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State of New York Public Employment Relations Board Decisions from November 06, 2017

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State of New York Public Employment Relations Board Decisions from November 06, 2017

Keywords

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Comments

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

In the Matter of
UNITED TRANSIT LEADERSHIP ORGANIZATION,

Petitioner,

-and-

CASE NO. C-6381

METROPOLITAN TRANSPORTATION AUTHORITY,

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

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

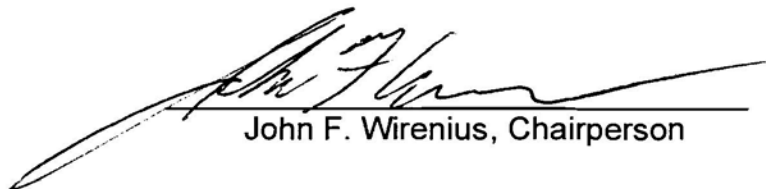
IT IS HEREBY CERTIFIED that the United Transit Leadership Organization has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations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

Included: Employees assigned to the Department of Buses (Responsibility Center Numbers 3000 through 3944 and 5000 through 5492) holding a Hay Title of (i) Assistant General Superintendent of Maintenance; (ii) Assistant General Superintendent of Transportation; (iii) Assistant General Superintendent of Facilities; (iv) Superintendent of Maintenance; (v) Superintendent of Technical Support; (vi) Superintendent of Transportation; (vii) Superintendent of Transportation Compliance; (viii) Superintendent of Facilities; (ix) Superintendent of Material Control; and (x) Superintendent of Storeroom Operations.

Excluded: Based upon their managerial and/or confidential duties, employees assigned to the Department of Buses (Responsibility Center Numbers 3000 through 3944 and 5000 through 5492) holding a Hay Title of (i) Assistant General Manager of Operations; (ii) Assistant General Manager of Strategic Planning; (iii) General Superintendent of Maintenance; (iv) General Superintendent of Transportation; (v) General Superintendent of Support Services; (vi) General Superintendent of Safety and Environmental Management; (vii) General Superintendent of Facilities; (viii) Assistant General Superintendent of Maintenance working in the Office of General Manager of Depot Operations; (ix) Assistant General Superintendent of Transportation working in the Office of General Manager of Road Operations and the Bus Command Center; and all other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the United Transit Leadership Organization. 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: November 6, 2017
Albany, New York


John F. Wirenius, Chairperson


Robert S. Hite, Member

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

In the Matter of
UNITED TRANSIT LEADERSHIP ORGANIZATION,

Petitioner,

-and-

CASE NO. C-6344

MTA BUS COMPANY,

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, 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 United Transit Leadership Organization 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: Employees holding a Hay Title of (i) Assistant General Superintendent of Maintenance; (ii) Assistant General Superintendent of Transportation; (iii) Assistant General Superintendent of Facilities; (iv) Superintendent of Maintenance; (v) Superintendent of Technical Support; (vi) Superintendent of Transportation; (vii) Superintendent of Transportation Compliance; (viii) Superintendent of Facilities; (ix) Superintendent of Material Control; and (x) Superintendent of Storeroom Operations.

Excluded: Based upon their managerial and/or confidential duties, employees

holding a Hay Title of (i) Assistant General Manager of Operations; (ii) Assistant General Manager of Strategic Planning; (iii) General Superintendent of Maintenance; (iv) General Superintendent of Transportation; (v) General Superintendent of Support Services; (vi) General Superintendent of Safety and Environmental Management; (vii) General Superintendent of Facilities; (viii) Assistant General Superintendent of Maintenance working in the Office of General Manager of Depot Operations; (ix) Assistant General Superintendent of Transportation working in the Office of General Manager of Road Operations and the Bus Command Center; and all other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the United Transit Leadership Organization. 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: November 6, 2017
Albany, New York


John F. Wirenius, Chairperson


Robert S. Hite, Member

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

In the Matter of

TEAMSTERS LOCAL 118,

Petitioner,

-and-

CASE NO. C-6479

TOWN OF FARMINGTON,

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

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

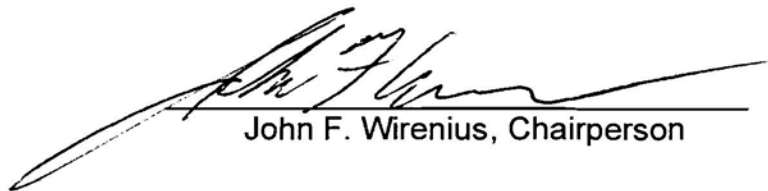
IT IS HEREBY CERTIFIED that the Teamsters Local 118 has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Included: All full-time and regular part-time water/sewer employees working PWMA's, MEO's, WWTP trainees, laborers, chief operators and plant operators.

Excluded: All other as defined by the ACT.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Teamsters Local 118. 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: November 6, 2017
Albany, New York



John F. Wirenius, Chairperson



Robert S. Hite, Member

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

In the Matter of
UNITED TRANSIT LEADERSHIP ORGANIZATION,

Petitioner,

-and-

CASE NO. C-6347

NEW YORK CITY TRANSIT AUTHORITY,

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

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

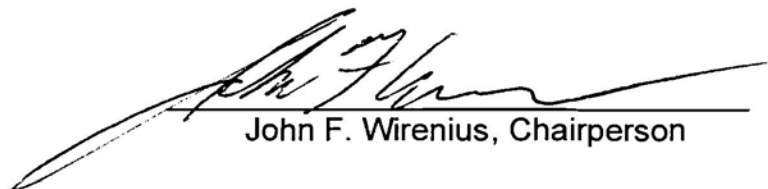
IT IS HEREBY CERTIFIED that the United Transit Leadership Organization has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations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

Included: Employees assigned to the Department of Buses (Responsibility Center Numbers 3000 through 3944 and 5000 through 5492) holding a Hay Title of (i) Assistant General Superintendent of Maintenance; (ii) Assistant General Superintendent of Transportation; (iii) Assistant General Superintendent of Facilities; (iv) Superintendent of Maintenance; (v) Superintendent of Technical Support; (vi) Superintendent of Transportation; (vii) Superintendent of Transportation Compliance; (viii) Superintendent of Facilities; (ix) Superintendent of Material Control; and (x) Superintendent of Storeroom Operations.

Excluded: Based upon their managerial and/or confidential duties, employees assigned to the Department of Buses (Responsibility Center Numbers 3000 through 3944 and 5000 through 5492) holding a Hay Title of (i) Assistant General Manager of Operations; (ii) Assistant General Manager of Strategic Planning; (iii) General Superintendent of Maintenance; (iv) General Superintendent of Transportation; (v) General Superintendent of Support Services; (vi) General Superintendent of Safety and Environmental Management; (vii) General Superintendent of Facilities; (viii) Assistant General Superintendent of Maintenance working in the Office of General Manager of Depot Operations; (ix) Assistant General Superintendent of Transportation working in the Office of General Manager of Road Operations and the Bus Command Center; and all other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the United Transit Leadership Organization. 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: November 6, 2017
Albany, New York



John F. Wirenius, Chairperson



Robert S. Hite, Member

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

In the Matter of
UNITED TRANSIT LEADERSHIP ORGANIZATION,

Petitioner,

-and-

CASE NO. C-6346

**MANHATTAN and BRONX SURFACE TRANSIT
OPERATING AUTHORITY,**

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, 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 United Transit Leadership Organization 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: Employees assigned to the Department of Buses (Responsibility Center Numbers 3000 through 3944 and 5000 through 5492) holding a Hay Title of (i) Assistant General Superintendent of Maintenance; (ii) Assistant General Superintendent of Transportation; (iii) Assistant General Superintendent of Facilities; (iv) Superintendent of Maintenance; (v) Superintendent of Technical Support; (vi) Superintendent of Transportation; (vii) Superintendent of Transportation Compliance; (viii) Superintendent of Facilities; (ix) Superintendent of Material Control; and (x)

Superintendent of Storeroom Operations.

Excluded: Based upon their managerial and/or confidential duties, employees assigned to the Department of Buses (Responsibility Center Numbers 3000 through 3944 and 5000 through 5492) holding a Hay Title of (i) Assistant General Manager of Operations; (ii) Assistant General Manager of Strategic Planning; (iii) General Superintendent of Maintenance; (iv) General Superintendent of Transportation; (v) General Superintendent of Support Services; (vi) General Superintendent of Safety and Environmental Management; (vii) General Superintendent of Facilities; (viii) Assistant General Superintendent of Maintenance working in the Office of General Manager of Depot Operations; (ix) Assistant General Superintendent of Transportation working in the Office of General Manager of Road Operations and the Bus Command Center; and all other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the United Transit Leadership Organization. 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: November 6, 2017
Albany, New York


John F. Wirenius, Chairperson


Robert S. Hite, Member

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

In the Matter of

TEAMSTERS LOCAL 294,

Petitioner,

-and-

CASE NO. C-6464

TOWN OF BETHLEHEM,

Employer,

-and-

**BETHLEHEM POLICE OFFICERS'
UNION (PBA),**

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, and it appearing that a negotiating representative has been selected;¹

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

¹ This unit has been represented by the Bethlehem Police Officers' Union (PBA), which notified PERB, by letter dated August 2, 2017, that it supports the petition and disclaims any interest in further representing the unit.

IT IS HEREBY CERTIFIED that the Teamsters Local 294 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 non-supervisory Police Officers and Detectives, including Provisionals employed by the Town.

Excluded: Chief, Deputy Chiefs, Commanders, Captains, Lieutenants, Detective Sergeants, Sergeants and civilian employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Teamsters Local 294. 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: November 6, 2017
Albany, New York


John F. Wirenius, Chairperson


Robert S. Hite, Member

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

In the Matter of

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

Petitioner,

-and-

CASE NO. C-6462

**COUNTY OF CHAUTAUQUA AND CHAUTAUQUA
COUNTY SHERIFF,**

Employer,

-and-

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

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, 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 Chautauqua County Sheriff's Employees 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

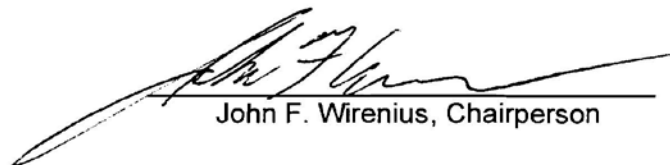
below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Included: Pilot; Cook; Emergency and Police Dispatcher; Emergency and Police Dispatcher Trainee; Senior Emergency and Police Dispatcher; Correction Officer; Senior Correction Officer; Recreation Specialist/Correction Officer; Seasonal Deputy Sheriffs when assigned to the navigation patrol; part-time Correction Officers; part-time Emergency and Police Dispatchers; part-time Emergency and Police Dispatcher Trainee; part-time Pilot; and part-time Cook.

Excluded: All other employees of Chautauqua County.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Chautauqua County Sheriff's Employees 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: November 6, 2017
Albany, New York


John F. Wirenius, Chairperson


Robert S. Hite, Member

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

In the Matter of

TEAMSTERS LOCAL 445,

Petitioner,

-and-

CASE NO. C-6480

TOWN OF MINISINK,

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

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

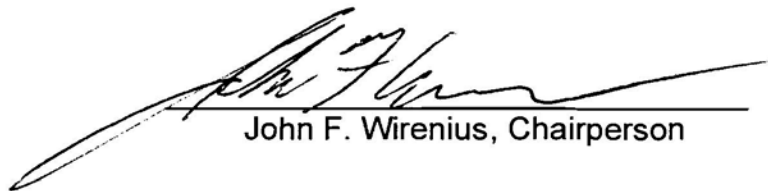
IT IS HEREBY CERTIFIED that the Teamsters Local 445 has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Included: Foreman, Motor Equipment Operator, Heavy Equipment Operator and Laborer in the Town Highway Department.


Excluded: Highway Department Superintendent.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Teamsters Local 445. 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: November 6, 2017
Albany, New York



John F. Wirenius, Chairperson



Robert S. Hite, Member

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

In the Matter of

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

Charging Party,

CASE NO. U-33576

- and -

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

Respondent.

**LIPPES MATHIAS WEXLER FRIEDMAN LLP (THIEN-NGA NGUYN-CLARK
of counsel), for Charging Party**

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

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the State of New York (Department of Corrections and Community Services) (State or DOCCS) to a decision of an Administrative Law Judge (ALJ) finding that the State violated §§ 209-a.1(a), (b), and (g) of the Public Employees' Fair Employment Act (Act).¹ The ALJ found that the State violated the Act by refusing to afford Correction Officer Nicole Hassett, who had not yet completed her probationary term, representation by the New York State Correctional and Police Benevolent Association, Inc. (NYSCOPBA) during questioning by representatives of the DOCCS Office of Special Investigations (OSI). The ALJ found that the State also violated the Act by arranging for another NYSCOPBA steward to represent Correction Officer Matthew Krzeminski after refusing to allow NYSCOPBA steward Michael Maltese to represent Krzeminski.

¹ 48 PERB ¶ 4602 (2015).

EXCEPTIONS

The State excepts to the ALJ's decision on three grounds. First, the State contends that the ALJ did not properly apply the standard necessary to prove a violation of § 209-a.1(g), by allowing statements allegedly made by the interrogators regarding Hassett's probationary status to factor in determining that it reasonably appeared that she may have been a subject of a potential disciplinary action. The State faults the ALJ for not considering the totality of the facts and circumstances of the interview.

Second, the State asserts that the ALJ erred in finding that DOCCS selected NYSCOPBA steward Jeffrey Helmicki to provide representation for Krzeminski in place of Maltese, thus violating § 209-a.1(a) and (c) of the Act, on the basis that the record does not establish any such selection of Helmicki, who was the only NYSCOPBA representative other than Maltese who was available at that time and place.

Finally, the State argues that the ALJ's remedial order that the State destroy any documents maintained by the State that contain information obtained at Hassett's questioning, on the ground that the remedy goes beyond what is provided by § 209-a.1(g), is overly broad, and unduly burdensome.²

NYSCOPBA supports the ALJ's decision.

For the following reasons, we affirm the ALJ's finding that DOCCS violated § 209-

² We note that the State does not except to the ALJ's dismissal of its claim that it had established the affirmative defense under § 209-a.1(g) of an available contractual remedy excluding any statements made at a subsequent disciplinary hearing on the ground that Hassett, as a probationary employee, was excluded from such provision of the parties' collective bargaining agreement. Additionally, the State does not except to the ALJ's finding that Hassett requested that she be afforded union representation at the interview. NYSCOPBA did not cross-except to the ALJ's finding "no violation of the Act in connection with DOCCS's refusal to allow Maltese to represent Krzeminski." 48 PERB ¶ 4602 at 4871. Therefore, "any such exceptions have been waived and are not properly before us." *Buffalo Sewer Auth*, 50 PERB ¶ 3020, 3083, n. 2 (2017), citing Rules of Procedure § 213.2(b) (4); *NYCTA (Burke)*, 49 PERB ¶ 3021, 3072, n. 4 (2016) (citing cases).

a.1(g) of the Act by refusing to allow Hassett union representation at her interview with OSI, and the remedial order related thereto, but reverse her finding that DOCCS interfered with Krzeminski's representation in violation of §§ 209-a.1(a) and (c) of the Act.

FACTS

After a January 21, 2014 incident of alleged workplace violence—that is, the throwing of food by at least one Correction Officer at a civilian employee—in the mess hall at Five Points Correctional Facility, Senior Investigator Donald Oliver of DOCCS's Office of Special Investigation (OSI) was assigned to investigate the mess hall incident.³ On January 23, as part of his investigation, Oliver went to the facility and interviewed the civilian involved, in addition to other civilian staff who were working in the mess hall at the time of the incident.⁴ Oliver testified that, because they were questioned only as witnesses, none of these interviewed civilian employees were permitted to have union representation.⁵

On January 28, 2014, Oliver questioned the security staff who had been present in the mess hall at the time of the incident, as well as some civilian staff who had not been available on January 23, 2014. Six to eight correction officers were interviewed at that time; all were afforded union representation.⁶ Oliver explained that he “wasn't sure as to who was on what end of the table and who else was throwing food So we gave everybody union representation at that point in time.”⁷ By contrast, the civilians interviewed on January 28 were not permitted union representation, according to Oliver, because they were merely witnesses.

³ Jt Ex 3; Tr, p. 83.

⁴ *Id.*

⁵ Tr, p. 84.

⁶ Tr, p. 88.

⁷ Tr, p. 88.

Of the corrections officers present during the incident, only Hassett and one other officer, who had transferred to another facility, were probationers.⁸ Although Hassett was originally scheduled to be among those interviewed on January 28 or the following day, Oliver testified that he was instructed by his supervisor not to conduct her interview at the facility, but rather at DOCCS's headquarters in Albany, and with a stenographer present, because of her probationary status.⁹

NYSCOPBA steward Michael Maltese provided union representation to the correction officers questioned on January 28 and/or January 29, 2014.¹⁰ Maltese testified that Oliver told him that Hassett would not be questioned at the facility, but at "Building 2" in Albany, because "she was probationary."¹¹ However, he testified that "[i]n my experience when someone's called to Building 2 for questioning, it's—it's not for—it's not for good. Nothing good can come of it. You feel as if you're in trouble at that point."¹² Maltese and Hassett both testified that "the interview in Albany was cancelled due to the weather."¹³

Hassett testified that "I was confused and wasn't sure why I was going to Building 2 when everyone else was talked to at the facility. I thought that I might have done something wrong, or could have been in trouble for something."¹⁴ Hassett testified that she was aware of DOCCS's rules regarding workplace violence and that, under those rules, "if I witnessed workplace violence, that I would have to report it, and if not I would be

⁸ Tr, p. 90.

⁹ Tr, pp. 90-91.

¹⁰ Tr, p. 24. The exact dates of the interviews identified by Maltese and Oliver range from January 28 through February 3, 2014.

¹¹ Tr, p. 27.

¹² Id.

¹³ Tr, pp. 28, 47.

¹⁴ Tr, p. 46.

subject to discipline.”¹⁵ Prior to the questioning on February 10, 2014, she had not reported any incidents of workplace violence, despite having witnessed the incident in the mess hall.¹⁶ At the time of the questioning, Hassett’s understanding was that, if DOCCS thought she had “done something wrong” she “could be terminated.”¹⁷ She testified that during her questioning, the investigators “told me that if they wanted me gone, they would just get rid of me, that they—I would not get an NOD [Notice of Discipline]. They would just fire me.”¹⁸

On February 10, Hassett was questioned at the facility. Hassett testified that she was accompanied into the interview room by Maltese, and after they sat down, “I was told that I was not allowed to have a union rep, that Officer Maltese had to leave the room.”¹⁹ Hassett also stated that when Maltese asked why Hassett was not entitled to union representation, “they told him that I was a probationary officer.”²⁰ Maltese directed Hassett to “make sure that I asked for my union rep and told them that I wanted one.”²¹

After Maltese left the room, Hassett asked the investigators why she was not entitled to union representation, “and I also told them I wanted my union rep in the room with me.”²² She testified that the investigators “told me that I was not allowed to have one.”²³ Hassett was not cross-examined, and Maltese’s testimony was consistent with Hassett’s.

The State’s testimony varied from that of Hassett and Maltese in certain key aspects. Oliver was accompanied by Assistant Deputy Chief Horace Thomas Knight, and Five

¹⁵ Tr, p. 54.

¹⁶ Tr, p. 54.

¹⁷ Tr, pp. 54-55.

¹⁸ Tr, p. 55.

¹⁹ Tr, p. 48.

²⁰ Tr, p. 49.

²¹ *Id.*

²² *Id.*

²³ Tr, p. 49.

Points Deputy Superintendent for Security Raymond J. Coveny, interviewed both Hassett and Correction Officer Matthew Krzeminski on February 10, 2014. Oliver testified that he and Knight asked Coveny to be present for Hassett's questioning because they "were going to be interviewing her without a union rep and . . . we asked [Coveny] to sit in so that she didn't feel that we were trying to intimidate her or anything else, that there was somebody that she knew from the facility."²⁴

Knight testified that Coveny was asked to participate because they "sometimes we have captains or depts, someone in the administrators [sic] if we think that there could be some issues. A lot of times we will have a dep or a captain sit in on the interviews as witnesses. That way it's not our word against other people's words."²⁵ Knight further testified that he was involved in the questioning because his supervisor was concerned that Maltese had "gotten verbal with some of our investigators" in the past, and in order "to explain to [Maltese] that her not being afforded a union rep had nothing to do with her being probationary. It was because she was only a witness."²⁶

Maltese testified that when he and Hassett entered the room where the questioning was to take place, Knight asked to see Maltese outside the room.²⁷ As Maltese recounted the discussion, Oliver, Knight, and Coveny went out with him, and told him that "because of her probationary status she would not be entitled to union representation and I would not be allowed in the room."²⁸ Maltese continued to argue that Hassett was entitled to union representation and said that if he was not present during the interview he would pull

²⁴ Tr, pp. 96-97.

²⁵ Tr, p. 121.

²⁶ Tr, pp. 119-120.

²⁷ Tr, p. 31.

²⁸ *Id.*

Hassett out.²⁹

Oliver testified, however, that Knight told Maltese that “we’ve gotten direction that she’s only a witness. We’re not going to allow her a union rep.”³⁰ Their subsequent reports, however, both refer to her probationary status and her status as a witness.³¹

At this point, Oliver, Knight, and Coveny returned to the room in which Hassett had been waiting. Maltese left the area and made a telephone call to NYSCOPBA’s headquarters in Albany about the situation. Maltese was told that he would get a call back.

Maltese testified that he returned to the room where the questioning was being held. It appeared to Maltese that the questioning of Hassett had begun, so he asked for a five minute delay, indicating that he was waiting for a response from NYSCOPBA headquarters.³² According to Maltese, Oliver said to him directly “[y]ou can call whoever you want. This questioning is moving forward.”³³ It is undisputed that Maltese, in his own words, “stormed into the room. I hit my hands on the—on the table they were sitting at and I called them cowards.”³⁴ Oliver, Knight, and Coveny testified that Maltese said to Oliver and Knight “This is fucking bullshit” and “You’re a fucking coward,” and repeated that both Oliver and Knight were “fucking cowards.”³⁵ Oliver testified that Maltese was

²⁹ Tr, p. 39.

³⁰ Tr, p. 100.

³¹ In his February 10, 2014 memo to DOCCS Director of Operations James Ferro, Oliver wrote that Knight said to Maltese that Hassett was not entitled to union representation because “she was a probationary employee whom [sic] is only a witness to an alleged incident.” Respondent Ex 2. Similarly, Knight’s memo to Ferro states that “[i]t was predetermined that Officer Hassett was not entitled to union representation because she was a probationary employee and not suspected of any misconduct.” Respondent Ex 3.

³² Tr, p. 32.

³³ *Id.*

³⁴ *Id.*

³⁵ Tr, pp. 101, 121-123, 135.

“screaming.”³⁶ Maltese did not deny using these words and admitted being “loud”, but he denied being threatening.³⁷ Coveny placed a hand on Maltese’s chest and led him from the room.

Coveny testified that “[he] felt it was [his] obligation not to let it get any further than that, and [he] got up and stood between the table and Officer Maltese and told [Maltese] he needed to leave the room.”³⁸

After Hassett’s interview, the investigators moved on to Krzeminski. When Coveny came out to bring Krzeminski into the interview room, Coveny approached Maltese, and informed him that Krzeminski would be afforded representation, but that Maltese would not be permitted to represent him.³⁹ Krzeminski objected to not being allowed Maltese as his representative.

Knight testified that the decision not to allow Maltese to represent Krzeminski that day was the result of the telephone conversation Knight had with DOCCS’s Director of Operations James Ferro and another supervisor, Vern Fonda. Knight testified that Ferro and Fonda had instructed him to not allow Maltese to represent Krzeminski’s based on what Ferro and Fonda characterized as Maltese’s threatening behavior at Hassett’s interview.⁴⁰

Correction Officer Jeffrey Helmicki, also a NYSCOPBA steward, was called down to represent Krzeminski. As the ALJ noted, the record is not clear as to who actually called for Helmicki to provide union representation. Both Oliver and Knight testified that Helmicki

³⁶ Tr, p. 101.

³⁷ Tr, p. 39.

³⁸ Tr, p. 135.

³⁹ Tr, p. 34.

⁴⁰ Tr, p. 127.

walked into the room with Krzeminski.⁴¹ None of the investigators—Oliver, Knight, or Coveny—were asked by NYSCOPBA or the State who made the call to Helmicki. Maltese said that he did not make the call or ask anyone else to do so.⁴² Helmicki testified that while he was on duty, he was called to represent Krzeminski, but was not asked who called him on either direct or cross examination.⁴³

Oliver, Knight, and Coveny all submitted memos dated February 10, 2015 to Ferro describing their interaction with Maltese before and during Hassett's questioning. DOCCS thereafter filed disciplinary charges against Maltese arising out of these events seeking a thirty-day suspension without pay.⁴⁴ The disciplinary charges were subsequently withdrawn by DOCCS, as were internal NYSCOPBA ethics charges against Oliver and Knight.⁴⁵

DISCUSSION

Section 209-a.1(g) provides that it is an improper practice for an employer:

to fail to permit or refuse to afford a public employee the right, upon the employee's demand, to representation by a representative of the employee organization, or the designee of such organization, which has been certified or recognized under this article when at the time of questioning by the employer of such employee it reasonably appears that he or she may be the subject of a potential disciplinary action. If representation is requested, and the employee is a potential target of disciplinary action at the time of questioning, a reasonable period of time shall be afforded to the employee to obtain such representation. It shall be an affirmative defense to any improper practice charge under paragraph (g) of this subdivision that the employee has the right, pursuant to statute, interest arbitration award, collectively negotiated agreement, policy or practice, to present to a

⁴¹ Tr, pp.107, 128.

⁴² Tr, p. 35.

⁴³ Tr, pp. 68, 70-78.

⁴⁴ Respondent Ex 1.

⁴⁵ Tr, pp. 40-41.

hearing officer or arbitrator evidence of the employer's failure to provide representation and to obtain exclusion of the resulting evidence upon demonstration of such failure. Nothing in this section shall grant an employee any right to representation by the representative of an employee organization in any criminal investigation.

As a threshold matter, we note that probationary employees such as Hassett are fully covered by § 209-a.1(g) of the Act.⁴⁶ Indeed, the State expressly acknowledges this to be the case, but, according to the testimony of both Maltese and Hassett, the investigators informed them that Hassett was not entitled to representation at the interview “because of her probationary status.”⁴⁷ This belies the State’s contention that “[i]t is undisputed that before the questioning began, Oliver explained three or four times that she was not the target or subject of the investigation, she was only a witness, and if at any time that were to change, they would stop and get her union representation.”⁴⁸ Rather, the ALJ had to determine whether Maltese’s and Hassett’s testimony on this point was more credible than that of Knight and Oliver, upon which the State relies.⁴⁹

While Hassett and Maltese testified unequivocally, Knight and Oliver each authored a memorandum stating that Hassett was denied representation mentioning both her status as a probationary employee and her status as a witness.⁵⁰ The ALJ credited Maltese and Hassett over Knight and Oliver, in part because Knight and Oliver in their memoranda refer to Hassett’s probationary status as part of their explanations of the denial of

⁴⁶ *State of New York (Department of Correctional Services)*, 43 PERB ¶ 3031, 3119-3120 (2010); *State of New York (Department of Correctional Services)*, 43 PERB ¶ 3039, 3149, n. 2 (2010).

⁴⁷ Tr, pp. 31 (Maltese), 49 (Hassett).

⁴⁸ Brief in Support of Exceptions at 20.

⁴⁹ Coveny, although present for the interview, did not offer any testimony as to the grounds upon which representation was denied Hassett. Tr, pp. 132, 134-135.

⁵⁰ Respondent Ex 3 (Knight) (representation was denied because “she was a probationary employee and not suspected of any misconduct”); see also Respondent Ex 2 (Oliver) (“she was a probationary employee who [] is only a witness to the alleged incident”).

representation.

The Board has long held that “[c]redibility determinations by an ALJ are generally entitled to ‘great weight unless there is objective evidence in the record compelling a conclusion that the credibility finding is manifestly incorrect.’”⁵¹ Here, the State simply asserts that its witnesses are credible; no objective reason compelling a conclusion that the ALJ’s finding them not to be on this point has been adduced. Indeed, the State does not even address the contrary testimony of Hassett and Maltese on this issue, incorrectly characterizing the issue as “undisputed.”

The State correctly contends that the ALJ’s finding that Hassett and Maltese were told that she was not entitled to representation because she was a probationary employee does not of its own weight establish that it reasonably appeared at the time of questioning that Hassett might be the subject of a potential disciplinary action. However, we find that the ALJ did not err in finding it to be a relevant fact under the circumstances.

In *State of New York (Department of Correctional Services)*, the Board explained that, in determining whether, at the time of questioning, it reasonably appeared that an employee was the potential subject or target of disciplinary action, as required to invoke the protections of § 209-a.1(g) of the Act:

we consider the totality of the circumstances including the reasonableness of the employee's subjective perception, which may have precipitated the request for representation. Although an employee's perceptions are relevant to our

⁵¹ *Village of Scarsdale*, 50 PERB ¶ 3007, n. 51 (2017), quoting *Village of Endicott*, 47 PERB ¶ 3017, 3051 (2014) (quoting *Manhasset Union Free Sch Dist*, 41 PERB ¶ 3005, at 3019, confirmed and modified in part sub nom *Manhasset Union Free Sch Dist v NYS Pub Empl Relations Bd*, 61 AD3d 1231, 42 PERB ¶ 7004 (3d Dept 2009), on remittitur, 42 PERB ¶ 3016 (2009), quoting *County of Nassau*, 24 PERB ¶ 3029 (1991); see also *County of Tioga*, 44 PERB ¶ 3016, at 3062; *Mount Morris Cent Sch Dist*, 41 PERB ¶ 3020 (2008); *City of Rochester*, 23 PERB ¶ 3049 (1990); *Hempstead Housing Auth*, 12 PERB ¶ 3054 (1979); *Captain's Endowment Assn*, 10 PERB ¶ 3034 (1977)).

inquiry, our primary focus is on objective facts in the record. Those facts include: the subject matter and context of the questioning; the verbal and written statements by the employer prior to the questioning; the verbal exchange between the employer representative and the employee; the timing and venue of the questioning; and the treatment of other employees similarly situated.⁵²

Here, several factors support the ALJ's finding that it reasonably appeared that Hassett was the potential subject or target of disciplinary action. The most significant factor, upon our review of the evidence, is that, as Hassett testified, she was concerned that, by not filing a report regarding the mess hall incident, she might have violated departmental rules requiring her to report workplace violence. The fact that the incident under investigation was the very one she had failed to report, quite reasonably would exacerbate that concern, as the lack of a report from her was self-evident—indeed, the State itself remarks that “Hassett had not submitted any ‘to/from’ memo about the incident.”⁵³ This evidence establishes that Hassett “may have violated the mandates of the [DOCCS] employee manual, which would render [her] a potential subject or target of discipline.”⁵⁴

In this context, the fact that the ALJ did not credit Knight's and Oliver's testimony that Hassett was repeatedly told that she was being questioned only as a witness, and therefore not entitled to representation, bears on the totality of the circumstances in two different respects. First, a contrary finding would have by its very nature assuaged, at least to some extent, Hassett's objectively reasonable perception that she might be a potential subject of discipline. Second, as the ALJ found, based on Hassett's unrebutted

⁵² 43 PERB ¶ 3031 at 3121; see also *State of New York (Dept of Corr Svcs)*, 43 PERB ¶ 3039, 3146 (2010).

⁵³ Brief in Support of Exceptions at 18.

⁵⁴ *State of New York (Dept of Corr Svcs)*, 43 PERB ¶ 3031, at 3121 (finding such evidence sufficient to establish right to representation).

testimony, the “verbal exchange between Hassett and the investigators included a reference to Hassett’s probationary status along with the statement that Hassett’s answers could result in termination without the need for the contractual disciplinary process.”⁵⁵ In the context of this case, such a statement could only exacerbate Hassett’s concerns that she was potentially subject to discipline.

Likewise, we do not find credible the State’s argument that the presence of Deputy Superintendent Coveny at what was purportedly a routine interview of a witness in an almost concluded investigation would reasonably be perceived as intended “to assure that she [Hassett] was comfortable during the questioning.”⁵⁶ Indeed, for a probationary employee to be confronted by a Senior Investigator, the Deputy Superintendent for Security of the Facility, and an Assistant Deputy Chief suggests a rather more ominous context than the benign atmosphere of reassurance the State suggests. This is especially so when she is reminded that her employment can be terminated without recourse to any contractual process, and has reason to believe that she might well have in fact violated of DOCCS policy with respect to the very incident in question.

In addition, the fact that Hassett was not interviewed with the other officers at the facility on January 28, but was to be interviewed at DOCCS headquarters in Albany tended to single her out. While Oliver had informed Maltese that the reason for this

⁵⁵ 48 PERB ¶ 4602, at 4870; see Tr, p. 55 (Hassett). The State claims that this testimony was controverted by Knight. (Brief in Support of Exceptions at 16, citing Tr, p. 127). Knight’s cited testimony comprises his statement that he “was trying to let [Maltese] know that it wasn’t because she was probationary. It was because she was only a witness that she was not being afforded the union representation.” Tr, p. 127. However, as noted above, this testimony was not deemed credible by the ALJ, and no objective grounds compelling a finding that the ALJ manifestly erred in this determination has been adduced. More to the point, Knight’s testimony of what he told Maltese is in no way inconsistent with Hassett’s testimony that she was told by the investigators that “if they wanted me gone . . . They would just fire me.”

⁵⁶ Brief in Support of Exceptions at 9.

treatment was that Hassett was a probationary employee, Maltese was himself skeptical of this, and the record does not reflect that he communicated this reasoning to her. Rather, she testified that she interpreted the summons to Albany as suggestive that she might be in trouble—a reading consistent with that of Maltese, though the record does not establish that he communicated his view on that matter to her either.

In sum, although the ALJ could have been more explicit about the basis of her findings, we find that her credibility determination was not an abuse of discretion, and that the record as a whole supports the finding that, at the interview on February 10, 2014, it reasonably appeared that Hassett might have been the subject of potential disciplinary action, and we therefore affirm the ALJ's finding that DOCCS violated § 209-a.1(g) of the Act by refusing to allow Hassett union representation at the investigatory interview.

The State's third exception, to the remedy ordered by the ALJ, is likewise unavailing. The State contends that the only appropriate remedy for a violation of § 209-a.1(g) of the Act is exclusion at any disciplinary hearing of any statements made by an unrepresented employee whose right to representation was violated, an argument based on language in § 209-a.1(g) providing that:

It shall be an affirmative defense to any improper practice charge under paragraph (g) of this subdivision that the employee has the right, pursuant to statute, interest arbitration award, collectively negotiated agreement, policy or practice, to present to a hearing officer or arbitrator evidence of the employer's failure to provide representation and to obtain exclusion of the resulting evidence upon demonstration of such failure.

In effect, the State argues that the only available remedy for a violation of § 209-a.1(g) of the Act is to treat the violation as if the employer had established that it had *not* violated the Act at all, by proving the affirmative defense which it has signally failed to

do.⁵⁷ Merely “[t]o state the argument is to refute it”⁵⁸; the whole point of a proven affirmative defense is that the respondent has established compliance with the Act’s mandates. The notion that a violation of the Act should be treated on par with compliance with the Act is not only absurd but would create a perverse incentive encouraging violations.

Nor has the State pointed to anything in the language of the statute that limits the Board’s remedial authority in the context of a § 209-a.1(g) violation. The State’s reliance on then-Governor Eliot Spitzer’s message approving the bill does not support its contention. The relied-upon text of the message refers to a context in which the affirmative defense has been established, and concludes that, when such is the case, “there can be no improper practice charge,” and thus no “two bites at the apple” for the employee to seek exclusion of her testimony.⁵⁹ The State draws its quotation not directly from the source, but from the Board’s decision in *State of New York (DOCCS)*, without addressing that decision’s express rejection of the very arguments it makes here, and approval of the almost identical remedy the ALJ ordered in this case.⁶⁰ Nor does it address the Board’s rejection of its arguments against the applicability of the general principles of make whole relief to violations of §209.a-1(g) in that case as well as in *State*

⁵⁷ Indeed, already noted at n. 1, *ante*, the State did not except to the ALJ’s finding that the affirmative defense had not been established, as Hassett’s probationary status denied her the benefit of the section of the parties’ collective bargaining agreement relied upon to establish the defense, the merits of which are not before us.

⁵⁸ See *United States v Ford*, 279 Fed Appx 68, 70 (2d Cir 2008).

⁵⁹ 2 MCKINNEY’S 2007 SESSION LAWS OF NEW YORK, Approval Message No 10 (July 18, 2017) (approving L 2007, ch 244) at 1498.

⁶⁰ 43 PERB ¶ 3031, at 3117, 3122-3123.

of New York (DOCCS).⁶¹ As both those cases demonstrate, “[p]ursuant to § 205.5(d) of the Act, PERB is granted broad remedial make-whole authority to order a party to cease and desist from engaging in an improper practice, and to order such affirmative action that will effectuate the policies of the Act.”⁶² In just such a case as this, involving the same parties, the Board has ordered:

[T]he State to immediately remove and destroy all documents maintained by the State, including documents in DOCS personnel records, [the employee’s] personnel history folder, and in DOCS OIG’s investigatory notes, memoranda, email, and reports, which may contain information that was obtained during the [date] questioning of [the employee] without representation.⁶³

The State argues that the remedy here is unduly burdensome, but does not specify any specific difficulty or cost in locating or destroying any notes or documents memorializing Hassett’s statements in her unrepresented interview. Nor does the State claim that Hassett’s testimony was of such paramount importance that its destruction would impair DOCCS’s functionality such that the remedy is grossly disproportionate to the impact on the agency. To the contrary, the State contends that Hassett’s answers were anodyne, acknowledging that “Oliver did not use any of the information he got from Hassett, since she said she did not see anything.”⁶⁴ A remedy has been found to be unduly burdensome where the remedy ordered imposes a grossly disproportionate cost, or the *status quo ante* cannot be restored due to subsequent events.⁶⁵ No such claim has been made here, and, indeed, none seems possible on these facts. Thus, no reason has

⁶¹ 43 PERB ¶ 3039, at 3147-3148 (rejecting claims that back pay was inappropriate remedy for probationary employee based on his statements given without union representation in violation of the Act).

⁶² *State of New York (Dept of Corr Svcs)*, 43 PERB ¶ 3031, at 3122. See generally *City of New York v NYS Pub Empl Relations Bd*, 103 AD3d 145, 149 (3d Dept 2012); *City of Albany v Helsby*, 29 NY2d 433, 439 (1972) (“The remedies for improper employer practices are peculiarly matters within administrative competence”).

⁶³ *Id.* at 3123.

⁶⁴ Brief in Support of Exceptions at 20.

⁶⁵ See, eg, *Town of Islip v NYS Pub Empl Relations Bd*, 23 NY3d 482, 494 (2014); *Manhasset Union Free Sch Dist v NYS Pub Emp Relations Bd*, 61 AD3d 1231, 1234–1235 (3d Dept 2009).

been suggested that would justify our not providing full relief by restoring the *status quo ante*, and affirming the ALJ's remedial order. We therefore deny the State's third exception, and affirm the ALJ's remedial order as to the violation of Hassett's right to union representation at the disciplinary interview.

Finally, we turn to the State's second exception, its contention that the ALJ erred in finding that the State violated § 209-a.1(a) and (b) of the Act by "selecting" Helmicki as the union representative at Krzeminski's interview. Under the unusual circumstances presented here, we find that the ALJ erred in finding that the State in any meaningful way "selected" Hekmicki to represent Krzeminski, and that it interfered with protected rights under the Act.

Section 209-a.1(a) defines as an improper practice "for a public employer or its agents deliberately to interfere with, restrain or coerce public employees in the exercise of their rights guaranteed in section two hundred two for the purpose of depriving them of such rights." It is well established that § 209-a.1(a) of the Act "broadly and generally prohibits employer actions which interfere with respect to any issue affecting their employment relationship, whether or not that subject embraces a mandatory subject of negotiation."⁶⁶ That "request for and receipt of union representation constitutes participation in a union, a right specifically protected by § 202 of the Act" is likewise well established.⁶⁷

Section 209-a.1(b) of the Act similarly declares it improper for a "public employer or its agents deliberately to dominate or interfere with the formation or administration of any employee organization for the purpose of depriving [public employees] of [their rights

⁶⁶ *City of Buffalo*, 30 PERB ¶ 3021, 3048 (1997); see also *Brunswick Cent Sch Dist*, 19 PERB ¶ 3063, 3126 (1986).

⁶⁷ *Id.*

guaranteed in § 202].”⁶⁸ The Board has long held that the term “interference” in subsection (b) is “designed to prevent a public employer from meddling in the internal affairs of the organization or trying to control it.”⁶⁹ Moreover, the Board has made clear that the prohibition in § 209-a.1(b) “is directed to conduct by a public employer which would compromise the independence of an employee organization that represents or seeks to represent its employees.”⁷⁰

The Board’s precedents establish “either party to a bargaining relationship may choose its own representatives and neither may attempt to control the other’s selection.”⁷¹ Thus, “under ordinary circumstances, an attempt by one party to control the selection of the other party’s representative might constitute a violation of the Act.”⁷² Indeed, we would go further and say that such an attempt, successful or not, generally *would* constitute a violation, to remove any ambiguity created by the Board’s use of “might” in *County of Onadonga*. However, we do not agree that the evidence establishes that DOCCS selected Helmicki as Krzeminski’s union representative.

As a threshold matter, in an improper practice case, “the burden of proof at all times rests with the charging party to prove all [requisite] elements by a preponderance of the

⁶⁸ *Monroe BOCES No. 1*, 28 PERB ¶ 3068, 3157 (1995).

⁶⁹ *County of Rockland (Rockland County Community College)*, 13 PERB ¶ 3089, 3143 (1980).

⁷⁰ *County of Onondaga*, 14 PERB ¶ 3029, 3051 (1981). While a violation of this section does not require a finding of anti-union animus, or specific motive, evidence must be adduced of circumstances in which the employer’s actions necessarily have the effect of interfering with fundamental rights. *Monroe BOCES No. 1*, 28 PERB ¶ 3068, at 3158.

⁷¹ *Erie County Water Auth*, 25 PERB ¶ 3030, 3063 (1992); *Village of Malone*, 23 PERB ¶ 3019, 3036 (1990); *City of Newburgh*, 16 PERB ¶ 3081 (1983).

⁷² *Village of Malone*, 23 PERB ¶ 3019, at 3036 (finding no violation where union had waived by express contractual provision right to select member on grievance board).

evidence.”⁷³ Here, the ALJ’s conclusion that NYSCOPBA proved that DOCCS “selected” Helmicki rests solely on Maltese’s testimony that he did not himself place the call. In view of Krzeminski’s testimony that either Maltese or a sergeant placed the call and giving the lack of any other proof regarding who placed the call, we find that NYSCOPBA failed to establish the elements of the charge.

Accordingly, we affirm the ALJ’s decision holding that DOCCS’s denial of Hassett’s request for representation at the interview on February 10, 2014, affirm the ALJ’s remedial order for that violation, and reverse the ALJ’s finding that DOCCS’ selection of Helmicki as a replacement for Maltese constituted interference in violation of §§209-a.1(a) and (b) of the Act.

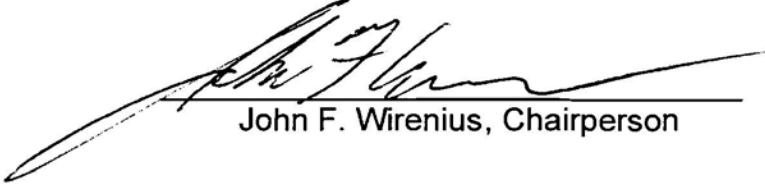
IT IS, THEREFORE, ORDERED that the State forthwith:

1. Permit, upon the employee’s demand, representation for a DOCCS employee in the NYSCOPBA represented unit when at the time of questioning it reasonably appears that he or she may be the subject or target of potential disciplinary action;
2. Immediately remove and destroy all documents maintained by the State, including documents in DOCCS personnel records, correction officer Nicole Hassett’s personnel records, and in DOCCS OSI’s investigatory notes, memoranda, email, and reports which may contain information that was obtained during the February 10, 2014 questioning of Hassett without representation;
3. Not use, in the context of Nicole Hassett’s State employment, any information obtained during the February 10, 2014 interview; and

⁷³ *Catskill Housing Authority (Biegel)*, 49 PERB ¶ 3025 (2016) (charge under § 209-a.1(a) and (c)); *City Sch Dist of the City of Buffalo*, 48 PERB ¶ 3001, (2015) (dismissing charge under § 209-a.1(b) where charging party’s evidence could not reasonably support inference of intention to interfere on the part of the public employer); *NYCTA (Andre)*, 32 PERB ¶ 3061 (1999) (charge under § 209-a.1(a) and (b)).

4. Sign and post notice in the form attached at all physical and electronic locations customarily used to post notices to unit employees.

DATED: November 6, 2017
Albany, New York



John F. Wirenius, Chairperson



Robert S. Hite, Member

NOTICE TO ALL EMPLOYEES

**PURSUANT TO
THE DECISION AND ORDER OF THE
NEW YORK STATE
PUBLIC EMPLOYMENT RELATIONS BOARD**

and in order to effectuate the policies of the

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

we hereby notify all employees of State of New York (Department of Corrections and Community Supervision) in the unit represented by the New York State Correctional Officers and Police Benevolent Association, Inc. that the State of New York (Department of Corrections and Community Supervision) will:

1. Permit, upon the employee's demand, representation for a State of New York (Department of Corrections and Community Supervision) (DOCCS) employee in the NYSCOPBA represented unit when at the time of questioning it reasonably appears that he or she may be the subject or target of potential disciplinary action;
2. Immediately remove and destroy all documents maintained by the State, including documents in DOCCS personnel records, correction officer Nicole Hassett's personnel records, and in DOCCS OSI's investigatory notes, memoranda, email, and reports which may contain information that was obtained during the February 10, 2014 questioning of Hassett without representation; and
3. Not use, in the context of Nicole Hassett's State employment, any information obtained at the February 10, 2014 interview.

Dated **By**
on behalf of the State of New York
(Department of Corrections and Community Supervision)

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

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

In the Matter of

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

Charging Party

CASE NO. U-32543

- and -

**STATE OF NEW YORK (OFFICE OF
MENTAL HEALTH – ROCHESTER PSYCHIATRIC CENTER),**

Respondent.

BRUCE D. SMITH, for Charging Party

**MICHAEL N. VOLFORTE, GENERAL COUNSEL (CLAY J. LODOVICE of
counsel), for Respondent**

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the State of New York (Office of Mental Health – Rochester Psychiatric Center) (State or RPC) to a decision of an Administrative Law Judge (ALJ) finding that the State violated § 209-a.1(d) of the Public Employees' Fair Employment Act (Act) when, on December 13, 2012, the State unilaterally imposed a new sick leave usage procedure applicable to employees represented by the New York State Public Employees Federation, AFL-CIO (PEF).¹ The new procedure requires the represented employees to submit a doctor's certificate for unscheduled use of sick leave surrounding the 2012-2013 Christmas and New Year's holidays. The ALJ ordered the State to cease and desist from implementing the

¹ 48 PERB ¶ 4610 (2015).

new requirement, to make whole affected unit employees, and to post a notice.

EXCEPTIONS

The State excepts to the ALJ's decision on four main grounds. The State argues that language in the parties' collective-bargaining agreement (CBA) provides PEF with an arguable source of right with respect to documentation requirements for the use of sick leave, thus depriving the Board of jurisdiction over the current dispute. In the alternative, the State argues that the Board should defer to the parties' agreed-upon dispute resolution procedures and conditionally dismiss this proceeding. The State further argues that it has satisfied any duty to negotiate over sick leave documentation requirements. Finally, the State argues that PEF failed to establish an enforceable past practice and that PEF consequently has failed to support its allegation that a change actually occurred.

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

FACTS

The facts are fully set forth in the ALJ's decision and are discussed here only as far as is necessary to address the exceptions.

At the time the charge was filed, PEF and the State were parties to a CBA running for the term of April 2, 2011 through April 1, 2015.²

On December 13, 2012, Christopher Kirisits, the Director of Nursing at RPC, sent an email to the entire RPC nursing staff, including those represented by PEF, advising them, in relevant part, that:

² Joint Ex 1.

[l]ast minute call [ins] will require documentation supporting the rational (sic) for the absence ...[b]eginning 7:00 am Monday December 24th, 2012... [e]nding 7:00 am Wednesday December 26th, 2012... &...[b]eginning 7:00 am Monday December 31st, 2012...[e]nding 7:00 am Wednesday January 2nd, 2013.³

Lisa Couperus, PEF's Chief Steward at the time of the events, and other union officials informed Kirisits of PEF's opposition to his order immediately after it was published.⁴

Since November 1982, RPC has had a policy in place concerning "Submission of Doctor's Certificate(s) [f]or absences due to illness/injury."⁵ In relevant part, the policy states:

It is the policy of Rochester Psychiatric Center not to routinely require an employee to submit a doctor's certificate for each instance of unscheduled absence. However, management will require that a doctor's certificate be submitted under the following circumstances:

- 1) Occupational injury leave or workers' compensation leave
- 2) Sick leave with half pay
- 3) Sick leave without pay
- 4) Leave for maternity/child rearing purposes
- 5) Extended illness of more than four (4) consecutive work days
- 6) Medical restrictions that affect performance of duties

Management may also require employees who have been identified as abusers of time and attendance standards to submit a doctor's certificate for each instance of unscheduled absence. In such instances, the employee will be given advance notice that for a specified period of time (not to exceed six months), a doctor's certificate will be required and failure to provide a doctor's certificate will result in a loss of pay.⁶

Karen Spotford, PEF's Chief Steward from Spring 2003 to November 29, 2012,

³ Joint Ex 2.

⁴ See separate correspondence dated December 14, 17 and 24, 2012 (Joint Exs 3-5).

⁵ Policy and Procedure #1520, Joint Ex 6.

⁶ *Id.* emphasis in original.

testified that during her entire tenure as Chief Steward, RPC followed the foregoing policy as written and never required any employees to provide a doctor's certificate for their absence outside the specific circumstances set forth in the policy.

Article 45 of the parties' CBA, entitled "BENEFITS GUARANTEED," states:

With respect to matters not covered by this Agreement, the State will not seek to diminish or impair during the term of this Agreement any benefit or privilege provided by law, rule or regulation for employees without prior notice to PEF; and, when appropriate, without negotiations with PEF; provided, however, that this Agreement shall be construed consistently with the free exercise of rights reserved to the State by the Management Rights Article of this Agreement.⁷

Article 12 of the CBA contains attendance and leave provisions related to sick leave. Section 12.8, Sick Leave Accumulation, states:

- (a) Sick Leave shall be credited in accordance with the New York State Attendance Rules.
- (b) Employees who are entitled to earn and accumulate sick leave credits may accumulate such credits up to a total of 200 days. Employees shall have the opportunity to use up to a total of 200 days for retirement service credit. Employees shall have the ability to use up to 200 days of such credits to pay for health insurance in retirement.⁸

Section 12.9, Use of Sick Leave, states:

- (a) Sick leave credits may be used for scheduled medical or dental appointments with the advance approval of the appointing authority or the authority's designee.
- (b) Sick leave credits may be used in such units of time as the appointing authority may approve, but the appointing authority shall not require that sick leave credits be used in units greater than one-quarter hour.⁹

The New York State Civil Service Commission promulgates various rules and regulations that govern state civil service, codified in New York Code, Rules and

⁷ Joint Ex 1, at p. 85.

⁸ *Id.* at p. 36.

⁹ *Id.* at pp. 36-37.

Regulations (NYCRR). As relevant here, Title 4, Chapter II, Article 1, Parts 20-26, of NYCRR covers “Attendance for Nonmanagerial/Confidential Employees in New York State Departments and Institutions.” Part 21, titled “Absence with Pay”, contains § 21.3 titled “Sick leave.”¹⁰ Rule 21.3 contains subsections (b) and (d).¹¹ Subsection (b) of Rule 21.3 addresses sick leave accumulation while subsection (d) thereof addresses sick leave usage including related “proof of illness” requirements. The full text of those subsections are as follows:¹²

(b) Employees shall earn sick leave credits at the rate of one-half day per biweekly pay period and may accumulate such credits up to a total of 150 days; provided, however, that an employee shall not earn sick leave credit for any biweekly pay period unless he is in full pay status for at least seven work days during such biweekly pay period. A part-time employee who is required to work a fixed number of hours, five days per week, shall also earn sick leave credit as provided herein, but his total pay when absent on such leave shall be the amount which would have been due him had he been working regularly at his usual hours for such period.

(d) Before absence for personal illness may be charged against accumulated sick leave credits, the appointing authority may require such proof of illness as may be satisfactory to it, or may require the employee to be examined, at the expense of the department or agency, by a physician designated by the appointing authority. In the event of failure to submit proof of illness upon request, or in the event that, upon such proof as is submitted of illness sufficient to justify the employee’s absence from the performance of his duties, such absence may be considered as unauthorized leave and shall not be charged against accumulated sick leave credits. Abuse of sick leave privileges shall be cause for disciplinary action.

¹⁰ 4 NYCRR § 21.3 (hereinafter referred to as “Rule 21.3”).

¹¹ *Id.*

¹² Respondent’s Ex 5.

DISCUSSION

Deferral Issues

We first address the State's argument that the charge should be deferred to the dispute resolution procedures contained in the CBA and conditionally dismissed because the underlying dispute here raises contractual questions arguably beyond our jurisdiction.¹³ Specifically, the State argues that Article 12.8 of the CBA incorporates all of the provisions of Rule 21.3, including Rule 21.3(d), which states that "the appointing authority may require such proof of illness as may be satisfactory to it." The State asserts that because all of the provisions of Rule 21.3 have been incorporated into the CBA, any alleged violations of the Rules can be challenged through the grievance-arbitration provisions of the CBA. The State therefore argues that the CBA provides PEF with a reasonably arguable source of right with respect to the subject of the improper practice charge.

We, like the ALJ, find this argument unpersuasive. The CBA does not expressly incorporate Rule 21.3, in whole or in part. Rather Article 12.8(a) of the CBA, contained in a section entitled "Sick Leave Accumulation," says that "Sick leave shall be credited in accordance with the New York State Attendance Rules." Contrary to the State's argument, this single reference to the Rules is not sufficient to incorporate all of the provisions of the Rule into the CBA. Instead, the context of the reference (a sentence referring to how sick leave will be *credited*, in a section dealing with sick leave *accumulation*), makes it clear that the parties intended to reference only those portions of the Rules that relate to how employees earn sick leave time. Rule 21.3(d),

¹³ *Herkimer County BOCES*, 20 PERB ¶ 3050, 3109 (1987); *Town of Carmel*, 29 PERB ¶ 3073, 3174-3175 (1996); *County of Livingston*, 30 PERB ¶ 3046, 3106 (1997).

addressing requirements to be met before sick leave absences are charged against sick leave credits, is not such a provision.¹⁴

Moreover, as the argument is presented by the State, Article 12.8 would give a source of right not to PEF, but to the State itself. That is, the State argues that Article 12.8 gives it a right to require documentation of sick leave use by employees, not that it gives PEF a right to place limitations on the State's ability to request such documentation. However, "if an agreement is a source of right to the employer, an issue of a waiver of the right to negotiate is presented," or one of duty satisfaction.¹⁵ Such arguments "concern the merits of the charge, not jurisdiction."¹⁶

In sum, we agree with the ALJ that the reference to the Rules in the CBA does not give PEF a reasonably arguable contractual source of right to challenge the State's action through a grievance.

The State also argues that, even if Rule 21.3 is not fully incorporated into the CBA, Article 45 of the CBA nevertheless mandates jurisdictional deferral because PEF could challenge the State's actions via a grievance alleging a violation of Article 45.

Article 45 is entitled "BENEFITS GUARANTEED" and states, in relevant part:

With respect to matters not covered by this Agreement, the State will not seek to diminish or impair during the term of this Agreement any benefits or privilege provided by law, rule or regulation for employees without prior notice to PEF;

¹⁴ If the parties intended to incorporate the Rules relating to how sick leave absences would be charged to employees, one might expect them to have referenced such Rules in the next provision of the CBA, Article 12.9, entitled "Use of Sick Leave." Article 12.9, however, contains no reference to the Rules.

¹⁵ *City of New Rochelle*, 44 PERB ¶ 3002, 3026 (2011), quoting *County of Nassau*, 23 PERB ¶ 3051, 3108 (1990).

¹⁶ *Id.*; see also *State of New York (Unified Court System)*, 25 PERB ¶ 3035, 3073 (1992); *County of Livingston*, 30 PERB ¶ 3046, 3106 (1997). See also *County of Nassau*, 23 PERB ¶ 3051, at 3108.

and, when appropriate, without negotiations with PEF¹⁷

Article 45 is similar to a “maintenance of benefits” clause.¹⁸ “Maintenance of benefits” clauses give rise to rights that “parallel” the statutory right to the maintenance of noncontractual practices.¹⁹ “The contractual right, however, does not extinguish the statutory right,” and we retain jurisdiction over the proceeding.²⁰ Thus, a jurisdictional deferral is not warranted. Nevertheless, deferral to the grievance-arbitration procedures agreed to by the parties may still be appropriate under the Board’s merits deferral policy.²¹

In that regard, the ALJ made no finding on whether the statutory right to the maintenance of past practices was included in Article 45’s protection of benefits and privileges “provided by law, rule or regulation.” The Board has previously had occasion to examine this exact language in *State of New York (Workers’ Compensation Board)*.²² In that case, the Director of Public Employment Practices and Representation (Director) found that a substantively identical “Benefits Guaranteed” clause gave the union a reasonably arguable source of right with respect to the employer’s unilateral change to

¹⁷ Joint Ex 1, at p. 85.

¹⁸ Although Article 45 appears to protect a narrower set of noncontractual terms and conditions of employment from change. Typical “maintenance of benefits” clauses prohibit an employer from changing any non-contractual terms and conditions of employment without notice to and bargaining with the certified employee representative, while Article 45 only prohibits the State from unilaterally altering any non-contractual “benefit or privilege provided by law, rule or regulation”

¹⁹ *City of Buffalo (Fire Department)*, 17 PERB ¶ 3090, 3138 (1984).

²⁰ *Id.*

²¹ A merits deferral is appropriate when PERB has jurisdiction over a charge's allegation, but resolution of the charge necessitates “an interpretation of an agreement which is arguably a source of right to the charging party, and an award rendered under a binding grievance arbitration procedure is potentially dispositive of the issues underlying the charge.” See *Town of Carmel*, 29 PERB ¶ 3073, at 3175.

²² 32 PERB ¶ 3017, 3031 (1999), *on remand* 32 PERB ¶ 4597; 32 PERB ¶ 3076 (1999).

an existing practice. The Director concluded that the union's right under the Act to negotiate terms and conditions of employment before any changes to those terms and conditions are made is arguably "a benefit or privilege provided by law" within the meaning of the "Benefits Guaranteed" clause. Under that interpretation of the "Benefits Guaranteed" clause, the Director found that deferral was appropriate because a grievance would be potentially dispositive of the charges.²³

On review, the Board made no finding on whether the "Benefits Guaranteed" clause included rights protected by the Act. Instead, it remanded the matter to the Director so that the parties could provide clarifying arbitration awards or judicial decisions regarding the applicability of the "Benefits Guaranteed" provision to the change at issue. The Board reasoned that "our deferral policies, whether jurisdictional or merits, hinge ultimately on whether the parties' agreement reasonably afford a charging party rights with respect to the subject matter of the improper practice charge . . . Deferral to the parties' grievance arbitration procedure obviously is not appropriate if [the "Benefits Guaranteed" clause] is not applicable to the State's alleged unilateral rescission of this particular benefit."²⁴

As in *Workers' Compensation Board*, the issue of whether the language in Article 45 encompasses the State's duty under the Act to negotiate before making changes to non-contractual terms and conditions of employment was not a focus of the parties'

²³ 31 PERB ¶ 4572, 4688 (1998).

²⁴ After the remand, the parties submitted to the Director a Stipulation of Interpretation in which they agreed that the rights accorded by § 209-a.1 of the Act are not employee benefits provided by law, rule, or regulation within the meaning of Article 39. 32 PERB ¶ 4597, 4856 (1999).

arguments at the hearing or in the post-hearing briefs.²⁵ Also like *Workers' Compensation Board*, we make no finding on whether Article 45 encompasses the rights and duties contained in the Act. Unlike the prior Board, however, we find it unnecessary to remand for further evidence regarding Article 45 because we find it proper to exercise jurisdiction here in either event.

First, if the laws, rules, and regulations referenced in Article 45 do not include Taylor Law obligations, there is no basis to find that PEF has an arguable source of right in the CBA. If a charging party is without reasonably arguable rights under an agreement, there can be no violation of that agreement, and the pursuit of a grievance would be to no end. Thus, there would be no basis on which to defer.²⁶

Second, if Article 45 does require the State to fulfill its Taylor Law duty to negotiate before making changes to non-contractual terms and conditions of employment, Article 45 becomes the equivalent of a "maintenance of benefits" clause. As discussed above, such clauses give rise to rights that parallel, but do not extinguish, PERB's jurisdiction to determine the statutory rights. Therefore, while a merits deferral might have been appropriate, there is no basis for arguing that the Board is deprived of jurisdiction under § 205.5(d) of the Act.

As explained above, a merits deferral may still be appropriate in proceedings that

²⁵ Although the State did not squarely raise this issue before the ALJ and therefore could be found to have waived this argument, it is PERB's "right and responsibility . . . to ensure that the deferral policies we have fashioned to give effect to the Legislature's intent are correctly applied." 32 PERB ¶ 3017, at 3031.

²⁶ *Id.*

allege the respondent's actions violate a "maintenance of benefits" clause.²⁷ A merits deferral is not required by the Act, however, but is, instead, a policy developed by the Board which is designed to further the public policy of the State to "encourage public employers and employee organizations to agree upon procedures for resolving disputes."²⁸ As such, the Board may, in an exercise of its discretion, retain jurisdiction and decide the merits of the underlying improper practice charge.²⁹ In the current case, although the State interposed both a jurisdictional and a merits deferral affirmative defense in its answer, neither the State nor the PBA asserted to the ALJ at the hearing that the proceeding should be deferred. Nor did either party file an interlocutory appeal to the Board from the ALJ's failure to defer. As a result, the merits of the improper practice charge were fully litigated before the ALJ, and the merits of the ALJ's decision on the charge have been fully argued before us. "Deferral would, therefore, impose wasteful duplication of efforts on the parties."³⁰ Moreover, PEF has not filed a grievance challenging the State's action and, as a result, there are no grievance or arbitration proceedings for us to defer to. In these circumstances, we believe that it would best effectuate the policies of the Act for us to decide the State's exceptions regarding the merits of the charge, and we therefore decline to defer this proceeding.

²⁷ *City of Buffalo*, 17 PERB ¶ 3090, at 3138-3139. We conditionally dismiss such charges, subject to reinstatement should the respondent interpose objections to arbitrability or should an arbitration award not satisfy the standards for deferral delineated in *New York City Transit Authority (Bordansky)*, 4 PERB ¶ 3031 (1971). See also *East Meadow Union Free Sch Dist*, 48 PERB ¶ 3006, 3020 (2015); *County of Sullivan and Sullivan County Sheriff*, 41 PERB ¶ 3006, 3035-3036 (2008).

²⁸ See § 200 of the Act; *City of Buffalo*, 17 PERB ¶ 3090, at 3138-3139.

²⁹ *County of Sullivan and Sullivan County Sheriff*, 41 PERB ¶ 3006, at 3035.

³⁰ *Id.*, at 3036.

Substantive Merits

It is well-established that “[t]he procedures for granting and terminating sick leave and returning to work are mandatorily negotiable.”³¹ In particular, changed requirements for submission of medical documentation or physician’s notes are mandatory.³² Accordingly, the State’s decision here to require medical documentation constituted a violation of § 209-a.1(d) of the Act, unless one or more of the defenses offered by the State have merit.

The State argues that PEF failed to show that the State had an unequivocal practice of not requiring sick leave documentation for one-day absences such that employees had a reasonable expectation that they would not be required to produce such documentation.³³ We affirm the ALJ’s rejection of this argument. As he found, RPC’s policy for submission of doctor’s certificates for absence due to illness/injury contemplates six specific circumstances in which the State will require medical documentation.³⁴ None requires medical documentation simply based on the date of the absence. The policy also provides that the State may require employees who have been identified as “abusers of time and attendance standards” to submit medical

³¹ *City of New Rochelle*, 47 PERB ¶ 3004, 3011 (2014), citing *Plainedge UFSD*, 7 PERB ¶ 3050 (1974); and *City of Schenectady*, 24 PERB ¶ 3016 (1991); see also *County of Cortland*, 48 PERB ¶ 3028, 3009 (2015); *Triborough Bridge and Tunnel Auth.*, 27 PERB ¶ 3076 (1994); *State of New York (DOCS)*, 31 PERB ¶ 3065 (1998); *City of New York*, 35 PERB ¶ 3034 (2002).

³² *Village of Scarsdale*, 50 PERB ¶ 3007 (2017); *State of New York (DOCS)*, 37 PERB ¶ 3023, 3064 (2004); *State of New York (DOCS)*, 31 PERB ¶ 3065, 3144 (1998); see also *City of New York v Bd of Collective Bargaining*, 107 AD3d 612, 612-613 (1st Dept 2013) (upholding administrative finding that employer’s unilateral requirement of a doctor’s “fit for duty” statement following an employee’s absence from service for three or more days violated the City’s duty to negotiate).

³³ *County of Nassau*, 24 PERB ¶ 3029, 3058 (1991); See also *Chenango Forks Cent Sch Dist*, 40 PERB ¶ 3012 (2007); *City of Oswego*, 41 PERB ¶ 3011, 3070 (2008).

³⁴ Joint Ex 6.

documentation for each instance of unscheduled absence. Nowhere in the policy document does it state or suggest that the use of sick leave on any particular date constitutes abuse, and it does not support the contention that medical documentation will be required for single-day absences that occur on or near a holiday. The enumeration of these circumstances in the policy does not suggest any additional circumstances in which documentary evidence of sickness would be required, and the document cannot reasonably be read as establishing any such circumstances.

Likewise, the evidence before the ALJ supports his finding. Indeed, Spotford's uncontradicted testimony confirmed that the State had not required such documentation since at least the Spring of 2003.³⁵ The State presented no evidence showing that it had ever required that medical documentation be submitted for single-day absences that occur on or near a holiday. We affirm the ALJ's finding that the evidence establishes that a clear practice existed whereby the State never required any employees to provide medical documentation for their absences outside the specific circumstances set forth in the policy and that employees had a reasonable expectation that this practice would continue.

The State also argues that it satisfied any duty it had to negotiate over its medical documentation requirement by agreeing to incorporate Rule 21.3(d) into the parties' CBA. For the reasons discussed above, we reject the State's argument that Rule 21.3(d) has been incorporated into the CBA. There are no contractual provisions that either expressly or implicitly demonstrate that the parties had reached accord on the

³⁵ Contrary to the State's assertion, nothing that Spotford said during cross-examination contradicted her testimony that the State had never, prior to 2012, required medical documentation for single-day absences occurring during the Christmas and New Year's holidays.

specific subject of medical documentation for sick leave absences, and no basis for finding that the specific subject had been “negotiated to fruition.”³⁶ Therefore, we reject the State’s duty satisfaction defense.

The State additionally argues that, even if Rule 21.3 is not incorporated into the CBA, Rule 21.3 nevertheless applies to unit employees as a matter of law because there is no conflicting provision in the CBA.³⁷ The State further argues that Rule 21.3 authorizes it to request documentation for sick leave from unit employees. PEF does not dispute that Rule 21.3 is applicable to unit employees here.

Rule 21.3 was promulgated in 1966 by the New York State Civil Service Commission,³⁸ and, even were we to impermissibly treat it as having the equivalent authority of a statute and read it as broadly as the State urges, we would be compelled to find that the enactment of the Act rendered it invalid to the extent it conflicts with the Act.³⁹ In the specific context of the Act, the Board and the Courts have found that a “[r]egulation does not supersede the Taylor Law duty to bargain, nor does it evidence a public policy which supersedes the public policy contained in the Taylor Law that

³⁶ *County of Nassau*, 48 PERB ¶ 3014, 3051 (2015), citing *Orchard Park Central School District*, 47 PERB ¶ 3029, 3089 (2014); *New York City Transit Authority*, 41 PERB ¶ 3014, 3076 (2008).

³⁷ Rule 26.3 states that the attendance rules, “insofar as they apply to employees in the negotiating units established pursuant to article 14 of the Civil Service Law, shall be continued; provided, however, that during periods of time when there is in effect an agreement between the State and an employee organization reached pursuant to the provisions of said article 14, the provisions of such agreement and the provisions of such rules shall both be applicable. In the event the provisions of the agreement are different from the provisions of the attendance rules, the provisions of the agreement shall be controlling.”

³⁸ 1966 Department of Civil Service Regulations, 4 CRR-NY 21.3 (sec amd, filed Sept 16, 1966).

³⁹ See, eg, *General Electric Capital Corp v NYS Div of Tax Appeals*, 301 AD2d 819 (3d Dept 2003) (Provisions of later, more specific statute control over earlier, more general statute).

encourages collective bargaining as to terms and conditions of employment.”⁴⁰ In sum, the obligation to bargain imposed by the Act cannot be suspended, superseded, or otherwise impaired by the unilateral promulgation of a regulation.

Moreover, the Board has already twice examined the language of Rule 21.3 and twice rejected the State’s precise argument here. We find that the Board’s prior analysis of Rule 21.3 appropriately harmonizes the Rule with the supervening passage of the Act, and therefore serves the policies of the Act while allowing the Rule to govern in circumstances that do not infringe upon mandatory subjects of bargaining.

In *State of New York (Dept of Correctional Services – Downstate Correctional Facility) (Downstate Correctional Facility)*, the Board found that Rule 21.3 does not excuse the State from its obligation to bargain before implementing new requirements for sick leave medical documentation, a mandatory subject of bargaining.⁴¹ While we reach the same conclusion, we do so for the additional reason that Rule 21.3 *cannot* privilege the State to disregard its obligations under the Act and to act unilaterally with

⁴⁰ *Newburgh Enlarged City Sch Dist*, 21 PERB ¶ 3036, 3079 (1988) (citing and quoting *Bd. of Education of the UFSD # 3 of the Town of Huntington v Associated Teachers of Huntington*, 30 NY2d 122, 130, 5 PERB ¶ 7507, 7510 (1972), *confd sub nom Bd of Educ of the Newburgh Enlarged City Sch Dist v NYS Pub Empl Relations Bd*, 22 PERB ¶ 7009 (Sup Ct Alb Co 1989).

⁴¹ 31 PERB ¶ 3065 (1998); see also *State of New York (Dept of Correctional Services)*, 37 PERB ¶ 3023, 3065 fn. 4 (2004). In *Downstate Correctional Facility*, the State argued that its actions were allowed by the New York State Department of Civil Service Attendance and Leave Manual, a document published by the Department of Civil Service, rather than the rule itself. We find this distinction to be immaterial, however, since the same considerations are at play here.

respect to changes in mandatory subjects of negotiation.⁴²

As the Act, a statute enacted by the Legislature, controls over a Rule promulgated by an Agency, such as the Civil Service Commission, we find that this construction of the Act in limiting the scope of the Rule is appropriate, and adhere to it. Thus, even if Rule 21.3 authorizes the State to request sick leave documentation, the State must comply with its Taylor Law obligation to bargain prior to doing so. Moreover, although the State disagrees with the conclusion reached by the Board in *Downstate Correctional Facility* and argues that the current matter is factually distinguishable, the State has presented no compelling reasons for us to revisit or overrule the Board's holding.⁴³ As a result, we find that the State is not privileged pursuant to Rule 21.3 to change the sick leave use procedures without negotiations with PEF.

Based on the foregoing, we find that the State violated § 209-a.1(d) of the Act when it unilaterally required employees to submit a doctor's certificate for unscheduled absences surrounding the 2012-2013 Christmas and New Year's holidays.

IT IS, THEREFORE, ORDERED that the State:

- (1) Cease and desist from requiring unit employees to submit medical

⁴² See also *Newburgh Enlarged City Sch Dist*, 21 PERB ¶ 3036 (1988) ("Under the Taylor Law, the obligation to bargain as to all terms and conditions of employment is a broad and unqualified one, and there is no reason why the mandatory provision of that Act should be limited, in any way, except in cases where some other applicable statutory provision explicitly and definitively prohibits the public employer from making an agreement as to a particular term or condition of employment"), *confirmed* 22 PERB ¶ 7009 (Sup Ct Albany, 1989), *motion to appeal dismissed* 25 PERB ¶ 7008 (3d Dept 1992).

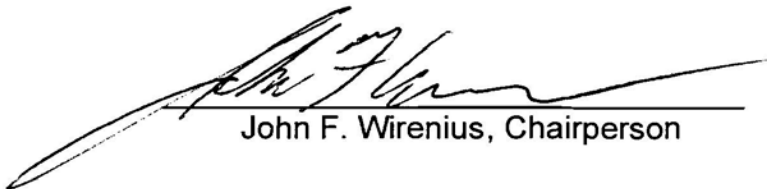
⁴³ Moreover, absent such a compelling reason to do so, we are loathe to disrupt the settled expectations of the parties, formed by our decisions, especially when they have been relied upon in entering into the collective bargaining agreement at issue here. See, eg, *State of New York (SUNY Buffalo)*, 50 PERB ¶ 3001, 3004 (2017).

documentation as a prerequisite for approving the use of accumulated sick leave credits for unscheduled absences of four days or less occurring during Christmas and New Year's holidays, except as provided for in Rochester Psychiatric Center Policy and Procedure #1520;

(2) Make unit employees whole for wages and benefits lost, if any, as a result of the State's implementation of the at-issue sick leave usage policy concerning Christmas and New Year's holidays, with interest at the maximum legal rate; and

(3) Sign and post the attached notice at all physical and electronic locations normally used by it to post written communications to unit employees.

DATED: November 6, 2017
Albany, New York



John F. Wirenius, Chairperson



Robert S. Hite, Member

NOTICE TO ALL EMPLOYEES

PURSUANT TO
THE DECISION AND ORDER OF THE

NEW YORK STATE
PUBLIC EMPLOYMENT RELATIONS BOARD

and in order to effectuate the policies of the

NEW YORK STATE
PUBLIC EMPLOYEES' FAIR EMPLOYMENT ACT

We hereby notify all employees of the State of New York (Office of Mental Health – Rochester Psychiatric Center) (State) in the bargaining unit represented by the New York State Public Employees Federation, AFL–CIO that the State will:

1. Not require unit employees to submit medical documentation as a prerequisite for approving the use of accumulated sick leave credits for unscheduled absences of four days or less occurring during Christmas and New Year's holidays, except as provided for in Rochester Psychiatric Center Policy and Procedure #1520; and
2. Make unit employees whole for wages and benefits lost, if any, as a result of the State's implementation of the at issue sick leave usage policy concerning Christmas and New Year's holidays, with interest at the maximum legal rate.

Dated

By

on behalf of the **State of York (Office
of Mental Health - Rochester
Psychiatric Center)**

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

**LOCAL 456, INTERNATIONAL BROTHERHOOD OF
TEAMSTERS,**

Petitioner,

CASE NO. CP-1445

- and -

CITY OF YONKERS,

Employer.

BRIAN LUCYK, ESQ., for Petitioner

**MICHAEL V. CURTI, GENERAL COUNSEL (MATTHEW GALLAGHER of
counsel), for Employer**

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the City of Yonkers (City) to a decision by an Administrative Law Judge (ALJ) granting the petition filed by the International Brotherhood of Teamsters, Local 456 (Local 456) for unit placement of the titles of Director of General Services, Director of Purchasing, and Budget Analyst into the unit of City employees represented by Local 456.¹

EXCEPTIONS

The City argues that the ALJ should have excluded the Director of General Services (DGS) and the Director of Purchasing (DP) because they are managerial employees and that the ALJ should have excluded Budget Analysts (BAs) because they

¹ 49 PERB ¶ 4005 (2016).

are confidential employees.

FACTS

The facts are fully set forth in the ALJ's decision and are discussed here only as far as is necessary to address the exceptions. The unit represented by Local 456 consists of 48 white-collar administrative titles totaling approximately 60 employees. The evidence that was offered pertaining to each of these disputed titles is separately presented below.

Director of General Services

One person, Joseph Celli, holds this title. Celli testified that he has been in the position for 18 years and oversees the facilities maintenance staff of approximately 32 people, of whom four are in Local 456's white-collar unit. The rest are in a blue-collar unit also represented by Local 456.

Celli testified that he reports to three Deputy Commissioners and the Commissioner of Public Works. Celli attends monthly meetings, which the Commissioner holds, and reports on the status of various projects. The Commissioner sets priorities for work and Celli sees that those are executed.² Celli supervises two Assistant Superintendents of Buildings, who in turn supervise the people working on the various projects within General Services.

Celli is not involved in personnel decision-making, but rather is told, for example, who to transfer, and he carries out those instructions.³ He has the authority to document disciplinary infractions, but does not do so and, instead, leaves that to the

² Tr, at 15-16.

³ Tr, at 21-22.

people below him to do. Disciplinary reports are forwarded directly to the Commissioner for a final determination as to how to proceed.⁴ Celli does not have access to the personnel records of the employees under his supervision. He decides how work will get done and sees that it is executed. Celli testified that he submits a draft budget, including capital improvements, to the Commissioner. The Commissioner reviews and makes changes to Celli's draft budget and then submits the budget to the Mayor, who makes further changes.⁵ Celli gave no indication that his budget figures relate to specific personnel changes or lines for salaries and/or benefits.

The record includes a job description for the title of "Director of General Services." The description states, among other things, that

this position is responsible for planning, directing and implementing a standard operational policy for the general services of the City including property management, efficiency studies, general management of selected operations, budget preparation, etc. The work includes evaluating current operations to provide guidance, instruction or resolution of problems. The incumbent has the added responsibility for planning and directing the activities and assignments to ensure effective deployment of personnel.⁶

Director of Purchasing (DP)

Commissioner of Finance and Management Services, John Liszewski, supervises the title of DP. Liszewski has been employed by the City for 28 years in various capacities including Budget Analyst, Senior Budget Analyst, Director of General Purchasing, and Director of General Services for the Department of Public Works. In

⁴ Tr, at 24.

⁵ Tr, at 19-20.

⁶ Joint Ex 1, Attachment B.

his present capacity he oversees all financial activity of the City and the Yonkers Board of Education.

Liszewski gave little testimony as to his present duties as Commissioner other than to cite his responsibility to oversee the financial activities of the City and the Yonkers School District. He said he has no role in negotiations, although he is kept informed of their progress.⁷

The DP reports to Liszewski and the Deputy Commissioner for Finance and Management Services.⁸ Liszewski said the DP is required to know bidding procedures under the law, makes bid recommendations to the Board of Supply which consists of the Mayor, the City Council President, the City Engineer, and Liszewski, and ensures compliance with all state laws and the City charter.⁹ To make purchasing recommendations, the DP receives feedback from department heads. He also supervises 12 employees and can impose discipline. Asked to describe the DP's typical work activities, Liszewski said he maintains the City's purchasing policies, receives bids, and executes contract awards. Liszewski did not know, however, the amount of the budget that the DP works with and, when prompted, said it is upwards of 100 or 200 million dollars.

Although the job description for the DP states that the DP establishes purchasing policies and procedures, Liszewski said that those policies relate to the bidding process, and the DP does not have the final say. He merely makes recommendations as to how the bidding process can function most effectively. When the Yonkers Board of

⁷ Tr, at 47, 48.

⁸ No testimony was given regarding the deputy's duties.

⁹ Tr, at 41-42.

Education was merged with the City, the DP changed some of the Board's bidding policies to conform them with those of the City. Then, again, the DP did not have the final say, but reviewed his proposed changes with Liszewski, the Deputy Commissioner, or the Law Department.¹⁰

The job description for the title of DP states, among other things, that the DP

is responsible for directing the purchasing functions by approving all purchases in accordance with the limits established by State law. The incumbent analyzes formal bids and makes recommendations to the Board of Contract and Supply. The work also involves establishing, documenting and maintaining purchasing policy and procedures¹¹

Budget Analyst (BA)

Liszewski also testified to the duties of the BA, which position he held along with Senior Budget Analyst when he came to the City's employ 28 years ago. There are presently three people in the BA position: Michael Brown, Robert O'Mara, and John Jacobson.

Liszewski said that as a BA many years ago he was assigned to handle budgetary matters for the budget office and the Police Department, and analyzed the costs of expenses such as programs, materials and overtime.¹² Asked if he was involved in the negotiations process, he said only to the extent of providing budgetary information.¹³ He added that, as for his own role presently in negotiations, he has been

¹⁰ Tr, at 51-52.

¹¹ Joint Ex 1, Attachment B.

¹² Tr, at 32.

¹³ *Id.*

copied on some communication relating to costing that Jacobson did.¹⁴ He noted that the other two BAs have not been involved in costing, but could be. Liszewski also said that he believes Jacobson has not been present during the negotiations themselves.¹⁵ Elaborating, he explained that Jacobson's role has been limited to, at times, costing out salary and fringe benefits for the City contracts.

Asked what other functions the BAs who presently work within his division perform, he explained that they prepare the budget for the City and the Board of Education and monitor compliance with it throughout the year. They help to prepare a spending plan which projects budget costs over a four-year period. The budget, Liszewski said, represents policy and the BAs have the opportunity to influence that since they are part of the process that allocates funds to various areas. Budget figures also reflect the number of employees the City can have and where resources are going to be assigned, including layoffs.¹⁶

The job description for the title of BA states, among other things, that the BA

is responsible for assisting in the preparation and monitoring of the Budget and for updating and developing improved departmental budgeting, management and reporting systems . . . [D]irect supervision is received from an immediate supervisor¹⁷

DISCUSSION

Section 201.7(a) of the Act defines a public employee as a "person holding a position by appointment or employment in the service of a public employer." The

¹⁴ Tr, at 47, 48.

¹⁵ Tr, at 48.

¹⁶ Tr, at 37.

¹⁷ Joint Ex 1, Attachment B. There is no indication in the record of who supervises BAs.

statute exempts from this definition those individuals whom the Board may designate either “managerial” or “confidential,” employees, if the criteria in § 201.7(a) are met.¹⁸

The Board strictly applies the statutory criteria for such designations, with all uncertainties resolved in favor of coverage under the Act.¹⁹

Employees may be designated as managerial only if they are persons “(i) who formulate policy or (ii) who may reasonably be required on behalf of the public employer to assist directly in the preparation for and conduct of collective negotiations or to have a major role in the administration of agreements or in personnel administration, provided that such role is not of a routine or clerical nature and requires the exercise of independent judgment.” Our designation of employees as managerial is based on evidence in the record concerning duties actually performed or duties that an employee may actually be reasonably required to perform in the future, and we will not deprive an employee of representation based on a job description alone.²⁰

Notably, the Act does not exclude supervisors from coverage, nor does it define what constitutes a supervisor.²¹ Thus, with respect to employees who are alleged to

¹⁸ While an employer’s opinion that certain employees are managerial or confidential is entitled to serious consideration, our determination must be based on the application of the statutory criteria to the parties’ evidence. *Lippman v NYS Pub Empl Relations Bd*, 263 AD2d 891, 896-897, 32 PERB ¶ 7017 (3d Dept 1999), *confirming* 30 PERB ¶ 3067 (1997); *State of New York*, 5 PERB ¶ 3001, 3003 (1972).

¹⁹ *Lippman v NYS Pub Empl Relations Bd*, 263 AD2d 891, at 896; *Town of Walworth*, 43 PERB ¶ 3013, 3052 (2010); *Fashion Institute of Technology*, 42 PERB ¶ 3018, 3061 (2009); *Owego-Apalachin Cent Sch Dist*, 33 PERB ¶ 3005, 3014 (2000).

²⁰ *Hoosick Falls Cent Sch Dist*, 46 PERB ¶ 3015, 3031 (2013); *Uniformed Firefighters Association of Scarsdale, Local 1394, IAFF, AFL-CIO*, 39 PERB ¶ 3009, 3041 (2006), *County of Rockland*, 28 PERB ¶ 3063, 3145 (1995); *Town of East Fishkill*, 27 PERB ¶ 3166, 3073 (1994).

²¹ *St. Paul Boulevard Fire Dist*, 42 PERB ¶ 3009 (2009). This distinguishes the Act from the National Labor Relations Act, see 29 USC §§ 152(3) and (11).

formulate policy, the Act's language mandates that we distinguish employees who perform various supervisory duties and responsibilities, but who nonetheless have the right to representation under the Act, and the much narrower subset of employees with broad powers to develop "particular objectives of a government or agency thereof in the fulfillment of its mission and the method, means and extent of achieving such objectives."²² Only the latter employees are excluded.

The applicable standard for determining whether an employee formulates policy, pursuant to § 207.1(a)(i) of the Act, was set forth in *City of Binghamton*:

To formulate policy is to participate with regularity in the essential process involving the determination of the goals and objectives of the government involved, and of the methods for accomplishing those goals and objectives that have a substantial impact upon the affairs and the constituency of the government. The formulation of policy does not extend to the determination of methods of operation that are merely of a technical nature.²³

Employees may be designated as confidential only if they are persons who assist and act in a confidential capacity to managerial employees concerning collective negotiations, contract administration or personnel administration.²⁴ Our designation of employees as confidential, like our examination of other unit placement issues, is based on the job duties actually performed, as shown on the record, and we will not deprive an

²² *State of New York*, 5 PERB ¶ 3001, at 3005; *State of New York-Unified Court System*, 30 PERB ¶ 3067, at 3168.

²³ 12 PERB ¶ 3099, 3185 (1979).

²⁴ Act, §201.7(a) provides specifically that "Employees may be designated as confidential only if they are persons who assist and act in a confidential capacity managerial employees described in clause ii," that is, employees "who may reasonably be required on behalf of the public employer to assist directly in the preparation for and conduct of collective negotiations or to have a major role in the administration of agreements or in personnel administration provided that such role is not of a routine or clerical nature and requires the exercise of independent judgment."

employee of representation based on a job description alone.²⁵

In *Town of Dewitt*,²⁶ the Board held that the Act establishes a two-pronged test for a confidential designation: the employee must both assist a managerial employee in his or her labor relations managerial functions and act in a confidential capacity to the managerial employee. The former prong reflects the confidential employee's duties, while the latter connotes a confidential employment relationship involving trust and confidence between the managerial employee and the confidential employee.²⁷ The two parts of the test are distinct, and satisfaction of one might not satisfy the other.²⁸

Director of General Services (DGS)

The City argues that DGS Joseph Celli is a managerial employee based on his role in formulating policy. The City argues that the DGS job description alone warrants Celli's designation and that Celli's testimony further supports a managerial designation.

We affirm the ALJ's finding that Celli is not a managerial employee.

First, our designation of employees as managerial is based on evidence in the record concerning duties actually performed or duties that an employee may actually be reasonably required to perform in the future, and we will not deprive an employee of

²⁵ See *Uniformed Firefighters Association of Scarsdale, Local 1394, IAFF, AFL-CIO*, 49 PERB ¶ 3009, at 3041; *County of Rockland*, 28 PERB ¶ 3063, at 3145; *Town of East Fishkill*, 27 PERB ¶ 3073, at 3166 (1994); *Adirondack Community College*, 20 PERB ¶ 3070, 3149-3150 (1987); *City of Binghamton*, 12 PERB ¶ 3099, at 3186.

²⁶ 32 PERB ¶ 3001, 3002 (1999).

²⁷ *Id.* See also *Hoosick Falls Cent Sch Dist*, 46 PERB ¶ 3015, at 3033; *State of New York (Office of Parks, Recreation and Historic Preservation)*, 39 PERB ¶ 3007, 3030 (2006); *City of Rome*, 39 PERB ¶ 3009, 3037 (2006); *New York Power Authority*, 38 PERB ¶ 3003, 3008 (2005).

²⁸ *Town of Dewitt*, 32 PERB ¶ 3001, at 3002; *Hoosick Falls Cent Sch Dist*, 46 PERB ¶ 3015, at 3033; *North-Rose Wolcott Cent Sch Dist*, 33 PERB ¶ 3002, 3008 (2000).

representation based on a job description alone.²⁹

Further, while the job description states that the DGS is “responsible for planning, directing and implementing a standard operational policy for the general services of the City,”³⁰ Celli’s testimony failed to establish that he actually formulates policy in the sense contemplated by the Act. Celli testified that he submits a proposed budget, reviews the department’s operations, and created a work order system. These tasks do not show that Celli is among the subset of employees with broad powers to develop “particular objectives of a government or agency thereof in the fulfillment of its mission and the method, means and extent of achieving such objectives.”³¹ Rather, Celli appears to participate only in determining methods of operations that are of a technical nature. Because the record does not show that Celli participates with regularity in the essential process involving the determination of the goals and objectives of the City and of the methods for accomplishing those goals and objectives, we conclude that Celli is not a managerial employee.³²

Director of Purchasing (DP)

The City argues that the DP is a managerial employee because the DP formulates policy, citing the DP’s job description and Liszewski’s testimony.

We affirm the ALJ’s finding that the DP is not a managerial employee. While

²⁹ *Hoosick Falls Cent Sch Dist*, 46 PERB ¶ 3015, at 3031; *Uniformed Firefighters Association of Scarsdale, Local 1394, IAFF, AFL-CIO*, 39 PERB ¶ 3009, 3041 (2006), *County of Rockland*, 28 PERB ¶ 3063, 3145 (1995); *Town of East Fishkill*, 27 PERB ¶ 3166, 3073 (1994).

³⁰ Joint Ex 1, Attachment B.

³¹ *State of New York*, 5 PERB ¶ 3001, at 3005; *State of New York-Unified Court System*, 30 PERB ¶ 3067, at 3168.

³² *Lippman v NYS Pub Empl Relations Bd*, 263 AD2d 891, at 900.

Liszewski testified that the DP is responsible for purchases for the City and the Board of Education, evaluates bids and makes recommendations to the Board of Supply, and ensures compliance with state laws and the City charter, these tasks do not show that the DP participates with regularity in the essential process involving the determination of the goals and objectives of the City and of the methods for accomplishing those goals and objectives. Instead, as with Celli, it appears that the CP participates only in determining methods of operations that are of a technical nature. Further, although Liszewski testified that the DP changed some of the Board of Education's bidding policies to conform them with the City's policies, this one-time event does not show regular participation in setting the goals or objectives of the City, particularly where Liszewski also testified that the DP did not have the final say, but, rather, that the proposed changes were approved by Liszewski, the Deputy Commissioner, or the Law Department.³³ Thus, the record does not establish that the DP exercises "independent judgment reflecting substantial discretionary responsibility, including standard setting."³⁴ In sum, we conclude that the DP is not a managerial employee.

Budget Analyst (BA)

The City argues that BAs should be designated as confidential employees based on their role in costing collective-bargaining proposals. We affirm the ALJ's rejection of this argument. As the ALJ found, Liszewski's testimony and the other evidence introduced (primarily the BA job description) is insufficient to warrant a confidential designation.

³³ Tr, at 51-52.

³⁴ *Hoosick Falls Cent Sch Dist*, 46 PERB ¶ 3015, at 3031, citing *Lippman v NYS Pub Empl Relations Bd*, 263 AD2d 891, at 902.

As a threshold matter, the City did not except to the ALJ's finding that "the BA is not a managerial employee."³⁵ Nor did the City except to the finding that the record "failed to support the premise that "Liszewski or his deputy formulate policy or have a major role in the administration of agreements," and thus "Liszewski is not a managerial employee for the purposes of deciding the status of the DP and the BAs in this proceeding."³⁶ Because the City did not except to these findings, their factual sufficiency and basis is not properly before us.³⁷ In particular, we do not opine as to whether or not Liszewski was a managerial employee under § 201.7(a)(i), requiring a determination as to whether he played a major role in formulating policy. However, for an employee to be deemed confidential, that "employee must assist and act in a confidential capacity to a managerial employee who performs the statutorily enumerated labor relations responsibilities for managerial employees, including collective bargaining negotiations, contract administration, and personnel administration."³⁸ Even were we to look beyond the City's fatal failure to except to the ALJ's conclusion on this issue, her finding that Liszewski was not such a managerial employee under § 201.7(a)(ii) is supported by his own testimony that he had no involvement in such matters. Thus, regardless of their actual duties, and the trust Liszewski may or may not have reposed

³⁵ 49 PERB ¶ 4005, at 4032.

³⁶ *Id* at 4031.

³⁷ *NYCTA (Burke)*, 49 PERB ¶ 3021, 3072 n. 4 (2016); *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).


³⁸ *Lippman v NYS Pub Empl Relations Bd*, 263 AD2d at 902, citing *State of New York*, 5 PERB ¶ 3001, 3006 (1972), *Town of Dewitt*, 32 PERB ¶ 3001 (1999); *Matter of Newburgh Enlarged City School Dist*, 21 PERB ¶ 3047 (1988).

in them, the BAs cannot be deemed confidential employees through their relationship with him.³⁹

In sum, no evidence has been adduced to establish that BAs act in a confidential capacity to a managerial employee. The record does not establish that BAs report to managerial employee or that BAs are in a relationship of “trust and confidence” with any managerial employee.⁴⁰

IT IS, THEREFORE, ORDERED that Local 456's unit placement petitions are granted.

DATED: November 6, 2017
Albany, New York



John F. Wirenius, Chairperson



Robert S. Hite, Member

³⁹ *Id.* See also *County of Otsego*, 34 PERB ¶ 3024 (2001).

⁴⁰ *Town of Dewitt*, 32 PERB ¶ 3001, at 3003. See also *City of Rome*, 39 PERB ¶ 3009, at 3037; *Village of Suffern*, 38 PERB ¶ 3016, 3057 (2005).

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

In the Matter of

**INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
CITY EMPLOYEES UNION, LOCAL 237,**

Charging Party,

CASE NO. U-34446

- and -

LAWRENCE UNION FREE SCHOOL DISTRICT,

Respondent.

**ARCHER, BYINGTON, GLENNON & LEVINE, LLP (ALEXANDRA HOWELL of
counsel), for Charging Party**

**MINERVA & D'AGOSTINO, PC (CHRISTOPHER G. KIRBY of counsel), for
Respondent**

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the International Brotherhood of Teamsters, City Employees Union, Local 237 (Local 237) to a decision and order of an Administrative Law Judge (ALJ).¹ The ALJ found that the Lawrence Union Free School District (District) did not violate § 209-a.1(d) of the Public Employees' Fair Employment Act (Act) when it unilaterally transferred work performed by Information Technology Aides, Level I (ITAs) and Security Aides to outside contractors. ITAs and Security Aides were both represented by Local 237. The ALJ also found that the District did not violate §§ 209-a.1(a) and (c) of the Act by transferring the work because Local 237 failed to establish a prima facie case of retaliatory motive.

¹ 49 PERB ¶ 4587 (2016).

EXCEPTIONS

Local 237 filed seven exceptions to the ALJ's decision. With respect to the allegation that the District unlawfully transferred bargaining-unit work, Local 237 argues that the ALJ erred by finding that the work performed by employees of the outside contractors was not substantially similar to the work performed by ITAs and Security Aides.² Local 237 also contends that the ALJ erred in dismissing its claim that the District transferred work to retaliate for employees protected activity, incorrectly finding that Local 237 had failed to establish a prima facie case of retaliatory motive.³ Finally, Local 237 asserts that the District failed to present any legitimate business justification for the transfer of work.⁴

The District supports the ALJ's decision and contends that no basis has been demonstrated for reversal.

Based upon our review of the record and our consideration of the parties' arguments, we affirm the decision of the ALJ as to the ITAs. We reverse the ALJ's decision in part, and remand in part, with respect to the Security Aides.

FACTS

The District and Local 237 are parties to a collective bargaining agreement (CBA) dated July 1, 2007 through June 30, 2012 which includes the titles of ITA and Security Aide. The District employed ITAs and Security Aides from 1980 until mid-2015, when the employment of the persons filling those positions was terminated and the work was

² Exceptions 6 and 7.

³ Exceptions 1-3.

⁴ Exceptions 4 and 5.

assigned by the District to outside contractors. The termination of employees occurred in the context of on-going negotiations for a successor CBA, although no negotiations were held regarding the District's decision to assign the work of ITAs and Security Aides to outside contractors, identified as Shoreline Networks Inc. (Shoreline) and Summit Security Services (Summit), respectively.

Information Technology Aides, Level I

The ITA level I position is intended to perform duties as spelled out in the Nassau County Civil Service job description.⁵ Those duties include diagnosis of first-level personal computer/workstation problems, learning and assisting in network maintenance, performing minor hardware adjustments, assisting in the demonstration of operating computers and related equipment, and referring more complex problems to other personnel. Testimony established, however, that the District's ITAs assisted with VCR and television set-ups, managed inventory, performed anti-virus scans, investigated Wi-Fi connection issues, handled printer maintenance and repair, assisted with computer log-in issues, and oversaw the District's computer lab program. Duties that the ITAs performed outside of the job description included photography, PowerPoint presentations, and graduation visual displays.

Shoreline employee Mike Walsh has been employed as the District's on-site network technician since 2008. Walsh, supported by Shoreline, handled all network administration including engineering, firewalls, exchange servers, storage systems, and software systems. He also performed many of the duties included in the ITA level I job

⁵ Respondent's Ex 1.

description, such as importing data, manipulating data bases, generating reports, and upgrading District network operating systems. Additionally, Walsh installed and made operational the District's PC workstations and computer labs, and built-up system images. Although it was not among his primary duties, Walsh also assisted when ITAs could not open Microsoft or get the computers to turn on.

Security Aides

The Civil Service job description for Security Aides advises that the duties include patrolling and protecting school buildings and grounds and performing "related duties" as required.⁶ It also outlines unskilled tasks such as sweeping and attending to parking areas. District witness testimony established that Security Aides did not carry firearms⁷ or wear formal uniforms,⁸ and they would monitor or report emergency situations or disorder, but would not ordinarily directly intervene. Former Security Aide Danette Jamal, however, provided some specific instances where intervention did occur.⁹ The District also noted that the Security Aides could direct traffic in District lots, but not on public roads even when roadways are adjacent to District property. They were not responsible for crowd control or security on school buses. They were not part of the District's school safety plan, nor did they work under the direct supervision of law enforcement officers or those previously in the field of law enforcement. Qualifications

⁶ Respondent's Ex 2.

⁷ Though one witness said many in her rank were licensed to do so. Tr, at p 98.

⁸ They were required by the District only to wear blue logo t-shirts and jeans or dark slacks, although this was not always the case. Tr, at pp 46-47, 94, 211-212. By comparison, the new security personnel wear uniforms provided by Summit, including jackets and hats identifying them as security staff. Tr, at pp 211-212.

⁹ Tr, at p 117.

for the Security Aide title include an 8th grade education and one year of experience in security. They are required to complete 24 hours of training for licensure by the New York State Education Department (SED) and, thereafter, complete eight hours of additional training on an annual basis to maintain their license.

The District began to reevaluate its security function and safety protocols after the attacks at Columbine and Sandy Hook. Superintendent Gary Schall explained that he regularly received parental inquiries about the security of District premises, and those same concerns were conveyed by him to the Board of Education and from members of the public at board meetings.

On August 3, 2015, the District entered into a contract with Summit pursuant to the District's new security plan.¹⁰ Summit is run by four former law enforcement officers. The company provides a site supervisor who is a former military policeman and former employee of the Nassau County Police Department. Its officers wear uniforms and are registered New York State security guards. While Summit officers are unarmed, the firm will provide armed personnel within 24 hours, if requested.¹¹ All Summit officers have background checks, and the company assumes liability for acts of negligence. Summit guards provide security at all school events, including those after hours. They intervene in emergency and crowd control situations. They direct traffic both on and off District property including public streets, which the District maintains is essential for lockdown situations. The services provided by Summit have been

¹⁰ Summit is licensed by New York State and is a state approved vendor.

¹¹ This was testified to by Schall; however, there is no provision in the contract between Summit and the District expressly providing for this. Joint Ex 5.

incorporated into the District's school safety plan.

The duties of Summit personnel include patrolling and protecting school buildings and grounds, ensuring the safety of persons on school premises, maintaining security and order, assisting in fire drills and inspections, assisting in crowd control, directing and regulating the flow of traffic, assisting in developing security plans, maintaining log books, and reporting unusual occurrences to law enforcement. Qualifications for Summit officers include high school graduation and six months of experience in security operations.¹²

One former Security Aide, James Bowles, stated that he was offered a position with Summit after he was terminated by the District; however, he was unclear as to who made that offer and said he was told by someone only that the job "might" have been available.¹³

Regarding the claim that the District acted without bargaining with the unit, Local 237's Long Island Area Director John Burns testified that at no point during the protracted negotiations for a successor CBA did the District formally propose the terminations, the subcontracting, or any other "cost-saving measures."¹⁴ There was, however, mention that cost savings were something to "think about,"¹⁵ although Burns said the union did not take it seriously.¹⁶

¹² Respondent's Ex 3.

¹³ Tr, at p 130.

¹⁴ Local 237's Brief, at p 3.

¹⁵ This statement applied to both Security Aides and ITAs.

¹⁶ Tr, at p 27.

DISCUSSION

Section 209-a.1(d) allegations

It is well established that two essential questions must be addressed when determining whether a transfer of unit work violates § 209-a.1(d) of the Act: (1) was the at-issue work exclusively performed by unit employees for a sufficient period of time to establish a binding past practice; and (2) was the work assigned to non-unit personnel substantially similar to that exclusive unit work.¹⁷ If both these questions are answered in the affirmative, a violation of § 209-a.1(d) of the Act will be found unless there has been a significant change in job qualifications. When there has been a significant change in job qualifications, the respective interests of the employer and the unit employees must be balanced to determine whether the Act has been violated.¹⁸

With respect to the allegation that the District unlawfully transferred work performed by ITAs to Shoreline employees, the ALJ found that the work performed by ITAs was not exclusive to unit employees because Walsh had been performing a significant portion of ITA work from as early as 2008. A finding that work was not exclusive to the unit is alone sufficient to defeat an allegation that a transfer of work

¹⁷ *Manhasset Union Free Sch Dist*, 41 PERB ¶ 3005 (2008), *confirmed and mod, in part, Manhasset Union Free Sch Dist v NYS Pub Empl Relations Bd*, 61 AD3d 1231, 42 PERB ¶ 7004 (3d Dept 2009), on remand, 42 PERB ¶ 3016 (2009). See also *County of Chemung and Chemung Co Sheriff*, 50 PERB ¶ 3022 (2017); *Cayuga Community College*, 50 PERB ¶ 3003, 3012-3013 (2017); *Greater Amsterdam City Sch Dist*, 49 PERB ¶ 3011, 3046 (2016); *Town of Riverhead*, 42 PERB ¶ 3032, 3119 (2009); *Town of Stony Point*, 45 PERB ¶ 3045, 3115 (2012); *Niagara Frontier Transportation Authority*, 18 PERB ¶ 3083, 3182 (1985).

¹⁸ *Cayuga Community College*, 50 PERB ¶ 3003, at 3012-3013, *quoting State of NY (Div State Police)*, 48 PERB ¶ 3012, 3041 (2015); *Town of Stony Point*, 45 PERB ¶ 3045, at 3115, *citing Town of Riverhead*, 42 PERB ¶ 3032 (2009).

violates § 209-a.1(d) of the Act.¹⁹

Local 237 did not file any exceptions to the ALJ's finding, and it has therefore waived any argument that the ALJ erred in her finding on exclusivity.²⁰ As a result, we affirm the ALJ's dismissal of this allegation²¹ and find it unnecessary to address Local 237's other contentions.

With respect to the allegation that the District unlawfully transferred work performed by Security Aides to Summit employees, the parties stipulated that "exclusivity with respect to the Security Aides is not contested."²² The ALJ nevertheless found that the transfer did not violate § 209-a.1(d) of the Act because she found that the work assigned to Summit employees was not substantially similar to the work performed by Security Aides. In support, the ALJ found that Summit employees direct and regulate traffic in public streets, provide security on school buses and for special events, wear professional uniforms that clearly identify them as security patrols, and that they are directly supervised by persons with law enforcement training and experience. Relying on Schall's testimony, the ALJ concluded that the District specifically

¹⁹ See, eg, *City of Canandaigua*, 47 PERB ¶ 3025, 3072 (2014); *Canastota Cent Sch Dist*, 32 PERB ¶ 3003, 3006 (1999); *County of Suffolk and Suffolk Co Sheriff*, 29 PERB 3002, 3007 (1996).

²⁰ See Rules of Procedure § 213.2; *NYCTA (Burke)*, 49 PERB ¶ 3021, 3072, n. 4 (2016) and cases cited therein; *Village of Endicott*, 47 PERB ¶ 3017, 3052, n. 5 (2014).

²¹ The ALJ's finding is based on her crediting Walsh's testimony that he performed a significant portion of the work of the ITAs. The ALJ's credibility resolutions are fully consistent with the record, and we therefore see no basis to reverse the ALJ's decision, even had exceptions been filed. See, eg, *Bellmore-Merrick Cent Sch Dist*, 48 PERB ¶ 3022, 3077 (2015); *Mount Pleasant Cottage Union Free Sch Dist*, 50 PERB ¶ 3002, 3008 (2017); *Catskill Housing Auth*, 49 PERB ¶ 3025, at 3081; *County of Clinton*, 47 PERB ¶ 3026, 3079 (2014); *Buffalo Sewer Auth*, 31 PERB 3083, 3182 (1998).

²² Tr, at 6.

implemented a heightened and more professional security presence through its contract with Summit.

As explained below, we find that the scope of the stipulation is ambiguous in such a way that we cannot fully assess the correctness of the ALJ's conclusions, and we shall remand in part for further proceedings. For the reasons given below, we also reverse the ALJ's finding in part and find that the transfer of unit work exclusively performed by Security Aides did violate § 209-a.1(d) of the Act.

The "General Statement of Duties" in the Civil Service job description for Security Aides states that a Security Aide "[p]atrols and protects school buildings and grounds."²³ That is, Security Aides' general duties are to protect the District's property. The stipulation between the parties means, at a minimum, that "property protection" duties were exclusively performed by Security Aides.

There was testimony, however, that Security Aides also intervened in situations to protect the safety of persons using the District's premises (i.e., "personal protection").²⁴ It is not clear whether the stipulation covered these additional duties, particularly since the District argued that the ability to intervene was one of the key differences between Security Aides and Summit employees.²⁵

With respect to "property protection," the Civil Service job description for Security Guards, which the District admits conforms to some of the duties of Summit employees, states that a Security Guard, like a Security Aide, "[p]atrols and protects school

²³ Respondent's Ex 2. The general statement also says that a Security Aide "performs related duties as required." See *a/so* Tr, at 86.

²⁴ See Tr, at 113, 120, 127, 325.

²⁵ See Respondent Post-Hearing Brief, at 1, 8, 15.

buildings and grounds.”²⁶ That is, Summit employees perform the same “property protection” duties that Security Aides performed.

Because the “property protection” work assigned to Summit employees was previously performed exclusively by Security Aides, we find that a violation of § 209-a.1(d) of the Act has been established under *Niagara Frontier* and its progeny with respect to the “property protection” work, unless there has been a significant change in job qualifications.

The ALJ found that there had been no showing that the qualifications of Summit employees have been changed significantly from that of Security Aides. No exceptions were filed to this finding, and we agree, in any event, with the ALJ’s conclusion. The minimum qualifications for Security Guards are somewhat different than those for Security Aides,²⁷ but such minor differences do not amount to a significant change in job qualifications.²⁸ Moreover, as the ALJ found, there was no showing that Summit hires to the standards of the job description for Security Guards.²⁹

The District argued that it implemented a higher level of services and should be excused from bargaining on that basis. However, “[a]lthough improved service is often

²⁶ Respondent’s Ex 3.

²⁷ Security Guards must graduate from high school and have six months of satisfactory law enforcement and/or security operations experience, while Security Aides need to possess an eight grade education and one year of satisfactory work experience. Respondent’s Exs 2 & 3.

²⁸ *County of Westchester*, 42 PERB ¶ 3025, 3099 (2009).

²⁹ In its brief to the ALJ, the District relied on *Town of Brookhaven*, 17 PERB ¶ 3087 (1984), and *West Hempstead*, 17 PERB ¶ 3087 (1984) to argue that it had no obligation to bargain over the transfer at issue here. R Post-Hearing Brief, at 18-20. *Town of Brookhaven and West Hempstead*, however, both involved situations where the qualifications of employees assigned to perform the work had changed. See 17 PERB ¶ 3087, at 3133-3134; *Niagara Frontier*, 18 PERB ¶ 3083, at 3182.

a reason given by employers in justification of their unilateral subcontracting, it has not been considered a defense to a refusal to bargain allegation.”³⁰ Although the ALJ found that Summit employees performed additional duties that Security Aides did not perform, such as directing traffic in public streets and providing security on school buses and for special events, these additional duties are “immaterial to our determination whether the nature of the . . . work performed on behalf of the County is substantially similar.”³¹ Moreover, “the fiscal or operational wisdom of a decision to subcontract unit work is immaterial to the negotiability of the subject.”³²

As mentioned above, the exclusivity of “personal protection” work is not clear. If the parties stipulated that “personal protection” work was exclusively performed by Security Aides, it would appear that such work was subsequently performed by Summit employees. Such circumstances, as explained above, would establish a violation of the Act here, where no change in qualifications has been shown. By contrast, if the stipulation does not cover “personal protection” work, that element of the violation would not have been established by the Charging Party, and no violation of the

³⁰ *Town of Smithtown*, 25 PERB ¶ 3081, 3166 (1992). See also *County of Erie*, 29 PERB ¶ 3045, 3106 (1996) (finding, in case involving subcontracting of medical services, that “[i]n assessing the negotiability of the County’s decision, the issue is not whether the care provided to the Home’s residents is in fact better than before the subcontract . . . or whether it is unchanged or worse than before . . .).

³¹ *County of Westchester*, 42 PERB ¶ 3025, at 3099. See also *County of Erie and Erie Community College*, 39 PERB ¶ 3005, 3020 (2006).

³² *Manhasset Union Free Sch Dist*, 41 PERB ¶ 3005, at 3021; *Cayuga Community College*, 50 PERB ¶ 3003, at 3013. See also *New York State Thruway Auth*, 33 PERB ¶ 3017, 3042 (2000), *confd New York State Thruway Auth v NYS Pub Empl Relations Bd*, 279 AD2d 851, 34 PERB ¶ 7003 (3d Dept 2001).

Act would have occurred with respect to “personal protection” work.³³ Under these circumstances, we remand this aspect of the charge to the ALJ for a clarification of the scope of the stipulation. If there is a dispute over the scope of the stipulation, the ALJ may, at her discretion, reopen the record for the parties to present offers or proof and/or additional evidence as well as arguments about the scope of the stipulation and related issues concerning the exclusivity of “personal protection” security work.

Section 209-a.1(a) and (c) allegation

When an improper practice charge alleges unlawfully motivated retaliation in violation of §§ 209-a.1(a) and (c) of the Act, the charging party has the burden of demonstrating three elements by a preponderance of the credible evidence: a) that the affected individual engaged in protected activity under the Act; b) such activity was known to the person or persons taking the employment action; and c) the employment action would not have been taken “but for” the protected activity.³⁴ These elements establish a prima facie case and give rise to an inference of improper motivation.³⁵ Only “if the charging party can establish such an inference, does the burden of production shift to the respondent to present evidence demonstrating that its conduct

³³ Exclusivity and substantial similarity of the work are elements to be established by the charging party in a charge grounded upon a unilateral transfer of unit work. *Cayuga Community College*, 50 PERB ¶ 3003, at 2012-3013; see *NYCTA*, 33 PERB ¶ 3017, at 3041; *City of Rome*, 32 PERB ¶ 3058, 3140 (1999); *Town of Brookhaven*, 26 PERB ¶ 3066, 3121 (1993).

³⁴ *Bellmore-Merrick Cent High Sch Dist*, 48 PERB ¶ 3022, 3976 (2015); citing *Village of Endicott*, 47 PERB ¶ 3017, 3050 (2014); see generally *UFT (Jenkins)*, 41 PERB ¶ 3007 (2008), *confd sub nom Jenkins v NYS Pub Empl Relations Bd*, 41 PERB ¶ 7007 (Sup Ct NY Co 2008), *affd*, 67 AD3d 567, 42 PERB ¶ 7008 (1st Dept 2009); *State of New York (State University of New York at Buffalo)*, 46 PERB ¶ 3021 (2013); see also *City of Salamanca*, 18 PERB ¶ 3012 (1985).

³⁵ See *Town of Tuscarora*, 48 PERB ¶ 3011, at 3037.

was not improperly motivated.”³⁶

The ALJ found that the elements of protected activity and the District’s knowledge of protected activity were established, given that the parties were engaged in protracted negotiations for a new CBA at the time the District decided to transfer the work of ITAs and Security Aides. There are no exceptions to these findings.³⁷ The ALJ found, however, that Local 237 had not demonstrated that the transfer of work would not have taken place “but for” Local 237’s participation in contract negotiations. We agree.

To establish the “but for” element of unlawful motivation, Local 237 relies on an alleged “threat” to outsource bargaining unit work that was made by the Board of Education president at a negotiating session, the fact that the District allegedly offered a position with Summit to a Security Aide who was not active in Local 237 but failed to offer a position to a Security Aide with identical qualifications who was a member of Local 237’s negotiating committee, and the timing of the transfer during protracted negotiations for a new CBA.³⁸

We agree with the ALJ that this circumstantial evidence is not sufficient to show that the transfer of work would not have taken place “but for” the contract negotiations,

³⁶ *Id*; see generally *Littlejohn v City of New York*, 795 F3d 297, 307-308 (2d Cir 2015).

³⁷ 49 PERB ¶4587, at 4784-4785.

³⁸ In its brief in support of exceptions, Local 237 argues that the District’s animus towards protected activity is also shown by the fact that the subcontracted employees were among the last remaining full-time employees represented by Local 237. This alleged fact was not established on the record before the ALJ and, as a result, we do not consider it. Our review is limited to the record as it was developed before the ALJ. See, eg, *CSEA (Josey)*, 49 PERB ¶ 3022, 3072 (2016) (quoting *Smithtown Fire District*, 28 PERB ¶ 3060, 3135 (1995)).

for the reasons she gave. Specifically, we agree that the testimony does not demonstrate that a “threat” to outsource ITAs and/or Security Aides was made during negotiations. The only testimony about this alleged threat was Burns’ testimony that the Board of Education president “mentioned” outsourcing and said that “we needed to think about possibly outsourcing the IT group. He wanted us to think about outsourcing security”³⁹ The Board president’s statement was vague and mentioned outsourcing as simply a possibility and did not state or imply that outsourcing was an inevitable consequence of continued contract negotiations. We agree with the ALJ that this statement was neither threatening nor a retaliatory response to Local 237’s engagement in protected activity.

We also agree with the ALJ that the evidence does not establish that the District offered a non-union security job to Security Aide James Bowles. Bowles offered vague testimony that the Assistant Superintendent of Finance and Operations said to him that “I might have a job for you.”⁴⁰ Such testimony simply does not establish that a job offer was made to Bowles. In the absence of the threat and the job offer to Bowles, Local 237 can point only to the circumstance that the transfer of work took place during contract negotiations. Timing alone, however, is insufficient to satisfy the “but for” element of a § 201-a.1(a) or (c) violation.⁴¹

In sum, we find that the evidence fails to establish that the District would not have

³⁹ Tr, at pp 20, 26-27.

⁴⁰ Tr, at pp 129-130.

⁴¹ *Bellmore-Merrick Cent High Sch Dist*, 48 PERB ¶ 3022, 3076; *Board of Educ of the City Sch Dist of the City of New York*, 35 PERB ¶ 3002, 3004 (2002); *Roswell Park Cancer Institute*, 34 PERB ¶ 3040, 3096 (2001).

transferred the work of ITAs and Security Aides “but for” Local 237’s involvement in contract negotiations. As a result, no inference of improper motivation has been established, and we shall dismiss this allegation in the charge. In these circumstances, we find it unnecessary to examine whether the ALJ correctly found that the District established a legitimate business justification for the transfer of work or Local 237’s associated exceptions.

Based upon the foregoing, we affirm the ALJ’s decision with respect to ITAs, reverse the ALJ’s decision with respect to the “property protection” work performed by Security Aides, and remand the allegation concerning “personal protection” work for further proceedings consistent with this opinion. We affirm the decision of the ALJ with respect to the allegation that the District violated §§ 209-a.1(a) and (c) of the Act.

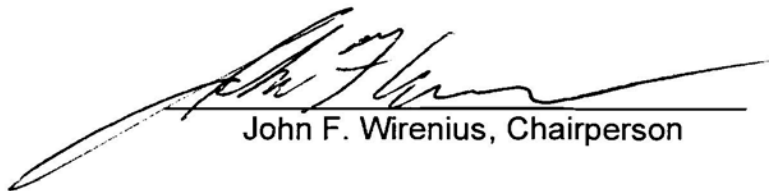
IT IS, THEREFORE, ORDERED that the District forthwith:

1. Cease and desist from unilaterally transferring to nonunit personnel the work of “property protection” security work previously exclusively performed by Security Aides within the bargaining unit represented by Local 237;
2. Restore to Security Aides in the unit represented by Local 237 the work of “property protection” security;
3. Offer reinstatement to all unit employees terminated as a result of the District’s transfer of “property protection” security work, under the prevailing terms and conditions of employment as they existed when the work was transferred;
4. Make the affected unit employees whole for wages and benefits, if any, lost as a result of its unilateral transfer to nonunit employees of said work, with interest at the

maximum legal rate;

5. Sign and post the attached notice at all physical and electronic locations customarily used to post notices to unit employees.

DATED: November 6, 2017
Albany, New York



John F. Wirenius, Chairperson



Robert S. Hite, Member

NOTICE TO ALL EMPLOYEES

PURSUANT TO
THE DECISION AND ORDER OF THE

NEW YORK STATE
PUBLIC EMPLOYMENT RELATIONS BOARD

and in order to effectuate the policies of the

NEW YORK STATE
PUBLIC EMPLOYEES' FAIR EMPLOYMENT ACT

we hereby notify all employees of the Lawrence Union Free School District in the bargaining unit represented by the International Brotherhood of Teamsters, City Employees Union, Local 237, that the Village will:

1. Cease and desist from unilaterally transferring to nonunit personnel the work of "property protection" security work exclusively performed by Security Aides within the bargaining unit represented by Local 237;
2. Restore to Security Aides in the unit represented by Local 237 the work of "property protection" security;
3. Offer reinstatement to all unit employees terminated as a result of the District's transfer of "property protection" security work, under the prevailing terms and conditions of employment as they existed when the work was transferred;
4. Make affected unit employees whole for wages and benefits, if any, lost as a result of its unilateral transfer to nonunit employees of said work, with interest at the maximum legal rate;

Dated

By

(Representative)

(Title)

Lawrence 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

**LONG BEACH PROFESSIONAL FIREFIGHTERS
ASSOCIATION, IAFF, LOCAL 287,**

Charging Party,

- and -

CASE NO. U-34671

CITY OF LONG BEACH,

Respondent.

LOUIS D. STOBBER, ESQ., for Charging Party

**BOND, SCHOENECK & KING, PLLC (TERRY O'NEIL & EMILY HARPER of
counsel), for Respondent**

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the City of Long Beach (City) to a decision and order of an Administrative Law Judge (ALJ) finding that the City violated § 209-a.1(d) of the Public Employees' Fair Employment Act (Act).¹ The ALJ found that the City violated the Act by refusing to negotiate over the applicable procedures after informing a firefighter represented by the Long Beach Professional Firefighters Association, IAFF, Local 287 (Association) that it intended to seek his termination under Civil Service Law (CSL) § 71 and providing an opportunity for the employee to be heard prior to his termination.

EXCEPTIONS

The City excepts to the ALJ's finding and argues that it has no obligation to bargain prior to terminating an employee pursuant to CSL § 71. The City also argues

¹ 50 PERB ¶ 4503 (2017).

that the ALJ erred by finding that the charge was facially sufficient to state a claim under the Act.

The Association supports the ALJ's decision and contends that no basis has been demonstrated for reversal.

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

FACTS

The parties stipulated to the following facts. The Association and the City are parties to a collective bargaining agreement (CBA) covering the period of July 1, 2004 through June 30, 2010, the terms of which remain in effect pursuant to § 209-a(1) (e) of the Act.² The Association is the recognized bargaining representative "of all City employees in the following unit: paid professional members of the fire fighting force in the ranks of Fire Fighter, Lieutenant (including all specializations) and any full-time professional personnel assigned to the Fire Department as the City may deem necessary, and excluding all Volunteer members of the Fire Department."³

On or about November 12, 2014, Association member Jay Gusler (Gusler) reported that he was injured in the line of duty. He received Workers' Compensation benefits, and was continuously absent from work using sick leave accruals since on or about November 13, 2014.⁴

As a result of Gusler's cumulative absence from work, by letter dated November 10, 2015, the City informed Gusler that, *inter alia*: the City "is evaluating whether to

² Stipulation of Facts, ¶ 1.

³ *Id.*, ¶ 4.

⁴ *Id.*, ¶ 3-8.

exercise its right to separate you from employment pursuant to New York Civil Service Law [CSL] § 71.”⁵ The letter further advised Gusler that his employment “may” be terminated. The letter stated that Gusler could meet with Fire Commissioner Scott Kemins (Kemins) and representatives of the City on November 24, 2015 if he disputed the potential termination, and that Kemins intended to recommend that his employment be terminated if he did not contest such termination.⁶ The letter ended by explaining that Gusler may have an opportunity to be reemployed in the future by the City.⁷

The Association thereafter sent the City a demand to negotiate the procedure for separating a member of the Association from service under CSL § 71 and it provided the City with a proposed procedure. The City has refused to negotiate such procedure.⁸

The City did not separate Gusler from service pursuant to § 71 of the CSL.⁹

DISCUSSION

It is undisputed that public employers are permitted to terminate an employee who is absent from work for a cumulative period of one year due to occupational injury or disease pursuant to CSL § 71.¹⁰ In *Town of Cortlandt*, the Board examined whether an employer is required to bargain prior to exercising this right and found that the

⁵ *Id.*, Ex 4.

⁶ *Id.*, ¶ 9.

⁷ *Id.*, Ex 4.

⁸ *Id.*, ¶ 10.

⁹ *Id.*, ¶ 11.

¹⁰ CSL § 71 provides, inter alia, that, “[w]here an employee has been separated from the service by reason of a disability resulting from occupational injury or disease as defined in the workmen's compensation law, he shall be entitled to a leave of absence for at least one year” CSL § 71 has been interpreted to allow, but not require, an employer to terminate an employee who is absent from work for a cumulative period of one year due to an occupational injury or disease. See *Allen v Howe*, 84 NY2d 665 (1994).

employer violated § 209-a.1(d) of the Act by unilaterally adopting a policy requiring termination of employment and contractual benefits after one year of occupational disability.¹¹ The Board held that nothing in CSL § 71 explicitly addresses collective negotiations under the Act, “nor is there anything inescapably implicit in that statute which establishes the Legislature’s plain and clear intent to exempt the [employer] from the State’s strong public policy favoring the negotiation of all terms and conditions of employment.”¹² The Board explained that:

[b]y requiring the negotiation of decisions to terminate employees from employment based upon the length of time they are away from work due to occupational injuries or illnesses, and in the absence of a plain and clear legislative intent to the contrary, we give effect to the State's declared public policy favoring collective negotiations.¹³

The Board’s determination was confirmed by the New York Supreme Court, Westchester County.¹⁴ The Court agreed with the Board that:

While an employer is permitted to terminate an employee who has been disabled by an occupational injury for more than one year, there is no requirement that it do so and no express prohibition against negotiation of an employer's exercise of the prerogative. Nor does such discretionary authority constitute a non-delegable power which, for reasons of sound public policy, is implicitly exempt from this State's strong policy in support of collective bargaining.

Neither has petitioner overcome this presumption in favor of collective bargaining with respect to its unilateral implementation of the administrative procedures. The submission of said procedures to the bargaining process would not have any adverse effect upon petitioner's ability to exercise any of the rights which it is accorded under GML

¹¹ 30 PERB ¶ 3031, 3078 (1997).

¹² *Id.*

¹³ *Id.*

¹⁴ *Town of Cortlandt v NYS Pub Empl Relations Bd*, 30 PERB ¶ 7012 (1997).

207-c.¹⁵

The City argues that the instant case is distinguishable from *Town of Cortlandt*. First, the City argues that it did not establish any procedures, but instead provided a hearing to comply with constitutional due process requirements. We, like the ALJ, find this argument unpersuasive. First, we agree with the ALJ that providing notice to the affected employee, an opportunity to be heard, and an automatic recommendation of termination if the employee does not pursue the opportunity to be heard, constitute procedures for implementing a decision to terminate an employee pursuant to CSL § 71. Second, even assuming that the City's hearing was intended to provide constitutional due process safeguards, this did not relieve the City of its statutory duty to negotiate.¹⁶ The City's statutory duties are "independent of and exceed its constitutional obligations."¹⁷ While *Prue v Hunt*,¹⁸ cited by the City, may speak to constitutional due process minimums, "the City is still obligated to satisfy its separate statutory duty to negotiate the procedures pursuant to which decisions are made as to whether the wages and economic benefits . . . will be paid."¹⁹ Put another way, while the City may have a constitutional obligation to provide due process, such an obligation does not relieve the City of its separate obligation to negotiate concerning the process that is implemented.

The City also argues that the current case is distinguishable from *Town of*

¹⁵ 30 PERB ¶ 7012, at 7025.

¹⁶ *City of Syracuse*, 32 PERB ¶ 3029, 3062-3063 (1999), *affd City of Syracuse v NYS Pub Empl Relations Bd*, 279 AD2d 98, 33 PERB ¶ 7022 (4th Dept 2000), *lv denied* 34 PERB ¶ 7025 (2001).

¹⁷ *Id.*, at 3063.

¹⁸ 78 NY2d 364 (1991).

¹⁹ *City of Syracuse*, 32 PERB ¶ 3029, at 3063.

Cortlandt because the City's letter to Gusler, unlike that in *Town of Cortlandt*, did not *require* termination but simply stated that the Fire Commissioner *may* recommend termination to the City Manager (although if Gusler did not appear at the hearing, the letter stated that the Fire Commissioner would recommend termination).²⁰ We find this distinction to be immaterial. Although the City's letter to Gusler did not state that termination would automatically result from the hearing, it is clear that the hearing, and associated right to be heard or to forfeit that right, are steps in the City's process of terminating an employee pursuant to CSL § 71. As explained above, the City is obligated to bargain prior to imposing such steps.

Assuming that the Board finds that the current case is not distinguishable from *Town of Cortlandt*, the City argues that the Board should not follow *Town of Cortlandt*. The City argues that its exercise of the discretion to terminate employees granted by CSL § 71 is not mandatorily negotiable and that CSL § 71 exempts employers from bargaining over a decision to terminate an employee who has been absent for more than one year due to occupational injury or disease. The City argues that CSL § 71 contains extensive post-termination requirements and that if the legislature had intended for there to be pre-termination requirements, it would have provided them.

We adhere to the Board's reasoning in *Town of Cortlandt*. As the Board there explained, there is nothing inescapably implicit in CSL § 71 which establishes the Legislature's plain and clear intent to exempt employers from the State's "strong and

²⁰ Stipulation of Facts, Ex. 4.

sweeping policy” to support employer-employee negotiations.²¹ The absence of pre-termination procedures in the statute cannot be read as preempting an employer’s duty to negotiate. As the Court of Appeals explained with regard to GML § 207-c, “the rights explicitly given to [employers] are outside the scope of mandatory bargaining,” but the statute “does not remove from mandatory bargaining those other matters—such as review procedures—that the Legislature chose not to address.”²²

In its Memorandum of Law submitted to the ALJ, the City asserted that the Association proposed to have an arbitrator from the American Arbitration Association serve as a hearing officer to determine whether an employee may be separated from service under CSL § 71. The City argued that it should not be required to negotiate who will determine whether to separate an employee pursuant to CSL § 71. The ALJ found that the argument was not relevant to the issue before her. On exceptions, the City again argues that it should not have to negotiate who the decision maker would be in a hearing under CSL § 71.

We, like the ALJ, find that the City’s argument is not relevant to the issue before the Board. An allegation that the Association has made a prohibited proposal in negotiations sounds in a violation of the Association’s duty to bargain in good faith. There is no improper practice charge in front of us, however, concerning the Association’s conduct. Rather, the only issue we decide today is that the City has an obligation to bargain prior to imposing procedures for terminating an employee pursuant

²¹ *Cohoes City School Dist v Cohoes Teachers Assn*, 40 NY2d 774, 778, 9 PERB ¶ 7529 (1976); *City of Watertown v NYS Pub Empl Relations Bd*, 95 NY2d 73, 78, 33 PERB ¶ 7007 (2000). Compare *City of Schenectady v NYS Pub Empl Relations Bd*, ___ NY3d ___, slip op 07210 (Oct 17, 2017) (finding police discipline to be prohibited subject of bargaining where policy favoring local control over police set forth in Second Class Cities Law prevailed over policy supporting collective bargaining embodied in the Act).

²² *City of Watertown v NYS Pub Empl Relations Bd*, 95 NY2d, at 83, citing *City of Schenectady PBA v NYS Pub Empl Relations Bd*, 85 NY2d 480 (1995).

to CSL § 71.

Finally, the City argues that the charge is facially deficient and should not have been processed because it failed to allege that the Association was an employee organization covered by § 209-a of the Act, that the Association was the duly-recognized or certified exclusive bargaining representative of firefighters, or that the City was an employer covered by § 209-a of the Act. We find that the charge is facially sufficient to meet our pleading requirements. Section 204.1(b) of our Rules of Procedure concerns the requirements for the contents of a charge. Nothing therein requires that a charge make the specific factual allegations recited by the City. Moreover, the City stipulated to the fact that the Association is the recognized exclusive bargaining representative “of all City employees in the following unit: paid professional members of the fire fighting force in the ranks of Fire Fighter, Lieutenant”²³ The City also does not dispute that the Association is an employee organization as defined in § 201.5 of the Act or that the City is an employer as defined in § 201.6 of the Act. Thus, even assuming that there was some technical deficiency in the charge, the City has failed to show that it suffered any prejudice as a result.

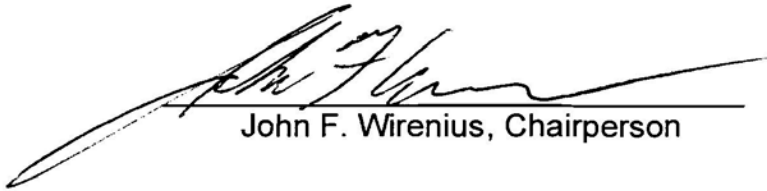
IT IS, THEREFORE, ORDERED that the City forthwith:

1. rescind its procedure relating to CSL § 71 terminations; and

²³ Stipulation of Facts at ¶ 2.

2. sign and post the attached notice at all physical and electronic locations customarily used to post notices to unit employees.

DATED: November 6, 2017
Albany, New York



John F. Wirenius, Chairperson



Robert S. Hite, Member

NOTICE TO ALL EMPLOYEES

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

**NEW YORK STATE
PUBLIC EMPLOYMENT RELATIONS BOARD**

and in order to effectuate the policies of the

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

We hereby notify all employees of the City of Long Beach in the bargaining unit represented by the Long Beach Professional Firefighters Association, IAFF, Local 287 that the City of Long Beach will:

1. rescind its procedure relating to CSL § 71 terminations.

Dated

By

On behalf of the City of Long Beach

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

THE VILLAGE OF WESTHAMPTON DUNES

CASE NO. E-2603

Upon the Application for Designation of
Persons as Managerial or Confidential.

**BEE READY FISHBEIN HATTER & DONOVAN, LLP (WILLIAM C. DE WITT of
counsel), for Employer**

REYNOLD A. MAURO, ESQ., for Intervenor

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Westhampton Dunes Police Constabulary Association (Association) to a decision by an Administrative Law Judge (ALJ) granting the application by the Village of Westhampton Dunes (Village) to exclude two constable-sergeants as managerial or confidential within the meaning of § 201.7(a) of the Public Employees' Fair Employment Act (Act).¹ After a hearing, the ALJ found that the constable-sergeants should be excluded from the unit as confidential employees.

EXCEPTIONS

The Association excepts to the ALJ's designation of constable-sergeants as confidential. The Association argues that no specific testimony was presented that the constable-sergeants have in the past received confidential information that would require their designation and that the constable-sergeants' future potential involvement in bargaining is too speculative to warrant their designation as confidential employees.

¹ 50 PERB ¶ 4002 (2017).

The Village supports the ALJ's decision and contends that no basis has been demonstrated for reversal.

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

FACTS

The facts are fully set forth in the ALJ's decision and are discussed here only as far as is necessary to address the exceptions. The Village employs five full-time and five part-time constables. The Association was certified in June 2015 and represents only the full-time constables of the Village. As of the time of the hearing, negotiations for a collective bargaining agreement (CBA) had commenced between the Association and the Village, but the parties had not reached agreement.

Constables are "peace officers" charged with enforcing the laws of the State and Village. Typical duties include patrols and answering calls for assistance within the Village for incidents such as accidents and emergencies, in addition to the general maintenance of public order. Constables also may direct pedestrian and vehicular traffic, investigate potential or actual violations of the law, issue summonses and appearance tickets, and file activity reports.

Of the five full-time constables, Brian Hennig and Timothy Turner are the only two who are designated "constable-sergeants." "Constable-sergeant" is a title used by the Village and is not a Civil Service title. In addition to the duties explained above, Hennig and Turner are responsible for scheduling and staffing on a day-to-day basis, including the authorization of overtime. Hennig and Turner conduct initial interviews of potential candidates for open positions. They also review the radar logs, field reports, and vehicle maintenance entries that the constables prepare, and have the authority to counsel the constables regarding the performance of their duties.

Village Mayor Gary Veglianie testified in support of the Village's application. Veglianie, in addition to being Mayor, is the Village's Police Commissioner. As such, Veglianie is head of the Police Department, charged with overseeing all of its activities. Veglianie testified that he discusses salaries with Hennig and Turner prior to preparing a budget to submit to the Village board.² With respect to constables' salaries, Veglianie testified:

Ultimately it is determined by the Village Board at budget time. But prior to the budget being created, I discuss with Hennig and Turner my views on what the salaries should be and they would discuss with me what they think they should be and then we will come up with a number and then it would be proposed to the Board.

For equipment purchases, Hennig and Turner make requests and the Mayor forwards those to the board, as well. With respect to collective bargaining, the Mayor testified that the Village had decided that Hennig and Turner will assist in collective bargaining. As of the date of the hearing, Hennig and Turner had not been involved in any collective bargaining preparations or negotiations.

DISCUSSION

Section 201.7(a) of the Act defines a public employee as a "person holding a position by appointment or employment in the service of a public employer." The statute exempts from this definition those individuals whom the Board may designate managerial or confidential. In order for a public employee to be designated either managerial or confidential, the criteria in § 201.7(a) must be met. Section 201.7(a) states:

Employees may be designated as managerial only if they are persons (i) who formulate policy or (ii) who may reasonably be required on behalf of the public employer to assist directly in the preparation for and conduct of collective negotiations or to have a major role in the administration of agreements or in personnel administration, provided that

² Tr, at p 16.

such role is not of a routine or clerical nature and requires the exercise of independent judgment.

Employees may be designated as confidential only if they are persons who assist and act in a confidential capacity to managerial employees concerning collective negotiations, contract administration or personnel administration.

The statutory criteria for such designations are applied strictly, with all uncertainties resolved in favor of representation and coverage under the Act.³ Notably, unless shown to be excluded from the Act as managerial or confidential, supervisors are eligible for representation.⁴

The Board has held that the Act establishes a two-pronged test for a confidential designation: the employee must both assist a managerial employee in his or her labor relations managerial functions and act in a confidential capacity to the managerial employee.⁵ The “former prong reflects the confidential employee’s duties, while the latter connotes a confidential employment relationship involving trust and confidence between the managerial employee and the confidential employee.”⁶ The two prongs of the test are distinct, and satisfaction of one does not relieve the employer from satisfying the other.⁷

³ *County of Westchester*, 50 PERB ¶ 3016, 3068 (2016), citing *Lippman v NYS Pub Empl Relations Bd*, 263 AD2d 891, 896, 32 PERB ¶ 7017 (3d Dept 1999), confirming 30 PERB ¶ 3067 (1997); *Town of Walworth*, 43 PERB ¶ 3013, 3052 (2010); *Fashion Institute of Technology*, 42 PERB ¶ 3018, 3061 (2009); *Owego-Apalachin Cent Sch Dist*, 33 PERB ¶ 3005, 3014 (2000).

⁴ *Fashion Institute of Technology*, 42 PERB ¶ 3018, 3061 (2009); *Town of East Fishkill*, 27 PERB ¶ 3073, 3166 (1994). See also *Matter of Lippman v NYS Pub Empl Relations Bd*, 263 AD2d 891, 903.

⁵ *County of Westchester*, 50 PERB ¶ 3016, at 3068, citing *Hoosick Falls Cent Sch Dist*, 46 PERB ¶ 3015, 3033 (2013); *Town of Dewitt*, 32 PERB ¶ 3001, 3002 (1999).

⁶ *Id.* See also *State of New York (Office of Parks, Recreation and Historic Preservation)*, 39 PERB ¶ 3007, 3030 (2006); *City of Rome*, 39 PERB ¶ 3009, 3037 (2006); *New York Power Authority*, 38 PERB ¶ 3003, 3008 (2005).

⁷ *Id.*, citing *Town of Dewitt*, 32 PERB ¶ 3001, at 3002; *Hoosick Falls Cent Sch Dist*, 46 PERB ¶ 3015, at 3033; *North-Rose Wolcott Cent Sch Dist*, 33 PERB ¶ 3002, 3008 (2000).

The ALJ found that Hennig and Turner should be excluded as confidential employees based on their future involvement in the collective bargaining process and their involvement in making wage recommendations that have been acted upon by the Village board.⁸ The ALJ also found that Hennig and Turner have input into personnel administration, including hiring, staffing, and discipline. In sum, the ALJ found that Hennig and Turner's direct relationship with the Mayor/Police Commissioner and their de facto role of running the department qualified them for a confidential designation.

Contrary to the ALJ, we find that the record does not support designating Hennig and Turner as confidential employees. First, our designation of employees as confidential, like our examination of other unit placement issues, is based on the job duties actually performed, as shown on the record.⁹ Although the Mayor testified that the Village had decided that Hennig and Turner "will assist in collective bargaining," the mere speculative possibility that employees could be assigned confidential duties in the future is not sufficient to warrant their designation as confidential employees.¹⁰ As we explained in *Adirondack Community College*, "the policies in favor of our consideration only of actual duties performed are necessary in order to avoid basing confidential designations on speculation, anticipation, plans or hopes of the applicants, rather than

⁸ The Village argued that Hennig and Turner should be excluded either as managerial or confidential. The ALJ found that Hennig and Turner were not managerial employees, and there were no exceptions to this finding. As a result, any exceptions to the ALJ's finding have been waived. Rules of Procedure § 213.2(b) (4); see, eg, *County of Chemung and Chemung County Sheriff*, 50 PERB ¶ 3022, 3090 (2017); *Village of Endicott*, 47 PERB ¶ 3017, 3052, n. 5 (2014); *NYCTA (Burke)*, 49 PERB ¶ 3021, 3072, n. 4 (2016) (citing cases).

⁹ See *County of Westchester*, 50 PERB ¶ 3016 at 3069, 3070; *Village of Scarsdale*, 49 PERB ¶ 3009, at 3041; *County of Rockland*, 28 PERB ¶ 3063, 3145 (1995); *Town of East Fishkill*, 27 PERB ¶ 3073, 3166 (1994); *Adirondack Community College*, 20 PERB ¶ 3070, 3149-3150 (1987); *City of Binghamton*, 12 PERB ¶ 3099, 3186 (1979).

¹⁰ See *County of Westchester*, 50 PERB ¶ 3016, at 3069, 3070; *New York Power Auth*, 38 PERB ¶ 3003, at 3008; *Owego-Apalachin Cent Sch Dist*, 33 PERB ¶ 3005, at 3016 n. 16; *City of Newburgh*, 16 PERB ¶ 3053, 3082 (1983); *City of Binghamton*, 12 PERB ¶ 3099, at 3186. See also *Village of Scarsdale*, 49 PERB ¶ 3009, at 3040-3041.

upon evidence which is subject to scrutiny and contradiction.”¹¹ In the absence of evidence that Hennig or Turner play any role in collective negotiations or contract administration (as of the date of the hearing, the parties had not agreed to a contract), they can only be designated as confidential based on their role in personnel administration.

Contrary to the ALJ, we find that Hennig and Turner’s input into personnel administration, including hiring, staffing, and discipline, reflects nothing more than their supervisory status and does not justify designating them as confidential employees. “Supervisors at whatever level . . . are eligible for representation under current law.”¹²

Finally, we find that the record does not support designating Hennig and Turner as confidential employees based on their suggestions and discussions with Veglianie regarding wage recommendations, as found by the ALJ. Veglianie testified that

I discuss with Hennig and Turner my views on what the salaries should be and they would discuss with me what they think they should be and then we will come up with a number and then it would be proposed to the [Village] Board.”¹³

¹¹ 20 PERB ¶ 3070, at 3149-3150. See also *County of Westchester*, 50 PERB ¶ 3016, at 3069, 3070; *East Meadow Union Free Sch Dist*, 16 PERB ¶ 3027, 3042 (1983) (finding employee cannot be designated confidential “on the basis of assignments that have been contemplated but have not yet been made”).

A confidential designation may be appropriate even if an employee has not yet performed confidential duties where the duties are contained in the employee’s job description but the opportunity to perform such confidential duties has not yet arisen. *Somers Central School District*, 14 PERB ¶ 3058 (1981). This limited exception is not applicable here. No job description was introduced into evidence and it is, in any event, undisputed that Hennig and Turner have the same Civil Service designation as other constables. Thus, their job description would not contain any reference to collective-bargaining responsibilities. Moreover, at the time of the hearing, the Association had been certified for over a year and negotiations were ongoing, so the opportunity for Hennig and Turner to perform confidential duties (i.e. to be involved in collective bargaining) had already arisen. *County of Westchester*, 50 PERB ¶ 3016, at 3070 (distinguishing *Somers*).

¹² *Town of East Fishkill*, 27 PERB ¶ 3073, at 3166.

¹³ Tr, at 16.

This testimony does not establish that Hennig and Turner assist and act in a confidential capacity to Veglianie concerning the recommendation of wages to the Village board. Rather, Veglianie's testimony suggests to us that Hennig and Turner's interactions with Veglianie on proposed salary recommendations were in furtherance of their own interests as employees. That is, Hennig and Turner have access to confidential information (i.e., Veglianie's proposed and final recommendations to the board) for the purpose of advocating for themselves, and possibly for the other constables, but not for the purpose of assisting Veglianie in the performance of his duties as chief executive of the Village. In short, Hennig and Turner's exposure to confidential information is not supportive of a confidential designation, as they were "not thereby assisting in labor relations duties as contemplated by [Section 201.7(a) of the Act]."¹⁴


In sum, we find that the Village has failed to meet its burden of demonstrating that Hennig and Turner meet the statutory criteria to justify a confidential designation,¹⁵ especially when resolving any uncertainty in favor of coverage under the Act.

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

DATED: November 6, 2017
Albany, New York

¹⁴ *Matter of Lippman v NYS Pub Empl Relations Bd*, 263 AD2d 891, 903, 32 PERB ¶ 7017 (3d Dept 1999); cf *County of Westchester*, 50 PERB ¶ 3016 at 3069.

¹⁵ *County of Rockland*, 28 PERB ¶ 3063, 3141 (1995); *Newburgh Enlarged City Sch Dist*, 21 PERB ¶ 3047, 3102 (1988).



John F. Wirenius, Chairperson



Robert S. Hite, Member

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

In the Matter of

MICHAEL G. LEONE,

Charging Party,

CASE NO. U-35086

- and -

**STATE OF NEW YORK (OFFICE OF CHILDREN
AND FAMILY SERVICES),**

Respondent.

USHER Z. PILLER, for Charging Party

**MICHAEL N. VOLFORTE, ACTING GENERAL COUNSEL (LYNN HOMES
LYON & CLAY J. LODOVICE of counsel), for Respondent**

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by Michael G. Leone (Leone) to a decision and order of an Administrative Law Judge (ALJ) dismissing his charge alleging that the State of New York (Office of Children and Family Services) (OCFS) violated §§ 209-a.2(a) and (c) of the Public Employees' Fair Employment Act (Act) when it provided false information in a reference to a potential employer.¹ The ALJ dismissed the charge because she found it was untimely.

EXCEPTIONS

Leone filed six exceptions to the ALJ's decision, in which he argues that the ALJ's ruling on timeliness was in error. Leone argues that he filed his charge within four months of receiving sufficient information to allege that a violation of the Act had occurred.

The State requests that the Board affirm the ALJ's decision but, in the alternative,

¹ 50 PERB ¶ 4506 (2017).

argues that the charge should be dismissed because Leone, as a former public employee but not an active one, lacks standing to file the charge.

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

FACTS

Leone was employed by OCFS from March 2010 until he resigned from his position in October 2015. Prior to resigning, Leone had taken an extended leave of absence from his employment and, in the spring of 2015, applied for a position with a governmental agency in Florida. Leone was not hired for that position. On or about September 2, 2015, Leone was informed by the bureau chief of the Florida agency that he was denied the job because OCFS indicated during a reference check that he had been disciplined during his employment.

On September 21, 2015, Usher Piller (Piller), a union representative with the Public Employees Federation who represented Leone during his employment with OCFS, sent an email to OCFS regarding Leone. The email stated that Leone had applied for employment in Florida and was informed that he would not get the position because a reference check with OCFS disclosed that he had been disciplined. In the email, Piller stated that the information provided to the Florida agency was "patently false."²

On January 28, 2016, Leone received a copy of the reference form upon which the prospective employer relied.³ The reference form was completed on August 10, 2015.

² Ex A to OCFS's Answer.

³ Attached to charge.

Leone filed his improper practice charge on May 24, 2016.

DISCUSSION

Section 204.1(a) of our Rules of Procedure (Rules) requires an improper practice charge to be filed within four months of when the charging party knew or reasonably should have known of the conduct that forms the basis for the alleged improper practice.⁴ Here, Leone alleges that OCFS provided false information to Leone's prospective employer in August of 2015. Thus, Leone's charge, filed on May 24, 2016, concerns conduct that occurred well beyond the filing period set by our Rules.

We agree with the ALJ that Leone's charge was untimely. As established by Leone's charge and Pillar's email, Leone knew that OCFS had informed his potential employer that Leone had been disciplined while employed by OCFS in September 2015. Thus, Leone had knowledge of the conduct underlying the alleged improper practice more than four months prior to the date he filed the charge. Leone's attempt to gather more information and evidence to support his charge does not extend his time for filing an improper practice charge. To "run the filing period from the date of a charging party's discovery of evidence in support of the charge would permit charges to be filed years after the act in question, a result contrary to the policies sought to be served by the imposition of a short filing period."⁵

Although the Board has found a respondent to be equitably estopped from asserting a timeliness defense where the respondent has, through its conduct, induced

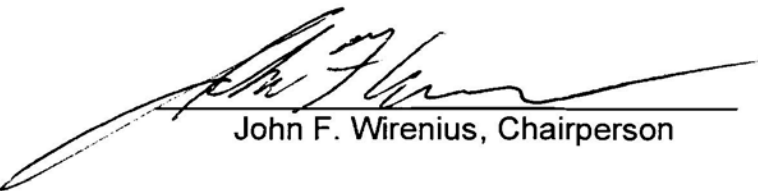
⁴ See, eg, *District Council 37 (Bacchus)*, 50 PERB ¶ 3013, 3057-3058 (2017); *UFT (Davis)*, 50 PERB ¶ 3014, 3059 (2017); *New York State Thruway Auth*, 40 PERB ¶ 4533, 4595 (2007); *Civil Service Employees Assn, Inc., Local 1000, AFSCME, AFL-CIO*, 28 PERB ¶ 3072, 3168, n. 4 (1995).

⁵ *State of New York (Office of Alcoholism and Substance Abuse Services)*, 32 PERB ¶ 3036, 3083 (1999), citing *County of Schoharie*, 30 PERB ¶ 3055 (1997).

the charging party to delay filing a charge until the filing period has passed, that limited exception does not apply here, where there is no evidence that Leone was detrimentally induced to delay filing a charge until the appropriate filing period had passed.⁶

Accordingly, the charge was untimely filed, and the ALJ correctly dismissed it on that basis.

DATED: November 6, 2017
Albany, New York



John F. Wirenius, Chairperson



Robert S. Hite, Member

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

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

In the Matter of

RICARDO FONSECA,

Charging Party,

CASE NO. U-35574

- and -

DISTRICT COUNCIL 37, AFSCME, AFL-CIO,

Respondent,

- and -

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

Employer.

RICARDO FONSECA, *pro se*

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by Ricardo Fonseca to a decision of the Director of Public Employment Practices and Representation (Director) dismissing his improper practice charge.¹ In his initial charge, Fonseca alleged that he was terminated from his employment with the Board of Education of the City School District of the City of New York (District), that he spoke to an attorney from the legal department of District Council 37, AFSCME, AFL-CIO (DC 37) on February 13, 2017, that DC 37 refuses to take his case to arbitration, and that he disagrees with this decision.

Fonseca was advised that his charge was deficient for a variety of reasons and was offered an opportunity to amend the charge.

In response, Fonseca filed an amended charge with the Director on March 6,

¹ 50 PERB ¶ 4549 (2017).

2017, alleging DC 37 violated § 209-a.2(c) of the Public Employees' Fair Employment Act (Act). In the revised statement of facts in the charge, Fonseca alleges that he had a meeting with representatives from DC 37 on July 15, 2015, who informed him that "the allegations against [him] from those two (2) students was [sic] very severe." Fonseca also alleges, *inter alia*, that:

With the impact that I had a few years ago, the Legal Department are [sic] refusing to take this matter to arbitration. I disagree with they're [sic] decision. I strongly believe in my opinion that I deserve a second chance.

Thereafter, by notice dated April 21, 2017, the Director advised Fonseca that the charge remained deficient and that he needed to clarify when the events he complained of occurred. He was specifically directed to provide the date(s) on which he was terminated from employment and when he first requested assistance from DC 37.

Fonseca filed a second amendment on April 26, 2017, stating that he was terminated from employment as a Senior School Lunch Helper on January 20, 2015. In addition, Fonseca stated that he requested assistance from DC 37 on January 20, 2015. Finally, Fonseca alleged that the purpose of his February 2017 telephone call to DC 37's legal department "was to get my case arbitrated . . . so I can get reinstated or rehired back to the New York City Department of Education Office of School Food and Nutrition Services."

The Director found that Fonseca's amended charge remained deficient, and she dismissed Fonseca's charge in full.

EXCEPTIONS

Fonseca filed exceptions to the Director's decision. Fonseca stated that he was "dissatisfied" with the Director's decision and felt that he was being discriminated

against because of his race. Neither DC 37 nor the District filed a response to the exceptions.

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

DISCUSSION

Fonseca's letter exceptions are dated August 13, 2017, and thus were timely filed. However, no proof of service upon the other parties was provided. A letter was sent to Fonseca on August 22, 2017, pointing out this omission and giving Fonseca an opportunity to provide the requisite proof of service.² Fonseca subsequently submitted copies of his letter exceptions that he had sent to DC 37 and the District, dated August 26, 2017.

Section 213.2(a) of our Rules of Procedure (Rules) provides that a party must file exceptions within 15 working days after receipt of a final decision by the Director. Such exceptions must be "simultaneously served upon all other parties."³ "Timely service of exceptions upon all other parties is a necessary component for the filing of exceptions under the Rules, and this timeliness requirement is strictly applied."⁴ Fonseca's exceptions were not timely served on the other parties to this proceeding, and they must

² Both DC 37 and the District were sent copies of our letter to Fonseca. Neither filed any papers in response.

³ *Id.*

⁴ *Transport Workers Union of Greater New York, Local 100, AFL-CIO (Waters)*, 49 PERB ¶ 3026, 3083 (2016); *United Federation of Teachers (Hunt)*, 48 PERB ¶ 3005, 3012 (2015); *State of New York (Commission of Correction)*, 47 PERB ¶ 3019, at 3058. (citing *UFT (Pinkard)*, 44 PERB ¶ 3011, 3042 (2011); *UFT (Elgalad)*, 43 PERB ¶ 3028 (2010); see generally *Honeoye Falls-Lima Cent Sch Dist (Malcolm)*, 41 PERB ¶ 3015 (2008); *Town/City of Poughkeepsie Water Treatment Facility*, 35 PERB ¶ 3037 (2002); *Yonkers Fedn of Teachers (Jackson)*, 36 PERB ¶ 3050 (2003).

be denied on this basis alone.⁵

We also note that Fonseca's exceptions are deficient because they fail to comply with the requirements of § 213.2(b) of our Rules. The exceptions do not "set forth specifically the questions or policy to which exceptions are taken," "identify that part of the decision . . . to which exceptions are taken," or "state the grounds for exceptions." Instead, Fonseca simply makes a conclusory statement that he feels that he is being discriminated against because of his race. Fonseca provides no facts to support this claim, and conclusory statements cannot substitute for proof. Fonseca's unsupported allegations are both inappropriate and unpersuasive.

In view of Fonseca's *pro se* status, we have examined the exceptions and the charge and amended charges submitted to the Director, even in light of the deficiencies noted above. Even if the exceptions had been timely served and filed, we would affirm the Director's decision.

Section 204.1(a) of our Rules of Procedure (Rules) requires an improper practice charge to be filed within four months of when the charging party had actual or constructive knowledge of the conduct that forms the basis for the alleged improper practice.⁶ Here, Fonseca's allegation is that DC 37 refused to take his case to arbitration after Fonseca requested assistance over his termination on January 20, 2015 (the same day as his termination). Fonseca also alleges that DC 37 again refused to take his case to arbitration after a July 15, 2015 meeting between Fonseca and DC 37.

⁵ *TWU (Waters)*, 49 PERB ¶ 3026, at 3083; *UFT (Hunt)*, 48 PERB ¶ 3005, at 3012; *UFT (Pinkard)*, 44 PERB ¶ 3011, at 3042.

⁶ See, eg, *District Council 37 (Bacchus)*, 50 PERB ¶ 3013, 3057-3058 (2017); *UFT (Davis)*, 50 PERB ¶ 3014, 3059 (2017); *New York State Thruway Auth*, 40 PERB ¶ 4533, 4595 (2007); *Civil Service Employees Assn, Inc., Local 1000, AFSCME, AFL-CIO*, 28 PERB ¶ 3072, 3168, n. 4 (1995).

We agree with the Director that Fonseca knew by mid-July 2015 that DC 37 would not be pursuing his claim to arbitration. Thus, Fonseca's charge, filed on February 22, 2017, concerns conduct that occurred well beyond the filing period set by our Rules. We also agree with the Director that the fact that Fonseca renewed his request to DC 37 on February 13, 2017 does not extend the filing period or revive his charge.⁷

Although the Board has found a respondent to be equitably estopped from asserting a timeliness defense where the respondent has, through its conduct, induced the charging party to delay filing a charge until the filing period has passed, that limited exception does not apply here, where there is no evidence that Fonseca was detrimentally induced to delay filing a charge until the appropriate filing period had passed.⁸

Moreover, even if the charge were timely filed, we would affirm the Director's dismissal of the charge on the merits. The Board has often reaffirmed that "to establish a breach of the duty of fair representation under the Act, a charging party has the burden of proof to demonstrate that an employee organization's conduct or actions are

⁷ See, eg, *NYCTA (Rosado)*, 37 PERB ¶ 3036, 3108 (2004); *UFT (Paul)*, 23 PERB ¶ 3038, 3077 (1990).

⁸ *UFT (Davis)*, 50 PERB ¶ 3014 (2017); *DC 37 (Bacchus)*, 50 PERB ¶ 3013 (2017), citing *County of Onondaga*, 12 PERB ¶ 3035, 3065 (1979), *confd sub nom County of Onondaga v NYS Pub Empl Relations Bd*, 77 AD2d 783, 13 PERB ¶ 7011 (4th Dept 1980) (finding charge filed 14 months after announcement of change to be timely where employer detrimentally induced employee organization to delay filing a challenge to change pending employer's actions aimed at such revocation); *Great Neck Water Pollution Control District*, 27 PERB ¶ 3057, 3134 (1994) (finding charge filed more than four months after announced change timely where employer led employee organization to believe that that change had been rescinded). *Confirmed City of Elmira*, 41 PERB ¶ 3018, at 3086 (finding charging party failed to meet burden of demonstrating that respondent was equitably estopped from asserting timeliness defense).

arbitrary, discriminatory or founded in bad faith.”⁹

As we have previously explained, the courts have:

reject[ed] the standard . . . that “irresponsible or grossly negligent” conduct may form the basis for a union’s breach of the duty of fair representation as not within the meaning of improper employee organization practices set forth in Civil Service Law § 209-a. An honest mistake resulting from misunderstanding or lack of familiarity with matters of procedure does not rise to the level of the requisite arbitrary, discriminatory or bad-faith conduct required to establish an improper practice by the union.¹⁰

Thus, “an employee’s mere disagreement with the tactics utilized or dissatisfaction with the quality or extent of representation does not constitute a breach of the duty of fair representation.”¹¹

Fonseca has neither expressly alleged nor provided any basis upon which we could conclude that the representation was tainted by any “arbitrary, discriminatory or bad-faith conduct” sufficient to violate the duty of fair representation. Fonseca’s charge and amended charges simply assert that he disagrees with DC 37’s decision not to pursue arbitration in his case, but his mere disagreement is not sufficient to make out a claim of a violation of DC 37’s duty of fair representation.

The charge does not set forth a claim that DC 37’s conduct was arbitrary,

⁹ *District Council 37 (Calendario)*, 49 PERB ¶ 3015, 3060 (2016), *quoting UFT (Cruz)*, 48 PERB ¶ 3004, 3010, *petition denied*, *Cruz v NYS Pub Empl Relations Bd*, 48 PERB ¶ 7003 (Sup Ct NY Co 2015) (internal quotation and editing marks omitted), *quoting UFT (Munroe)*, 47 PERB ¶ 3031, 3095 (2014), *petition denied*, 48 PERB ¶ 7002 (Sup Ct NY Co 2015) (*quoting CSEA (Bienko)*, 47 PERB ¶ 3027, 3082-3083 (2014)); see *District Council 37, AFSCME, AFL-CIO (Farrey)*, 41 PERB ¶ 3027, 3119 (2008).

¹⁰ *Id.*; see also *Cairo-Durham Teachers Assn*, 47 PERB ¶ 3008, 3026 (2014) (*quoting CSEA, L 1000 v NYS Pub Empl Relations Bd (Diaz)*, 132 AD 2d 430, 432, 20 PERB ¶ 7024, 7039 (3d Dept 1987), *affd on other grounds*, 73 NY2d 796, 21 PERB ¶ 7017 (1988)).

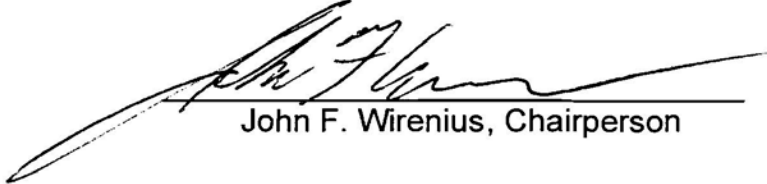
¹¹ *Id.*

discriminatory or in bad faith as required to establish a breach of the Act.¹² Accordingly, even if the improper practice charge were timely, it would be dismissed for failure to allege facts indicating a violation of the Act.

Based upon the foregoing, we deny the exceptions, affirm the decision of the Director, and dismiss the charge.

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

DATED: November 6, 2017
Albany, New York



John F. Wirenius, Chairperson



Robert S. Hite, Member

¹² See *TWU (Waters)*, 49 PERB ¶ 3026, at 3083; *CSEA (Bienko)*, 47 PERB ¶ 3027, at 3082-3083; *CSEA (Smulyan)*, 45 PERB ¶ 3008, 3017 (2012).