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State of New York Public Employment Relations Board Decisions from April 3, 2008

New York State Public Employment Relations Board

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State of New York Public Employment Relations Board Decisions from April 3, 2008

Keywords

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

Comments

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

In the Matter of

**MANHASSET EDUCATIONAL SUPPORT
PERSONNEL ASSOCIATION, NYSUT, AFT,
AFL-CIO,**

Charging Party,

CASE NO. U- 26091

- and -

MANHASSET UNION FREE SCHOOL DISTRICT,

Respondent.

CONRAD W. LOWER, Labor Relations Specialist, for Charging Party

**SEYFARTH SHAW LLP (PETER A. WALKER and LORI M. MEYERS of
counsel), for Respondent**

BOARD DECISION AND ORDER

This case comes to the Board on exceptions filed by the Manhasset Union Free School District (District) to a decision of an Administrative Law Judge (ALJ) on an improper practice charge filed by the Manhasset Educational Support Personnel Association, NYSUT, AFT, AFL-CIO (Association) finding that the District violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when it unilaterally subcontracted its bus transportation services to private contractors.¹

¹ 39 PERB ¶14610 (2006).

EXCEPTIONS

The District filed 59 exceptions to the ALJ's decision which contend in substance that the ALJ erred in: a) failing to dismiss the improper practice charge based on the alleged failure of the Association to serve a timely notice of claim; b) crediting the Association's witnesses while discrediting the District's witnesses and in analyzing the documentary evidence; c) finding that substitute bus drivers were in the bargaining unit and that the work performed by those drivers was consistent with the Association's claim of exclusivity of the at-issue work; and d) concluding that the bus transportation of District students from home to public school, to athletic and field events and summer school and in providing maintenance and repair services in the bus garage constituted exclusive bargaining unit work.

The Association supports the ALJ's decision.

BOARD INVITATION FOR FILING AMICUS BRIEFS

Following the filing of the District's exceptions and the Association's response, the Board issued a notice inviting interested entities to submit *amici* briefs relating to two specific issues:

What should be the appropriate standards for establishing a discernible boundary or boundaries regarding bargaining unit work in a school district's provision of student transportation services?

What public policy considerations under the Act should be considered by the Board in determining whether a discernible boundary or boundaries has been established in providing such services?

In response to the Board's request, five *amici* filed separate briefs. Thereafter, the District and Association each submitted supplemental briefs responding to the arguments raised in the *amicus* briefs.²

Following a review of the record and after consideration of the arguments by the District, Association and *amici*, we hereby deny the District's exceptions and affirm the ALJ.

FACTS

Composition of the Bargaining Unit

On March 31, 1983, the Board certified the Association as the exclusive bargaining representative for the following bargaining unit:

All regular full-time and regular part-time employees in the following titles: audio-visual technicians, cleaners, custodians, drivers, groundskeepers, federal/state funded program assistants, community aides (guidance), and secretarial employees.³

Following certification, the District and Association entered into at least two collectively negotiated agreements containing clauses recognizing a broader bargaining unit of District employees than originally certified by the Board: the July 1, 1997-June 30, 2000 agreement and the July 1, 2000-June 30, 2005 agreement.⁴

The recognition clauses in both agreements state:

The District hereby recognizes the Association as the exclusive negotiating agent for employees in a unit consisting of nurses, audio visual technicians, computer

² Consistent with the Board's notice, the identity of entities that filed briefs has remained anonymous.

³ *Manhasset Union Free Sch Dist*, 16 PERB ¶3000.21 (1983).

⁴ During the hearing, neither the District nor Association presented evidence about the negotiations resulting in the voluntary modification of the Board's 1983 certification.

technicians, security guards, cleaners, custodians, drivers, groundskeepers, teacher assistants, supervisory aides and secretarial/clerical employees and excluding head custodians, assistant head custodians (evening cleaning supervisors), bus dispatchers, supervisor of buildings and grounds, administrative assistant, bookkeeper, secretary to the Superintendent of Schools, secretary to the Assistant Superintendent of Schools, secretary to the Personnel Director, payroll clerk, business office clerks, the central office receptionist/secretary, the supervisor and assistant supervisor for transportation and all other employees.

In contrast to the Board's certification, the agreements contain explicit definitions for the term "employee" in the recognized unit. An "employee" is defined as a person who is employed full-time or part-time for forty-five days in a job title within the recognition clause. A "full-time employee" is defined as an employee who provides services to the District in the normal workday, workweek and work year set forth in schedules that are included in the agreements. A "part-time employee" is defined as an employee "who provides service to the District for 20 hours or fewer per workweek." Unlike full-time employees, part-time employees are not eligible for many negotiated benefits including vacation leave, sick leave and District-paid health insurance.

Until July 1, 2005, the District employed in its transportation department approximately 38 bus drivers to drive 28 full size buses and 12 full size vans. Additionally, the transportation department employed mechanics, aides/attendants, clerical staff and a dispatcher.

Substitute Bus Drivers

In 1997, following receipt of recommendations about its transportation program, the District created a small pool of substitute bus drivers. The substitute drivers, who are alternately referred to as "permanent substitute" or "per diem" drivers, are subject to formal appointment by the District. On an annual basis, they are asked by the District

whether they wish to continue as a substitute and those who do are retained. Substitute drivers are assigned the same duties as all other District bus drivers. The salaries for substitute drivers are based on the negotiated salary scale for all drivers. Substitute driver vacancies are posted in accordance with the negotiated posting requirements.

Unlike other drivers employed by the District, substitute drivers do not have fixed work schedules. Like other drivers, however, substitute drivers report to work every day and none have ever been sent home due to a lack of work. On at least one occasion, the District terminated a substitute driver for failing to come to work and for refusing to drive a particular bus run. Following establishment of the substitute driver's pool in 1997, the parties did not engage in any specific negotiations over the terms and conditions of employment for the substitute drivers.

Between 1982 and June 30, 2005, Ira Chudd (Chudd) was the District's Supervisor of Pupil Transportation. Chudd was responsible for supervising the entire transportation department including interviewing and hiring bus drivers, scheduling work assignments, preparing the District's bus routes and runs and arranging for contracting with outside vendors.

Chudd testified that he did not draw a distinction between substitute drivers and other drivers employed by the District and treated them equally under District policies. If the work performance of a substitute driver was satisfactory, the driver would be eligible for a vacant regular position. In response to a workplace complaint from substitute drivers, Chudd referred them to an Association representative.

Overtime for District drivers is offered on a rotating basis from a District-wide seniority list. The seniority list is comprised of all District drivers, including substitute drivers, in the order of their respective dates of hire. Under the negotiated agreement,

full-time drivers are first offered overtime in seniority order. Part-time drivers are then offered the overtime opportunity in the same manner.

With the possible exception of one substitute driver, the Association did not receive membership dues or agency shop fees from substitute drivers. However, substitute drivers were informed by the Association of their obligation to pay dues or agency fees and substitute drivers attended Association meetings.

On October 21, 2004, an overtime grievance was filed challenging an assignment to a substitute driver over more senior full-time drivers. The grievance was withdrawn in 2005 after it was presented at the first stage of the grievance procedure.

Transportation Services Provided By the District

The District provides transportation services to and from school for students attending the District's four public schools, as well as students attending parochial schools, private schools and special education. In the 2004-05 school year,⁵ the District transported 2,156 public school students, 110 private school students, 413 parochial students and 55 special education students. The District provides transportation services to and from school through daily bus routes with most routes having both morning and afternoon runs. The District also provides bus transportation for public school athletic events, field trips, band practice and summer school. In addition, the District operates a bus garage where District vehicles are serviced and fueled.

Transportation To and From School

Chudd testified that historically the District utilized private contractors sparingly and only based on a special District need. Association witnesses confirmed that, with a few minor exceptions, students attending the District's public schools are transported to

⁵ All additional references to years in this decision refer to a school year.

and from school exclusively by District drivers. In contrast, both District drivers and private contractors are assigned to transport parochial, private and special education students.

On an annual basis, Chudd established, subject to review by the Superintendent of Schools, distinct bus routes, runs and stops for daily student transportation for all public, parochial, private and special education students in the District.⁶

In 2000-01, the District utilized 37 bus routes with a total of 71 bus runs for student bus transportation to and from school. District drivers provided transportation services for all the runs with the exception of seven that were performed by a private contractor. The private contractor was assigned runs for the transportation of parochial, private, and special education students. In addition, the private contractor was assigned to transport 120 public school students. The public school student assignment was temporary, in response to District safety concerns relating to the major repair of a railroad bridge.

After the private contractor declined to renew its contract for 2001-02, the District contracted with another company to provide bus transportation. In 2001-02, the District established 35 bus routes with a total of 66 runs. At the beginning of the school year, private contractors were assigned to five runs transporting parochial, private and special education students and 100 public school students. In November 2001, following a meeting with public school parents over their complaints about the quality of transportation services provided by the private contractor, Assistant Superintendent for Business Joseph Marchesello (Marchesello) directed Chudd to "switch things around"

⁶ The record includes the District's documentation with respect to routes and runs for each school year from 2000-01 through 2004-05.

so that District personnel would transport all public school students each day. According to Chudd, Marchesello directed that "(i)n the future, district owned buses were to be used for students who attended district schools."

In response to this directive, Chudd discontinued utilizing the private contractor to transport the public school students and reassigned those responsibilities to a District driver. In addition, Chudd announced the directive to District drivers at a meeting held in the transportation department's bus garage.

District statistics establish that in the years following Marchesello's directive, there was a decline in the number of public school students transported by private contractors. In 2002-03, the District established 36 bus routes with a total of 68 runs. In 2003-04, the District initially utilized 35 bus routes containing 66 runs which were later modified to 36 routes with 68 runs. In 2004-05, the District continued to utilize 36 routes made up of 68 runs. In 2002-03, 2003-04 and 2004-05, private contractors were assigned to the same runs each year to transport parochial, private, and special education students. According to District statistics, private contractors also transported a total of 10 public school students in each of those school years.

Beginning in 2002-03 and continuing for the next two school years, one of the afternoon bus runs assigned to a private contractor van transported District elementary school students home. The District's use of the private van was in response to particular safety concerns associated with having a full-size District bus stop on a heavily traveled street. In addition, Chudd testified that the District used the private van for that run because the van would have been otherwise idle.

In 2002-03 and 2003-04, Chudd assigned one feeder run to a private contractor to transport District students for band practice at two elementary schools.⁷ Chudd testified that the private contractor was used because of the unavailability of a District bus to travel to the particular outlying area where the students resided. In the 2004-05 school year, a private contractor was also assigned to transport two homeless students.

On October 26, 2004, the District held a public meeting on the question of subcontracting the District's transportation services. At the meeting, the District distributed to the public a document entitled "Transportation Outsourcing: Is It a Viable Option for Manhasset." The document set forth District statistics outlining the number of public school students, private school students, parochial school students and special education students who are transported by the District. The document informed the public that all 2,166 public school students are transported by District buses.⁸ The document also stated that both District drivers and private contractors are assigned to transport parochial school and private school students with District drivers assigned to transport three-quarters of the 525 parochial and private students. At the same time, private contractors transport all 55 special education students.

⁷ Some runs are referred to as feeder runs in which private or parochial students are delivered to an assigned location where they meet another bus to transport them to school or home.

⁸ A few months later, during collective negotiations between the District and the Association over the decision to outsource, the District modified its statistics to indicate that private contractors transported 10 public school students in 2002-03, 2003-04 and 2004-05.

Transportation to Athletic Events, Field Trips and Summer School

The District provides bus transportation to public school students for summer school. District drivers are assigned exclusively to provide summer school transportation.

With certain limited exceptions, transportation for athletic events and field trips is performed exclusively by District drivers. District drivers transport students exclusively except for a few trips during peak hours during the day. For 2004-05, District drivers were assigned 969 of the 984 field and athletic trips, with a private contractor being assigned approximately 15. In 2003-04, District drivers drove over 1,300 field and athletic trips while a private contractor was assigned to less than five.

District Operated Bus Garage

The District operates a bus garage adjacent to the high school where bargaining unit employees perform all mechanical work and repairs on buses and other District vehicles and fuel vehicles from a tank next to the garage. Prior to July 1, 2005, the District employed three mechanics, one of whom was also assigned to drive bus runs. With the exception of work covered by manufacturers' warranties, the maintenance and repair work is performed exclusively by bargaining unit members.

Collective Negotiations on the Decision to Subcontract Transportation Services

On January 21, 2005, the District and Association commenced collective negotiations with respect to the District's consideration of subcontracting the entire transportation program to private contractors. Between January 21, 2005 and April 20, 2005, the Association and District participated in at least twelve negotiation sessions on

the subject of subcontracting the transportation services and continued those discussions on May 9, June 14 and June 21, 2005.⁹

District's Solicitation and Acceptance of Bids

In 1999, the District solicited bids for the possible outsourcing of the District's pupil transportation program. After evaluating the bids and upon the recommendation of the then Assistant Superintendent for Business, the District decided to continue operating its own transportation program but to periodically solicit bids to test the private sector market.

During the course of the 2005 negotiations, the District took various steps related to subcontracting the transportation program, including again soliciting bids for pupil transportation effective July 1, 2005.

The bids were opened on March 23, 2005 and the District adopted a resolution awarding contracts to various private contractors on April 20, 2005. The District's resolution to subcontract the transportation program was approved by the public on May 17, 2005 and the District's decision was implemented on July 1, 2005.

Notice of Claim

On June 23, 2005, the Association filed with the District a notice of claim, pursuant to Education Law §3813(1), alleging that the District violated §209-a.1(d) of the Act based on its unilateral action to subcontract the transportation and maintenance work performed by bargaining unit members.

⁹ Our factual conclusions are based on admissions contained in the pleadings. ALJ Exhibit No.1, Details of Charge, ¶¶15, 28; ALJ Exhibit No. 2, ¶¶1, 8.

DISCUSSION

A. Notice of Claim

A(1). Timeliness of the Association's Notice of Claim

Prior to reaching the District's exceptions targeted at the substantive aspects of the ALJ's decision, we first examine the District's exception challenging the ALJ's conclusion that the Association's notice of claim was timely. The ALJ found that the Association was in substantial compliance with Education Law §3813(1) when it served a notice of claim within 90 days of April 20, 2005, the date when negotiations ended and the District adopted a resolution awarding contracts to various bidders to perform the work.

The District argues that the notice of claim was untimely because the Association's claim allegedly accrued on February 17, 2005, when the District "made a final decision" to subcontract by commencing the bid solicitation process.

In support of its argument, the District cites to *Board of Education of Union-Endicott Union Free School District v New York State Public Employment Relations Board* (hereinafter, *Union-Endicott*)¹⁰ and refers the Board to an exhibit the ALJ excluded from the record after sustaining a District objection to its admissibility.¹¹

In *Union-Endicott*, the Appellate Division, Third Department, concluded that an employee organization's subcontracting claim under the Act accrued when the employer resolved to place the bargaining unit work out to bid because that was the point when the damage to the unit "was readily ascertainable." The Third Department articulated the test in the following manner:

¹⁰ 29 PERB ¶¶3056 (1996) *rev'd*, 250 AD2d 82, 31 PERB ¶¶7016 (3d Dept 1998), *lv denied*, 93 NY2d 805, 32 PERB ¶¶7006 (1999).

¹¹ Charging Party Exhibit No. 4 for identification.

The key to ascertaining a claim's accrual date is to look at the crux of the challenge being asserted (see, *Matter of Vilella v Department of Transp*, 142 AD2d 46, 48-49, *lv denied*, 74 NY2d 602). In this case, the union has no quarrel with the over-all bidding process, the actual awarding of the bid or the terms of the contract ultimately entered into. It cares not what contractor is doing the work or on what terms; rather, its complaint is that the work is not being done by School District employees represented by the union. Thus viewed, it becomes apparent that the key event was petitioner's decision to put the work out to bid..... At that point (to the extent that it ever could be), the damage to the union employees was readily ascertainable.¹²

The facts in *Union-Endicott* did not involve, as here, the solicitation of bids to test the private sector market. Neither were the parties in *Union-Endicott* engaged in good faith negotiations over the decision to subcontract both before and after the commencement of the bid solicitation process. In *Deposit Central School District v New York State Public Employment Relations Board*¹³ (hereinafter, *Deposit*), the Appellate Division, Third Department, had held that an impasse in collective negotiations constituted the triggering event for a notice of claim under Education Law §3813(1). Although the Appellate Division, Third Department, in *Union-Endicott*, cited to *Deposit*, it did not reverse that earlier decision.

In the present case, the Association's claim under §209-a.1(d) of the Act did not accrue from the commencement of the bid solicitation process on February 17, 2005 based on the conduct of the District. In 1999, the District solicited bids but decided against subcontracting after comparing the bids with the work performed by the drivers in the bargaining unit. At the time, the District decided to "check the market every four or

¹² *Board of Educ of Union-Endicott Union Free Sch Dist v PERB*, *supra*, note 10 at 85 and at 7027.

¹³ 27 PERB ¶3020 (1994), *affd*, 214 AD2d 288, 28 PERB ¶7013 (1995), *lv denied*, 88 NY2d 866, 29 PERB ¶7007 (1996).

five years" in order to determine whether it should modify the means of delivering student transportation services.

In addition, consistent with *Deposit*, we conclude the Association's improper practice claim under the Act would have been premature until after the good faith negotiations reached an impasse on April 20, 2005, or after the District issued a resolution that day awarding the bids.¹⁴ Both before and after the District solicited the bids, the parties engaged in good faith negotiations on the decision to subcontract. The parties held four negotiation sessions prior to soliciting bids and eight bargaining sessions thereafter, until April 20, 2005. Additionally, the parties continued their discussions in three subsequent meetings ending on June 21, 2005.

The District concedes in its exceptions that under the Act it was legally obligated to maintain the *status quo* until an impasse was reached in the negotiations.¹⁵ Indeed, it is well-settled that an employer may not unilaterally change a term and condition of employment unless it has negotiated the change in good faith to the point of impasse, has an urgent need to do so, and continues to negotiate thereafter to an agreement.¹⁶

¹⁴ As noted, the District, in its exceptions, cites to an exhibit not in evidence to support its argument that it commenced the solicitation of bids on February 17, 2005. During the hearing, the District did not offer any documentary evidence regarding the solicitation of bids or the conditions set forth in the solicitation. Nevertheless, as the Association correctly notes in its brief, the admissions in the pleadings constitute a sufficient evidentiary basis for the Board to conclude that the solicitation of bids commenced on February 17, 2005.

¹⁵ Exception No. 56.

¹⁶ *Sackets Harbor Cent Sch Dist*, 13 PERB ¶3058 (1980); *Town of West Seneca*, 19 PERB ¶3028 (1986); *Wappingers Cent Sch Dist*, 19 PERB ¶3037 (1986). See also, *Wappingers Cent Sch Dist*, 5 PERB ¶3074 (1972).

In *Hewlett-Woodmere Union Free School District*,¹⁷ the Board succinctly described some of the substantive negotiation areas with respect to the possible subcontracting of unit work, stating:

We are aware that the District's decision was motivated by a need or a desire to save money. It is, however, precisely because its decision turned upon the labor costs involved that the transfer of work is amenable to resolution in the collective bargaining process. The bargaining process affords the parties an opportunity, for example, to obtain general or specific salary and benefit compromises which might have eliminated the District's felt need to transfer the work outside the unit. Moreover, there may well be alternatives to a work transfer which were within the District's unilateral control.¹⁸ (citations omitted)

In the present case, the record supports the conclusion that both parties participated in the negotiations with a sincere desire to reach an agreement with respect to the District's subcontracting of the transportation services.¹⁹ In fact, many of the same documents admitted into evidence during the hearing were originally exchanged during the negotiations.

We conclude that the District's violation of §209-a.1(d) was not ascertainable by the Association until the District made a final decision to subcontract on April 20, 2005 after the parties had reached an impasse in negotiations. Therefore, we deny the District's exception challenging the timeliness of the Association's notice of claim because it was served within ninety days following the conclusion of negotiations on April 20, 2005.

¹⁷ 28 PERB ¶3039 (1995), *confirmed sub nom.* 232 AD2d 560, 29 PERB ¶7019 (2d Dept 1996).

¹⁸ *Id.* at 3090-3091.

¹⁹ See, *Southampton PBA*, 2 PERB ¶3011 (1969); *Cent Sch Dist No 6*, 6 PERB ¶3018 (1973).

A(2). The Lack of Necessity of a Notice of Claim

In the alternative, we deny the District's exception because a notice of claim under Education Law §3813(1) is not a precondition to the filing of an improper practice charge under the Act. In reaching our conclusion, we recognize that the Appellate Division, Third Department, has held that the service of a timely notice of claim pursuant to Education Law §3813(1) constitutes a condition precedent to the filing of an improper practice charge against a school district under the Act.²⁰ However, the subsequent decision by the Court of Appeals in *Freudenthal v Nassau County*²¹ (hereinafter, *Freudenthal*) calls into question the validity of the Third Department's holding. In *Freudenthal*, the Court ruled that a party making a claim through an administrative agency -- there, the New York State Division for Human Rights -- rather than in court, was not obligated to file a notice of claim. In addition, the Appellate Division, Fourth Department, in *City of Syracuse v New York State Public Employment Relations Board*,²² disagreed with the Third Department with respect to the necessity of statutory notices of claim as a prerequisite to the filing of an improper practice charge. The Fourth Department concluded that an improper practice charge is a creature of PERB's administrative process and, therefore, does not constitute a proceeding or action requiring a notice of claim.

²⁰ See, *Bd of Educ of Union-Endicott Cent Sch Dist v New York State Pub Empl Rel Bd*, 197 AD2d 276, 27 PERB ¶7005 (1994), *lv denied*, 84 NY2d 803, 27 PERB ¶7013 (1994); *Deposit Cent Sch Dist v New York State Pub Empl Rel Bd*, *supra*, note 13; *Odessa-Montour Cent Sch Dist v New York State Pub Empl Rel Bd*, 228 AD2d 892, 29 PERB ¶7009 (1996); *Bd of Educ of Union-Endicott Cent Sch Dist v New York State Pub Empl Rel Bd*, *supra*, note 10.

²¹ 99 NY2d 285 (2003).

²² 279 AD2d 98, 33 PERB ¶7022 (4th Dept 2000), *lv den*, 96 NY2d 717, 34 PERB ¶7025 (2001).

Previously, the Court of Appeals ruled in *Cayuga-Onondaga Counties BOCES v Sweeney* (hereinafter, *Sweeney*),²³ that a notice of claim requirement is inapplicable to an administrative procedure that seeks to vindicate a public interest. In that case, the Court held that an Education Law §3813(1) notice of claim was unnecessary prior to invoking the administrative procedures under Labor Law §220.

The Court's discussion in *Sweeney* with respect to the public interest underlying Labor Law §220 is equally applicable to the Taylor Law and PERB's improper practice jurisdiction. A 1969 amendment to the Taylor Law²⁴ created, and granted PERB exclusive jurisdiction over, employer and employee organization improper practices, and delegated to PERB the sole power to establish procedures for their prevention. The avoidance of public sector strikes and threats of strikes was the public interest that precipitated the enactment of that 1969 legislation.²⁵

The language of the 1969 amendment demonstrates a clear legislative mandate for PERB to establish a symmetrical and balanced improper practice procedure equally applicable to public employers and employee organizations especially with respect to their conduct during negotiations. The requirement of a symmetrical process is necessitated by one of the essential purposes of the Act: to correct the uneven bargaining positions between public employers and employees, so as to ameliorate the

²³ 89 NY2d 395, 30 PERB ¶7501 (1996).

²⁴ L 1969, ch 24, §3.

²⁵ See, Governor's Memorandum, New York State Legislative Annual (1969), p 49; Memorandum of Senate Rules Committee in Support of Legislation; Report of the Select Joint Legislative Committee on Public Employment Relations (1969), p 12; CSL §§209-a.1 and 209-a.2.

tendency of public employers to impose conditions of employment upon public employees unilaterally and thereby "infringe upon the public interests."²⁶

A rule requiring an employee organization to file a notice of claim against an employer but not by an employer against an employee organization, as a prerequisite to an improper practice charge, creates a procedural imbalance in the improper practice process inconsistent with the Legislature's intent.²⁷ The 1969 amendment, which followed strikes by public school teachers in New York City and elsewhere in both 1967 and 1968, contains nothing to suggest a requirement that the ameliorative improper practice process is to be subject to the notice of claim requirement in Education Law §3813(1) or that school districts should be treated differently than all other public employers.

Although the procedures adopted by the Board in 1969²⁸ to prevent improper practices afford parties an equal forum to present their issues to the agency, rather than establish an administrative process of investigation followed by the issuance and prosecution of PERB complaints, those procedures were chosen as the best means of serving the public interest.

The Legislature's choice in delegating to PERB the exclusive authority to establish the appropriate procedures necessary for the prevention of improper practices instead of dictating those procedures, underscores PERB's essential role in effectuating

²⁶ *Board of Educ for the City Sch Dist of the City of Buffalo v Buffalo Teachers Fedn*, 89 NY2d 370, 377, 29 PERB ¶7506 at 7511 (1996), quoting from the Taylor Committee Report, a copy of which can be found in Lefkowitz, Doerr, Berlin, Public Sector Labor and Employment Law, p 77 (3rd Ed. 2008).

²⁷ *City of Syracuse v New York State Pub Empl Rel Bd*, *supra*, note 22.

²⁸ Rules of Procedure, Part 204 (Rules).

the public policy underlying the Act.²⁹ Therefore, PERB “is not solely a judicial body appointed to adjudicate impartially controversies between employers and employees. [PERB] is a public agency acting in the public interest; the instrument created by the Legislature to assure to the people of the State protection” from “improper practices” set forth in the Act.³⁰

We take administrative notice of the history of our improper practice procedures.

The procedures chosen by the Board in 1969 did not establish the agency as an administrative equivalent to a court whose sole function is to adjudicate improper practices impartially. In fact, pursuant to §204.2(a) of PERB’s Rules, all improper practice charges are subject to an initial review and summary administrative dismissal if they fail to adequately set forth a basis for the invocation of PERB’s administrative process.³¹

The 1969 procedures were an outgrowth of the agency’s experience with an earlier procedure adopted by the Board following the creation of the agency in 1967. Between 1967 and 1969, PERB’s Rules established a procedure for the investigation and prosecution of complaints by Board agents similar to the procedures followed by the National Labor Relations Board (NLRB) and the New York State Employment Relations Board. PERB’s pre-1969 procedure, however, was nullified by the Appellate

²⁹ Act, §205.5(d). In contrast, the Legislature codified the administrative procedures to be followed by the New York State Employment Relations Board (SERB) in private sector unfair labor practice charges under the New York State Labor Relations Act. Lab Law §706.

³⁰ *New York State Labor Rel Bd v Holland Laundry, Inc*, 294 NY 480, 485 (1945).

³¹ *MABSTOA*, 40 PERB ¶3023 (2007).

Division, Third Department, on the ground that it was in excess of the agency's jurisdiction.³²

Following the 1969 statutory amendment, the Board adopted the current procedure, which abandoned the prosecutorial model for the current procedures for a variety of public policy reasons. The Board found that the prior procedure made the agency vulnerable to attacks for partiality from employers and employee organizations for either prosecuting a charge or for refusing to prosecute a charge. Unlike the NLRB, PERB has responsibilities for mediation and the conciliation of negotiation disputes.³³ Therefore, its staff's role as impartial mediators could be undermined if its counsel was prosecuting one side or the other for engaging in an improper practice.

In addition, the Board was concerned that the prosecutorial model could result in PERB being drawn into partisan political frays. It sought to avoid the prospect of media coverage of the agency issuing and prosecuting a *prima facie* meritorious charge against a local government shortly before an election, which might ultimately be dismissed following the presentation of evidence at an administrative hearing. The avoidance of such a scenario was particularly important at that time to help ensure public acceptance of the new public sector labor relations statute and agency. Accordingly, the Board deemed it more consistent with the policies of the Act to leave the filing of a charge and answer, along with the presentation of the evidence, to the parties, with PERB's role limited to examining the evidence in the record to determine whether remedial relief is warranted.

³² *Helsby v Cent Sch Dist No 2 of the Town of Claverack*, 34 AD2d 361, 3 PERB ¶7004 (3d Dept 1970).

³³ Rules, Part 205.

The difference between the Board's pre-1969 and post-1969 procedures has no relevance to the application of a notice of claim requirement. Both procedures recognize that the administrative resolution of certain disputes between public employers and employee organizations under the Act vindicates the public interest rather than the private statutory right of a public employer or employee organization.³⁴ The vital public interest vindicated through the improper practice process is not diminished in any manner by the Board choosing to adopt the current administrative process in 1969. The resolution of alleged improper practices by employers and employee organizations vindicates the public interest by aiding in the maintenance of harmonious and cooperative public sector labor relations through good faith negotiations thereby helping to ensure the uninterrupted delivery of governmental services.

More recently, the Legislature recognized the fundamental distinction between the public interest served by PERB's administrative process to remedy the failure to negotiate in good faith when it enacted legislation in 1992³⁵ granting individuals a private cause of action against a public employer for violating certain rights protected by the Act. In crafting that amendment to the Labor Law, the Legislature preserved PERB's exclusive improper practice jurisdiction over alleged breaches of the duty to negotiate pursuant to §209-a.1(d) of the Act.³⁶

Therefore, even if the Association's notice of claim was untimely, we would deny the District's exception.

³⁴ See, *Cayuga-Onondaga Counties BOCES v Sweeney*, supra, note 23; *Union Free Sch Dist No 6 of the Towns of Islip and Smithtown v New York State Human Rights Appeal Bd*, 35 NY2d 371 (1974).

³⁵ See, Lab Law §201-d(2)(d).

³⁶ *CSEA v City of Troy*, 223 AD2d 825, 29 PERB ¶7501 (3d Dept 1996).

B. ALJ Credibility Determinations and Analysis of the Documentary Record

We deny the District's exceptions challenging the ALJ's credibility determinations and analysis of the documentary record.

In general, ALJ credibility determinations are entitled to substantial deference and great weight unless there is objective evidence in the record compelling a conclusion that the credibility finding is manifestly incorrect.³⁷ We find no basis in the record for overturning the ALJ's credibility findings. Similarly, upon our review of the record, we reject the District's challenge to the ALJ's analysis of the documentary evidence.

C. Substitute Drivers In the Bargaining Unit

We next turn to the District's exceptions challenging the ALJ's determination that substitute drivers are in the bargaining unit.

The District excepts to all three grounds relied upon by the ALJ in reaching his conclusion: a) substitute drivers are not casual employees and, therefore, are public employees under the Act; b) substitute drivers are included in the recognition clause; and c) the parties treated substitute drivers as unit members.

C(1). Substitute Drivers Are Public Employees Under the Act

Our decisions fully support the ALJ's conclusion that the District's substitute drivers are not casual employees pursuant to §201.7(d) of the Act.³⁸ Moreover, they

³⁷ *City of Rochester*, 23 PERB ¶¶3049 (1990); *Captain's Endowment Assn*, 10 PERB ¶¶3034 (1977). See also, *Hempstead Housing Auth*, 12 PERB ¶¶3054 (1979).

³⁸ *Weedsport Cent Sch Dist*, 12 PERB ¶¶3004 (1979); *Unatego Cent Sch Dist*, 15 PERB ¶¶3097 (1982); *Guilderland Cent Sch Dist*, 24 PERB ¶¶4040 (1991).

have "a regularity and continuity of employment sufficient" to demonstrate that they are entitled to representation under the Act.³⁹

The evidence establishes that the substitute drivers receive reasonable assurances of continuing employment from the District.⁴⁰ They are subject to formal appointment by the District and the appointment is not subject to an expiration date. On an annual basis the District seeks confirmation that a substitute driver will be returning the following school year. They are included on the District's driver seniority list by their original dates of hire along with all other District drivers. Finally, substitute driver vacancies are posted by the District and their salaries are based on the negotiated salary schedule.

C(2). Substitute Drivers Are Included in the Recognized Unit

In *Hammondsport Central School District*,⁴¹ the Board held that long-term substitute bus drivers/bus mechanics were included in the bargaining unit based on the terms of the recognition clause and the listing of the bargaining unit titles in the agreement, as well as the parties' practices toward the substitutes. Similarly, in decisions resolving unit clarification petitions, the Board examines the recognition clause and other contractual language to determine whether a position is encompassed in a particular bargaining unit. If it is determined that the contract language is unclear,

³⁹ *Onondaga-Cortland-Madison BOCES*, 23 PERB ¶13014 (1990).

⁴⁰ Act, §201.7(d).

⁴¹ 29 PERB ¶13063 (1996).

the practice of the parties is examined to determine the intent of the parties regarding the composition of the bargaining unit.⁴²

In the present case, we conclude that the recognition and definition clauses of the agreement along with the treatment of the substitute drivers demonstrate that they are encompassed within the bargaining unit.

Following the Board's 1983 certification, the parties expanded the composition of the bargaining unit through negotiations and continued to list "drivers" as being within the bargaining unit. While expanding the unit composition, the parties did not exclude substitute drivers from the recognition clause.

The earliest collectively negotiated agreement in the record was entered into in 1997, the same year that the District created the substitute driver position. Following the establishment of the pool of substitutes, the parties negotiated one additional contract for the period July 1, 2000-June 30, 2005. Under the negotiated definitional clause, an "employee" is defined as a person employed full or part-time in one of the job titles set forth in the recognition clause for a period in excess of 45 days. The term "part-time employee" is defined as any employee who works for the District for 20 hours or less per week. The definitional clause does not exclude substitute drivers from the definition of a part-time employee. Furthermore, the clause does not define a part-time employee as an employee with a regular schedule; therefore, the lack of a fixed schedule for substitutes does not place them outside the contractual definition of a part-time employee.

⁴² *Newburgh Enlarged Cent Sch Dist*, 37 PERB ¶3027 (2004); *Town of Huntington*, 33 PERB ¶3049 (2000); *Monroe-Woodbury Cent Sch Dist*, 33 PERB ¶3007 (2000).

We also reject the argument that because some substitute drivers may have worked more than 20 hours in a particular week, they are excluded from the definition of part-time employee. The precise number of hours worked by each substitute is not included in the record. In addition, the agreement does not exclude employees from the bargaining unit who may have worked more than 20 hours but who are not full-time.

We find nothing in the record to demonstrate an intent by the parties to exclude drivers from the bargaining unit who work more than 20 hours in a week but less than a full-time driver. Indeed, such an exclusion would be at odds with our experience in interpreting the Act.

The fact that substitute drivers do not receive many contractual benefits, including vacation leave, sick leave and paid health insurance, does not demonstrate that they are excluded from the unit because other part-time employees who are in the unit also do not receive the full range of benefits received by full-time employees.⁴³ On the contrary, Chudd acknowledged in his testimony that he treated substitute drivers equally with all other drivers employed and referred substitutes to the Association when they had workplace complaints. The substitute drivers' salary scale was set by the District based on the negotiated agreement. Vacancy notices for substitute positions were posted consistent with the agreement. Substitute drivers are listed on the overtime list along with all other drivers in the order of their respective dates of hire. Although the Association may not have vigorously sought membership dues from

⁴³ The District's reliance on the NLRB's decision in *Robert Wood Johnson University Hospital*, 328 NLRB No 131 (1999) is misplaced. The recognition clause in that case, along with the demonstrated facts and admissions cited in the decision, is substantially different from the present case.

substitute drivers, the drivers were notified by the Association of their obligation to pay dues and invited to participate in Association meetings.

The District's exceptions premised on the Association's 2004 grievance are similarly unpersuasive. The withdrawn grievance cannot be reasonably construed as an admission against interest or as a determination on the merits.⁴⁴ In fact, the grievance was withdrawn by the Association prior to the District issuing a written decision.

Based on the foregoing, we conclude that the substitute drivers are within the Association's bargaining unit.⁴⁵

D. The Subcontracting of Bargaining Unit Work

D(1). Subcontracting Can Constitute a Mandatory Subject of Bargaining

For over three decades, the Board has held that the subcontracting of bargaining unit work, for economic or other reasons, constitutes a mandatory subject of negotiations under the Act where there is no curtailment in the level of services.⁴⁶ These holdings are premised on the "strong and sweeping policy" under the Act to support collective negotiations between public employers and employee organizations with respect to terms and conditions of employment.⁴⁷

⁴⁴ See, *Antonopoulou v Beame*, 32 NY2d 126, 6 PERB ¶¶7504 (1973).

⁴⁵ We note that a colorable argument exists for the proposition that the use of substitute employees to perform unit work does not adversely impact exclusivity under the Act. See, *Webster Cent Sch Dist*, 19 PERB ¶¶4612 (1986), *affd*, 20 PERB ¶¶3064 (1987), *revd on other grounds*, *Webster Cent Sch Dist v New York State Pub Empl Rel Bd*, 75 NY2d 619, 23 PERB ¶¶7013 (1990). However, based on the ALJ's decision and the issues raised in the briefs submitted by the parties and *amici*, we need not reach the issue.

⁴⁶ See, *Somers Faculty Assn*, 9 PERB ¶¶3014 (1976). See also, *Northport Union Free Sch Dist*, 9 PERB ¶¶3003 (1976); *Niagara Frontier Transp Auth*, 18 PERB ¶¶3083 (1985).

⁴⁷ *Cohoes City Sch Dist v Cohoes Teachers Assn*, 40 NY2d 774, 778, 9 PERB ¶¶7529 at 7564 (1976).

As the Board stated in *Somers Faculty Association*:

We see subcontracting as being a technique that can be used by management to undermine its agreement and/or its duty to reach agreement on other terms and conditions of employment. Thus, the decision to contract unit work is inextricably bound to the other mandatory terms and conditions of employment.⁴⁸

In *Niagara Frontier Transportation Authority (Niagara Frontier)*,⁴⁹ the Board recognized that such unilateral subcontracting can result in collective harm to the bargaining unit as well as individual harm to bargaining unit members. In that decision, the Board found that the rights of organization and representation, guaranteed by §§202 and 203 of the Act, can be diminished when the scope of the bargaining unit is unilaterally reduced. The asserted merits or demerits of a decision to transfer unit work, including the fiscal and operational wisdom of a decision to privatize, are immaterial to whether the subject matter is mandatorily negotiable.⁵⁰

Under *Niagara Frontier*, there are two essential questions that must be answered in deciding whether a unilateral transfer of work violates §209-a.1(d) of the Act:

[w]as the at-issue work performed by unit employees exclusively for a sufficient period of time to have become binding and was the work assigned to non-unit personnel substantially similar to that exclusive unit work?⁵¹

⁴⁸ *Supra*, note 46, at 3026.

⁴⁹ *Supra*, note 46 (1985). See also, *Saratoga Springs Sch Dist*, 11 PERB ¶¶3037 (1978), confirmed sub nom. *Saratoga Springs Cent Sch Dist v New York State Pub Empl Rel Bd*, 68 AD2d 202, 12 PERB ¶¶7008 (3d Dept 1979), *lv denied*, 47 NY2d 711, 12 PERB ¶¶7012 (1979).

⁵⁰ *City of Niagara Falls*, 31 PERB ¶¶3085 (1998).

⁵¹ *Chenango Forks Cent Sch Dist*, 40 PERB ¶¶3012 at 3046 (2007).

Unless the qualifications for the positions have been changed significantly, the loss of unit work is sufficient for the finding of a violation. However, if there has been a significant change in job qualifications, a balancing test is applied, examining the respective interests of the public employer and the unit employees, both individually and collectively.⁵²

D(2). Summary of Prior Board Precedent

In defining unit work and determining the issue of exclusivity, the Board's analysis has traditionally focused on the past practice of the parties.⁵³

In *Town of West Seneca*,⁵⁴ (hereinafter, *West Seneca*) the Board applied a past practice analysis in finding that an employer violated the Act when it expanded the extent to which nonunit employees were assigned work previously performed by the bargaining unit exclusively. In finding a violation in that case, the Board concluded that a clearly circumscribed past practice had been created regarding the assignment of unit work to non-unit employees and that the employer had broken the "perimeter of the past practice" that limited the use of nonunit employees to one department during the summer vacation period:

⁵² *Niagara Frontier Transp Auth*, *supra*, note 45. See also, *State of New York (DOCS)*, 27 PERB ¶¶3055 (1994), *confirmed sub nom. State of New York v Kinsella*, 220 AD2d 19, 29 PERB ¶¶7008 (1996).

⁵³ *Chenango Forks Cent Sch Dist*, *supra*, note 51. See also *Deer Park Union Free Sch Dist*, 15 PERB ¶¶3104 (1982); *Town of West Seneca*, *supra*, note 16; *Indian River Cent Sch Dist*, 20 PERB ¶¶3047 (1987); *City of Rochester*, 21 PERB 3040 (1988), *confd sub nom. City of Rochester v New York State Pub Empl Rel Bd*, 155 AD2d 1003, 22 PERB ¶¶7035 (4th Dept 1989); *City of Rochester*, 27 PERB ¶¶3031 (1994); *County of Onondaga*, 27 PERB ¶¶3048 (1994); *State of New York (DMNA)*, 27 PERB ¶¶3027 (1994); *Town of Brookhaven*, 27 PERB ¶¶3063 (1994); *City of Schenectady*, 31 PERB ¶¶3019 (1998); *Vil of Rye Brook*, 39 PERB ¶¶3028 (2006); *Board of Educ of the City Sch Dist of the City of New York*, 40 PERB ¶¶3002 (2007).

⁵⁴ *Supra*, note 16.

The actions of the Town complained of in the charge broke the perimeter of the past practice. It was improper for the Town to do so unilaterally. It is irrelevant that no unit employees were laid off. A public employer may not assign tasks of unit employees to nonunit employees unless the tasks or the qualifications for the job have been substantially changed.⁵⁵ (footnote omitted)

One year later, in *Indian River Central School District*⁵⁶ (hereinafter, *Indian River*), the Board adopted the ALJ's phrase "discernible boundary" to describe the contours of a past practice that would permit an employee organization to retain exclusivity over unit work even though nonunit personnel have also performed the work in certain circumscribed contexts. For example, in *City of Rochester*,⁵⁷ the Board found a discernible boundary based on the employer's decision that the at-issue work at a particular construction site needed a "police presence" along with the 13-month past practice of exclusively assigning police to perform that work.

Since then, Board decisions have articulated various criteria that may be considered in determining whether a discernible boundary exists: the nature and frequency of the work performed by unit members,⁵⁸ the geographic location where the

⁵⁵ *Supra*, note 16, at 3070.

⁵⁶ *Supra*, note 53.

⁵⁷ *Supra*, note 53.

⁵⁸ *City of Buffalo*, 24 PERB ¶¶3043 (1991); *County of Onondaga*, *supra*, note 53; *City of Rome*, 32 PERB ¶¶3058 (1999), *revd in part*, *City of Rome v New York State Pub Empl Rel Bd*, 33 PERB ¶¶7002 (Sup Ct Albany County 2000), *affd* 283 AD2d 817, 34 PERB ¶¶7020 (3d Dept 2001), *appeal dismissed*, 96 NY2d 936, 34 PERB ¶¶7027 (2001), *lv denied*, 97 NY2d 607, 34 PERB ¶¶7039 (2001); *NYCTA*, 30 PERB ¶¶3004 (1997), *confirmed sub nom. NYCTA v New York State Pub Empl Rel Bd*, 251 AD2d 583, 31 PERB ¶¶7012 (1998), *lv denied*, 92 NY2d 819, 31 PERB ¶¶7015 (1999); *Dryden Cent Sch Dist*, 36 PERB ¶¶3005 (2003).

work is performed,⁵⁹ the employer's rationale for the practice,⁶⁰ an explicit or implicit recognition that the at-issue work is distinct,⁶¹ and other facts that have set the claimed unit work apart from work performed by nonunit personnel.⁶²

In addition, commencing in *West Seneca*, Board decisions have examined past practices when determining the related issue of exclusivity. For example, in *State of New York (DMNA)*,⁶³ the Board held that a consistent employer practice of assigning nonunit personnel to work performed by unit members for a period in excess of one year constituted constructive knowledge to the employee organization of the practice, thereby breaching unit exclusivity. On the other hand, Board precedent establishes that a practice of limited and incidental use of nonunit personnel to perform tasks also performed by unit employees will not breach exclusivity otherwise maintained over the unit work. To determine whether the work performed by nonunit staff is only incidental, our cases have examined the practice to determine the extent to which the work was performed by nonunit employees in comparison to the work performed regularly by unit

⁵⁹ *City of Buffalo*, *supra*, note 58; *Hudson Cent Sch Dist*, 24 PERB ¶13039 (1991); *State of New York (Butler Corr Fac)*, 34 PERB ¶13014 (2001).

⁶⁰ *Town of West Seneca*, *supra*, note 16.

⁶¹ *Hudson Cent Sch Dist*, *supra*, note 59; *County of Onondaga*, 24 PERB ¶13014 (1991), *confirmed sub nom. County of Onondaga v Kinsella*, 187 AD 2d 1014, 25 PERB ¶17015 (4th Dept 1992), *lv denied*, 81 NY 2d 70, 26 PERB ¶17003 (1993); *County of Erie*, 28 PERB ¶13053 (1995); *Clinton Comm Coll*, 29 PERB ¶13066 (1996); *NYCTA*, *supra*, note 58.

⁶² *County of Nassau*, 21 PERB 3038 (1988); *NYCTA*, 38 PERB ¶13024 (2005).

⁶³ 27 PERB ¶13027 (1994). In the present case, we need not determine the applicable evidentiary standard and burden of proof with respect to an employee organization's constructive knowledge of a past practice that would constitute a breach of exclusivity.

employees.⁶⁴ For example, in *County of Onondaga*,⁶⁵ the Board held that a bargaining unit retained exclusivity even though nonunit personnel performed 881 out of approximately 54,000 of the at-issue tests.

Finally, the Board has examined past practice in determining whether there is a reasonable relationship between a discernible boundary and the exclusive duties of the unit employees.⁶⁶

Beginning with *County of Westchester*,⁶⁷ the Board moved away from a discernible boundary analysis based solely on past practice with the introduction of a new concept analyzing the “core components” of work performed by multi-task positions. In that case, the Board stated that where an employee organization “has not acquired or lost exclusivity over the major aspects of the work at issue, exclusivity is not possessed as to tasks incidental to the performance of the core components of that unit work, even if only unit employees have performed those incidental tasks.”⁶⁸ Under the “core component” theory, work deemed by the Board to be “intrinsic” to the position is examined to determine whether a discernible boundary exists in cases where nonunit personnel have regularly performed several, if not most, of the tasks regularly

⁶⁴ *City of Schenectady*, *supra*, note 53; *County of Onondaga*, *supra*, note 53; *Village of Malverne*, 28 PERB ¶13042 (1995); *Honeoye Cent Sch Dist*, 39 PERB ¶13003 (2006), *confirmed sub nom. Sliker v New York State Pub Empl Rel Bd*, 42 AD3d 653, 40 PERB ¶17006 (3d Dept 2007).

⁶⁵ *Supra*, note 53.

⁶⁶ *City of Buffalo*, *supra*, note 58; *Hudson Cent Sch Dist*, *supra*, note 59; *Town of Brookhaven*, *supra*, note 53; *County of Erie*, *supra*, note 61; *Board of Educ of the City Sch Dist of the City of New York*, *supra*, note 53. See also, D(4) *infra*.

⁶⁷ 31 PERB ¶13034 (1998).

⁶⁸ *Id.* at 3076.

performed by unit personnel.⁶⁹ At the same time, under this theory only the unilateral reassignment of the core component of exclusive unit work to nonunit employees can constitute a violation of §209-a.1(d) of the Act.⁷⁰

D(3). The Positions of *Amici Curiae*

In response to the Board's solicitation for *amicus curiae* briefs focused on the concept of discernible boundary, we received five *amicus* briefs. Each brief, along with the responding briefs from the Association and District, has substantially enhanced our deliberations in examining the Board's precedent in the context of the present case.

One *amicus* urges the Board to abandon the concept of discernible boundary to determine unit work and exclusivity on the grounds that: a) it is inconsistent with the public policy underlying the Act favoring collective negotiations aimed at promoting harmonious and cooperative public sector labor relations; b) it allegedly destabilizes labor relations because it encourages employers to seek to erode bargaining unit exclusivity; c) it results in the diminution of organizational and representational rights; d) it undermines the certification of bargaining units; e) it encourages the filing of improper practice charges; and f) it is in conflict with contract reversion and waiver principles.

In its place, this *amicus* suggests that the Board create a presumption premised on a certification and/or recognition clause that all work performed by persons in titles contained in a Board certification or a recognition clause constitutes exclusive bargaining unit work. The proposed presumption would be subject to an employer defense demonstrating that the employee organization voluntarily and knowingly waived

⁶⁹ *Port Jefferson Union Free Sch Dist*, 35 PERB ¶3041 (2002).

⁷⁰ *County of Rockland and Rockland County Sheriff*, 37 PERB ¶3032 (2004).

exclusivity. In the present case, it argues that because the title of “driver” is contained in the certification and the recognition clause, all District pupil transportation constitutes exclusive bargaining unit work of the Association. To the extent that the District has utilized private contractors to provide transportation services, the Association retained the privilege to revert to the provisions of the recognition clause.

A second *amicus* urges the adoption of what it describes as a “bright line” test for determining what constitutes a discernible boundary. Under this proposed test, the Board would apply the standard for an enforceable past practice reaffirmed in *Chenango Forks Central School District* (hereinafter *Chenango*).⁷¹ Under the proposed “bright line” test, the requirement that a reasonable relationship exist between a discernible boundary and job duties would be eliminated. It claims that the reasonable relationship rule is too vague to be administered consistently. However, it urges the retention of the rule that an employer’s incidental or infrequent use of nonunit personnel does not pierce a discernible boundary because such use does not meet the necessary standards for an enforceable past practice. With respect to the present case, it contends that under its proposed test the ALJ properly found a discernible boundary around the work that had been exclusively performed by the Association.

Another *amicus* encourages the Board to apply a test limited to: a) core component analysis focusing on what is intrinsic to the at-issue work; and b) a determination whether the proposed discernible boundary is reasonably related to the basic job duties of unit members. In support of the test, it cites to *Board of Education of the City School District of the City of New York*⁷² and other cases that have applied

⁷¹ *Supra*, note 51.

⁷² *Supra*, note 53.

those standards in determining that a discernible boundary did not exist. For purposes of consistency under the Act, it encourages the Board to apply the same standards in the application of the discernible boundary concept without regard to the at-issue work.

A fourth *amicus* proposes a similar test that would limit the inquiry to an examination of whether nonunit personnel have performed the same work under similar working conditions as bargaining unit members. Under this test, a discernible boundary would not be found when the duties performed by nonunit personnel are reasonably related to the components of the work performed by the bargaining unit. It argues that recognition of discernible boundaries based on subcategories of unit work results in unnecessary improper practice charges, confusion and undue pressure on public employers. In addition, it contends that the Board's standards in transfer of unit work cases have created practical obstacles to public employers being able to privatize governmental services.

The fifth *amicus* does not propose a test under the Act for determining a discernible boundary. Instead, it contends that school districts should be granted broad discretion under the Act to privatize based on public policy arguments. In support of its argument, the *amicus* cites New York's statutory and regulatory procedures that must be followed by school districts when soliciting bids for contracts with private companies to provide pupil transportation services.

In response to the *amici* briefs, the Association urges the Board to apply the test proposed by the first *amicus* that would grant the Association a presumption of exclusivity based on the terms of the recognition clause that would be subject to a waiver defense by the District. The District, on the other hand, argues that the Board should apply a test for discernible boundary similar to the tests urged by the third and

fourth *amici* that would focus the inquiry on the core component of the at-issue work and then compare the actual duties performed by the Association's bargaining unit with the duties performed by the non-unit personnel under similar working conditions.

D(4). The Applicable Standard for Determining Discernible Boundary

The arguments by the parties and *amici* in the present case do not persuade us to abandon Board precedent that has applied a past practice analysis as the means for analyzing the related issues of unit work, discernible boundary and exclusivity.

A past practice analysis in transfer of unit work cases is consistent with the dynamics of the bilateral employer-employee organization relationship and the policies underlying the Act.⁷³ The enforcement of past practices in this area permits flexibility in the provision of governmental services without undermining the bargaining position of the employee organization or eliminating the respective duties of the parties to bargain under the Act. As a practical matter, job duties are rarely codified in negotiated agreements and the assignment of duties is a management prerogative as long as that work is within the inherent duties of the employee's position.⁷⁴ Enforcement of past practices in subcontracting cases encourages parties to seek agreement clarifying or memorializing practices and avoiding the filing of unnecessary improper practice charges challenging peripheral intrusions into global exclusivity.⁷⁵

When determining the scope of unit work and whether that work has been performed exclusively by the bargaining unit, we will examine whether an enforceable

⁷³ *City of Rochester, supra*, note 53.

⁷⁴ *MABSTOA, supra*, note 31.

⁷⁵ *Long Beach Cent Sch Dist*, 26 PERB ¶3065 (1993).

past practice exists by applying the test recently restated in *Chenango*.⁷⁶ It asks whether the “practice was unequivocal and was continued uninterrupted for a period of time under the circumstances to create a reasonable expectation among the affected unit employees that the [practice] would continue.”⁷⁷ This *prima facie* showing is subject to a defense raised by the employer demonstrating its lack of actual or constructive knowledge and, therefore, a lack of a bilateral acceptance of or acquiesce in the practice.⁷⁸ As in *Chenango*, however, constructive knowledge exists when the past practice is reasonably subject to the employer’s managerial and/or supervisory responsibilities and obligations.

The criteria articulated in earlier Board decisions provide clear guidance for determining the discernible boundary, if any, of a past practice in transfer of unit work cases: the nature and frequency of the work performed, the geographic location where the work is performed, the employer’s explicit or implicit rationale for the practice, and other facts establishing that the at-issue work has been treated as distinct from work performed by nonunit personnel.

Although we agree with the second *amicus* that the past practice standard should be applied in transfer of unit work cases, we do not agree that the reasonable relationship requirement, wherein the Board will examine the relationship between the proposed discernible boundary and the duties of the unit employees, should be abandoned. This test is directly relevant to a determination of whether unit employees had a reasonable expectation that the past practice would continue. Moreover, we

⁷⁶ *Supra*, note 51.

⁷⁷ Quoting *County of Nassau*, 24 PERB ¶3029 at 3058 (1991).

⁷⁸ *Supra*, note 51.

agree with the District and the two *amici* that the reasonable relationship requirement is necessary to discourage non-meritorious assertions of subcategories of work as constituting a discernible boundary.

A past practice analysis for determining discernible boundaries does not assure absolute predictability because past practice cases are inherently fact-specific. Thus, Board precedent in such cases may not always be dispositive.⁷⁹ Nevertheless, we believe that the standards articulated today are more consistent with the policies of the Act than those proposed by the *amici* and the parties.

The alternative standard urged by one *amicus* and the Association for the establishment of a rebuttable presumption of exclusivity premised on the titles in a certification or recognition clause is both impractical and inconsistent with the policies underlying the Act. Specific titles are not always set forth in a certification or recognition and the duties assigned to a particular title can vary from employer to employer. In situations where job titles are not listed in the certification or recognition clause, it would be difficult, if not impossible, to apply this proposed new standard.

A certification or recognition is the necessary prerequisite under §204 of the Act for the duty to bargain. Although job duties performed is one factor in determining uniting questions under §207.1 of the Act,⁸⁰ a certification or recognition commences, rather than eliminates, the duty to negotiate the mandatory subject of subcontracting; indeed, voluntary recognition is not a mandatory subject of bargaining.⁸¹ Upon

⁷⁹ *Hudson Cent Sch Dist*, *supra*, note 59; *State of New York (Butler Corr Fac)*, *supra*, note 59.

⁸⁰ See, *State of New York (Division of Parole)*, 40 PERB ¶3011 (2007).

⁸¹ *Village of Hudson Falls*, 14 PERB ¶3021 (1981); *Onondaga-Cortland-Madison BOCES*, 25 PERB ¶3044 (1992).

certification or recognition, the parties must, upon demand, negotiate a wide variety of subjects including a clause prohibiting the use of nonunit personnel to perform current unit work and a management rights clause that may waive the right to future bargaining on the subject.⁸²

We do not accept the argument that a discernible boundary analysis encourages employers to unilaterally subcontract because employee organizations have an allegedly difficult time protecting exclusivity. Past practices can enhance or diminish the rights of members of a bargaining unit. In order to be able to negotiate with the employer, process grievances and provide other representation to the bargaining unit, an employee organization has a strong incentive to remain cognizant of the work performed by the bargaining unit. The lack of actual knowledge by an employee organization of the work performed by the bargaining unit, as well as work assigned to nonunit personnel, can lead to the loss of exclusivity if constructive knowledge can be imputed to the organization based on the circumstances.⁸³ The necessary and relevant information is obtainable by the employee organization from the employer through reasonable information demands pursuant to §209-a.1(d) of the Act.⁸⁴

We also reject the proposed standard, urged by the District and the two *amici*, that the Board's analysis focus on the core components of the at-issue work and then determine whether the proposed discernible boundary is reasonably related to those

⁸² *Somers Faculty Assn*, *supra*, note 45; *City of Poughkeepsie*, 15 PERB ¶¶3045 (1982), *confirmed sub nom. City of Poughkeepsie v Newman*, 95 AD2d 101, 16 PERB 7021 (3d Dept 1983), *app dismissed*, 60 NY2d 859, 16 PERB ¶¶7027 (1983), *lv denied*, 62 NY2d 602, 17 PERB ¶¶7009 (1984); *County of Livingston*, 26 PERB ¶¶3074 (1993); *Garden City Union Free Sch Dist*, 27 PERB ¶¶3029 (1994); *City of Newburgh*, 30 PERB ¶¶3007 (1997).

⁸³ *State of New York (DMNA)*, *supra*, note 63.

⁸⁴ *Board of Educ of the City Sch Dist of the City of New York*, *supra*, note 53.

intrinsic duties. Adoption of this standard would constitute an unwarranted abandonment of the Board's past practice analysis as the essential test for determining whether a discernible boundary exists. Furthermore, it would constitute the adoption of an absolutist approach to exclusivity previously rejected in *City of Rochester*.⁸⁵ Fundamentally, the proposed standard would discourage negotiations and encourage unilateral employer actions in the area of transfer of unit work, results that are inconsistent with the policies of the Act.

Furthermore, we note that the phrase "core component" is a mere derivation of the rule that incidental use of nonunit personnel to perform tasks is insufficient to defeat exclusivity. Unfortunately, use of the phrase has caused confusion; moreover, it has not been applied uniformly in transfer of unit work cases. To the extent that the Board's use of the phrase in prior cases has suggested an abandonment of the application of past practice analysis in transfer of unit work cases, those cases are hereby overruled.⁸⁶

D(5). Application of the Standards to the Present Case

Based on the record in the present case, we conclude that an enforceable past practice exists establishing a discernible boundary around Association unit work that includes the transportation of public school students to and from the District's schools along with transportation for athletic and field events and summer school. In addition, the unit work includes the maintenance, repair and refueling of District buses and other District vehicles.

⁸⁵ *Supra*, note 53.

⁸⁶ We find no merit to the arguments by the fifth *amicus* premised on New York's statutory and regulatory procedures for the solicitation of bids by school districts for contracts with private companies to provide pupil transportation services.

In November 2001, the District made an explicit and unequivocal decision that public school students would be transported only by bargaining unit bus drivers. The District made the decision following complaints by public school parents about the quality of transportation services provided by a private contractor. Assistant Superintendent for Business Marchesello notified Chudd of the decision in an explicit directive of indefinite duration. Thereafter, Chudd announced the decision to the District drivers at a meeting in the bus garage.

In the four years following the policy pronouncement, there was a precipitous drop in the number of the District's public school students transported by private contractors to and from school. In 2000-01, private contractors transported 120 public school students and by 2004-05, private contractors drove only 10 out of the 2,156 District's public school students. The evidence reveals that the assignment to private contractors to transport the ten District students was premised on safety and other specific needs.

The record establishes that after 2000-01, the District also decreased the number of runs assigned to private contractors. The voluminous documentary evidence establishes that in the school years subsequent to 2000-01, the District maintained a consistent pattern of assigning private contractors to the same identical five runs for the transportation of parochial, private and special education students. During those same school years, bargaining unit drivers were assigned over 65 runs for the transport of all but a *de minimis* number of public school students.

The District's expressed policy and rationale for assigning unit drivers to drive District students, the nature and frequency of the District's assignment of unit drivers to runs transporting public school students and the segregation of the five particular runs

to be driven by private contractors constitutes more than sufficient evidence to demonstrate that the District treated daily public school transportation distinct from transporting parochial, private and special education students.

The record demonstrates the existence of an enforceable past practice of unit drivers being assigned by the District to runs transporting public school students with exclusivity not being affected by *de minimis* exceptions. The enforceable past practice also includes the District assigning unit drivers to transport summer school students as well as assigning unit drivers to athletic and field trips. Finally, the evidence establishes that the maintenance and repair work on District vehicles is performed exclusively by bargaining unit members with the exception of work subject to a manufacturer's warranty.

This practice began in November, 2001 and continued uninterrupted until July 1, 2005. The practice was clear and unequivocal and was implemented under circumstances that created a reasonable expectation among unit employees that the practice would continue. Specifically, Chudd's announcement to the unit bus drivers of the District's new policy, along with its implementation thereafter, furnished unit employees with a reasonable expectation that the practice of assigning them exclusively to drive public school students would continue.⁸⁷

We reject the District's contention that the discernible boundary found by the ALJ has no reasonable relationship to the duties assigned unit employees. The derivation of this practice from a District policy decision renders this argument without merit. Moreover, the District's practical and functional need to satisfy a major constituency,

⁸⁷ A different outcome in this case may have resulted if the record had not included evidence of an explicit District policy decision followed by a practice consistent with that policy.

public school parents, through transportation services subject to the District's daily direct supervision underscores the reasonable relationship between the discernible boundary and the unit work. The District's policy decision and practice was a reasonable reaction to the parental complaints.

The overt nature of the District's policy and the statistics offered to the public at the October 2004 meeting lead us to conclude that the District had actual knowledge of the practice. Alternatively, we conclude that the District had constructive knowledge based on the Superintendent of School's annual review of the routes and runs developed by Chudd along with the District's supervisory responsibilities and obligations over pupil transportation and safety.

In its exceptions, the District relies upon *Indian River*⁸⁸ in contending that the ALJ erred in finding a discernible boundary. We disagree. The facts underlying the past practice in the present case are significantly different from those examined in *Indian River*. Unlike *Indian River*, the District in this case made a deliberate policy decision, following parental complaints, to draw a clear distinction between the transporting of public school students and the transporting of other students. In further contrast to *Indian River*, the District, following its decision, decreased the number of runs assigned to private contractors along with the number of public school students transported by private contractors. In addition, it set aside five specific runs to be assigned to private contractors. Therefore, the practice in the present case does not include the type of wholesale commingling of unit and private drivers as in *Indian River*.

Further, the percentage of transportation services provided by private contractors in the present case is well below the 33% in *Indian River*. Here, in 2004-05, private

⁸⁸ *Supra*, note 56.

contractors were assigned less than 9% of the total number of bus runs and less than 1% of the District's public school students transported. In contrast, private contractors transported 75% of the District's 523 private school and parochial school students and all 55 special education students.

The District argues that its legal obligation to provide certain transportation services for private and parochial students renders the discernible boundary found by the ALJ irrational.⁸⁹ This obligation does not prohibit the District from establishing, as in the present case, a distinct means of providing transportation services to those students.

Finally, we reject the District's exceptions challenging the ALJ's conclusion that the Association had exclusivity over the unit work. A comparison of District statistics with respect to the use of unit and nonunit personnel to perform the unit work establishes that the transportation of District students by private contractors has been limited and incidental. The unique circumstances that led the District to have ten public students transported by private contractors to and from school in the three years prior to July 2005 are fully set forth in the ALJ's decision and fully supported by the record. Similarly, we conclude that the small number of times that a private contractor was assigned to transport District students to and from field and athletic trips, in comparison to the number of such trips by unit members, renders the use of such nonunit personnel incidental. We reach the same conclusion with respect to the use of nonunit personnel to make repairs to District equipment based on a warranty.

Based on the foregoing, we deny the District's exceptions and affirm the decision of the ALJ.

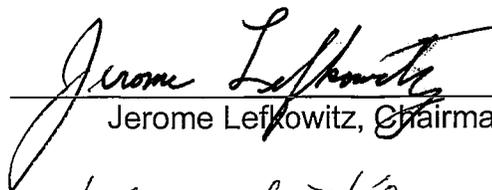
⁸⁹ See, Educ Law §§2853, 3635.

The Board, therefore, finds that the District violated §209-a.1(d) of the Act when it unilaterally subcontracted work performed exclusively by employees in the unit represented by the Association.

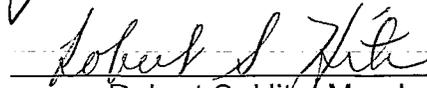
IT IS THEREFORE, ORDERED that the District:

1. Cease and desist from unilaterally transferring to nonunit employees the work of employees in the bargaining unit represented by the Association consisting of the transporting of students from home to public school, to athletic and field events, and summer school, and the providing of maintenance and repair for District equipment;
2. Make Association unit employees whole for wages and benefits with interest at the maximum legal rate, if any, lost as a result of its unilateral transfer to nonunit employees of the work of transporting students to and from public school, to athletic and field events, and summer school, and the providing of maintenance and repair for District equipment;
3. Sign and post a notice in the form attached at all locations normally used for communications to employees in the bargaining unit.

DATED: April 3, 2008
Albany, New York



Jerome Lefkowitz, Chairman



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 Manhasset Union Free School District in the unit represented by the Manhasset Educational Support Personnel Association, NYSUT, AFT, AFL-CIO, that the Manhasset Union Free School District:

1. Refrain from unilaterally transferring to nonunit employees the work of employees in the bargaining unit represented by the Association consisting of the transporting of students from home to public school, to athletic and field events, and summer school, and the providing of maintenance and repair for District equipment;
2. Make Association unit employees whole for wages and benefits with interest at the maximum legal rate, if any, lost as a result of its unilateral transfer to nonunit employees of the work of transporting students to and from public school, to athletic and field events, and summer school, and the providing of maintenance and repair for District equipment.

Dated

By
(Representative) (Title)

.....

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

ANTONIO JENKINS,

Charging Party,

- and -

CASE NO. U-26822

**UNITED FEDERATION OF TEACHERS, LOCAL 2,
AFT, AFL-CIO AND BOARD OF EDUCATION OF
THE CITY SCHOOL DISTRICT OF THE CITY OF
NEW YORK,**

Respondents.

ANTONIO JENKINS, *pro se*

**JAMES R. SANDNER, GENERAL COUNSEL (ANTONIO M. CAVALLARO
of counsel), for Respondent United Federation of Teachers**

**ROBERT E. WATERS, ESQ. (KAREN SOLIMANDO of counsel), for
Respondent Board of Education of the City School District of the City
of New York**

BOARD DECISION AND ORDER

This case comes to the Board on exceptions filed by Antonio Jenkins (Jenkins) to a decision of an Administrative Law Judge (ALJ) dismissing an improper practice charge alleging that the Board of Education of the City School District of the City of New York (District) violated §§209-a.1(a) and (c) of the Public Employees' Fair Employment Act (Act) and that the United Federation of Teachers, Local 2, AFT, AFL-CIO (UFT) violated §§209-a.2(a) and (c) of the Act. Jenkins alleges that the District retaliated against him for pursuing various contract grievances and that UFT breached its duty of

fair representation in the handling of his grievances.¹

The District and UFT filed answers to the charge, denying that they violated the Act and raising various affirmative defenses.

A hearing was held before the ALJ on October 19, 2006 and January 22, 2007. On August 14, 2007, the ALJ issued a decision dismissing the charge. As to the District, the ALJ concluded that Jenkins had failed to present sufficient evidence establishing a *prima facie* case of unlawful motivation by the District. In the alternative, the ALJ concluded that Jenkins had failed to demonstrate that the District's legitimate non-discriminatory justifications for its conduct were pretextual. With respect to UFT, the ALJ concluded that Jenkins had failed to demonstrate that UFT's conduct regarding its handling of his grievances was arbitrary, discriminatory or in bad faith.

EXCEPTIONS

In his exceptions, Jenkins challenges the dismissal of his charge against the District for allegedly violating §§209-a.1(a) and (c) of the Act on the grounds that the ALJ erred in: a) concluding that Jenkins failed to establish a *prima facie* case of unlawful motivation; b) concluding that Jenkins failed to rebut the District's evidence regarding the non-discriminatory reasons for its conduct; c) crediting the testimony of Principal Daryle A. Young (Young) regarding the District's motivation and crediting her testimony over Jenkins' testimony to resolve conflicting recollections over what transpired during meetings on June 2, 2006 and June 28, 2006; d) failing to find a violation of §§209-a.1(a) and (c) of the Act when the District did not permit UFT representation during the

¹ In *Board of Educ of the City Sch Dist of the City of New York (Jenkins)*, 38 PERB ¶3012 (2005), the Board denied prior exceptions filed by Jenkins challenging the dismissal by the Director of Public Employment Practices and Representation of his earlier and related improper practice charge against the District and the UFT.

June 28, 2006 meeting; e) denying him the opportunity to conduct discovery; and f) making various evidentiary rulings along with the general conduct of the hearing.

In his exceptions to the ALJ's dismissal of his charge against the UFT, Jenkins asserts that the ALJ erred in failing to find a violation of §§209-a.2(a) and (c) of the Act based on: a) UFT's alleged "forging" of his signature on a grievance; b) UFT's presentation of his grievance before an arbitrator; and c) UFT's failure to grant him a third step hearing regarding a subsequent grievance.

Neither the District nor UFT filed a response to the exceptions.

Based upon our review of the record and our consideration of the exceptions and application of relevant precedent, we reverse the ALJ's conclusion that Jenkins failed to establish a *prima facie* case against the District but affirm the ALJ's dismissal of the charge against the District and UFT.

FACTS

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

For over ten years, Jenkins has been a teacher at Public School (PS) 194 which is located in northern Manhattan. During the 2004-05 school year, Michael Brown, the then principal of PS 194, denied an application by Jenkins for a music cluster teaching position on the ground that he lacked the necessary certification from the New York State Education Department.

In September 2004, Jenkins filed a grievance challenging the denial of the music teacher position, citing certain provisions in the collectively negotiated UFT-District

² 40 PERB ¶4565 (2007).

agreement (agreement) including §17(c).³ Shortly thereafter, a UFT representative redrafted, signed Jenkins' name on his behalf and processed the grievance. At the Step 2 grievance hearing on September 28, 2004, the UFT representative advocated on behalf of Jenkins, citing various provisions of the agreement including §17(c). After the District denied the grievance, UFT continued to process the grievance through the contractual grievance procedure to and including arbitration.

In September 2005, Principal Young was appointed as the new principal for PS 194. At the time, the District had designated the school as a "school in need of improvement" due to its prior ineffectual administration and poor student performance.

At the commencement of the 2005-06 school year, Jenkins was assigned to teach a fifth grade class. On or about September 15, 2005, Jenkins filed a grievance alleging that he should have been assigned to be a music teacher instead of a fifth grade teacher. UFT processed the grievance and advocated on his behalf at the first and second steps of the grievance procedure. The District denied the grievance on the grounds that Jenkins had not applied for the position, lacked the necessary certification and the successful candidate for the position had the proper certification.⁴

In a letter, dated December 6, 2005, UFT's Manhattan Borough Representative

³ Section 17(c) of the agreement states:

Appointment to New Program, License or Title

Teachers who are displaced by the establishment of a new program, license or title shall be given an opportunity to present their qualifications and if found qualified shall be given preference for appointment to such new program, license or title.

⁴ Although UFT advised Jenkins during the processing of his 2004 grievance that he was not qualified for the music teacher position due to his lack of the required certification, Jenkins did not take the necessary steps to obtain the certification.

informed Jenkins that UFT would not be processing his September 2005 grievance to the third step of the grievance procedure due to a lack of sufficient merit. Thereafter, Jenkins filed internal appeals with UFT challenging the decision not to further process his grievance. The internal appeals were ultimately denied by UFT based on its determination that the grievance lacked merit.

On February 9, 2006, UFT represented Jenkins at the arbitration with respect to his September 2004 grievance. During the arbitration, the arbitrator refused to consider arguments made by UFT and Jenkins premised on §17(c) of the agreement. On February 13, 2006, the arbitrator issued an award denying the grievance.

On March 6, April 3, and May 1, 2006, Young distributed to the entire PS 194 faculty information about the District's Open Market Transfer System (OMTS).⁵ In addition, Young discussed OMTS at various faculty meetings during the same period, advising teachers that if they were dissatisfied with the school they should consider seeking a transfer.

During the course of the 2005-06 school year, Jenkins was reassigned from the fifth grade class to duties in the school library and was also assigned to provide classroom coverage for absent teachers. The reassignment was precipitated by numerous administrative observations resulting in a determination that Jenkins had difficulties with classroom management of the fifth grade class and that he was not following the relevant curriculum.

Toward the end of the 2005-06 school year, Jenkins was temporarily reassigned to cover a special education class due to an emergency. Prior to the reassignment, the

⁵ OMTS permits teachers to file on-line transfer applications for region and city wide vacancies.

District's Committee on Special Education granted Young permission to reassign Jenkins to the special education class even though he lacked the necessary certification. According to Young, she had been granted permission to implement the reassignment because it was temporary, at the end of the school year, and Jenkins had special education teaching credits.

~~On or about May 17, 2006, Jenkins filed two grievances with respect to his~~ reassignment to the special education class. The first grievance challenged the assignment on the ground that he lacked the necessary certification to teach special education, and the second challenged the District's failure to suspend a student for allegedly punching Jenkins in the chest.

On June 2, 2006, Young conducted a first step meeting with Jenkins and his UFT representative, Michelle Hogan (hereinafter, Hogan), with respect to the 2006 grievances. During the meeting, Jenkins argued that because he had been previously denied the music teacher assignments based on a lack of the necessary certification, he should not have been assigned to the special education class for the same reason. In response, Young explained that a properly certified music teacher had been selected over Jenkins and that if he wanted to teach music he should consider applying for a music teacher vacancy at another school through OMTS. In addition, Young informed Jenkins that the District had granted her specific permission to reassign him temporarily under the circumstances despite his lack of a special education certification. Finally, Young stated that while Jenkins had been assigned to the library he had not actively engaged the students.

With respect to his second grievance, Young advised Jenkins that his accusation about being hit by a special education student had been the subject of an investigation that included interviews with the student, his mother and other students in the class. In addition, Young reminded Jenkins that he had failed to prepare the requested documentation about the incident prior to filing his grievance. Jenkins was informed by Young that, as a result of the investigation, a decision was made not to suspend the student because it was highly unusual for the student to engage in such behavior; however, the student's parents would be speaking with the student's therapist.

It is undisputed that, during the June 2, 2006 grievance meeting, Young raised with Jenkins certain deficiencies she found in his classroom management and instruction during the 2005-06 school year. She stated that he needed to be more engaged with the students and advised him that if his job performance did not improve in the next school year he faced the possibility of an unsatisfactory evaluation. She also reiterated that he had the right to seek a transfer through OMTS if he was dissatisfied with his assignments.

Jenkins claims that during the June 2, 2006 meeting, Young engaged in a long tirade, threatening him with an unsatisfactory evaluation and discipline if he did not transfer to another school. In addition, he alleges that Young ordered him to stop filing grievances. Young denied making any such threats or ordering him to discontinue filing grievances. While testifying as a rebuttal witness for Jenkins, UFT representative Hogan stated that during the meeting Young did not threaten Jenkins with discipline, but, rather, reaffirmed his right to file grievances. Hogan also testified that the meeting was

conducted in a professional manner.

On June 28, 2006, Jenkins attended a meeting with Young and other school administrators to discuss his annual written performance evaluation.⁶ During the meeting, Young gave Jenkins his annual evaluation which rated his performance as satisfactory. She discussed with him certain deficiencies in his job performance during the school year. During the meeting Jenkins declined Young's request to provide a self-evaluation of his job performance. Instead, Jenkins reiterated his desire to be a music teacher at the school despite his continuing lack of proper certification. Young informed Jenkins that the music program at the school was being eliminated for the 2006-07 school year and reiterated that if he wanted to teach music or was dissatisfied with the school, he should consider a transfer through OMTS.

Jenkins alleges that during the June 28, 2006 meeting, he was verbally abused, denied union representation and threatened with discipline and an unsatisfactory evaluation if he did not transfer to another school. Young denied that Jenkins was verbally abused or threatened in any manner during the meeting. In response to Jenkins' inquiry, Young informed him that a UFT representative was not present at the meeting because the purpose of the meeting was to review his annual evaluation.

DISCUSSION

It is well-established that a charging party in an improper practice charge alleging unlawfully motivated interference or discrimination in violation of §§209-a.1(a) and (c) of the Act has the burden of proof to demonstrate by a preponderance of evidence that: a) the affected individual engaged in protected activity under the Act; b) such activity was

⁶ It is undisputed that Young met with other teachers that year who were also experiencing difficulties in the classroom or who were receiving an unsatisfactory evaluation.

known to the person or persons taking the employment action; and c) the employment action would not have been taken "but for" the protected activity.⁷

Certain forms of employer conduct which, if proven by a preponderance of the evidence, can constitute a *per se* violation of §209-a.1(a) of the Act and, therefore, do not require the charging party to present proof of unlawful motivation.⁸ Most violations of §§209-a.1(a) and (c), however, require proof of an employer's unlawful motivation that can be proven through direct evidence such as oral statements, memoranda or email, or by means of circumstantial evidence.⁹

Direct evidence is "evidence tending to show, without resort to inference, the existence of a fact in question."¹⁰ When a charging party introduces direct evidence of unlawful discriminatory motivation, the burden then shifts to the respondent to establish by a preponderance of the evidence that the protected activity under the Act was not a motivating factor in the employment action.

Unlawful motivation "is rarely so obvious or its practices so overt" because it is

⁷ *City of Salamanca*, 18 PERB ¶3012 (1985); *Town of Independence*, 23 PERB ¶3020 (1990); *County of Orleans*, 25 PERB ¶3010 (1992); *Stockbridge Valley Cent Sch Dist*, 26 PERB ¶3007 (2000); *County of Wyoming*, 34 PERB ¶3042 (2001).

⁸ See, *State of New York*, 10 PERB ¶3108 (1977); cf. *Greenburgh #11 Union Free Sch Dist*, 33 PERB ¶3018 (2000).

⁹ *Town of Hempstead*, 19 PERB ¶3022 (1986); *Town of Independence*, *supra*, note 7; *Vil of New Paltz*, 25 PERB ¶3032 (1992); *Hudson Valley Community Coll*, 25 PERB ¶3039 (1992); *County of Nassau*, 35 PERB ¶3045 (2002), *confirmed sub nom. CSEA v New York State Pub Empl Rel Bd*, 2 AD3d 1197, 36 PERB ¶7019 (3d Dept 2003).

¹⁰ *Tyler v Bethlehem Steel Corp*, 958 F2d 1176, 1183 (2d Cir 1992).

"accomplished usually by devious and subtle means."¹¹ More commonly, unlawful motivation is demonstrated through circumstantial evidence that may include disparity of treatment toward the affected individual, the timing and context of the employment action or decision, the resurrection of disciplinary allegations, or the pretextual rationale given to the individual or the employee organization for the employment action or decision.¹² In some cases, circumstantial evidence can be more persuasive than direct evidence in establishing unlawful motivation.¹³

At minimum, the circumstantial evidence necessary to prove a *prima facie* case must be sufficient to give rise to an inference that unlawfully motivated interference or discrimination was a factor in the employer's conduct. This relatively low initial evidentiary threshold for establishing a *prima facie* case in circumstantial evidence cases is necessitated by the principles underlying §§209-a.1(a) and (c) of the Act along with the lack of discovery and the pleading requirements under our Rules of Procedure (Rules).¹⁴ Although the timing and the context of events alone in a circumstantial evidence case may not be sufficient to meet a charging party's ultimate burden of proof, the timing and context of an employer's conduct may be sufficient to establish an inference of improper motivation, thereby shifting the burden of persuasion to the respondent to come forward with evidence demonstrating a non-discriminatory basis for

¹¹ *300 Gramatan Ave Assoc v State Div of Human Rights*, 45 NY2d 176, 183 (1978).

¹² *County of Cattaraugus and Sheriff of Cattaraugus County*, 24 PERB ¶3001 (1991); *Hudson Valley Community Coll*, *supra*, note 9; *County of Wyoming*, *supra*, note 7; *County of Orleans*, *supra*, note 7; *Catskill Regional OTB*, 28 PERB ¶3002 (1995).

¹³ See, *Desert Palace, Inc v Costa*, 539 US 90, 100 (2003).

¹⁴ *State of New York (SUNY at Oswego)*, 34 PERB ¶3017 (2001).

the alleged conduct.¹⁵ To the extent the Board's decision in *Roswell Park Cancer Institute*¹⁶ suggests otherwise, it is hereby overruled.

If a charging party establishes an inference of unlawful motivation through circumstantial evidence, the burden of persuasion shifts to the respondent to rebut the inference by presenting evidence demonstrating that the employment action or conduct was motivated by a legitimate non-discriminatory business reason.¹⁷ If the respondent establishes a legitimate non-discriminatory reason, then the burden shifts back to the charging party to establish that the articulated non-discriminatory reason is pretextual.¹⁸ At all times, however, the burden of proof rests with the charging party to establish the requisite causation under the Act by a preponderance of evidence.

In this case, Jenkins has clearly satisfied the first two requirements for establishing a violation of §§209-a.1(a) and (c) of the Act. It is uncontroverted that Jenkins engaged in protected activity by filing contract grievances in September 2004, September 2005 and May 2006. It is also uncontroverted that Young had knowledge of Jenkins' grievance activities.

With respect to the third requirement for establishing a violation of §§209-a.1(a) and (c) of the Act, Jenkins must establish, by a preponderance of the evidence, that the District took an improper employment action and that the District would not have taken such action but for Jenkins having engaged in the

¹⁵ *Board of Educ of the City Sch Dist of the City of New York*, 35 PERB ¶¶3002 (2002).

¹⁶ 34 PERB ¶¶3040 (2001).

¹⁷ *State of New York (SUNY at Buffalo)*, 33 PERB ¶¶3020 (2000).

¹⁸ *Supra*, notes 7, 8, 11 and 14.

protected activity.

An improper employment action under the Act can include a termination, demotion, involuntary transfer, reassignment, reprimand, denial of a promotion, or denial of pay or benefits. It can also include explicit or implied threats of retaliatory action for engaging in protected activity.

Based upon our reading of the record, it would appear that Jenkins contends that the following alleged District conduct constitutes violations of §§209-a.1(a) and (c): 1) abusive and threatening statements made by Young during the June 2, 2006 grievance meeting; 2) Young's discussion of deficiencies in Jenkins' job performance during the June 2, 2006 meeting; 3) Young's holding the June 28 meeting to discuss Jenkins' year-end performance evaluation; 4) abusive and threatening statements made by Young during the June 28, 2006 meeting; 5) the lack of union representation during the June 28, 2006 meeting; and 6) statements made by Young during the June 2 and 28 meetings regarding Jenkins' transfer opportunities.

Jenkins testified that at the June 2, 2006 grievance meeting, Young ordered him to stop filing grievances, encouraged him to transfer to another school through OMTS and threatened him with a negative evaluation and discipline if he did not transfer. If Jenkins established, by a preponderance of the evidence, that during the meeting Young ordered him to stop filing grievances, it would constitute a *per se* violation of §209-a.1(a) of the Act. It would also constitute direct evidence of unlawful motivation regarding Young's other alleged conduct during the meeting.

However, the testimony of Young and Hogan directly contradicts Jenkins' allegation that he was ordered to stop filing grievances and threatened with a negative

evaluation and discipline at the June 2, 2006 meeting. After hearing the testimony of Jenkins, Young and Hogan about the June 2, 2006 meeting, the ALJ concluded that Young did not order Jenkins to stop filing grievances and did not otherwise verbally abuse or explicitly threaten Jenkins. This conclusion is premised, in part, on a credibility determination based on the demeanor of the witnesses. The ALJ concluded that Young's testimony, denying that she ordered him to stop filing grievances or otherwise verbally abused or threatened Jenkins, is more credible than Jenkins' inconsistent and confused testimony. The ALJ's credibility determination is bolstered by Hogan's testimony.

We find no basis in the record to disturb these ALJ credibility conclusions. An ALJ's credibility determination resolving a conflict in testimony based on the demeanor of witnesses is entitled to substantial deference and great weight unless there is objective evidence in the record compelling a conclusion that the credibility finding is manifestly incorrect.¹⁹

Therefore, we conclude that Jenkins failed to establish a *per se* violation of the Act or present direct evidence of unlawful motivation with respect to Young's conduct during the June 2, 2006 meeting.²⁰

Jenkins testified that during the June 28, 2006 meeting, he was verbally abused and threatened with discipline and an unsatisfactory evaluation if he did not transfer to

¹⁹ *City of Rochester*, 23 PERB ¶3049 (1990); *Captain's Endowment Assn*, 10 PERB ¶3034 (1977); see also, *Hempstead Housing Auth*, 12 PERB ¶3054 (1979).

²⁰ Based on our conclusion, we do not need to reexamine in the present case the legal question whether the presumption of unlawful motivation in a *per se* violation case is irrebuttable or rebuttable. See, *State of New York, supra*, note 8; *Greenburgh #11 Union Free Sch Dist, supra*, note 8.

another school; however, Young denied that Jenkins was verbally abused or threatened in any manner during the meeting. As with the testimony regarding the June 2, 2006 meeting, the ALJ found Young's testimony to be credible and concluded that Jenkins was not verbally abused or explicitly threatened during the June 28, 2006 meeting. We again find no basis in the record to disturb the ALJ's credibility conclusions. Therefore, we conclude that Jenkins has failed to establish, by a preponderance of the evidence, that Young verbally abused or explicitly threatened him during the June 28, 2006 meeting.

In his exceptions, Jenkins asserts, among other things, that the ALJ erred in finding that he failed to present sufficient evidence relating to causation to establish a *prima facie* case of unlawful motivation against the District. We grant Jenkins' exceptions, in part.

It is undisputed that Young made negative comments about Jenkins' job performance and statements about his transfer opportunities during the grievance meeting and reiterated his transfer opportunities during the June 28, 2006 meeting. Based on the timing, content and context of these statements, we conclude they constitute a bare minimum of circumstantial evidence sufficient to shift the burden of persuasion to the District to come forward with evidence demonstrating a legitimate non-discriminatory reason for the statements.

The purpose of the June 2, 2006 meeting was to discuss Jenkins' May 17, 2006 grievances, neither of which dealt with his job performance, evaluation or transfer opportunities. On their face, and in the context of the grievance meeting, Young's statements can be construed as constituting an implicit threat of retaliation for Jenkins'

grievance activities. Similarly, Young's conduct at the June 28, 2006 meeting, under the totality of the circumstances, suggests that the meeting, along with Young's comments relating to Jenkins' transferring, may have been unlawfully motivated in violation of the Act.

Therefore, we reverse the ALJ to the extent that she found that Jenkins did not present sufficient evidence to establish an inference of unlawful motivation thereby shifting the burden of persuasion to the District to present non-discriminatory reasons for Young's admitted statements during the two meetings.

We reject, however, Jenkins' exceptions challenging the ALJ's conclusion that the District had met its burden of persuasion refuting the inference of unlawful motivation established by Jenkins' testimony.

The ALJ concluded that Young's testimony about her comments and conduct during the meetings was more credible than Jenkins' testimony. As noted, the ALJ's credibility resolution is entitled to substantial deference and great weight and we find nothing in the present record to disturb those findings.

The record supports the ALJ's conclusion that Young's comments about Jenkins' job performance during the grievance meeting were not unlawfully motivated. In response to Jenkins' grievances challenging his reassignment to the special education class and alleging that he had been hit by a student, Young discussed the performance problems Jenkins had in his prior assignments that school year including problems with classroom management. Her comments were made in the context of explaining the rationale for his recent temporary reassignment that was the subject of the grievance. In addition, Young informed Jenkins of the steps that had been taken to investigate his

allegation of being hit, reminded him that he had failed to file a written report as requested and stated that it was highly unusual for this particular student to engage in such conduct.

The record further supports the ALJ's conclusion that Young's discussion with Jenkins of transfer opportunities during the grievance meeting was not unlawfully motivated. The comments were responsive to Jenkins continued desire for a music assignment rather than a special education assignment. Young had already distributed information about transferring to the school's entire faculty encouraging dissatisfied teachers to seek a transfer.

Furthermore, Young's meeting with Jenkins about his annual evaluation did not constitute disparate treatment. Young met with other teachers whose work performance needed improvement or who received an unsatisfactory evaluation that school year. The fact that Jenkins received a satisfactory annual evaluation during the meeting fully supports the conclusion that Young's comments about the potential for future negative consequences if his job performance did not improve was advisory in nature and not motivated by unlawful animus. Finally, Young's comments during the meeting about transferring were motivated by the scheduled expiration of that transfer opportunity in August 2006.

It is uncontroverted that Jenkins did not receive union representation during the June 28, 2006 meeting. However, contrary to his exceptions, Jenkins did not have a right under the Act to union representation during the June 28, 2006 meeting to discuss his evaluation. In *New York City Transit Authority v New York State Public Employment*

Relations Board,²¹ the Court held that the Act did not grant public employees a statutory right to union representation even during a disciplinary interrogation. Moreover, the recent amendment to the Act, adding §209-a.1(g), is not retroactive.²² Consequently, the District's refusal to permit union representation during the June 28, 2006 meeting, even if true, would not constitute a violation of §§209-a.1(a) and (c) of the Act.

We find that the remaining exceptions regarding the dismissal of the charge against the District to be similarly without merit. Under the Rules, parties are not entitled to conduct pre-hearing discovery. In addition, the record demonstrates that there is no basis for overturning the ALJ's evidentiary rulings or reversing the ALJ's decision based on the general conduct of the hearing.

We deny Jenkins' exceptions challenging the dismissal of the charge against UFT. It is well-settled that in order to establish a duty of fair representation charge against an employee organization under the Act, a charging party must demonstrate that the employee organization engaged in arbitrary, discriminatory or bad faith conduct.²³

We agree with the ALJ's conclusion that UFT did not handle Jenkins' grievances in an arbitrary, discriminatory or bad faith manner. The Board will not substitute its judgment for that of an employee organization regarding the filing and prosecution of grievances, since the employee organization is entitled to a wide range of reasonable

²¹ 8 NY3d 226, 40 PERB ¶7001 (2007).

²² L 2007, ch 244.

²³ *TWU Local 100 (Brockington)*, 37 PERB ¶3002 (2004); *AFSCME Council 66, Local 3933 (Altieri)*, 39 PERB ¶3015 (2006).

discretion in this regard under the Act.²⁴

The fact that a UFT representative redrafted and signed Jenkins' name to the grievances on his behalf, before processing it, is insufficient to establish a violation of the Act. In fact, UFT processed that grievance and advocated on Jenkins' behalf to and including arbitration. Jenkins' dissatisfaction with the arbitrator's rulings and award does not demonstrate that UFT violated its duty under the Act.

Finally, Jenkins failed to demonstrate that the refusal of UFT to continue to process his second grievance regarding the music assignment was arbitrary, discriminatory or in bad faith. The record establishes that UFT's final decision was based on UFT's conclusion that the grievance's lack of merit, following UFT's consideration of Jenkins' internal appeals, and came after the unsuccessful arbitration award denying Jenkins' first grievance relating to the music assignment.

Based on the foregoing, we grant Jenkins' exceptions to the limited extent that he presented sufficient circumstantial evidence to establish an inference of unlawful animus by the District but affirm the ALJ's decision to dismiss the charge in all other respects.

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

DATED: April 3, 2008
Albany, New York


Jerome Lefkowitz, Chairman


Robert S. Hite, Member

²⁴ See, *District Council 37, AFSCME (Gonzalez)*, 28 PERB ¶3062 (1995).

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

In the Matter of

**SULLIVAN COUNTY PATROLMAN'S BENEVOLENT
ASSOCIATION, INC.,**

Charging Party,

CASE NO. U-26725

- and -

**COUNTY OF SULLIVAN and SULLIVAN COUNTY
SHERIFF,**

Respondent.

JOHN M. CROTTY, ESQ., for Charging Party

**ROEMER WALLENS & MINEAUX, LLP (DIONNE A. WHEATLEY of counsel),
for Respondent**

BOARD DECISION AND ORDER

This case comes to the Board on exceptions filed by the County of Sullivan and Sullivan County Sheriff (County) to a decision of an Administrative Law Judge (ALJ) on an improper practice charge filed by the Sullivan County Patrolman's Benevolent Association, Inc. (PBA), finding that the County violated §§209-a.1(d) and (e) of the Public Employees' Fair Employment Act (Act). The ALJ found that the County violated §209-a.1(d) of the Act by unilaterally implementing a system for the recovery of leave accruals and holiday pay which unit employee, Deputy Sheriff Amanda Cox (Cox), allegedly owed to the County. Further, the ALJ found that the County violated §§209-a.1(d) and (e) when it deducted 6.67 hours of vacation leave, 8 hours of sick leave and

24 hours of personal leave from Cox's leave accruals. The ALJ dismissed the alleged violations of §§209-a.1(a) and (c) concluding that the PBA had not established that the County was improperly motivated under the Act.¹ Finally, the ALJ declined to defer the charge to the parties' contractual grievance procedure, although there was a grievance pending that had been filed by the PBA on behalf of Cox.

EXCEPTIONS

The County argues in its exceptions that the ALJ erred in finding that the County violated §§209-a.1(d) and (e) of the Act when it concluded that Cox was on General Municipal Law (GML) §207-c leave continuously from December 17, 2004 through January 24, 2005, and by, thereafter, deducting sick, vacation, and personal leave accruals and requesting reimbursement for holiday pay. The PBA supports the ALJ's decision.

Following receipt of the County's exceptions limited to the alleged violations of §§209-a.1(d) and (e) of the Act, the Board requested that the parties submit supplemental briefs on the following question:

Whether the Board should apply its authority to defer the charging party's §§209-a.1(d) and (e) claims based on the April 2006 grievance that is subject to the parties' contractual dispute resolution procedure that ends in binding arbitration?

Thereafter, the County informed the Board that it would not be filing a supplemental brief, noting that the ALJ had determined that deferral was inappropriate

¹ No exceptions were taken to this finding of the ALJ. Therefore, it is not before us. Rules §213.2(b) (4); *Town of Orangetown*, 40 PERB ¶3008 (2007).

and the County had not excepted to that determination. The PBA filed a supplemental brief, arguing that the Board should not defer the §§209-a.1(d) and (e) allegations after the ALJ had heard and determined them because such a deferral would be contrary to existing Board policy and precedent.

Subsequently, the Board requested that the parties file supplemental pleadings, pursuant to §213.3 of the Rules of Procedure (Rules), setting forth the status of the Cox grievance. Thereafter, both parties filed affirmations stating that no action had been taken with respect to the grievance following the filing of the demand for arbitration and that an arbitrator had not been selected.²

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

FACTS

The facts are fully set forth in the ALJ's decision³ and are repeated here only as necessary to address the exceptions.

The parties' collective bargaining agreement (agreement) expired on December 31, 2000. As relevant to the exceptions before the Board, the agreement provides that employees are to receive pay for specific holidays.⁴ Employees accrue vacation time monthly in 6.67 hour increments if they are employed for more than one month but less

² The County's affirmation further states that Cox resigned from her position in August 2007.

³ 40 PERB ¶4519 (2007).

⁴ Employees receive one-half day off with pay for New Year's Eve and Christmas Eve, and one day off with pay for New Year's Day, Martin Luther King, Jr. Day and Christmas Day.

than three years. Employees accrue sick leave at the rate of one day for each month of continuous service. Annually, three days of personal leave are credited to each employee on January 1, and one day of personal leave is credited on July 1 and September 1. Article XXI of the agreement sets forth the grievance procedure for the resolution of disputes under the agreement including, among other matters, disputes regarding leave accruals and use.

Article I provides that the agreement will be interpreted consistent with County local laws, resolutions and regulations. County Local Law #1 of 1989, entitled the Sheriff's Department Disability Claims Procedure Law (DCPL), defines the rights and procedures for County employees under GML §207-c. The parties have incorporated the DCPL into the collective bargaining agreement.⁵

Pursuant to DCPL §601, GML §207-c eligibility decisions by the Insurance Administrator may be appealed to a County designated hearing officer. A claimant is entitled to a hearing and, following the hearing, the hearing officer presents a recommended report to the Insurance Administrator. The Insurance Administrator then has ten days to prepare a decision. Under the local law, determinations by the

⁵ Article XIX, §1902 states:

Local Law #1 of 1989 entitled the Sheriff's Department Disability Claims Procedure Law, defines the rights of employees and the application of Section 207-c of the General Municipal Law. A copy of such local law is attached hereto. Alleged violation of such Local Law or of this section of this agreement are not subject to the provisions of Article XXI of this agreement and must be resolved in accordance with the provisions of such local law.

Insurance Administrator are subject to review pursuant to Article 78 of the Civil Practice Law and Rules (CPLR).

DCPL §701 states that if an employee is found ineligible for GML §207-c "[t]he claimant shall be required to reimburse the County for any funds collected which are attributable to 207-c benefits." This section also provides that the failure to reimburse the County can render the claimant ineligible for GML §207-c benefits.

Cox has been employed by the County since July 21, 2003. On December 16, 2004, Cox slipped on ice while entering her patrol vehicle at the commencement of her shift. Cox suffered injuries, for which she was treated at the emergency room, and then returned to work. She worked the remainder of her shift that day and an extended shift until noon on December 17, 2004.

Thereafter, Cox had three regularly scheduled days off: December 17, 18 and 19, 2004. Cox was seen at her doctor's office on December 20, 2004 and was given a note excusing her from work until December 23, 2004. Cox worked desk duty for two shifts on December 23, 2004.⁶ Cox did not work on December 24, 2004 due to her injury. Cox's regularly scheduled days off were December 25 and 26, 2004 and she returned to work on December 28, 2004. On December 29, 2004, Cox was again seen by her doctor and was excused from work on December 29, 30 and 31, 2004.⁷

Cox had regularly scheduled days off on January 1, 2, 8 and 9, 2005 and she did not work on January 3, 4, 5, 6 and 7, 2005 due to her injury. She worked desk duty on

⁶ Cox had agreed to fill a shift for another deputy and was unable to find a replacement.

⁷ The diagnosis was "sciatic root syndrome or a lumbar radiculopathy on the left side", causing pain and numbness in the back and leg.

January 10, but was out of work due to her injury on January 11 and 12, 2005. Cox took January 13 and 14 off and was not scheduled to work on January 15 and 16, 2005. Cox worked her regular shift on January 17, but was out of work due to her injury on January 18, 2005. She returned to work on January 19, had a regularly scheduled day off on January 20 and took January 21, 2005 off due to her injury. She returned to full duty on February 2, 2005.

Cox applied to the County for GML §207-c leave benefits. On January 25, 2005, the County denied her the benefit. Cox then appealed the denial of benefits to the County designated hearing officer consistent with DCPL procedures.

On January 19, 2006, the hearing officer issued a decision determining that Cox had been out of work on 16 specific days due to a work-related injury and was entitled to GML §207-c benefits for those days.⁸ The County stipulated at the appeal hearing that it would be bound by the hearing officer's recommendations.

Thereafter, by letter dated March 17, 2006, Cox was informed by Monica Farquhar Brennan (Brennan), the County's Director of Risk Management and Insurance, that effective December 17, 2004 through January 21, 2005, Cox would be considered to be "out on leave under 207-c" and the 16 days outlined by the hearing officer would be restored to her. However, Brennan noted, that §103(g) of the DCPL, states:

Section 207-c Benefits – Means benefits provided under §207-c of the General Municipal Law, including the full

⁸ Relying on medical evidence showing that Cox's injury was such that on some days she would feel well enough to go to work and that on others she would not be able to work, the hearing officer found that her injury accounted for 16 specific absences from work.

amount of salary or wages and expenses for medical treatment or hospital care rendered as a result of job related injury or illness, but shall not include continued payment of uniform allowance, continued accrual of leave time, or other benefits to which active employees are entitled.

Notwithstanding the lack of a procedure in either the parties' agreement or the DCPL for recoupment or reimbursement of wages or benefits, Brennan concluded that Cox's accruals would be adjusted down by 6.67 hours of vacation leave and 8 hours of sick leave for December 2004 and 24 hours of personal time for January 2005. Brennan also instructed Cox to make arrangements with the County's payroll department to reimburse the County for 32 hours of holiday pay for the following holidays: 4 hours on Christmas Eve, 8 hours on Christmas Day, 4 hours on New Year's Eve, 8 hours on New Year's Day and 8 hours on Martin Luther King, Jr. Day. Cox was not required to return the uniform allowance she received from the County in January 2005 or the pay for the days she actually worked.

The PBA filed a grievance on April 6, 2006 in response to Brennan's March 17, 2006 letter to Cox. After the grievance was denied at the initial steps of the grievance procedure, the PBA filed a demand for arbitration on June 6, 2006.

Before the ALJ, Brennan testified that it was her belief that once the hearing officer determined that Cox was entitled to GML §207-c benefits, Cox was considered to be on GML §207-c leave for the entire period of her disability, December 17, 2004 through January 24, 2005. Brennan reached this conclusion even though during that period Cox had worked several specific days and there were regularly scheduled days off and holidays. As a result of her belief, Brennan calculated the leave accruals and

holiday pay that had to be returned to the County because Cox was not in "continuous employment" on the days that leave accrued or that were eligible for holiday pay.

Brennan also testified that, in her opinion, because Cox was in GML §207-c status at the end of December 2004, when sick and vacation leave were credited for the month of December, and on January 1, 2005 when personal leave was credited, she was not eligible for those accruals. Brennan admitted, however, that she did not administer the parties' collective bargaining agreement and was not familiar with its terms. Likewise, Brennan testified that because Cox was on GML §207-c leave during December 2004 and January 2005, she was not entitled to holiday pay for Christmas Eve, Christmas Day, New Year's Eve, New Year's Day and Martin Luther King, Jr. Day. Brennan's belief was based on how she handled similar situations with the County's correction officers, who are not in the PBA's bargaining unit, but who are eligible for GML §207-c benefits and who are also subject to the DCPL.

DISCUSSION

Deferral Issues

In response to the County's request, the ALJ declined to defer the charge to the contractual grievance procedure because Cox's right to receive the at-issue benefits, although derived from the parties' agreement, was subject to the statutory provisions of the DCPL which are not subject to arbitration. In addition, the ALJ did not defer the charge because it also alleged violations of §§209-a.1(a) and (c) of the Act that were

not derivative of the §§209-a.1(d) or (e) allegations.⁹ The ALJ denied deferral even though the PBA had pending a related grievance filed on behalf of Cox.¹⁰

As noted above, the County has not filed exceptions to the ALJ's decision on deferral and both the County and the PBA have each stated their opposition to the Board now deferring the §§209-a.1(d) and (e) allegations.

In *Town of Carmel*,¹¹ (hereafter, *Carmel*), the Board, on its own motion, deferred to the parties' contractual grievance procedure a charge alleging a unilateral change in violation of §§209-a.1(d) and (e) of the Act. The Board found that jurisdictional deferral was necessary because the record was unclear with respect to the at-issue agreement's duration and whether or not the grievance procedure was applicable to that agreement. In the alternative, the Board concluded that a merits deferral of the charge was appropriate because the agreement constituted an arguable source of right to the charging party and an arbitration award might be dispositive of the relevant issues. The Board reached its decision to defer even though the employee organization had not filed a grievance and the issue of deferral had not been raised to the ALJ or the Board.

In the present case, we must decide whether, pursuant to *Carmel*, it would be consistent with the public policy of the Act for the Board, on its own motion, to defer the remaining §§209-a.1(d) and (e) allegations to the parties' grievance procedure, even

⁹ *Schuyler-Chemung-Tioga BOCES*, 34 PERB ¶3019 (2001); *Connetquot Cent Sch Dist*, 19 PERB ¶3045 (1986).

¹⁰ The grievance alleged that the County violated the contractual leave and holiday pay provisions.

¹¹ 29 PERB ¶3073 (1996).

after the ALJ had dismissed of the §§209-a.1(a) and (c) allegations and reached the merits of the §§209-a.1(d) and (e) allegations.

In *State of New York (SUNY Health Science Center of Syracuse)*,¹² (hereafter, *SUNY*), the Board determined that a merits deferral of a §209-a.1(d) unilateral change allegation to arbitration was appropriate, noting that an interpretation of the parties'

agreement was necessary because the agreement was a reasonably arguable source of right and a binding arbitration award was potentially dispositive of the charge. At the same time, the Board retained the §209-a.1(d) bad faith negotiations allegation because the disposition of that aspect of the charge did not rest on an interpretation of the agreement and it would not likely be an issue reached by the arbitrator. The Board made clear that it was not holding that a bifurcated merits deferral policy, applied allegation by allegation, would be appropriate in every case. Rather, the Board stated that:

We... need not decide here whether a deferral of unilateral change/contract discontinuation allegations, which have been included in a charge together with nondeferrable allegations of statutory impropriety, would be appropriate if litigation of the nondeferred allegations necessitated proof of facts relevant to a disposition of the allegations otherwise susceptible to deferral. There may well be circumstances in which the "all or nothing" deferral policy applied in *Connetquot* may be the most appropriate policy choice.¹³

¹² 30 PERB ¶3019 (1997).

¹³ *Id.* at 3044.

As to alleged violations of §209-a.1(e) of the Act, the Board in *SUNY* noted that jurisdictional deferral of an (e) allegation is never appropriate.¹⁴ The Board concluded, however, that the deferral of the merits of the alleged §209-a.1(e) violation was appropriate under the circumstances of that case, because the §209-a.1(e) allegation rested upon the same facts as the §209-a.1(d) unilateral change allegation, which the Board decided should be deferred. The Board cautioned, however, that it was not holding that a merits deferral of §209-a.1(e) allegations is always appropriate regardless of circumstance.¹⁵

Cases raising merits deferral of §§209-a.1(d) and (e) allegations will be reviewed on a case by case basis to determine whether we should exercise our discretion and defer an alleged §§209-a.1(d) or (e) violation to arbitration. *SUNY* sets forth our policy reasons for a merits deferral of an alleged violation of §209-a.1(d) of the Act:

Our merits deferral policy is grounded upon the belief that the policies of the Act favoring an accommodation of the parties' contractual dispute resolution procedures are generally advanced by deferral of the merits of certain charges when an interpretation of an expired agreement, which is a reasonably arguable source of right to the charging party, is necessary to the disposition of the merits and an award rendered under a binding grievance arbitration procedure is potentially dispositive of the charge.¹⁶

¹⁴ "Allegations of a violation of §209-a.1(e) of the Act are never subject to jurisdictional deferral because a cause of action under §209-a.1(e) of the Act is necessarily based upon terms in an agreement which is expired for purposes of the Act." (*SUNY, supra*, at 3044).

¹⁵ In *Addison CSD*, 17 PERB ¶3076 (1984), the Board applied its discretion based upon the circumstances in that case, and denied a merits deferral of alleged violations of §§209-a.1(a), (c), and (e) of the Act.

¹⁶ *Supra*, note 13, at 3043.

Fundamentally, our merits deferral policy encourages the parties to develop their own means to resolve disputes.¹⁷ When appropriate, we will continue to defer an alleged violation of §209-a.1(d) premised on a unilateral change consistent with the standards set forth in *SUNY*.

Section 209-a.1(e) grants PERB exclusive jurisdiction to hear improper practice charges alleging an employer's failure to continue all the terms of an expired agreement until a new agreement is negotiated. This statutory provision constitutes an express exception to the denial, in §205.5(d) of the Act, of PERB's jurisdiction over improper practice charges asserting breaches of collectively negotiated agreements. In such cases, PERB is required to interpret the terms of the expired agreement. Balancing the Act's public policy goal of encouraging negotiated procedures for the resolution of disputes with the exclusive jurisdiction granted to the Board under §209-a.1(e) of the Act leads us to conclude that our case by case analysis of whether to defer the merits of an §209-a.1(e) allegation continues to be the most appropriate approach. Consistent with *SUNY*, on a case by case basis, when we determine that it is appropriate to defer an alleged violation of §209-a.1(d) and the alleged violation of §209-a.1(e) rests upon the same facts, we will ordinarily also defer the §209-a.1(e) allegation.

However, we will retain jurisdiction over the merits of an improper practice charge alleging a violation of §209-a.1(e) of the Act at the Board's discretion when the parties

¹⁷ See *NYCTA (Bordansky)*, 4 PERB ¶3031 at 3070 (1971) where the Board held that a merits deferral policy allows the "consideration of the merits of certain charges within... [PERB's jurisdiction] to be deferred when a contractual grievance has been filed under a grievance procedure ending in binding arbitration".

have evidenced their mutual preference for PERB to determine the contract issue. This can be established by evidence that a charging party has not filed a grievance, or is holding in abeyance a filed grievance alleging the same contractual violation as set forth in the improper practice charge and where the respondent does not seek deferral. But, it will continue to be our general practice to defer alleged violations of §209-a.1(e), on a case-by-case basis, to a contractual grievance procedure when an arbitrator's binding decision and award is reasonably likely to resolve the contract interpretation issue at the center of the dispute.

In the present case, another factor that renders a merits deferral of the §§209-a.1(d) and (e) claims by the Board inappropriate is that the parties have fully pursued the contract interpretation issues before the ALJ. Deferral would, therefore, impose wasteful duplication of efforts on the parties. To the extent that the Board's decision in *Carmel* suggests that the Board on its own motion will issue a merits deferral of §§209-a.1(d) and (e) allegations following the parties' development of a full record before an ALJ with respect to the merits, it is hereby overruled. We believe this best effectuates the policies of the Act and is in the interest of administrative economy by limiting the parties to the forum of their choosing, but only one forum, for the resolution of their dispute.

Substantive Issues

The ALJ found that the County violated §209-a.1(d) of the Act by unilaterally implementing a noncontractual method of recovering leave accruals and holiday pay when it deducted leave from Cox's accrued leave and when it instructed her to reimburse the County for 32 hours of holiday pay. Cox was instructed to make

arrangements for the repayment with Brennan or the Commissioner of Personnel. Citing to *Levitt v Board of Collective Bargaining of the City of New York*,¹⁸ where the Court of Appeals held that a policy of collecting employee debts owed to the employer through lump sum payments or payroll deductions involved wages and was a mandatory subject of negotiations, the ALJ concluded that the County's direction that holiday pay and other leave accruals be repaid was the unilateral implementation of such a system that should have first been negotiated with the PBA. We find that the ALJ correctly determined that the County violated §209-a.1(d) of the Act by acting unilaterally with respect to this mandatory subject of negotiations.¹⁹

The ALJ next determined that the County violated §§209-a.1(d) and (e) of the Act by denying Cox leave accruals and holiday pay to which she was entitled under the expired collective bargaining agreement. In its exceptions, the County argues that the ALJ erred in finding a violation on the grounds that Brennan's determination is entitled to substantial deference because, as Insurance Administrator, she is given exclusive authority to make initial GML §207-c eligibility determinations and to decide whether to accept the hearing officer's subsequent recommendations. The County further argues that Brennan "modified" the hearing officer's recommendation by finding that Cox was on GML §207-c leave continuously from December 17, 2004 through January 24, 2005 and that her action was within her authority under the DCPL.

¹⁸ 79 NY2d 120, 25 PERB ¶7514 (1992).

¹⁹ *City of Albany*, 23 PERB ¶4531, *affd on other grounds*, 23 PERB ¶3027(1990), *affd*, 24 PERB ¶7004 (Sup Ct Albany County 1991). Although the Board dismissed the City's subsequent exceptions on procedural grounds, it noted that if it had reached the merits of the charge, it would have affirmed the ALJ's decision finding that a unilaterally implemented recoupment procedure violated the Act.

Upon our review, we concur with the ALJ's decision not to grant deference to Brennan's interpretation of the agreement as well as with the ALJ's interpretation of the expired agreement.

First, Brennan's opinions with respect to the proper interpretation of the agreement were not due any deference by the ALJ. During Brennan's testimony, she acknowledged that she did not administer the agreement, was not even familiar with its terms and had no actual knowledge of how accruals were credited in the Sheriff's department.

As the ALJ correctly found, the County had agreed to be bound by the hearing officer's determination. The hearing officer determined that Cox was entitled to GML §207-c benefits for the 16 days that she was absent from work due to a work-related injury and ordered her accruals restored for those days. He did not determine that Cox was on continuous GML §207-c leave for the entire time covered by her injury.

Second, the expired collective bargaining agreement clearly states that employees on the payroll of the County who are in continuous employment are entitled to leave accruals and holiday pay. Cox remained a County employee continuously from December 17, 2004 through January 24, 2005 even though she received intermittent GML §207-c benefits during that period.²⁰ Neither the agreement nor the DCPL prohibits an employee on intermittent GML §207-c leave from continuing to accrue contractual leave on days worked or days when not on GML §207-c leave. Therefore,

²⁰ *City of Schenectady v New York State Public Employment Relations Board*, 132 AD2d 242, 20 PERB ¶¶7022 (3d Dept 1987), *lv denied*, 71 NY2d 803, 21 PERB ¶¶7007 (1988), where the court held that a police officer applying for or receiving GML §207-c benefits is a public employee of the employer within the meaning of the Act.

under the agreement, Cox is contractually entitled to leave accruals and holiday pay only if she was continuously employed and not on GML §207-c leave on the dates when such leave or holiday pay accrued.

The collective bargaining agreement provides that employees accrue personal leave on January 1, July 1 and September 1 of each year, vacation leave on a monthly basis, and sick leave for each month of continuous service. Holiday pay is due employees on each of several specified holidays, as here relevant: Christmas Eve, Christmas Day, New Year's Eve, New Year's Day and Martin Luther King, Jr. Day.

The ALJ correctly found, consistent with the hearing officer's decision, that Cox was not on GML §207-c leave on January 1, 2005, her regularly scheduled day off. Therefore, Cox was entitled to accrue three days of personal leave on January 1, 2005, consistent with the express terms of the expired agreement.

Likewise, the ALJ was correct in finding that Cox was entitled to holiday pay under the expired agreement for Christmas Day (December 25, 2004), New Year's Day (January 1, 2005) and Martin Luther King, Jr. Day (January 19, 2005) because the County's hearing officer had concluded that Cox was not on GML §207-c leave on those days. Similarly, the ALJ correctly found that Cox was not entitled to holiday pay for December 24 and December 31, 2004, because the County's hearing officer had concluded that Cox was on §207-c leave for those days. Therefore, we affirm the ALJ's determination that the County violated the Act when it wrongfully sought reimbursement

for 24 hours of holiday pay for contractual holidays when Cox was not on GML §207-c leave.²¹

With respect to the accrual of vacation and sick leave in December 2004, the agreement allows employees to accrue vacation time monthly in 6.67 hour increments, if they have been employed for more than one month but less than three years, and to accrue sick leave at the rate of one day for each month of continuous service. The ALJ correctly rejected the County's argument that Cox was not entitled to accrue vacation and sick leave in December 2004 because she was on GML §207-c leave at the end of the month. In light of Brennan's speculative testimony, we affirm the ALJ's finding that the agreement does not provide for vacation and sick leave accruals to be credited at the end of each month. Therefore, we find that the County violated the Act when it failed to continue the mandatory terms of the expired agreement.²²

Lastly, the County argues that the PBA waived its right to file an improper practice charge because the DCPL limits challenges to determinations made thereunder

²¹ While we have found that Cox was only entitled to 24 hours of holiday pay based upon our determination that she was not eligible for 4 hours of holiday pay on December 24 and on December 31, 2004, we have ordered the County to reimburse her for the entire 32 hours of holiday pay that was improperly recouped from her, pursuant to Brennan's March 17, 2006 letter. Once the County and the PBA have negotiated a recoupment procedure, the County may recoup the 8 hours of holiday pay for December 24 and 31, 2004 pursuant to that negotiated procedure.

²² In affirming, we note that the County did not file an exception challenging the ALJ's conclusion that it had violated §209-a.1(d) of the Act by refusing to continue the mandatorily negotiated terms of the expired agreement. Therefore, it is waived. *Supra*, note 1. However, we further note that, under the Act, PERB has jurisdiction to hear an improper practice charge challenging the failure of an employer to continue the terms of an expired collectively negotiated agreement under §209-a.1(e), but not §209-a.1(d) of the Act.

to court review pursuant to CPLR Article 78. As the County did not raise waiver as an affirmative defense in its answer and raises it for the first time in its exceptions, the Board will not address it.²³

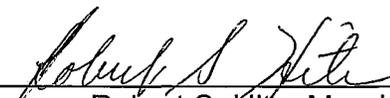
Based on the foregoing, we deny the County's exceptions and affirm the decision of the ALJ, finding that the County violated §§209-a.1(d) and (e) of the Act when it unilaterally deducted personal, vacation and sick leave from Cox's accruals and required reimbursement to the County of 32 hours of holiday pay.

IT IS, THEREFORE, ORDERED that the County forthwith:

1. Cease and desist deducting any wages and leave benefits from Deputy Sheriff Amanda Cox pursuant to its March 17, 2006 letter, and return to her all wages and leave benefits that it has already deducted pursuant to said letter, including 8 hours of holiday pay found herein to be owed to the County, until it satisfies its bargaining obligations concerning a system to recoup overpayments to unit employees, plus interest at the maximum legal rate on any holiday pay that Cox reimbursed the County up to 24 hours.
2. Sign and post the attached notice at all locations customarily used to post notices to unit employees.

DATED: April 3, 2008
Albany, New York


Jerome Lefkowitz, Chairman


Robert S. Hite, Member

²³ *NYCTA*, 20 PERB 3037 (1987), *confd*, *NYCTA v PERB* 147 AD2d 574, 22 PERB ¶7001 (2d Dept 1989), *motion to amend granted*, 156 AD2d 689, 23 PERB ¶7002 (2d Dept 1989).

NOTICE TO ALL EMPLOYEES

PURSUANT TO
THE DECISION AND ORDER OF THE

NEW YORK STATE
PUBLIC EMPLOYMENT RELATIONS BOARD

and in order to effectuate the policies of the

NEW YORK STATE
PUBLIC EMPLOYEES' FAIR EMPLOYMENT ACT

we hereby notify all employees of the County of Sullivan in the unit represented by the Sullivan County Patrolman's Benevolent Association, Inc., that the County:

1. Will discontinue deducting any wages and leave benefits from Deputy Sheriff Amanda Cox pursuant to its March 17, 2006 letter, and return to her all wages and leave benefits that it has already deducted pursuant to said letter, including 8 hours of holiday pay found herein to be owed to the County, until it satisfies its bargaining obligations concerning a system to recoup overpayments to unit employees, plus interest at the maximum legal rate on any holiday pay that Cox reimbursed the County up to 24 hours.

Dated

By
(Representative) (Title)

.....

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

BOCES UNITED SUPPORT STAFF,

Petitioner,

-and-

CASE NO. C-5774

**BOARD OF COOPERATIVE EDUCATIONAL
SERVICES FIRST SUPERVISORY DISTRICT
OF MONROE,**

Employer.

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

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

Pursuant to the authority vested in the Board by the Public Employees' Fair Employment Act,

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

Included: Full and part-time employees in the following titles: Bus Driver, Bus Attendant, Bus Mechanic, Cleaner, Custodial Assistant, Maintenance Mechanic I, Maintenance Mechanic II, Maintenance Mechanic III, School Sentry I, School Sentry II, Food Service Helper, Cook Manager and Head Groundskeeper.

Excluded: All others.

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

DATED: April 3, 2008
Albany, New York



Jerome Lefkowitz, Chairman



Robert S. Hite, Member