

PERB NEWS

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2001-2002 RECAP

Throughout the 2001-2002 fiscal year, PERB has continued its efforts to increase efficiency and accessibility to its constituency. PERB's collective bargaining impasse caseload reached its high point this decade in 1992-93 and has since declined to fewer than four hundred cases per year. More impasses have been resolved than filed in each of the past five fiscal years. As a result, there are very few long-standing (more than one year) impasses in the state.

The improper practice charge caseload reached its high point of 1,193 cases in 1997-98 and has since declined to 799 cases received in 2001-02. However, the number of improper practice charges filed in the first five months of fiscal year 2002-03 (403) represents a 42 case increase from the 361 filed in the same period last year. It is expected that this upward trend will continue for the remainder of this fiscal year. Since fiscal austerity has a tendency to increase labor relations friction, it is possible that this upward trend may be signaling that more difficult times lie ahead for dispute resolution.

At the same time that the improper practice caseload was declining to historic lows, the cases received for litigation by Counsel's office have shown a remarkable decrease to about one-third the average level experienced over the past decade. However, early indications for 2002-03 would indicate that here, also, the rates are again turning upward.

The only strike last fiscal year involved fire fighters in the City of New Rochelle who staged a "sick out" on several days. Public inconvenience was limited to calling-in additional fire fighters on overtime. The Board imposed a six-month suspension of the union's dues deduction privileges.

While the New York City Teachers and Police contract settlements were the subjects of intense negotiating efforts and extraordinary media attention in the early months of 2002-03, the purposes of the Taylor Law have been upheld with peaceful settlements and no work stoppages. Throughout this period, PERB has continued to modernize our client services, increase individual productivity and accelerate the disposition of charges brought to us for resolution and adjudication.

Decision times:

Continuing a trend begun several years ago, we have again reduced the amount of time needed to process a case to record low levels. For fiscal year 2001-02, it took an average of 155 days to process a case to closure. This is a reduction from the 226-day average the prior fiscal year and the 261-day average the fiscal year prior thereto.

We place great emphasis on the full utilization of pre-hearing settlement efforts in furtherance of our belief that the parties and the agency are best served by reducing time-consuming and expensive litigation. Our efforts have contributed, in part, to the lowest number of improper practice cases carried forward at the end of the fiscal year in over a decade.

Outreach:

We continue to collaborate with educational institutions, professional organizations and with the Bar Association throughout the state to provide educational outreach and training to labor law practitioners. Over 850 individuals participated in programs with PERB staff as presenters during 2001-02.

In keeping with our more traditional roles of client outreach, we have continued to update our printed publications, including the *Mandatory/Nonmandatory Subjects of Negotiation*. An updated version of the 1997 edition of *The Taylor Law* is being readied for publication and will reflect all legislative action from 1997 through 2002. We are currently marketing a new publication entitled *The Taylor Law and the Duty of Fair Representation*, PERB's latest effort to assist the thousands of public employers, the approximately 4,350 bargaining units and the approximately 950,000 public employees in understanding their rights and obligations under the Taylor Law.

We continue to make PERB forms available on diskette and on-line and offer the monthly *PERB News* and subscription service to *PERB Advance Decisions* to our constituency electronically.

PERB decisions are available on Westlaw and Lexis/Nexis and summaries are available on our website.

The annual publication of *The Official Opinions and Decisions of the Public Employment Relations Board* is marketed in a CD-ROM version in addition to the traditional printed volume.

In our ongoing effort to educate our clients and publicize our services, our Internet web site continues to be a two-way vehicle for communication with our constituency. The web site features answers to questions frequently asked about the Taylor Law, provides access to PERB's departments and individual staff members, offers synopses of current decisions, includes petitions and other official forms which can be downloaded, and provides an order form for our publications and educational outreach programs.



PERB NEWS

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BOARD CERTIFICATIONS

TEAMSTERS LOCAL 294, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AFL-CIO has been certified to represent employees of the Village of Tannersville in the titles of laborers and working foreman. All other employees are excluded. (C-5220, 10/2/02)

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 808 has been certified to represent all employees of the Metropolitan Transportation Authority in the job titles of telephone operator/receptionist, communications operator, clerk-typist, clerk messenger, file clerk, accounting clerk (all grades), senior accounting clerk, accounting clerk-budget, payroll accounting clerk, chief mail clerk, messenger, executive secretary, secretary, secretarial assistant, tape librarian, accounting clerk assistant, I/O control clerk, senior I/O control clerk, senior I/O control-data management, computer operator, lead computer operator, word processing operator and bursting decollating clerk. All other employees are excluded, including the shift supervisor (Data Center), operations supervisor (Data Center) and confidential personnel of the employer. (C-5218, 10/2/02)

IMPROPER PRACTICES

NEW YORK STATE SUPREME COURT OFFICERS ASSOCIATION, ILA, LOCAL 2013, AFL-CIO AND STATE OF NEW YORK (UNIFIED COURT SYSTEM) AND NEW YORK STATE COURT OFFICERS ASSOCIATION. The Board denied the interlocutory appeal made by the NYS Supreme Court Officers Association (SCOA) seeking review of an Administrative Law Judge's granting of intervenor status to the NYS Court Officers Association and the ALJ's denial of SCOA's motion that the ALJ recuse himself. Applying the standard of review for interlocutory appeals, the Board found that there were no extraordinary circumstances or evidence of severe prejudice presented sufficient to invoke the Board's jurisdiction. (U-23131, 10/2/02)

LYRIC P. SMITH AND ORGANIZATION OF STAFF ANALYSTS. The Board affirmed the decision of the ALJ dismissing Smith's improper practice charge alleging that the Organization of Staff Analysts (OSA) violated the Act by failing to respond to a letter. Finding that Smith had failed to prove as part of his direct case that OSA had acted in an arbitrary or discriminatory manner or in bad faith, the ALJ granted OSA's motion to dismiss. The Board concurred, noting that OSA had adequately responded to Smith's inquiries on several levels. (U-23181, 10/2/02)

TRANSPORT WORKERS UNION OF AMERICA, LOCAL 100 AND NEW YORK CITY TRANSIT AUTHORITY. The Board affirmed the decision of the ALJ finding that the Transit Authority violated §209-a.1(a) of the Act when it

denied an employee's request for union representation while he was required to write a statement in the presence of his supervisors responding to allegations of workplace misconduct. The Board found that the reasoning of the United States Supreme Court in *NLRB v. Weingarten* was applicable to employees covered by the Act. Finding that a request for union representation at an investigatory interview was a clear expression of participation in an employee organization protected by §202 of the Act, the Board determined that the Authority violated the Act when it required an employee to respond to a workplace incident inquiry in a closed room in the presence of his supervisor without union representation. (U-22551, 10/2/02)

NEW YORK STATE CORRECTIONAL OFFICERS AND POLICE BENEVOLENT ASSOCIATION, INC. AND STATE OF NEW YORK (DEPARTMENT OF CORRECTIONAL SERVICES – GROVELAND CORRECTIONAL FACILITY). The Board reversed the decision of the ALJ and found that the State did not violate §209-a.1(d) of the Act when it unilaterally terminated a practice at the Groveland Correctional Facility of allowing unit employees at the facility to convert sick leave absences to vacation leave without prior approval. Finding that a past practice that involves an issue of unit-wide concern, such as time and attendance, is a practice that affects the unit as a whole, the Board determined that the evidence did not establish an unequivocal, enforceable past practice that unit employees could reasonably expect to continue and dismissed the charge. (U-22223, 10/2/02)

POLICE BENEVOLENT ASSOCIATION OF THE NEW YORK STATE TROOPERS, INC. AND STATE OF NEW YORK (DIVISION OF STATE POLICE). The Board partially affirmed and partially reversed the decision of the ALJ on an interlocutory appeal by the State in which it argued that the ALJ erred in reaching the merits of the case rather than deferring the charge to binding arbitration. The charge alleged that the State violated §§209-a.1(a) and (d) of the Act when it denied the PBA access to an employee during an investigatory interview. The ALJ determined that he needed to decide whether the Supreme Court's decision in *NLRB v. Weingarten* applied to public employees covered by the Act in deciding whether the matter could appropriately be deferred. The Board found that it was unnecessary for the ALJ to reach the merits of the charge in making a deferral decision because the Board retains jurisdiction of the entire charge unless an alleged violation of §209-a.1(a) of the Act is purely derivative of an alleged §209-a.1(d) violation. As the charge arguably made out a §209-a.1(a) violation that was independent of the alleged §209-a.1(d) violation, deferral was inappropriate and the matter was remanded to the hearing ALJ for further processing. (U-22830, 10/2/02)

NYS PUBLIC EMPLOYMENT RELATIONS BOARD ACTIVITIES

Fiscal Years 1997-98 — 2001-02

Activity	1997-98	1998-99	1999-2000	2000-01	2001-02
Conciliation					
Negotiating Units	4,170	4,232	4,263	4,310	4,350
Contracts Negotiable	2,589	2,496	2,422	2,377	2,250
Settled or Negotiations Continue Without Third-Party Assistance	2,154	2,105	2,050	2,042	1,910
Brought to PERB for Assistance	435	393	372	335	340
Impasses Resolved					
Settled by Mediation	340	317	291	234	254
Settled by Mediation by Fact-finder	28	23	30	26	14
Settled by Negotiations Based on Fact-finding Report	38	38	26	23	13
Settled by Acceptance of Fact-finding Report	4	7	4	6	8
Settled by Post Fact-finding Conciliation	9	16	8	9	5
Settled by Arbitration	24	27	20	10	13
Closed for Other Reasons	47	47	38	28	34
Representation					
Petitions Received	110	115	115	114	171
Director's Decisions	37	31	35	31	29
Board Decisions	16	24	12	8	9
Board Certifications	29	38	30	31	27
Petitions Withdrawn	69	78	73	61	111
Elections	17	19	14	14	11
Employees Involved	855	2,871	25,754	1,580	1,901
Clarification/Unit Placement Cases					
Cases Pending at Beginning of Year	33	42	29	46	31
Applications Received	83	54	89	68	67
Director's Decisions	14	12	17	22	6
Board Decisions	1	4	5	5	1
Withdrawn After Conference	59	48	58	53	45
Cases Pending at End of Year	42	29	46	31	49
Improper Practices					
Cases Pending at Beginning of Year	703	613	515	411	366
Charges Filed During Year	1,193	943	865	925	799
Administrative Law Judge Decisions	236	168	170	159	104
Board Decisions	65	99	61	50	22
Charges Settled by Agreement, Withdrawn or Closed	982	875	796	770	691
Cases Pending at End of Year	613	515	411	366	405
Management/Confidential Cases					
Cases Pending at Beginning of Year	19	17	14	21	16
Applications Received	40	44	46	42	30
Director's Decisions	28	35	27	35	23
Board Decisions	2	1	1	0	2
Withdrawn After Conference	12	10	10	11	10
Cases Pending at End of Year	17	14	21	16	14
Work Stoppages					
Strikes	0	2	2	3	1

REPRESENTATION

TEAMSTERS LOCAL 264 AND TOWN OF CHEEKTOWAGA. The Teamsters' petition seeking to be certified as the representative of a unit of eight unrepresented part-time court officers was dismissed, where the Town objected to the creation of an additional bargaining unit and asserted the title was appropriately placed in the existing blue and white collar employees' unit represented by the Town of Cheektowaga Employees Association (TCEA), and a community of interest was found to exist among the court officers and the other court employees in the TCEA unit. The TCEA agreed to represent the title if placed in its unit, and, although the petition had been filed during a period when the TCEA unit was not open to challenge, the Town and the TCEA waived the period of unchallenged representation, and the title was placed in the TCEA unit. (ALJ Fitzgerald, C-5153, 9/30/02)

UNIT CLARIFICATION

PUBLIC EMPLOYEES FEDERATION, AFL-CIO AND STATE OF NEW YORK. The Director of Public Employment Practices and Representation added the title of Forester 4 to PEF's professional, scientific and technical unit. (Director Klein, CP-533, 9/4/02)

UNITED PUBLIC SERVICE EMPLOYEES UNION AND COUNTY OF ONEIDA AND MOHAWK VALLEY COMMUNITY COLLEGE. The ALJ dismissed a petition for unit placement. Because a petition for unit placement is a "mini-representation proceeding", the appropriateness of the unit was placed in issue. Here, noting that the at-issue employees appear to share a significant community of interest with those in the existing unit, the ALJ held that the existing (and, therefore, the proposed) bargaining unit was inappropriate, as a matter of law. The ALJ dismissed the petition because the existing unit includes employees who are employed by both the County and a joint employer, comprised of both the County and the College. (ALJ Quinn, CP-793, 9/13/02)

CIVIL SERVICE EMPLOYEES ASSOCIATION, INC., LOCAL 1000, AFSCME, AFL-CIO, WAYNE COUNTY LOCAL 859, TOWN OF ONTARIO BLUE COLLAR UNIT 9111 AND TOWN OF ONTARIO. CSEA's unit clarification petition was dismissed as the recognition clause of the parties' agreement excluded salaried personnel. The unit placement petition went forward, however, as PERB is not bound by the agreement of the parties with regard to unit composition. The title of Assistant Building Inspector/Maintenance Mechanic was found to share a community of interest with employees in the blue-collar unit and, thus, was placed therein. The Town's defense that the person encumbering the title was a public officer and not a public employee was dismissed, as was the defense that the employee was managerial or confidential. (ALJ Doerr, CP-798, 10/07/02)

MANAGEMENT/CONFIDENTIAL

UNITED SOUTHAMPTON EDUCATION OFFICE PERSONNEL, NYSUT, AFL-CIO AND SOUTHAMPTON UNION FREE SCHOOL DISTRICT. Where the administrative assistant has a confidential relationship to the Superintendent of Schools and the Assistant Superintendent for Business in their performance of managerial responsibilities, a confidential designation was warranted. (ALJ Cacavas, E-2285, 9/30/02)

TOWN OF ULSTER. The ALJ found that the Town's municipal bookkeeper performs duties warranting her designation as confidential. In particular, the bookkeeper's intimate knowledge of the Town's anticipated revenues and expenditures exposes her to the Town's plans with respect to labor relations. (ALJ Quinn, E-2267, 10/17/02)

RUSH-HENRIETTA CENTRAL SCHOOL DISTRICT. The Secretary I to the District's Director of Human Resources was designated as confidential in accordance with the criteria set forth in §201.7(a) of the Act, as the factual averments in the application and supporting documents justified the designation. The Union that represents the Secretary I designated did not oppose the application. (ALJ Doerr, E-2276, 10/18/02)

PENFIELD CENTRAL SCHOOL DISTRICT. The Administrative Assistants in the District's Personnel Office, Business Office, Superintendent's Office and Business Office were designated confidential in accordance with the criteria set forth in §201.7(a) of the Act as the factual averments in the application and supporting documents justified the designations. The union that represents the titles designated did not oppose the application. (ALJ Doerr, E-2277, 10/18/02)

CITY OF PLATTSBURGH. Giesele LaClair, Stenographer to the Mayor of the City of Plattsburgh, was designated as confidential in accordance with the criteria set forth in §201.7(a) of the Act as the factual averments in the application and supporting documents justified the designation. The union that represents the stenographer consented to the designation. (Director Klein, E-2269, 10/25/02)

IMPROPER PRACTICES

LOCAL 287, IAFF, UNIFORMED FIREFIGHTERS ASSOCIATION, AFL-CIO, CITY OF LONG BEACH AND CITY OF LONG BEACH. The ALJ dismissed the charge, submitted on the basis of a stipulated record, alleging a violation of §§209-a.1(a), (b) and (c) of the Act. The basis of the violations alleged was that the City barred the Association president from department premises after he was suspended from service for alleged disciplinary infractions. A clause in the parties' collective bargaining agreement permitted the Association to use an office in the department for union business. The ALJ held that, in light of the parties' stipulation that the fire commissioner issued this directive because of potential liability

concerns, the Association could not sustain its burden of proof that the directive was issued because of the president's protected activity. Additionally, absent improper motive, the Association could not demonstrate that the directive unlawfully interfered with the Association. The specification alleging a violation of §209-a.1(b) was dismissed since no evidence was submitted to demonstrate that the City sought to, or in fact did, compromise the Association in its role as collective bargaining representative. (ALJ Maier, U-22960, 9/9/02)

MONROE COUNTY SHERIFF POLICE BENEVOLENT ASSOCIATION, INC. AND COUNTY OF MONROE AND SHERIFF OF MONROE COUNTY. The County and the Sheriff were found to have violated §209-a.1(c) of the Act when, following the PBA's rejection of the fact finder's report and recommendation, the President of the PBA was denied a second release day per week for the conduct of union business. The necessary animus for a finding of a violation was established by the timing of the event and the employer's wholly pretextual business justification for the act complained of. (ALJ Doerr, U-22122, 9/11/02)

HARRY JOSEPH AND NEW YORK CITY TRANSIT AUTHORITY. Joseph's charge, alleging that the Authority violated §209-a.1(a) of the Act when it disciplined him because of his actions as a shop steward, was dismissed for failure to prove that Joseph's supervisors were improperly motivated. Although Joseph was disciplined days after he made safety complaints and filed a contractual grievance, the ALJ held that it was not credible that the supervisors' actions were improperly motivated in light of the fact that Joseph had been a steward for four years and had made numerous and far more serious complaints in the past, that there was no record evidence of prior antiunion animus or actions against Joseph by the supervisors, that the complaints made and grievance in question were of a common type, that Joseph's supervisor had warned him and given him an opportunity to avoid discipline, and that the penalty sought against Joseph was lenient. (ALJ Blassman, U-22570, 9/11/02)

CIVIL SERVICE EMPLOYEES ASSOCIATION, INC., LOCAL 1000, AFSCME, AFL-CIO AND COUNTY OF NASSAU. Where a grievance has been filed on the same action underlying an improper practice charge and the parties request that the charge be deferred to the contractual grievance procedure, it is proper to conditionally dismiss the case pending the outcome of the grievance and subject to a motion to reopen pursuant to *Herkimer County BOCES* or an argument by the respondent in the arbitration which forecloses a determination on the merits. (ALJ Cacavas, U-23521, 9/12/02)

DRYDEN EDUCATIONAL SUPPORT PERSONNEL ASSOCIATION, NEA/NY, NEA AND DRYDEN CENTRAL SCHOOL DISTRICT. The ALJ found that the District violated §209-a.1(d) of the Act (U-22953) when it unilaterally transferred welding tasks to a non-unit person. However, he dismissed a charge alleging that the District violated the same provision of the Act by unilaterally transferring painting work to non-unit persons (U-22944). On

a procedural note, after discussing the applicability of Education Law §3813(1) to PERB's improper practice proceedings, the ALJ considered himself constrained to apply that provision because the charges alleged a refusal to negotiate. However, he found that the Association had substantially complied with the notice requirements by delivering to the District copies of the charges that it previously filed with PERB within 90 days of when the "cause of action" accrued. (ALJ Quinn, U-22944 & U-22953, 9/13/02)

CIVIL SERVICE EMPLOYEES ASSOCIATION, INC., LOCAL 1000, AFSCME, AFL-CIO AND STATE OF NEW YORK (SUNY OSWEGO). A unit employee was reinstated to a portion of his probationary employment because the employer, in terminating his probationary appointment, considered the bargaining agent's intervention on his behalf regarding certain of his employment concerns, which consideration was introduced into the probationary process due to the union animus of the employee's immediate supervisor. (ALJ Comenzo, U-22017, 9/30/02)

SUPERVISORY, TECHNICAL, EXECUTIVE AND PROFESSIONAL ASSOCIATION AND WAPPINGERS CENTRAL SCHOOL DISTRICT. An improper practice charge alleging that the District violated the Act when it unilaterally changed and increased the work hours of a unit employee was conditionally dismissed when the parties indicated that a grievance had been filed on the same issue and was proceeding to arbitration. (ALJ Mayo, U-23679, 10/3/02)

CIVIL SERVICE EMPLOYEES ASSOCIATION, INC., LOCAL 1000, AFSCME, AFL-CIO, SARATOGA EDUCATIONAL LOCAL 864 AND SARATOGA SPRINGS CITY SCHOOL DISTRICT. The ALJ held that a school district failed to satisfy its statutory bargaining obligations before transferring exclusive bargaining unit work (the behind-the-wheel component of a bus driver training program) to non-unit persons. (ALJ Quinn, U-23095, 10/3/02)

UNITED PUBLIC SERVICE EMPLOYEES UNION, TCU, AFL-CIO AND NORTH SHORT CENTRAL SCHOOL DISTRICT. The ALJ found that the District had satisfied its duty to bargain and had not violated the Act when it unilaterally ceased paying its part-time bus drivers double time for work performed on Sundays, although it had done so for more than 12 years. By agreeing to a term in the collective bargaining agreement (CBA) that provides for payment of double time for work performed on specified holidays, the UPSEU necessarily agreed that the drivers would not be paid double time for other work. The ALJ also noted that the CBA included compensation such as the rate of pay, providing for time-and-one-half pay for certain types of work, longevity pay, payment for cancelled trips, a schedule for the regular rate of pay, in addition to double time pay, which demonstrated that the UPSEU had fully negotiated the issue of the rate of pay and the employer was privileged to rely on that agreement. (ALJ Blassman, U-23191, 10/9/02)

Decisions of the Office of Representation

RONALD PAGANINI AND CIVIL SERVICE EMPLOYEES ASSOCIATION, INC., LOCAL 1000, AFSCME, AFL-CIO.

The ALJ dismissed a charge which alleged that the union violated its duty of fair representation by failing to file a grievance on behalf of a unit member. The charge was dismissed since the record demonstrated that the union undertook a good faith investigation of the charge and determined that the grievance lacked merit. There was no evidence that the union acted in an arbitrary, discriminatory or bad faith manner, or that the employee's interpretation of the parties' collective bargaining agreement was the only possible interpretation of the clause in issue. As a result, the charge was dismissed in its entirety. (ALJ Maier, U-23182, 10/10/02)

CITY OF WATERVLIET AND WATERVLIET POLICE BENEVOLENT ASSOCIATION. The City was found to have violated §209-a.1(d) of the Act when it unilaterally imposed a residency requirement on currently employed police officers as a condition of continued employment. (ALJ Doerr, U-23287, 10/10/02)

DARLENE DAVIS AND TRANSPORT WORKERS UNION OF AMERICA, LOCAL 100 AND NEW YORK CITY TRANSIT AUTHORITY. Applying the balancing test set forth in *Board of Education of the City School District of the City of Albany*, 6 PERB ¶3012 (1973), the ALJ held that the Authority did not violate the Act when it refused to provide the TWU with records it sought to represent Davis, a unit member, in a disciplinary matter, including disciplinary records of other unit employees, complaints against a non-unit supervisor, and records of employee

assignments. Some of the records had never existed or did not exist at the time the request was made and the Authority, therefore, had no obligation to produce the documents. As to other requests, the TWU's failure to identify in its requests to the Authority the relevance of, and need for the information to, its representation of Davis, balanced against the Authority's interests, including its interest in maintaining employee privacy, weighed against requiring the production. The allegation that the Authority unlawfully disciplined Davis in retaliation for protected activity was dismissed on the ground that Davis' supervisors were not motivated by Davis' protected activity, but by her misconduct. (ALJ Blassman, U-22244, 10/15/02)

DAVID L. KIBLER AND STATE OF NEW YORK (OFFICE OF GENERAL SERVICES) AND CIVIL SERVICE EMPLOYEES ASSOCIATION, INC., LOCAL 1000, AFSCME, AFL-CIO. The Director dismissed, as being untimely, a charge alleging, as amended, a violation of §209-a.1(a) of the Act by the State for retaliation for filing grievances and a violation of §§209-a.2(a) and (c) of the Act by CSEA for failure to address claims of harassment by the State. (Director Klein, U-23727, 10/22/02)

NEW YORK STATE PUBLIC EMPLOYEES FEDERATION, AFL-CIO AND STATE OF NEW YORK. The ALJ dismissed a charge which alleged that the State had retaliated against PEF for filing an improper practice charge. Although the filing of the charge was protected activity, the ALJ concluded that the State's actions and response to said charge were driven by legitimate business reasons, not anti-union animus. (ALJ Mayo, U-22178, 10/30/02)

PERB Newsletter

**NYS Public Employment Relations Board
80 Wolf Road, Albany, NY 12205-2604**

PERB NEWS

State of New York
Public Employment Relations Board
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