STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

UNIFORMED FIRE FIGHTERS' ASSOCIATION, INC. OF THE CITY OF MOUNT VERNON, LOCAL 107, IAFF, AFL-CIO,

CASE NO. U-35616

Charging Party,

- and -

CITY OF MOUNT VERNON,

Respondent.

ARCHER, BYINGTON, GLENNON & LEVINE LLP (RICHARD S. CORENTHAL of counsel), for Charging Party

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Uniformed Fire Fighters' Association, Inc. of the City of Mount Vernon, Local 107, IAFF, AFL-CIO (Local 107) to a decision of an Administrative Law Judge (ALJ).[1] In her decision, the ALJ dismissed an improper practice charge alleging that the City of Mount Vernon (City) violated §§ 209-a.1 (a) and (d) of the Public Employees' Fair Employment Act (Act) when it unilaterally implemented a procedure for obtaining benefits under New York State General Municipal Law (GML) § 207-a (2). The ALJ found that the change applied only

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[1] 53 PERB ¶ 4516 (2020).

to retired employees and was thus not a mandatory subject of bargaining, citing our recent decision in *City of Yonkers*.[2]

EXCEPTIONS

Local 107 filed two exceptions to the ALJ's decision. In its first exception, Local 107 disputes the ALJ's findings that there is no record evidence that the City sent a letter to current employees, or undertook any other action, to advise current employees of a change in their benefits under GML § 207-a (2). Local 107 contends to the contrary that "there is significant, undisputed record evidence that the City advised [Local 107] and its current bargaining unit members of the City's unilateral change to the GML § 207-a (2) procedure, a mandatory subject of bargaining."[3] Specifically, Local 107 asserts that an email sent to Local 107's president, attached to which was a copy of the unilaterally-promulgated GML § 207-a (2) procedures, "constitutes evidence of the City's announcement to the bargaining unit that the City intended to apply its new, unilaterally-implemented procedure, instead of the procedure that the City had negotiated with [Local 107]."[4]

Local 107's second exception insists that the ALJ misinterpreted and misapplied *City of Yonkers* by creating a "bright-line rule" that requires a specific announcement to current employees that their future benefits are being changed. Further, Local 107 avers that the current case is distinguishable from *City of Yonkers* because the

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[2] 52 PERB ¶ 3015 (2019). Our decision in *City of Yonkers* is under review pursuant to Article 78 of the Civil Practice Law and Rules. The proceeding is pending before the Appellate Division, Third Department.
[3] Local 107's Exceptions, at 2.
[4] *Id.*

evidence substantiates the City's intent to make changes to the benefits of current employees who may retire during the life of the agreement.

The City did not file any response to Local 107's exceptions.

For the reasons that follow, we reverse the ALJ's decision and find that the City has violated § 209-a.1 (d) of the Act, based on the unrebutted allegations in the charge and the facts adduced at the hearing in this matter.

FACTS

Because, as described below, the ALJ properly exercised her discretion pursuant to § 212.4 of our Rules of Procedure (Rules) in striking the City's answer, the only factual allegations before us are those set forth in Local 107's charge, the referenced admissions in the otherwise dismissed Answer, and the documentary evidence and testimony.

Local 107 and the City are parties to a collective bargaining agreement (CBA), which was in effect from January 1, 2014 to December 31, 2017.[5] The CBA contains a negotiated procedure for benefits under GML § 207-a.[6] That procedure was first agreed to by the parties and incorporated in the CBA on or about November 25, 1991.[7]

Of relevance here, GML § 207-a (1) provides benefits for currently employed firefighters who are injured or taken ill in the line of duty. GML § 207-a (2) provides supplementary benefits to retired, former firefighters who become permanently disabled due to an injury or illness incurred on the job. The ALJ found that the contractual

[5] Charge, ¶ 4.
[6] Charge, ¶ 5.
[7] Charging Party Exs 3 and 4.

procedure by its terms related only to applications for GML § 207-a (1) benefits, not applications for GML § 207-a (2) benefits. Nonetheless, the charge alleges, upon information and belief, that "claims for benefits under GML § 207-a (2) have been processed in the past under the Negotiated 207-a Procedure."[8] This fact is deemed admitted based on the ALJ's ruling striking the City's answer.

On or about December 14, 2016, the City's Fire Commissioner, Theo Beale, sent via e-mail a document entitled "City of Mount Vernon Fire Department Procedure for filing [for] General Municipal Law § 207-a (2) benefits (Procedure Document)," to Kevin Holt, Local 107's President, without any explanation.[9]

According to the admitted allegations of the charge, the procedure sent by Beale "is different than the [n]egotiated 207-a procedure. For example, the City's [u]nilateral 207-a (2) procedure does not provide for arbitration or contain other [negotiated] protections, such as a time deadline by which a decision on applications must be made."[10] The charge expressly alleges that the City has failed to follow the negotiated procedure with respect to applications for GML § 207-a (2) benefits.[11]

Holt testified that Local 107 did not represent retired employees with respect to claims under GML § 207-a (2).[12] Rather, as counsel for Local 107 stated, the gravamen of the charge was that the unilateral change affected by the issuance of the non-

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[8] Charge, ¶ 7.
[9] Charge, ¶¶ 10 and 12.
[10] Charge, ¶ 10.
[11] Charge, ¶ 15.
[12] Tr, at 25-26.

negotiated procedure was "prejudicial to the members of the Department represented by the Union in this case."[13]

Holt testified that, prior to December 19, 2016, he had not ever seen the unilaterally promulgated procedure for filing for GML § 207-a (2) benefits.[14] Holt further testified that the City had never given him prior notice that it was implementing this new procedure for filing for GML § 207-a (2) benefits.[15] Holt additionally averred that the City did not negotiate this new procedure with Local 107.[16] Holt asserted under oath that the City had not "[e]ver followed this [new] procedure prior to [Holt's] getting this email and then sending it on to Justin Chase."[17]

DISCUSSION

Initially, we note that the ALJ made certain findings which are not before us for review. Pursuant to § 212.4 (b) of our Rules, "[t]he failure of a party to appear at the hearing may, in the discretion of the administrative law judge, constitute grounds for dismissal of the absent party's pleading and a default determination." In view of the City's failure to appear at the hearing or to offer any excuse or justification for its failure to appear, the ALJ dismissed the City's answer, found that the City admitted the material facts of the charge, and allowed Local 107 to enter testimony and documentary

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[13] Tr, at 14; Charge, ¶¶ 8, 15, and 17 (Asserting rights of "current employees who retire during the life of the collective bargaining agreement" and of "members").
[14] Tr, at 28-29.
[15] Tr, at 29.
[16] *Id*; see also Charge, ¶ 16.
[17] Tr, at 29. Justin Chase was a retired bargaining unit member who was applying for GML § 207-a (2) benefits. Local 107 does not represent employees applying for GML § 207-a (2) benefits. Tr, at 25-26, 28.

evidence to supplement the allegations in the charge.[18] The ALJ found no evidence supporting a violation of § 209-a.1 (a) of the Act. Neither the City nor Local 107 filed any exceptions to these determinations by the ALJ. Any exceptions thereto have therefore been waived, and these findings are not before us for review.[19]

The ALJ found that PERB had jurisdiction over the charge because Local 107 had no arguable source of right in the CBA. The ALJ examined the CBA and found that a review of the negotiated GML § 207-a procedure, as a whole, shows that it is intended to address only the procedures to be followed when employees seek to qualify for, or maintain, benefits under GML § 207-a (1). The ALJ found that several of the substantive provisions, such as the requirement that individuals file a report of an injury or illness within 48 hours of when it initially occurred, the allowance for employees to use their leave accruals pending a determination of their benefits claim, and the repeated references to "employees", could not apply to retirees requesting benefits under GML § 207-a (2). The ALJ also relied on the lack of provisions in the negotiated procedure that are specific to a determination under GML § 207-a (2), such as a requirement that retirees provide statutorily required information. We affirm this finding,

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[18] Tr, 16; Rules, § 212.4 (b); *see, eg, State of New York (Dept of Civil Service)*, 51 PERB ¶ 3027, 3115 (2018); *Village of Westhampton Dunes*, 50 PERB ¶ 3035, 3146, n 8 (2017); *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). We note further that, were these issues properly before us, we would find the ALJ providently and appropriately exercised her discretion in ruling as she did.

[19] Rules § 213.2 (b) (4); *see, eg, State of New York (Dept of Civil Service)*, 51 PERB ¶ 3027, at 3115.

for the reasons given by the ALJ. Not only has no exception been filed, but the ALJ's finding is supported by the provisions of the CBA.

Against this backdrop, we find Local 107's first exception to be dispositive.[20] We affirm the ALJ's decision to the extent that she dismissed claims for relief solely applicable to retirees. We have long held, and recently reaffirmed in *City of Yonkers*, relied upon by the ALJ, that changes with respect to retirees fall outside the ambit of the Act.[21] Thus, the City did not violate the Act through its actions taken towards Chase, a retired employee. However, we reverse the ALJ's finding as to a lack of jurisdiction over the claim asserted on behalf of current employees who might retire during the life of the CBA, and find that such a claim is properly before us. The ALJ's conclusion is predicated on her determination that "[t]here is no record evidence that the City sent a letter to current employees, or undertook any other action, to advise current employees of a change in their benefits under GML § 207-a (2)."[22]

That holding, squarely controverted by Local 107 in its exceptions, is the basis upon which we find that the decision must be reversed and relief awarded. We find that the record evidence, coupled with the uncontested allegations of the effect of the emailing of the non-negotiated procedure, was sufficient to establish that the City undertook action to advise current employees of a change in the procedure for employees to apply for benefits under GML § 207-a (2) after they retired.

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[20] *See City of Yonkers*, 52 PERB ¶ 3015, at 3067; *Town of Brookhaven*, 30 PERB ¶ 3040 (1997).
[21] 52 PERB ¶ 3015, 3068 (2019), citing *Aeneas McDonald Police Benevolent Assn v City of Geneva*, 92 NY2d 326, 330-331 (1998) (*Aeneas McDonald*).
[22] 53 PERB ¶ 4516, at 4560.

With respect to Local 107's second exception, we find that the current case is distinguishable from *City of Yonkers*.[23] In *City of Yonkers*, we examined whether letters sent to retirees were sufficient to establish notice of a change to a past practice. There was no notification to current employees of any change. In the current case, as explained above, the City did notify current employees of a change to their post-retirement benefits.

Accordingly, we reverse the ALJ's dismissal of the charge on the ground of insufficiency with regard to communication with either Local 107 or with the employees it represents. Post-retirement monetary benefits, including procedures for the grant of GML § 207-a (2) benefits, are mandatory subjects of bargaining that cannot be unilaterally altered for current employees who may retire during the life of the CBA.[24] We find that the announcement violated the rights solely of employees who may have retired between the date of the announcement and the expiration of the CBA; that is, between December 14, 2016 and December 31, 2017.

Accordingly, and for the reasons stated above, we reverse the ALJ's dismissal of the charge and conclude that the City violated § 209-a.1 (d) of the Act when it announced changes to the procedure for applying for benefits pursuant to

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[23] 52 PERB ¶ 3015 (2019).

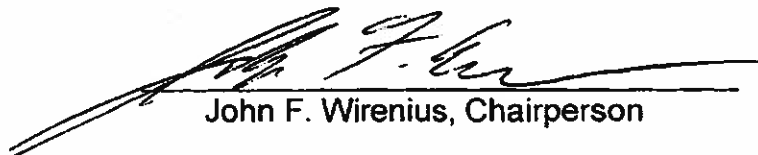
[24] *City of Albany*, 53 PERB ¶ 3009, 3038 (2020); *City of Yonkers*, 52 PERB ¶ 3015, 3067 (2019); *Chenango Forks Cent Sch Dist*, 40 PERB ¶ 3012, 3048 (2007), *on remand* 42 PERB ¶ 4527 (2009), *affd* 43 PERB ¶ 3017 (2010), *confd sub nom Chenango Forks Cent Sch Dist v NYS Pub Empl Relations Bd*, 92 AD3d 1479, 45 PERB ¶ 7006 (3d Dept 2012), *affd* 21 NY3d 255, 46 PERB ¶ 7008 (2013) (*Chenango Forks*); *Incorporated Village of Lynbrook*, 10 PERB ¶ 3065, 3115-3116 (1977); *Aeneas McDonald*, 92 NY2d 326, at 330-331; *Myers v City of Schenectady*, 244 AD2d 845, 846-847 (3d Dept 1997), *lv den* 91 NY2d 812 (1998).

GML § 207-a (2). We order the City to rescind the announcement, the same relief we granted in *Chenango Forks*, a case where a public employer similarly unilaterally announced changes to employees' post-retirement benefits.[25]

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

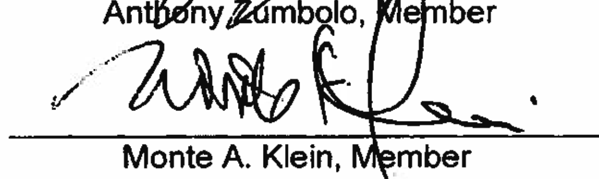
1. Rescind the December 14, 2016 announcement to employees changing the procedures for applying for GML § 207-a (2) benefits;
2. Sign and post the attached notice at all physical and electronic locations customarily used by it to post notices to unit employees.

DATED: May 26, 2021
Albany, New York



John F. Wirenius, Chairperson

Anthony Zumbolo, Member



Monte A. Klein, Member

[25] 43 PERB ¶ 3017, at 3069.

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 Mount Vernon (City) in the unit represented by Uniformed Fire Fighters' Association, Inc. of the City of Mount Vernon, Local 107, IAFF, AFL-CIO that the City will:

> rescind the December 14, 2016 announcement to employees changing the procedures for applying for GML § 207-a (2) benefits.

Dated . . . .

By . . . .
on behalf of the CITY OF MOUNT VERNON

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.