

# **AN INTRODUCTION TO THE TAYLOR LAW**

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The Public Employees' Fair Employment Act, Civil Service Law §§200-214, commonly known as the Taylor Law, is a labor relations statute covering public employees in New York State whether employed by the State, or by counties, cities, towns, villages, school districts, public authorities or certain special service districts. It became effective on September 1, 1967 and was the first comprehensive labor relations law for public employees in the State, and among the first in the United States.

The Taylor Law does the following:

Grants public employees the right to organize and to be represented by unions of their own choice;

Requires public employers to negotiate and enter into agreements with unions regarding terms and conditions of employment of their employees;

Establishes impasse procedures for the resolution of collective bargaining disputes;

Defines and prohibits improper practices by public employers and unions;

Prohibits strikes by public employees; and

Establishes a state agency to administer the Law - the Public Employment Relations Board (PERB).

PERB is a three-member Board appointed by the Governor with the consent of the State Senate. Board members serve six—year staggered terms and cannot hold any other public employment position. No more than two members of the Board can be of the same political party. There is one full-time Chairperson and two per diem members.

As an independent, neutral agency, the Board acts primarily as an umpire in disputes arising under the Taylor Law and it has the following major responsibilities:

Administer the Taylor Law statewide within the policy framework established by the Legislature;

Resolve representation disputes;

Provide impasse resolution services;

Adjudicate improper practice charges;

Designate managerial/confidential employees;

Determine responsibility of unions for striking and order forfeiture of dues and agency fee check-off privileges;

Make recommendations to the Legislature for statutory changes;

Conduct educational programs for the public and the labor relations community;

Administer grievance and interest arbitration panels.

## EVOLUTION OF THE TAYLOR LAW

- 1947 The Condon-Wadlin Act continues the common law prohibition of strikes, and enforces the prohibition through severe penalties. Striking employees are terminated, with reappointment possible only on condition that:
- a) compensation not exceed that received prior to the strike;
  - b) no pay increase be granted for three years; and
  - c) reinstatement be probationary for five years.
- 1963 Condon-Wadlin is amended to add a penalty of two days pay for each day the employee is on strike, but the probationary period is reduced to one year and an increase in salary is permitted after six months.
- 1965 Condon-Wadlin amendment expires and Condon-Wadlin Act reverts to its original terms.
- 1966 Twelve-day New York City transit strike. State Legislature grants amnesty to striking employees. Governor appoints Taylor Committee to make legislative proposals regarding public sector strikes and employee rights. Taylor Committee issues its report on March 31, recommending repeal of Condon-Wadlin and enactment of a statute similar to that which would become the Taylor Law.
- 1967 The Public Employees' Fair Employment Act (Taylor Law) is enacted, granting employees the right to organize and bargain collectively with their employers, while continuing the strike prohibition.
- 1969 The Taylor Law is amended to prohibit improper practices (unfair labor practices) by employers and unions and to make individual strikers subject to the "two for one" penalty and one year of probation. Added legislative hearing to impasse procedures.
- 1971 The Taylor Law is amended to permit the exclusion of managerial/confidential employees. Communication privilege created for agency staff and appointees.
- 1973 Negotiation over retirement benefits prohibited.
- 1974 The Law is amended to provide binding arbitration as the last step in police and firefighter impasses. Another amendment eliminates the legislative hearing from impasse procedures for educational institutions.
- 1977 The agency shop fee is made mandatory for state negotiating units, and a mandatory subject of negotiations at the local level. Fact finding is eliminated as an impasse resolution step in police and fire disputes. PERB's remedial powers expanded in refusal to bargain charges. Jurisdiction limited over contract violations. Definition of

- collective bargaining added.
- 1978 The probationary period for employees who strike is eliminated.
- 1981 Substitute teachers with reasonable assurance of employment deemed covered employees.
- 1982 The Law is amended to require employers to continue the terms of an expired contract until a new agreement is negotiated, provided that the employee organization does not strike.
- 1986 Employee organizations representing units of the New York City Transit Authority, the Metropolitan Transit Authority and the Triborough Bridge and Tunnel Authority, and subsidiaries thereof, are given rights under a new binding interest arbitration provision.
- 1989 Unions granted exclusivity of representation. Statutory coverage extended to all substitute employees of a school district or BOCES who have been issued a notice of reasonable assurance of continuing employment under altered Labor Department definition. New York City transit police made eligible for interest arbitration.
- 1990 Union's duty of fair representation codified. Four month statute of limitations established for judicial proceedings on duty of fair representation causes of action. Public employers joined as parties on certain duty of fair representation improper practices. PERB's remedial powers regarding duty of fair representation charges expanded. Detective investigators in county district attorney offices made eligible for interest arbitration.
- 1991 Criminal investigators in county district attorney offices made eligible for interest arbitration. Employees of Staten Island Rapid Transit Operating Authority made eligible to elect interest arbitration.
- 1992 Agency fee deduction mandated for all public employees represented by a union.
- 1993 Period of unchallenged representation status of unions representing employees in the State's executive and judicial branches under the current contracts was defined. School Plant Managers in the New York City School District made managerial/confidential.
- 1994 Injunctive relief pending disposition of improper practice charges is made available starting January 1, 1995.
- 1995 Compulsory interest arbitration for state police (compensation and compensation-related issues only).

- 1996 Nonattorney representation authorized.
- 1998 Use of state funds to discourage union organization prohibited by adding new §209-a.1(f); all police and fire impasses placed within PERB's jurisdiction with option afforded the unions representing those employees to remain within jurisdiction of mini-PERB.

## §209-a

### **Improper Employer Practices; Improper Employee Organization Practices; Application**

1. Improper employer practices. It shall be an improper practice for public employer or its agents deliberately (a) to interfere with, restrain or coerce public employees in the exercise of their rights guaranteed in section two hundred two for the purpose of depriving them of such rights; (b) to dominate or interfere with the formation or administration of any employee organization for the purpose of depriving them of such rights; (c) to discriminate against any employee for the purpose of encouraging or discouraging membership in, or participation in the activities of, any employee organization; (d) to refuse to negotiate in good faith with the duly recognized or certified representatives of its public employees; (e) to refuse to continue all the terms of an expired agreement until a new agreement is negotiated, unless the employee organization which is a party to such agreement has, during such negotiations or prior to such resolution of such negotiations, engaged in conduct violative of subdivision one of section two hundred ten of this article; or (f) to utilize any state funds appropriated for any purpose to train managers, supervisors, or other administrative personnel regarding methods to discourage union organization or to discourage an employee from participating in a union organizing drive.

2. Improper employee organization practices. It shall be an improper practice for an employee organization or its agents deliberately (a) to interfere with, restrain or coerce public employees in the exercise of the rights granted in section two hundred two, or to cause, or attempt to cause, a public employer to do so; (b) to refuse to negotiate collectively in good faith with a public employer, provided it is the duly recognized or certified representative of the employees of such employer; or (c) to breach its duty of fair representation to public employees under this article.

3. The public employer shall be made a party to any charge filed under subdivision two of this section which alleges that the duly recognized or certified employee organization breached its duty of fair representation in the processing of or failure to process a claim that the public employer has breached its agreement with such employee organization.

4. **Injunctive relief.** (a) A party filing an improper practice charge under this section may petition the board to obtain injunctive relief, pending a decision on the merits of said charge by an administrative law judge, upon a showing that: (i) there is reasonable cause to believe an improper practice has occurred, and (ii) where it appears that immediate and irreparable injury, loss or damage will result thereby rendering a resulting judgment on the merits ineffectual necessitating the maintenance of, or return to, the status quo to provide meaningful relief.

(b) Within ten days of the receipt by the board of such petition, if the board determines that a charging party has made a sufficient showing both that there is reasonable cause to believe an improper practice has occurred and it appears that immediate and irreparable injury, loss or damage will result thereby rendering a resulting judgment on the merits ineffectual necessitating maintenance of, or return to the status quo to provide meaningful relief, the board shall petition the supreme court, in Albany county, upon notice to all parties for the necessary injunctive relief or in the alternative may issue an order permitting the charging party to seek injunctive relief by petition to the supreme court, in which case the board must be joined as a necessary party. The board or, where applicable, the charging party, shall not be required to give any undertakings or bond and shall not be liable for any damages or costs which may have been sustained by reason of any injunctive relief ordered. If the board fails to act within ten days as provided herein, the board, for purposes of review, shall be deemed to have made a final order determining not to seek injunctive relief.

(c) If after review, the board determines that a charging party has not made a sufficient showing and that no petition to the court is appropriate under paragraph (b) of this subdivision, such determination shall be deemed a final order and may be immediately reviewed pursuant to and upon the standards provided by article seventy-eight of the civil practice law and rules upon petition by the charging party in supreme court, Albany county.

(d) Injunctive relief may be granted by the court, after hearing all parties, if it determines that there is reasonable cause to believe an improper practice has occurred and that it appears that immediate and irreparable injury, loss or damage will result thereby rendering a resulting judgment on the merits ineffectual necessitating maintenance of, or return to, the status quo to provide meaningful relief. Such relief shall expire on decision by an administrative law judge finding no improper practice to have occurred, successful appeal or motion by respondent to vacate or modify pursuant to the provisions of the civil practice law and rules, or subsequent finding by the board that no improper practice had occurred. The administrative law judge shall conclude the hearing process and issue a decision on the merits within sixty days after the imposition of such injunctive relief unless mutually agreed by the respondent and charging party.

(e) A decision on the merits of the improper practice charge by an administrative law judge finding an improper practice to have occurred shall continue the injunctive relief until either: (i) the respondent fails to file exceptions to the decision and implements the remedy, or (ii) the respondent successfully moves in court, upon notice, to vacate or modify the injunctive relief pursuant to provisions of the civil practice law and rules.

(f) Any injunctive relief in effect pending a decision by the board on exceptions: (i) shall expire upon a decision by the board finding no improper practice to have occurred, of which the board shall notify the court immediately, or (ii) shall remain in effect only to the extent it implements any remedial order issued by the

board in its decision, of which the board shall notify the court immediately.

(g) All matters in which the court has granted injunctive relief pursuant to this subdivision shall be given preference in the scheduling, hearing and disposition over all other matters before the board or its administrative law judges.

(h) The appeal of any order granting, denying, modifying or vacating injunctive relief ordered by the court pursuant to this subdivision shall be made in accordance with the provisions of article fifty-five of the civil practice and rules except that where such injunctive relief is stayed pursuant to section fifty-five hundred nineteen of the civil practice law and rules, an appeal for removal of such stay may be given preference in the same manner as provided in rule fifty-five hundred twenty-one of the civil practice law and rules.

(i) Nothing in this section shall be deemed to eliminate or diminish any right that may exist pursuant to any other law.

(j) Pursuant to paragraph (d) of subdivision five of section two hundred five of this article, the board shall make such rules and regulations as may be appropriate to effectuate the purposes and provisions of this subdivision.

5. Injunctive relief before the New York city board of collective bargaining. (a) A party filing an improper practice charge under section 12-306 of the administrative code of the city of New York may petition the board of collective bargaining to obtain injunctive relief before the supreme court, New York county, pending a decision on the merits by the board of collective bargaining, upon a showing that: (i) there is reasonable cause to believe an improper practice has occurred, and (ii) where it appears that immediate and irreparable injury, loss or damage will result and thereby rendering a resulting judgment on the merits ineffectual necessitating the maintenance of, or return to, the status quo to provide meaningful relief.

(b) Within ten days of the receipt by the board of such petition, if the board of collective bargaining determines that a charging party has made a sufficient showing both that there is reasonable cause to believe an improper practice has occurred and it appears that immediate and irreparable injury, loss or damage will result thereby rendering a resulting judgment on the merits ineffectual necessitating maintenance of, or return to, the status quo to provide meaningful relief, said board shall petition the supreme court in New York county, upon notice to all parties, for the necessary injunctive relief, or in the alternative said board may issue an order permitting the charging party to seek injunctive relief by petition to the supreme court, New York county, in which case said board must be joined as a necessary party. Such application shall be in conformance with the civil practice law and rules except that said board, or where applicable, the charging party shall not be required to give any undertaking or land [sic] and shall not be liable for any damages or costs which may have been sustained by reason of any injunctive relief order. If the board of collective bargaining fails to act

within ten days as provided in this paragraph, the board of collective bargaining, for purposes of review, shall be deemed to have made a final order determining not to permit the charging party to seek injunctive relief.

(c) If after review, the board of collective bargaining determines that a charging party has not made a sufficient showing and that no petition to the court is appropriate under paragraph (b) of this subdivision, such determination shall be deemed a final order and may be immediately reviewed pursuant to article seventy-eight of the civil practice law and rules upon petition by the charging party to the supreme court, New York county.

(d) Injunctive relief may be granted by the court, after hearing all parties, if it determines that there is reasonable cause to believe an improper practice has occurred and that it appears that immediate and irreparable injury, loss or damage will result thereby rendering a resulting judgment on the merits ineffectual necessitating maintenance of, or return to, the status quo to provide meaningful relief. Any injunctive relief granted by the court shall expire upon decision of the board of collective bargaining finding no improper practice to have occurred or successful challenge of the said board's decision pursuant to article seventy-eight of the civil practice law and rules. The said board shall conclude the hearing process and issue a decision on the merits within sixty days after the imposition of such injunctive relief unless mutually agreed by the respondent and charging party.

(e) A decision on the merits of the improper practice charge by the board of collective bargaining finding an improper practice to have occurred shall continue the injunctive relief until either: (i) the respondent fails to appeal the decision and implements the remedy, or (ii) the respondent successfully moves in court, upon notice, to vacate or modify the injunctive relief pursuant to provisions of the civil practice law and rules.

(f) Any injunctive relief in effect pending a decision by the board of collective bargaining on appeal: (i) shall expire upon a decision by the said board finding no improper practice to have occurred, of which the said board shall notify the court immediately, or (ii) shall remain in effect only to the extent it implements any remedial order issued by the said board of [sic] its decision, of which the said board shall notify the court immediately.

(g) All matters in which the court has granted injunctive relief upon petition by the charging party pursuant to this subdivision shall be given preference in the scheduling, hearing and disposition over all other matters before the said board. The said board shall establish rules and regulations dealing with the implementation of this section including time limits for its own actions.

(h) The appeal of any order granting, denying, modifying or vacating injunctive relief ordered by the court pursuant to this subdivision shall be made in accordance with the provisions of article fifty-five of the civil practice law and

rules except that where such injunctive relief is stayed pursuant to section fifty-five hundred nineteen of the civil practice law and rules, an appeal for removal of such stay may be given preference in the same manner as provided in rule fifty-five hundred twenty-one of the civil practice law and rules.

(i) Nothing in this section shall be deemed to eliminate or diminish any right that may exist pursuant to any other law.

(j) The board of collective bargaining shall make such rules and regulations as may be appropriate to effectuate the purposes and provisions of this subdivision.

6. Application. In applying this section, fundamental distinctions between private and public employment shall be recognized, and no body of federal or state law applicable wholly or in part to private employment, shall be regarded as binding or controlling precedent.

## COLLECTIVE BARGAINING

### I. CONTROLLING PRINCIPLES

- A. Executive function between chief executive officer and certified or recognized union. No right or duty to individual unit employees. Legislative body serves to approve only those parts of contract which require legislative approval prior to enactment.
- B. Includes right to bargain for contract and regarding questions arising under contract including grievances.
- C. Scope extends to terms and conditions of employment defined as wages, hours and other “tens and conditions of employment.”
- D. Necessitates meetings at reasonable times, overall good faith, written contract on demand. Does not compel agreement to any particular proposal or any particular concession.

### II. SCOPE OF NEGOTIATIONS

- A. mandatory subjects - must bargain and can insist
- B. permissive subjects - can bargain but can't insist
- C. prohibited subjects - can't bargain, insist or agree
- D. Balancing test determines negotiability: Is the subject primarily related to the employer's mission or to the employees' terms and conditions of employment?
- E. City of Cohoes makes all terms of agreement mandatorily negotiable

### III. CONDUCT OF NEGOTIATIONS

- A. Examples which violate duty to negotiate
  - 1. Surface bargaining - overall manifestation of unwillingness to reach an agreement
    - Indicia of surface bargaining
      - a. No willingness to exchange proposals
      - b. No willingness to discuss issues
      - c. No willingness to explain positions on issues
      - d. No willingness to empower negotiator to negotiate

- e. Canceling or postponing meetings
  - f. Refusing to make counter proposals
  - g. Inconsistency of positions
2. Unreasonable delay in commencement of negotiations – judged by the totality of the circumstances
  3. Refusal to discuss a mandatory subject of bargaining
  4. Insistence upon ground rules
  5. Failure to support the agreement at ratification; The improper failure of a party's negotiators to support the ratification of an agreement deprives it of the right to require such ratification. Ratification may not be unreasonably delayed.
  6. Actions designed to frustrate negotiations, such as increasing initial demands after impasse has been declared
  7. Submitting nonmandatory demands to the fact finder or arbitration panel. Submitting a proposal to the fact finder where the proposal had not been presented or discussed during prior negotiations.
  8. Refusal to participate in the mediation and/or fact finding processes of the Act, once impasse has been declared and the impasse procedures invoked.
  9. Refusal to execute a written agreement to reflect the parties' verbal agreement
  10. Failure to provide a party with information that is necessary for bargaining
  11. Bypassing the designated negotiator
  12. Strike
  13. Meaningful strike threat

#### IV. IMPASSE RESOLUTION PROCEDURES

- A. Declaration of Impasse; Either party or PERB on own motion; deemed to exist if no contract 120 days before end of fiscal year.
- B. Mediation; Staff and Panel.

- C. Fact finding; If no contract 80 days before end of fiscal year for those without interest arbitration.
- D. Legislative imposition for those without interest arbitration except school districts.
- E. Superconciliation and Continued Bargaining; No finality to school district impasses.
- F. Interest arbitration for police and fire and miscellaneous others.

#### V. CONTRACT RATIFICATION

- A. Not required.
- B. If parties elect to ratify, condition precedent to contract.
- C. Negotiators generally required to recommend ratification unless made dissent known.
- D. Not the same as statutorily required legislative approval.
- E. Failure to endorse may cause contract to be executed even if not ratified.

#### VI. DUTY TO BARGAIN PAST CONTRACT

- A. Continual duty as to matters not covered or otherwise clearly waived.
- B. Duty attaches either when employer takes unilateral action on a nonmandatory subject of negotiation which affects mandatory subjects (impact bargaining) or when issue has not previously been negotiated.
- C. Waiver
  - 1. by negotiation, whether or not agreement embodied in contract
  - 2. demand dropped
  - 3. management rights clause
  - 4. zipper clause
  - 5. silence
  - 6. Compare duty satisfaction

## VII. REFUSAL TO BARGAIN IN UNILATERAL CHANGE CONTEXT

### A. During contact

1. no violation if subject changed is nonmandatory or prohibited
2. if mandatory and extra contractual (i.e. a past practice) violation unless employer has defense
3. if mandatory and in contract - no jurisdiction Act §205.5(d). Union must grieve or sue employer for breach of contract.

### B. After contract expires

1. same as 1 & 2 above
2. any change in contract terms, whether or not mandatory, is violation of §209-a.1(e). Few defenses under §209-a.1(e).

### C. Employer Defenses

1. Waiver
2. De minimus change
3. Strike
4. Compelling need

## VIII. IMPACT BARGAINING

### A. Merely one example of continuing duty to bargain

### B. Rights and duties same as in duty to negotiate contract

1. Demand to bargain required
2. Impasse procedures applicable
3. Generally contingent upon a change in practice; contractual right to act does not waive right to negotiate impact
4. Employer not privileged to decide action has no impact
5. Nonmandatory subjects need not be negotiated

- C. Submission and negotiation of impact demand(s) preclude later submission of impact demand(s) on same subject during pendency of contract.

## **SIMPLIFIED JURISDICTION/DEFERRAL**

### **JURISDICTION**

1. PERB is without power to hear or remedy allegations which are only contract violations.
2. Jurisdictional issue presented under refusal to negotiate charge resting on unilateral change when change is in a term of a current collective bargaining agreement
3. Controlling inquiry: Is the existing agreement a reasonably arguable source of right to the charging party with respect to the alleged improper practice i.e., is there something in the contract the charging party can sue on or grieve and arguably win.
4. If jurisdictional issue presented, PERB will defer decision as to whether it, in fact, has jurisdiction to enable other forum (court or contractual forum) to decide contract question. Charge is conditionally dismissed with an opportunity to reopen if the other forum decides contract is not applicable or has not been violated.
5. Contract repudiation is within agency's jurisdiction. Redudiation exists only if contract has been violated without any colorable defense.

### **MERITS DEFERRAL**

1. If charge is within PERB's jurisdiction, agency need not exercise that jurisdiction.
2. Merits deferral issues presented if unilateral change in expired contract term (§209-a. 1(d) or (e)), if unilateral change in a noncontractual past practice, or if there has been an arguable violation of a contractual past practice clause even if violation occurs during life of contract.
3. Violations of §209-a.1(a), (b) and (c) are not as matter of policy subject to merits deferral.
4. Deferral appropriate if contract contains grievance procedure ending in binding arbitration, whether or not charging party has actually invoked that procedure by filing a grievance
5. Rationale: Act encourages voluntary dispute resolution and parties should be made to use contractual procedures for litigation of charges requiring an interpretation of contract language.

**RECENT DEVELOPMENTS UNDER THE**  
**PUBLIC EMPLOYEES' FAIR EMPLOYMENT ACT**

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These materials cover Taylor Law developments from September 1999 through July 2001. The full text of the reported decisions should be examined as appropriate to the reader's circumstances.

PERB Website: [www.perb.state.ny.us](http://www.perb.state.ny.us)

## REPRESENTATION

Lippman v. PERB, \_\_\_ A.D.2d \_\_\_, 32 PERB ¶7017 (3d Dep't 1999). PERB's determination, denying M/C status to high level supervisory personnel, confirmed. Policy making requires participation in the processes essential to decisions regarding government mission. Relevant factors include nature, timing and level of employee's involvement in decision-making process and employer practices and hierarchy. Managers have authority to change procedures and operations. Confidential designation requires performance of duties linked to labor relations or administration of collective bargaining agreement.

Broome County Sheriff's Law Enforcement Supervisors Association, 32 PERB ¶3054. Petition to fragment supervisors from existing unit dismissed because showing of interest was not submitted on agency's prescribed form. Petitions signed by employees did not set forth unit alleged to be appropriate. Director not required to undertake extraordinary measures to notify petitioner of deficiency even if extraordinary measures might have allowed for a timely correction of deficiency.

County of Rockland, 32 PERB 3074, conf'd, 34 PERB ¶7013. Investigative Aides in County DA office fragmented from County unit. Without deciding whether employees are police officers, fragmentation warranted as employees are law enforcement personnel who perform law enforcement duties. (appeal pending)

County of Putnam and Sheriff, 33 PERB ¶3001. Elected Sheriff and County are joint employer of deputy sheriff personnel.

North Rose-Wolcott Central School District, 33 PERB ¶3002. Only the personnel functions which present conflicts with an employee's representation qualify for confidential designation.

County of Montgomery, 33 PERB ¶3006. Coverage hinges on regularity and continuity of employment, not simply number of hours worked, although that is relevant as one factor. Seasonal tests not applicable to all-year employees.

Monroe-Woodbury Central School District, 33 PERB ¶3007. Where title is included in recognition clause, title is encompassed in unit even though parties by practice have not treated the title as included.

Town of Crawford, 33 PERB ¶3008. Police sergeant excluded from unit of police officers on finding sergeant exercised significant supervisory responsibilities on a department-wide basis. Employee left without representation, but units consisting of only one employee per se inappropriate.

Marcus Whitman Central School District, 33 PERB ¶3016. Felt-interests of employees, here opposition to inclusion in unit, are immaterial to unit placement. Bargaining units cannot fluctuate according to employees' personalities.

County of Erie and Community College, 33 PERB ¶3023. Academic Deans held managerial and not appropriately placed in bargaining unit even if unit includes other managerial personnel.

CSEA v. PERB, 33 PERB ¶7013 (Alb. Co. Sup. Ct. 2000), rev'g 32 PERB ¶3013. Unrevoked dues deduction authorizations are valid for purposes of certification without election.

City of Rye, 33 PERB ¶3035. Inappropriate to place command supervisor in fire department in rank-and-file unit over employer's objection. Responsibilities, including employee evaluation, discipline, assignments and grievance adjustment, raised potential conflict of interest.

Ichabod Crane Central School District, 33 PERB ¶3042. Fragmentation of registered nurses from long-standing unit of nonprofessional employees ordered. Compelling need standard generally applicable to fragmentation cases rejected. Cases to the contrary overruled. Nurses have a unique community of interest and/or conflict of interest with nonprofessional employees requiring fragmentation.

Town of Huntington, 33 PERB ¶3049. Town Park Supervisor is not in and should not be appropriately added to blue collar unit. Employer's placement in white collar unit not disturbed as shared community of interest and weight is to be afforded the employer's administrative convenience.

Rye City School District, 33 PERB ¶3053. Lab assistants not one and the same as the computer aides the lab assistants replaced. Unit clarification aspect of petition dismissed. Not included in title-specific recognition clause and community of interest dissimilar. Unit placement dismissed as community of interest, evaluated in light of employer's uniting preference, favored placement in secretarial, clerical and school nurse unit represented by different union.

County of Steuben, 34 PERB ¶3023. No fragmentation of mid-level supervisors from county-wide unit. Supervisory role severely circumscribed. No supervisory conflict or subversion of responsibility or inadequate representation. Reiterates compelling need standard for fragmentation of existing units.

## **IMPROPER PRACTICES**

### **INTERFERENCE/DISCRIMINATION**

Rockville Centre Union Free School District, 32 PERB ¶3050, conf'd, \_\_\_ A.D.2d \_\_\_, 34 PERB ¶\_\_\_\_. Discharge of probationary teaching assistant not proven to have been caused by exercise of statutorily protected rights. Board not required to defer to ALJ's factual or legal conclusions. Charging party must meet its burden of proof on each element of an interference/discrimination charge before respondent must rebut that proof .

New York City Transit Authority, 32 PERB ¶3057. Union representative's directive to employees to stop work is protected if representative has a good faith belief that work is threatening to employees' safety.

Chenango Forks Central School District, 32 PERB ¶3060 (1999). Act protects public employees, persons seeking to acquire or regain public employment, but not persons who are privately employed at the date of the alleged act of interference and discrimination even if the retaliation is grounded upon the employee's protected activity when a public employee.

Riverhead Central School District, 32 PERB ¶3070. Error for ALJ to not consider evidence of business reasons for change in work assignment allegedly made because employee availed herself of contractual rights regarding union release time. Business reasons are relevant to charge grounded upon interference or discrimination for exercise of rights under collective bargaining agreement even if employer does not have any contractual defense to contract violation.

Cayuga-Onondaga BOCES, 32 PERB ¶3079. Board need not defer to ALJ's "subjective evaluation of the evidence."

Civil Service Employees Association, 32 PERB ¶3080. Escrow of all agency shop fees satisfies union's duty. Financial disclosure three months after initial deduction no violation because fees escrowed.

Town of Gates, 33 PERB ¶3009. Charge dismissed upon finding that discipline was not caused by employees' exercise of statutory protected rights.

Greenburgh #11 UFSD, 33 PERB ¶3018. Irrebuttable presumption of culpable motive when employer conduct is inherently destructive of employees' rights wrongly established. State of New York, 10 PERB 3108 reversed. Substitutes "permissive presumption" that action was for the purpose of depriving employees of their statutory rights. Respondent must "destroy the presumption by sufficient proof to the contrary."

City of Utica, 33 PERB ¶3039. Union president's off-duty conduct in Mayor's office not protected. Disobeyed directive from public safety commissioner regarding service of letter related to interest arbitration award. Refusal and "loud and opprobrious conduct" deprived employee of Act's protection.

CSEA v. PERB, \_\_\_ A.D.2d \_\_\_, 33 PERB ¶7018 (3d Dep't 2000) aff'g 32 PERB ¶7011 and rev'g 32 PERB ¶3018. On finding employee discharged unlawfully, employee entitled to an unconditional award of back pay and benefits. Conforming order issued 34 PERB ¶3013.

Holbrook Fire District, 33 PERB ¶3050. Charge dismissed as insufficient evidence of "but for" causation. Timing, disparate treatment, employee's good record and de minimus nature of alleged misconduct not enough under preponderance of evidence standard to satisfy burden of proof. Employer not required to rebut because not all elements of case satisfied.

Council of Supervisors & Administrators of City of New York, 33 PERB ¶3052. DFR breached only by arbitrary, discriminatory or bad faith conduct. Careless, inept, ineffective action do not establish breach of duty.

William Floyd United Teachers Local 1568, 33 PERB ¶3055. DFR dismissed as union's interpretation of contract clause was not "patently unreasonable" nor was employee's interpretation the "only one possible."

Buffalo Police Benevolent Ass'n, 33 PERB ¶3060. Union breached its duty of fair representation by giving unit employees false and inaccurate information about the status of pending grievances and improper practice charges. Also DFR violation in legal position taken in CPLR Article 78 proceeding as arguments directly contrary to positions taken in pending contractual grievance proceedings.

State of New York, 33 PERB ¶3046. State blocked all computer-generated e-mail of employee/union official. No violation because blockage was not based on the content of the e-mail which was protected, rather on employee's refusal to comply with directive to limit use within the perimeters of State e-mail policy. Assistant Director's credibility resolution favorable to the charging party reversed. Refusal to obey directive was misconduct "even though clothed in protected activity." (appeal filed)

County of Monroe and Sheriff, 33 PERB ¶3044. Withdrawal of practice under which unit employees were allowed to use employer cars to travel to and from work not interference or discrimination. Insufficient proof that action was caused by union's complaint about changes in the employees' use of compensatory flex time. Timing alone is insufficient to establish animus.

New York City Transit Authority, 34 PERB ¶\_\_\_\_. Individual waived any right to bring charge in disciplinary settlement. Waiver enforceable if language covers the improper practice charge, is consistent with public policy and is clear and knowing.

New York City Transit Authority (Fredericson), 34 PERB ¶3025. Employees disobedience of order (leave work site) renders activity (return to take photographs of claimed safety issue) unprotected. Return was "tantamount to misconduct, even though clothed in protected activity."

### **GOOD FAITH BARGAINING**

City of Cohoes, 32 PERB 3046, conf'd, 33 PERB ¶\_\_\_\_ (Sup. Ct. Alb. Co. 1999). Union not required to negotiate or arbitrate City's demand calling for waiver of salary differential granted employees by express terms of GML §207-a. As employers have been released from duty to negotiate express grants of right under GML, principle of mutual negotiations required that union also be released from any duty to negotiate express right under GML.

City of Watertown v. PERB, \_\_ N.Y.2d \_\_, 33 PERB ¶7007, conf'g 30 PERB ¶3072. Demand for arbitration of GML §207-c eligibility determinations is a mandatory subject of negotiation.

County of Nassau, 32 PERB ¶3052. Duty to bargain impact of changes in shifts and non-vacation leave usage satisfied. Contractual right to make the changes also addressed explicitly and implicitly the effects of the employer's exercise of contractual right to make changes.

City of Utica, 32 PERB ¶3056. Components of and procedures for respirator fitness testing for firefighters held mandatorily negotiable except as mandated by federal or state regulation.

Town of Greece, 32 PERB ¶3059. Parties found to have reached final agreement to amend contract to clarify vacation accrual provisions. Town obligated to prepare and sign written agreement. Any right of ratification waived by failure to submit agreement to Town Supervisor.

New York State Office of Court Administration, 32 PERB ¶3063. Impact bargaining arises from effects inevitably or necessarily arising from exercise of managerial prerogative.

State of New York, 32 PERB ¶3067. Impact bargaining right is not conditioned on proof of actual impact. But, contractual right to subcontract satisfied duty to negotiate both decision to subcontract and the impact of implementation of that decision.

Uniform Firefighters of Cohoes v. PERB, 32 PERB ¶7026 (Sup. Ct. Alb Co.) aff'd, \_\_\_ A.D.2d \_\_\_, 33 PERB ¶\_\_\_. Confirms PERB's conversion theory of negotiability under which all contract terms are deemed mandatory subjects of negotiation. Leave to appeal denied. \_\_\_ N.Y.2d \_\_\_, 34 PERB ¶7018 (2001).

Town of Carmel PBA Inc. v. PERB, \_\_\_ A.D.3d \_\_\_, 32 PERB ¶7028 (3d Dep't 1999), aff'g 31 PERB 3006. Vacation overlap nonmandatory as inextricably entwined with staffing level determinations.

Poughkeepsie Professional Fire Fighters' Assn., 33 PERB ¶3029 . Demand for "de novo" arbitration review of GML §207-a initial and continuing eligibility determinations not mandatorily negotiable.

Benson v. Cuevas, \_\_\_ A.D.2d \_\_\_, 33 PERB ¶7008 (3d Dep't 2000) leave to appeal denied \_\_\_ N.Y.2d \_\_\_, 33 PERB 7014. Motive immaterial in assessing negotiability.

Niagara Falls Police Captains and Lieutenants Association, 33 PERB ¶3058. Union's demand at interest arbitration regarding Retirement and Social Security Law §443(f)(1) nonmandatory as not arbitrable by express terms of RSSL.

Greenburgh No. 11 Union Free School District, 33 PERB ¶3059. Duty to provide information continues into grievance arbitration.

City of White Plains, 33 PERB ¶3051. Demand to add language to existing contract provision is not subject to City of Cohoes conversion theory of negotiability. New language "is not related to the parties' grievance mechanism." Cohoes also does not convert prohibited subjects into mandatory subjects. Employer's demand regarding CSL §58(4)(c) regarding police officer's appointment as detective which would effect waiver of employees' rights nonmandatory because demand "foreclosed" by legislative intent.

City of Mount Vernon v. PERB, 33 PERB ¶7015 (Sup. Ct. Alb. Co.), rev'g, 32 PERB ¶3030. alternative to disciplinary procedure established by local charter not mandatorily negotiable as CSL §76(4) exempted City from duty to negotiate.

## **UNILATERAL CHANGE/DISCONTINUATION OF EXPIRED CONTRACT TERMS**

Town of Ramapo, 32 PERB ¶3072. Requirement that employees record their work assignments, work location and workload mandatorily negotiable as there was a possibility of discipline for noncompliance. But see New York City Transit Authority, 31 PERB 3051. Negotiability of a work rule and its enforcement by discipline are distinct issues to be analyzed separately.

State of New York (Workers' Compensation Board), 32 PERB ¶3076. Abolition of practice under which employees given release time to cash paychecks no violation. Employer permissibly reverted to terms of contract regarding personal leave when it required employees to charge time to leave accruals.

Triborough Bridge and Tunnel Authority, 32 PERB ¶3078. Light duty assignment is nonmandatory subject of negotiation.

State of New York (Wende Correctional Facility), 33 PERB ¶3022. A past practice is not "unequivocal" unless there has been consent to it. Three minute early release was not a practice despite employer's characterization of release as a practice because employer did not acquiesce to early release. Stipulated record established only that employer notified employees of error in time clock system.

State of New York, 33 PERB ¶3024. Charge alleging Executive Order requiring employees to report corruption under disciplinary sanction for noncompliance dismissed for failure to prove change in working conditions. No proof employees were not required to report corruption until the Executive Order.

County of Westchester, 33 PERB ¶3025, conf'd, 33 PERB ¶7016 (Sup. Ct Alb Co.). Withholding of income tax from employees whose Workers' Compensation and General Municipal Law §207-C claims were being contested by employer held mandatorily negotiable. Unilateral change in practice of not withholding tax held a violation.

CSEA v. Cuevas, \_\_\_ A.D.2d \_\_\_, 33 PERB ¶7012, aff'g 32 PERB ¶3047. Charging party bears burden to prove change in practice and fails where record evidence supports two or more equally reasonable conclusions. Here record equally susceptible to conclusion practice was drug plan with fixed cost or one with the lowest co-payment offered by particular health care provider.

County of Monroe and Sheriff, 33 PERB ¶3044. Withdrawal of practice under which unit employees were allowed to use employer cars to travel to and from work was refusal to bargain. Practice was not conditional.

State of New York - Unified Court System, 33 PERB ¶3043. Administrative Order establishing "guidelines" for maximum transcript fees to be paid by private parties to stenographers violation. Subjects of order on application of balancing test were mandatorily negotiable as they directly affected employees' compensation. Contractual waiver defense rejected as management rights and zipper clause were too general. Make whole remedy appropriate even if amount owed is difficult to ascertain.

State of New York (SUNY), 33 PERB ¶3045. Academic freedom of teaching assistants (TA) resting on the syllabus employees' elected to teach is not mandatorily negotiable. Issue characterized as the manner in which undergraduate courses will be taught and that affects the "essence of educational policy." Reassignment of TAs not disciplinary.

Port Jefferson Union Free School District, 33 PERB ¶3047. Imposition of sign-in/sign-out requirement upon employee subjected to Education Law §3020-a charges held mandatorily negotiable. Negotiability not properly assessed on the facts of the particular case. Administrative work rule mandatory unless it has only slight impact on employment or has major impact on nondelegable managerial responsibilities under law or public policy.

Town of Shawangunk, 33 PERB ¶3054. Charge dismissed as no unequivocal past practice of employer paying 100% of premium for health insurance upon an employee's retirement.

Town of Southampton, 34 PERB ¶3007. Terms of expired interest arbitration award constitute the status quo which must be continued until successor agreement is reached or new award issues.

Bellmore Union Free School District, 34 PERB ¶3009. Charge alleging that hiring of teaching assistant above first step was unilateral change in past practice dismissed. Seven of 62 titles hired since 1986 above first step. Past practice must be unequivocal and in existence for a significant period of time such that there is a reasonable expectation of continuation without change. Practice generally tested unit-wide not as to a specific job title. General management rights clause not waiver or duty satisfaction because it did not address salary.

New York City Transit Authority v. PERB, \_\_\_ A.D.2d \_\_\_, 33 PERB ¶7020 (2d Dep't. 2000), aff'g 30 PERB ¶3006. Disciplinary work rules and penalties are mandatorily negotiable.

City of Syracuse v. PERB, \_\_\_ A.D.2d \_\_\_, 33 PERB ¶7022 (4th Dep't 2000), aff'g 32 PERB ¶3029 (1999). GML §207-a procedures mandatorily negotiable. Continuing duty to negotiate matters not covered by agreement. Local notice of claim provisions not applicable as improper practice charges are not "actions" or "special proceedings."

### **SUBCONTRACTING/TRANSFER OF UNIT WORK**

City of Rome, 32 PERB ¶3058. "Core component" analysis is used to determine whether there is a discernible boundary to unit work in which to test exclusivity, at least for work involving multiple tasks, multiple-function jobs or multiple locations. Core work of Acting Purchasing Agent's job defined as the review and supervision of open market purchases and open competitive bidding. Exclusivity established and maintained over the work as defined despite certain duties peripheral to core component having been done by nonunit employees. Reinstatement remedy reversed because appointment was to "Acting" position, 33 PERB ¶7002 (Sup. Ct. Alb. Co. 2000), aff'd \_\_\_ A.D.2d \_\_\_, 34 PERB ¶7020.

Town of Mamaroneck, 33 PERB ¶3010. Clerical duties of police department permissibly transferred to civilian employee. Reaffirms police "civilization cases." That police officers did the clerical work when civilian was absent held immaterial. Civilization need not be permanent

or absolute to be permissible.

New York State Thruway Authority, 33 PERB ¶3017, conf'd \_\_\_A.D.2d\_\_\_, 34 PERB ¶7003 (3d Dep't 2001). Charge timely and duties were substantially similar. Subcontracting of pavement marking violation. Reaffirms that subcontract incidental to different set of tasks or larger project does not breach exclusivity. Change in equipment or design does not breach exclusivity or make work different. Fiscal or operational wisdom of decision to subcontract is immaterial to negotiability.

County of Alleghany, 33 PERB ¶3019. Employer permitted to subcontract work under contractual management rights clause giving employer right to assign work to nonunit employees.

CSEA v. PERB, \_\_\_A.D.2d \_\_\_, 33 PERB ¶7009 (3d Dep't 2000), aff'g 32 PERB ¶3015. Animal control officer case. Substitution of civilian employees for uniformed officers or substitution of uniformed personnel for civilians necessarily results in significant change in qualifications without regard to duties performed. Job loss not part of balancing test because the job loss preceded the transfer of unit work.

County of Westchester, 33 PERB ¶3057. Charge dismissed as county employees did not have exclusivity over guarding State DOCS inmates in facilities under State control and operating under State law.

State of New York (DOS - Butler Correctional Facility), 34 PERB ¶3014. Use of inmates to do snowplowing violated Act notwithstanding that inmates plowed snow at other facilities. There was a discernible boundary defined by facility. General review of discernible boundary caselaw.

## **PRACTICE AND PROCEDURES**

Lippman v. PERB, \_\_\_ A.D.2d \_\_\_, 32 PERB ¶7017 (3d Dep't 1999). PERB's interpretation and application of Taylor Law is to be accepted if reasonable and not arbitrary or irrational. No transfer in representation proceeding and no substantial evidence review as hearing is discretionary with PERB and not required by law. Only question is whether PERB's determination is arbitrary and capricious.

Town of New Windsor, 32 PERB ¶3049. Charge alleging a unilateral change and a refusal to negotiate the change and its effects was properly deferred in its entirety to parties' grievance arbitration process. The violations were all linked legally and factually such that deferral of the unilateral change allegation only, as the ALJ had ordered, was not appropriate.

New York City Transit Authority, 32 PERB ¶3057. Collateral estoppel not properly extended to issue of whether union representative had a good faith belief that continuing work would threaten worker safety because that issue was not clearly raised at arbitration and was not material or essential to award.

Jardim v. PERB, 32 PERB ¶7024 (2d Dept. 1999). No direct judicial appeal from ALJ's decision. Appeal is from PERB not ALJ order.

PERB v. County of Westchester, 32 PERB ¶7025. County could not prevent enforcement of PERB order as it did not appeal order. County precluded from questioning PERB's remedy unless timely appeal.

New York State Office of Court Administration, 32 PERB ¶3073. Charge alleging only violation of agreement "in place" dismissed for lack of jurisdiction. No facts pleaded to support conclusory allegation that contract had been repudiated.

United Federation of Teachers (Fearon), 33 PERB ¶3003. Withdrawn charge may be reopened only if evidence establishes a repudiation of underlying settlement agreement.

State of New York (GOER), 33 PERB ¶3012. Charge dismissed for lack of jurisdiction. Charge presented breach of contract only. Note: no jurisdictional deferral because contract grievance procedure had already been exhausted.

New York State Thruway Authority, 33 PERB ¶3017, conf'd, \_\_A.D.2d\_\_, 34 PERB ¶7003 (3d Dep't). Charge timely. Initial subcontract characterized by supervisor as experiment. Charge filed within 4 months of final act.

Allen v. PERB, 33 PERB ¶7001 (Sup. Ct. Broome Co. 2000). Superintendent of Schools not public employer. District is public employer. Failure to raise notice of claim issue to PERB is waiver of claim even though issue raised with ALJ. Notice of Petition lacking a return date is jurisdictional defect. If can't fix return date, prudent to insert "a/some/any future business date" in the Notice of Petition.

State of New York, 33 PERB ¶3024. Motion to dismiss is tested only by evidence introduced up to point of motion. Charging party may not establish prima facie case by evidence submitted by respondent after ALJ has reserved decision on motion to dismiss.

Westchester County Police Officers Benevolent Ass'n Inc. v. PERB, \_\_A.D.2d\_\_, 34 PERB ¶7002 (3d Dep't 2001). PERB decision to defer improper practice on merits to collective bargaining agreement grievance procedure final for purposes of review. Remand to Supreme Court to determine whether determination was in error, arbitrary and capricious, or an abuse of discretion. Not a substantial evidence question.

Village of Belmont, 34 PERB ¶3008. ALJ permitted to demand offer of proof. Failure to respond resulted in no hearing and decision on pleadings.

New York City Transit Authority, 34 PERB ¶3006. Four-month filing period not subject to extension and not tolled by pursuit of ancillary proceedings. Filing period runs from alleged misconduct, not receipt of grievance arbitration award.

State of New York (Drakes), 34 PERB ¶3001. Failure to serve exceptions requires dismissal upon party objection.

New York State COPBA v. PERB, 33 PERB ¶7017 (Sup. Ct. Alb. Co. 2000). CPLR Article 78 petition dismissed as petition was not filed with County clerk's office.

Greenburgh No. 11 Union Free School District, 33 PERB ¶3059. When no specific act, time to file charge runs from date charging party reasonably should have known there was an arguable improper practice. Here, demand for information needed for arbitration, not specifically refused, union could wait until date of arbitration. Alternatively, charge timely as each demand and each refusal to provide information constitutes a separate violation of Act. Notice of claim satisfied as charge received within 90 days of accrual date. Notice of claim provisions of Education Law §3813 not applicable to §209-a.1(a) improper practice charges.

CSEA v. Nassau County PERB, \_\_\_A.D.2d\_\_\_, 34 PERB ¶7502 (2d Dep't 2001). Mini-PERB's fragmentation of correction officers confirmed. Uses substantial evidence or arbitrary and capricious as a standard of review.

Flynn v. Cuevas, 34 PERB ¶7009 (Sup. Ct. Alb. Co. 2001). Service before purchase of index number is nullity.

State of New York (SUNY - Oswego), 34 PERB ¶3017. Legitimate business reason for action is not an affirmative defense. Can be considered even if not raised in answer. Not waived.

Board of Education of the City School District of the City of New York, 34 PERB ¶3016. Board is empowered to review staff determinations, here Director of Conciliation's decision to appoint a mediator to teacher impasse despite employer's allegation that parties were not at impasse.

Grassel v. PERB, 34 PERB ¶7021 (Sup. Ct. Kings Co. 2001). Court is without jurisdiction to review PERB decision if petitioner has not filed exceptions with the agency. Failure to exhaust administrative remedies which were available. Filing Article 78 petition is not filing exceptions and does not preserve issue for judicial review.

Lippman v. PERB, 34 PERB ¶7015 (Sup. Ct. Alb. Co. 2001). Papers filed in application for injunctive relief ordered added to record for review of improper practice determination even though not in evidence in the latter proceeding.

Schuyler-Chemung-Tioga BOCES, 34 PERB ¶3019. No deferral of interference allegation arising from alleged refusal to provide information needed for grievance processing. Will not defer interference allegation to contract language that restates §209-a.1(a) or provides rights similar to those that flow from §209-a.1(a). Having exercised jurisdiction under (a), also declined to defer §209-a.1(d) allegations. Have jurisdiction over the (d) allegation because right to information exists as a right independent of the contractual right to information.

## MISCELLANEOUS

Syracuse City School District PERB, 32 PERB ¶3066. Mini-PERB's approval rescinded.

Port Washington UFSD v. Port Washington Teachers Association, 33 PERB ¶7502 (2d Dep't 2000). Contractual religious leave clause giving observers time off without charge to leave accrual violates Constitution's Establishment Clause. Arbitration stayed.

City of New York v. Uniformed Fire Fighters Association, \_\_\_ N.Y.2d \_\_\_ (October 17, 2000). Arbitration over procedures to be followed by City's Department of Investigation in carrying out a criminal investigation held barred by public policy. City not acting as employer but as sovereign in conducting a criminal investigation.

Patrolmen's Benevolent Ass'n of the City of New York, Inc. v. PERB, 34 PERU ¶7017 (Sup. Ct. Alb. Co. 2001) aff'd \_\_\_ A.D.2d \_\_\_, 34 PERB ¶\_\_\_. Law transferring jurisdiction over police impasses to PERB held constitutional. State PERB, not mini-PERB, has jurisdiction to make determinations as to scope of negotiations and whether parties are at impasse.

State of New York (SUNY Oswego), 34 PERB ¶45\_\_\_. Disciplinary notice included allegations regarding employee's stated intent to contact his union which were subsequently withdrawn from the NOD. Charge held not moot citing Plainedge Union Free School District, 31 PERB ¶3063.