

# **JEROME LEFKOWITZ: A Pragmatic Intellect and Major Figure in Taylor Law History** by William A. Herbert\*

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## **I. Introduction**

An important accomplishment of Eliot Spitzer's short tenure as New York's Governor was the 2007 appointment of Jerome (Jerry) Lefkowitz as the fifth Chairperson of the Public Employment Relations Board (PERB), the state agency responsible for administering the Taylor Law.<sup>1</sup>

Governor Spitzer's astute choice enabled Jerry to spend the remaining years of his illustrious legal career leading the agency he helped shape into existence as an independent labor relations agency dedicated to the dictates of the Taylor Law and not politics. As PERB practitioner Richard K. Zuckerman aptly stated at the time, it was a "return to the future."

The appointment of Jerry as PERB Chairperson was greeted with broad support from his colleagues in the New York State Bar Association Labor and Employment Section and many other practitioners of public sector labor relations. Over a half-century career, Jerry had a well-earned reputation for fairness, balance, and a dedication to the neutral application of the law.

He served as Chairperson for eight years, stepping down in 2015. His steadfast separation of personal beliefs and value judgments from the work of administering the Taylor Law is one of his key legacies. He eschewed explicit ideology and political labels, preferring pragmatism as his guide. Collective bargaining in his view is a form of checks and balances in the workplace that can promote harmonious employer-employee relations.

He understood that agency decisions must be grounded in the evidence presented, statutory language, legislative history, regulations, and administrative and judicial precedent. While there can be disagreements over decisions and doctrines he helped develop and supported, one cannot reasonably dispute his dedicated desire to properly effectuate the policies of the Taylor Law. As an intellectual with wide interests, Jerry respected creative arguments, informed debate, diversity of opinion, and scholarship.

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\* Mr. Herbert is a Distinguished Lecturer at Hunter College, City University of New York, and Executive Director of the National Center for the Study of Collective Bargaining in Higher Education and the Professions. From 1989 to 2007, Mr. Herbert worked with Mr. Lefkowitz in the CSEA Legal Department. After Mr. Lefkowitz was appointed PERB Chairperson in 2007, Mr. Herbert became PERB's Deputy Chairperson where he served until 2013 before joining the Hunter College faculty.

<sup>1</sup> Civ. Ser. Law §§ 200, *et seq.* In 2010, the Taylor Law was amended to be gender-neutral resulting in the title of Chairman being changed to Chairperson. L.2010, c. 56, pt. O, § 8, eff. July 22, 2010). For purposes of consistency the gender-neutral noun will be used in this article.

At the same time, he disliked sloppy reasoning and writing, and was very particular when it came to grammar and word usage.

## **II. Background**

Jerry was born in the Bronx, and educated at New York University's Bronx Campus, and Columbia Law School. In his youth, he attended Camp Massad, a Hebrew-speaking Zionist summer camp, which substantially shaped his values and worldview, including his devoted support for the State of Israel. Among his many campmates was Noam Chomsky, the noted linguist, scholar, and social critic.<sup>2</sup> Jerry visited Israel over a dozen times during his lifetime; his first trip there was in 1949, when he was 18 years old.<sup>3</sup>

His top priority has always been his family. He met his wife Myrna at Camp Massad, and they married in 1956 when he was stationed by the United States Army in West Germany. They have four children, and 10 grandchildren. The accomplishments of his children, their spouses, and grandchildren have been a source of great pride and satisfaction.

## **III. Drafting the Taylor Law and Tenure as PERB Deputy Chairperson**

From the beginning, Jerry was a central figure in the history of the Taylor Law and PERB. During the 1966 New York City transit strike, he was summoned from his office at the New York State Department of Labor to the State Capitol by the Counsel to Governor Nelson Rockefeller to explore potential legislative means for ending the strike.<sup>4</sup> At the meeting, Jerry recommended a public sector bill similar to the 1963 legislation he drafted amending the New York State Labor Relations Act to grant workers at New York City private not-for-profit hospitals with the right to unionize and to engage in collective bargaining but without the right to strike.<sup>5</sup> Although Governor

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<sup>2</sup> Interview with Myrna Lefkowitz, July 24, 2017.

<sup>3</sup> Interview with Myrna Lefkowitz, July 24, 2017.

<sup>4</sup> Oral History Interview with Jerry Lefkowitz on July 24, 2001, p. 4, Series 9, CSEA 1000 Project, Civil Service Employees Association, Inc. Local 1000, AFSCME Records, 1918-2015. M.E. Grenander Department of Special Collections and Archives, University Libraries, University at Albany, State University of New York (hereinafter "Lefkowitz Interview," July 24, 2001)

<sup>5</sup> Lefkowitz Interview, July 24, 2001, p.4. Laws of 1963, chapter 515. The state collective bargaining legislation for New York City private non-profit hospitals included interest arbitration, a procedure for ending contract negotiation impasses. The 1963 legislation was strongly opposed by the New York State AFL-CIO because of its anti-strike and interest arbitration provisions. Lefkowitz Interview, July 24, 2001, p. 10; Legislative Bill Jacket to Act of April 24, 1963, ch. 515, 1963 N.Y. Laws, Letter from Raymond R. Corbett to Governor Nelson A. Rockefeller (April 23, 1963). Historically, the American labor movement has opposed interest arbitration. See, JOSEPH BARTLETT LAMBERT, "IF THE WORKERS TOOK A NOTION": THE RIGHT TO STRIKE AND AMERICAN POLITICAL DEVELOPMENT, 91-96 (2003). Interest arbitration in New York's public sector was first introduced into the Taylor Law over the opposition of the AFL-CIO through amendments signed into law by Governor Malcolm Wilson. L. 1974, Chs. 724 and 725.

Rockefeller approved of Jerry's concept for a public sector collective bargaining law, the transit strike ended before legislation could be drafted.<sup>6</sup>

On January 15, 1966, Governor Rockefeller appointed a five-member Committee on Public Employee Relations, chaired by Professor George W. Taylor from the Wharton School at the University of Pennsylvania, and composed of labor relations experts.<sup>7</sup> After the Taylor Committee issued its March 31, 1966 report,<sup>8</sup> Jerry was assigned the task of drafting legislation that would "embody the Taylor Committee's specific proposals."<sup>9</sup> During the drafting, he was directed to include language for certifications of unions without an election, a procedure the Civil Service Employee Association (CSEA) had advocated for before the Taylor Committee.<sup>10</sup>

The fierce opposition to the bill by local governments and New York City public sector unions delayed its enactment until April 1967, and made it unlikely that the law and agency would succeed.<sup>11</sup> At a May 23, 1967 union rally in Madison Square Garden, the statute was condemned as an "evil law" and a pledge was made that the law and its supporters will be "left in the dust of history."<sup>12</sup> The critical reception to the law was described in a 2001 article by Melvin H. Osterman, counsel to the Taylor Committee:

Proposing a statute, however, did not end the controversy. It took more than a year to sort through a maze of competing Democratic and Republican bills until the final statute became law. Even then, it was highly controversial. On the day of its enactment, it was described by a prominent labor leader as the "Rockefeller/Travia [the then-Speaker of the

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<sup>6</sup> Lefkowitz Interview, July 24, 2001, p. 4. The strike began on January 1, 1966 and ended 13 days later. See *Transit Strike Accord is Reached; Service Expected to Resume Today*, NY Times, Jan. 13, 1966, p. 1.

<sup>7</sup> The other Committee members were E. Wight Bakke, David L. Cole, John L. Dunlop and Frederick H. Harbison. See, Lefkowitz Interview, July 24, 2001, p. 4; MICHAEL MARMO, MORE PROFILE THAN COURAGE: THE NEW YORK CITY TRANSIT STRIKE OF 1966, 270 (1990).

<sup>8</sup> See GOVERNOR'S COMMITTEE ON PUBLIC EMPLOYEE RELATIONS (Mar. 31, 1966), reprinted in LEFKOWITZ ON PUBLIC SECTOR LABOR AND EMPLOYMENT LAW, (Herbert, Maier & Zuckerman, Eds.), 4<sup>th</sup> Ed. 2016, Chapter 1 Appendix.

<sup>9</sup> Lefkowitz Interview, July 24, 2001, p. 5.

<sup>10</sup> Lefkowitz Interview, July 24, 2001, p. 5. See also, William A. Herbert, *Card Check Certification: Lessons from New York*, 74 Alb. L. Rev. 93, 143, 146-7 (2010/2011).

<sup>11</sup> Laws of 1967, Ch. 392; Lefkowitz Interview, July 24, 2001, pp. 5-6, 11.

<sup>12</sup> See RONALD DONOVAN, ADMINISTERING THE TAYLOR LAW: PUBLIC EMPLOYEE RELATIONS IN NEW YORK, 53-4 (1990).

Assembly] Slave Labor Act.” It also was characterized as the “RAT Bill” (again Rockefeller and Travia).<sup>13</sup>

A month and half before the law’s effective date, PERB Chairperson Robert Helsby appointed Jerry to be Deputy Chairperson, and the agency’s first employee.<sup>14</sup> Chairperson Helsby and Jerry had previously worked together at the New York State Department of Labor, and Jerry had great respect for him as “a man of rectitude” and a “superb administrator”<sup>15</sup> Scholar Ronald Donovan has described Jerry as a “forceful intellect on whom Helsby heavily relied.”<sup>16</sup>

Jerry’s immediate primary responsibility was to prepare the agency’s Rules of Procedure. The rules were drafted in consultation with a committee comprised of three academics from Columbia University and Cornell University, and Melvin H. Osterman, who had served on Governor Rockefeller’s legal staff before becoming the Taylor Committee’s counsel.<sup>17</sup>

The rules corrected an important deficiency in the original statute by creating a procedure for determining complaints of anti-union retaliation similar to the procedures of the National Labor Relations Board, the State Labor Relations Board,<sup>18</sup> and under Mayor Robert F. Wagner’s 1958 Executive Order 49.<sup>19</sup> Discrimination for union activity in New York’s public sector was nothing new. As far back as 1935, a New York City mayoral committee found that there was a practice of discrimination and surveillance of union activists in a municipal agency.<sup>20</sup> Nevertheless, during a September 1967 meeting with PERB staff, Taylor Committee members expressed vehement opposition to the anti-reprisal rule.<sup>21</sup> Ultimately, PERB’s regulatory anti-reprisal procedure was

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<sup>13</sup> Melvin H. Osterman *A Formerly Arcane practice Now Handles A Wide Range of Issues*, 73 N.Y. St. B.J. 40 (2001).

<sup>14</sup> Lefkowitz Interview, July 24, 2001, p. 11

<sup>15</sup> Lefkowitz, *Joseph Crowley—A Dedicated Public Servant*, 54 Fordham L. Rev. 468 at 469, n. 4.(1986)

<sup>16</sup> DONOVAN, ADMINISTERING THE TAYLOR LAW, 62.

<sup>17</sup> Lefkowitz Interview, July 24, 2001, p. 11. DONOVAN, ADMINISTERING THE TAYLOR LAW, 64.

<sup>18</sup> See *Manhasset Union Free Sch Dist*, 41 PERB ¶ 3005 (2008), *confirmed sub nom. and mod, in part, Manhasset Union Free Sch Dist v. New York State Pub Empl Rel Bd*, 61 AD3d 1231 (3d Dept 2009) on remittur, 42 PERB ¶ 3016 (2009).

<sup>19</sup> Exec. Order No. 49, §8 (Mar. 31, 1958), reprinted in *Labor Relations Program of Employees of the City of New York*, 12 Indus & Lab. Rel. Rev. 371, 618-25 (1959). The Wagner Executive Order granted collective bargaining rights to New York City’s municipal workers for the first time. It was succeeded by the New York City Collective Bargaining Law, which was enacted in 1967.

<sup>20</sup> *Text of Final Section of the Report on City Relief by the City Mayor’s Committee*, reprinted in NY Times, Mar. 30, 1935.

<sup>21</sup> DONOVAN, ADMINISTERING THE TAYLOR LAW, 65-6.

judicially nullified,<sup>22</sup> but was succeeded by a 1969 amendment that created statutory improper practices.<sup>23</sup>

In his role as Deputy Chairperson over the next 19 years Jerry worked closely with PERB Chairpersons Robert Helsby and Harold Newman, and drafted approximately 95% of all PERB Board decisions including dissenting and concurring opinions.<sup>24</sup> The drafting required him to work closely with the Board members including labor relations experts Joseph R. Crowley, Ida Klaus, and Eric J. Schmertz.

Jerry's intellectual and emotional intelligence were essential to enable the PERB Board to issue hundreds of timely and frequently scholarly decisions during his tenure. Another important factor in the early success of the PERB Board's decision making was Member Crowley's sense of humor:

Joe's wit was the assurance that his other attributes would be well taken. Frequently, he would make a humorous comment that would disrupt a serious meeting at which his associates were futilely wrestling with a difficult problem. The changed mood usually facilitated more innovative thinking. At the least, it would be an antidote to obstinacy and self-righteousness. And since he was the frequent butt of his own jokes, he rarely permitted himself the opportunity of being closed-minded.<sup>25</sup>

Jerry's counsel was critical in establishing PERB's independence as a labor relations agency. He was the primary proponent of the agency's first courageous act of independence when the PERB Board on November 30, 1967 issued a restraining order to the State Negotiating Committee to cease and desist from negotiating with CSEA two weeks after Governor Rockefeller had voluntarily recognized CSEA as the exclusive representative of a general unit of State employees.<sup>26</sup>

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<sup>22</sup> *Helsby v. Cent Sch Dist No 2 of the Town of Claverack*, 34 AD2d 361 (3d Dept 1970).

<sup>23</sup> L. 1969, ch. 24; Civ. Serv. Law §209-a.

<sup>24</sup> Lefkowitz Interview, July 24, 2001, p.6.

<sup>25</sup> Lefkowitz, *Joseph Crowley—A Dedicated Public Servant*, 54 Fordham L. Rev. 468 at 469 (1986).

<sup>26</sup> Lefkowitz Interview, July 24, 2001, pp. 12-13; *State of New York*, 1 PERB ¶ 301 (1967). In the decision, PERB ordered "the State Negotiating Committee to refrain from negotiating with the Civil Service Employees Association on an exclusive basis with respect to the terms and conditions of employment of employees of the State of New York within the general unit until this Public Employment Relations Board receives the dispute concerning representation status within such unit. We further order that the State Negotiating Committee be neutral in its treatment of employee organizations which file timely petitions supported by the requisite showing of interest to represent employees of the State of New York within the general unit until this Public Employment Relations Board resolves the dispute concerning representation status." See, DONOVAN, ADMINISTERING THE TAYLOR LAW, 76 (describing Jerry as the "principal proponent" of the injunctive order).

The restraining order was issued in response to the request of six employee organizations that had filed representation petitions challenging the voluntary recognition of CSEA as well as the composition of the three state bargaining units established by the State. In the court litigation that followed, Jerry unsuccessfully defended PERB's restraining order all the way up to the New York Court of Appeals.<sup>27</sup>

In a 1973 monograph, Jerry acknowledged the conflicting considerations and the relatively weak legal basis underlying the order. He explained, however, that "[r]esponding to the realization that excessive zeal might be remedied by the court, whereas excessive timorousness would be unremedied, the Board decided upon the more aggressive course."<sup>28</sup> This explanation reveals a central truth: while conservative and humble by nature, he was willing to take necessary risks after carefully weighing the available options.

PERB's intention to be independent was reaffirmed by its handling of the numerous petitions seeking to represent various groups of employees in the general State bargaining unit unilaterally established by Governor Rockefeller.<sup>29</sup> Over the years, Jerry frequently reminisced with great pride about his role in the agency's resolution of the complicated legal and practical issues presented by those representation cases.

Jerry presided over the contentious representation hearing, which lasted 10 months and resulted in 26,000 pages of transcript and exhibits.<sup>30</sup> Following the hearing, he recommended that there should be six bargaining units instead of one general State unit: Operational Services Unit; Security Services Unit; Institutional Services Unit; Administrative Services Unit; Professional, Scientific and Technical Services Unit; and a unit of all seasonal employees of the Long Island State Park Commission.<sup>31</sup> His decision infuriated CSEA, which demanded his discharge.<sup>32</sup> The PERB Board, on review, accepted the uniting decision with the exception of rejecting the appropriateness of a seasonal unit.<sup>33</sup> CSEA was unsuccessful when it sought to stay the representation elections for the five units.<sup>34</sup>

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<sup>27</sup> Lefkowitz Interview, July 24, 2001, pp. 17-18; *Civil Service Empl. Assn v. Helsby*, 55 Misc.2d (Alb. Co. 1967), rev., 29 A.D.2d 196 (3d Dept. 1968), *affd*, 21 N.Y.2d 541 (1968).

<sup>28</sup> Jerome Lefkowitz, *The Legal Basis of Employee Relations of New York State Employees*, 8 Association of Labor Mediation Agencies (1973).

<sup>29</sup> Lefkowitz Interview, July 24, 2001, p. 13.

<sup>30</sup> Lefkowitz Interview, July 24, 2001, pp. 13-14, 16.

<sup>31</sup> Lefkowitz Interview, July 24, 2001, pp. 13-17. *State of New York*, 1 PERB ¶ 424, 1 (1968).

<sup>32</sup> Lefkowitz Interview, July 24, 2001, p. 17.

<sup>33</sup> Lefkowitz Interview, July 24, 2001, pp. 13-17. *State of New York* 1 PERB ¶ 399.85 (1968).

<sup>34</sup> *Civil Service Empl. Assn v. Helsby*, 58 Misc. 2d 745 Alb. Co. 1969) *reversed*, 31 A.D.2d 325 (3d Dept 1969), *lv. granted*, 24 N.Y.2d 915 (1969) *affd*, 24 N.Y.2d 993 (1969).

PERB's early challenge to state executive authority concerning union representation of state workers is striking, particularly in the present era when rigid hierarchical subservience on policy issues has become an expectation, if not a requirement, at many levels of government.<sup>35</sup> Although there was a strong pushback from Rockefeller Administration officials in response to PERB's decision, it did not result in retaliatory personnel actions. Secretary to the Governor Alton G. Marshall was livid at the decision and viewed Chairperson Helsby as a traitor.<sup>36</sup> Nevertheless, Governor Rockefeller ultimately accepted the decision based on advice from his long-time labor advisor Victor Borella who recognized the importance of agency independence in insuring the Taylor Law's success.<sup>37</sup> At a private meeting with Helsby at the Rockefeller estate in Pocantico Hills, the Governor apologized for his senior staff's reaction to the decision and explained that his reputation depended on PERB's successful administration of the Taylor Law.<sup>38</sup> Subsequent governors continued the policy of respecting PERB's decision making independence during Jerry's tenure as Deputy Chairman.<sup>39</sup>

During his two decades as PERB Deputy Chairperson, Jerry was active as an educator, scholar, and consultant in the field of public sector labor relations. He helped in drafting statutory amendments and legislative reports concerning the Taylor Law. His position as an adjunct law professor at his alma mater Columbia Law School brought him great satisfaction. His best-known book, the New York State Bar Association treatise, which is

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<sup>35</sup> See *Lewis v. Cowen*, 165 F. 3d 154 (2d Cir. 1999), *cert. denied*, 120 S.Ct. 70 (1999) (holding that the termination of a public official who refused to speak favorably before a state agency about a policy change he opposed did not violate the First Amendment.); see also Wolfgang Saxon, *Harold A. Jerry Jr., 81; Helped Preserve the Adirondacks as Forever Wild*, NY Times, Jun. 20, 2001 (State agency chair demoted after casting a dissenting vote on a state environmental board against a policy change sought by Governor George E. Pataki). The modern authoritarian impulse in government today is aided by judicial constriction of First Amendment principles and the political drive to eviscerate collective bargaining and due process protections. See *Garcetti v. Ceballos*, 126 S.Ct. 1951 (2006) (excluding speech made by public officials pursuant to official duties from First Amendment protections); see also William A. Herbert and Alicia McNally, *Just Cause Discipline for Social Networking in the New Gilded Age: Will the Law Look the Other Way?* 54 U. Louisville L. Rev. 381, 382-383 (2016) (describing the ascendancy of opposition to workplace procedural protections against discipline).

<sup>36</sup> DONOVAN, ADMINISTERING THE TAYLOR LAW, 77.

<sup>37</sup> Oral History Interview with Jerry Lefkowitz on April 13, 2005, pp. 6, 14-5, Series 9, CSEA 1000 Project, Civil Service Employees Association, Inc. Local 1000, AFSCME Records, 1918-2015. M.E. Grenander Department of Special Collections and Archives, University Libraries, University at Albany, State University of New York (hereinafter Lefkowitz Interview, April 13, 2005).

<sup>38</sup> Jerome Lefkowitz, *2009-2010 Summary Annual Report, Message from Jerome Lefkowitz, Chairman*, PERB News, Vol. 43, No. 2, p. 2. (February-April 2010).

<sup>39</sup> Lefkowitz Interview, April 13, 2005, pp. 6-7. Jerry stated during the interview that Governor Mario M. Cuomo began making appointments at the agency but he could not recall actual or attempted intervention by the Cuomo Administration concerning an agency decision. Lefkowitz Interview, April 13, 2005, p.7.

now known as Lefkowitz on Public Sector Labor and Employment Law,<sup>40</sup> was begun during this period. His other published works include a book on public sector unionism in Israel,<sup>41</sup> an article on classical Jewish labor law,<sup>42</sup> a monograph on the legal foundations of New York State employee relations,<sup>43</sup> a law review article on collective bargaining in human services agencies,<sup>44</sup> and a book chapter on unfair labor practice procedures.<sup>45</sup>

Other jurisdictions consulted him on public sector labor relations including Japan, which he visited in 1984.<sup>46</sup> He chaired a Public Employment Relations Services Review and Evaluation Team that studied the functioning of the Massachusetts Labor Relations Commission and the Massachusetts Board of Conciliation and Arbitration. The PERS Review and Evaluation Team issued a report on June 1980.<sup>47</sup> Jerry also participated in the International Symposium on Public Employment Labor Relations, and many conferences sponsored by groups such as the Association of Labor Relations Agencies, the Society of Professionals in Dispute Resolution, and the National Center for the Study of Collective Bargaining in Higher Education and the Professions.

The most interesting and little-known of Jerry's activities during his tenure as Deputy Chairperson was his two-week vacation trip to Russia in 1977 to gather information and to report on the status of Jewish dissidents.<sup>48</sup> The cover for the journey was research into Russian labor law for an article in a scholarly journal.<sup>49</sup> The trip is another example of Jerry's courage and willingness to take calculated risks.

On May 1, 1977, Jerry and his wife Myrna landed in Moscow on their planned mission to meet with Jewish dissidents and to attend the trial of Josif Begun, a mathematician

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<sup>40</sup> See, LEFKOWITZ ON PUBLIC SECTOR LABOR AND EMPLOYMENT LAW, (Herbert, Maier & Zuckerman, Eds.), 4<sup>th</sup> Ed. 2016.

<sup>41</sup> JEROME LEFKOWITZ, PUBLIC EMPLOYEE UNIONISM IN ISRAEL, INSTITUTE OF LABOR AND INDUSTRIAL RELATIONS (1971).

<sup>42</sup> Jerome Lefkowitz, *Labor in Halacha (Classical Jewish Law)*, 24, CERL Review (September/Fall 1981).

<sup>44</sup> Jerome Lefkowitz, *Unionism in the Human Services Industries*, 36 Alb. L. Rev. 603 (1971-1972).

<sup>45</sup> Jerome Lefkowitz, *Unfair Labor Practice Procedures and Their Function* in THE EVOLVING PROCESS—COLLECTIVE NEGOTIATIONS IN PUBLIC EMPLOYMENT, Association of Labor Relations Agencies (1985).

<sup>46</sup> Interview with Myrna Lefkowitz (Jul. 24, 2017).

<sup>47</sup> *Report and Recommendations to the Massachusetts Labor Relations Commission and Massachusetts Board of Conciliation and Arbitration*, Public Employment Relations Services Review and Evaluation Team (June 1980).

<sup>48</sup> Interview with Myrna Lefkowitz, July 24, 2017.

<sup>49</sup> Jerry and Myrna Lefkowitz, Report on Trip to Russia, p. 4 (undated).

arrested after attempting to emigrate.<sup>50</sup> During their trip, they met with dissidents in Moscow, Kiev, Odessa and Leningrad. They also met with a Russian prosecutor in an unsuccessful attempt to get permission to attend the Begun trial. On the day of the scheduled trial, they went to the courthouse and learned that it had been adjourned until June based on a claim that Begun's prison was under quarantine.<sup>51</sup> Upon their return to the United States, Jerry and Myrna prepared a detailed written report concerning their trip, and Jerry gave a presentation before the Albany Chamber of Commerce.<sup>52</sup>

#### **IV. Following and Applying the Taylor Law from the Outside**

In 1986, Jerry resigned as Deputy Chairperson, and became a PERB Board Member.<sup>53</sup> After exploring other options, including becoming an arbitrator, a full-time law professor, and joining a prominent New York City management law firm, Jerry commenced a new professional journey by accepting a position as CSEA's Deputy Counsel in 1987. He cherished the irony of being hired by an organization that had sought his termination twenty years before.

The move to CSEA was mistakenly viewed by some, who were ignorant of Jerry's personal views and intellectual independence, as evidence of a lack of neutrality.<sup>54</sup> It is hard, however, to correctly label someone as "pro-union" when he is an opponent of the right to strike by public employees,<sup>55</sup> a registered Republican, an avid reader of the journal *Commentary*, and an opponent of publically-funded universal health care and other social programs. Nevertheless, blessed with a long memory, Jerry understood the historical importance and value of collective bargaining and job security in governmental labor relations.

When he joined CSEA, Jerry was very familiar with its history, and knew it to be a moderate, lobbying-oriented association rather than an organization with a long tradition of trade union militancy. During his subsequent two decades with CSEA, Jerry functioned as a litigator before PERB, the courts, and in arbitration.

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<sup>50</sup> Lefkowitz, Report on Trip to Russia; *Soviet is Said to Arrest Jew Seized at Embassy*, NY Times, Mar. 10, 1977.

<sup>51</sup> Lefkowitz, Report on Trip to Russia.

<sup>52</sup> Jerome Lefkowitz, *A "Parasite" in Russia* (June 1977).

<sup>53</sup> Lefkowitz Interview, July 24, 2001, p. 1; DONOVAN, ADMINISTERING THE TAYLOR LAW, 156.

<sup>54</sup> DONOVAN, ADMINISTERING THE TAYLOR LAW, 237.

<sup>55</sup> Jerome Lefkowitz, *Civil Servants and the Strike*, Good Government, Vol. LXXXV, No. 1, p. 15 (Spring, 1968). He believed that public sector strikes were analogous to civil disobedience, and that the right of public sector unions to engage in political action and lobbying was a sufficiently powerful tool in collective negotiations.

Among his many litigated successes was persuading the New York Court of Appeals that the Taylor Law's Triborough Amendment,<sup>56</sup> which mandates public employers to continue all terms of an expired agreement until a new agreement is reached, extended contractual obligations protected by the Contract Clause of the United States Constitution.<sup>57</sup> He also successfully argued before PERB that a school district was mandated to negotiate its decision to subject a bus driver to compulsory urinalysis testing for drugs,<sup>58</sup> and that a state agency had a duty to negotiate a dress code concerning the wearing of blue denim jeans to work.<sup>59</sup> The citation of these Taylor Law cases is not to suggest he supported drug use or wore blue jeans. Instead, they reflect his professionalism as an attorney and his continued faith in public sector collective bargaining under the Taylor Law.

In addition to litigation, much of Jerry's work at CSEA involved analyzing PERB decisions, and assisting field staff in constructing improper charge pleadings and arguments to challenge unilateral changes by public employers. He mentored scores of attorneys and law students, and became a beloved figure among CSEA staff for his knowledge and patience. He also remained active in the American Bar Association Labor and Employment Section, and the New York State Bar Association Labor and Employment Section, which he chaired in 1991-92.

## **V. Returning as Chairperson in 2007 to Redirect the Agency**

In 2007, after two decades as an advocate, Jerry readily accepted Governor Spitzer's nomination as PERB Chairperson, and he was unanimously confirmed by the New York State Senate along with Board Member Robert Hite. Jerry relished the opportunity to return to the agency he helped found to administrator a law he helped draft.

Jerry's appointment provided him with the opportunity, at age 76, to reemphasize the agency's commitment to scholarship and practicality, while also reasserting the agency's neutrality. In taking the position, he was keenly aware of the impact austerity budgets had had on agency functioning including its statutory research mission.

Upon his return, Jerry acted to improve the esprit de corps among agency staff, held meetings with representatives of public employers and unions, advocated for an increase in the agency's budget, and began the process of organizing a conference celebrating the 40<sup>th</sup> anniversary of the Taylor Law. In an era of demonization of public employees, Jerry sought to emulate Chairperson Helsby by supporting and encouraging PERB staff to engage in scholarly and organizational work on a regional and national

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<sup>56</sup> Civ. Ser. Law §209-a.1(3).

<sup>57</sup> U.S. Const., art. I, § 10, cl. [1]. See, *Assn of Surrogates and Supreme Court Reporters Within City of N.Y. v. State of New York*, 79 N.Y.2d 39 (1992).

<sup>58</sup> *Arlington Cent. Sch. District*, 25 PERB ¶ 3001 (1992).

<sup>59</sup> *State of New York (Dept. of Tax & Finance)*, 30 PERB ¶ 3028 (1997).

level. But most importantly, Jerry worked to have the agency's processes and decisions respected by the parties.

Shortly after his appointment, the PERB Board scheduled its first oral argument in many years to explore specifically identified issues concerning an Administrative Law Judge's decision finding that a Town violated its duty to negotiate when it unilaterally prohibited the taping of medical examinations used in determining eligibility for benefits under state law.<sup>60</sup> During the argument, the union's counsel persuasively argued that the PERB Board could not reach an issue it had identified in the oral argument notice because the Town had not raised the issue in its exceptions, and therefore the issue was waived under the agency's Rules of Procedure. The oral argument and resultant decision were clear signs that the new PERB Board would be actively engaged in the issues but, at the same time, understood the limits of its authority.

In *Chenango Forks Central School District (Chenango Forks)*<sup>61</sup> the new PERB Board faced a major doctrinal issue that had become increasingly confusing due to inconsistencies in decisions over the prior few years: the standard for determining an enforceable past practice. After years of reading and analyzing Board decisions, Jerry knew that the recent decisions had utilized varying language that suggested different meaning, while at the same time citing *County of Nassau*.<sup>62</sup> In that 1991 decision, the PERB Board had concluded that a practice is binding when it is unequivocal and is continued "uninterrupted for a period of time under the circumstances to create a reasonable expectation among the affected unit employees that the [practice] would continue."<sup>63</sup>

In *Chenango Forks*,<sup>64</sup> the PERB Board reiterated the *County of Nassau* standard and stated "that the clear meaning of our decision in *County of Nassau* is that the expectation of the continuation of the practice is something that may be presumed from its duration with consideration of the specific circumstances under which the practice has existed." The subsequent Board decision finding that the school district had unilaterally ended an enforceable past practice under that standard was upheld by the New York Court of Appeals in 2013.<sup>65</sup>

Another doctrinal issue that had become muddled over time was the standard for determining bargaining unit work in the context of a charge alleging the unilateral transfer of work under the Taylor Law. To help clarify that issue, the PERB Board in *Manhasset*

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<sup>60</sup> *Town of Orangetown*, 40 PERB ¶ 3008 (2007).

<sup>61</sup> 40 PERB ¶ 3012 (2007).

<sup>62</sup> 24 PERB ¶ 3029 (1991).

<sup>63</sup> 24 PERB ¶ 3029, at 3058.

<sup>64</sup> *Supra*.

<sup>65</sup> *Chenango Forks Cent. Sch. Dist. v. New York State Pub. Empl. Rel. Bd*, 21 N.Y.3d 255 (2014).

*Union Free School District (Manhasset)*,<sup>66</sup> issued a notice soliciting amicus curiae briefs concerning two specific doctrinal issues. The notice generated five briefs by amici, which were responded to by the parties.

Following a careful summary of applicable precedent, the Board determined in *Manhasset* that a past practice analysis “is consistent with the dynamics of the bilateral employer-employee organization relationship and the policies underlying the Act” because it “permits flexibility in the provision of governmental services without undermining the bargaining position of the employee organization or eliminating the respective duties of the parties to bargain under the Act.” In its decision, the PERB Board also addressed an issue that had arisen from judicial decisions following Jerry’s original departure from the agency, but had not been finally determined by the New York Court of Appeals: the necessity of notices of claim in charges against school districts. In concluding that such notices were not required the Board relied upon the language of the 1969 Taylor Law amendments creating a “symmetrical and balanced improper practice procedure equally applicable to public employers and employee organizations especially with respect to their conduct during negotiations.”

There were many other challenging cases faced by the PERB Board during Jerry’s tenure as Chairperson which required careful consideration of statutes and legislative history external to the Taylor Law. His analytical approach focused on discerning legislative intent based on the terms of the Taylor Law, the other statutory provisions, and other relevant interpretative tools.

The most notable of the cases was a challenge made by charter schools to the mandate of the Charter Schools Act of 1998 that charter schools and charter school employees be covered by the Taylor Law. Relying on the clear and unambiguous statutory language, the PERB Board found that charter schools were subject to the Taylor Law, as modified.<sup>67</sup> Ultimately, the Board’s legal conclusion was overturned when the National Labor Relations Board (NLRB) concluded that New York charter schools are not political subdivisions, and therefore covered under the National Labor Relations Act.<sup>68</sup> The NLRB decision had the effect of creating an historic legal anomaly in New York by exempting employees who work for an “independent and autonomous public school”<sup>69</sup> from the Taylor Law’s prohibition against strikes.

Some of the other cases determined by the PERB Board during Jerry’s tenure as

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<sup>66</sup> 41 PERB ¶ 3005 (2008).

<sup>67</sup> *Brooklyn Excelsior Charter School and Buffalo United Charter Schools*, 44 PERB ¶ 3001 (2011), *pet. granted in part and denied in part*, *Buffalo United Charter School v. New York Pub. Empl. Rel. Bd.*, 37 Misc.3d 294 (Erie Co. 2012), *app. stayed and decision reserved*, 107 A.D.3d 1437 (3d Dept. 2013), *lv. denied*, 22 N.Y.3d 1082 (2014).

<sup>68</sup> *Hyde Leadership Charter School*, 364 NLRB No. 88 (2016).

<sup>69</sup> Educ. Law § 2853.l(c).

Chairperson raised important legal issues, such as the negotiability of police disciplinary procedures and General Municipal Law §§207-a and 207-c procedures, which required interpretation of appellate court decisions.

Jerry faced judicial reversal with equanimity and was very reluctant to revisit issues determined in final appellate court decisions that narrowed negotiability or the application of the Taylor Law even when he felt that the decisions constituted judicial activism. Throughout his tenure as PERB Chairperson Jerry remained fiercely independent and willing to issue decisions that he understood could ruffle feathers among the powerful and partisans.<sup>70</sup>

Lastly, it is important to note that Jerry's seriousness of purpose did not render him immune from enjoying music as well as mischievous humor. In determining a case involving the mundane issue of whether listening to the radio at work can be a mandatory subject of bargaining, the PERB Board stated in its decision "our decision should not be construed as indicating any obligation under the Act to negotiate over employee musical preferences whether they are Chopin or Schoenberg, Monk or Mingus, Ella or Hendrix."<sup>71</sup>

## **VI. Conclusion**

Jerry's long career provides a welcome antidotal model at a time when *ad hominem* attacks on adversaries, friends, and strangers have become normative. His decency, intellectual independence, and pragmatism are traits that have substantially helped the Taylor Law and PERB to succeed over the past half-century.

On top of his many professional accomplishments, Jerry has always been well-regarded for his respectful and kind treatment of those around him. The only notable exception to that trait is his tenacious competitive spirit on the tennis court and while participating in other sports. His tenacity in those arenas was perhaps motivated by a desire to prove Leo Durocher wrong: nice guys can finish first.

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<sup>70</sup> See *State of New York*, 47 PERB ¶ 3009 (2014), conf. sub nom, *State v. New York Pub. Empl. Rel. Bd*, 137 A.D.3d 1467 (3d Dept, 2016) (denying a request from the Governor's Office of Employee Relations to withdraw from a stipulation of settlement with a union concerning a representation matter).

<sup>71</sup> *State of New York (Dept. of Transportation)*, 46 PERB ¶ 3029 (2013).