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Government Consolidations and the Taylor Law: Cooperate, Litigate, or Legislate?

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In these difficult financial times, local governments and other public entities are in constant search of cost-saving measures. One such measure is consolidation, also referred to as merger. This option may take several forms, such as sharing a discrete service, merging entire departments, or full consolidation resulting in a single, new public entity. There are many things for each subject entity to evaluate when considering consolidation, but only one of them is the subject of this paper and accompanying discussion: the new entity's labor relations, if any, regarding its newly constituted workforce after a full consolidation. Then again, this is not only a concern for the consolidating entities, but for workers and labor organizations as well.

In what little that has been written on this subject as it relates to the public sector, there is at least one thing that all can agree on, which is that it is rather uncharted territory under the Taylor Law. While there is a slew of private sector authority on the topic of a successor employer's bargaining obligations, public sector decisions issued by PERB and the courts are few, yet provide a foundation from which public employers and unions alike can work. Also, in 2009 legislation was enacted, after a push by then-Attorney General Cuomo, which arguably

simplifies the processes of dissolution and consolidation of public entities.¹ *Chap. 74 of the Laws of 2009, codified at General Municipal Law Article 17-A (§§750-793)*. Although some may argue that this new law provides scant guidance regarding the new entity's bargaining obligations and the affected labor organization's rights, there is a colorable argument that the statute envisions the new entity assuming existing contractual obligations even absent a pending question concerning representation.

There are few clear answers in this area, in large part because they depend heavily upon the facts of each case. The hope is that this paper and the accompanying discussion will provide, in the least, the starting point from which to tackle this issue that has already begun arising more frequently. In many instances, the answers will not be easily arrived at, thus leaving public entities and labor organizations with two options and the State Legislature with a third: cooperation, litigation, or legislation.

I. Laws Governing Consolidation

There are two areas of law that address the mechanics of governmental consolidation: General Municipal Law and the Education Law. The former does not apply to school districts insofar as consolidation. The Education Law, on the other hand, contains a patchwork of statutes that address the types of consolidation—and there are many, some might say unnecessarily. Common among these areas of law however is that neither comprehensively addresses the bargaining obligation, if any, of the new consolidated entity with regard to its new combined

¹As discussed below, the new law does not apply to school districts. Moreover, to the extent it deals with dissolution, the new law will not be discussed as labor relations issues are generally less complex in such cases. Instead, the more complicated issues arising under merger and consolidation will only be addressed.

workforce, nor do they devise a unique or expedited process by which to deal with such pressing issues that will almost inevitably arise.

A. General Municipal Law

General Municipal Law §750(2) defines “consolidation” as

(a) the combination of two or more local government entities resulting in the termination of the existence of each of the entities to be consolidated and the creation of a new entity which assumes jurisdiction over all of the terminated entities, or (b) the combination of two or more local government entities resulting in the termination of the existence of all but one of the entities which shall absorb the terminated entity or entities.

In turn, General Municipal Law §750(13) defines a “local government entity” as a

town, village, district, special improvement district or other improvement district, including, but not limited to, special districts created pursuant to articles eleven, twelve, twelve-A or thirteen of the town law, library districts, and other districts created by law; provided, however, that a local government entity shall not include school districts, city districts or special purpose districts created by counties under county law.

Consolidation of covered entities can be initiated either by a joint resolution of the entities desiring it or by the registered voters in each of the entities. *GML §751*. As to the latter, a petition must be submitted containing signatures of ten percent or five thousand, whichever is less, of the registered voters *in each entity sought to be consolidated*. *Id. at §757*. Thereafter, although in slightly different orders depending on the type of initiation, a “consolidation plan” is devised, a public hearing is held, and the public is required to vote.

Upon a successful consolidation, the statute defers largely to the consolidation plan to govern the terms and conditions of the new entity’s existence. *GML §765(1)*. However, the statute does address specifically the impact of consolidation on a number of areas such as the pre-

existing entities' local laws, pending litigation, and elected officials. *Id. at §§776, 779, 780.*

Moreover, and most relevant for our purposes, the statute also explicitly references the consolidated entity's obligations with regard to the component entities' contracts:

GML §765(5):

Upon the effective date of the consolidation, the joint consolidation agreement or the elector initiated consolidation plan, as the case may be, shall be subordinate in all respects to the contract rights of all holders of any securities or obligations of the local government entities outstanding at the effective date of the consolidation.

GML §768(1),(3)

1. All valid and lawful debts and liabilities existing against a consolidated local government entity, or which may thereafter arise or accrue against the consolidated local government entity, which but for consolidation would be valid and lawful debts or liabilities against one or more of the component local government entities, shall be deemed and taken to be like debts against or liabilities of the consolidated local government entity and shall accordingly be defrayed and answered to by it to the same extent, and no further than, the component local government entities would have been bound if no consolidation had taken place.

3. All bonds, contracts and obligations of the component entities which exist as legal obligations shall be deemed like obligations of the consolidated local government entity, and all such obligations as are authorized or required to be issued or entered into shall be issued or entered into by and in the name of the consolidated local government entity.

Though these sections reference only contracts generally, and not collective bargaining agreements specifically, it is beyond cavil that CBAs are a variety of the former. That said, there is a single section in the statute that does reference CBAs, under the heading "effect of transition on employees":

Except as otherwise provided by law and except for those officials and employees protected by tenure of office, civil service provisions or collective bargaining agreement, upon the effective date of consolidation, all appointive offices and positions then existing in all component local government entities involved in the consolidation shall be subject to the terms of the joint consolidation agreement or elector initiated consolidation plan, as the case may be. Such agreement or plan may provide for instances in which there is duplication of positions and for other matters such as varying length of employee contracts, different civil service regulations in the constituent entities and differing ranks and position classifications for similar positions. *GML §767.*

The above provisions provide strong evidence to argue that collective bargaining agreements between a component entity and a labor organization at the time of consolidation are superior to the consolidation plan and are enforceable against the consolidated entity. This premise will be discussed in further detail below.

B. Education Law

Compared to the new streamlined way in which non-school governmental entities are consolidated, school districts enjoy having to navigate a panoply of patchworked statutes consisting of an array of reorganizational forms. Although cumbersome, confusing and, frankly, in need of consolidation themselves, these statutes are nevertheless the law within which schools must work until a change is made.

The manner in which school districts are organized or choose to reorganize is “largely a matter of local determination.” NEW YORK STATE EDUCATION DEPARTMENT, EDUCATION MANAGEMENT SERVICES, GUIDE TO THE REORGANIZATION OF SCHOOL DISTRICTS IN NEW YORK STATE, §IX, http://www.p12.nysed.gov/mgtserv/sch_dist_org/GuideToReorganizationOfSchoolDistricts.htm#Introduction (last visited January 3, 2013) [hereinafter GUIDE TO REORGANIZATION]. Reorganization is a general term that includes a number of different statutory forms of merging two or more school

districts in the state. There are generally four statutory forms of reorganization: annexation, centralization, consolidation or dissolution. Utilizing these forms, there are six potential pathways to reorganize a school district, depending on what “type” of district seeks reorganization (e.g., common school districts, union free school districts, central school districts, city school districts and central high school districts).² The reorganization statutes are generally contained in Articles 33, 35, 37 and 39 of the Education Law. However, as discussed *infra*, the application of even the same reorganization form on different school district types may produce differing results with regards to employee rights.

Furthermore, most of the reorganization statutes, which were enacted prior to the Taylor Law, do not even address employee rights or include job protection language. Regulations have not been promulgated to fill in the gaps of this legislation, although the SED has published guidance on its website to that effect. GUIDE TO REORGANIZATION , http://www.p12.nysed.gov/mgtserv/sch_dist_org/GuideToReorganizationOfSchoolDistricts. The following is a general overview of the four statutory reorganization forms, with mention of how the statutes touch upon effected employee rights, if at all.

1. “*Annexation*” is the statutory process whereby any school district, other than a city school district, is dissolved and its territory annexed to a contiguous central school district or to a union free school district. *See generally, Education Laws* §§1705, 1801, 1803. Annexation is distinguished from centralization and consolidation by the fact that a new school district is not

² A discussion of the history of the structure of New York State school districts and their implementing statutes can also be found in the SED’s “Guide to Reorganization.” *Id.* at §II. Currently in the State there are 11 common school districts; 161 union free school districts (16 of which are “Special Act” school districts); 463 central school districts; 57 small city school districts and 5 large city school districts (Big 5); and only 3 central high school districts. *Id.*

created. GUIDE TO REORGANIZATION,§III(B)(1), (C)(1),

http://www.p12.nysed.gov/mgtserv/sch_dist_org/GuideToReorganizationOfSchoolDistricts.

Annexation of a union free school district largely triggers *Education Laws* §1705 and 1505-a. Unlike the statutes authorizing annexation of territory to a central school district, *Education Law* §1705 explicitly provides for certain employee rights and job protections for teaching personnel.

Notwithstanding any other provision of law, whenever a common school district, union free school district or central school district is annexed in its entirety to a union free school district pursuant to this section, all employees of the former school districts at the time of dissolution shall immediately become employees of the reorganized union free school district, shall retain their tenure and/or employment status and the seniority gained in the annexed district, and the seniority list of the employees of the annexed school district shall be merged with the seniority list of the employees of the annexing school district. If the number of teaching positions needed to provide services in the reorganized union free school district is less than the number of teachers considered to be employees of the reorganized union free school district pursuant to this subdivision, the board of education shall abolish the unneeded positions and place teachers on preferred eligible lists in accordance with section three thousand thirteen of this chapter. For salary, sick leave and other purposes, an employee's length of service with the annexed school district shall be credited as employment time with the annexing union free school district. This section shall in no way be construed to limit the rights of any such employees set forth in this section granted by any other provision of law. *Education Law* §1705(4).

The job protection rights of *Education Law* §1505-a only applies to teaching personnel subject to section 1505 (when a superintendent dissolves or annexes his own districts) or section 1705 (annexation to a union free school district). Section 1505-a provides, in pertinent part, that:

[E]ach teacher employed in such former school district at the time

of such dissolution shall select the particular school district to which territory is added in which he or she shall be considered an employee, with the same tenure status he or she maintained in such former school district. Such selection of the particular school district to which territory is added by such teacher shall be based upon each teacher's seniority in such former school district, with the right of selection passing from such teachers with the most seniority to such teachers with least seniority. *Education Law* §1505-a(1).

Furthermore, the statute provides that any teacher who is unable to obtain a teaching position in a district annexed pursuant to *Education Law* §1705 shall be placed on a preferred eligibility list for a period of seven years:

Any such teacher who is unable to obtain a teaching position in any such school district to which territory is added, because the number of positions needed are less than the number of teachers eligible to be considered employees pursuant to subdivision one of this section, shall, in all such school districts to which territory is added, be placed on a preferred eligible list of candidates for appointment to a vacancy that may thereafter occur in a position similar to the one such teacher filled in such former school district. The teachers on such a preferred eligible list shall be appointed to such vacancies in such corresponding or similar positions under the jurisdiction of the school district to which territory is added in the order of their length of service in such former school district, within seven years from the date of the dissolution of such former school district. *Education Law* §1505-a(1).

Lastly, as stated in identical language to *Education Law* §1705, this statute also allows that “for salary, sick leave and any other purpose, the length of service credited in such former school district shall be credited as employment time with such school district to which territory is added.” *Education Law* §1505-a(3). Additionally, the statute “shall in no way be construed to limit the rights of any such teachers set forth in this section granted by any other provision of law.” *Education Law* §1505-a(4).

In a corresponding statute under Article 45 (Supervisory Districts), the Education Law also provides for similar employment rights in the instances of dissolution or annexation to a union free school pursuant to a district superintendent's partitioning order. *Education Law* §2218. Under this statute, a superintendent may order the partitioning of territory from an existing union free, central, central high school or enlarged city school district that is located within his or her supervisory district. Under section five ("Effect of partitioning of territory"):

Members of the teaching and supervisory staff of the pre-existing school district at the time of the reorganization shall have the right to select the school district in which he or she shall be considered an employee, with the same tenure status he or she maintained in the pre-existing school district. Such selection shall be based on each teacher's seniority in the pre-existing school district, with the right of selection passing from such teachers with the most seniority to such teachers with the least seniority. Any such teacher who is unable to obtain a teaching position in the new school district because the number of positions needed is less than the number of teachers eligible to be considered employees pursuant to this paragraph shall, in such new school district and in the remaining school district, be placed on a preferred eligible list of candidates for appointment to a vacancy that may thereafter occur in a position similar to the one such teacher filled in the pre-existing school district. Such teachers shall be appointed to vacancies in such corresponding or similar positions in the order of their length of service in the pre-existing school district, within seven years from the date of the reorganization pursuant to this section. For such teachers, for salary, sick leave or any other purpose, the length of service credited in the pre-existing school district shall be credited as employment time with the new school district or the remaining school district, as applicable. *Education Law* §2218(5)(f).

Therefore, it appears that teaching personnel affected by an annexation pursuant to supervisory order may have the same job protections as teaching personnel involved in an annexation to a union free school district. In both cases, teaching personnel become employees of the annexing district, although in the instance of supervisory order the teacher would get to

choose which district to become an employee (where as with section 1705 annexation it is automatic). Because the Education Laws governing annexation to a central school district do not address the issue of employee rights, teaching personnel in that scenario receive inferior employment rights. They are not considered employees in the annexing district and therefore cannot displace even less senior teachers in the annexing district.

Teaching personnel in all annexation scenarios retain the right to be placed on a preferred eligibility list in the instance that the teacher is unable to retain employment in the annexing district. It is important to note, however, that neither existing statutory framework addresses the employment or other rights of non-teaching staff (school related professionals) .

2. “*Centralization*” is the most common form of reorganization, but is not available for city school districts. GUIDE TO REORGANIZATION, §III(A)(1), http://www.p12.nysed.gov/mgtserv/sch_dist_org/GuideToReorganizationOfSchoolDistricts; *Education Laws* §§1801(2), 1804(1); NEW YORK STATE SCHOOL BOARDS ASSOCIATION & NEW YORK STATE BAR ASSOCIATION, SCHOOL LAW 549 (33rd ed., LexisNexis 2010). This reorganization procedure creates a new school district that encompasses the entire area of merged school districts. GUIDE TO REORGANIZATION, §III(A)(1); *Education Laws* §§1801(2), 1804(1); SCHOOL LAW at 549.

The Education Law does not specify the employment rights of employees in school districts reorganized by centralization. However SED guidance has attempted to clarify the rights of these employees. According to the SED, teachers in the former school district become employees of the newly formed/centralized school district. GUIDE TO REORGANIZATION , §III(a). It appears that the most senior teaching personnel between the merged districts would displace their

less-senior colleagues. This result is of course different from reorganization procedures that do not allow for teaching personnel of a former school district to automatically (or by choice) become employees of the new district upon reorganization, thereby denying those more senior teachers “bumping rights.”

If teachers’ positions are abolished in a merger under *Education Law* §1801, the persons with the least seniority within the tenure area of the abolished positions are placed on a preferred eligibility list for a period of seven years following their dismissals. Additionally, the SED guidelines state that for salary, sick leave and other purposes, the length of service credited in the former district shall be credited as employment time with the newly formed and centralized school district. GUIDE TO REORGANIZATION , §III(a).

3. “*Consolidation*” is a statutory procedure involving the merger of any combination of common or union free school districts to form a new common or union free school district. *Education* §1510. Consolidation does not involve central school districts. GUIDE TO REORGANIZATION, §III(D)(1). There are several ways in which two or more school districts may be consolidated. However, in all cases, consolidation results in the creation of a new school district and the districts consolidated cease to exist. *Education Laws* §§1524, 1526.

The Education Law does not specify the employment rights of teaching personnel subjected to the consolidation procedures. However SED guidance has attempted to clarify the rights of these employees. Once again, however, the rights of non-teaching professionals are not addressed at all.

a. Consolidation with a Union Free or Common School District

Union Free or common school districts may be consolidated, so long as the process does

not also consolidate central school districts. Generally, consolidation under these circumstances proceeds under sections 1510-1514 and 1517-18 of the Education Law. SED guidelines state that when consolidation with a union free or common school occurs, teachers of the former districts immediately become employees of the consolidated district. GUIDE TO REORGANIZATION, §III(D). Therefore, the most senior teaching personnel may displace their less-senior colleagues in the same tenure positions. If instructional positions are abolished, those individuals with the least seniority within the specific tenure areas of the abolished positions are to be released and placed on a preferred eligibility list for a period of seven years. *Id.*

b. Consolidation with a City School District

Consolidation with a city school district differs from consolidation with a union free or common school district. In effect, this form of consolidation acts as an annexation of one district to the city school district. The districts to be consolidated cease to exist and the city school district bears the responsibility for education in the whole consolidated area. *Id.* at §III(E). Because the teachers of the former consolidated school do not immediately become teachers of the consolidated district, they do not maintain “bumping” rights to other teachers who may be less senior than them in the city school district.

Consolidation with a union free or common school district bears a different result: all teachers of the former school districts are immediately members of the new school district and their jobs are maintained by order of seniority among *all* former district teachers. The city school district in the instant form of consolidation, however, retains its autonomy and its employees cannot be “bumped” from their job positions merely because another employee in the

consolidated district has more seniority.

Therefore, if a vacancy is not available within a teacher's tenure area, the teacher is placed on a preferred eligibility list for a period of seven years. Filling of vacancies and placement on the preferred eligibility list is accomplished by seniority. The Districts affected include city school districts under a population of 125,000 and also school districts (of any type) outside of the city which are directly contiguous to another district that will also be consolidated with the city school district.

4. "*Dissolution*" is a seldom-used form of reorganization in which a school district superintendent dissolves, by order, one or more districts within his or her supervisory district and forms a new district from such territory. SCHOOL LAW, 549-50. *See also Education Laws* §§1505, 1505-a and 2218. Whether dissolution will become more common in light of fiscal insolvency of small and rural districts remains to be seen.

II. The Law of Successorship and Labor Relations

We know that the cases are bountiful in the private sector under the National Labor Relations Act ("NLRA") regarding what happens to bargaining obligations, if any, in the event of a successor employer situation. As recognized by PERB in *Public Employees Federation (ORDA)*, 20 PERB ¶3046 (1987), the most significant cases in this area are *John Wiley & Sons v. Livingston*, 376 U.S. 543 (1964); *NLRB v. Burns International Security Services*, 406 U.S. 272 (1972); *Howard Johnson Co. v. Detroit Joint Board*, 417 U.S. 249 (1974); and *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27 (1987). These cases distill the questions regarding successorship into two categories: 1. The successor employer's obligation, if any, to honor the existing terms and conditions of the CBA between the predecessor and its employees, and 2. The

successor employer's obligation, if any, to recognize and negotiate with the predecessor's employees' union. These inquiries beg the question, however, of what is a "successor"? In a nutshell, it depends upon whether there is "substantial continuity" between the former and current enterprises, i.e. are a majority of the former employer's workers working for the putative successor and is the work being performed substantially the same? *See, e.g., ORDA*, 20 PERB ¶3046, 3099; see also, *Opinion of Counsel*, 18 PERB ¶5002 at 5003.

These questions then lead down a rabbit hole of minutiae, such as against what "snapshot" in time of the former employer's workforce do you determine whether the successor has hired a majority thereof? Or, can a hiatus between a purchase of a company and its reopening can destroy continuity? Or, can the putative successor employer start with less than a majority of the former's employees, but later reach a majority complement such that it has to bargain with them? But, thankfully, we need not delve into these issues since, one, it is hard to imagine facts arising from a governmental merger that would require doing so and, two, the Taylor Law expressly states that "[i]n applying [§209-a, which includes the duty to bargain], 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." *Civ. Serv. Law §209-a(6)*; see also, *ORDA at 3099*. With this, we turn to a discussion of the PERB cases that have addressed successorship in the public sector.

The first occasion on which PERB addressed the question of a successor public employer's bargaining obligation was in *City of Amsterdam*, 17 PERB ¶3045 (1984). The facts of *Amsterdam* were unique and far from an "ordinary" consolidation. AFSCME represented

employees of the Board of Water Commissioners, an entity separate and apart from the City. CSEA represented employees at a sewage plant owned by the State. In 1982, the City assumed control of the sewage plant and abolished the Board of Water Commissioners, thus putting both water and sewage under the City's auspices. The City filed a petition with PERB seeking to unite the two units into one. PERB rejected the City's argument that the largest unit was most appropriate under §207.1 because it would serve its administrative convenience. Instead, PERB found the two units to be appropriate because "the undisputed history of effective representation in both negotiating units...is indicative of separate communities of interest." 17 PERB ¶¶3045, 3071. As discussed below, and contrary to the claims by management that this decision is apocalyptic for public employers, *Amsterdam's* reach is limited and has, in fact, been distinguished by PERB in the years since.

As opposed to *Amsterdam*, where two full, discrete units were subsequently placed under a third employer, in *Public Employees Federation (ORDA)*, 20 PERB ¶¶3046 (1987), PEF sought to continue representing a small complement of approximately 46 employees who had been covered by the CBA between the State and PEF's Professional, Scientific and Technical Unit ("PS&T"). More specifically, by operation of statute, in 1984 the management and operation of Gore Mountain was transferred from the State to the Olympic Regional Development Authority ("ORDA"). Prior to the transfer, ORDA employed approximately 500 employees at Whiteface Mountain and other Olympic facilities and had recognized CSEA Local 059 as the collective bargaining representative for its employees.

In dismissing the petition and finding the former PEF employees to be appropriately represented by CSEA, PERB engaged in a discussion which outlines its philosophical approach

to successorship issues. Although it emphasized that its ultimate decision in such cases will depend “on the particular facts of the case,” the Board laid out an analytical roadmap for future cases, stressing its obligation to resist adopting federal principles:

While we have cited these private sector cases here and in previous decision [sic], we do so only as for the purpose of comparison and not because we consider them controlling. The result reached in these cases are based on the policies of the national labor laws. The treatment of the “successor employer” problem under the Taylor Law, on the other hand, must be fashioned on the basis of the policies and provisions of that Law and other statutes relevant to the conduct of the affected public employers.

In particular, the legal obligations of “successor” public employers must be consistent with our longstanding interpretation of the Act that the criteria set out in CSL § 207.1 requires us to certify only the “most appropriate” units and that these are ordinarily the largest units consistent with the Act's standards.

Furthermore, most successorship questions in the public sector arise by virtue of operational changes made pursuant to statutory authorization. Transfers, mergers and consolidations of governmental operations, made pursuant to statute, do not involve policy concerns peculiar to the private sector, such as those relating to entrepreneurial freedom, transfer of capital and rejuvenation of failing businesses, which policies significantly influenced the decisions in *Burns* and *Howard Johnson*.

We are persuaded that ORDA's legal obligations, if any, to PEF cannot be decided simply on the basis of labeling ORDA as a “successor employer.” The real question is whether, on the particular facts of the case, and in light of the policies of the Act and those implicit in the Public Authorities Law, ORDA is obligated to recognize and negotiate with PEF for a unit of employees consisting of seasonal ski instructors and one supervisor employed at Gore, and is bound by the State-PEF contract. Unquestionably, under the “continuity of enterprise” test, ORDA is a “successor employer” in the sense that it succeeded to the operations of Gore, formerly operated by the State, and performs those operations essentially in the same manner. Nevertheless, ORDA has recognized a unit of all employees at its various

facilities, including the seasonal ski instructors at both Gore and Whiteface. There is no basis for a finding that a unit consisting solely of former PS&T Unit titles at Gore is a “most appropriate” unit. For reasons entirely unrelated to the operations of ORDA, these positions were included in a Statewide unit of the Executive Branch of the State of New York. While these positions may have been appropriately placed in the PS&T Unit, there is no basis relating to ORDA's operations for concluding that these employees should continue to have separate unit status.

To date, this is the most concise set of guideposts provided by PERB. What it emphasizes, in essence, is the axiom that the Taylor Law requires the *most* appropriate unit, which most often is the largest, as opposed to *an* appropriate unit which, under a private sector analysis, very well could have led to a different result. As ORDA’s other facilities are approximately one and a half hours from Gore Mountain and, presuming there was little to no interchange, functional integration or common supervision between Gore and the others, a Gore-only unit could have been appropriate. However, as pointed out by PERB, the “policy concerns” underlying the justification for separate units in the private sector, are non-existent in the public sector. *C.f.*, *CSEA (Broome Co.)*, 24 PERB ¶4603 (1991) (finding appropriate the NLRA test for whether substantial continuity exists such that a public employer is required to recognize a successor union that has changed affiliations).

The most recent decision which comprehensively discusses successorship in the public sector is *NYSNA (County of Schenectady)*, 25 PERB ¶3043 (1992). *NYSNA* involved 12 registered nurses who worked for the City of Schenectady’s Health Department and were represented by NYSNA, a unit existing since 1968. In 1991, the functions of those nurses were transferred to the County, which had a CBA with CSEA and its wall-to-wall unit. NYSNA filed an improper practice charge, alleging that the County was refusing to bargain and was instead

treating them as part of the existing CSEA unit. In finding the nurses belonged to the CSEA unit, PERB acknowledged that the principles in *Amsterdam* were controlling:

The Association misreads *City of Amsterdam* to the extent it argues that the County must continue to recognize and bargain with it for a separate unit of [nurses] because the County took over the discrete City unit. Although in *City of Amsterdam*, as here, an entire discrete unit was transferred, the controlling feature of that case was our conclusion on application of the uniting criteria in §207.1 of the Act that a continuation of the discrete units was most appropriate. Analysis here of those same uniting criteria, however, leads us to a different conclusion. The County has not succeeded to two separate uniting structures independent, as in *City of Amsterdam*, of any other uniting in the County. It is against the County's existing unit structure that the most appropriate determination must be made.

PERB then engaged a balancing test, considering “the long history of effective representation in the city and County units and the fact that the [nurses] continue to function separately from other County operations,” juxtaposed with

the overall recognition clause in the CSEA/County unit, the existence of other registered nurses in CSEA's unit, the relatively small number of [former City nurses] as compared to the large number of employees in the County unit, and the similarity of benefits in the units' most recent collective bargaining agreement.

Accordingly, the nurses were accreted into the existing CSEA unit.

The common theme to be drawn from these seminal cases is that PERB will look at the totality of the circumstances, including the comparative sizes of the units at-issue; whether the employees affected by the consolidation constitute an entire, preexisting unit or only a fraction thereof; whether the work being performed by the units overlaps; the bargaining history of the units; and the similarity of benefits. Granted, PERB has shown the inclination, even after considering these factors, to defer to the largest possible unit, departure from this default is not

impossible to successfully argue—as was shown in *Amsterdam*.

III. The Representative Union and Appropriate Unit(s) in Complete Mergers

While the cases discussed above provide guidance as to how “partial” successorship or shared services issues will be addressed by PERB, the guidance is not definitive for our purposes of full consolidation. None of those cases dealt with the complete consolidation or merger of entire government entities: *Amsterdam* involved the City’s absorption of separate sewage and water functions; ORDA assumed control of one facility previously run by the State; and *NYSNA* involved the City shedding the single function of nursing from its health department. Left open are the questions of what happens when Town A consolidates with Town B and the former has a wall-to-wall unit of employees represented by the Teamsters while the latter has a DPW unit represented by the Teamsters and a clerical unit represented by CSEA? Or, School District 1 has one unit comprised of teachers, teaching assistants and nurses, and a second comprised of solely teaching aides; while School District 2 has two units, one comprised (in part) of teaching assistants, teacher aides, and nurses, and the second of just teachers and other certificated personnel—all of which are represented by NYSUT?

These questions, and others like them, give rise to two concerns: 1. What positions will the new, consolidated unit(s) be comprised of? and 2. If the units of the predecessor employers are represented by different unions, who will represent the new, consolidated unit(s)?

With respect to non-school consolidations, the first consideration must be *General Municipal Law Article 17-A* which arguably, as discussed above, may dispose of these questions for the short-term. *General Municipal Law §765(5)* states that “the joint consolidation agreement or the elector initiated consolidation plan, as the case may be, *shall be subordinate in*

all respects to the contract rights of all holders of any securities or obligations of the local government entities outstanding at the effective date of the consolidation.” Emphasis added.

Moreover, §§768(1) and (3) provide that

1. *All valid and lawful debts and liabilities existing against a consolidated local government entity, or which may thereafter arise or accrue against the consolidated local government entity, which but for consolidation would be valid and lawful debts or liabilities against one or more of the component local government entities, shall be deemed and taken to be like debts against or liabilities of the consolidated local government entity and shall accordingly be defrayed and answered to by it to the same extent, and no further than, the component local government entities would have been bound if no consolidation had taken place.*

3. *All bonds, contracts and obligations of the component entities which exist as legal obligations shall be deemed like obligations of the consolidated local government entity, and all such obligations as are authorized or required to be issued or entered into shall be issued or entered into by and in the name of the consolidated local government entity. Emphasis added.*

An unstrained, plain reading of these provisions states that any valid contractual obligations against an entity subject to consolidation shall be assumed by, and enforceable against, the new consolidated entity. Thus, if the consolidated entities are not schools, there is statutory support for the proposition that CBAs pre-existing consolidation must continue to be honored as long as they are valid, which includes during the time of their continuation under Triborough. *Civil Service Law §209(a)(1)(e)*. Considering the example provided above, this means that Town A’s CBA with the Teamsters will apply to each employee covered by it and who continue to be employed by the consolidated entity. Similarly, the Teamster and Town B/CSEA CBAs will survive and cover those employees to which they respectively applied.

This application of the GML proves to be academic, though. Once the CBA expires, the consolidated entity's obligations arguably cease because a question concerning the appropriateness of separate units has arisen. However, as discussed below, once such a question arises, the GML exits the picture and an employer is obligated under the Taylor Law to maintain the status quo, i.e. recognition of each respective unit and the terms of their contracts. *See, Genesee Valley BOCES SRP Association (Genesee-Livingston-Steuben-Wyoming BOCES)*, 29 PERB ¶4584 (1996) (*Genesee II*).

Putting the GML aside, which provides only a short-term solution, and getting to the heart of the issue, how has PERB addressed questions of representation and unit composition after a complete merger? In *Edwards-Russell CSD*, 19 PERB ¶4041 (1986), the Knox and Edwards districts were merged. After consolidation, the Edwards-Russell Teachers Association filed a petition. The Edwards Teachers Association intervened and argued that it was the recognized collective bargaining agent for some of the employees for whom the petitioner sought representation rights and, thus, its CBA with the predecessor Edwards district rendered the petition untimely.

The Director of Representation disagreed, concluding that neither of the existing contracts served to bar the petition and that “‘sound and stable labor relations will best be served’ by allowing the employees in the new unit to determine which, if any, employee organization they wish to represent them.” 19 PERB ¶4041, 4056.

In *Genesee-Livingston-Steuben-Wyoming SRP Association*, 28 PERB ¶4021 (1995) (*Genesee I*), the facts were more intricate and required more than merely a direction of election as to what, if any, labor organization should represent the new employees. Indeed, it presented

facts similar to those we should anticipate seeing in most municipalities as they seek to consolidate; that is, units on both sides of the equation that vary greatly in their composition and their representation. In *Genesee I*, the Genesee Wyoming BOCES and the Livingston Steuben Wyoming BOCES were ordered consolidated by the Commissioner of Education. Prior to the consolidation, the following positions were in separate units:³

Livingston-Steuben-Wyoming	Genesee-Wyoming
Teacher Aides	Teacher Aides, Teacher Assistants, Nurse, COTAs
Nurse	“All Certified Personnel”
Teachers, Teaching Assistants, Certified Occupational Therapy Assistants (“COTA”)	

After consolidation, the new GLSW BOCES recognized a unit of all certificated personnel, excluding Teaching Assistants. NYSUT thereafter requested recognition of a second unit comprised of School Related Professionals, including Teacher Aides, COTAs, Teaching Assistants, and Nurses, which the BOCES refused. Finally, the intervenor, the GLSW Non-Instructional Support Services Staff, requested recognition as the representative of all “non-instructional staff.”

Confronted with this hodgepodge, the Director of Representation distilled the question before him down nicely, succinctly stating,

As this case involves the merger of two BOCES into a single new entity, the question concerning representation is, in essence, *an issue of initial uniting*. Thus, the fact that a past unit configuration had existed, without conflict, over a long period of time is not

³All units were represented by NYSUT.

dispositive of what the unit configuration in the instant case should be. Further, I am obligated to find the most appropriate unit, even if not proposed or sought by one of the parties. 28 PERB ¶¶4021, 4029, *emphasis added*.

Applying settled Taylor Law principles of initial uniting, the Director separated the positions into Nurses and COTAs, Teacher Aides, and Teaching Assistants, and ordered that if either petitioner or intervenor wished to represent one or both of the units, an election should be held.

What we can pull from both *Edwards-Russell* and *Genesee I* are two basic premises. First, in the face of claims by two competing unions wishing to represent a unit or units of employees, PERB will order an election to be held. Second, where two or more units pre-dating consolidation vary in their makeup, PERB will use a “clean slate” approach and apply initial uniting standards to determine the appropriate unit composition.

IV. Terms and Conditions of Employment

The above discusses what ultimately will happen to the existing units. In the meantime, however, what happens to the collective bargaining agreements which were in effect prior to the consolidation? To address this question, we look first at statutes outside of the Taylor Law to see if they speak to the issue, namely the General Municipal Law and the Education Law. As discussed above, the General Municipal Law arguably requires the a successor employer to honor a preexisting CBA’s terms. Thus, unless and until a question of representation is raised, at which time the Taylor Law applies (see below), whether through an employer’s refusal to bargain or a union’s representation petition, a non-school employer must follow the applicable contracts.

Turning next to the Education Law, the impact of school district reorganization on employment contracts and CBA provisions is a largely undeveloped area of the law. Although

SED has published guidelines (not formal regulations) to clarify these rights they appropriately do not address the impact of reorganization on school districts' Agreements or bargaining rights. *See*, GUIDE TO REORGANIZATION. These issues fall within the jurisdiction of PERB.

The Education Law, however, does provide for one general rule concerning all forms of reorganization. Generally, the newly reorganized district assumes the debts of the former school district which it replaces or annexes, specifically assuming the debts incurred through bonds or notes or those debts relating to school building construction. *See generally Education Laws* §§1517, 1705(3), 1804(5)(b); GUIDE TO REORGANIZATION, §III; SCHOOL LAW, 554. At least one court has strictly construed the 'kind of indebtedness' to which the Education Law refers to when allowing for the assumption of former school district debt. *See Matter of Cent. Hudson Gas & Elec. Corp. v. City School. Dist. of City of Kingston*, 11 A.D.2d 826 (3d Dep't 1960) (court would not compel a "new [consolidated] district" to include amounts in its next budget for the tax refunds owed to petitioner from its school district, prior to consolidation). A newly reorganized district will also assume all property rights and assets of the former district or districts which it replaces or annexes. *Id.*

Other debt outside of the scope of *Education Law* §1517, such as tuition owed to another school district and other accounts payable, remain a charge on the former district which incurred the debt. *Id.* *Education Law* §1518 provides that any dissolved school district shall continue to exist in law "for the purpose of providing for and paying all its just debts." The Education Law, however, does not address which former debts of a dissolved school district constitute "just debts" under §1518, or what kind of "indebtedness" a new school district is supposed to assume, if any, outside of those debts specifically enumerated in statute. Therefore, it is unclear if CBA

obligations would constitute such a debt under the Education Law. Even further, it is unclear whether any CBA would even survive any reorganization procedure, as discussed more fully below.

It is well-settled that if a teacher has an employment contract with a school district, that contract is a property right subject to the rules of property distribution in the reorganization procedures, and assumable by the replacing or annexing district as a debt of the former school district. *Barringer v. Powell*, 230 N.Y.37 (1920). In *Barringer*, the Court of Appeals found a clear property right in an employment contract that had ripened, due to one party's performance of the terms of the contract, therefore triggering an assumable debt prior to the time of reorganization (consolidation, in that case). *Id.*

To date, there is only one court that has ruled that a collective bargaining agreement is not a contract assumed by an *annexing* school district under the Education Law. *Cuba-Rushford CSD v. Rushford Faculty Ass'n*, 182 A.D.2d 127 (4th Dep't 1992). In *Cuba-Rushford*, the union which had represented the teachers in the annexed district demanded arbitration, after annexation, with the new combined district, seeking continuation of benefits found in its contract. The Appellate Division, Fourth Department held that the CBA of the annexed school district expired upon annexation. *Id.* at 130. In reaching this result, the court found that the CBA was not of the type of obligation, e.g., a "just debt" or other "property right," envisioned by the Education Law that could survive annexation. *Id.* The court held that:

It would be anomalous to obligate an annexing school district to honor the terms and conditions of the collective bargaining agreement for teachers of a dissolved school district when those very teachers are only afforded limited statutory rights of employment in the annexing district. In an analogous situation . . . PERB has ruled as a

matter of public employment practice that no rights under a collective bargaining agreement survive where the agreement has been terminated because one of the parties no longer exists (County of Clinton v. Deputy Sheriff's Unit Local 810, 19 PERB ¶¶3048, 3102). *Id.* at 130-31.

There appear to be no cases which decisively state that a CBA agreement continues or ceases to exist upon consolidation or centralization of school districts. *Cuba-Rushford CSD* is the only guidance we have from the courts on whether a CBA can survive under the Education Law. At least with regard to annexation, a CBA does not. It is not clear that centralization or consolidation would demand a different result. Therefore, it is currently unclear which contract terms, if any, would remain in place in a centralized school district under operation of the Education Law.

Assuming *arguendo* that neither the General Municipal Law nor the Education Law provide guidance, we look to how PERB has applied the Taylor Law with regard to whether the terms of prior CBAs survive consolidation. In *Genesee Valley BOCES SRP Association (Genesee-Livingston-Steuben-Wyoming BOCES)*, 29 PERB ¶4584 (1996) (*Genesee II*), the issue before the Administrative Law Judge was whether the newly-consolidated BOCES violated the Act by unilaterally changing certain contractual terms of one group of employees while a representation petition (related to who should represent the employees and what positions the units should consist of) was pending. Specifically, after the Director of Representation issued his decision in *Genesee I, supra*, which resulted in a petition being filed, the new BOCES concluded that “the three former units were no longer in effect and that their CBAs were null and void.” 29 PERB ¶4584, 4729. Accordingly, BOCES eliminated a paid lunch period for those employees who had been represented by one of the former units.

After summarizing its decision in *ORDA* and the basic principles of successorship, PERB enunciated clearly that “[w]here a former unit configuration has been found to be inappropriate after a merger, the employer has not been required to assume the obligations of the CBAs, and in such situations an employer could require its employees to seek new representation. 29 PERB ¶4584, 4730. However, continued the decision,

[E]ven assuming BOCES’ obligations to the prior units expired upon the merger due to the inappropriateness of their composition, BOCES violated the Act when it altered the status quo by instituting various changes in terms and conditions, including eliminating a paid lunch and longevity payments for certain classes of unit employees, after a representation issue had been raised. *Id.*, citing *Onondaga-Cortland-Madison BOCES*, 25 PERB ¶3044, 3092 (1992), *rev’d on other grounds*, 198 A.D.2d 824 (4th Dep’t 1993).

Thus, while there is no rule that an employer must honor the terms of previous CBAs merely by operation of successorship, it is a *per se* violation of §§209-a(1)(a) and (c) of the Act to change the status quo while a question of representation is outstanding.

VI. Going Forward

Although this area of consolidations, whether partial or complete, is largely uncharted territory, that is not to say that there is a lack of a labor law base that would otherwise require us to reinvent the wheel. The *Amsterdam-ORDA-Schenectady* line of cases provides workable guidance as to how PERB will address situations where there is less than a full merger of governmental entities. Insofar as full mergers or consolidations under the GML or Education Law, *Edwards-Russell CSD*, *Genesee I*, and *Genesee II* give us an idea of what will happen to existing units and the terms and conditions that previously governed.

Due to the requirement of *Genesee II* to maintain the status quo pending a representation

question, it is the long-term effect of consolidation, i.e. who is going to be represented and by which union?, that will present the largest impediment. The question remains though, will parties to consolidation resort to cooperation or litigation, or will additional legislation prove to be the most expedient way to streamline this process? There is little doubt that improving the clarity and simplicity of the process of consolidation and its attendant labor relations issues would facilitate the process when needed.