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8-6-2012

State of New York Public Employment Relations Board Decisions from August 6, 2012

New York State Public Employment Relations Board

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State of New York Public Employment Relations Board Decisions from August 6, 2012

Keywords

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STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

LOCAL 74, USWU, IUJAT,

Petitioner,

-and-

CASE NO. CU-6010

OUR LADY OF LOURDES HIGH SCHOOL,

Employer,

-and-

LAY FACULTY ASSOCIATION, LIUNA, AFL-CIO,

Intervenor/Incumbent.

**O'DWYER & BERNSTEIN, LLP (ANDREW GRABOIS, ESQ., of counsel) for
Petitioner**

**SHEPPARD, MULLIN, RICHTER & HAMPTON LLP (JAMES HAYS, ESQ., of
counsel) for Employer**

**ARCHER, BYINGTON, GLENNON & LEVINE LLP (JAMES VERSOCKI, ESQ.,
of counsel), for Intervenor/Incumbent**

BOARD DECISION AND ORDER

On September 3, 2010, the Local 74, USWU, IUJAT (Petitioner) filed a timely petition seeking to be certified as the exclusive negotiating representative for employees in the following unit, currently represented by the Lay Faculty Association, LINUA, AFL-CIO (Intervenor/Incumbent):

Included: Full and Regular Part-time Lay Faculty Members (including librarians and counselors).

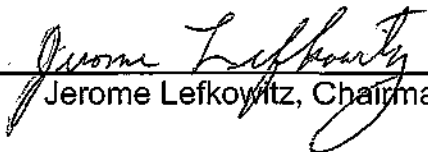
Excluded: All clerical, supervisory and religious employees.

Upon the consent of the parties, a mail ballot election was held on July 10, 2012 concerning whether employees in the unit wanted to be represented by Petitioner, Intervenor/Incumbent or neither. The results of this election show that the majority of eligible employees in the unit who cast valid ballots no longer desire to be represented for purposes of collective negotiations.^{1/}

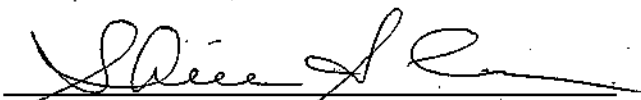
THEREFORE, IT IS ORDERED that the petition seeking certification by Petitioner should be, and it hereby is, dismissed;

IT IS FURTHER ORDERED that Intervenor/Incumbent be, and it hereby is, decertified as the negotiating agent for the unit.

DATED: August 6, 2012,
Albany, New York



Jerome Lefkowitz, Chairman



Sheila S. Cole, Member

^{1/} Of the 37 ballots cast, 23 were against representation, 11 were for representation by Petitioner and 3 were for continued representation by Intervenor/Incumbent. There were no challenged ballots.

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

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

Petitioner,

-and-

CASE NO. C-6068

**INCORPORATED VILLAGE OF ROCKVILLE
CENTRE,**

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,

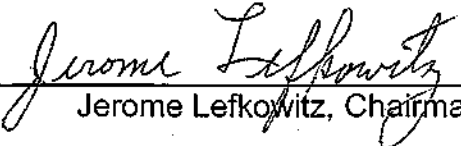
IT IS HEREBY CERTIFIED that the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

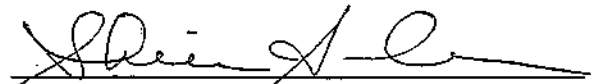
Included: The Account Clerk in the Comptroller's Office who supervises Tax Assessment and the Senior Account Clerk in the Comptroller's Office who supervises Utilities Accounting and all employees in the titles of Inspector of Street Maintenance, Motor Repair Supervisor, Electric Engineer-Utilities, Deputy Superintendent of Public Works, Recreation Specialist, Housing Coordinator, Power Plant Maintenance Supervisor, Community Youth Group Worker, Senior Citizen Program Development Specialist, Assistant Superintendent-Power Plant, Purchasing Agent, Information Technology Specialist I, Programmer/Computer Operator, Safety Coordinator and Deputy Superintendent of Electric Utilities.

Excluded: All other Account Clerks and Senior Account Clerks and all other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO. The duty to negotiate collectively includes the mutual obligation to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party. Such obligation does not compel either party to agree to a proposal or require the making of a concession.

DATED: August 6, 2012
Albany, New York


Jerome Lefkowitz, Chairman


Sheila S. Cole, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

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

Petitioner,

-and-

CASE NO. C-6115

**VALLEY STREAM CENTRAL HIGH SCHOOL
DISTRICT,**

Employer,

-and-

**LOCAL 74, UNITED SERVICE WORKERS
UNION, IUJAT,**

Intervenor/Incumbent.

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

A representation proceeding having been conducted in the above matter by the Public Employment Relations Board in accordance with the Public Employees' Fair Employment Act and the Rules of Procedure 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 Civil Service Employees Association, Inc.,

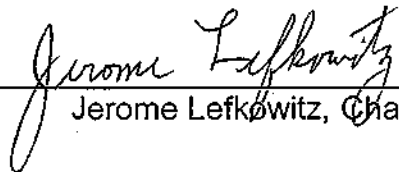
Local 1000, AFSCME, AFL-CIO has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Included: All permanent, full-time and part-time members of the custodial, grounds and maintenance staff of the Valley Stream Central High School District, including but not limited to the following job titles: Assistant Head Custodian, Cleaner, Custodian/Groundskeeper, Plumbing and Electrical Maintenance Mechanic, Skilled Maintainer, Building Attendant and Messenger (CHSD).

Excluded: Seasonal and casual employees and all others not set forth above.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO. The duty to negotiate collectively includes the mutual obligation to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party. Such obligation does not compel either party to agree to a proposal or require the making of a concession.

DATED: August 6, 2012
Albany, New York


Jerome Lefkowitz, Chairman


Sheila S. Cole, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

JOHN S. BURKE CATHOLIC HIGH SCHOOL,

Employer/Petitioner,

-and-

CASE NO. CE-6128

LAY FACULTY ASSOCIATION,

Union.

**SHEPPARD, MULLIN, RICHTER & HAMPTON LLP (JAMES HAYS, ESQ., of
counsel) for Employer**

**ARCHER, BYINGTON, GLENNON & LEVINE LLP (JAMES VERSOCKI, ESQ.,
of counsel), for Intervenor/Incumbent**

BOARD DECISION AND ORDER

On April 6, 2012, the John S. Burke Catholic High School (petitioner) filed a timely petition for decertification of the Lay Faculty Association (union), the current negotiating representative for employees in the following unit:

Included: Full and regular part-time Lay Faculty Members (including librarians and counselors).

Excluded: All clerical, supervisory and professional and religious employees.

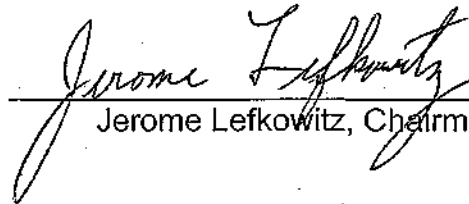
Upon consent of the parties, a mail ballot election was held on June 4, 2012.

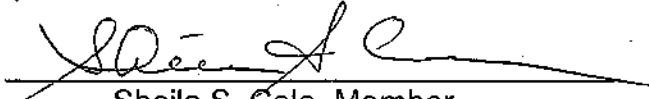
The results of this election show that the majority of eligible employees in the unit who cast valid ballots no longer desire to be represented for purposes of collective

negotiations by the union.^{1/}

THEREFORE, IT IS ORDERED that the union be, and it hereby is, decertified as the negotiating agent for the unit.

DATED: August 6, 2012,
Albany, New York, New York


Jerome Lefkowitz, Chairman


Sheila S. Cole, Member

^{1/} Of the 31 ballots cast, 4 were for representation and 9 against representation. There were no challenged ballots.

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

SHEFFIELD TULLOCH,

Charging Party,

-and-

CASE NO. U-31040

**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.

SHEFFIELD TULLOCH, *pro se*

**RICHARD E. CASAGRANDE, GENERAL COUNSEL (WENDY M. STAR of
counsel), for Respondent**

**DAVID BRODSKY, ESQ., DIRECTOR, OFFICE OF LABOR RELATIONS AND
COLLECTIVE BARGAINING (ALLISON S. BILLER of counsel), for Employer**

BOARD DECISION AND ORDER

This case comes to the Board on exceptions filed by Sheffield Tulloch (Tulloch), to a decision by an Administrative Law Judge (ALJ) dismissing an improper practice charge, as amended, filed by Tulloch against the United Federation of Teachers, Local 2, AFT, AFL-CIO (UFT) alleging that UFT violated §209-a.2(c) of the Public Employees'

Fair Employment Act (Act).¹ The ALJ dismissed the charge on the ground that it is untimely pursuant to §204.1(a)(1) of the Rules of Procedure (Rules).

PROCEDURAL BACKGROUND

On May 10, 2011, Tulloch filed the charge alleging that UFT violated the Act when it failed to respond to his inquiries concerning his salary and refused to process a grievance. Tulloch specifically alleged in the charge that he has "been attempting to obtain Union representation on this issue for approximately 2 years now."² Following a preliminary review of the charge pursuant to §204.2(a) of the Rules, the Director of Public Employment Practices and Representation (Director) notified Tulloch that the charge is untimely. The Director, however, granted Tulloch an opportunity to amend his allegations. In response, Tulloch filed an amended charge alleging that he filed a complaint with UFT in March 2011 concerning back wages and that UFT refuses to process his complaint. Thereafter, UFT and the District filed answers asserting, *inter alia*, that the amended charge is untimely.

During the hearing before the ALJ, Tulloch testified that following his reinstatement in 2003, UFT failed to respond to his inquiry concerning his salary, and refused to file a grievance. According to Tulloch, UFT did not respond to his salary inquiry in 2006, and refused to file a grievance in 2007.³ Tulloch emphasized: "That is

¹ 45 PERB ¶4556 (2012). The Board of Education of the City School District of the City of New York (District) is a statutory party pursuant to §209-a(3) of the Act.

² ALJ Exhibit 1.

³ Transcript, pp. 7-9, 12-14. In light of Tulloch's testimony, we reject the assertion in his exceptions that he did not request UFT to file a grievance until 2011.

the basis of this hearing, this whole issue, this case.”⁴ During his narrative testimony, the District objected, on relevancy grounds, to Tulloch testifying about purported mistreatment by the District.⁵ At the conclusion of Tulloch’s case, UFT and the District made oral motions to dismiss the amended charge as untimely.⁶ The ALJ adjourned the hearing to provide the parties with an opportunity to submit briefs regarding the motions by UFT and the District. After Tulloch, UFT and the District filed their respective briefs, the ALJ issued a decision dated April 26, 2012, dismissing the charge. Following issuance of the decision, Tulloch complained to the ALJ that he had not been notified of the number of copies he needed to serve on the other parties, he had not received UFT’s post-hearing brief, and UFT failed to respond to his discovery requests during the processing of the charge. On May 4, 2012, the ALJ responded with a letter explaining that the case before him was closed following issuance of the decision.

EXCEPTIONS

In his exceptions, Tulloch does not challenge the ALJ’s conclusion that his amended charge is untimely. Instead, his exceptions focus on purported procedural errors, factual mistakes and alleged bias by the ALJ. UFT and the District support the ALJ’s decision. Following our careful review of the record, and the arguments of the parties, we affirm the ALJ’s decision, as modified.

⁴ Transcript, p. 10. Tulloch also testified to UFT’s failure to pursue another grievance in 2004. Transcript, pp. 18-20.

⁵ Transcript, pp. 21-24.

⁶ Transcript, pp. 25-26.

DISCUSSION

Pursuant to §212.5 of the Rules, a party submitting a brief to an ALJ is required to file an original and three copies. Contrary to Tulloch's exceptions, the failure of the ALJ to explicitly inform him of that requirement does not constitute reversal error. There is nothing in the record to demonstrate that the charge was dismissed because Tulloch did not file or serve a sufficient number of copies of his post-hearing brief.

Tulloch's claim that the ALJ failed to order UFT to comply with his discovery demand does not constitute a procedural error or demonstrate unfairness. While voluntary pre-hearing exchange of documents between the parties is important in expediting the administrative process, our Rules do not mandate pre-hearing disclosure.

The record also does not support Tulloch's claim that the ALJ demonstrated partiality toward UFT. At the hearing, the ALJ permitted Tulloch to testify in a narrative form and he was provided with an opportunity to articulate the relevant facts to support his claim against UFT. Tulloch testified that the UFT conduct which forms the basis for his charge occurred in 2006 and 2007. His testimony supports the affirmative defenses raised by UFT and the District in their respective answers that the charge is untimely.

While Tulloch claims that the ALJ denied him an opportunity to testify with respect to certain unidentified documents, the transcript reveals that he requested permission to "get something," and little else.⁷ The ALJ did not expressly deny his request. Moreover, we are unable to discern from the transcript whether Tulloch was referencing documents, and if he was, whether those documents were relevant to the timeliness of the charge.

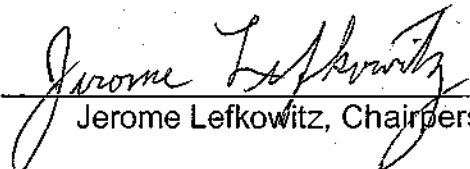
⁷ Transcript, pp. 24-25.


The fact that the ALJ asked at the conclusion of Tulloch's testimony whether UFT intended to make a motion does not demonstrate bias or unfairness in the administrative process. A motion to dismiss at the conclusion of a charging party's case is a common procedure, and the ALJ's question cannot be reasonably construed as suggesting that UFT make such a motion.⁸

Finally, we grant, in part, Tulloch exceptions claiming that the ALJ made misstatements in his decision and in his subsequent letter. Tulloch filed his charge in 2011, and not 2010 as stated in the ALJ's decision. In addition, the record does not support the ALJ's statement in his May 4, 2012 letter that Tulloch was already aware of the issuance of the decision. These minor misstatements, however, are not bases for reversing the ALJ's decision.

IT IS, THEREFORE, ORDERED that Tulloch's exceptions are denied, in part, and granted, in part, and the ALJ's decision is affirmed as modified.

DATED: August 6, 2012
Albany, New York


Jerome Lefkowitz, Chairperson


Sheila S. Cole, Member

⁸We also reject Tulloch's claim that the circumstances surrounding the ALJ's grant of an extension of time for UFT to file its brief demonstrates partiality by the ALJ.

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

**SHELTER ISLAND FACULTY ASSOCIATION,
NYSUT, AFT, NEA, AFL-CIO,**

Charging Party,

CASE NO. U-30525

- and -

**SHELTER ISLAND UNION FREE SCHOOL
DISTRICT,**

Respondent.

**JONATHAN D. RUBIN, LABOR RELATIONS SPECIALIST, NYSUT, for
Charging Party**

**INGERMAN SMITH, L.L.P. (CHRISTOPHER VENATOR of counsel), for
Respondent**

BOARD DECISION AND ORDER

This case comes to the Board on exceptions filed by the Shelter Island Faculty Association, NYSUT, AFT, NEA, AFL-CIO (Association) to a decision of an Administrative Law Judge (ALJ) dismissing the Association's improper practice charge, which alleges that the Shelter Island Union Free School District (District) violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when it unilaterally discontinued a past practice of compensating a unit member for attending quarterly Board of Trustees meetings of the East End Health Plan (Health Plan) without charging accumulated leave under the parties' collectively negotiated agreement (agreement). The ALJ dismissed the charge, sustaining the District's related affirmative defenses of

contract reversion and duty satisfaction.¹

The case was submitted to the ALJ on a stipulated record, which has aided in an expedited final resolution of the issues raised by the parties.

EXCEPTIONS

In its exceptions, the Association asserts that the ALJ erred in concluding that the District met its burden of demonstrating its contract reversion and duty satisfaction defenses based upon the personal leave provision in Article XVII(B) of the agreement. The Association also claims that the ALJ erred in concluding that a unit member's attendance as a trustee at the quarterly meetings of the Health Plan's Board of Trustees is personal in nature. Finally, the Association excepts to the ALJ's purported conclusion that the unit member may have been eligible to utilize union leave to attend Board of Trustees' meetings. The District supports the ALJ's decision.

Following our review of the record, we reverse the ALJ's decision, and conclude that the District violated §209-a.1(d) of the Act when it discontinued the past practice of compensating an Association unit member, who is a trustee of the Health Plan, for attending quarterly Board of Trustees' meetings without charging accumulated leave under the parties' agreement.

FACTS

Article XVII of the parties' agreement is entitled "Teacher Leaves." It includes provisions concerning a variety of specifically defined paid leaves for Association unit members: jury duty; subpoenaed attendance to testify before a tribunal concerning litigation; sick leave; personal leave; professional days; child care leave; sabbatical

leave; and bereavement leave.²

Article XVII(B) is the sick and personal leave provision, which states in relevant part:

SICK LEAVE/PERSONAL LEAVE

Each full-time teacher shall be entitled to 15 sick days per annum and 2 personal days per annum (said sick days to accumulate annually). The leave days shall be for the following purposes including medical treatment.

1. **Sickness**
2. **Personal Business**
(Personal business is defined as an activity which cannot be accomplished on a non-working day or during non-working hours.)
3. **Medical Treatment**
(Medical treatment is defined as an activity which cannot be accomplished on a non-working day or during non-working hours).

Requests for personal leave days should be made at least three (3) days in advance, except in cases of emergency. The Superintendent shall request specific reasons for any personal leave in excess of two days per year and may grant these at his/her discretion.

Both unused personal and sick leave may accumulate to a maximum of two hundred (200) days.³

The Association President is entitled to union leave under Article VI(G) of the agreement, which states:

The District shall continue its practice of permitting the Association President to attend union conferences and programs, up to a maximum of six (6) days a year. In the discretion of the Superintendent, additional time may be approved.⁴

² Stipulation of Facts, Exhibit A, pp. 8-11.

³ Stipulation of Facts, Exhibit A, pp. 8-9.

The District is a participating school district of the Health Plan, a multi-employer municipal cooperative health plan established under the Insurance Law.

Article XXI of the parties' agreement expressly references the Health Plan.

Article XXI(A) states:

The Board of Education agrees to provide medical coverage (East End Health Plan) for a period of four (4) years to all affected employees, (those bargaining unit members hired prior to the date of the memorandum of agreement, August 28, 1996), retirees and their dependents. The Board of Education shall incur full costs of the program for all employees and their dependents. Both parties shall adhere to all requirements and benefits developed by the Plan.

In the event the parties choose not to continue in the "Plan" at the conclusion of four (4) years, or the "Plan" ceases to exist, all necessary steps will be taken to re-enter the Empire Plan unless the parties agree to other forms of health coverage.⁵

The Health Plan is subject to the East End Health Plan Trust Agreement (Trust Agreement), which became effective on January 1, 1991. The Health Plan is governed by a Board of Trustees, which is composed of individuals in the following categories from participating school districts: three Board of Education members, each from different school districts; two Superintendents of Schools; one BOCES I, Suffolk representative; four teacher members, each from different school districts; one civil service employee, and one non-Central Office Administrator.⁶ All qualified individuals in participating school districts may run for an elected trustee position in their respective category. However, only one trustee in each category can be from the same school

⁵ Stipulation of Facts, Exhibit A, p. 15.

district, and a participating school district is limited to two representatives. Although the District is a participating district, it does not have a representative on the Board of Trustees.

Frank Emmett (Emmett) is a District teacher and the Association President.⁷ Since September 2000, Emmett has been an employee representative on the Board of Trustees and has attended its quarterly meetings in that capacity. During his tenure on the Board of Trustees, Emmett has been permitted by the District to attend the quarterly meetings without utilizing personal or any other form of leave under the terms of the agreement.

On or about September 1, 2010, the District advised Emmett that he would be required to utilize personal leave when attending quarterly meetings of the Board of Trustees. In order to attend the September 15, 2010 Board meeting, Emmett elected to take the day without pay rather than utilizing personal leave, which the District had made available to him.

DISCUSSION

When parties have negotiated an agreement with respect to a specific subject, an employer may unilaterally end a past practice without violating the Act by reverting to the terms of that specifically negotiated provision of the agreement.⁸ After satisfying the duty to negotiate a particular subject, a respondent cannot be found to have acted

⁷ According to the Association's exceptions, Emmett did not become an Association representative until 2003, a factual assertion that is not supported by the stipulated record. Association Exception No. 4.

⁸ *Village of Mount Kisco*, 43 PERB ¶3029 (2010); *NYCTA*, 42 PERB ¶3012 (2009); *Bd of Educ of the City Sch Dist of the City of New York*, 42 PERB ¶3019 (2009); *NYCTA*,

unilaterally in violation of the Act, when its actions are permitted under the terms of the negotiated agreement.⁹

The burden rests with the respondent to plead and prove a contract reversion or duty satisfaction defense through negotiated terms that are reasonably clear on the specific subject at issue.¹⁰ By definition, a determination with respect to either defense requires us to interpret the meaning of the agreement through the application of standard principles of contract interpretation. If the language of an agreement is reasonably clear but susceptible to more than one interpretation, we will consider extrinsic evidence in determining the intent of the parties.¹¹

Although the Health Plan is explicitly referenced in Article XXI of the parties' agreement, the agreement is silent concerning membership or participation on the Board of Trustees by the District Superintendent, Board of Education members, or Association unit members. Nor does Article XXI contain a leave provision concerning attendance by Association unit members at the quarterly meetings of the Board of Trustees.

The ALJ concluded, however, that the District has a right under the Act to revert to Article XVII(B) of the agreement on the ground that attendance at meetings of the Board of Trustees is an activity that falls within the contractual definition of "personal business" for use of personal leave. We disagree.

⁹ *Niagara Frontier Transit Metro System, Inc.*, 42 PERB ¶3023 (2009); *County of Greene and Sheriff of Greene County*, 42 PERB ¶3031 (2009).

¹⁰ *NYCTA*, *supra* note 8; *NYCTA*, 20 PERB ¶3037 (1987), *confirmed*, *NYCTA v New York State Pub Empl Rel Bd*, 147 AD2d 574, 22 PERB ¶7001 (2d Dept 1989); *Town of Shawangunk*, 32 PERB ¶3042 (1999).

Following our review of the applicable provision, we conclude that the agreement is not reasonably clear that the parties intended that attendance at quarterly meetings of the Board of Trustees by a unit member as a trustee be an activity that constitutes "personal business" under the agreement. Pursuant to Article XVII(B) of the agreement, Association unit members are entitled to a minimum of 15 sick days and 2 personal days per annum. Those two forms of accumulated leave can be used for one of three specifically defined purposes under the agreement: sickness; personal business and medical treatment. The parties define the phrases "personal business" and "medical treatment" in an identical manner: "an activity which cannot be accomplished on a non-working day or during non-working hours." The parties' utilization of the same definition for both phrases demonstrates that the definition alone is insufficient to demonstrate that attendance at meetings of the Board of Trustees constitutes "personal business" covered by Article XVII(B). In addition, in order for a unit member to have sufficient leave time to attend the quarterly meetings, he or she would have to supplement the 2 personal days with 2 sick days or be granted additional personal days at the Superintendent's discretion.

At best, the agreement is ambiguous concerning the at-issue subject, warranting our consideration of extrinsic evidence in the stipulated record. The extrinsic evidence is comprised of the 2000 and 2002 amendments to the Trust Agreement describing the composition of the Board of Trustees and the applicable selection procedures for membership on that governing board. The extrinsic evidence also includes the stipulated facts.

Read together, the extrinsic evidence reveals that Emmett's membership and

multi-employer municipal cooperative health plan. While Emmett is not a representative of the District, as a trustee he functions in a fiduciary capacity to, *inter alia*, the District and other participating school districts in the management, control and administration of the Health Plan. Indeed, his fiduciary activities and responsibilities are equivalent to those of the three Board of Education members and the two Superintendents of Schools who are also trustees. Under these facts and circumstances, Emmett's attendance at the Board of Trustees cannot be construed as a personal activity or as a subject already covered under Article XVII(B) of the agreement.¹²

Based upon the foregoing, we reverse the ALJ's conclusion that the District did not violate §209-a.1(d) of the Act on the bases of its contract reversion and duty satisfaction defenses.

Finally, we deny the Association's exception challenging what it claims is the ALJ's conclusion that a unit member may be eligible to utilize union leave to attend Board of Trustees' meetings. In fact, the ALJ found that the agreement did not include "any provision for release time in furtherance of Association business."¹³ While Article VI(G) of the agreement demonstrates that the ALJ's statement is erroneous, the error is not a basis for disturbing the decision. Article VI(G) of the agreement did not form the basis for the District's contract reversion and duty satisfaction defenses, or the ALJ's decision, and the District has not filed cross-exceptions to the ALJ's decision.

¹² The ALJ's reliance upon *Florida Union Free Sch Dist*, 31 PERB ¶3056 (1998), is misplaced. Unlike the present case, the particular contract provision in that case was found to encompass daily coffee breaks.

Therefore, the possible applicability of Article VI(G) of the agreement to the District's defenses is waived.¹⁴ Finally, the record does not support the conclusion that Emmett was an Association representative on the Board of Trustees.

Based upon the foregoing, we reverse the ALJ's decision and conclude that the District violated §209-a.1(d) of the Act when it unilaterally discontinued the past practice of compensating Emmett for attending, as a trustee, the quarterly meetings of the Board of Trustees of the Health Plan without charging personal leave under the agreement.

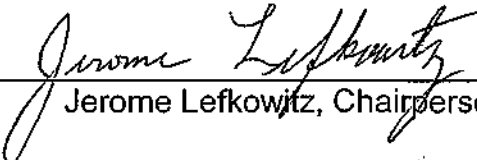
IT IS, THEREFORE, ORDERED that the District:

1. Cease and desist from discontinuing the practice of compensating an Association unit member for attending the quarterly meetings of the Board of Trustees of the East End Health Plan as a trustee without having to charge accumulated leave under the terms of the collectively negotiated agreement;
2. Compensate Frank Emmett and/or make him whole for any loss of pay or benefits for attending, as a trustee, the September 15, 2010 meeting of the Board of Trustees of the East End Health Plan and any subsequent quarterly meetings of such Board of Trustees, with interest at the maximum legal rate;
3. Sign, post and distribute the attached notice in all locations normally used to

¹⁴ Section 213.2(b)(4) of the Rules of Procedure; *Town of Orangetown*, 40 PERB ¶13008 (2007), *confirmed*, *Town of Orangetown v New York State Pub Empl Rel Bd*, 40 PERB ¶17008 (Sup Ct Albany County 2007).

communicate both in writing and electronically with Association unit employees.

DATED: August 6, 2012
Albany, New York



Jerome Lefkowitz, Chairperson



Sheila S. Cole, 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 Shelter Island Union Free School District, in the unit represented by Shelter Island Faculty Association, NYSUT, AFT, NEA, AFL-CIO, that the District will:

1. Reinstate the practice of compensating an Association unit member for attending, the quarterly meetings of the Board of Trustees of the East End Health Plan as a trustee without having to charge accumulated leave under the collectively negotiated agreement;
2. Compensate Frank Emmett and/or make him whole for any loss of pay or benefits for attending, as a trustee, the September 15, 2010 meeting of the Board of Trustees of the East End Health Plan and any subsequent quarterly meetings of such Board of Trustees.

Dated

By

On behalf of the Shelter Island Union
Free School District

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

ANTHONY FALSO,

Charging Party,

CASE NO. U-31025

- and -

ROCHESTER TEACHERS ASSOCIATION,

Respondent,

- and -

ROCHESTER CITY SCHOOL DISTRICT,

Employer.

ANTHONY FALSO, *pro se*

**RICHARD E. CASAGRANDE, GENERAL COUNSEL (HAROLD EISENSTEIN
of counsel), for Respondent**

**CHARLES G. JOHNSON, GENERAL COUNSEL (BETHANY A. CENTRONE
of counsel), for Employer**

BOARD DECISION AND ORDER

This case comes to the Board on exceptions filed by Anthony Falso (Falso) to a decision of an Administrative Law Judge (ALJ) dismissing an improper practice charge, filed on May 5, 2011, alleging that the Rochester Teachers Association (Association) violated §209-a.2(c) of the Public Employees' Fair Employment Act (Act). The charge was dismissed based upon the ALJ's conclusion that the charge, as supplemented and modified by Falso's offer of proof, failed to allege sufficient facts, which if proven, would

demonstrate that the Association violated §209-a.2(c) of the Act.¹

In his exceptions, Falso asserts four bases for reversing the ALJ's decision. His first exception asserts that his allegations concerning the private attorney retained by the Association to evaluate the merits of his 2007 grievance are sufficient to set forth a claim of a violation of §209-a.2(c) of the Act against the Association. He also asserts that the Association's alleged failure to respond to his workplace complaints in 2006 and 2007 and to keep him properly informed about the processing of his grievance prior to 2011 state a claim under §209-a.2(c) of the Act. Finally, he claims that the ALJ's decision should be overturned on the grounds that he was denied pre-hearing discovery and an evidentiary hearing. The Association supports the ALJ's decision.

Following our review of the exceptions, the Association's response, and the record, we affirm the decision of the ALJ dismissing the charge.

FACTS

For purposes of determining Falso's exceptions, we consider the undisputed facts set forth in the ALJ's letter to the parties dated August 26, 2011, and assume the truth of the allegations in the charge and offer of proof as they relate to the specifics of the exceptions.²

Falso was employed as a *per diem* substitute teacher by the Rochester City School

¹ 45 PERB ¶4509 (2012). Pursuant to §209-a.3 of the Act, the Rochester City School District is named as a statutory party.

² *County of Livingston*, 43 PERB ¶3018 (2010); *Bd of Educ of the City Sch Dist of the City of New York (Grassel)*, 43 PERB ¶3010 (2010); *Niagara Frontier Transit Metro System, Inc.*, 42 PERB ¶3023 (2009).

District (District) for the period May 2006-November 2007. During his tenure, the District received complaints from five District schools about his mismanagement of assigned classrooms and other related problems concerning his job performance. Falso responded to each written complaint with a letter to the District. He also contacted the Association President about each complaint, but she failed to take any action on his behalf.

On October 19, 2007, the District notified Falso that he was being permanently removed from the District's roster of *per diem* substitute teachers. Following a meeting between Falso and Association representatives, the Association filed a grievance on behalf of Falso challenging the District's adverse action. The Association processed the grievance to Step 3 and advocated on Falso's behalf at a grievance hearing.

The Association sent a memorandum to Falso dated October 9, 2008, informing him that at a mediation session between the Association and the District concerning the grievance, a mediator advised the parties that the District acted properly in removing Falso from the *per diem* substitute teacher roster. Thereafter, the Association retained a private attorney to recommend whether the Association should process Falso's grievance to arbitration.

Pursuant to the Association's request, the attorney reviewed the grievance, Falso's work history, the relevant provision of the collectively negotiated agreement between the District and the Association, and he interviewed Falso. On January 17, 2011, the attorney sent the Association a letter setting forth the results of his review and his conclusions. The attorney recommended that the Association decline to process the grievance to arbitration based upon the following: the documented work performance issues during Falso's short tenure with the District; the attorney's impressionistic evaluation of Falso's

attitude concerning those complaints; and the ambiguity in the applicable contract language.

The Association notified Falso by a letter dated January 28, 2011, that it would not be processing his grievance to arbitration based upon the analysis and recommendation of the attorney retained by the Association. In addition, the Association's letter stated that it would not be responsible for attorneys' fees incurred by Falso in his federal discrimination lawsuit against the District concerning his removal from the *per diem* substitute roster.³

DISCUSSION

We begin with Falso's procedural arguments concerning pre-hearing disclosure and the dismissal of his charge without an evidentiary hearing.

Pursuant to State Administrative Procedure Act §305, an administrative agency has the authority to adopt procedural rules permitting pre-hearing discovery. Our Rules of Procedure (Rules), however, do not include procedures for pre-hearing discovery in the processing of an improper practice charge. Therefore, Falso's argument that the ALJ should have permitted him to conduct discovery concerning his charge lacks any merit.⁴

We also reject Falso's claim that the dismissal of the charge without an evidentiary hearing violates State Administrative Procedure Act §301. The record demonstrates that

³ On March 31, 2011, United States District Court Judge David G. Larimer issued a decision granting summary judgment to the District concerning Falso's federal action under Title VII of the Civil Rights Act of 1964, which claimed that the District removed him from the *per diem* substitute register because of Falso's Italian-American ancestry. See, *Falso v Rochester City Sch Dist*, 09-CV-6651L (WDNY 2011).

⁴ See, *Heim v Regan*, 90 AD2d 656 (3d Dept 1982).

Falso had a full and fair opportunity to set forth any facts in dispute between the parties and to make legal and factual arguments, including submitting an offer of proof identifying evidence that he erroneously asserts would demonstrate that the Association violated §209-a.2(c) of the Act.

The exceptions with respect to the substance of the charge are equally without merit. Falso failed to articulate sufficient and relevant factual allegations in his offer of proof, which, if proven, would demonstrate that the Association acted in a manner that was arbitrary, discriminatory, or was motivated by bad faith when it refused to process his grievance to arbitration.⁵

An employee organization is not obligated under the Act to take every grievance to arbitration.⁶ It is entitled to a broad range of discretion in determining whether a particular grievance should be taken to arbitration, and we will not substitute our judgment concerning the merits of that grievance.⁷ In particular, we will not second-guess an employee organization's decision concerning the processing of a grievance when the decision was made based upon a professional disinterested review and recommendation of an attorney retained or employed by the employee organization.⁸

In the present case, the Association retained a private attorney to conduct a

⁵ *Board of Education of the City Sch Dist of the City of New York and UFT (Zarinfar)*, 44 PERB ¶3012 (2011).

⁶ *New York State Public Employees Fedn (Frisch)*, 29 PERB ¶3019 (1996).

⁷ *Rochester Teachers Assn (Danna)*, 41 PERB ¶3003 (2008); *UFT (Morrell)*, 44 PERB ¶3030 (2011).

⁸ *DC 37 (Maltsev)*, 41 PERB ¶3022 (2008).

PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

NEW YORK STATE NURSES ASSOCIATION,

Charging Party,

CASE NO. U-30579

- and -

**COUNTY OF ERIE and ERIE COUNTY MEDICAL
CENTER CORPORATION,**

Respondent.

**SPIVAK LIPTON LLP (DENIS P. DUFFEY, JR. and ADRIAN HEALY, ESQ., of
counsel), for Charging Party**

CHRISTOPHER M. PUTRINO, ESQ., for Respondent County of Erie

**COLUCCI & GALLAHER, PC (KATHRYN A. LISANDRELLI and PAUL. G.
JOYCE, ESQ., of counsel), for Respondent Erie County Medical Center
Corporation**

BOARD DECISION AND ORDER

This matter comes to the Board on exceptions filed by Respondent Erie County Medical Center Corporation (ECMCC) to a decision by an Administrative Law Judge (ALJ)¹ finding that the County of Erie (County) and ECMCC, as a joint employer, violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) by refusing to provide certain information sought by the New York State Nurses Association (NYSNA) for the purposes of investigating and processing grievances related to acts of workplace violence.²

¹ 44 PERB ¶4597 (2011).

² The County and ECMCC constitute a statutorily created joint employer pursuant to Pub Auth Law §3629. See, *County of Erie*, 44 PERB ¶3027 (2011). See also, *County of Erie and ECMCC*, 42 PERB ¶4511 (2009), *affd*, 43 PERB ¶3008 (2010), n.2. Nevertheless, only ECMCC has filed exceptions to the ALJ's decision in the present

In *Hampton Bays Union Free School District*,³ we reaffirmed a basic principle under the Act: an employee organization has a general right to receive documents and information, requested from an employer, for use in investigating a potential grievance, and/or the processing of a pending grievance.⁴ This general right is subject to three primary limitations: reasonableness, relevancy and necessity. In addition, we have concluded that prior to refusing to disclose information under the Act based upon a claim of confidentiality, a respondent is obligated to first engage in good faith negotiations for the purpose of reaching an agreed-upon accommodation concerning the requested information.⁵

In its exceptions, ECMCC advances various reasons to justify the withholding of the documents sought by NYSNA.

First, it contends that NYSNA is not entitled to the requested documents concerning a July 2010 workplace violence incident during which a non-unit security guard was injured in the presence of NYSNA-represented unit members. According to ECMCC, NYSNA has not sufficiently demonstrated the reasonableness, relevancy and necessity for this information. We disagree.

Section 19.06 of the parties' collectively negotiated agreement (agreement)

³ 41 PERB ¶¶3008 (2008) *confirmed sub nom. Hampton Bays Union Free Sch Dist v New York State Pub Empl Rel Bd*, 62 AD3d 1066, 42 PERB ¶¶7005 (3d Dept 2009), *lv den*, 13 NY3d 711, 42 PERB ¶¶7009 (2009).

⁴ *See also, County of Erie and Erie County Sheriff*, 36 PERB ¶¶3021 (2003), *confirmed sub nom. County of Erie and Erie County Sheriff v State of New York*, 14 AD3d 14, 37 PERB ¶¶7008 (3d Dept 2004); *Town of Evans*, 37 PERB ¶¶3016 (2004); *State of New York (OMRDD)*, 38 PERB ¶¶3036 (2005), *confirmed sub nom. CSEA v New York State Pub Empl Rel Bd*, 14 Misc3d 199, 39 PERB ¶¶7009 (2006), *affd*, 46 AD3d 1037, 40 PERB ¶¶7009 (3d Dept 2007).

⁵ *Hampton Bays Union Free Sch Dist*, *supra* note 3. *See also, Nanuet Union Free Sch Dist*, 45 PERB ¶¶3007, n.15 (2012).

states that:

The County will observe all applicable health and safety laws and regulations. The County will take all steps practical to protect employee health and safety.

Among the applicable health and safety laws is Labor Law §27-b, which mandates public employers to create and implement workplace violence protection programs aimed at preventing and minimizing workplace assaults and homicides.

Based upon the breadth of §19.06 of the agreement, the pendency of numerous class action and individual workplace violence and safety grievances under the contract provision, and the record of alleged workplace assaults on NYSNA unit members, we reject ECMCC's contention that it was not obligated to provide the requested information concerning the July 2010 incident. The documents are relevant to NYSNA for determining whether the County and ECMCC are complying with the agreement by taking all practical measures to protect the health and safety of unit members in the area of the July 2010 assault. The facts that a non-unit employee was injured during the incident and NYSNA may be able to interview unit members who were present at the scene are not legitimate grounds for refusing to provide the requested information concerning compliance with §19.06 of the agreement. Furthermore, the record does not support ECMCC's claim that the presence of a NYSNA representative at meetings of the Psych Task Force Committee satisfies NYSNA's need for information to administer the provisions of §19.06 of the agreement.

In its second exception, ECMCC asserts that the ALJ erred in directing that the County and ECMCC provide NYSNA with copies of reports of workplace violence for the period 2007 through August 20, 2010. According to ECMCC, the ALJ should have limited the scope of NYSNA's request to specific incidents already known to NYSNA. In addition, ECMCC asserts that compliance with the remedial order would be unduly

burdensome because it would require a search of paper and electronic records for reports related to violence-related injuries. In light of the targeted nature of NYSNA's request and the arguable relevance of the information for investigating and prosecuting workplace violence grievances under §19.06 of the agreement, we do not find the scope of the information request to be overbroad. Furthermore, we are not persuaded under the facts and circumstances before us that the search for and the redaction of the relevant records would be overly burdensome.⁶

ECMCC also claims in its exceptions that documents sought by NYSNA might include protected health information under the Health Insurance Portability and Accountability Act (HIPAA),⁷ which prohibits release of such confidential information. HIPAA, however, permits disclosure of de-identified protected health information,⁸ and NYSNA has already consented to the redaction of all patient and staff identifying information. There is no evidence in the record that the County and ECMCC engaged in good faith negotiations with NYSNA aimed at reaching a voluntary accommodation concerning the joint employer's continued confidentiality concerns under HIPAA.⁹

Finally, we reject ECMCC's exception premised upon Education Law §6527, which prohibits the release of medical records in certain circumstances. In pertinent part, Education Law §6527 states:

⁶ ECMCC's reliance upon our decision in *State of New York-Unified Court System*, 41 PERB ¶3009 (2008), vacated, *Pfau v New York State Pub Empl Rel Bd*, 24 Misc3d 260, 42 PERB ¶7003 (Sup Ct, Albany County 2009), *affd*, 69 AD3d 1080 43 PERB ¶7001 (3d Dept 2010), is misplaced. In that case, we found a demand seeking copies of all documents "including, without limitation, any memoranda between or among agents of the employer" referring or relating to an employee's alleged behavior to be overbroad.

⁷ Pub L No 104-191, 110 Stat 1936 (1996).

⁸ See, 45 CFR §§164.502 and 164.514.

⁹ ...

Neither the proceedings nor the records relating to performance of a medical or a quality assurance review function or participation in a medical and dental malpractice prevention program nor any report required by the department of health pursuant to section twenty-eight hundred five-1 of the public health law described herein, including the investigation of an incident reported pursuant to section 29.29 of the mental hygiene law, shall be subject to disclosure under article thirty-one of the civil practice law and rules except as hereinafter provided or as provided by any other provision of law. (Emphasis added.)

In *Civil Service Employees Association, Inc, v New York State Public Employment Relations Board*,¹⁰ the Appellate Division, Third Department held that Education Law §6527 is inapplicable to the release of documents in response to a demand for information made by an employee organization, pursuant to §209-a.1(d) of the Act, in furtherance of its duty to represent a member.¹¹ As a result, we find no merit to ECMCC's reliance upon Education Law §6527 in the present case.

Based upon the foregoing, we affirm the decision of the ALJ finding that the County and ECMCC have violated §209-a.1(d) of the Act.

IT IS, THEREFORE, ORDERED that the County and ECMCC provide NYSNA, subject to redaction of patient and staff identifying information, with the following:

- (1) Information as to any investigation which was performed with regard to the July 2010 incident in which a security guard was injured, including any notes, statements and the conclusion of such an investigation, if performed;
- (2) Copies of reports of violence documented in OMH 147 Incident Reports and OMH 174 A Examination Sheets, or alternately documented electronically through NIMRS or otherwise, that are related to violence from 2007 through August 20, 2010;

¹⁰ *Supra* note 4.

¹¹ See also, *Mental Hygiene Legal Serv v Maul*, 36 AD3d 1133 (3d Dept 2007), *lv denied*, 8 NY3d 812 (2007).

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 Erie and Erie County Medical Center Corporation (ECMCC) in the unit represented by the New York State Nurses Association (NYSNA), that the County of Erie and ECMCC will provide forthwith to NYSNA, the following:

1. Information as to any investigation which was performed with regard to the July 2010 incident in which a security guard was injured, including any notes, statements and the conclusion of such an investigation, if performed;
2. Copies of reports of violence documented in OMH 147 Incident Reports and OMH 174 A Examination Sheets, or alternately documented electronically through NIMRS or otherwise, that are related to violence from 2007 through August 20, 2010; and
3. Copies of reports of any act of violence recorded in the Quantrose system from 2007 to August 20, 2010.

Dated By
on behalf of the **County of Erie and
Erie County Medical Center Corporation**

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

**ITHACA POLICE BENEVOLENT ASSOCIATION,
INC.,**

Charging Party,

CASE NO. U-31665

- and -

CITY OF ITHACA,

Respondent.

MARILYN D. BERSON, ESQ., for Charging Party

BOARD DECISION AND ORDER

This matter comes to the Board on exceptions filed by the Ithaca Police Benevolent Association, Inc. (Association) to a decision of the Director of Public Employment Practices and Representation (Director) dismissing a charge, as amended, filed by the Association alleging that the City of Ithaca (City) violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when it ended a past practice of assigning light or modified duty to Association unit members, at their request, after they returned to work from contractual sick leave due to an off-duty injury or illness.¹

PROCEDURAL BACKGROUND

Following the filing of the original charge, the Director sent a letter to the Association stating that the charge is deficient because the City's "decision whether to offer a return to light duty appears nonmandatory. It is not procedural." In response to

¹ 45 PERB ¶4547 (2012).

the deficiency notice, the Association filed an amended charge, which alleged the following:

Returning to work from sick leave is a term and condition of employment within the meaning of the Act and mandatorily negotiable as such. The practice of allowing employees at their request to return to work from sick leave is inherently a substantive benefit that is economic in nature. A return to work at an employee's request avoids the dissipation of accrued, paid sick leave, opens the employee to overtime opportunities and affords them every other thing of value that comes from an employee's presence at work (e.g. training opportunities, preferred assignment opportunities, promotional opportunities) all of which are negatively affected by job absence.

Following receipt of the amendment, the Director issued his decision dismissing the charge, as deficient, on the ground that the assignment of light duty constitutes a managerial prerogative unless the assignment falls outside the essential duties and functions of an employee's position. In reaching his decision, the Director relied upon our decision in *Triborough Bridge and Tunnel Authority*.²

EXCEPTIONS

In its exceptions, the Association asserts that the Director erred in dismissing the charge during his initial review on the grounds that he failed to apply the appropriate standard to its pleading, and deprived the Association of an opportunity to provide additional information in support of the charge during a pre-hearing conference and hearing. Furthermore, the Association contends that its charge is not deficient as a matter of law because the subject of the charge is a unilateral termination of a disability benefit plan covering off-duty injuries and illnesses.

² 32 PERB ¶3078 (1999). See also, *Town of Oyster Bay*, 12 PERB ¶3086 (1979); *Waverly Cent Sch Dist*, 10 PERB ¶3103 (1977).

Based upon our review of the Association's exceptions, we reverse the Director's decision.

DISCUSSION

Pursuant to §204.1(a)(3) of the Rules of Procedure (Rules), a charging party is obligated to set forth a clear and concise statement of facts that it claims constitutes an alleged improper practice under §209-a of the Act. After a charge is filed, the Director is required by §204.2(a) of the Rules to review and weed out facially deficient charges that fail to allege facts that, as a matter of law, might constitute a violation of §209-a of the Act.³ The Director's review and dismissal of deficient charges constitutes an important administrative function because it helps avoid unnecessary conferences and hearings. In determining whether an improper practice charge sets forth a claim under an acceptable or recognizable legal theory, the charging party is entitled to all reasonable inferences from the facts alleged.⁴

Contrary to the Association's suggestion, a charging party is not entitled to have a charge processed to a pre-hearing conference or hearing when the charge is facially deficient under §204.2(a) of the Rules. Our administrative improper practice procedures were never intended to guarantee parties an administrative forum for facially nonmeritorious or untimely claims. In fact, even after a charge is processed following the Director's initial review, the charge may be dismissed by an Administrative

³ *MABSTOA*, 40 PERB ¶¶3023 (2007).

⁴ *City of Yonkers*, 23 PERB ¶¶3055 (1990); *State of New York (Office of Mental Health)*, 24 PERB ¶¶3004 (1991); *Dutchess Comm Coll*, 41 PERB ¶¶3029 (2008); *State of New York (Department of Correctional Services)*, 42 PERB ¶¶3014 (2009).