB ¶ 3032 (1976).

⁴³ *Lefevbre v Morgan*, ___ F Supp3d ___, 2017 WL 564090 at n. 8 (SDNY Feb 2, 2017).

⁴⁴ Indeed, enforcing the similar statutory requirement in § 12–306(c)(4) of the New York City Collective Bargaining Law (12 NYCRR ch 3) (NYCCBL) while overturning over 40 years of Board holdings which the NYCCBL effectively codifies would provide New York City employee organizations more substantive and procedural rights than state employee organizations, drawing into question whether the NYCCBL conforms to the requirement that it “be ‘substantially equivalent’ to the ‘provisions and procedures’ of the Taylor Law itself.” *Mayor of the City of New York v Council of the City of New York*, 7 NY3d, 40 PERB ¶ 7524 (2007) (quoting Civil Service Law § 212(1), (2)). The State has provided no persuasive reasoning for so unprecedented and draconian a reading of the Act.

⁴⁵ Act, §§ 202, 203 (emphasis added).

which in turn requires access to appropriate information in the possession, custody and control of public employers.⁴⁶

Moreover, we find it instructive that our decisions finding a duty to provide requested information within the statutory duty to negotiate in good faith and a breach of that duty as violative of § 209-a.1 (a) and (d), are broadly consistent with those of the National Labor Relations Board (NLRB) and the federal courts finding similar obligations under the duty to “bargain collectively” and “in good faith” prescribed by the National Labor Relations Act (NLRA).⁴⁷ Under the NLRA, as under the Act, “[t]here can be no question of the general obligation of an employer to provide information that is needed by the bargaining representative for the proper performance of its duties. Similarly, the duty to bargain unquestionably extends beyond the period of contract negotiations and applies to labor-management relations during the term of an agreement.”⁴⁸ Thus, we reject the State’s argument that the Act does not provide a “firm footing” for the right to request and obtain information not just for collective bargaining purposes, but for purposes of contract administration.

The *Pfau* decision does hold, however, that “in light of, among other things, the

⁴⁶ See generally *Board of Educ of the City Sch Dist of the City of Albany*, 6 PERB ¶ 3012 (1973); *Salmon River Cent Sch Dist*, 21 PERB ¶ 3006 (1988); *City of Rochester*, 29 PERB ¶ 3070 (1996); *Board of Educ of the City Sch Dist of the City of New York*, 40 PERB ¶ 3002 (2007) (unions entitled to information in aid of negotiations and administration of grievances).

⁴⁷ 29 USC §§ 158(a) (1), (2), and (5) & (d). We note that § 209-a (6) of the Act provides that “no body of federal or state law applicable wholly or in part to private employment, shall be regarded as binding or controlling precedent,” and that we do not consider ourselves bound by these decisions, but cite them as demonstrating the reasoned approach of our construction of the same terms.

⁴⁸ *NLRB v Acme Industrial Co*, 385 US 432, 435-436 (1967), citing *NLRB v Truitt Mfg Co*, 351 US 149, 152-153 (1956); see also *American Baptist Homes, Inc v NLRB*, 858 F.3d 612, 613 (DC Cir. 2017); *SDBC Holdings, Inc. v NLRB*, 711 F.3d 281, 287-288 (2d Cir 2013); *NLRB v Dover Hospital Services, Inc.*, 636 Fed.Appx. 826 (2d Cir 2016); see *City of Albany*, 6 PERB ¶ 3012, 3030-3031 (1973).

starkly disparate roles of contractual grievances and employer disciplinary proceedings, it was arbitrary to import the established right to information in contractual grievances into employee disciplinary proceedings,” noting that the collective bargaining agreement between the parties in that matter did not expressly import a right to receive information.⁴⁹ Relying on this holding, the State contends that we should treat the “disciplinary proceedings” at issue here as distinct from contract grievances, and find that the collective bargaining agreement’s lack of an express right to receive information precludes applying the right to request and receive information under the Act. In support of this claim, the State points to the fact that the Agreement has separate articles addressing “Grievance and Arbitration” (Article 7) and “Discipline” (Article 8).⁵⁰

As a threshold matter, “[i]t is well settled that a contract provision in a collective bargaining agreement may modify, supplement, or replace the more traditional forms of protection afforded public employees,” specifically, “those in sections 75 and 76 of the Civil Service Law which delineate procedures and remedies available to employees to challenge disciplinary action taken or proposed to be taken against them by their employers.”⁵¹ Article 8 of the Agreement explicitly does this, stating that the “procedure and remedies herein shall apply in lieu of the procedure and remedies prescribed by such sections of the Civil Service Law which shall not apply to employees.”⁵² In other words, the contractual grievance and arbitration procedures relating to discipline wholly

⁴⁹ 69 AD3d at 1083.

⁵⁰ Jt Ex 3; ALJ Ex 3, Ans, Ex A.

⁵¹ *Dye v NYC Transit Auth*, 88 AD2d 899, 899 (2d Dept); *Johnson City Professional Firefighters Assn v Village of Johnson City*, 75 AD3d 805, 806 (3d Dept 2010) (under Civil Service Law §§ 75 and 76, “statutory power may be modified or superseded through collective bargaining or negotiation”); *Transport Workers Union of Greater NY v Bianco*, 130 AD3d 507, 507 (1st Dept 2015) (quoting *Patel v New York City Hous Auth*, 26 AD3d 172, 174 (1st Dept 2006)).

⁵² Ans, Ex A, § 8.1.

displace the statutory procedures and remedies under Civil Service Law §§ 75 and 76.

Section 203 of the Act, which provides for the right to union representation in negotiating collective bargaining agreements “and the administration of grievances arising thereunder,” does not distinguish between grievances arising out of disputes over benefits, over other unit-wide terms and conditions, or over discipline. The right applies to grievances, writ large. In the context of negotiated disciplinary grievance procedures lacking explicit disclosure provisions, the Board has long held, and the courts have affirmed, that “[t]he failure to provide an employee organization with information relevant and material to the investigation or prosecution of a potential grievance constitutes an improper practice.”⁵³ The State contends that our following our long standing precedent conflicts with the decision in *Pfau*.

We have previously found that *Pfau* does not apply where a union “seeks documents and information to evaluate a pending contract grievance concerning discipline and to enable it to provide representation to the at-issue unit member at arbitration pursuant to the negotiated terms of the parties' agreement.”⁵⁴ Our

⁵³ See, eg, *Hamptons Bay Union Free Sch Dist*, 62 AD3d, at 1067-1068 (finding improper practice where employer refused to furnish documentation underlying its termination of a probationary physical education teacher before her probationary period expired, and collective bargaining agreement allowed teacher to grieve termination on grounds that it was “capriciously, arbitrarily or discriminatorily”); *CSEA*, 46 AD3d, at 1038 (upholding Board finding an improper practice where State refused to provide information in context of contractual disciplinary arbitration where State was seeking to terminate employees for misconduct); *County of Erie v State*, 14 AD3d 14 (2004) (upholding Board finding that employer committed improper practice in failing to turn over to union files pertaining to discharged employee’s grievance for union’s use in its own investigation of grievance, inasmuch as requested materials were not otherwise available to union).

We note that the State’s efforts to distinguish these cases, by selective quotation and by not addressing the actual holdings of the Third Department, or the Board’s decisions confirmed by the Court, are entirely lacking in merit.

⁵⁴ *County of Montgomery*, 44 PERB ¶ 3045, 3135 (2011).

confidence in this distinction of *Pfau* from the instant case is strengthened by the Court of Appeals's recent drawing of what is essentially the same distinction in *City of New York v New York State Nurses's Association*.⁵⁵ There, the Court held that, "by defining 'grievance' to include disciplinary action, the CBA, has, as a matter of contract, incorporated as to disciplinary actions the information requirements applicable to grievances."⁵⁶

Unlike *Pfau*, but exactly parallel to the *City of New York* case, the Agreement here covers both interpretative and disciplinary grievances. Article 7, titled "Grievance and Arbitration," creates two separate grievance procedures, one (contained within Article 7) for interpretative grievances and the other (provided for in Article 7, but set forth in Article 8), for disciplinary grievances. Both are expressly comprised of a "grievance" and an "arbitration" phase. Moreover, Article 8 repeatedly and expressly refers to the pre-arbitration proceedings as a "disciplinary grievance" or just a "grievance."⁵⁷ Here, as in *City of New York*, the parties have negotiated a contractual grievance procedure for disciplinary matters. The duty to negotiate in good faith, which extends to contract administration and to investigation and processing of grievances,

⁵⁵ ___ NY3d ___, 2017 WL 2466673 (June 8, 2017).

⁵⁶ *Id.*

⁵⁷ For example, Ans, Ex A, §§ 8.2(b)(c), (d), (e), 8.3 ("a disciplinary grievance may be settled at any time..."), 8.4 (Prior to. . . the exhaustion of the disciplinary grievance procedure provided for in this Article"), 8.5 (employee's right to be "represented at a disciplinary grievance meeting or arbitration", representatives to be paid for "[r]easonable and necessary time for processing and investigating grievances...").

therefore applies.⁵⁸

Indeed, the Agreement expressly recognizes the applicability of this duty, by expressly providing for union representation in disciplinary matters and by acknowledging that such representation extends to “processing and investigating grievances” by union representatives, who need not charge leave or forfeit pay for such processing and investigation of grievances during scheduled work hours.⁵⁹

Thus, this case falls under the rubric of *City of New York*, not *Pfau*.

Having disposed of the more global issues posed by the exceptions, we turn now to the more case-specific ones. In the instant case, the State contends that the ALJ erred in not considering what the State contends is its long-term practice of allowing for union representatives and the grievant to view videos of incidents forming the basis of charges at DOCCS’s Office of Labor Relations, and of providing copies of the footage upon the receipt of a demand for arbitration. The State further contends that the ALJ erred by not giving sufficient weight to the specific security and privacy concerns it advanced, arguing that the ALJ impermissibly dismissed these concerns on the ground that DOCCS was willing to produce the video to the assigned attorney after the filing of a demand for arbitration. DOCCS defended this distinction on the ground that production of sensitive material “is more reasonably handled when turned over to the

⁵⁸ Again, as we noted in rejecting the State’s challenge to the right to receive information as inherent in the duty to negotiate in good faith, we further note that the NLRB has long found that duty applies to disciplinary grievances such as that here, which has been upheld by the federal courts. *See, eg, Chesapeake and Potomac Telephone Co v NLRB*, 687 F.2d 633, 636-637 (2d Cir 1982) (“disclosure of the type of discipline, if any, imposed by C&P upon employees in the past for exhibiting an improper attitude toward customers could lead to withdrawal of the Union’s arbitration demand or settlement by C&P, depending on whether C&P’s practice was consistent with the discipline imposed here”).

⁵⁹ Ans Ex A, § 8.5.

control of an attorney who is an officer of the court.”⁶⁰

As to the specific contours of the right to receive information on request under the Act, we have recently reaffirmed:

For close to four decades, we have held that under the Act an employee organization has a general right to receive documents and information requested from an employer for use by the employee organization in the administration of a collectively negotiated agreement including processing a grievance and preparing for a grievance hearing and/or arbitration. Failure of an employer to produce requested information and documents may constitute a violation of both §§209-a.1(a) and (d) of the Act.⁶¹

In *State of New York (OTDA)*, we also explained:

That duty includes an obligation on the part of the employer to provide information relevant to a union's investigation of the merits of a grievance. Moreover, an employee organization is entitled to a reasonable opportunity to examine requested information and documents before determining whether to continue to process a grievance, and the right to receive information and documents extends after a grievance has been processed to arbitration.⁶²

However, the right is not without limitations. We have long held that:

the general right to receive requested documents and information is subject to three primary limitations: reasonableness, which includes the burden on the responding party; relevancy; and necessity. This duty may, where appropriate, prevail over confidentiality rights under statutes other than the Act. In such cases, we have further held that prior to refusing to disclose information under the Act based upon a claim of confidentiality, a respondent is

⁶⁰ Brief in Support of Exceptions at 30.

⁶¹ *State of New York*, 50 PERB ¶ 3009, at 3043, quoting *County of Montgomery*, 44 PERB ¶ 3045, at 3134, citing, *inter alia*, *Board of Educ, City Sch Dist of the City of Albany*, 6 PERB ¶ 3012 (1973); *Hornell Cent Sch Dist*, 9 PERB ¶ 3032 (1976); *City of Rochester*, 29 PERB ¶ 3070 (1996).

⁶² *Id.*, at 3043-3044 (footnotes and quotation marks omitted; citing and quoting *County of Erie v State*, 14 AD3d 14, 37 PERB ¶ 7007, 7015 (3d Dept 2004)); *Matter of Schuyler-Chemung-Tioga BOCES*, 34 PERB ¶ 3019 (2001); *State of New York (Department of Health & Roswell Mem Inst)*, 26 PERB ¶ 3072 (1993).

obligated to first engage in good faith negotiations for the purpose of reaching an agreed-upon accommodation concerning the requested information.⁶³

Here, the record is insufficiently complete for us to apply these factors.

As a threshold matter, because the ALJ did not make a credibility finding between the starkly contrasting accounts of Shipley on the one hand and Golderman and Miano on the other, we are unable to determine whether or not an offer was in fact made to allow a NYSCOPBA representative and the grievant to view the video at the DOCCS Office of Labor Relations. While we do not hold that such an offer would necessarily have satisfied the duty in this case, let alone in every case, we do agree that a more nuanced balancing of the interests asserted by the parties was warranted here than is reflected in the ALJ's opinion.⁶⁴ We reiterate that the test is a standard, inquiring what is reasonable under the circumstances under the specific factual context presented by each individual case, and that no "bright line rule" dictates every outcome.⁶⁵ We note in particular that, to the extent that DOCCS's action was predicated on Shipley's understanding that there was no duty under the Act to produce the video, based on his understanding of *Pfau*, it was without foundation.

⁶³ *Id.*, at 3044 (footnotes and quotation marks removed; citing and quoting *Utica City School Dist*, 48 PERB ¶ 3008 (2015); citing *Hampton Bays Union Free Sch Dist*, 41 PERB ¶ 3008, 3051 (2008), *confirmed sub nom. Hampton Bays Union Free Sch Dist v Pub Empl Relations Bd*, 62 AD3d 1066 (3d Dept 2009)), *lv denied*, 13 NY3d 711 (2009); *Bd of Ed, City Sch Dist of the City of Albany*, 6 PERB ¶ 3012 (1973); *State of New York (OMRDD)*, 38 PERB ¶ 3036 (2005), *confirmed sub nom. CSEA v New York State Pub Empl Relations Bd*, 14 Misc3d 199, 39 PERB ¶ 7009 (2006), *affd*, 46 AD3d 1037, 40 PERB ¶ 7009 (3d Dept 2007); *County of Erie*, 45 PERB ¶ 3036 (2012)).

⁶⁴ We note that in *Greenburgh No 11 Union Free Sch Dist (Greenburgh No 11 Fedn of Teachers)*, 33 PERB ¶ 3059 (2000), the Board held that a union is entitled to appropriate information at all stages of a contractual grievance procedure, both before and including arbitration.

⁶⁵ See Adam I. Muchmore, "Jurisdictional Standards (And Rules)," 46 Vand. J. Transnat'l L. 171, 176-183 (2013) (explaining distinction); HLA Hart, *The Concept of Law* 128-30 (Oxford Press 1961) (same).

Normally, in such circumstances, we would remand the matter for such a credibility determination and weighing of the applicable factors. However, multiple reasons militate against such a remand here. The remand would, in this case, have to be to a different ALJ as the ALJ who decided the case below is no longer with the Agency. The parties would thus be put to the inconvenience of a second hearing before a new ALJ, and this matter would expend their and the Agency's resources years after the production of the video at issue.

More to the point, the video having been produced, and the underlying grievance settled, we have entertained the State's exceptions not because of a live controversy between the parties, but because the State's contention that no duty to respond to pre-arbitration information requests was susceptible of repetition yet evading review.⁶⁶ Having authoritatively rejected that argument, as well as the State's more global arguments that no such right can be found in the Act, and that any such right does not, in any event apply to the parties' negotiated disciplinary grievance and arbitration provisions, we do not believe that the policies of the Act would be well served by a purely academic remand.

Accordingly, as the ALJ's decision cannot be sustained on the record before us, and the underlying matters are moot, we vacate the ALJ's decision.

DATED: August 31, 2017
Albany, New York


John F. Wirenius, Chairperson


Robert S. Hite, Member

⁶⁶ *City of New York*, 50 PERB ¶ 6501, at n. 8.