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12-18-2009

## State of New York Public Employment Relations Board Decisions from December 18, 2009

New York State Public Employment Relations Board

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## State of New York Public Employment Relations Board Decisions from December 18, 2009

### 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

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In the Matter of

**UNITED PUBLIC SERVICE EMPLOYEES UNION,**

Petitioner,

-and-

CASE NO. C-5834

**CITY OF TROY,**

Employer.

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**CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE**

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

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

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

Included: Assessor; Assistant to City Clerk (Legislative Aide); Assistant Operations Manager; City Water Plant Operator; City Auditor; City Engineer; Commissioner of Planning and Community Development; Deputy City Clerk; Deputy Comptroller for Financial Operations; Grants Writing Specialist; Personnel Associate; Recreation Director; Superintendent of Water and Sewer.

Excluded: All other employees.

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

DATED: December 18, 2009  
Albany, New York

  
Jerome Lefkowitz, Chairman

  
Robert S. Hite, Member

  
Sheila S. Cole, Member

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

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In the Matter of

**MICHAEL GOLDSTEIN,**

Charging Party,

**CASE NO. U-28828**

- and -

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

Respondent,

-and-

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

Employer.

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**MICHAEL GOLDSTEIN, *pro se***

**JAMES R. SANDNER, GENERAL COUNSEL (LORI M. SMITH of counsel),  
for Respondent**

**DAVID BRODSKY, DIRECTOR OF LABOR RELATIONS (ALLISON SARA  
BILLER of counsel), for Employer**

**BOARD DECISION AND ORDER**

This case comes to the Board on exceptions filed by Michael Goldstein (Goldstein) to a decision by an Administrative Law Judge (ALJ) dismissing an improper practice charge filed by Goldstein on or about December 21, 2008, as amended, alleging that the United Federation of Teachers, Local 2, AFT, AFL-CIO (UFT) violated §209-a.2(c) of the Public Employees' Fair Employment Act (Act).

The ALJ granted UFT's unopposed motion to dismiss the charge based upon Goldstein's failure to respond to the ALJ's directive that he file an affidavit by August 6, 2009 explaining his absence at the scheduled hearing on July 29, 2009.

EXCEPTIONS

In his exceptions, Goldstein contends that the ALJ's decision contains errors of fact in its description of his communications with respect to the scheduled hearing date. In support of his exceptions, Goldstein attaches a copy of an email, dated July 28, 2009, which he claims he sent requesting an adjournment of the July 29, 2009 hearing. The UFT supports the ALJ's decision.

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

BACKGROUND

The procedural history of the charge is fully set forth in the ALJ's decision.<sup>1</sup> It is repeated here only as necessary to address the exceptions.

In response to a notice scheduling the hearing on his charge for May 28, 2009, Goldstein submitted a written request seeking leave from the ALJ to participate in the hearing telephonically from his residence in Florida. UFT objected to Goldstein's request. It also requested an adjournment of the hearing due to a scheduling conflict.<sup>2</sup>

On May 22, 2009, the ALJ issued a letter denying Goldstein's request to appear telephonically at the hearing and adjourned the hearing until July 29, 2009. The letter stated, in part:

Failure to appear at the hearing may constitute grounds for dismissal of the absent party's pleading. Any request for an adjournment must be made reasonably in advance, in writing, indicating the basis therefor and the position of each party thereon.

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<sup>1</sup> *UFT (Goldstein)*, 42 PERB ¶4565 (2009).

<sup>2</sup> UFT's attorney was scheduled to appear at a hearing in another administrative forum on May 28, 2009.

On May 27, 2009, the ALJ sent a letter to Goldstein in response to his telephone inquiry about possible alternative means to avoid being physically present at the scheduled hearing on July 29, 2009. In her letter, the ALJ stated, *inter alia*, that the hearing would proceed on the scheduled date unless the parties were able to stipulate to the record. In addition, she directed Goldstein to cease attempting to engage in *ex parte* communications with her, and to henceforth communicate with her in writing with copies sent to the other parties.

During the two days preceding the scheduled hearing, the ALJ attempted to contact Goldstein, including faxing him a letter on July 28, 2009, aimed at confirming that he would be present at the July 29, 2009 hearing. The ALJ did not receive a response from Goldstein and Goldstein did not attend the hearing. In a letter, dated July 29, 2009, the ALJ directed Goldstein to file an affidavit by August 6, 2009 explaining his reasons for failing to appear at the scheduled hearing. Goldstein did not respond.

On August 26, 2009, UFT filed a motion to dismiss the charge based upon Goldstein's non-appearance at the July 29, 2009 hearing, and his failure to comply with the ALJ's directive to submit an affidavit explaining his failure to appear at the hearing. Goldstein did not oppose UFT's motion.

#### DISCUSSION

Goldstein argues in his exceptions that the ALJ erred in concluding that he failed to respond to her repeated efforts to confirm that he would be attending the July 29, 2009 hearing. In support of his exceptions, Goldstein has submitted a copy of an email he claims he sent on July 28, 2009 requesting an adjournment of the scheduled hearing.

Section 213.2 of our Rules of Procedure (Rules) limits our review of the ALJ's

determination to the record before her.<sup>3</sup> Our review of the record demonstrates that the ALJ did not have Goldstein's July 28, 2009 email before her when she issued her decision. Goldstein sent his email to an email address of a PERB secretary without notice to the other parties. In response to the ALJ's July 29, 2009 letter seeking an affidavit explaining his failure to attend the hearing, Goldstein did not submit a copy of his email to the ALJ. Therefore, we are foreclosed from considering his email in support of his exceptions.

In the alternative, even if we considered Goldstein's email, we would conclude that it does not form the basis for reversing the ALJ, in whole or in part.

Section 212.4(b) of the Rules states:

The hearing will not be adjourned unless good and sufficient grounds are established by the requesting party, who shall file with the administrative law judge an original and three copies of the application, on notice to all other parties, setting forth the factual circumstances of the application and the previously ascertained position of the other parties to the application. The failure of a party to appear at the hearing may, in the discretion of the administrative law judge, constitute ground for dismissal of the absent party's pleading.

Two months before the scheduled hearing, Goldstein received explicit directions from the ALJ stating that a request for an adjournment must be made reasonably in advance of the hearing, setting forth the basis for the request, and on notice to the other parties. Despite these instructions, Goldstein's email was sent on the afternoon before the scheduled hearing, without stating any factual basis for the request, and without notice to the other parties. Furthermore, he took no other action to ensure that

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<sup>3</sup> CSEA (*Paganini*), 36 PERB ¶13006 (2003).

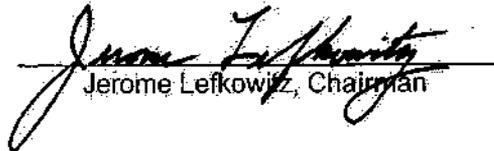
the ALJ and the other parties were aware of his adjournment request.

It is well-settled that the failure of a charging party to prosecute a charge constitutes grounds for dismissal of a charge.<sup>4</sup> In the present case, Goldstein's last minute email, along with his failure to file an affidavit in response to the ALJ's directive, and his failure to respond to UFT's motion to dismiss, demonstrate a clear and calculated decision by him to disregard prescribed procedures for pursuing his charge so as to constitute an abandonment of his claim against UFT.

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

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

DATED: December 18, 2009  
Albany, New York

  
Jerome Lefkowitz, Chairman

  
Robert S. Hite, Member

  
Sheila S. Cole, Member

<sup>4</sup> Board of Educ of the City Sch Dist of the City of New York (Greenberg), 16 PERB ¶3067 (1983); Smithtown Fire Dist, 28 PERB ¶3060 (1995); IBT, Local 237 (Jouldach), 34 PERB ¶3010 (2001).

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

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In the Matter of

**SULLIVAN COUNTY COMMUNITY COLLEGE,**

Petitioner,

- and -

**CASE NOS. C-5810 & CP-1163**

**LOCAL 445, INTERNATIONAL BROTHERHOOD  
OF TEAMSTERS,**

Intervenor/Incumbent.

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**JACKSON LEWIS LLP (THOMAS P. MCDONOUGH of counsel),  
for Petitioner**

**SAPIR & FRUMKIN LLP (WILLIAM D. FRUMKIN of counsel),  
for Intervenor/Incumbent**

**BOARD DECISION AND ORDER**

These cases come to the Board on exceptions filed by the Sullivan County Community College (College) to a decision by the Director of Public Employment Practices and Representation (Director) dismissing a petition for decertification (Case No. C-5810) and a petition for unit clarification and/or unit placement (Case No. CP-1163) filed by the College seeking to fragment employees working in non-professional titles at the College from a County-wide unit represented by Local 445, International Brotherhood of Teamsters (IBT).<sup>1</sup>

The Director dismissed Case No. C-5810 on the grounds that the decertification petition was not timely under §201.3(d) of the Rules of Procedure (Rules) and that the College may not file a decertification petition during the period set forth in §201.3(e) of the Rules. In addition, the Director dismissed CP-1163 on the ground that such a petition cannot be utilized to fragment titles from an existing bargaining unit.

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<sup>1</sup>42 PERB ¶4003 (2009).

### EXCEPTIONS

In its exceptions, the College asserts that the fragmentation of non-professional employees at the College from the County-wide unit is appropriate and that, as a matter of policy, it should not be barred from filing a representation petition seeking fragmentation following the expiration of the last collectively negotiated agreement (agreement) between the County of Sullivan (County) and IBT under §201.3(e) of the Rules. IBT supports the Director's decision.

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

### FACTS

In 1986, IBT was certified as the exclusive representative of a County-wide bargaining unit that includes employees working in non-professional titles at the College.<sup>2</sup> The most recent agreement between the County and IBT, which expired on December 31, 2007, recognized IBT as the exclusive representative of a unit of employees including approximately three dozen non-professional employees at the College.

On May 28, 2008, the College filed two petitions seeking to fragment the non-professional employees from the County-wide unit. Following receipt of the petitions, the Director issued notices informing the parties that Case No. C-5810 was untimely pursuant to §201.3 of the Rules, and Case No. CP-1163 was deficient because a unit clarification petition is not a proper procedural mechanism for the removal of titles from a unit. In response to the deficiency notices, both parties filed supplemental pleadings with the Director asserting facts with respect to the relationship between the College and County during the last round of negotiations, which led to a memorandum of agreement

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<sup>2</sup> *County of Sullivan*, 19 PERB ¶3000.38 (1986).

(memorandum), dated November 18, 2008, between the County and IBT.

### DISCUSSION

It is well-settled that the requirements for the filing and processing of a certification and/or decertification petition under our Rules are strictly applied.<sup>3</sup>

Pursuant to §201.3(d) of the Rules, public employers, employee organizations or public employees have a right to file a petition for certification or decertification during the 30-day period before the expiration of the period of unchallenged representation status under §208.2 of the Public Employees' Fair Employment Act (Act). It is undisputed that the College's petition was not filed prior to the expiration of the window period set forth in §201.3(d) of the Rules. Therefore, the College's petition is untimely under that Rule.<sup>4</sup>

Section 201.3(e) of the Rules expressly limits who may file a petition for certification or decertification following the expiration of an agreement. The only parties that may file a certification or decertification petition 120 days following the expiration of an agreement under §201.3(e) of the Rules are an employee organization other than the incumbent employee organization; or one or more public employees.<sup>5</sup>

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<sup>3</sup> See, *County of Dutchess and Dutchess County Sheriff*, 26 PERB ¶¶3080 (1993); *City University of New York*, 20 PERB ¶¶4045 (1987), *affd*, 20 PERB ¶¶3069 (1987).

<sup>4</sup> Therefore, we do not need to reach the issue whether a public employer, which is arguably a component of a joint public employer, may file its own petition seeking fragmentation under §201.3(d) of the Rules.

<sup>5</sup> The Rule states: A petition for certification or decertification may be filed by *an employee organization other than the recognized or certified employee organization* and a petition for decertification *may be filed by one or more public employees*, if no new agreement is negotiated, 120 days subsequent to the expiration of a written agreement between the public employer and the recognized or certified employee organization or, if the agreement does not expire at the end of the employer's fiscal year, then 120 days subsequent to the end of the fiscal year immediately prior to the termination date of such agreement. Thereafter, such a petition may be filed until a new agreement is executed. Such a petition shall be supported by a showing of interest of at least 30 percent of the employees in the unit already in existence or alleged to be appropriate by the petitioner. (emphasis added)

In support of its exceptions, the College contends that its petition should be deemed timely because Board precedent supports the fragmentation of employees at a County-sponsored community college from a County-wide unit.<sup>6</sup> However, the arguable merit of the College's petition is not relevant to determining whether §201.3(e) of the Rules permits it to file a decertification petition during the applicable period.

Similarly, we are not persuaded by the College's argument that the petition should be treated as timely because it is a distinct legal entity from the County, and it did not have an opportunity to participate in the most recent negotiations between the County and the IBT resulting in the November 2008 memorandum. The first part of this argument is a necessary element to the College's contention that employees in non-professional titles at the College should be fragmented because they are employed by a joint public employer comprised of the County and the College. The second aspect of the argument focuses on the relationship between the two alleged components of that joint public employer. Neither element of its argument, however, places the College within the category of organizations that may file a decertification or certification petition pursuant to §201.3(e) of the Rules.

Next, we examine the College's policy argument for treating its petition as timely. In *Greece Central School District*,<sup>7</sup> we set forth the applicable policy underlying the prohibition against a public employer filing a decertification petition pursuant to §201.3(e) of the Rules:

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<sup>6</sup> See, *County of Jefferson and Jefferson County Community Coll*, 26 PERB ¶13010 (1993), *confd*, *Jefferson County v Pub Empl Rel Bd*, 204 AD2d 1001, 27 PERB ¶7010 (4<sup>th</sup> Dept 1994), *lv denied*, 84 NY2d 804, 27 PERB ¶7014 (1994); *Genesee Community Coll and County of Genesee*, 24 PERB ¶3017 (1991). See also, *Niagara County Community Coll and County of Niagara*, 23 PERB ¶4052 (1990).

<sup>7</sup> 18 PERB ¶13033 (1985).

The policy underlying Rule 201.3(e) is that the public employer should be under major pressure to conclude an agreement to succeed one that has expired, and it should not be able to evade this pressure by filing a petition. The potential problem of unit employees being represented by an employee organization that is no longer of their choosing may be remedied by an appropriate petition, but not one brought by the public employer.<sup>8</sup>

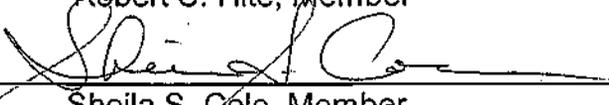
Contrary to the College's argument, this policy rationale is equally applicable to a joint public employer under §201.6(b) of the Act or a component of that joint public employer seeking fragmentation. The fact that the College did not participate in the negotiations leading to the November 2008 memorandum does not eliminate the exclusion contained in §201.3(e) of the Act with respect to who may file a petition following the expiration of an agreement. In addition, even if a timely petition seeking fragmentation had been filed and granted, the certified or recognized representative of the fragmented unit would negotiate with a joint public employer composed of the County and the College and not just the College.<sup>9</sup>

IT IS, THEREFORE, ORDERED that the Director's decision is affirmed and the petitions are dismissed.

DATED: December 18, 2009  
Albany, New York

  
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Jerome Lefkowitz, Chairman

  
\_\_\_\_\_  
Robert S. Hite, Member

  
\_\_\_\_\_  
Sheila S. Cole, Member

<sup>8</sup> *Supra* note 7, 18 PERB ¶3033 at 3067.

<sup>9</sup> *Supra* note 6.

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

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In the Matter of

**LOCAL 891, INTERNATIONAL UNION OF OPERATING  
ENGINEERS, AFL-CIO,**

Charging Party,  
-and-

**CASE NO. U-28706**

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

Respondent.

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**SPIVAK LIPTON LLP (NEIL D. LIPTON of counsel), for Charging Party**

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

**INTERIM BOARD DECISION AND ORDER**

This case comes to the Board on a motion, dated October 29, 2009, by the Board of Education of the City School District of the City of New York (District) requesting an extension of time to file exceptions, pursuant to §213.4 of our Rules of Procedure (Rules), to a decision of an Administrative Law Judge (ALJ), dated September 25, 2009, on an improper practice charge filed by Local 891, International Union of Operating Engineers, AFL-CIO (Local 891). The District's motion for an extension of time is premised upon an assertion of law office failure. Local 891 opposes the District's motion.

### PROCEDURAL BACKGROUND

On October 27, 2008, Local 891 filed an improper practice charge alleging that the District violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when it unilaterally modified a past practice by reducing the number of parking permits for Custodian Engineers in the bargaining unit represented by Local 891. The District filed a timely answer to the charge on or about November 21, 2008 asserting various affirmative defenses. A hearing was held before the ALJ on March 23, 2009 during which both Local 891 and the District presented evidence. Following the filing of post-hearing briefs by both parties in mid-July 2009, the ALJ issued his decision denying the District's motion to dismiss the charge and concluding that the District violated §209-a.1(d) of the Act when it unilaterally terminated the past practice of providing parking permits to Local 891 unit members.

### FACTS

In support of its motion, the District has submitted affidavits from four District attorneys including David Brodsky (Brodsky), the Director of the District's Office of Labor Relations and Collective Bargaining (OLR). The affidavits set forth the facts that form the basis for the District's assertion of extraordinary circumstances under §213.4 of our Rules premised on law office failure.

OLR maintains a centralized administrative procedure for the receipt and the internal distribution of administrative and arbitral decisions. Upon receipt of a decision, OLR administrative staff members are required to forward the decision directly to the OLR clerical employee who functions as the tribunal administrator. After the tribunal administrator copies and scans a decision, it is then distributed to OLR's Deputy

Director and Supervising Attorney Robert E. Waters (Waters), and the staff attorney who represented the District at the hearing. After the decision has been reviewed by Waters and/or the staff attorney, it is then forwarded to OLR Director Brodsky.<sup>1</sup>

In the present case, the District's affidavits reveal that after the tribunal administrator received the ALJ's decision, it was date stamped October 2, 2009 and placed in a folder for filing.<sup>2</sup> However, the tribunal administrator did not follow OLR office procedures by distributing the ALJ's decision to Waters or Seth J. Blau (Blau), the staff attorney who represented the District before the ALJ.<sup>3</sup> It is undisputed that Waters and Blau did not become aware of the ALJ's decision until October 29, 2009.

In mid-October 2009, Local 891 President Troeller telephoned Brodsky in response to a memorandum issued by Bartholomew Cournane (Cournane), the Deputy Director of the District's Division of School Facilities, which referenced off-site parking permits. During their conversation, Troeller asked Brodsky whether the District intended on challenging the ALJ's decision. According to Brodsky, he explicitly told Troeller that he had not seen the ALJ's decision and that he was unaware that a decision had been issued.<sup>4</sup> In contrast, Troeller asserts that it "appeared perfectly plain to me" that during

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<sup>1</sup> Affidavit of Robert E. Waters, ¶¶4-7.

<sup>2</sup> In his affidavit in opposition to the District's motion, Local 891 President Robert J. Troeller (Troeller) states he received an electronic copy of the ALJ's decision from Local 891's attorney on October 2, 2009. Affidavit of Robert J. Troeller, ¶3.

<sup>3</sup> The District states that it is unable to submit an affidavit from the tribunal administrator because she is entitled to representation, pursuant to Civ Serv Law §75.2, during questioning about her handling of the ALJ's decision.

<sup>4</sup> Affidavit of David Brodsky, ¶5.

the telephone conversation Brodsky was aware of the ALJ's decision.<sup>5</sup> Nevertheless, it is undisputed that Brodsky told Troeller that the District had every intention of challenging an ALJ decision that was adverse to the District.<sup>6</sup> Following the conversation, Brodsky contacted Blau to inquire whether the ALJ had issued a decision. In response, Blau told Brodsky that he had not received a decision and that he was unaware that the ALJ had issued a decision.<sup>7</sup>

On October 29, 2009, Blau received an email from a New York City Assistant Corporation Counsel referencing the ALJ's decision. In response to a request from Blau, the Assistant Corporation Counsel emailed him an electronic copy of the decision in the mid-afternoon.<sup>8</sup> On the same day, Waters and the District's Executive Agency Counsel Russell J. Platzek (Platzek) were present at the law offices of Spivak Lipton, LLP, the attorneys for Local 891. During an afternoon colloquy with Neil Lipton (Lipton), following a negotiations session between the parties on an unrelated matter, Waters and Platzek learned, for the first time, of the issuance of the ALJ's decision in the present case and another ALJ decision favorable to the District, dated September 30, 2009, in an unrelated improper practice case between the parties.<sup>9</sup> As a professional

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<sup>5</sup> Affidavit of Robert J. Troeller, ¶16.

<sup>6</sup> Affidavit of David Brodsky, ¶15; Affidavit of Robert J. Troeller, ¶15. In fact, the District had already commenced litigation challenging an arbitration award with respect to parking privileges for District supervisors and administrators.

<sup>7</sup> Affidavit of Seth J. Blau, ¶10; Affidavit of David Brodsky, ¶18.

<sup>8</sup> Affidavit of Seth J. Blau, ¶11.

<sup>9</sup> *Board of Educ of the City Sch Dist of the City of New York*, 42 PERB ¶14569 (2009).

courtesy, Lipton provided Waters with a copy of the ALJ's decision. Thereafter, Platzek returned to the District's office and delivered a hard copy of the decision to Blau.

After Local 891 declined the District's October 29, 2009 request to extend its time to file exceptions, the District filed its motion with the Board.

### DISCUSSION

Our Rules require that exceptions be filed within 15 working days after the receipt of a decision and that requests for any extension must be filed with the Board before the expiration of that time period.<sup>10</sup> However, the Board has discretionary authority under §213.4 of the Rules to extend the time during which a party may request an extension of time to file exceptions upon a showing of extraordinary circumstances.<sup>11</sup> To establish extraordinary circumstances, a party must present specific and detailed facts demonstrating that the failure to make a timely request for an extension was not the result of mere neglect or burdens connected with other obligations.<sup>12</sup> The high standard for establishing extraordinary circumstances is consistent with our strict application of the timeframes set forth in our Rules.

In *Auburn Industrial Development Authority*,<sup>13</sup> we held that a party had demonstrated extraordinary circumstances warranting the grant of additional time to

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<sup>10</sup> Rules, §§213.2(a) and 213.4.

<sup>11</sup> *Onondaga Community Coll*, 11 PERB ¶3008 (1978).

<sup>12</sup> See, *Westbury Union Free Sch Dist (Handy)*, 12 PERB ¶3107 (1979); *UFT (Gottlieb)*, 13 PERB ¶3101 (1980); *Bd of Educ of the City of New York (Barnett)*, 16 PERB ¶3051 (1983); *UFT (Thompson)*, 18 PERB ¶3014 (1985); *CSEA (Adams)*, 28 PERB ¶3054 (1995).

<sup>13</sup> 15 PERB ¶3075 (1982).

request an extension of time to file exceptions. In that case, the party's motion was supported by an affidavit that set forth detailed facts demonstrating that the original attorney assigned to prepare exceptions had become disabled during the period in which a request for an extension can be made under the Rules. Due to the attorney's disabled condition, the case was reassigned to a new attorney who made a prompt request for an extension of time after he had reviewed the file over a weekend.

In opposition to the District's motion, Local 891 relies upon our decision in *City of Albany*.<sup>14</sup> In *City of Albany*, we granted a motion to dismiss the respondent's exceptions because they were filed beyond the specific date set by the Board, as the result of an earlier request by the respondent for an extension, and because the exceptions were not accompanied by proof of service upon the other party. Although respondent asserted that its mailroom had failed to mail the exceptions in a timely manner, we concluded that those bare allegations alone were not sufficient to establish extraordinary circumstances warranting the grant of an additional extension of time to file exceptions. Our decision was subsequently confirmed by the courts.

In the present case, under the specific facts and circumstances established by the District's affidavits, we conclude that the District has demonstrated extraordinary circumstances warranting the grant of additional time to file exceptions pursuant to §213.4 of the Rules. The affidavits demonstrate that the District's attorneys did not become aware of the ALJ's decision until October 29, 2009, and filed the District's motion for an extension within hours of that discovery. The District's lack of awareness

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<sup>14</sup> 23 PERB ¶3027 (1990) *confirmed sub nom. City of Albany v Newman*, 24 PERB ¶7004 (Sup Ct Albany County 1991), *affd*, 181 AD2d 953, 25 PERB ¶7002 (3d Dept 1992).

of the ALJ's decision was the direct result of a breakdown in OLR's established administrative procedure for the distribution of decisions, and not the result of any form of neglect, omission or delays by its attorneys. The fact that the District learned from Local 891, on October 29, 2009, of the issuance of another decision in an unrelated case underscores the breakdown in the OLR distribution system.

We are not persuaded by Local 891's argument that the motion should be denied because the District failed to submit an affidavit from its tribunal administrator explaining her conduct. The record establishes that the District is in the midst of conducting an investigation into the administrative breakdown. It did not submit a statement from the tribunal administrator in support of its motion because she is a potential subject of discipline and, pursuant to Civ Serv Law §75.2, she is entitled to representation during questioning about her handling of the ALJ's decision. As a result, her interrogation did not take place prior to the District filing its motion, supporting affidavits and reply papers.

Similarly, we reject Local 891's assertion that the mid-October, 2009 conversation between Brodsky and Troeller should have triggered an earlier District investigation into whether the ALJ had issued his decision. Troeller's affidavit sets forth only his impression that Brodsky was aware of the issuance of the ALJ's decision. It is not disputed that during their conversation, Troeller did not state that a decision had been issued. In response to the conversation, however, Brodsky took the reasonable and prudent step of inquiring with Blau about the status of the case. In response, Blau informed Brodsky that he had not received a decision. Based upon the District's improper practice caseload, which we take administrative notice of, we conclude that

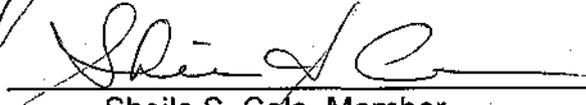
the District was not obligated, at that time, to take affirmative steps aimed at determining whether an ALJ's decision had been issued.

Finally, we reject Local 891's reliance on precedent under CPLR §2005 that requires a party asserting law office failure to establish the merits of its claim or defense. In *City of Albany*,<sup>15</sup> the court specifically rejected the argument that CPLR §2005 is applicable to PERB procedures.

IT IS, THEREOFRE, ORDERED that the District's exceptions<sup>16</sup> will be timely if filed with the Board on or before January 14, 2010 with proof of service upon Local 891.<sup>17</sup>

DATED: December 18, 2009  
Albany, New York

  
\_\_\_\_\_  
Jerome Lefkowitz, Chairman

  
\_\_\_\_\_  
Sheila S. Cole, Member

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<sup>15</sup> *Supra* note 14.

<sup>16</sup> Neither party shall submit or cite to evidence outside the administrative record before the ALJ in support of, or in response to, the exceptions filed by the District.

<sup>17</sup> Board Member Hite took no part.

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

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In the Matter of

**NIAGARA CHARTER SCHOOL INSTRUCTIONAL  
STAFF ASSOCIATION, NIAGARA WHEATFIELD  
TEACHERS ASSOCIATION/NYSUT/AFT,**

Charging Party,

**CASE NO. U-27727**

- and -

**NIAGARA CHARTER SCHOOL,**

Respondent.

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**MICHAEL DEELY, LABOR RELATIONS SPECIALIST, for Charging Party**

**GROSS SHUMAN BRIZDLE & GILFILLAN, P.C. (JONATHAN D. SCHECHTER  
and TREVOR M. TORCELLO, of counsel), for Respondent**

**BOARD DECISION AND ORDER**

This case comes to the Board on exceptions filed by the Niagara Charter School (NCS) to a decision of an Administrative Law Judge (ALJ) on an improper practice charge, dated July 18, 2007, filed by the Niagara Charter School Instructional Staff Association, Niagara Wheatfield Teachers Association/NYSUT/AFT, alleging that NCS violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when NCS refused to acknowledge the charging party as the collective negotiation representative of NCS instructional staff and when it refused requests by the charging party to commence collective negotiations for a first contract.

Following submission of the case on a stipulation of facts, the ALJ issued a decision<sup>1</sup> concluding that the charging party is the collective negotiation representative of

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<sup>1</sup>42 PERB ¶4519 (2009).

NCS instructional staff, as a matter of law, pursuant to the express terms of New York Charter Schools Act of 1998<sup>2</sup> (Charter Schools Act) and that NCS violated §209-a.1(d) of the Act when it refused requests to commence collective negotiations.

### EXCEPTIONS

In its exceptions, NCS contends that the ALJ erred when she concluded that: a) the charge raises a case or controversy under the Act; b) the recognition and certification provisions of the Act are inapplicable to NCS instructional employees; c) NCS instructional employees are represented by the charging party, as a matter of law, pursuant to Charter Schools Act, Education Law §2854(3)(b-1); and d) Charter Schools Act, Education Law §2854(3)(b-1), does not violate the United States and New York State Constitutions. The charging party supports the ALJ's decision.

Based upon our review of the record and our consideration of the parties' arguments, we remand the case to the ALJ for further processing aimed at clarifying the record with respect to the employee organization that asserts representational rights pursuant to Charter Schools Act, Education Law §2854(3)(b-1), and the right to engage in collective negotiations pursuant to §209-a.1(d) of the Act.

### FACTS

The following facts are based upon the terms of the parties' stipulation of facts.

In August 2006, NCS commenced operations with an enrollment of 264 students. In November 2006, a New York State United Teachers (NYSUT) representative wrote NCS stating that, because NCS has a student enrollment in excess of 250 students, the same employee organization that represents similar employees in the school district where NCS is located, represents NCS instructional staff pursuant to Education Law

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<sup>2</sup> L.1998, c. 4; Education Law §2850, *et seq.*

§2854(3)(b-1).

In December 2006, two NYSUT representatives met with NCS instructional employees and stated to them that, *inter alia*, the "Niagara Charter School Instructional Staff Association, Niagara-Wheatfield Teachers Association/NYSUT/AFT (Association) represented the instructional staff at Niagara Wheatfield School District, and that, therefore, under the statute the Association was automatically the representative of the instructional staff of NCS in a separate bargaining unit."<sup>3</sup> This position was reiterated in January and February memoranda from NYSUT representatives to NCS, including the president of the "Association," requesting the commencement of collective negotiations.

NCS asserts that NYSUT does not represent the instructional employees. In an April 2007 letter, NCS informed a NYSUT representative that it had serious concerns about agreeing to the prior requests because of a belief that the grant of recognition would violate the Act and may violate rights guaranteed by the United States and New York State Constitutions.<sup>4</sup> In response, NYSUT representatives sent NCS a May 2007 memorandum reiterating that the Association represents NCS instructional employees, that it seeks to commence negotiations, and that it would file an improper practice charge if NCS refused to commence negotiations.<sup>5</sup>

The Niagara Wheatfield Teachers Association, NYSUT, AFT, NEA, AFL-CIO has not filed a representation petition, pursuant to PERB's Rules of Procedure (Rules), seeking to represent NCS instructional employees. In addition, it has not presented a showing of

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<sup>3</sup> Joint Exhibit, ¶8.

<sup>4</sup> Joint Exhibit 1, p.2.

<sup>5</sup> There were other written, electronic and oral communications between NYSUT and NCS over the disputed issues between December 2006 and May 2007. Joint Exhibit 1, ¶14.

interest pursuant to the Rules and does not claim to have majority status among NCS instructional employees. There has not been a representation election for a unit of NCS instructional employees, and NCS refuses to agree to commence negotiations.

### DISCUSSION

This case presents the Board with its first opportunity to examine and apply the employee organization representation provision codified in the Charter Schools Act.<sup>6</sup>

Education Law §2854(3)(b-1) provides that when a particular charter school has an enrollment of more than 250 students, an incumbent employee organization representing similar employees in the school district where the charter school is located shall be deemed the representative of a separate negotiation unit of similar employees of the charter school. Specifically, the law states:

[t]he employees of a charter school that is not a conversion from an existing public school shall not be deemed members of any existing collective bargaining unit representing employees of the school district in which the charter school is located, and the charter school and its employees shall not be subject to any existing collective bargaining agreement between the school district and its employees. Provided, however, that (i) if the student enrollment of the charter school on the first day on which the charter school commences student instruction exceeds two hundred fifty or if the average daily student enrollment of such school exceeds two hundred fifty students at any point during *the first two years after the charter school commences student instruction, all employees of the school who are eligible for representation under [the Act] shall be deemed to be represented in a separate negotiating unit at the charter school by the same employee organization, if any, that represents like employees in the school district in which such charter school is located (emphasis added)*; (ii) the provisions of subparagraph (i) of this paragraph may be

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<sup>6</sup> In *Niagara Charter School*, 40 PERB ¶6603 (2007), *affd*, 41 PERB ¶6501 (2008), we affirmed the dismissal of a related NCS petition seeking a declaratory ruling pursuant to §210 of the Rules seeking an analysis of the interplay between provisions of the Act and the provisions of the Charter School Act. Our dismissal was on technical grounds based upon the purposes of a declaratory ruling under the Rules.

waived in up to ten charters issued on the recommendation of the charter entity set forth in paragraph (b) of subdivision three of section twenty-eight hundred fifty-one of this article; (iii) the provisions of subparagraph (i) of this paragraph shall not be applicable to the renewal or extension of a charter; and (iv) nothing in this sentence shall be construed to subject a charter school subject to the provisions of this paragraph or its employees to any collective bargaining agreement between any public school district and its employees or to make the employees of such charter school part of any negotiating unit at such school district. The charter school may, in its sole discretion, choose whether or not to offer the terms of any existing collective bargaining to school employees. (emphasis added)

Thus, Education Law §2854(3)(b-1) requires, in certain circumstances, that the "same employee organization" that represents similar employees in the school district where a charter school is located, be deemed to represent a separate negotiating unit of similar employees in the charter school. The statute does not state that the employee organization must file a representation petition or obtain a showing of interest under the Act.

In the present case, the record needs to be clarified before we can reach the merits of NCS's exceptions. This is necessitated by ambiguities in the parties' stipulation of facts with respect to the employee organization that is asserting representational rights for NCS instructional employees pursuant to Education Law §2854(3)(b-1).

The stipulation states that NYSUT representatives told an assembled group of NCS instructional employees that the "Niagara Charter School Instructional Staff Association, Niagara Wheatfield Teachers Association/NYSUT/AFT (Association)" represents instructional staff of the Niagara Wheatfield School District. However, the stipulation does not state that NCS agrees that the Association referenced by NYSUT representatives during the meeting is the same employee organization representing instructional staff at the Niagara Wheatfield School District. In addition, the stipulation is unclear as to the specific Association that asserts representational rights under

Education Law §2854(3)(b-1) and that requested the commencement of collective negotiations with NCS. Under the stipulation, it is unclear whether the Niagara Charter School Instructional Staff Association is a subpart of the Niagara Wheatfield Teachers Association or a separate entity affiliated with NYSUT. Furthermore, the stipulation is silent as to whether NCS is located in the Niagara Wheatfield School District. Finally, the stipulation states that NCS maintains that NYSUT, as opposed to an affiliated Association, does not represent its instructional staff.

In remanding the case for clarification, we have taken administrative notice that the parties' stipulation of facts in a prior related case explicitly stated that "[t]he employee organization representing instructional employees in the school district in which NCS is located is the Niagara Wheatfield Teachers Association, NYSUT, AFT, NEA, AFL-CIO" and that "[t]he employee organization seeking to represent instructional employees at NCS is the Niagara Wheatfield Teachers Association, NYSUT, AFT, NEA, AFL-CIO." In addition, the prior stipulation references a March 26, 2007 memorandum from NYSUT representatives to NCS demanding commencement of negotiations with the Niagara Wheatfield Teachers Association, NYSUT, AFT, NEA, AFL-CIO.<sup>7</sup> The earlier stipulation does not refer to the Niagara Charter School Instructional Staff Association. However, that stipulation was agreed to over a month before the filing of the present charge, and the identity of the employee organization asserting rights under the Education Law §2854(3)(b-1) and the right to engage in collective negotiations pursuant to §209-a.1(d) of the Act may have changed in the interim.

As noted, Education Law §2854(3)(b-1) states that the "same employee organization" that represents similar employees in the school district where a charter

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<sup>7</sup> *Niagara Charter School*, *supra*, note 6, 40 PERB at 6613.

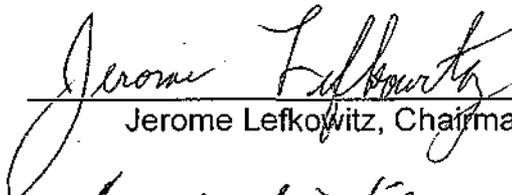
school is located is entitled to certain representational rights. The reference to Niagara Charter School Instructional Staff Association in the present stipulation, as well as its inclusion in the name of the charging party, creates an ambiguity that must be resolved before the Board can reach the merits of NCS's exceptions.

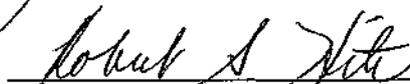
We fully recognize the importance and value of parties entering into stipulations of facts. They are an economical and convenient means of eliminating or limiting the need for a hearing before an ALJ.<sup>8</sup> However, parties retain the same level of responsibility and care for ensuring a complete record whether through a stipulation or through the presentation of evidence at an improper practice hearing.

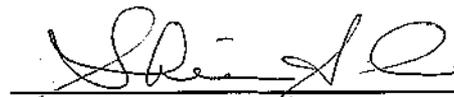
Based upon the foregoing, we remand the case to the ALJ for further processing aimed at clarifying the record consistent with our decision.

IT IS, THEREFORE, ORDERED, that this case is hereby remanded to the ALJ.

DATED: December 18, 2009  
Albany, New York

  
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Jerome Lefkowitz, Chairman

  
\_\_\_\_\_  
Robert S. Hite, Member

  
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Sheila S. Cole, Member

<sup>8</sup> City of Albany, 42 PERB ¶3005 (2009).

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

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In the Matter of

**ODESSA E. HUNTER,**

Charging Party,

-and-

**CASE NO. U-28615**

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

Respondent,

-and-

**STATE OF NEW YORK (DEPARTMENT OF  
CORRECTIONAL SERVICES),**

Employer.

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**ODESSA E. HUNTER, *pro se***

**SHEEHAN GREENE CARRAWAY GOLDBERMAN & JACQUES LLP  
(ERIN N. WALSH of counsel), for Respondent**

**MICHAEL N. VOLFORTE, ACTING GENERAL COUNSEL  
(RONALD S. EHRLICH of counsel), for Employer**

**BOARD DECISION AND ORDER**

This case comes to the Board on a motion, dated December 1, 2009, by Odessa E. Hunter (Hunter) requesting an extension of time to file exceptions, pursuant to §213.4 of our Rules of Procedure (Rules), to a decision of an Administrative Law Judge (ALJ), dated October 26, 2009, on an improper practice charge, as amended, filed by Hunter alleging that the New York State Correctional Officers and Police Benevolent Association, Inc. (NYSCOPBA) violated §209-a.2(c) of the Public Employees' Fair

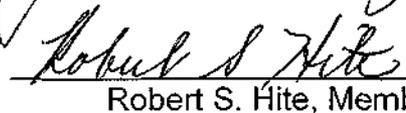
demonstrates extraordinary circumstances will we grant a motion to extend the period of time for a party to request an extension of time to file exceptions.<sup>1</sup> Extraordinary circumstances can be established through the presentation of specific and detailed facts demonstrating that the failure to make a timely request for an extension was not the result of a neglectful error or the burdens from other obligations.<sup>2</sup>

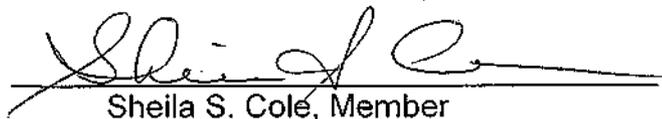
In the present case, Hunter fails to set forth sufficient and relevant facts demonstrating extraordinary circumstances. Her misreading of the clear and explicit notice accompanying the ALJ's decision, and her need for additional time to review the ALJ's decision, do not meet the high standard necessary to demonstrate extraordinary circumstances under §213.4 of the Rules, and our precedent applying that Rule.

IT IS, THEREFORE, ORDERED that Hunter's motion is denied.

DATED: December 18, 2009  
Albany, New York

  
Jerome Lefkowitz, Chairman

  
Robert S. Hite, Member

  
Sheila S. Cole, Member

<sup>1</sup> *Onondaga Community Coll*, 11 PERB ¶3008 (1978).

<sup>2</sup> *Westbury Union Free Sch Dist (Handy)*, 12 PERB ¶3107 (1979); *UFT (Gottlieb)*, 13 PERB ¶3101 (1980); *Bd of Educ of the City of New York (Barnett)*, 16 PERB ¶3051 (1983); *UFT (Thompson)*, 18 PERB ¶3014 (1985); *CSEA (Adams)*, 28 PERB ¶3054 (1995); *County of Westchester*, 28 PERB ¶4535 (1995).