New York State Bar Association - Labor Section
A Conversation with the PERB Chair
October 9, 2024

Practical Tips and Suggestions for PERB Public Sector Litigants

The following are recommendations from PERB staff, as compiled by Chairman Timothy Connick. The suggestions involve things that are helpful to staff and make the PERB adjudicative process operate more smoothly.

Unless otherwise indicated, these statements are not legal requirements; for the specific legal requirements, of course, see the applicable statutes and regulations.

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1. Charges and Petitions:

a. Don't attach everything to the charge; the charge is not an Article 78 petition. We prefer not getting voluminous and numerous attachments of peripheral relevance. For example, if the CBA is silent on a subject, just say so, you don't have to attach it. Attachments never substitute for a properly written summary of the details of charge.

b. By the same token, do be sure to attach a document or documents that reflects the specific matter in issue, such as a memo, order, or letter in issue. E.g., with M/C petitions, job descriptions; regarding duty satisfaction/waiver defenses, relevant portions of the CBA. Please use common sense and remember that you are not at the stage of proceedings where you need to present all of your evidence.

c. Details of charges should allege the relevant *facts* that are required for the elements of the cause of action raised and minimize conclusory statements. Rule §204.1(b)(3).

d. On the charge form, do not list the name of any specific individual as the respondent; identify only the public employer – not who you think their representative or attorney is. PERB must send the initial charge to the employer-proper.

e. Always provide the date upon which the alleged violation occurred or became known to the charging party.

f. If applicable, indicate whether a grievance has been filed related to the same subject matter of the charge (i.e., relevant to issues of jurisdiction/deferral).

g. We often see people checking the §209-a.1(b) box --- don't routinely check that box. There are very few instances of interference with the *administration* of a union; this section is frequently confused and conflated with §209-a.1(a) interference.

h. Do not check off the §209-a.1(e) box simply because the CBA has expired. The subject matter of the charge must be specifically covered by a section of the expired CBA for this section to apply.

i. Do not automatically check off the injunctive relief box unless you are actively planning to so file.

j. With certification petitions, make sure all required attachments are included, especially the Declaration of Authenticity and the Showing of Interest.

k. Please take the time to look over your filing and proof-read it before you mail it to PERB. Make sure there is an original and enough (four) copies, make sure the filing is signed and make sure that charges and declarations of authenticity are properly notarized. Make sure the notary also signed because you would be surprised how many notaries forget to sign. Charges are not infrequently delayed because the notary forgot to sign or date their notarization and a deficiency notice is issued.

l. Questions about initial filing procedures are welcomed by our Office of Public Employment Practices and Representation (518-457-6410).

2. Answers:

a. A PERB answer is not like a plenary court answer with just admits/denials and a string of affirmative defenses.

b. Our rules require respondents to set out *facts* in the answer, and the facts should be concisely and clearly stated. Rule §204.3(c). Respondents often lose sight of the necessity to plead facts to support their affirmative and other defenses.

c. A PERB answer should have a short, concise factual narrative in there somewhere so we can plainly understand your position. For example, a subheading "AS AND FOR A

FURTHER RESPONSE" after the admit/deny section and before the affirmative defenses, that clearly and concisely lays out your factual position, is extremely helpful.

d. Regarding the requirement to allege facts, if you just say "the charge is barred by duty satisfaction," for example, you have not set forth any facts but have only made a conclusory statement. If, however, you recite the contractual provision, you have effectively raised the defense even if you do not use the magic words "duty satisfaction."

e. The same goes for attachments to an answer as with the charge --- we don't need the entire CBA if you are reciting one provision that the respondent relies on as a defense. Just attach that provision, or quote it in the answer, and the entire CBA can be entered into evidence later if the matter does not settle and goes to hearing.

f. Mail the sworn answer with required copies to the assigned ALJ and not to the attention of the Director. Mailing the answer to the Director in Albany may delay the case, especially if the case is assigned to an ALJ in the Brooklyn or Buffalo office.

3. Conferences:

a. Conference dates are scheduled by the assigned ALJ. Dates now will be scheduled approximately four weeks from the assignment of the ALJ, depending on the ALJ's schedule.

b. Priority is given to certification cases, scope charges, declaratory ruling petitions about the scope of negotiations where the parties are in negotiations, and now also information demand disputes.

c. Bear in mind that the ALJ's role during the conference is two-fold: (1) assist the parties at reaching a settlement; and (2) narrow the issues.

d. Have persons available at the conference with first-hand knowledge of the issues presented to answer questions and authority to settle and consider a settlement. Please bring that person or those persons to the conference if at all possible or in the very least have them available by phone.

e. Please put some thought into and discuss with your client some possible avenues for settlement prior to the conference. The ALJ is going to mediate and discuss your case with you so it's best to have put some thought into some viable paths for a settlement if there are any.

f. If you have a recalcitrant client who is not amenable to a reasonable settlement given the law and facts or does not seem to accept your statement of the law, the ALJ can assist you in obtaining settlement if you bring your client with you. Hearing the same thing you told your client from an ALJ can help move the client from an unrealistic position.

g. Along the same line, if you have a client that you think could benefit from hearing something direct from the ALJ, it is fine to ask the ALJ something to the effect of "could you please outline for Mr. X what remedies are available for this type of case based on the PERB statute and caselaw?" Another example: "please describe to Ms. Z what type of evidence would you expect to hear to meet our burden of proof?"

h. Please read "on point" cases or substantially similar cases and make sure that you have a response to the question "how would you differentiate this charge or affirmative defense from the decision in XYZ case"?

i. When proposing a settlement, do not propose unrealistic requests that the other party will reject out-of-hand. Instead, express your client's realistic concerns and needs which can often lead to settlement.

4. Adjournments and Communications:

a. When you ask for an adjournment of a conference or a hearing date, already have talked to the other side and state their position and, if they consent, indicate three alternative dates that you mutually agreed to.

b. You can now request an adjournment via email, copied to the other side of course. A formal letter is no longer required.

c. Parties should not include ALJs on correspondence or emails that are not specifically directed to him/her. ALJs do not need to be cc'ed on your conversation with opposing counsel about alternate dates or getting consent for a request that will be made. Once you have conferred, then send your communication to the ALJ.

d. In your communications, please be clear and specific regarding what you are asking for. If you are asking that the matter be placed on hold, say that. If you want an adjournment of a conference/hearing and a new date, say so.

5. Motions to Dismiss:

a. You may have noticed that our rules actually don't provide for motions to dismiss. We do, as you know, consider them but almost always only after the conference when a briefing schedule can be set.

b. You can make motions to dismiss before the conference if you wish but the motion won't be considered until some point after the conference. You could wait until the conference to discuss making the motion and, if you do, you might get a pretty good sense whether the ALJ thinks such a motion would be useful or a waste of time.

c. Only move to dismiss a case if it is clear that the case can be dismissed on the papers (pleadings, confirmed facts, or offer of proof). Remember that the standard is that the ALJ must assume the truth of all of the charging party's evidence and give the charging party the benefit of all reasonable inferences that could be drawn from those assumed facts.

6. Holds, Offers of Proof, Subpoenas:

a. If all parties are in agreement on a hold, the case will almost always be put on a hold. If one party is against a hold, it is up to the discretion of the ALJ.

b. For internal control reasons, cases are usually not put on hold at a single time for more than 60 days absent unusual circumstances. Cases sometimes will be put on hold for longer periods where, for example, there is pending litigation that might resolve the matter.

c. Offers of proof will be requested when: (1) the ALJ needs to explore whether there are actually any disputed facts even requiring a hearing; (2) if there is a strong likelihood that the case can be decided based on the charge and the charging party's offer of proof alone (where the allegations will be treated as true and given the most favorable inference); or (3) to narrow the actually disputed facts if possible.

d. We prefer that subpoenas for testimony just be issued by a party's attorney when the party is represented by an attorney, which we imagine would be the party's attorney's preference anyway (it's faster and more direct, without a middleman).

e. If you file a request for a subpoena for documents, please be sure to put in your affidavit, as required by the rules, specific facts sufficient to establish the relevance of the sought-after material and what you in particular are seeking. This isn't discovery though; you have to specifically describe what you want and why.

f. You do not need to provide a proposed form subpoena duces tecum with your request. If the request is granted, the ALJ will issue the subpoena on the PERB form.

g. Remember you can ask for the production of the documents before the hearing date, as permitted by our rules, as it saves hearing time if all parties are familiar with the documents before the day of the hearing. Rule §211.5.

7. Other Pre-Hearing Matters:

a. The ALJ usually will not spend time on the actual day of the hearing trying to settle the case. It would be useful therefore if you talked with the other side before the hearing date to see if settlement is possible.

b. When you do get to review the opposing party's proposed exhibits, consider if you will consent to the entry of all or any those documents in evidence. And obviously see if they will agree to your documents or some of them. This will greatly expediate the hearing.

c. For your client and witnesses on some routine hearing items:

- Be respectful of the other participants and the process.
- It is ok to bring water or coffee to a hearing, but no food is allowed in the hearing room.
- No gum and no hats.
- Silence your phone.
- There is usually a lunch break, but it will not be lengthy.
- No weapons are allowed but if carried in course of job and on duty, there is a weapon locker in Albany on the 18th floor where the weapon can be stored.
- A conference room will be made available for parties.

8. Hearings:

a. For the hearing, have witnesses lined up, ready to go (they may have to wait a short period). Everyone hates waiting around for extended periods for witnesses to show up, and we can get the hearing done more expeditiously.

b. Bring enough copies of each exhibit, usually three copies --- one for the witness, one for the judge, and one for opposing counsel.

c. Stipulate to facts not in dispute. This does not have to be a formal document (although it can be); it can also be a few bullet points spoken on the record before, during, or even after the testimony.

d. Tailor direct examinations closely to the issues in the case; it is usually not necessary to engage every witness in a lengthy personal history, detailed description of the workplace and its policies, and explanation of undisputed facts.

e. For cross, prepare ahead to the extent you can; do not expect to have long breaks to prepare.

f. For cross, please get to the point and then stop; you're not conducting a deposition, it is almost always not helpful to you.

g. If the other side is going to be done by, say 2:00 pm, expect to proceed with your case. Do not expect a half-a-day hearing. Generally, expect to go to at least 4:00 pm.

h. Do not object unnecessarily, avoid long speaking objections, and avoid repeatedly objecting regarding the same matter. To preserve an issue for exceptions, just ask for a standing objection regarding a certain issue.

i. Please though *do* object where appropriate. Although an ALJ can interject on his or her own and direct a witness not to proceed in a line of testimony that is not relevant or is for some reason not appropriate, the ALJ must remain neutral in appearance as well as fact and do not like being in the position of having to inordinately intervene.

j. Representation hearings (including unit placement and unit clarification petitions) are considered investigatory. Because the employer generally possesses more information about job titles and duties, we often require the employer witnesses to proceed first. If you are unclear who will be proceeding first in such a case, please ask the ALJ before the hearing as to his/her expectations.

k. Tell your clients to refrain from rude behavior, and of course do not engage in it yourself. Please no angry outburst or laughing out loud if someone thinks the opposing party's question or answer was ridiculous. The ALJ would rather pay attention to the testimony than have to police the parties' behavior. Inappropriate behavior can result in interruptions in testimony, delays, sanctions and even dismissals depending on the severity. Part 214 of our Rules.

9. Current Practices Re In-Person and Virtual Appearances:

a. Albany: conferences are presently conducted virtually, with occasional exceptions at the discretion of the ALJ. Hearings with local parties are in-person. Hearings with out-of-area parties are virtual.

b. Brooklyn: conferences are virtual. Hearings are virtual unless a party requests in-person and then at the discretion of the ALJ.

c. Buffalo: conferences are virtual. Hearings with local parties are in-person. Hearings with out-of-area parties are virtual.

d. Virtual hearing procedures: the parties will receive a standard letter prior to a virtual hearing that will set out the procedures and will require, among other things, the pre-filing, via email, of exhibits several days before the hearing.

10. Post-Hearing Briefs:

a. ALJs will now allow you, if you wish, to do an oral summation instead of submitting a closing brief. You can always file a post-hearing brief if you want.

b. In your closing brief, you do not need to concentrate on the basic elements of the cause of action; the ALJ is familiar with the basic caselaw regarding most causes of action. Instead, concentrate on finding caselaw that addresses the unusual issue in your case. For example, in a transfer of unit work case, do not go on too long on the basic elements of the cause of action; instead, for instance, if you allege that there is a discernable boundary, explain why that discernable boundary makes sense and try to find a case that is similar to your case.

c. Cite to cases in the manner PERB cites to cases (employer name first) and if you're citing an ALJ decision that has been affirmed by the Board, be sure to include the Board cite.

d. If there are relevant facts or caselaw that exist that are not in your party's favor, please address.

e. Unless it is relevant to the presentation of the case (e.g., credibility), it is off-putting to read petty or impolite characterizations of an individual, specific testimony, or a parties' legal arguments.

11. Exceptions:

a. Requests for an extension to filing exceptions or responses (Rule §213.7): ascertain the other side's position and send a letter to Deputy Chair, with copy of course to other parties. Reasonable requests for extensions are virtually always granted.

b. Briefs: you don't need to state dates of hearing days and a lot of routine regurgitation. No string citations. Put what's relevant and deal with it. Don't ignore the elephant in the room.

c. Please have a table of contents for your briefs --- it's hard to find things for us if you don't have one.

d. A statement like "X continues to advance all arguments made in its post-hearing brief," without further discussion of specific points, is not going to get you anywhere. Per the Rules, an exception which is not specifically urged is waived. Parties need to advance their arguments in their exceptions and brief – the Board does not comb through a record looking for something unaddressed by the ALJ that was not specifically excepted to.

e. Oral argument: if you ask for oral argument, put it prominently in the cover letter (not just a notation next to the caption on the papers). Don't just ask but explain why you think it's necessary. Be aware though that the Board rarely grants oral argument (maybe once every year or two) and usually only on cases that it is struggling with. Oral argument *can* make a difference in such cases.

f. Electronic filing: we do have electronic filing for exceptions now (sure, of a rudimentary nature, but nonetheless a system). And you can consent to have the Board decision served on you via email. We love it if you use it.

g. Questions about procedures for filing exceptions and responses are welcomed by the Deputy Chair's Office (518-457-2578).

12. Applications for Injunctive Relief:

a. Make sure to follow the requirements in our rules to the letter or the application will be rejected. Rules §§204.7 – 204.10.

b. Make sure you support irreparable injury with solid, specific proof.

c. PERB's time to review an application for injunctive relief is very tight and set out by statute --- to be sure you give us as much time as possible to carefully review your papers, a heads-up to the PERB Office of Counsel before filing and a courtesy email copy would be much appreciated (note: the courtesy copy does not constitute filing with PERB).

d. Also, a courtesy email copy of the response to the PERB Office of Counsel would be greatly appreciated (note again: emailing a courtesy copy does not relieve the parties of the regular filing requirements.)

e. To see what we will or will not proceed with on an application for an injunction, look at what we have and have not proceeded with in the past. From 2002 to 2010, decisions by the Office of Counsel on injunction applications were reported in *PERB Reports*. The decisions will be reported again in *PERB Reports* recommencing in 2025.

f. The PERB Office of Counsel (518-457-2678) welcomes questions about submissions --- filing requirements are kind of tricky and are strictly enforced and we're sure you'd rather have your application considered on the merits than denied because of improper filing.

13. Requests for Enforcement:

a. When you file a request for enforcement, please set out specifically how you tried to get compliance with the Board's Order, what the employer has done, and what you think they should do.

b. Upon receipt of a request for enforcement, PERB Office of Counsel will send it out to the other party and give them at least two weeks to respond.

c. After the request and response, a conference call will be scheduled in an attempt to resolve the parties' issues.

d. Failing resolution, the Office of Counsel will issue a decision as to how it will proceed.

14. Court Proceedings:

a. Remember that you have only 30 days from receipt of a Board decision to file an Article 78 proceeding to challenge a Board decision.

b. After you file, our counsel will contact you to set up a briefing schedule. We are flexible; please be flexible too.