



PERB NEWS

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1986-87

1984-1985

CONCILIATION EXPERIENCE

3,544 Negotiating Units
2,343 Contracts Negotiable
1,777 (72%) Settled without third party assistance
566 (24.2%) Brought to PERB for assistance

Of 541 Impasses resolved during 1984-85

174 (32.2%) settled by mediation
191 (35.3%) settled by mediation by fact-finder
74 (13.7%) settled by negotiations based on fact-finding report
31 (5.7%) settled by acceptance of fact-finding report
37 (6.8%) settled by post fact-finding conciliation
22 (4%) settled by arbitration
12 (2.2%) Closed for other reasons

REPRESENTATION ACTIVITY

150 Petitions received
51 Director's decisions
18 Board decisions
49 Board certifications
68 Petitions withdrawn
29 Elections involving 23,728 employees

CLARIFICATION/UNIT PLACEMENT CASES

11 Cases pending at beginning of year
25 Petitions received
2 Director's decisions
0 Board decisions
22 Withdrawn after conference
12 Cases pending at end of year

IMPROPER PRACTICES

291 Cases pending at beginning of year
662 Charges filed during year
185 ALJ decisions
87 Board decisions
508 Charges settled by agreement, withdrawn or closed
260 Cases pending at end of year

MANAGEMENT/CONFIDENTIAL CASES

29 Cases pending at beginning of year
90 Applications received
78 Director's decisions
5 Board decisions
16 Withdrawn after conference
25 Cases pending at end of year

WORK STOPPAGES

1 Strike
51 Employees involved
765 Worker-days idle
4 Board decisions on dues and/or Agency Shop Fee forfeiture

1985-1986

CONCILIATION EXPERIENCE

3,621 Negotiating Units
2,163 Contracts Negotiable
1,623 (75%) Settled without third party assistance
540 (25%) Brought to PERB for assistance

Of 610 Impasses resolved during 1985-86

185 (30.3%) settled by mediation
188 (30.8%) settled by mediation by fact-finder
74 (12.1%) settled by negotiations based on fact-finding report
56 (9.2%) settled by acceptance of fact-finding report
39 (6.4%) settled by post fact-finding conciliation
23 (3.8%) settled by arbitration
45 (7.4%) Closed for other reasons

REPRESENTATION ACTIVITY

136 Petitions received
61 Director's decisions
20 Board decisions
59 Board certifications
66 Petitions withdrawn
41 Elections involving 3,885 employees

CLARIFICATION/UNIT PLACEMENT CASES

12 Cases pending at beginning of year
23 Petitions received
2 Director's decisions
0 Board decisions
15 Withdrawn after conference
18 Cases pending at end of year

IMPROPER PRACTICES

260 Cases pending at beginning of year
591 Charges filed during year
127 ALJ decisions
62 Board decisions
402 Charges settled by agreement, withdrawn or closed
322 Cases pending at end of year

MANAGEMENT/CONFIDENTIAL CASES

25 Cases pending at beginning of year
94 Applications received
78 Director's decisions
3 Board decisions
21 Withdrawn after conference
20 Cases pending at end of year

WORK STOPPAGES

2 Strikes
371 Employees involved
1409 Worker-days idle
1 Board decision on dues and/or Agency Shop Fee forfeiture

1986-1987

CONCILIATION EXPERIENCE

3,690 Negotiating Units
2,328 Contracts Negotiable
1,748 (75.1%) Settled without third party assistance
580 (24.9%) Brought to PERB for assistance

Of 534 Impasses resolved during 1986-87*

175 (32.8%) settled by mediation
150 (28.1%) settled by mediation by fact-finder
59 (11.0%) settled by negotiations based on fact-finding report
56 (10.5%) settled by acceptance of fact-finding report
22 (4.1%) settled by post fact-finding conciliation
15 (2.8%) settled by arbitration
57 (10.7%) Closed for other reasons

REPRESENTATION ACTIVITY*

148 Petitions received
66 Director's decisions
14 Board decisions
38 Board certifications
65 Petitions withdrawn
31 Elections involving 7,362 employees

CLARIFICATION/UNIT PLACEMENT CASES*

18 Cases pending at beginning of year
35 Petitions received
3 Director's decisions
1 Board decision
19 Withdrawn after conference
31 Cases pending at end of year

IMPROPER PRACTICES*

322 Cases pending at beginning of year
695 Charges filed during year
167 ALJ decisions
57 Board decisions
510 Charges settled by agreement, withdrawn or closed
340 Cases pending at end of year

MANAGEMENT/CONFIDENTIAL CASES*

34 Cases pending at beginning of year
116 Applications received
79 Director's decisions
3 Board decisions
32 Withdrawn after conference
39 Cases pending at end of year

WORK STOPPAGES*

3 Strikes
131 Employees involved
228 Worker-days idle
3 Board decisions on dues and/or Agency Shop Fee forfeiture

*Estimated

1969 that five units of State employees were the most appropriate configuration. The Board's decision was ultimately affirmed by the Court of Appeals on July 1, 1969. Presently the great majority of State employees are encompassed in these same five units. The Administrative, Institutional and Operational Services units are represented by the Civil Service Employees' Association; the Professional, Scientific and Technical Services unit is represented by the Public Employees' Federation; and, the Security Services unit is represented by Council 82 of the American Federation of State, County and Municipal Employees. There are other units representing State University personnel, State Police and some supervisors.

In another landmark case, the Board in 1971 determined, in *West Irondequoit School District*, that numerical limitation on "class size" was related to the district's "mission". The concept embodied in the holding is that the level of services which the employer chooses to provide — its "mission" — is a nonmandatory subject of bargaining. It was affirmed by the Appellate Division in 1973 and

continues to be part of the case law.

In 1982, the State Legislature amended the Act, making it an improper practice for a public employer "to refuse to continue all the terms of an expired agreement until a new agreement is negotiated." The legislation grew out of the Board's "Triborough" doctrine in which it ruled that it was improper for an employer to change an existing term or condition of employment, including those contained in an expired agreement, during negotiations for a successor contract unless there was a change in the *status quo* — essentially meaning that a strike ensued.

Another major challenge that besets the Board began in 1977, when the Legislature authorized an "amount equivalent to dues" to be deducted from the wages of employees who were in a bargaining unit represented by a union, but were not members of the organization. A provision in the law requires, however, that unions establish and maintain a procedure to refund "any part of an agency shop fee deduction which represents ... expenditures ... of a political or ideological nature ..."

Challenges to the agency shop fee provisions and to the unions' refund procedures were brought to the Board for resolution. The Board declined to mandate any specific refund procedure, but reviewed the adequacy of the procedures on a case-by-case basis. The Board also determined in *Hampton Bays Teachers Association* in 1981 that it had no jurisdiction to review the "amount of the agency fee rebate."

U.S. Supreme Court decisions in *Abood*, *Hudson* and *Ellis* prompted PERB to commission a report from Professor Richard Briffault of the School of Law at Columbia University for the purpose of examining New York's agency fee law in the light of constitutional requirements.

Briffault's report was presented at a symposium conducted by PERB in September of 1986 in Syracuse. All interested parties were invited to attend and to submit their reactions to the report.

The report and the comments of interested parties have been submitted to the Board for consideration; the Board is expected shortly to release a policy statement on the subject.

The Twentieth Year

In September, PERB began its 20th Year with an anniversary program held at the Queensbury Hotel in Glens Falls. Featured on the program were Thomas Donohue, Secretary-Treasurer of the AFL-CIO; PERB Chairman Newman and Dr. Robert D. Helsby, PERB's first chairman. Some 200 people attended the program including leaders of major unions and management groups, along with members of PERB's panels of mediators, factfinders and arbitrators. That program was the first of a series of events this year that PERB has conducted or will conduct to commemorate the 20th year of the law.

Highlights of 1986-87 workload



(Left to right): Robert D. Helsby, Thomas Donohue, Harold R. Newman, and Robert E. Doherty at the 20th Anniversary Program.

included the fact that the Conciliation office handled some 580 impasses; the office of Public Employment Practices and Representation received some 140 petitions seeking certifications of unions, and more than 690 charges of improper employer or employee organization practices.

Outreach

Long-standing outreach programs of cooperation with other state agencies and with constituent groups continued during 1986-87.

PERB continues its cooperative efforts with the Department of State which compiles salary and fringe benefit information on police and firefighters. The data bank maintained by its Office of Local Government is called LADS (Labor Agreements Data System). The office collects information on some 350 police and firefighter units across the state; PERB assists in a major way in that collection, and provides all awards arising from interest arbitration.

The Office of Conciliation is continuing its work with the Rockefeller College of Public Affairs and Policy in exploring the use of a computer-based, automated decision-making technique and its application to dispute resolution. (More information on the program's progress appears in the Conciliation section of this report.)

In the early months of 1987, PERB began a cooperative effort with the New York State Labor Department which compiles a "Calendar of Negotiations" listing contracts up for renewal. Using information from PERB's file of public sector labor agreements, the Labor Department and PERB will try to improve the scope and usefulness of the "Calendar."

Since early 1986, PERB has participated in the Governor's Forms Simplification and Reduction Project under the direction of the Office of Management and Productivity. By eliminating some forms and simplifying others, PERB was able to save

Ralph Vatalaro **Executive Director** **1967-Present**

PERB and the Taylor Law have been involved for 20 years in an evolutionary process, one which had great speed and momentum in the earliest years and which has now slowed. But the evolution continues.

Not unlike other new and innovative programs, the challenges were greatest for the agency staff when they were dealing with unknowns and uncertainties; many issues coming to the agency were novel. Impasses resulted, in part, from the newness of relationships between parties. Lessons have been learned over the years and we believe we are doing some intelligent things, adapting earlier experiences to today's agenda. In short, we are not standing still. Moreover, the agency, in my opinion, and supported by the broader labor relations community, has reached a maturity in its various roles that is unsurpassed in the nation.



more than \$2,000 in agency funds and almost 300 hours of annual personnel time.

PERB was also cited in the 1987 annual report of the Governor's Office of Management and Productivity for programs initiating and supporting labor-management committees in local government, and for the successful undertaking with Ulster County and the Civil Service Employees' Association in obtaining a federal grant to expand an existing joint committee in Ulster County.

Other outreach activities in which PERB is involved include:

- Co-sponsorship of a public lecture by Dr. Howard Raiffa, of Harvard, in April 1987 with the Decision Techtronics Group at the Rockefeller Institute of Government, the second of four events noting PERB's 20th year.
- Co-sponsorship of a September 1987 program with LeMoyné College's Institute of Industrial Relations. This is the third in the series of commemorative events.
- Co-sponsorship with the Joseph R. Crowley Institute at Fordham Law School of a November 6,

1987 seminar on the Taylor Law and New York City negotiations, the final event commemorating the agency's 20th year.

- Cooperation with the American Arbitration Association in promoting "Arbitration Days" in New York City and upstate.
- An on-going speakers' bureau, making expert speakers available from the staff to labor and management groups. Major contributions of expertise on the law, PERB and labor relations generally were made to the New York State School Board Association and the New York State United Teachers, AFL-CIO.

"... the agency ... has reached a maturity in its various roles that is unsurpassed in the nation."

R. Vatalaro

Agency staff changes in fiscal 1986-87 were made in the Office of Public Employment Practices and Representation. Kenneth J. Toomey, an Administrative Law Judge for 12 years, was promoted to Assistant Director. He succeeded Robert J. Miller who retired from State service.

Appointed to fill Toomey's ALJ position was Dona J. Bulluck, a 1981 graduate of Albany Law School.



Toomey



Bulluck

A series of meetings to enhance professional development skills of PERB staff were continued during fiscal 1986-87. In May of 1986, John Lawe, president of the Transit Workers Union, met with PERB's staff to discuss the negotiating history and labor relations climate affecting New York City and its transit workers.

In September, Dean Martin Belsky of Albany Law School spoke to the staff, describing the school's expansion plans over the next several years.

Strikes

New York public schools opened for the third consecutive year with no teacher strikes to interfere with classes. Only three strikes occurred during the entire fiscal year and fewer than five days were involved. Thus, for the past five years, public employee strikes have totaled ten, with three for 1986-87; two in 1985-86; one each in 1984-85 and 1983-84; and three in 1982-83. It is the lowest strike incidence of all major states.

Office of Conciliation

The number of impasses received for fiscal 1986-87 suggests a leveling out of the case load. Although the number of impasses has increased over the two previous years, i.e., 580 cases in 1986 compared to 540 in 1985, and 555 in 1984, the 1987 total includes 31 impasses involving negotiations over the distribution of the "Excellence in Teaching" funds. Those separate negotiations were required by legislation funding the State E.I.T. program.

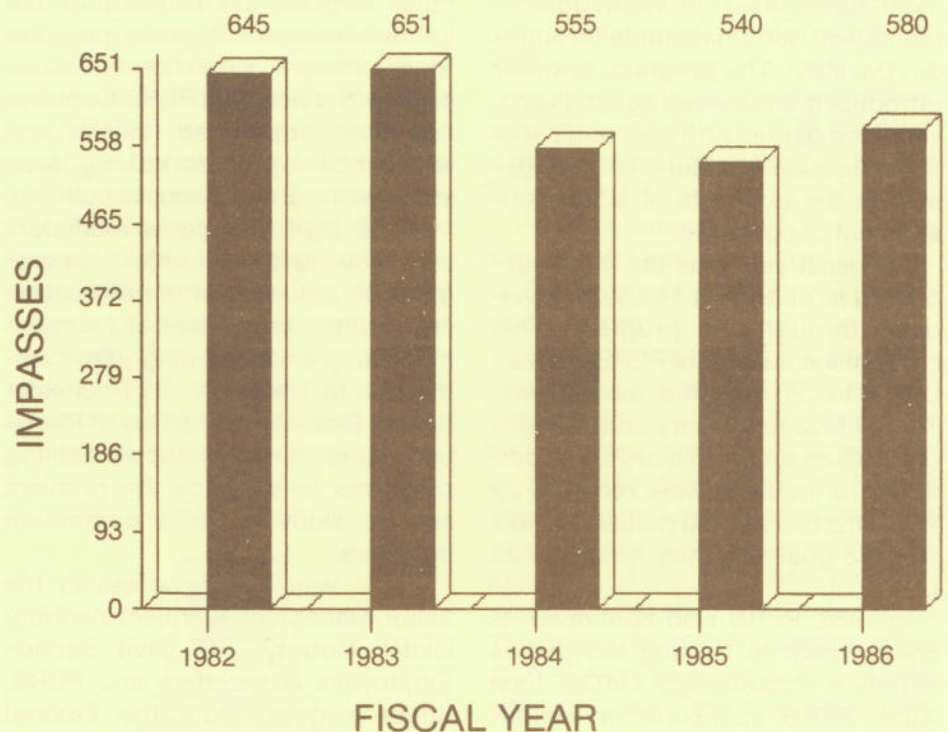
School districts continue to be the major arena for impasses. Slightly less than 60 percent of the agency's impasses occurred in school districts over the last three years with half of these being teacher unit impasses.

Last year there were impasses in some large State units in which PERB was involved, including the Office of Court Administration. Next year the

contracts of almost every major city school district will expire, as well as the contracts between the State of New York and the largest units of its employees.

An innovative approach to negotiations and possible impasse was taken by the Buffalo School District and its Teachers Federation. In an effort to reach agreement by June of 1987, when the present contract expires, the parties agreed, well before negotiations began, that if settlement were not achieved by March 1, they would request a mediator to assist them. PERB responded by appointing Ronald Kowalski, a long time member of the agency's panel of labor relations professionals. As this annual report goes to press, mediation efforts are in progress, with factfinding to begin on April 7, if agreement has not been reached.

IMPASSE TREND



Erwin Kelly Director of Conciliation, 1978-Present

As Director of Conciliation, it might be expected that 1983, PERB's year without strikes, would be my fondest memory. Indeed, that was a year of accomplishment — but the accomplishment was the work of the negotiators — and the glory is theirs.

My perception of what PERB is about comes in the mail each day — or by telephone. It is the request for a mediator in a county, town or village; it is the call that mediation did not resolve the dispute, please send more help; a labor management committee needs some training assistance or help to get established or, a union or management negotiator calls to announce that his side will accept a fact finder's recommendations, but not a critical one.

Twenty years later, our constituents continue to seek our help. They are confident that we can usually provide it. For us, it is a confidence we do not take lightly and we strive not to lose.



the position from the Ulster County Legislature. During a year of difficult contract negotiations, the project committee dealt with several sensitive issues, such as performance evaluation; withstood a number of personnel changes; and expanded into major departments of the county. Last May, project representatives from the county, CSEA and PERB attended a national conference in Washington, D.C. focusing on activities of such committees nationwide.

PERB's Director of Conciliation, Erwin Kelly, expressed a firm intention to continue support of the LMC program, characterizing it as "an intergral part of PERB's mission which is expected to have continued growth."

Labor-Management Committees

The Conciliation Office continued its aggressive initiative to encourage the development of labor-management committees in local governments and school districts throughout the state. The program, formally introduced three years ago, has provided the parties with staff and panel facilitators and trainers, knowledgeable in the concepts of labor-management cooperation.

This past year was the most successful to date, with 14 LMCs developed through the program. This brought the number of PERB assisted LMCs to 39 over the three years. These LMCs represent a cross section of PERB clientele. In March, an additional 70 inquiries were received by PERB from interested parties; PERB's 1987-88 goal is to help establish 25 LMCs.

In 1986, PERB also continued its commitment to helping the parties maintain established LMCs. Last April, PERB sponsored a well-attended conference in Utica which brought together members of the LMCs from around the State. High-

lights of the conference included presentations by Professor Michael Schuster, of Syracuse University, and Peter Regner, the Director of the Labor-Management grant program for the Federal Mediation and Conciliation Service. The PERB Conciliation staff conducted "hands on" workshops on problem solving, decision making and consensus building.

PERB staff and panel mediators are following up the conference program by assisting in the evaluation and facilitation activities of a number of existing and emerging joint committees. In areas like the Rochester School District and the City of Plattsburgh, they have conducted training programs to enhance the problem solving skills of joint committee members.

There was also progress in the Labor-Management Project involving Ulster County, the Civil Service Employees Association and PERB, under a grant from the Federal Mediation and Conciliation Service. The joint committee hired a full-time coordinator and received funding for

Transit Workers

In December 1986, the State Legislature extended to the Metropolitan Transportation Authority and its employees authorization for binding interest arbitration to resolve contract disputes. The MTA and the union representing a majority of the employees, Transit Workers Union, Local 100, were immediately brought under coverage. Other unions representing employees of MTA and its subsidiaries (except those covered by the Railway Labor Act), were given until March 1 to elect coverage by



Peter Regner of the Federal Mediation and Conciliation Service speaks at PERB's Labor-Management Conference in Utica.

Arbitration

PERB's arbitration workload declined modestly in 1986-87 compared to 1985-86, but still ran well ahead of previous years. Cases totaled 662 for 1986-87 compared to 715 the previous fiscal year. Both grievance arbitration cases and discipline cases involving New York State and Council 82 of AFSCME decreased; while interest arbitration cases in police and firefighter disputes increased.

ARBITRATION WORKLOAD

	82-83	83-84	84-85	85-86	86-87
GRIEVANCES	371	406	361	409	384
INTEREST-POLICE/FIREFIGHTER	52	48	49	36	39
OER/COUNCIL 82 DISCIPLINE	148	136	162	260	239
TOTALS	571	590	572	715	662

the arbitration procedures. Twenty-one unions of the 27, chose the new procedures.

The procedures in the new law are similar to arbitration procedures utilized in police and firefighter disputes. The law expires July 1, 1989.

Police and Firefighter Interest Arbitration

An analysis of some 219 contracts (198 negotiated, 21 settled by interest arbitration) indicates that in 1986 the negotiated salary increases statewide for police averaged 6.52 percent (just slightly ahead of arbitration awards which averaged 6.45 percent). For firefighters, negotiated increases averaged 5.81 percent and arbitrated awards averaged 5.78 percent. There was a significant difference between negotiated increases for police units downstate compared to upstate. Downstate negotiations averaged 7.2 percent in increases, whereas upstate negotiated increases averaged 6.0 percent. When comparing arbitrated awards in police units, both downstate and upstate were nearly identical — downstate averaging 6.4 percent and upstate averaging 6.5 percent. Information regarding firefighter contracts was insufficient to make the upstate/downstate comparison for firefighter units.

Decision Techtronics

PERB continued its cooperation with the Rockefeller College of Public Affairs and Policy in assessing the application of automated decision-making techniques to impasse resolution. While the technique was previously limited to laboratory experiments involving simulations, in 1986 the Conciliation staff, in a joint effort with the Rockefeller "Decision Techtronics Group," used the technique in an actual impasse involving a small group of administrators in an upstate school district. Cooperating with PERB in assessing the decision-making is Donald Straus, Director of the Research Institute for the American Arbitration Association and Howard Raiffa, Professor of Managerial Economics at the Harvard Business School. It is anticipated that with the cooperation of the parties, PERB will use the process again during the forthcoming year in a larger, more complex impasse.



The Robert D. Helsby Internship

PERB's 1986-87 Robert D. Helsby intern was Andrea S. Erickson of Jamestown. Erickson spent the fall semester at the agency's Albany office participating with labor relations professionals in mediation sessions and factfinding proceedings, and working with administrative law judges in processing improper practice charges and representation petitions.



Andrea Erickson

The intern program, in its fourth year, is a joint undertaking of PERB and the School of Industrial and Labor Relations at Cornell, established to honor the first chairman of PERB.

Students earn credits toward their degree from ILR and PERB provides a stipend to help meet living expenses in Albany.

Previous interns have been Mary Krause of Syracuse; John Tribolati of Staten Island; and Gary Chodash of Smithtown.

During her stay at PERB, Erickson prepared a report analyzing agency impasse data for 1985-86. Her analysis indicated that nearly 60 percent of the impasses brought to PERB involve school districts which in the year of the study accounted for 315 impasses of a total of 540. Erickson noted that the New York State United Teachers with 165 impasses, and the Civil Service Employees Association with 133, were the two unions involved in the most impasses. They are the largest unions in the public sector.

Representation, Improper Practices, Management/Confidential

Harvey Milowe **Director of Public Employment** **Practices and Representation,** **1976-Present**



Twenty years is a long time. Twenty years ago my picture in "PERB — Year One" showed a young man, one with brown hair. Twenty years under the Taylor Law has shown a similar maturing — a much kinder word than aging — of the relationship between government, union and the employees. We started as trailblazers and today, we remain in front. For this, certainly, some credit is owed to the staff who drafted the Rules and who decided the cases and established the precedents. But, would we not have been a "success" even with a less dedicated staff. I suspect so, because no matter what the actual words of the Law, there was a compelling need for such a law. The parties wanted it to work and the parties made it work. It is to them that the real applause is due.

The Office of Public Employment Practices and Representation processed 800 cases during the year covered by this report, in addition to those cases pending at the beginning of the period. A vast majority of the cases were settled or withdrawn without the need for formal adjudication by the parties. As the Board pointed out in its recent *Town of Henrietta* decision, the procedures utilized by this office are an integral part of "the search for settlement [which] is implicit in all our endeavors." However, more than 300 decisions were issued involving improper practice charges against unions and public employers, scope of negotiations, applications to designate employees as managerial or confidential, and the appropriateness of bargaining units. The most significant of these are outlined here.

"The parties wanted it to work and the parties made it work."

H. Milowe

Negotiations: **Duty and Scope**

A number of cases which reached the Board this year further developed issues previously raised and discussed by the Board regarding the duty to negotiate in good faith and the scope of negotiations.

In *Village of Sloatsburg*, the employer was faced with a dilemma: should it negotiate with the union which PERB had certified or with the union with which it had negotiated after that certification? While PERB had certified one union, that union, the employer and an affiliated local of the union thereafter acted on the assumption that the actual bargaining agent was the local affiliate, and a contract was reached between the employer and the affiliate. When the affiliate later disassociated itself from the parent union and sought negotiations under an affiliation with another parent union, the "certified" union sought, and was refused, negotiations by the employer. The Board found that the "certified" parent union had never intended to represent the unit itself and had consented to the

"recognition" of the local; PERB dismissed the charge that the employer had improperly refused to negotiate with it.

In *State of New York (SUNY at Binghamton)*, the Board ruled that a registration fee on all vehicles regularly using the campus facilities was a nonmandatory subject of bargaining, as the fee applied to the public at large in the same manner as it did to unit employees and, so, was totally unrelated to employment status. The at-issue fee affected a large number of individuals, most of whom were not public employees, and, of the small number of public employees affected, only a few were in the unit represented by the union bringing the charge. The Board cited a prior case in which fees for nonpromotional civil service exams were found to be a nonmandatory subject of bargaining (*State of New York* [1980]), and noted the language therein analogizing such fees to tolls on a public bridge. The Board distinguished two prior cases, in which free employee parking (*State of New York* [1973]) and free rides on a ferry (*City of New York* [1976]) were found to be mandatory subjects of bargaining, as both involved the removal of a prior exemption which had applied only to public employees. The Board noted that negotiation, upon demand, of an exemption from a public fee, would be mandatory.

Unatego CSD involved the employer's unilateral discontinuance of two health insurance plans and their replacement with another health insurance plan substantially different. The Board reviewed its major cases of 1983 regarding changes in health insurance plans: *City of Corning* and *City of Batavia*. In both cases, the Board noted, preexisting terms and conditions of employment were altered, creating the violations of the Act found therein. Neither case, the Board stressed, proposed that a change in health insurance must be negotiated under all circumstances. In *Unatego CSD*, the employer had

unilaterally decided in previous years, without objection from the bargaining agents of the affected unit employees, to make available the two plans offered by the State Employees Health Insurance Plan. When the State Plan replaced the two plans with one new plan, the employer did also. The Board found the past practice was the employer's participation in the State Plan, not the provision of any specific level or type of benefit, costs, or administration. As the employer's action was consistent with its past practice, no unilateral change occurred, the Board said.

Two interesting twists on the subject of the transfer of unit work to nonunit personnel were presented in *Town of West Seneca* and *New York City Transit Authority*. The exclusivity criterion was the main focus of *Town of West Seneca*. In the past, the employer hired nonunit seasonal employees in the sanitation and highway departments during summer vacations. Such hiring facilitated both the unit employees' vacations and their temporary transfer to the highway department, where they received higher wages. At issue in the case was the employer's hiring of nonunit "seasonals" for a January to May "season." These employees were paid less than unit employees but more than the summer seasonals, and some were rehired at the end of May for a new "season." The Board found that the employer had broken the perimeter of the limited past practice, notwithstanding the absence of job loss by existing unit employees. In the absence of evidence that the tasks or the job qualifications had substantially changed, the employer's assignments to the nonunit employees were improper.

New York City Transit Authority concerned the transfer of unit work for only one day. Following freezing weather, the employer's buses would not start. The employer utilized employees of another employer to move and start the buses. The Board rejected the employer's arguments that unit employees were not qualified to perform the specific tasks in question.

Nor did its claim of an emergency prevail, as it allowed substantial time to elapse before calling in nonunit employees, without utilizing or attempting to call in extra unit employees. The employer's assertion that no violation should be found as the harm, if any, was *de minimis* was rejected as irrelevant to a determination whether the Act had been violated, and instead was considered in fashioning a remedy. The Board did not order back pay, finding that the impact on individual employees was relatively inconsequential and that the record did not afford an adequate basis for determining which employees should be compensated.

The Board also rejected a claimed emergency as justification for subcontracting unit work in *Wappingers CSD*. The Board said that the employer was aware of the "emergency" for a substantial time before it subcontracted out its busing service for handicapped students but never sought to negotiate the issue with the affected union.

And, in *Otselic Valley CSD*, the Board reemphasized that the essential bases for a finding that unit work has been improperly transferred are that (a) the work had been exclusively performed by unit employees and (b) that the reassigned tasks are substantially similar to those previously performed by the employees.

Further refinement in the areas of sick leave and discipline occurred in *Poughkeepsie CSD*. The employer notified unit employees that use of more than 10 of the 15 days of sick leave available under the parties' collective bargaining agreement or use of sick leave in conjunction with weekends and vacations, in the absence of medical documentation, would be considered sick leave abuse and could result in disciplinary action.

The Board found no impropriety, stating that the employer has an inherent right to monitor use of employees' leave. The employer did not create a new work rule as it did not make the taking of sick leave without medical documentation a chargeable offense in and of itself.

In *Camden CSD*, the employer created a new work rule — that coaches could not chew tobacco while coaching students. Citing its prior decision in *Steuben-Allegany BOCES*, the Board stated that where students are present, the balance of interest shifts in favor of the employer and a management prerogative is established.

Loss of compensation, transportation, and other benefits was at issue in *State of New York (Dept. of Correctional Services)*. There, the employer terminated its practice of transporting certain employees daily from a reporting site to and from a distant job site, and also discontinued compensation and other benefits, such as workers' compensation coverage and disability leave benefits, previously provided to cover the trip. Instead, it required the employees to report directly to the work site. The employer did not change the services offered by the employees at the job site in question. The Board, in determining that the employer had violated the Act, found that the principal intent of the employer and the predominant effect of its action was to curtail the employees' economic benefits.

"When parties agree to restricted-purpose leave . . . the employer has an inherent right to monitor . . . employees who avail themselves of such leave . . ."

The duty of a union's negotiator to support ratification of an agreement reached in negotiations was addressed in *Bethlehem PBA*. The Board reiterated earlier case law that negotiators are obligated to support ratification unless they have advised the other party that they would not. By failing to do so, the union lost its right to obtain membership ratification. A union's refusal to bargain with respect to an employer's proposals because they were no "in precise contract language," as required by contractual ground rules, was found to be a violation of its duty to negotiate in *Addison Teachers Assn.* The Board held that the employer's proposals were clear and comprehensible, and that the failure to utilize "precise language" did not constitute a waiver of its right to negotiate.

Finally, in two decisions on the scope of negotiations involving *Teamsters, Local 687*, the Board held that a demand for binding interest arbitration is a nonmandatory subject of bargaining. The Board noted that this conclusion is in accord with private sector decisions of both the National Labor Relations Board and the courts. While it is the public policy of New York State that parties reach agreements regarding terms and conditions of employment, there is no public policy regarding agreements on the process of negotiations, including procedures for the resolution of negotiations impasses. The Taylor Law merely affords parties the opportunity, not the duty, to devise alternatives to the comprehensive procedures already provided in the statute.

"... negotiators are obligated to support ratification unless they have advised the other party that they would not."

Triborough Amendment

The "Triborough Amendment" to the Taylor Law (1982), makes it improper for a public employer "to refuse to continue all the terms of an expired agreement until a new agreement is negotiated . . ." Several cases decided by PERB this year involved that amendment.

Under Triborough, if the union opposes the imposition of terms and conditions of employment resulting from interest arbitration or a legislative determination, the Board has in the past held (*County of Niagara* (1983) and *City of Kingston* (1985)) that terms and conditions of employment reflected in an expired agreement may not be changed by the arbitration award or the legislative determination. In *City of Buffalo*, however, the Board found that a union had acquiesced to a legislative imposition which would not "diminish any of the benefits contained in the expired collective bargaining agreement." Finding no evidence of such diminution of benefits, the Board dismissed a charge that the legislative action violated the statute.

In *Board of Education of the City School District of the City of New York*, expired agreements contained a provision requiring negotiations concerning "proper subjects for collective bargaining" not otherwise covered by the agreements. The Board held that the employer failed to continue that term of the expired agreements when it imposed new financial disclosure and background reporting requirements upon unit members without prior negotiations, because certain aspects of the new disclosure requirements were "proper [mandatory] subjects for collective bargaining". Imposition of requirements beyond those mandated by applicable local law also was found to be a violation.

Discrimination

In *New York City Transit Authority*, the employer disciplined an employee, who was also a union delegate, because he filed a complaint with the local fire department and attempted to photograph an allegedly unsafe work area to support his complaint. The Board rejected the Authority's claim that the employee's behavior violated the employee manual which prohibited conduct creating adverse criticism. The Board found the delegate's conduct to be protected activity, and ruled that disciplinary charges stemming from such activity restrains employees from seeking remedies for perceived inadequacies or improvement of conditions affecting work safety.

In *Town of Hempstead*, the employer told a unit employee, whose request for a task reassignment had been denied, that the matter would have been decided differently if the employee had not brought the union president with him when he made the request. The Board found the statement to be inherently destructive of the employee's Taylor Law rights.

In *Connetquot CSD*, the Board reaffirmed its 1982 *County of Suffolk* holding that an employer's unilateral provision of a benefit greater than that called for in the collective bargaining agreement is improper.

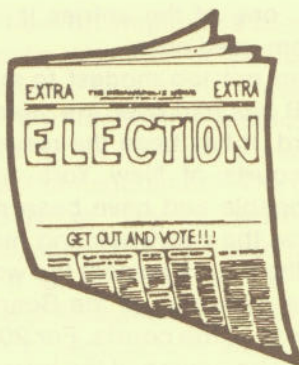
In *Brunswick CSD*, during a grievance hearing, the employer extensively questioned an employee about a matter unrelated to the grievance. As it bore no relationship to the

merits of the grievance and was relevant only to the possibility of future disciplinary charges, the Board held that such questioning has a chilling effect on the right to prosecute grievances. In *Chateaugay CSD*, the Board held that when the employer sent a letter to teachers which barred them from commenting on negotiations or labor relations at an event conducted by the union on the employer's property, it did not interfere with Taylor Law rights. Relying on its 1985 *Charlotte Valley* decision, the Board said that access to the employer's property for the purpose of communications with the public regarding negotiations disputes is not a protected right.

In *City of Rochester*, an employee applied for a vacant position. The application was approved on the condition that he resign his union position, and thus relinquish a contractual right to full release time, and agree not to accept any union position which would make him eligible for such release time for two years. The Board, relying on an earlier holding in *New York City Environmental Protection Agency*, found that while the employer could deny a promotion because an employee chose to avail himself of full release time and was thus not prepared to perform the job duties, to require the employee to resign his union office as a condition for the promotion interfered with Taylor Law rights.

In *County of Suffolk and Suffolk County Sheriff's Office*, a union official was told by one of four members of a promotion committee that he had been denied a promotion because his union activities would preclude him from being fully available to perform the job and created a potential conflict in exercising its supervisory responsibilities. The Board found that while the record did not establish that the union official would have been promoted but for his union activities, the perceptions of conflict between his union activities and job responsibilities by one of the committee members had been a factor in his evaluation and thus tainted the selection process. The

Board ordered the employer to conduct a new review of the applicants, without regard to union activities.



Representation

The effect of joint employer status on unit structure was again addressed by PERB in *Town of North Castle*, in which the Board distinguished earlier decisions in which it had held that deputy sheriffs employed by joint employers (county and sheriff) were entitled to a separate unit. The Board held that although employees of improvement and special districts also were employed jointly by a town, such joint employer relationship did not necessarily imply that a separate unit structure was appropriate for these employees. It found that, unlike the county-sheriff situation, there were officials of the involved districts and the town "who function at the level of a negotiating unit comprising the employees of both entities . . ."

In another fragmentation case involving sheriff's department employees, *County of Albany and Albany County Sheriff*, the Board reiterated its position that the "law enforcement" duties and responsibilities of deputy sheriffs and correction officers created a community

of interest which was not overcome by the fact that the deputy sheriffs performed police duties and the correction officers did not. The Board also ruled that the petitioner had failed to establish its allegation of inadequate or ineffective representation as a basis for fragmentation.

In *City of Schenectady*, the employer sought to fragment another type of law enforcement unit. The Board declined to remove captains and lieutenants from a department-wide police unit, which excluded only chiefs and assistant chiefs, finding that their authority, especially in labor relations, was severely limited and that their level of supervision was not sufficiently high to warrant fragmentation. The Board continued to apply the criteria for fragmentation of supervisors which it established in *County of Ulster*.

In *Merrick Union Free School District*, the Board applied its previous criteria to determine whether seasonal employees are "casual" employees or "public employees" to representation. The three-part test requires that to be entitled to representation, employees (1) must be employed at least six weeks a year, (2) must be employed at least 20 hours a week, and (3) at least 60 percent of the employees must return for at least two successive years. The petitioner contended that the third standard should not be used with respect to summer school employment unless it is shown that the employees have refused to return. Otherwise, the petitioner argued, the return rate standard gives the employer an unfair advantage because it is controlled entirely by the employer's hiring practices. Finding that such manipulation by the employer, if done for the purpose of depriving employees of organizing rights, could be addressed in the improper practice forum, the Board rejected this argument. It found that the uncertainty inherent in seasonal employment was a primary reason for the application of its objective standards. It thus dismissed the petition because the return rate of the summer school staff in the prior two years was less than 60 percent.

The third criterion of the public or casual employee test was clarified in *BOCES I, Suffolk County*. The petitioner asserted that because the summer school teachers it sought to represent had a return rate exceeding 60 percent in two of the last three years, the criterion had been satisfied. The Board held that the determination of public employee status "must be based on the most current status of the employees," which it found to be "the two most recent successive years preceding the petition."

Management/ Confidential

The managerial status of high ranking public safety personnel continued to be a subject of litigation. In *City of Jamestown*, the Board designated four assistant fire chiefs as managerial. While there was no evidence that the assistant chiefs had in the past performed functions which could be characterized as managerial, as the result of a reorganization the chief intended to give them negotiation and contract administration responsibilities. Since the assistant chiefs were second in command, the chief's intention to use them in such capacities was reasonable and their managerial designation based on such future services was warranted.

PERB NEWS

New York State
Public Employment Relations Board
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Published monthly by PERB
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In this age of computerized records, we produce in Counsel's Office a monthly printout of proceedings instituted in court to review Board decisions. Under the heading "disposition", one of the entries is "annulled". It is a seldom-used entry.

I am not too modest to suggest that the capable legal staff which PERB has had over the years is, to some extent, responsible for that record. It has been the responsibility of Counsel's Office to convince the courts of New York State that the rulings of the Board are reasonable and have been made by a responsible neutral agency. I believe the overwhelming number of entries of "confirmed" evidence that the courts respect the work of the Board.

The decisions of the Board are, of course, the real reason for our success in the courts. For 20 years, those decisions have evidenced a careful balancing of the interests of the employers, employees and the public. They have rationally interpreted the statute. They reflect dedication to the spirit of the Taylor Law. Most importantly, however, they have consistently been the honest product of honest men and women who have taken seriously their responsibilities as public officials.

The Taylor Law and The Courts

Represented by its Counsel's Office, PERB was a party to 42 court proceedings this last year. Twenty of these cases were concluded. As part of its litigation function, it was necessary for Counsel's Office to conduct eight investigations to determine whether there had been compliance with particular orders of PERB.

There were several important Taylor Law cases including one involving the duty of fair representation to which PERB was not a party.

Duty of Fair Representation

The giving of incorrect advice does not breach the duty of fair representation even where the consequences of heeding the advice are severe. That was the holding of the Court of Appeals in a case involving

a plenary suit for damages against a union. In *Smith v. Sipe, as President of Council 82, AFSCME, AFL-CIO*, the complaint alleged that the plaintiff had been denied reinstatement by his employer within one year after resigning from his employment to avoid suspension pending the outcome of a criminal investigation. The complaint further alleged that the plaintiff resigned in reliance upon the union president's incorrect advice that he was entitled to get his job back at any time within one year if the investigation did not result in a criminal conviction. The union moved to dismiss the complaint for failure to state a cause of action. It thereby admitted all of the complaint's material allegations. The court granted the motion, holding that the negligent giving of bad advice "was not the type of invidious, arbitrary or bad-faith conduct which the duty of fair representation was created to

prevent, and that even in those cases where negligence was held to breach the duty of fair representation, the negligent conduct of the union was more significant than merely the giving of incorrect advice."

In *United Federation of Teachers v. PERB*, the Appellate Division, First Department, confirmed without opinion a PERB determination which held that a union breached its duty of fair representation by advising nonmembers that it would not represent them at disciplinary proceedings or improper practice proceedings before PERB during the period when its right to agency shop fee deductions had been suspended for engaging in a strike. The heart of PERB's holding was that a union that is the exclusive representative of a negotiating unit "may not discriminate between members and nonmembers, but must represent them equally with respect to all job-related benefits."

"...because the ... purpose was destruction of job security procedures ... the unilateral change ... constituted improper coercion."

Agency Shop Fees

The Taylor Law requires that in order to collect agency shop fees, a union must maintain a procedure to protect non-members from contributing to causes of a political or ideological nature only incidentally related to terms and conditions of employment. Last year, the Supreme Court, Albany County, in *Bodanza v. PERB*, upheld PERB's determination that while it has jurisdiction to oversee the procedures, it does not have jurisdiction to determine the correctness of the amount allocated for political or ideological purposes. The

Appellate Division, Third Department, has since affirmed and the Court of Appeals has denied leave to appeal.

Interest Arbitration

Where an employer's conduct (in this case reduction of the number of employees on a shift) is authorized by its contract with the union, is the impact of its conduct a mandatory subject of negotiation? The Court of Appeals, in *City of Newburgh v. PERB*, upheld PERB's determination that it is, and that, in the case of police or firefighters, impasses arising in such negotiations are subject to interest arbitration.

The court concluded that because the contract was silent with regard to the parties' rights with respect to the impact of the employer's conduct, there was nothing that the union could grieve nor any provision under the agreement which an arbitrator could interpret or apply. The dispute, therefore, was not covered by the contract and was not subject to grievance arbitration. The court reasoned that otherwise unions would be "required to assume a collective bargaining position which anticipated all management decisions that might be made during the life of a contract and the impact such decisions would have on terms and conditions of employment". The court concluded that "negotiations over such speculative matters could only impede the bargaining process by provoking bargaining over issues that might never arise."

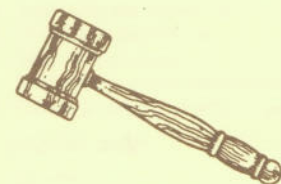
Seniority

In *Dutchess County BOCES v. PERB*, the Appellate Division Second Department, upheld PERB's determination that seniority as a basis for assignment is a mandatory subject of negotiation so long as it does not interfere with the employer's managerial prerogative to establish qualifications for the position.

Interference

The Taylor Law guarantees public employees the right to "form, join or participate" in unions or to refrain from doing so. It also guarantees them the right to be represented by employee organizations in collective bargaining. Moreover, the statute provides that it is an improper practice to interfere with those rights. In *County of Monroe v. PERB*, the Appellate Division, Fourth Department, sustained a PERB determination that an employer's interference with the right to negotiate has a chilling effect on the right to participate and, therefore, violates the law.

The improper practice provisions of the Taylor Law are patterned after the unfair labor practices of the National Labor Relations Act. There are differences, however. One is that while both the NLRA and the Taylor Law guarantee employees the right to form and belong to unions, the NLRA also guarantees them the right "to engage in concerted activities for the purposes of collective bargaining or other mutual aid or protection." In *Rosen v. PERB*, the Appellate Division, Second Department, agreed with PERB that this difference in language evidenced an intent by the New York State Legislature not to protect concerted activity that falls short of an attempt to form, join or participate in a union. The Court confirmed PERB's determination that an employer did not commit an improper practice by taking action against a teacher who had made job related complaints with the knowledge and consent of some other teachers after they had discussed their concerns among themselves.



Review of Intermediate Jurisdictional Determinations

Although the Taylor Law precludes review of intermediate determinations in PERB's representation proceedings, the Court of Appeals, in *State of New York (Insurance Department Liquidation Bureau) v. PERB*, has held that PERB's threshold jurisdictional determination that an employer is a public employer and, therefore, subject to the Taylor Law,

may be reviewed before the proceeding is completed. In so holding, the court reversed an Appellate Division decision. It did so on the basis of the dissenting opinion at that court, which reasoned that it would not be fair to compel the employer to have to participate in the entire proceeding before seeking review.

Triborough

The Supreme Court, Albany County, *CSEA v. PERB*, did not agree with a Board ruling that held "... the rights and obligations ... set forth in a collective bargaining agreement ... terminated" when the composition of the unit had been significantly changed. The court ruled that when a union is successful in moving some employees into a separate unit, the "Triborough" obligation "to continue all the terms of an expired agreement" is applicable to both units.

Arbitration Day in New York City

A seminar focusing on interest arbitration will be held on May 7 in New York City, conducted by the American Arbitration Association and co-sponsored by the Public Employment Relations Board and a host of other organizations.

The seminar will be part of the AAA's annual "Arbitration Day" program held at the New York Hilton Hotel.

Interest arbitration in private and public sector labor relations will be examined by a host of speakers including Dean Robert E. Doherty of the New York State School of Industrial and Labor Relations.

Other speakers are James W. Mastriani, Chairman of the New Jersey Public Employee Relations Commission; Howard Solomon, Executive Director of the Federal Service Impasses Panel; and arbitrators William Hockenberry, Jack Tillem and Gladys Gershenfeld.

For further information, write to "Arbitration Day," American Arbitration Association, 140 West 51st Street, New York, NY, 10020-1203, or call (212) 424-3233.

Strikes

There were two decisions by the Board in strike proceedings upon charges issued by Counsel's Office. The Board imposed a five month suspension of the dues and agency shop fee check-off rights of the Mt. Markham Teachers Association for its admitted participation in a three day strike. A three month suspension was imposed against the Cold Spring Harbor Teachers Association for its admitted participation in a one day strike.

PERB Newsletter
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