

## Seth H. Agata (Chair, 2015-2016)

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When I first met Seth Agata, it was in his office as First Assistant Counsel to the Governor. I was there to be interviewed by Mylan Denerstein, the Governor's Counsel, as a part of the process of my appointment as PERB's Deputy Chair and Counsel, and had come up from New York City for that purpose. Ms. Denerstein was in a meeting that was running long, and Seth came out, introduced himself to me, and suggested I wait in his office, rather than in the little reception area.

As I waited, I glimpsed on the mantelpiece of his office's fireplace a photograph that I had seen before. It was the same photograph that was left behind by the newly retired General Counsel of my then-employer, the New York City Office of Collective Bargaining. OCB is PERB's sister agency with jurisdiction over almost all public employees of the City of New York, its authorities and boards. The photograph was of OCB's staff, taken sometime in the late 1980s. I recognized Steven DeCosta, whose Deputy Counsel I had been, two support staff—and a somewhat younger version of the man I had just met, Seth Agata. When I asked him about it on his return to the office, he smiled fondly. We talked about OCB then and now, the state of New York State labor relations, and the work that PERB and OCB share—acting as a safety valve when the tension between the parties' interests needs to be eased to allow them to get on with the work of government. He spoke warmly of Steve, and of the lessons he had learned from OCB's fierce independence under Chairs Arvid Anderson and Malcolm McDonald, and of his respect for the man he would, it turned out, succeed at PERB, Jerry Lefkowitz.

When Jerry retired, the question we at PERB all asked was: How do you follow a legend?<sup>1</sup> And who do you get to do it?

The Governor's answer, Seth Agata, was undoubtedly the right call.

He began auspiciously, by scheduling series of meetings with every constituent group, management and labor, that wanted to meet the new Chair. At those meetings, he led the conversation just enough to get the ball rolling, and then he intently listened. When specific questions about case status or where resources could be found were asked, if he didn't have the answer, he would turn to his senior staff, and if we couldn't answer, he promised that we would follow through. Seth treated these meetings as opening the conversation, not as one-time-only events.

Seth brought to the position a combination of justified confidence, administrative flair, and an intuitive sense for the values of the Taylor Law. He also brought a willingness to listen to senior staff, to engage in discussions on the merits of cases and other issues without preconceptions.

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<sup>1</sup> See William A. Herbert, "A Pragmatic Intellect and Major Figure in Taylor Law History," above.

There have been, I think, two types of chairs at PERB. Some have set the tone, administered the Agency, in conjunction with the Executive Director, dealt with the constituent groups, but have left the primary drafting of decisions to the Deputy Chair, editing as to substance and style. Others, while not neglecting the administrative side of things, plunged into the research and writing, sharing the duty with the Deputy Chair, but getting into the details of the record and law themselves.

Seth was, as Chair, very much the latter.

Seth immersed himself in the record of every case for which he drafted a decision, paging through transcripts and exhibits to make sure he got the facts exactly right. He was amenable to feedback and editing on decisions he drafted, while providing me with generous editing on those I drafted. We kibitzed on tricky fact patterns, or on recondite passages in some of the earliest decisions.

His time at OCB gave him an intuitive grasp of the way the Taylor Law works because the New York City Collective Bargaining Law as administered by OCB, is required to be “substantially equivalent” to the Taylor Law.<sup>2</sup>

Under Seth’s leadership, the Board moved away from technical pleading requirements—what he memorably called “failing to invoke the magic words.”<sup>3</sup> Instead, Seth led the Board to overrule its earlier decision in *Dutchess Community College*,<sup>4</sup> which rejected a mislabeled “duty satisfaction defense” as “waiver,” a common error; since the nature of the defense was clear, the Board considered the defense on the merits.<sup>5</sup> Labor benefited from the same approach, as well. In another case decided the same day, the Board applied similar logic in to reverse an ALJ’s finding that a union had failed to timely plead repudiation as part of an improper practice charge which the employer sought to defer having obtained a stay of arbitration on the basis that the contract was void.<sup>6</sup> In both cases the Board overturned overly technical pleading requirements that prevented the Board from addressing meritorious claims on the substance when the pleading defect had no prejudiced the other party.

Despite the Agata Board’s willingness to overturn precedent where it obstructed determination on the merits, Seth was not a proponent of change for its own sake. Where the underpinnings of long-decided cases still held firm, Seth would apply them. To take but one example, in *Cayuga Community College*, the Board found that “the fundamentally different institutional roles played by the full-time faculty and the adjunct faculty are sufficient to create a conflict of interest precluding placing the adjunct faculty in the same bargaining unit as the full-time faculty.”<sup>7</sup> In so holding, the Board reaffirmed *Board of Higher Education of the City of New York*, in which the Board had similarly

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<sup>2</sup> Civil Service Law § 212.

<sup>3</sup> *Town of Tuscarora*, 48 PERB ¶ 3012, 3042 (2015).

<sup>4</sup> 46 PERB ¶ 3009, 3016 (2013).

<sup>5</sup> *County of Nassau*, 49 PERB ¶ 3001, *reargument denied*, 49 PERB ¶ 3014 (2016); *County of Suffolk*, 49 PERB ¶ 3005 (2016)

<sup>6</sup> *County of Suffolk*, 49 PERB ¶ 3005 (2016).

<sup>7</sup> 49 PERB ¶ 3007 (2016).

found that adjunct faculty and permanent faculty (that is, tenured faculty and tenure-track faculty) should be in different bargaining units, based upon their diverging interests and nearly even numbers.<sup>8</sup> The Board noted that the reasons for separate units were, in *Cayuga Community College*, if anything stronger:

Indeed, the conflict is starker and sharper in this case, as adding the adjunct faculty to the full-time faculty's bargaining unit would effectively drown out the voice of the full-time faculty, who would, at a stroke, be outnumbered by a more than three-to-one ratio. We note also that the approximately 200 adjunct faculty members petitioned for are sufficient to create a viable and coherent unit of employees with a genuine community of interest and absent conflict.<sup>9</sup>

The commonality between these two groups of cases—the pleadings cases and *Cayuga Community College*—is that Seth had a preference for the practical. “Good law should work,” he would maintain, and should be even-handed. Even-handedness was critical to the Board's neutrality, as Seth saw it, and arguments could not be deployed only in one direction unless the statute or the policies of the Taylor Law required it. For example, in *New York State Police*, the Board was confronted with a transfer of unit work from civilian employees to uniformed personnel.<sup>10</sup> The Board's prior cases had dealt with the converse situation—civilianization of the functions of uniformed personnel, thus establishing a change in qualifications, and in turn requiring a balance of the parties' respective interests to determine if the transfer constituted an improper practice.<sup>11</sup> In *New York State Police*, Seth applied the underlying logic of those cases and wrote for the Board that:

Consistent with precedent, and as a logical and predictable corollary to this proposition, when an employer has determined that the skills of a civilian employee are *not* necessary to perform a given set of tasks but that different qualifications are better suited for such tasks, especially tasks that are also performed by uniformed personnel and were so performed before being assigned to civilians, there has been a *de facto* change in qualifications for performing those tasks.<sup>12</sup>

Seth galvanized the Agency into reviving our long-quiescent rules revision. Our old Rules of Procedure, last updated in 1999, had aged poorly, with deviations in practice correcting many of the flaws, but putting the inexperienced practitioner or, even more so, the unrepresented litigant, at a great disadvantage. If for no other reason than that, Seth reasoned, the Rules needed to be revised to codify the actual practice. He reviewed the work that had been done line-by-line, proposing modifications, deletions,

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<sup>8</sup> 2 PERB ¶ 3056 (1969).

<sup>9</sup> 49 PERB ¶ 3007, 3033.

<sup>10</sup> 48 PERB ¶ 3012 (2015).

<sup>11</sup> See, eg, *Town of Stony Point*, 45 PERB ¶ 3045 (2012).

<sup>12</sup> 48 PERB ¶ 3012, at 3042.

additions. We brainstormed how to begin moving toward electronic filing of pleadings, and the newly revised rules PERB adopted on August 2, 2017, bear his imprint on every page. They are a tribute to his belief in fairness, efficiency, and open access to government.

As Chair, Seth was a considerate leader. On one occasion in his first weeks at PERB, I briefed him on a specific staff issue, proposing to address the matter myself without involving him, so that the individuals involved would not first encounter him a situation that showed them in an unusual moment of weakness. He readily agreed, though volunteered to help if I couldn't resolve the matter.

Seth's energy, self-deprecating humor, and deep interest in the theory as well as the outcome of PERB's work lifted staff morale, even as the regular delivery of cider donuts played a part. His enthusiasm was contagious, and his dedication to getting the right result inspiring.

How do you follow a legend? I'll let you know, if I figure it out.

John F. Wirenius, Chair, NYS PERB