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Board (PERB)

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7-13-2016

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

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

### 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

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

Petitioner,

-and-

**CASE NO. C-6174**

**COUNTY OF PUTNAM and PUTNAM COUNTY SHERIFF,**

Employer,

-and-

**PUTNAM COUNTY SHERIFF'S EMPLOYEES ASSOCIATION,**

Intervenor.

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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 Public Employment Relations Board, and it appearing that a negotiating representative has been selected,

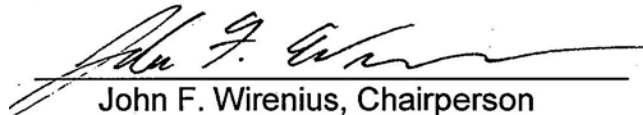
Pursuant to the authority vested by the Public Employees' Fair Employment Act,  
IT IS CERTIFIED that the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO has been designated and selected by a majority of the employees of the above-named public employer, in the unit and described below, as their

exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Included: All employees in the titles listed in Article XVII, Section C of the agreement between CSEA and the County (see attached), emergency services dispatcher, dispatch center shift supervisor, and dispatch center supervisor.

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: July 13, 2016  
Albany, New York

  
John F. Wirenius, Chairperson

  
Allen C. DeMarco, Member

  
Robert S. Hite, Member



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

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In the Matter of

**CAYUGA COMMUNITY COLLEGE PART-TIME  
FACULTY ASSOCIATION, NYSUT, AFT, NEA,  
AFL-CIO,**

Petitioner,

-and-

**CASE NO. C-6254**

**CAYUGA COMMUNITY COLLEGE,**

Respondent.

---

**CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE**

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

Pursuant to the authority vested by the Public Employees' Fair Employment Act;

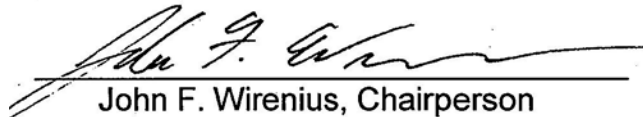
IT IS HEREBY CERTIFIED that the Cayuga Community College Part-time Faculty Association, NYSUT, AFT, NEA, AFL-CIO has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Included: All adjunct faculty.

Excluded: All other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Cayuga Community College Part-time Faculty Association, NYSUT, AFT, NEA, 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: July 13, 2016  
Albany, New York

  
John F. Wirenius, Chairperson

  
Allen C. DeMarco, Member

  
Robert S. Hite, Member

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

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In the Matter of

**EDWIN MOORE,**

Petitioner,

-and-

**CASE NO. C-6378**

**NEW YORK POWER AUTHORITY,**

Employer,

-and-

**LOCAL UNION #3, INTERNATIONAL BROTHERHOOD  
OF ELECTRICAL WORKERS,**

Intervenor/Incumbent.

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**EDWIN MOORE, for Petitioner**

**LORI ALESIO, ESQ., for Employer**

**HARRY GREENBERG, ESQ., for Intervenor**

**BOARD DECISION AND ORDER**

On January 4, 2016, Edwin Moore filed, in accordance with the Rules of Procedure of the Public Employment Relations Board, a timely petition for decertification of the Local Union #3, International Brotherhood of Electrical Workers, the current negotiating representative for employees in the following negotiating unit:

Included: All regular full-time and part-time Security Officers working at the Charles Poletti Power (Poletti facility).

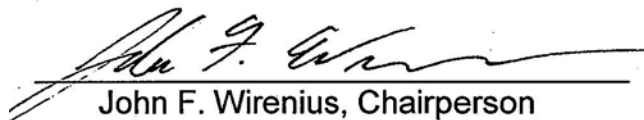


Excluded: All other employees.

Upon consent of the parties, an election was held on April 22, 2016. The results of the election show that a majority of eligible employees in the unit who cast valid ballots no longer desire to be represented for purposes of collective negotiations by the intervenor.

THEREFORE, IT IS ORDERED that the intervenor is decertified as the negotiating agent for the unit.

DATED: July 13, 2016  
Albany, New York

  
John F. Wirenius, Chairperson

  
Allen C. DeMarco, Member

  
Robert S. Hite, Member

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

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In the Matter of

**NORTH BABYLON PUBLIC LIBRARY STAFF ASSOCIATION,**

Petitioner,

-and-

**CASE NO. C-6391**

**NORTH BABYLON PUBLIC LIBRARY,**

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, and it appearing that a negotiating representative has been selected;

Pursuant to the authority vested by the Public Employees' Fair Employment Act;

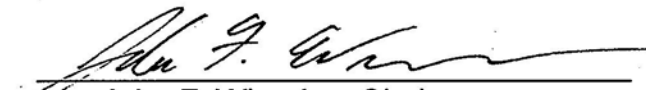
IT IS HEREBY CERTIFIED that the North Babylon Public Library Staff Association has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective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

Included: All full and part time professional and clerical staff.

Excluded: The Library Director, Assistant Director (or Librarian 3 assigned to the position), Confidential Secretary to the Director, Bookkeeper, Custodial Staff, Pages and Itinerant Substitute Employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the North Babylon Public Library Staff Association. 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: July 13, 2016  
Albany, New York

  
\_\_\_\_\_  
John F. Wirenius, Chairperson

  
\_\_\_\_\_  
Allen C. DeMarco, Member

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

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

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In the Matter of

**OPEIU, LOCAL 153,**

Petitioner,

-and-

**CASE NO. CU-6382**

**LA SALLE ACADEMY,**

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, and it appearing that a negotiating representative has been selected;

Pursuant to the authority vested by the Public Employees' Fair Employment Act;

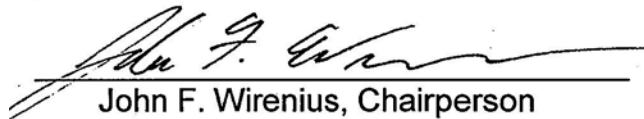
IT IS HEREBY CERTIFIED that the OPEIU, Local 153 has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Included: All full-time and regular part-time teachers and guidance counselors.

Excluded: All others (including, but not limited to, the members of the Christian Brotherhood).

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the OPEIU, Local 153. 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: July 13, 2016  
Albany, New York

  
John F. Wirenius, Chairperson

  
Allen C. DeMarco, Member

  
Robert S. Hite, Member

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

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In the Matter of

**LAY FACULTY ASSOCIATION, LOCAL 1261,  
L.I.U.N.A,**

Petitioner,

- and -

**CASE NO. CU-6386**

**SACRED HEART ACADEMY,**

Employer.

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**PAUL AJLOUNCY, ESQ., for Petitioner**

**RICHARD CEA, ESQ., for Employer**

**BOARD DECISION AND ORDER**

On March 7, 2016, the Lay Faculty Association, Local 1261, L.I.U.N.A (petitioner) filed, in accordance with the Rules of Procedure of the Public Employment Relations Board, a timely petition seeking certification as the exclusive representative of certain employees of the Sacred Heart Academy (employer).

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

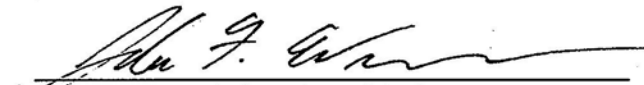
Included: All full-time (3/5 or more) lay teachers and guidance counselors.

Excluded: All others.

Pursuant to that agreement, a secret-ballot election was held on June 10, 2016, at which a majority of ballots were cast against representation by the petitioner.

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

DATED: July 13, 2016  
Albany, New York



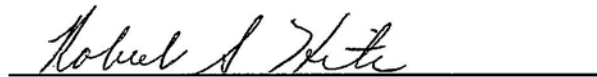
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John F. Wirenius, Chairperson



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Allen C. DeMarco, Member



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Robert S. Hite, Member

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

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In the Matter of

**CITY OF NEW YORK,**

**CASE NO. DR-133**

**Upon a Petition for a Declaratory Ruling**

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In the Matter of

**PATROLMEN'S BENEVOLENT ASSOCIATION OF  
THE CITY OF NEW YORK,**

**CASE NO. DR-134**

**Upon a Petition for a Declaratory Ruling**

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**PROSKAUER ROSE LLP (NEIL H. ABRAMSON & DANIEL ALTCHERK of  
counsel), for the City of New York**

**KAYE SCHOLER LLP (ROBERT GRASS of counsel), for the Patrolmen's  
Benevolent Association of the City of New York**

**BOARD DECISION AND ORDER**

These cases come to us on exceptions filed by the City of New York (City) and the Patrolmen's Benevolent Association of the City of New York, Inc. (PBA) to a decision of an Administrative Law Judge (ALJ) in a declaratory ruling proceeding, finding various proposals submitted for consideration in compulsory interest arbitration under § 209 of the Public Employees' Fair Employment Act (Act) to be mandatory or nonmandatory.<sup>1</sup>

On November 16, 2015, the arbitration panel issued its award, covering the period from August 1, 2010, to July 31, 2012. Accordingly, we find the instant proceeding to be moot, and dismiss the exceptions accordingly.

The Board has long held that where a proceeding raises solely issues that are academic, "we do not consider that the policies of the Act would be served by our

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<sup>1</sup> 48 PERB ¶ 6601 (2015).



consideration” of those issues.<sup>2</sup> In so holding, the Board explained that “the application of a mootness concept is controlled by the particular facts of the case and applied only to the extent consistent with the policies of the Act.”<sup>3</sup>

In prior cases, the Board has declined to find mootness where the parties’ agreement itself reserves the right to seek resolution of outstanding issues, or where the pending charge is that a party decided to “cease participating in negotiations because it may believe that the other party’s bargaining position constitutes an improper practice.”<sup>4</sup> Neither ground for our ruling on an otherwise academic case pertains here.

The Board has held that that “no purpose is served by . . . making a scope determination at this time” following the withdrawal of a proposal from interest arbitration.<sup>5</sup> Courts have similarly found that the parties’ reaching a collective bargaining agreement renders moot disputes over terms at issue in the negotiations culminating in that agreement.<sup>6</sup> Even more directly on point, in a case involving the same parties as here, the Appellate Division, Third Department, dismissed as moot a challenge to a scope decision still pending after the interest arbitration panel had rendered its award.<sup>7</sup>

Under the circumstances here, where the panel has issued its award, and

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<sup>2</sup> *City of Peekskill*, 26 PERB ¶ 3062, 3109 (1993); see also *Town of Wallkill*, 43 PERB ¶ 3026, 3101 (2010), confirmed sub nom *Town of Wallkill v NYS Pub Empl Relations Bd*, 44 PERB ¶ 7004 (Sup Ct Alb Co 2011).

<sup>3</sup> *Id.*

<sup>4</sup> *Town of Wallkill*, 43 PERB ¶ 3026, at 3101.

<sup>5</sup> *City of Buffalo*, 23 PERB ¶ 3036, 3073 (1990).

<sup>6</sup> See, e.g., *Faculty Assn of Suffolk Cmty College*, 125 AD2d 307, 308, 20 PERB ¶ 7002 (2d Dept 1986) (confirming *Suffolk Co. Cmty College*, 18 PERB ¶ 3030 (1985)); *Yonkers Teachers Fedn v Helsby*, 8 PERB ¶ 7014 (Sup Ct Alb Co 1975) (confirming *Bd of Educ of the Yonkers City Sch Dist*, 8 PERB ¶ 3020 (1975)).

<sup>7</sup> *City of New York v. NYS Pub Empl Relations Bd.*, 54 AD3d 480, 41 PERB ¶ 7004 (3d Dept 2008), *lv denied*, 12 N.Y.3d 701 (2009).

resolved all the issues pending before it, we find that an advisory opinion as to the scope of the already-concluded bargaining would not serve to advance the purposes of the Act.<sup>8</sup>

IT IS, THEREFORE, ORDERED that the parties' scope petitions must be, and hereby are, dismissed in their entirety as moot.

DATED: July 13, 2016  
Albany, New York



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John F. Wirenius, Chairperson



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Allen C. DeMarco, Member



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Robert S. Hite, Member

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<sup>8</sup> The fact that the panel issued its award, resolving all issues between the parties, does not bring this matter within any of the three exceptions to the mootness doctrine. *City of New York v. NYS Pub Empl Relations Bd.*, 54 AD3d at 482; see also *Hearst Corporation v. Clyne*, 50 N.Y.2d 707, 715 (1980). In particular, under *City of New York*, this case does not fit under the exception to the mootness doctrine applicable to matters of public importance capable of repetition yet evading review. As the Court explained in that case, “any negotiating party may seek a declaratory ruling or declaratory judgment when the proposal is first made, rather than waiting until the parties have reached an impasse and proceeded with arbitration, so as to obtain review before the arbitration process is complete.” *Id.*

Moreover, “[t]he core of the Taylor Law is the policy that governments should negotiate with and enter into written agreements with employee organizations representing public employees.” *City of Mt Vernon*, 5 PERB ¶ 3057, 3100 (1972). Under the circumstances here, an after-the-fact advisory opinion as to the efficacy of the parties’ respective negotiating strategies could vitiate that core policy by discouraging parties from finding their own resolutions at the bargaining table in future negotiations.

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

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In the Matter of

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

Charging Party,

**CASE NO. U-28899**

- and -

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

Respondent.

---

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

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

**BOARD DECISION AND ORDER**

This case comes to us on exceptions filed by the Board of Education of the City School District of the City of New York (District) to a decision of an Administrative Law Judge (ALJ) finding that the District violated § 209-a.1 (d) of the Public Employees' Fair Employment Act (Act).<sup>1</sup> The ALJ found that the District impermissibly "unilaterally denied parking permits to unit employees, thereby denying them access to free parking" without negotiating with Local 372, District Council 37, AFSCME, AFL-CIO (Local 372).<sup>2</sup>

**EXCEPTIONS**

The District contends that the ALJ erred in not dismissing the case on the basis

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<sup>1</sup> 48 PERB ¶ 4554 (2015).

<sup>2</sup> *Id.* at 4687.

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

### DISCUSSION

This is the third case before us arising out of the change at issue, albeit as affecting employees in different bargaining units. Thus, as explained below, the facts as stated by the ALJ are, in all material respects, identical to those addressed by the Board in *Board of Education of the City School District of the City of New York ("BOE I")*.<sup>7</sup> More recently, we followed this decision and the logic of the courts in upholding it, in *Board of Education of the City School District of the City of New York (BOE II)*.<sup>8</sup> Because the exceptions here are virtually identical to those which have already been the subject of two authoritative determinations by the Board and by the courts reviewing one of the Board's prior decisions on this exact subject, we do not address them

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<sup>3</sup> Exceptions Nos. 2.1-2.2.

<sup>4</sup> Exceptions No. 2.3.

<sup>5</sup> Exceptions Nos. 2.5, 2.4.

<sup>6</sup> Exception No. 2.6.

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

<sup>8</sup> 49 PERB ¶ 2010 (2016).

separately. To the extent that these prior determinations do not preclude the positions asserted by the District, we adhere to our prior decisions and adopt that of the Appellate Division, Third Department, as dispositive of the arguments contained in the exceptions at issue here.

As a threshold matter, we note that the District has not excepted to the ALJ's dismissal of its notice of claim defense and its defenses of *res judicata* and collateral estoppel. Accordingly, those defenses are waived, and not properly before us.<sup>9</sup>

As was the case in *BOE II*, the District has not addressed the ALJ's reliance in her decision on the Board's prior ruling in *BOE I*. In that case, the Board found that the District had violated the Act and sustained a charge brought by Local 891, International Union of Operating Engineers (Local 891). The District's omission of this decision, and of the judicial decisions confirming it, is particularly notable in view of the parties' express stipulation before the ALJ that:

The events leading to the instant Local 372 charge, the Local 372 grievances, and the Local 891 charge all stem from the same determination regarding distribution of parking permits and the distribution of permits was similar for employees represented by Local 372 and 891.<sup>10</sup>

During a subsequent conference, the parties clarified that the Stipulation represented their agreement that:

the practice regarding the issuance of parking permits to

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<sup>9</sup> *City University of New York*, 48 PERB ¶ 3021, 3071 (2015) (citing Rules of Procedure § 213.2 (b) (4); *Village of Endicott*, 47 PERB ¶ 3017, 3052, n. 5 (2014)); *City of Schenectady*, 46 PERB ¶ 3025, 3056, at n. 8 (2013), *confd sub nom Matter of City of Schenectady v NYS Pub Empl Relations Bd*, 47 PERB ¶ 7004 (Sup Ct Albany Co 2014), *affd*, 136 AD3d 1086 (3d Dept 2016); *Town of Orangetown*, 40 PERB ¶ 3008 (2007), *confd sub nom Matter of Town of Orangetown v NYS Pub Empl Relations Bd*, 40 PERB ¶ 7008 (Sup Ct Albany Co 2007); *Town of Wallkill*, 42 PERB ¶ 3006 (2009).

<sup>10</sup> Stipulation of Facts ¶ 30.

employees in the unit represented by Local 372 that was in effect before the charges in this matter was the same as that which was in effect for the employees in the unit represented by Local 891 and that that practice is set forth in *Local 891, Intl Union of Operating (Local 891)*, 42 PERB ¶ 4568 (2009), *affd*, 44 PERB ¶ 3003 (2011), *confirmed sub nom. City of New York v New York State Pub Empl Rels Bd*, 44 PERB ¶ 7007 (Sup Ct, Albany County 2011), *affd*, 103 AD3d 145, 46 PERB ¶ 7001 (3d Dept 2012).<sup>11</sup>

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

As the sole respondent before the Board in *BOE I*, and the only petitioner recognized to have a cognizable interest before the courts in the subsequent

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<sup>11</sup> 48 PERB ¶ 4554, at 4691, n. 10 (quoting ALJ Letter, February 12, 2015).

<sup>12</sup> Brief in Support of Exceptions at pp 5-10; 10-13; 13-16.

<sup>13</sup> *BOE I*, 44 PERB ¶ 3003, at 3031-3033 (Board decision); *City of New York*, 44 PERB ¶ 7007, at 7013-7014 (Supreme Court decision); *City of New York*, 103 AD3d at 149-152, 46 PERB ¶ 7001, at 7002-7005. Since the filing of the exceptions, of course, the Board has reaffirmed these holdings in *BOE II*.

proceedings under Article 78 of the Civil Practice Law and Rules,<sup>14</sup> the District clearly was a party to those matters and had a full and fair opportunity to litigate these issues, so that collateral estoppel, or issue preclusion, bars the District from contesting the material facts and legal issues necessarily decided adverse to it in those proceedings.<sup>15</sup>

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

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

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

<sup>16</sup> 49 PERB ¶ 2010, text at n. 16 (adopting reasoning and holding of *City of New York*, 107 AD3d at 149-152, 46 PERB ¶ 7001, at 7003-7005).

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

IT IS, THEREFORE, ORDERED that the District will forthwith:

1. Make available to Local 372 unit employees free parking, upon request, on a first come, first served basis, as was available before the fall of 2008;
2. Make whole, with interest at the maximum legal rate, Local 372 bargaining unit members who, upon a showing of reasonable documentary evidence and/or affidavits, incurred parking expenses that they would not have incurred but for the elimination of the availability of free parking on a first come, first served basis from September 2008 until the free parking benefit provided by paragraph 1 is restored;
3. Negotiate, upon Local 372's demand, with Local 372 regarding the availability of free parking for members of the Local 372 bargaining unit; and
4. Sign and post the attached notice below at all physical and electronic locations customarily used to post notices to unit employees.

DATED: July 13, 2016  
Albany, New York

  
\_\_\_\_\_  
John F. Wirenius, Chairperson

  
\_\_\_\_\_  
Allen C. DeMarco, Member

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



# NOTICE TO ALL EMPLOYEES

PURSUANT TO  
THE DECISION AND ORDER OF THE

NEW YORK STATE  
PUBLIC EMPLOYMENT RELATIONS BOARD

and in order to effectuate the policies of the

NEW YORK STATE  
PUBLIC EMPLOYEES' FAIR EMPLOYMENT ACT

we hereby notify all employees of the Board of Education of the City School District of the City of New York (District) in the unit represented by the Local 372, District Council 37, AFSCME, AFL-CIO (Local 372) that the District will forthwith:

1. Make available to Local 372 unit employees free parking, upon request, on a first come, first served basis, as was available before the fall of 2008;
2. Make whole Local 372 bargaining unit members who, upon a showing of reasonable documentary evidence and/or affidavits, incurred parking expenses that they would not have incurred but for the elimination of the availability of free parking on a first come, first served basis from the fall of 2008 until the free parking benefit provided by paragraph 1 is restored; and
3. Negotiate, upon Local 372's demand, with Local 372 regarding the availability of free parking for members of the Local 372 bargaining unit.

**Dated** .....

**By** .....

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

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

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

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In the Matter of

**TOWN OF ULSTER POLICEMEN'S  
BENEVOLENT ASSOCIATION, INC.,**

Charging Party,

-and-

**CASE NO. U-32984**

**TOWN OF ULSTER,**

Respondent.

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**JOHN M. CROTTY, ESQ., for Charging Party**

**ROEMER WALLENS GOLD & MINEAUX LLP (WILLIAM M. WALLENS  
of counsel), for Respondent**

**BOARD DECISION AND ORDER**

This case comes to us on exceptions filed by the Town of Ulster (Town) to a decision of an Administrative Law Judge (ALJ) finding that that the Town violated §§ 209-a.1 (d) and (e) of the Public Employees' Fair Employment Act (Act).<sup>1</sup> The ALJ found that the Town violated the Act when it informed the Town of Ulster Policemen's Benevolent Association (PBA) that it would be unilaterally implementing a newly enacted local law which created a new disciplinary procedure applicable to civilian dispatchers in the PBA's bargaining unit. For the reasons stated herein, we affirm the decision of the ALJ.

**EXCEPTIONS**

The Town excepts to the ALJ's ruling on three bases. First, the Town contends

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<sup>1</sup> 48 PERB ¶ 4507 (2015). The ALJ dismissed the claim that the Town had violated § 209-a.1 (a) of the Act.

that the ALJ erred in finding the disciplinary procedures pertaining to civilian dispatchers within the bargaining unit are a mandatory subject of bargaining, on the ground that pursuant to Town Law §§ 154 and 155, the subject of discipline is prohibited as to “members” of a police department, whether civilian or those performing police functions. The Town further asserts that the ALJ erred in applying the Board’s recent decision in *Town of Ulster*, which was under review in judicial proceedings pursuant to Article 78 of the Civil Practice Law and Rules.<sup>2</sup> Finally, the Town contends that, as the subject is a prohibited one, the ALJ erred in finding that the Town’s failure to continue the expired contractual provisions relating to discipline of civilian dispatchers violated § 209-a.1 (e) of the Act. The PBA cross-expected to the ALJ’s dismissal of its claim that the Town violated § 209-a.1 (a) on the ground that the Town’s refusal to continue the relevant terms of the expired contract was based on a colorable reading of the law.

### DISCUSSION

The facts are set forth in the ALJ’s decision, and are not contested in any way relevant to resolving the issues posed by the exceptions. As the Town correctly notes, this case raises the same legal issue decided in our prior case involving a single civilian dispatcher whose disciplinary interview was, in a unilateral change to procedure, tape recorded.<sup>3</sup> After canvassing the case law, the statutory language of the relevant sections of the Town Law, the legislative history, and parallel usage in similar statutory provisions, the Board found that:

Throughout the Court [of Appeals’s] decisions in this regard, it has only found “police discipline” to be precluded where “the legislation discloses a legislative intent and public policy

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<sup>2</sup> 47 PERB ¶ 3028 (2014), *confd sub nom Town of Ulster v NYS Pub Empl Relations Bd*, Index No. 403-15 (Sup Ct Alb Co March 24, 2016) (O’Connor, J.).

<sup>3</sup> *Id.* at 3084.

to leave the disciplining of *police officers* to the discretion of the Police Commissioner,” and has, in so doing, “emphasized the quasi-military nature of a police force.” Neither the legislative intent, nor the special nature of police officers’ work at issue in those cases is at issue here, and therefore we find that the public policy exclusion of police discipline from collective bargaining does not apply to civilian employees working in town police departments in non-police officer functions.<sup>4</sup>

In rejecting the Town’s challenge to the Board’s decision, the Supreme Court, Albany County “recognize[d] that it owe[d] no deference to PERB’s interpretation of the Town Law in this circumstance,” but nonetheless found that the Board “properly held that the term ‘member’ or ‘members’ of a police department in Town Law § 155 were intended to refer to police officers, not civilians employed in a police department.”<sup>5</sup> Accordingly, the Court confirmed the Board’s holding that disciplinary procedures applicable to such civilian employees were mandatory subjects of bargaining, and that a unilateral change to such procedures violated the Act.<sup>6</sup>

We adhere to the decision in *Town of Ulster*, for the reasons stated in that decision, and in the Court’s decision confirming it, and thus reject the Town’s argument that the ALJ erred in following it. Nor do we find persuasive the argument that the ALJ erred in following the Board’s decision during the pendency of the Article 78 proceeding challenging its validity. The mere fact of a party’s filing an Article 78 challenge to a Board decision does not preclude an ALJ, who necessarily looks to the Board’s

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<sup>4</sup> 47 PERB ¶ 3028, at 3086 (footnote omitted) (citing *Patrolmen’s Benevolent Assn of the City of NY, Inc. v NYS Pub Empl Relation Bd*, 6 NY3d 563, 575-576 (2006); see also *id.* at 3085-3086.

<sup>5</sup> *Town of Ulster v NYS Pub Empl Relations Bd*, Index No. 403-15, at 27; see also *id.* at 27-30. In reaching this conclusion, the Court followed not only the decisions of the Court of Appeals, but, in “applying the principles of statutory construction” as well as “the legislative history of that section [Town Law § 155], the provisions of Article Ten of the Town Law as a whole, and parallel provisions of similar statutes.” *Id.*

<sup>6</sup> *Id.* at 29-32.

decisions as enunciating the governing law, from relying on that decision.<sup>7</sup> Likewise, as we find that the subject of discipline of civilian employees in the Town Police Department is not prohibited but rather mandatory, we affirm the ALJ's finding that the Town violated § 209-a.1 (e) of the Act by failing to continue the disciplinary provisions of the expired contract applicable to civilian dispatchers.

Finally, we affirm the ALJ's finding that the Town did not violate § 209-a.1 (a) of the Act by repudiating the portions of the parties' collective bargaining agreement at issue. As we have previously found, in not dissimilar circumstances, a mistaken but not clearly foreclosed interpretation of an authoritative text may constitute a colorable claim of right premised on external law sufficient to rebut a repudiation claim.<sup>8</sup> In this case of first impression, as in *Town of Wallkill*, we find that the Town's position, while unpersuasive on the merits, was not so lacking in merit as to ground a repudiation claim.

Accordingly, we affirm the ALJ's decision.

IT IS THEREFORE ORDERED that the Town

1. Cease and desist from applying Local Law No. 2 to civilian dispatchers in the PBA's bargaining unit;
2. Destroy any records created as a result of the application of Local Law No. 2 to civilian dispatchers in the PBA's bargaining unit;


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<sup>7</sup> While not strictly applicable to these circumstances, we note that a pending appeal does not deprive a decision of the requisite finality to have preclusive effect. See, eg, *Sobenis v Harridge House Assocs of 1984*, 45 Misc3d 1216(A), 2014 N.Y. Slip Op. 51603(U) (Sup Ct Kings Co. Oct. 8, 2014) (law of the case); *Anonymous v. Dobbs Ferry Union Free School Dist.*, 19 AD3d 522, 522–523 (2d Dept 2005) (same; collateral estoppel).

<sup>8</sup> *Town of Wallkill*, 42 PERB ¶ 3017, (2009), *abrogated on other grounds by Town of Wallkill*, 19 NY3d 1066 (2012).

3. Make civilian dispatchers whole for any loss of wages or benefits resulting from the application of Local Law No. 2, with interest at the maximum legal rate; and
4. Sign and post the attached notice at all physical and electronic locations customarily used to post notices to unit employees.

DATED: July 13, 2016  
Albany, New York

  
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John F. Wirenius, Chairperson

  
\_\_\_\_\_  
Allen C. DeMarco, Member

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

# NOTICE TO ALL EMPLOYEES

**PURSUANT TO  
THE DECISION AND ORDER OF THE**

**NEW YORK STATE  
PUBLIC EMPLOYMENT RELATIONS BOARD**

**and in order to effectuate the policies of the**

**NEW YORK STATE  
PUBLIC EMPLOYEES' FAIR EMPLOYMENT ACT**

We hereby notify all employees of the Town of Ulster (Town) in the bargaining unit represented by the Town of Ulster Policemen's Benevolent Association, Inc. (PBA) that the Town will:

1. Not apply Local Law No. 2 to civilian dispatchers in the PBA's bargaining unit;
2. Destroy any records created as a result of the application of Local Law No. 2 to civilian dispatchers in the PBA's bargaining unit; and
3. Make civilian dispatchers whole for any loss of wages or benefits resulting from the application of Local Law No. 2, with interest at the maximum legal rate.

Dated .....

By .....  
on behalf of Town of Ulster

*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**

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In the Matter of

**RICHARD JOSEY,**

Charging Party,

**CASE NO. U-34279**

- and -

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

Respondent,

- and -

**STATE OF NEW YORK (OFFICE OF MENTAL HEALTH),**

Employer.

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**RICHARD JOSEY, *pro se***

**DAREN J. RYLEWICZ, GENERAL COUNSEL (ERIC E. WILKE  
of counsel), for Respondent**

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

**BOARD DECISION AND ORDER**

This case comes to us on exceptions filed by Richard Josey to a decision of an Administrative Law Judge (ALJ) dismissing his improper practice charge alleging that the Civil Service Employees Association, Inc., Local 1000, AFL-CIO, Local 401 (CSEA) violated § 209-a.2 (c) of the Public Employees' Fair Employment Act (Act) by declining to pursue a grievance arising from Josey's termination as a probationary employee.<sup>1</sup> The ALJ dismissed the charge on the grounds that Josey: (1) failed to attend a case conference scheduled by agreement between the parties and confirmed by letter, and

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<sup>1</sup> 48 PERB ¶ 4611 (2015).



(2) did not reply to a subsequent voicemail message and a letter giving him the opportunity to provide a sworn statement explaining his failure to appear.<sup>2</sup>

By agreement of the parties, the ALJ scheduled a case conference for August 13, 2015, as confirmed in a July 23, 2015 letter from the ALJ, which informed Josey “that the failure to appear at the conference may constitute a basis for dismissal of the absent party’s pleading.”<sup>3</sup> Josey did not request an adjournment of the conference.

On August 13, 2015, CSEA and the State timely appeared for the conference. When Josey did not timely appear, PERB staff called him, and he stated that he would appear shortly. Josey did not appear that day, nor did he answer further calls from PERB staff, including a voicemail message later that day asking him to contact PERB regarding his non-appearance. CSEA and the State subsequently moved to dismiss the charge based upon his failure to appear. In an August 14, 2015 letter, the ALJ informed Josey of the motions, and gave him until August 22 to file a sworn statement providing “good and sufficient reason” for his non-appearance. The August 14 letter further stated that “failure to file a sworn statement by the required date could serve as an additional basis for the dismissal of his charge.”<sup>4</sup> Josey did not respond to the letter.

In his exceptions, Josey admits receiving the call and telling PERB staff that he would appear on August 13, but then states that “due to my [fiancée’s] pregnancy and health issues, I could not appear.” He denies having received the August 14, 2015 letter from the ALJ, and states that “I still wish to pursue the charge and I wish for an appeal.”

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<sup>2</sup> *Id* at 4909.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

No further grounds for exception are provided.

Pursuant to § 212.2 of our Rules of Procedure (Rules), “[t]he failure of a party to appear at the conference may, in the discretion of the administrative law judge, constitute ground for dismissal of the absent party’s pleading.”<sup>5</sup> Thus, “[u]nless the ALJ’s dismissal of the charge evidences an abuse of discretion based on the record before the ALJ, there is no basis to reverse the decision.”<sup>6</sup> We find that the ALJ did not abuse her discretion in dismissing the charge under the circumstances presented to her.

Here, as in *Smithtown Fire District* and *Jouldach*, Josey claims not to have received the ALJ’s April 14 letter; as in those cases, the mailing of the ALJ’s letter and of the motions to dismiss (which Josey does not deny having received in his exceptions) was made in regular course to Josey’s address as provided by him, and no grounds exist to suggest that all three documents were not delivered.<sup>7</sup>

Moreover, even if we assume that Josey did not receive the August 14 letter, his conduct remains unexcused. The ALJ’s July 23 letter confirming the conference date made clear that the failure to appear at the conference “may constitute a basis for dismissal of the absent party’s pleading.” Despite this warning, Josey did not respond to the calls from PERB when he did not arrive for the conference after having told staff that he was coming, albeit late. Josey took no steps to seek another opportunity for the

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<sup>5</sup> See generally *UFT (Simpson Gray)*, 42 PERB ¶ 3011 (2009), *confd*, *Gray v United Fedn of Teachers*, 43 PERB ¶ 7004 (Sup Ct NY Co. 2010).

<sup>6</sup> *Smithtown Fire Dist*, 28 PERB ¶ 3060, 3135 (1995); see also *IBT, L. 237 (Jouldach)*, 34 PERB ¶ 3009, 3018 (2001).

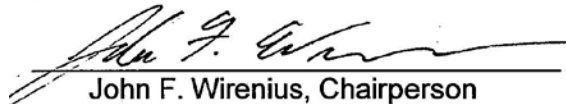
<sup>7</sup> *Smithtown Fire Dist*, 28 PERB ¶ 3060, at 3135; *Jouldach*, 34 PERB ¶ 3009, at 3020.

conference to take place, or to provide the ALJ and counsel to the parties with an explanation, let alone an excuse, for his failure to appear.<sup>8</sup>

We do not consider the excuse proffered now by Josey. Josey did not raise before the ALJ any issue with respect to his *fiancée's* health or other reason why he could not be present; he did not claim that urgent circumstances prevented his attendance or required an adjournment, either on August 13 or subsequently. As the Board explained in *Smithtown Fire District*, "we will not consider allegations of fact made for the first time in exceptions when reviewing an ALJ's decision because our review is limited to the record as it was developed before the ALJ," especially where, as here, the question is whether the ALJ abused her discretion, a determination inherently limited to the record before her.<sup>9</sup> We, therefore, deny the exceptions filed by Josey and affirm the decision of the ALJ.

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

DATED: July 13, 2016  
Albany, New York

  
John F. Wirenius, Chairperson

  
Allen C. DeMarco, Member

  
Robert S. Hite, Member

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<sup>8</sup> *Id.*

<sup>9</sup> 28 PERB ¶ 3060, at 3135.

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

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In the Matter of

**BRIAN BURKE,**

Charging Party,

**CASE NO. U-34459**

- and -

**NEW YORK CITY TRANSIT AUTHORITY,**

Respondent.

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**BRIAN BURKE, *pro se***

**JAMES B. HENLY, GENERAL COUNSEL (KRISTEN NOLAN, ESQ. of  
counsel), for Respondent**

**BOARD DECISION AND ORDER**

This matter comes to us on exceptions filed by Brian Burke to a decision of an Administrative Law Judge (ALJ) dismissing his improper practice charge against his employer, New York City Transit Authority (NYCTA).<sup>1</sup> Based on the allegations in the amended charge, discussions at a pre-hearing conference, and an offer of proof that Burke filed in support of his allegations, the ALJ held that Burke's allegations, if proved, would not establish a *prima facie* violation of §§ 209-a.1 (a) and (c) of the Public Employees' Fair Employment Act (Act).

Burke alleges in his exceptions that the ALJ mischaracterized the facts in his offer of proof and erroneously concluded that those facts failed to reveal a *prima facie* violation of the Act. NYCTA filed a response in support of the ALJ's description of the facts and her conclusion of law. Burke filed a reply to NYCTA's response, without

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<sup>1</sup> 48 PERB ¶ 4604 (2015).

seeking authorization to do so under § 213.3 of our Rules of Procedure (Rules).<sup>2</sup>

Because Burke did not seek permission to file a reply, and because NYCTA's response to Burke's exceptions did not raise material issues for the first time as to warrant the filing of a reply, we do not address or consider the allegations in his reply.<sup>3</sup> For the reasons given below, we affirm the ALJ's decision.

### PROCEDURAL HISTORY AND RELEVANT FACTS

Burke's amended improper practice charge alleges that NYCTA violated §§209-a.1 (a) and (c)<sup>4</sup> of the Act by comments made in a newspaper article and by withholding his wages, sick leave, vacation time, and overtime. NYCTA filed an answer denying that it violated the Act and asserting a number of defenses. At a pre-hearing conference, after Burke's statement of his case, NYCTA moved to dismiss the charge for its failure to present a *prima facie* claim. Following the conference, Burke filed an

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<sup>2</sup> "No pleading other than exceptions, cross-exceptions or a response thereto will be accepted or considered by the board unless it is requested by the board or filed with the board's authorization. Such additional pleadings will not be requested or authorized by the board unless the preceding pleading properly raises issues which are material to the disposition of the matter for the first time. If any additional pleading is requested or authorized by the board, the board shall notify the parties regarding the conditions under which that pleading will be permitted."

<sup>3</sup> *Id.*

<sup>4</sup> A claim under §209-a.1(d) of the Act was not processed based on lack of standing. Because Burke did not except to that portion of the ALJ's decision, any objection to that ruling has been waived and is not properly before us. *City University of New York*, 48 PERB ¶ 3021, 3071 (2015) (citing Rules § 213.2 (b) (4)); *Village of Endicott*, 47 PERB ¶ 3017, 3052, n. 5 (2014); *City of Schenectady*, 46 PERB ¶ 3025, 3056, at n. 8 (2013), *confd sub nom Matter of City of Schenectady v NYS Pub Empl Relations Bd*, 47 PERB ¶ 7004 (Sup Ct Albany Co 2014), *affd*, 136 AD3d 1086 (3d Dept 2016); *Town of Orangetown*, 40 PERB ¶ 3008 (2007), *confd sub nom Matter of Town of Orangetown v NYS Pub Empl Relations Bd*, 40 PERB ¶ 7008 (Sup Ct Albany Co 2007); *Town of Wallkill*, 42 PERB ¶ 3006 (2009). Likewise, Burke has not excepted to the ALJ's denial of his motion to dismiss the NYCTA's answer as untimely, on the ground that the late filing was a result of attorney error and did not prejudice Burke. Any such exception has been waived and is not properly before us. *Id.*

offer of proof in support of his charge and a brief in opposition to NYCTA's motion.

NYCTA filed a brief in support of its motion.

Burke is a 14-year employee of NYCTA, working most of that time as a train operator. He is also a Transit Workers Union, Local 100 (TWU) shop steward. In April 2014 he was demoted to station-agent trainee as the result of alleged safety violations.<sup>5</sup>

Burke had filed improper practice charges against NYCTA in 2007 and in February 2014. On March 20, 2015, he also filed a federal lawsuit against NYCTA seeking back pay and unspecified damages.

In his current improper practice charge, Burke claims retaliation by NYCTA for his prior improper practice proceedings.<sup>6</sup> He asserts that the retaliation came in the form of a derogatory article in the *New York Post* and NYCTA's withholding of pay and benefits "in an attempt to drive this whistleblower into poverty." He also claims that "unknown supervision and management" referred to him at a learning center as a "Train Kook."

The March 29, 2015 *Post* article, attached to Burke's charge, is headlined: "Satanic MTA out to kill' Train kook's claim." It begins, "It's the D train, as in devil." The article reports that Burke filed a lawsuit in federal court against NYCTA that accuses NYCTA of engaging in "satanic terroristic criminality" by sending bosses to "terrorize" and "assault" him. According to the article, Burke alleged in his lawsuit that NYCTA has

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<sup>5</sup> NYCTA inspectors allegedly entered his train to check if he was wearing corrective lenses. The visit was reportedly prompted by Burke's refusal to remove tinted glasses at a 2014 PERB hearing.

<sup>6</sup> He also claims "direct violation of NYCTA Department of Law policy and NYCTA Rules," both of which are beyond our jurisdiction.

intended to “endanger every soul on the train and on the track” when, in April 2014, its inspector “entered his train to see whether he was wearing corrective lenses.” The article further reports that Burke explained that the electricity on the tracks and the weight of trains create an “infinite way to be murdered or suicided” [sic]. It quotes Burke’s lawsuit as stating that he believes he may be in “mortal danger” and that his employer “may be more dangerous” than “the mob.” The article reports: “Transit sources say his previous wacky claims have been shot down by courts or the Public Employee [sic] Relations Board.” Finally, the article reports that Burke has called NYCTA “the Invisible Empire” and likened it to the “KKK.”

At no point does the article identify any of its sources. However, Burke told the ALJ at the pre-hearing conference that he was contacted by a reporter before the article was published and spoke to that person for 27 minutes. The ALJ surmised that the *Post* obtained its material from reviewing Burke’s federal complaint. There is no basis to conclude that NYCTA had anything to do with the publication of the article.

According to Burke, the article caused him to suffer a “panic attack.” He alleges that as a result of his panic attack, he has been out of work on Worker’s Compensation since the publication of the article. Burke claims that NYCTA is challenging his entitlement to Workers Compensation benefits. He further claims that the author of the article violated his civil rights and retaliated against him for his prior PERB cases “and other whistleblowing activity.”<sup>7</sup> Burke also contends that NYCTA “published” the piece in the *Post* and distributed it online.

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<sup>7</sup> This was Burke’s statement at the PERB conference when he was asked to explain the basis for his charge.

In specifying who within NYCTA he believed was responsible for the article, he pointed to attorney Kristen Nolan, who handled the 2007 PERB case, which was settled, and is the attorney assigned to the present charge. In an October 19, 2015 letter to the ALJ, Burke opined:

The charges against the Respondent are clear, that in retaliation for protected activity by the Charging Party, one or more attorneys at the NYCTA Department of Law, presumably Ms. Nolan, gave false information to the *New York Post* characterizing Respondent as a “Train kook” etc.<sup>8</sup>

In his charge, however, Burke states outright that Nolan “wrote and/or had published a false malicious slanderous defamatory hit piece.” He also asserts that it was “disseminated at the workplace, online at MTA Today Facebook and throughout the Transit system” without identifying by whom. He said that his supervisor brought a copy of the article to him and that “apparently someone from the supervisor’s office posted it.” An amendment to the charge, in response to a deficiency notice, however, asserts that Nolan was responsible for the article’s distribution online and at NYCTA’s work sites. No basis for that conclusion is provided.

Burke’s theory of the case is further confused by reference in his October 19, 2015 letter to the ALJ, stating:

The *New York Post*, in their motion to dismiss, acknowledged that it was a NYCTA attorney who gave the what they acknowledge now is false information [*sic*].<sup>9</sup>

However, the only motion to dismiss that is pending before PERB is that filed by NYCTA; the *New York Post* is not a party to the instant proceeding. This was pointed

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<sup>8</sup> Response to Exceptions, Ex F.

<sup>9</sup> *Id.*



out to Burke in a letter from the ALJ dated October 26, 2015, to which he did not respond. No papers from another legal action involving the newspaper have been presented.

As for Burke's claim of NYCTA's retaliatory withholding of his wages and benefits, no information was presented to the ALJ other than a statement of the amounts that were allegedly withheld and his conclusory assertion that the withholding was "in retaliation and a successful attempt to drive this whistle-blower into poverty."<sup>10</sup> It appears from the papers that the wages and benefits were stopped pending the outcome of the Worker's Compensation claim that NYCTA appears to be contesting.

#### DISCUSSION

The ALJ accurately recounted Burke's allegations and the basis for his claim that NYCTA violated §§ 209-a.1 (a) and (c). Moreover, although there is no written documentation of the discussion at the pre-hearing conference on which the ALJ relied, Burke's exceptions are not inconsistent with the ALJ's recitation of those discussions.

In *UFT (Jenkins)*,<sup>11</sup> the Board reaffirmed the settled test applicable to a charge such as this.

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

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<sup>10</sup> Burke's letter to the ALJ dated October 19, 2015. In his brief in opposition to the motion, Burke also cites, at p. 2, the "Wage Theft Prevention Act Section 195 of the NYS Labor Law." The ALJ correctly observed that our jurisdiction extends only to the Act, and not to any statute other than the Act.

<sup>11</sup> 41 PERB ¶ 3007 (2008), *confirmed sub nom. Jenkins v. New York State Pub Empl Relations Bd*, 41 PERB ¶ 7007 (Sup Ct NY County 2008).

to the person or persons taking the employment action; and  
c) the employment action would not have been taken “but  
for” the protected activity.<sup>12</sup>

There, the Board emphasized that proof of a *prima facie* case of improperly motivated action can be established with direct or circumstantial evidence, observing:

At minimum, the circumstantial evidence necessary to prove a *prima facie* case must be sufficient to give rise to an inference that unlawfully motivated interference or discrimination was a factor in the employer's conduct. This relatively low initial evidentiary threshold for establishing a *prima facie* case in circumstantial evidence cases is necessitated by the principles underlying §§ 209-a.1(a) and (c) of the Act along with the lack of discovery and the pleading requirements under our Rules of Procedure (Rules). Although the timing and the context of events alone in a circumstantial evidence case may not be sufficient to meet a charging party's ultimate burden of proof, the timing and context of an employer's conduct may be sufficient to establish an inference of improper motivation, thereby shifting the burden of persuasion to the respondent to come forward with evidence demonstrating a non-discriminatory basis for the alleged conduct.<sup>13</sup>

Here, we find that the facts alleged in Burke's improper practice charge, as amended, and clarified at the pre-hearing conference, and augmented by his offer of proof, do not make out a circumstantial *prima facie* case of a violation of §§ 209-a.1 (a) or (c) of the Act. At its heart, the charge and offer of proof complain of the article published in the *New York Post*. Burke's offer of proof and his allegations are devoid of any basis upon which a reasonable inference can be drawn that NYCTA was responsible for that publication. Moreover, there is nothing in any of Burke's pleadings that tends to establish that NYCTA retaliated against Burke by withholding wages and

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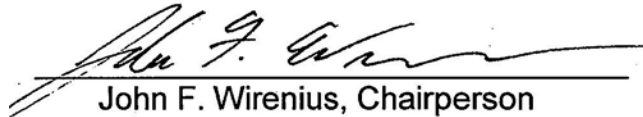
<sup>12</sup> 41 PERB ¶ 3007 at 3043.

<sup>13</sup> *Id.*

benefits because he filed his two prior improper practice charges. Based on the pleadings before us, we agree with the ALJ that the simple allegation that the withholding of Burke's wages and benefits followed the filing of his prior charges is an insufficient basis to require NYCTA to come forward with a defense to the charge.<sup>14</sup>

Accordingly, we affirm the decision of the ALJ and dismiss Burke's improper practice charge.

DATED: July 13, 2016  
Albany, New York

  
John F. Wirenius, Chairperson

  
Allen C. DeMarco, Member

  
Robert S. Hite, Member

<sup>14</sup> See, eg, *State of New York (SUNY Buffalo)*, 33 PERB ¶ 3020 (2000).