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Injunctive Relief Under the Taylor Law: An Update and Discussion

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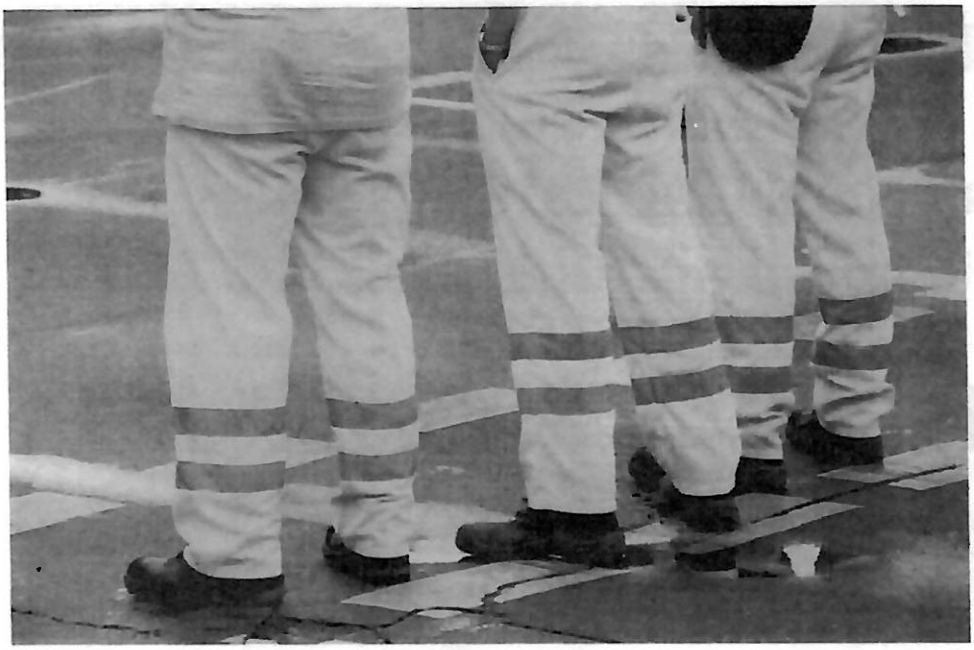

David P. Quinn is Associate Counsel and Director of Litigation at the New York State Public Employment Relations Board. The opinions stated herein are his own and do not necessarily reflect those of the Board. He notes that much of the development of PERB's administration of the Taylor Law's injunctive relief provisions is the product of the work of his predecessors, Gary Johnson, William Busler and Sandra Nathan. This article first appeared, in a slightly different form, in the Spring 2012 *Labor and Employment Law Journal*, a publication of the Labor and Employment Law Section of the New York State Bar Association.

Injunctive Relief Under the Taylor Law: A Primer

By David P. Quinn

Effective January 1, 1995, Civil Service Law Article 14 (the Taylor Law) was amended by adding § 209-a.4, which provides for injunctive relief in aid of improper practice charges before the New York State Public Employment Relations Board (PERB) and the New York City Board of Collective Bargaining (BCB). This article takes a look at the statute and its history; it also describes PERB's Rules of Procedure and offers some practice tips.

History

Under Civil Service Law (the Act) § 205.5(d), PERB is authorized to issue an order directing an offending party in an improper practice proceeding to "cease and desist from any improper practice, and to take such affirmative action as will effectuate the policies of [the Act]." By directing an offending party to "cease and desist," PERB provides prospective relief to the charging party. Retroactive relief is granted under PERB's authority to direct the offending party to "take such affirmative action as will effectuate the policies of [the Act]," which restores the *status quo ante* as nearly as possible.

However, occasionally, by the time the improper practice charge is finally decided and a remedial order is issued, no order of the Board can adequately effectuate the policies of the Act by restoring the *status quo*.

Such a situation arose in *Schenectady PBA v. City of Schenectady*.[1] There, the Appellate Division held that supreme court was authorized to grant an injunction under the CPLR to enjoin the city from unilaterally implementing a polygraph test for represented police officers – conduct that was at issue in an improper practice charge before PERB. The Appellate Division observed: "But for the injunction, respondent would administer the polygraph, petitioner would have no relief and the PERB matter would be ineffectual." Likewise, in *CSEA v. Hudson Valley Community College*,[2] supreme court enjoined the college from conducting a disciplinary hearing until the propriety of the disciplinary charges was decided by PERB in an improper practice proceeding.

Soon after *Schenectady* and *Hudson Valley Community College*, however, the Court of Appeals held that the supreme court was not authorized to grant injunctive relief in aid of an improper practice charge that was pending before the New York City Board of Collective Bargaining.[3] In *Uniformed Firefighters Association*, the Court reasoned that judicial involvement in improper practice proceedings is "inconsistent with the basic purposes of the doctrine of primary jurisdiction" because it interferes

with the authority of administrative agencies that have the "principal responsibility for adjudicating the merits of disputes requiring special competence."[4] It emphasized that "early judicial assessment of the merits in public sector labor disputes would be particularly inappropriate because such disputes often require 'a balancing of the interests' and an evaluation of subtle questions for which '[n]o litmus test has yet been devised' in an area where the courts have little experience or expertise."[5]

In response to *Uniformed Firefighters*, the Legislature passed a bill to amend the Taylor Law in order to empower charging parties in improper practice proceedings before PERB and BCB to apply directly to supreme court for injunctive relief under CPLR Article 63.[6] PERB and BCB were given no role in assessing the merits of the injunctions. Thus, the bill did not address the doctrine of primary jurisdiction that figured so prominently in *Uniformed Firefighters*.

Governor Mario Cuomo, though, appears to have had the doctrine of primary jurisdiction in mind when he vetoed the bill. While agreeing with the need for injunctive relief in appropriate circumstances, in his June 7, 1993, veto message, the Governor stated: "[S]ince the special expertise for reviewing improper practice charges rests with PERB, I would prefer that the remedy be provided through PERB, instead of directly from the courts."

In the following year, the Legislature passed, and Governor Cuomo signed, the bill that now provides for injunctive relief in aid of improper practice charges before PERB and BCB.[7] First effective on January 1, 1995, the statute expires every two years, but has, to date, been renewed each time. Its current incarnation expires on December 31, 2013.

The Statute

Now, under § 209-a.4(a) of the Act, a party filing an improper practice charge 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.

Notably, the standards for a Taylor Law injunction are not the same as those for an injunction under CPLR Article 63.

> A preliminary injunction may be granted under CPLR Article 63 when the party seeking such relief demonstrates: (1) a likelihood of ultimate success on the merits; (2) the prospect of irreparable injury if the provisional relief is withheld; and (3) a balance of equities tipping in the moving party's favor.[8]

In *PERB v. Town of Islip*,[9] citing the standards for a Taylor Law injunction, the Court of Appeals observed: "The applicable standard for granting injunctive relief [under the Taylor Law] differs significantly from the familiar three-part standard that applies to most requests for injunctive relief." In addition, a CPLR injunction may require the moving party to post an "undertaking" sufficient to compensate the other party if the movant does not prevail in the underlying action. No such undertaking is required for a Taylor Law injunction.[10]

If PERB determines that the elements warranting injunctive relief are shown, it is authorized to petition in Supreme Court, Albany County, on notice to all parties, to obtain the appropriate injunction.[11] Alternatively, PERB may authorize the charging party to file the petition, in which event PERB must be named as a necessary party in the judicial proceeding.[12] Supreme court is authorized to grant the appropriate injunctive relief if the standards are satisfied.[13] The statute contains virtually identical language covering injunctive relief in aid of improper practice charges before BCB, except that such proceedings originate in New York County Supreme Court.[14]

The standards for a Taylor Law injunction are not the same as those for an injunction under CPLR Article 63.

As a rule, PERB does not authorize the charging party to petition the court for the injunction. To date, consistent with the doctrine of primary jurisdiction, PERB has preferred to retain control over the theories advanced in support, particularly because it is the effectiveness of its remedial order that is ultimately at stake. However, when PERB petitions for injunctive relief, the charging party is permitted, on motion, to intervene in the proceeding.[15] Such motions are governed by the CPLR, not the injunctive relief provisions under the Act.[16]

PERB has 10 calendar days after receipt of an application for injunctive relief to petition supreme court for the appropriate injunction or to authorize the charging party to initiate the proceeding or to issue a decision explaining why it is denying the application.[17] If PERB does none of those things, the application is deemed denied. An application that is denied (or deemed denied) is subject to review under CPLR Article 78.[18]

Because the denial of an application for injunctive relief is not based on the record of a hearing, the standard of review is whether it was arbitrary and capricious, an abuse of discretion or affected by error of law under CPLR 7803(3).[19] In *New York State Supreme Court Officers*

Association v. PERB,[20] the court observed that it may not issue an injunction if it disagrees with PERB's denial.

If an injunction is granted, the judicial order may be appealed.[21] Therefore, under CPLR 5519, where the appellant or moving party is the state, any political subdivision of the state, or officer or agency of the state or of any political subdivision, service of a notice of appeal or an affidavit of intention to move for permission to appeal stays all proceedings to enforce the injunction pending the appeal or determination on the motion for permission to appeal.[22]

If an injunction is granted, the ALJ assigned to the underlying improper practice charge must establish a hearing schedule that will enable a decision to be issued in 60 days or, by mutual agreement, to extend that period.[23] Improper practice charges that have injunctions must be given a preference over all other matters before the Board.[24]

The Act does not provide for the resurrection of an injunction if the ALJ dismisses the charge and the Board reverses and finds that an improper practice, in fact, occurred.

If the ALJ finds that the respondent committed an improper practice, the injunction continues to the extent it implements the ALJ's remedial order, unless the respondent satisfies the remedial order and files no exceptions with the Board or successfully vacates or modifies the injunction.[25] If exceptions are filed, and the Board finds that the respondent has committed an improper practice, the injunction continues to the extent it implements the Board's remedial order.[26] The injunction expires if the Board finds that no improper practice has occurred.[27] The Act does not provide for the resurrection of an injunction if the ALJ dismisses the charge and the Board reverses and finds that an improper practice, in fact, occurred.

The Rules of Procedure

The procedures governing applications for injunctive relief are provided in §§ 204.15–204.18 of PERB's Rules of Procedure (Rules, 22 N.Y.C.R.R.). In § 204.17, the Board delegated the responsibility for administering the Rules and for making the appropriate determinations to PERB's Office of Counsel, currently headed by the Associate Counsel and Director of Litigation.

A complete application for injunctive relief consists of an original and two copies of a form, the underlying improper practice charge and affidavit(s) of person(s) with personal knowledge of the relevant facts establishing that an injunction is warranted, as well as any relevant exhibits.[28] The form is fairly self explanatory and may be downloaded from PERB's website (www.perb.ny.gov). If the Office of Counsel determines that injunctive relief is appropriate, the affidavit(s) and exhibits in support of the application are used by PERB to support its petition to supreme court for an injunction. Therefore, they should be clear, concise and convincing. Conclusory allegations in the affidavits will not suffice.[29]

A memorandum of law in support of an application for injunctive relief is optional[30] and is not used by the Office of Counsel as evidence in support of the injunction. However, it is here that the charging party can effectively argue to the Office of Counsel why the injunction is warranted, including reference to PERB precedents regarding the merits of the charge and why the alleged harm is irreparable.

An application for injunctive relief is a separate filing from the improper practice charge. While an improper practice charge is filed with the Director of Public Employment Practices and Representation, a charging party filing an application for injunctive relief must separately file it with PERB's Office of Counsel at the Board's Albany address.[31] If filed by mail, the envelope must bear the legend "INJUNCTIVE RELIEF APPLICATION."[32] In that way it will signal the need for prompt action.

The application and all supporting documents must be delivered to the respondent(s) in an envelope bearing the legend "ATTENTION: CHIEF LEGAL OFFICER" before they are filed with PERB, and the application must show proof of the date of actual delivery to the respondent(s).[33] The Office of Counsel will not consider the merits of an application for injunctive relief that fails to show that it has been actually delivered to the respondent(s). An application that includes an affidavit of service by mail on the respondent(s) is not evidence that it has been actually delivered. If the application is served on the respondent(s) by mail, evidence that it has been actually delivered could be an executed return receipt, or some other acknowledgment of receipt, or tracking data from the delivery service showing delivery.

Unlike filing an improper practice charge, which requires an original and four copies, an application for injunctive relief requires an original and only two copies. That is because the charging party has previously served a copy of the application on the respondent(s), unlike an improper practice charge, which is served on the respondent(s) by the Director of Public Employment Practices and Representation.

A respondent to whom an application has been delivered may (but is not required to) file with the Office of Counsel a verified response to the application within five calendar days of such delivery,[34] unless an earlier time is directed by the Office of Counsel.[35] The response is deemed filed when the Office of Counsel receives it, not when it is posted.[36] Therefore, the Rules permit filing by fax under certain circumstances. As with the application, the response should be directed to PERB's Office of Counsel. If not so directed, the response might be delivered to the wrong office and cause unnecessary, if not seriously problematic, delays.

The response must be supported by affidavits of person(s) with personal knowledge of the facts asserted. The response (if any) must be accompanied by proof of service on the charging party. Unlike the application itself, actual receipt by the charging party is not a prerequisite to filing the response. As with the application, a memorandum of law in support of the response is optional.

The time for a respondent to file a response (if it chooses) commences when it receives the application from the charging party, not when the Office of Counsel receives it. There is no need to call the Office of Counsel to find out whether it has received an application to which a response will be filed. Indeed, only after the charging party has confirmation that the application has been delivered to the respondent may it file the application with the Office of Counsel. Therefore, occasionally, the Office of Counsel receives a response before it receives the application.

The response is not an answer to the underlying charge.[37] Although the response may contain affirmative defenses to the charge, the failure to raise them in the response to the application does not constitute a waiver of those affirmative defenses in the underlying improper practice proceeding.

Although a response is optional, if none is filed the Office of Counsel has only the charging party's evidence and arguments to consider. What may appear to be a meritorious application for injunctive relief may be rejected based on information provided in the response. Examples of such circumstances are where the respondent raises a meritorious affirmative defense or where the application is based on hearsay which is directly rebutted by the respondent's affidavit(s). Sometimes allegations of harm are questionable and the respondent has information that defeats them. Although the respondent always has the opportunity to answer PERB's petition to supreme court, nipping the application in the bud at the administrative level is usually less burdensome and costly.

PERB's Review

When the Office of Counsel receives an application for injunctive relief, it first ascertains whether a charge has been filed with the Director of Public Employment Practices and Representation and, if so, whether that office is processing the charge. It then determines whether the application has been properly filed and is complete, including whether there is proof that it has been previously delivered to the respondent. If the answer to any of those questions is "no," the Office of Counsel will not process the application. Many applications for injunctive relief are denied based on this preliminary review.

PERB's Rules do not provide for replies or sur-replies, and, because of the very tight time frame to decide the merits of an application, the Office of Counsel does not encourage them. For the same reason, the Office of Counsel does not usually pursue clarifications to allegations in the application and supporting documents regarding the merits of the application.

However, neither the Act nor the Rules provides a statute of limitations regarding applications for injunctive relief, nor do they prohibit a charging party from filing a new application if an earlier one is deficient or denied on the merits.[38] But, a second application alleging substantially similar facts will likely receive the same result.[39] Moreover, if possible, charging parties should seek injunctive relief sufficiently in advance of the alleged harm to enable the Office of Counsel to assess the merits and prepare a petition.[40]

Of the applications for injunctive relief that were not technically deficient, most have been denied on their merits – usually because the alleged harm is insufficient to warrant an injunction.[41] In contrast to the threshold "reasonable cause to believe an improper practice has occurred," which is a comparatively low standard, the standard for the necessary degree of harm is high.

When considering the harm, the Office of Counsel is guided by PERB's jurisdiction and remedial authority under § 205.5(d) of the Act. For example, in *CSEA & Village of Hempstead (Barrows)*,[42] the Office of Counsel denied an application for injunctive relief associated with an alleged breach of the duty of fair representation under § 209-a.2(c) of the Act, because the alleged harm was owing to the breach of the contract over which PERB lacked jurisdiction. Similarly, in *County of Suffolk (Communications Workers of America)*,[43] an application was denied concerning conduct allegedly affecting the outcome of an election being conducted by the Suffolk County mini-PERB, which had jurisdiction to remedy the effect of the conduct on the charging party.

Perhaps the clearest illustration of irreparable harm warranting an injunction is where an employer unilaterally requires employees or a union to disclose confidential information, as in *City of Schenectady*. If a violation is found, an order of the Board cannot restore the privacy interests so compromised.[44]

To date, the Office of Counsel has not pursued injunctive relief where the harm is limited to the pecuniary losses of individuals who have lost their jobs allegedly in

violation of the Act, finding that reinstatement with back pay is an effective remedial order under § 205.5(d) if a violation is found.[45] On the other hand, PERB obtained an injunction preventing a city from refusing to deduct and remit union dues and agency fees on the ground that the union required the funds to effectively represent the unit.[46] Similarly, PERB obtained an injunction against the state, requiring it to resume payments into a union health fund that provided prescription drugs to all unit employees for a variety of life-sustaining purposes.[47]

In addition, PERB obtained an injunction to prevent a unilateral change in vacation bid procedures affecting outside employment and planned vacations;[48] a unilateral change in sick leave procedures, which resulted in overtime assignments in derogation of doctor's restrictions;[49] and a unilateral directive requiring an employee to undergo a medical assessment and to enroll in a substance abuse treatment program.[50]

PERB unsuccessfully sought an injunction to require a town to reinstate a cadre of union organizers and negotiators allegedly terminated in retaliation for their exercise of protected rights.[51] The court rejected PERB's argument that the employer's action had a chilling effect on the remaining unit employees. Likewise, PERB's applications for injunctive relief were denied in *PERB v. Buffalo Water Board*[52] and in *PERB v. Town of Orangetown*.[53]

When the Office of Counsel decides to seek an injunction, it sends to each party a formal notice of intent that includes how and when it will proceed. As a rule, PERB seeks an injunction by Order to Show Cause and Petition, and requests a Temporary Restraining Order. In such cases, the notice of intent advises the respondent when PERB will appear in Albany County Supreme Court, affording it an opportunity to be heard on the request for the temporary relief. At that time, the court usually sets a time for the respondent to answer the petition and schedules a date for argument on the preliminary injunction.

Of the more than 350 applications for injunctive relief that PERB has received since 1995, only 12 (about 3.3%) resulted in a judicial order. One of the reasons that so few meritorious applications for injunctive relief result in a judicial order is that many are settled before a petition is filed or before the judgment is issued. Often, respondents are willing to voluntarily stay their hands regarding the at-issue conduct pending final disposition by the Board on the merits of the charge.

Although the Office of Counsel will consult with the charging party regarding such settlements, ultimately, if the Office of Counsel is satisfied that the alleged harm is no longer "irreparable" under the terms of the respondent's agreement, it will ask the charging party to withdraw the application, or it will deny it.[54] Occasionally, such settlement efforts resolve the underlying improper practice charge as well. However, because settlement efforts often take more than the statutory 10 days within which PERB must petition the court, they are undertaken only if the respondent agrees to waive the timeliness of the petition – a waiver that many respondents are willing to enter if it means that they might avoid costly litigation.

Conclusion

The Taylor Law has been amended several times to address deficiencies in PERB's remedial powers. The injunctive relief provision is the most recent. It is, as the others that preceded it, a tool to enable PERB to issue a meaningful remedial order in an improper practice proceeding that can effectuate the policies of the Act. ■

1. 158 A.D.2d 849, 23 PERB ¶ 7507 (3d Dep't 1990).
2. 24 PERB ¶ 7511 (Sup. Ct., Ulster Co. 1991).
3. *See Uniformed Firefighters Ass'n of Greater N.Y. v. City of N.Y.*, 79 N.Y.2d 236 (1992).
4. *Id.* at 241.
5. *Id.*
6. Senate Bill No. 1767, 1993.
7. 1994 N.Y. Laws ch. 695.
8. *Doe v. Axelrod*, 73 N.Y.2d 748, 750 (1988).
9. 41 PERB ¶ 7005 (Sup. Ct., Albany Co. 2008).
10. Civ. Serv. Law § 209-a.4(b).
11. *Id.*
12. *Id.*
13. Civ. Serv. Law § 209-a.4(d).
14. Civ. Serv. Law § 209-a.5.
15. *See, e.g., PERB v. City of Troy*, 28 PERB ¶ 7002 (Sup. Ct., Albany Co. 1995). Intervention may be advisable because subsequent litigation can be undertaken by the charging party. *See, e.g., PERB v. City of Troy*, 28 PERB ¶ 7003 (3d Dep't 1995).
16. *See, e.g., PERB v. Cnty. of Monroe*, 42 PERB ¶ 7007 (Sup. Ct., Albany Co. 2009) (motion to intervene denied).
17. Civ. Serv. Law § 204-a.4(b).
18. Civ. Serv. Law § 209-a.4(c).
19. *See, e.g., N.Y. State Supreme Court Officers Ass'n v. PERB*, 35 PERB ¶ 7009 (Sup. Ct., Albany Co. 2002); *Local 100, Transp. Workers Union v. PERB*, 28 PERB ¶ 7010 (Sup. Ct., Albany Co. 1995).
20. 35 PERB ¶ 7009 (Sup. Ct., Albany Co. 2002).
21. Civ. Serv. Law § 209-a.4(e).
22. CPLR 5519. The Appellate Division, Second Department, has held that the automatic stay on behalf of governmental appellants applies only to mandatory injunctions ordering the performance of some affirmative act — those that usually result in a change in the *status quo*. *State v. Town of Haverstraw*, 219 A.D.2d 64, (2d Dep't 1996). The court held that the stay does not apply to prohibitory injunctions, which are self-executing and need no enforcement procedure to compel inaction on the part of the person or entity restrained. In addition, courts will not suffer lightly any perversion of the Legislature's intention in affording governmental entities such an automatic stay on appeal. *See Troy Police Benevolent & Protective Ass'n v. City of Troy*, 223 A.D.2d 995 (3d Dep't 1996). An appeal for the removal of such a stay may be given a preference under CPLR 5521. *See* Civ. Serv. Law § 209-a.4(h).
23. Civ. Serv. Law § 209-a.4(d).
24. Civ. Serv. Law § 209-a.4(g).
25. Civ. Serv. Law § 209-a.4(e).
26. *Id.*
27. *Id.*
28. Rules § 204.15(b), (c).
29. *See, e.g., N.Y. State Supreme Court Officers Ass'n v. PERB*, 35 PERB ¶ 7009 (Sup. Ct., Albany Co. 2002).

30. Rules § 204.15(c)(5).

31. Rules § 204.15(a). The address is 80 Wolf Rd., Room 500, Albany, NY 12205.

32. If the charge and the application are filed in the same envelope, it is possible that one office or the other will not receive the material that is intended for that office in a timely fashion.

33. Rules § 204.15(c).

34. Rules § 204.16(a).

35. Rules § 204.16(c).

36. Rules § 204.16(a).

37. Rules § 204.16(b).

38. *See, e.g., Town of Orangetown (Orangetown PBA)*, 38 PERB ¶¶ 6006, 6008 (2005).

39. *See, e.g., N.Y. State Unified Court Sys. (McConnell)*, 41 PERB ¶¶ 6004, 6006 (2008).

40. *See, e.g., PERB v. City of Buffalo*, 34 PERB ¶ 7014 (Sup. Ct., Albany Co. 2001) (PERB's petition for an injunction was denied as moot because the harm had already occurred).

41. Between 1995 and 2002, decisions of the Office of Counsel denying applications for injunctive relief were in the form of brief orders, and none was published. In 2002, the Office of Counsel began publishing denial decisions (other than those for technical deficiencies) in the form of full PERB decisions, and, although not required under the statute, from 2002 until 2007, the office published decisions in like form explaining why it was going to seek an injunction. Because such decisions are not precedential, they were published only to serve as guides for practitioners. Currently, the office will publish a decision denying an application for injunctive relief only if it raises novel issues that will serve as further guidance to practitioners. It no longer publishes decisions explaining why it will seek an injunction.

42. 42 PERB ¶ 6010 (2009).

43. 42 PERB ¶ 6008 (2009).

44. *See, e.g., PERB v. Cnty. of Monroe*, 42 PERB ¶ 7007 (Sup. Ct., Albany Co. 2009); *PERB v. Town of Islip*, 41 PERB ¶ 7005 (Sup. Ct., Albany Co. 2008); *PERB v. City of Buffalo*, 28 PERB ¶ 7008 (Sup. Ct., Albany Co. 1995).

45. *See, e.g., City Univ. of N.Y. (Prof'l Staff Congress)*, 42 PERB ¶ 6003 (2009).

46. *PERB v. City of Troy*, 28 PERB ¶ 7002 (Sup. Ct., Albany Co. 1995).

47. *PERB v. State of N.Y.*, 29 PERB ¶ 7006 (Sup. Ct., Albany Co. 1996).

48. *PERB v. Cnty. of Rockland*, 29 PERB ¶ 7002 (Sup. Ct., Albany Co. 1996).

49. *PERB v. Cnty. of Onondaga & Sheriff of Onondaga Cnty.*, 29 PERB ¶ 7010 (Sup. Ct., Albany Co. 1996).

50. *PERB v. N.Y. City Transit Auth.*, 36 PERB ¶ 7012 (Sup. Ct., Albany Co. 2003).

51. *PERB v. Town of Lewiston*, 31 PERB ¶ 7005 (Sup. Ct., Albany Co. 1998).

52. 30 PERB ¶ 7005 (Sup. Ct., Albany Co. 1997) (alleged unilateral transfer of exclusive bargaining unit work to private company).

53. 38 PERB ¶ 7015 (Sup. Ct., Albany Co. 2005) (disciplinary proceeding under unilaterally imposed procedures).

54. *See, e.g., Town of Woodbury*, 40 PERB ¶ 6004 (2007).

NEW RULES GOVERNING APPLICATIONS FOR INJUNCTIVE RELIEF

§204.15] §204.7 Application for injunctive relief.

(a) *Filing of application.* A party filing an improper practice charge pursuant to Part 204 of this Chapter may apply to the board for injunctive relief pursuant to section 209-a.4 of the act by filing with the office of counsel at the board's Albany office either by electronic mail, or by filing an original and two copies of a signed application for injunctive relief [pursuant to section 209-a.4 of the act]. An application filed by mail or overnight delivery service shall be filed in an envelope or container prominently bearing the legend "INJUNCTIVE RELIEF APPLICATION" in capital letters on its front. An application that is filed by electronic mail at an address designated by the board for such purpose and published on the agency's website shall state in the subject line "APPLICATION FOR INJUNCTIVE RELIEF."

(b) *Application form.* The application shall be filed on a form prescribed by the board which shall give notice of the right to respond pursuant to section 204.[16]8 of this Part. The application form shall include the following:

(1) the name, address, telephone number, electronic mail address, fax number, and affiliation, if any, of the charging party;

(2) the name, title, address, telephone number, electronic mail address, and fax number of any representative filing the application on behalf of the charging party;

(3) the name, title, address, telephone number, electronic mail address, and fax number of any attorney or other representative who will represent the charging party during the processing of the application, if different from the representative named in response to paragraph (2) above;

(4) the name, address, electronic mail address if known, and telephone number of any public employer or employee organization named as a party to the improper practice charge;

(5) the date when the improper practice charge was filed[, if available]; and

(6) the case number of the improper practice charge, if available.

(c) *Additional contents of application.* The charging party shall attach to the application form the following documents:

(1) a copy of the improper practice charge;

(2) an affidavit or affidavits stating, in a clear and concise manner: (i) those facts personally known to the deponent that constitute the alleged improper practice, the date of the alleged improper practice, the alleged injury, loss, or damage arising from it, and the date when the alleged injury, loss, or damage occurred or will occur; and (ii) why the alleged injury, loss, or damage is immediate, irreparable, and will render a resulting judgment on the merits of the improper practice charge ineffectual if injunctive relief is not granted by the court, and why there is a need to maintain or return to the status quo in order for the board to provide meaningful relief. If filed electronically, the affidavit or affidavits shall be in searchable format and shall not be scanned copies of the original documents;

(3) copies of any documentary evidence in support of the application;

(4) proof [of the date of actual delivery of a copy of the completed application form and the attached documents (except proof of delivery), by mail, personal delivery, or overnight delivery service, in an envelope or container bearing the legend "ATTENTION: CHIEF LEGAL OFFICER" in capital letters on its front, addressed to every public employer and employee organization named as a party to the improper practice charge; and] that a copy of the completed application for injunctive relief and all supporting documents was delivered to the respondent's chief legal officer in an envelope bearing the legend "ATTENTION: CHIEF LEGAL OFFICER" in capital letters on its front, and the method and date that such delivery was made, and proof of service on all other parties to the charge. If delivery to the respondent's chief legal officer is not by electronic mail or personal service, proof of delivery must establish when the respondent's chief legal officer actually received the completed application and all supporting documents. Delivery by facsimile or by electronic mail will not be accepted, unless the charging party provides a written acknowledgment from the respondent's chief legal officer that such officer accepts delivery by that means, and when such officer received the completed application and all supporting documents; and

(5) [at the option of the charging party] charging party may file, at its option, a memorandum of law in support of the application for injunctive relief. If filed electronically, the application for injunctive relief shall be in searchable format and shall not be scanned copies of the original documents.

[§204.16] §204.8 Response to application for injunctive relief.

(a) *Filing of response.* A party to whom an application for injunctive relief is delivered pursuant to section 204.[15]7 of this Part may file with the office of counsel [within five days after such delivery] an original and two copies of a response to the application, with proof of service of a copy on all parties within five days after the application was actually delivered. Alternatively, an original and one copy of a response, with proof of service [of a copy of the response] on all parties, may be filed with the office of counsel by either electronic mail at an electronic mail address designated by the board for that purpose, or by fax at a fax number designated by the board for that purpose within five days after delivery of the application. If the response is filed by fax, the responding party shall mail or deliver an original and two copies of the response to the office of counsel by the next working day. Unless otherwise authorized by the office of counsel, copies of the response shall be served on all other parties in the same manner in which the [response] application is filed with the office of counsel. The response shall be signed and sworn to before any person authorized to administer oaths and shall be deemed filed when received by the office of counsel.

(b) *Contents of response.* (1) The response, if any, shall assert any defense that the responding party, at the time of filing, believes it could rightfully assert in an answer or responsive pleading to the improper practice charge, including any affirmative defenses pursuant to section 204.3(c)(2) of this Part. The response shall not constitute an answer or responsive pleading to the improper practice charge pursuant to section 204.3 of this Part, and asserting or not asserting any affirmative defense or other defense in the response shall not prejudice any party with regard to defenses or affirmative defenses that party may plead or not plead in an answer or responsive pleading filed pursuant to that section.

(2) Any affidavit submitted in support of the response shall be made on the basis of personal knowledge of the relevant facts and documentary evidence attached to the affidavit. If filed electronically, the affidavit or affidavits shall be in searchable format and shall not be scanned copies of the original documents.

(3) The response may be accompanied by a memorandum of law in opposition to the application for injunctive relief. If filed electronically, the affidavit or affidavits shall be in searchable format and shall not be scanned copies of the original documents.

(c) *Accelerated response.* Upon presentation of clear evidence of a compelling need for determination of an application for injunctive relief in fewer than 10 days from its receipt by the board, and upon a determination by the office of counsel that such compelling need exists, the office of counsel may direct that a response, if any, [shall] be filed within a specified time earlier than otherwise required by this section.

[§204.17] §204.9 Review of application for injunctive relief.

Within 10 days after receipt [of an] by the office of counsel of a completed application for injunctive relief [by the board], [where the board by its office of counsel determines that] the board, by its office of counsel, shall determine whether a sufficient showing has been made pursuant to section 209-a.4 of the act[,]. If a sufficient showing has been made, the board, by its office of counsel, shall petition supreme court [upon notice to all parties] for injunctive relief upon notice to all parties or shall issue an order, with notice to all parties, permitting the charging party to seek injunctive relief by petition to supreme court. Where a sufficient showing has not been made, notice of that determination, stating the reasons for it, shall be issued by the board by its office of counsel to all parties within 10 days after receipt of the application by the board. Orders permitting the charging party to seek injunctive relief by petition to supreme court and notices to the parties that a sufficient showing has not been made may be issued by fax or electronic mail.

[§204.18] §204.10 Expedited treatment where injunctive relief imposed.

Notwithstanding the time limits stated in sections 204.2 and 204.3 of this Part, when injunctive relief is imposed by a court pursuant to section 209-a.4 of the act, after affording the parties an opportunity for consultation, the administrative law judge assigned to the proceeding shall issue a scheduling order or orders setting the dates and times for service and filing of answers, responsive pleadings, motions, responses, briefs, and proposed findings of fact and conclusions of law, and for conduct of a pre-hearing conference and hearing. Unless the parties mutually agree to waive the time limit for concluding the hearing and issuing a decision pursuant to section 209-a.4(d) of the act, scheduling orders shall be fashioned in such a manner as to permit the administrative law judge to issue a decision on the improper practice charge within 60 days after the imposition of injunctive relief in accordance with section 209-a.4(d) of the act.

PROCESSING BY PERB

Sample decision denying application

Yonkers Police Benevolent Association v City of Yonkers (A-391 / U-35005)

Sample decision authorizing charging parties to seek injunction

Powers (NYSCOPBA) v State of New YORK (Department of Correctional and Community Services (A-385 / U-34326)

Spence (PEF) v State of New York (Office of Information Technology Services) (A-401 / U-35624)

COURT DECISIONS since 2013 (the date of the NYSBA article)

Powers v State of New YORK (Department of Correctional and Community Services), 50 PERB ¶7004 (Sup Ct, Albany County 2017). The Court denied an injunction to prevent DOCCS from implementing a new policy requiring correctional officers to carry their personal belongings into correctional facilities in a State-issued transparent plastic bag measuring 11-inches by 7-inches by 10-inches. As alleged in the charge, the new policy unilaterally eliminated the established practice of allowing correctional officers to carry their belongings into the facilities without restriction on the number, size or style of the containers. The Court deferred to PERB's determination that there was reasonable cause to believe that DOCCS's implementation of the new policy constituted an improper practice. However, while acknowledging the deference it owes to PERB regarding the appropriate remedy, and that the impact of the new policy on the employees' comfort, convenience, and privacy concerns could not be undone and was "problematic," the Court concluded that the harm did not warrant injunctive relief. the Court emphasized the absence of a showing by PERB that an ALJ could not issue a decision and order within 60 days without an injunction under the Act.

Spence v State of New York (Office of Information Technology Services), 48 PERB ¶ 7004 (Sup Ct, Albany County 2015). The Court granted an injunction to prevent the State from implementing a new policy requiring certain current employees of the Office of Information Technology Services to submit to fingerprinting for a background check. While the Court declined to defer to PERB's determination that the subject is negotiable under the Taylor Law, it agreed with that conclusion. It also agreed that once implemented, the loss of the affected employees' privacy interests could not be restored under a PERB remedial order.

County Police Association of Cortland, Inc. v County of Cortland, 48 PERB ¶ 7001 (Sup Ct, Albany County 2015). The Court granted a Temporary Restraining Order against the County preventing it from unilaterally implementing new conditions on the receipt of contractual medical insurance by the dependents of deputy sheriffs. Under the new conditions, employees were required to disclose to a private company acting as agent for the County detailed and confidential information about themselves and their dependents in order for the dependents to continue receiving medical insurance. The requirement also effectively required the employees to participate in the County's investigation into the dependents' continued eligibility. In a subsequent decision, the Court denied a motion for a preliminary injunction as moot. The PI sought an order confirming the terms of the prior temporary restraining order. According to the Court, the PI was unnecessary because the County agreed to abide by the TRO.

OTHER DECISIONS OF NOTE

Matter of Town of Islip v New York State Pub Empl Relations Bd, 23 NY3d 482 (2014) (the Court of Appeals held that it could not enforce PERB's remedial order as written where no "PERB injunction" was sought preventing the Town from disposing of vehicles that the Board ordered restored to unit employees, and requiring the Town to purchase new vehicles would be unduly burdensome).

Matter of Manhasset Union Free Sch Dist v New York State Pub Empl Relations Bd., 61 AD3d 1231, 1234-35 (3d Dept 2009). Court held:

> We do agree with petitioner, however, that PERB's remedial order, which requires petitioner to cease transferring the unit work of transporting public school students to nonunit employees, should be modified. While a remedy fashioned by PERB for an improper practice should be upheld if reasonable, it is for the courts to examine the reasonable application of PERB's remedies. PERB's order requires petitioner to restore the personnel and facilities of its former transportation department. Because petitioner has already sold its buses and leased its garage, compliance with the order may require taxpayer approval, which may or may not be forthcoming, and could be delayed by petitioner's contractual obligations. Under these unique circumstances, we find that enforcement of the current order is unreasonable, and we remit the matter to PERB to fashion a remedy that will allow for the contingencies that could prevent petitioner's compliance. [Internal citations and quotation marks omitted.]

In remanding the matter to PERB, the Court approvingly cited an ALJ's decision in *County of Chautauqua*, 21 PERB ¶ 4588 (1988) (later affirmed by the Board, 22 PERB ¶ 3016 [1989]), where the ALJ directed the employer to : "Restore all laundry service unit work to unit employees; *in the event it is impossible to restore unit work, make comparable work available to all displaced employees without loss of work to any current unit employee, or pay unit employees all lost wages and benefits until such unit work becomes available.*" [Emphasis added.] On remand to the Board, the Board issued a substantially similar remedial order in *Manhasset*.

Matter of Hudson Val. Comm Coll v New York State Pub Empl Relations Bd, 132 AD3d 1132, 1136 (3d Dept 2013).

Citing *Town of Islip* and *Manhasset, supra*, the Court held:

> There is, however, some record evidence supporting petitioner's claim that determinations regarding reinstatement and back pay are

impracticable as to certain second jobs that were infrequent and voluntary. Although some of the second jobs that petitioner stopped offering to NIEU members were formerly held by specific, identifiable individuals who worked regularly scheduled hours, others—such as assisting at student orientation events—were not regularly scheduled or assigned to particular individuals, but instead were available on a sporadic basis to those who chose to sign up for them. PERB's remedial order cannot be reasonably applied to these positions, as it cannot be determined who would have claimed the positions, how many hours they would have worked, and how much back pay is owed. We thus remit the matter to PERB for a determination as to which NIEU members can be reinstated to second jobs that they previously held or should receive back pay. [Internal citations omitted.]

§204.15] §204.7 Application for injunctive relief.

(a) *Filing of application.* A party filing an improper practice charge pursuant to Part 204 of this Chapter may apply to the board for injunctive relief pursuant to section 209-a.4 of the act by filing with the office of counsel at the board's Albany office either by electronic mail, or by filing an original and two copies of a signed application for injunctive relief [pursuant to section 209-a.4 of the act]. An application filed by mail or overnight delivery service shall be filed in an envelope or container prominently bearing the legend "INJUNCTIVE RELIEF APPLICATION" in capital letters on its front. An application that is filed by electronic mail at an address designated by the board for such purpose and published on the agency's website shall state in the subject line "APPLICATION FOR INJUNCTIVE RELIEF."

(b) *Application form.* The application shall be filed on a form prescribed by the board which shall give notice of the right to respond pursuant to section 204.[16]8 of this Part. The application form shall include the following:

(1) the name, address, telephone number, electronic mail address, fax number, and affiliation, if any, of the charging party;

(2) the name, title, address, telephone number, electronic mail address, and fax number of any representative filing the application on behalf of the charging party;

(3) the name, title, address, telephone number, electronic mail address, and fax number of any attorney or other representative who will represent the charging party during the processing of the application, if different from the representative named in response to paragraph (2) above;

(4) the name, address, electronic mail address if known, and telephone number of any public employer or employee organization named as a party to the improper practice charge;

(5) the date when the improper practice charge was filed[, if available]; and

(6) the case number of the improper practice charge, if available.

(c) *Additional contents of application.* The charging party shall attach to the application form the following documents:

(1) a copy of the improper practice charge;

(2) an affidavit or affidavits stating, in a clear and concise manner: (i) those facts personally known to the deponent that constitute the alleged improper practice, the date of the alleged improper practice, the alleged injury, loss, or damage arising from it, and the date when the alleged injury, loss, or damage occurred or will occur; and (ii) why the alleged injury, loss, or damage is immediate, irreparable, and will render a resulting judgment on the merits of the improper practice charge ineffectual if injunctive relief is not granted by the court, and why there is a need to maintain or return to the status quo in order for the board to provide meaningful relief. If filed electronically, the affidavit or affidavits shall be in searchable format and shall not be scanned copies of the original documents;

(3) copies of any documentary evidence in support of the application;

(4) proof [of the date of actual delivery of a copy of the completed application form and the attached documents (except proof of delivery), by mail, personal delivery, or overnight delivery service, in an envelope or container bearing the legend "ATTENTION: CHIEF LEGAL OFFICER" in capital letters on its front, addressed to every public employer and employee organization named as a party to the improper practice charge; and] that a copy of the completed application for injunctive relief and all supporting documents was delivered to the respondent's chief legal officer in an envelope bearing the legend "ATTENTION: CHIEF LEGAL OFFICER" in capital letters on its front, and the method and date that such delivery was made, and proof of service on all other parties to the charge. If delivery to the respondent's chief legal officer is not by electronic mail or personal service, proof of delivery must establish when the respondent's chief legal officer actually received the completed application and all supporting documents. Delivery by facsimile or by electronic mail will not be accepted, unless the charging party provides a written acknowledgment from the respondent's chief legal officer that such officer accepts delivery by that means, and when such officer received the completed application and all supporting documents; and

(5) [at the option of the charging party] charging party may file, at its option, a memorandum of law in support of the application for injunctive relief. If filed electronically, the application for injunctive relief shall be in searchable format and shall not be scanned copies of the original documents.

[§204.16] §204.8 Response to application for injunctive relief.

(a) *Filing of response.* A party to whom an application for injunctive relief is delivered pursuant to section 204.[15]7 of this Part may file with the office of counsel [within five days after such delivery] an original and two copies of a response to the application, with proof of service of a copy on all parties within five days after the application was actually delivered. Alternatively, an original and one copy of a response, with proof of service [of a copy of the response] on all parties, may be filed with the office of counsel by either electronic mail at an electronic mail address designated by the board for that purpose, or by fax at a fax number designated by the board for that purpose within five days after delivery of the application. If the response is filed by fax, the responding party shall mail or deliver an original and two copies of the response to the office of counsel by the next working day. Unless otherwise authorized by the office of counsel, copies of the response shall be served on all other parties in the same manner in which the [response] application is filed with the office of counsel. The response shall be signed and sworn to before any person authorized to administer oaths and shall be deemed filed when received by the office of counsel.

(b) *Contents of response.* (1) The response, if any, shall assert any defense that the responding party, at the time of filing, believes it could rightfully assert in an answer or responsive pleading to the improper practice charge, including any affirmative defenses pursuant to section 204.3(c)(2) of this Part. The response shall not constitute an answer or responsive pleading to the improper practice charge pursuant to section 204.3 of this Part, and asserting or not asserting any affirmative defense or other defense in the response shall not prejudice any party with regard to defenses or affirmative defenses that party may plead or not plead in an answer or responsive pleading filed pursuant to that section.

(2) Any affidavit submitted in support of the response shall be made on the basis of personal knowledge of the relevant facts and documentary evidence attached to the affidavit. If filed electronically, the affidavit or affidavits shall be in searchable format and shall not be scanned copies of the original documents.

(3) The response may be accompanied by a memorandum of law in opposition to the application for injunctive relief. If filed electronically, the affidavit or affidavits shall be in searchable format and shall not be scanned copies of the original documents.

(c) *Accelerated response.* Upon presentation of clear evidence of a compelling need for determination of an application for injunctive relief in fewer than 10 days from its receipt by the board, and upon a determination by the office of counsel that such compelling need exists, the office of counsel may direct that a response, if any, [shall] be filed within a specified time earlier than otherwise required by this section.

[§204.17] §204.9 Review of application for injunctive relief.

Within 10 days after receipt [of an] by the office of counsel of a completed application for injunctive relief [by the board], [where the board by its office of counsel determines that] the board, by its office of counsel, shall determine whether a sufficient showing has been made pursuant to section 209-a.4 of the act[,]. If a sufficient showing has been made, the board, by its office of counsel, shall petition supreme court [upon notice to all parties] for injunctive relief upon notice to all parties or shall issue an order, with notice to all parties, permitting the charging party to seek injunctive relief by petition to supreme court. Where a sufficient showing has not been made, notice of that determination, stating the reasons for it, shall be issued by the board by its office of counsel to all parties within 10 days after receipt of the application by the board. Orders permitting the charging party to seek injunctive relief by petition to supreme court and notices to the parties that a sufficient showing has not been made may be issued by fax or electronic mail.

[§204.18] §204.10 Expedited treatment where injunctive relief imposed.

Notwithstanding the time limits stated in sections 204.2 and 204.3 of this Part, when injunctive relief is imposed by a court pursuant to section 209-a.4 of the act, after affording the parties an opportunity for consultation, the administrative law judge assigned to the proceeding shall issue a scheduling order or orders setting the dates and times for service and filing of answers, responsive pleadings, motions, responses, briefs, and proposed findings of fact and conclusions of law, and for conduct of a pre-hearing conference and hearing. Unless the parties mutually agree to waive the time limit for concluding the hearing and issuing a decision pursuant to section 209-a.4(d) of the act, scheduling orders shall be fashioned in such a manner as to permit the administrative law judge to issue a decision on the improper practice charge within 60 days after the imposition of injunctive relief in accordance with section 209-a.4(d) of the act.

STATE OF NEW YORK

PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of the Application for Injunctive Relief pursuant to

Civil Service Law § 209-a.4

YONKERS POLICE BENEVOLENT ASSOCIATION,

Applicant,

-and-

APPLICATION NO. A-391

(I.P. NO. U-35005)

CITY OF YONKERS,

Respondent,

DECISION OF OFFICE OF COUNSEL[1]

On April 27, 2016, PERB's Office of Counsel received an amended application for injunctive relief under Civil Service Law ("CSL") § 209-a.4 from the Yonkers Police Benevolent Association ("PBA") in association with an amended improper practice charge (case no. U-35005).[2] The underlying improper practice charge, as amended, is being processed by PERB's Office of Employment Practices and Representation. The application seeks to prevent the City of Yonkers, the respondent in the underlying

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[1] This decision constitutes a preliminary determination solely for purposes of Civil Service Law § 209-a.4. It is not binding on an Administrative Law Judge or the Board in assessing the merits of the underlying improper practice charge on a full record or in fashioning an appropriate remedy if an improper practice is found.

[2] The amended application cured certain defects in the original application including a lack of proof that it had been *actually delivered* to the office of the respondent's chief legal officer. The amended application contained proof of actual delivery of the original and amended application. The amended improper practice charge cured a defect in the original.

improper practice charge, from implementing a new policy and related procedures requiring unit police officers to wear digital video and audio recording devices ("body-cams") in order to document their law enforcement interactions with the public. The application is supported by the underlying verified improper practice charge and its amendment, with exhibits, including the at-issue policy and procedures, an affidavit of Detective Keith Olson, the PBA's president, and a memorandum of law. The PBA contends that the City's unilateral implementation of the new body-cam policy and procedures violate CSL § 209-a.1 (d). The City did not file a response to the application.

As alleged in the unrefuted verified improper practice charge and Olson's affidavit, effective April 1, 2016, the City unilaterally implemented a new program of requiring selected unit police officers on each tour of duty to wear, activate, maintain aim and operate digital video and audio recording devices ("body-cams") during their shifts in order to document the officers' law enforcement interactions with the public. The new program is attached to the Improper Practice Charge as Exhibit C.

The policy states that the City's primary goal in requiring the use of police body-cams is to foster transparency in the police department's law enforcement activities, including the ability to rebut or corroborate citizen complaints. In addition, the City expects to use the digital data in law enforcement investigations and prosecutions, as well as for training purposes and police disciplinary matters. The body-cams are not to be used to record private conversations or while engaged in personal activities, and when the data is used for training purposes, the officers' faces will be blocked.

DISCUSSION

STATUTORY FRAMEWORK

Under CSL § 205.5 (d), PERB has exclusive, nondelegable jurisdiction to develop procedures to prevent improper practices defined in CSL § 209-a. Upon finding an improper practice, CSL § 205.5 (d) further authorizes PERB to issue remedial orders directing offending parties "to cease and desist from any improper practice, and to take such affirmative action as will effectuate the policies of [CSL Article 14]."

CSL § 209-a.4 (b) authorizes PERB to petition in Supreme Court for injunctive relief associated with an improper practice charge "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 . . . ." Section 204.17 of PERB's Rules of Procedure delegates the responsibility to make that determination on behalf of the Board to the Office of Counsel.

ANALYSIS

CSL Article 14 reflects a strong and sweeping public policy favoring collective bargaining and a presumption that all terms and conditions of employment are mandatorily negotiable. *City of Watertown v New York State Pub Empl Relations Bd*, 95 NY2d 73, 78 (2000). Here, because there is no dispute that the City unilaterally implemented the new body-cam policy and procedure, the threshold question in determining whether its conduct constituted an improper practice is whether and to what

extent the City had a duty to negotiate with the PBA concerning the subject.[3] The question is one of first impression to PERB, but not without relevant precedent.

The Board has held that the selection of police equipment "involves the manner and means by which [an employer] serves its constituency and hence is a management prerogative" (*City of New Rochelle*, 10 PERB ¶ 3042, at 3079 [1977] [type of revolver assigned to police officers, as equipment, is a nonmandatory mission-related decision]). In *City of Albany*, 7 PERB ¶ 3078 (1974), the Board held that an employer had a management right to determine whether police cars should be equipped with shotguns because the assigned weapons are equipment directly related to the City's level of services associated with its law enforcement mission. *Accord, City of White Plains*, 9 PERB ¶ 3007 (1976) (shotguns). *See also City of Amsterdam*, 10 PERB ¶ 3007 (1977) (number and nature of rounds for service weapons held nonmandatory equipment). *Compare, New York City Trans Auth*, 41 PERB ¶ 3014 (2008) (bulletproof vests, while equipment, are directly related to employees' health and safety and, thus, mandatorily negotiable).

The Board has also consistently held that procedures that require employees to participate in an employer's investigation affecting employment related decisions, including disciplinary charges, are "unquestionably mandatory subjects of negotiation, as are the grounds for the imposition of discipline" (*Patchogue-Medford Union Free School District*, 30 PERB ¶ 3041 at 3094 (1997) (*citing Auburn Police Local 195 v*

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[3] Notably, that a particular subject is mandatorily negotiable does not mean that it, or some variation thereof, may not ultimately be unilaterally implemented. If the parties are unable to agree upon its terms, the subject of the bargaining impasse may be finally resolved through the conciliation procedures specified in CSL § 209, where the full merits of each party's position may be considered and the impasse finally resolved for a specific duration.

Helsby, 46 NY2d 1034, *aff'g* 62 AD2d 12 [3d Dept 1978] and *Binghamton Civil Serv Forum v City of Binghamton*, 44 NY2d 23 [1978]). Likewise, an employer has a bargaining obligation concerning a requirement that its employees participate in its investigation into their fitness for continued employment by providing certain information to the employer, even though the employer may want it to ferret out official corruption. *See, e.g., Board of Educ of the City Sch Dist of the City of New York v New York State Pub Empl Relations Bd*, 75 NY2d 660 (1990). *See also City of Niagara Falls*, 44 PERB ¶ 3015 (2011), *confd sub nom. City of Niagara Falls v New York State Pub Empl Relations Bd*, 45 PERB ¶ 7004 (Sup Ct Albany County 2012) (procedures that an employer uses to determine whether an employee is qualified for continued employment – there, residency requirements – are mandatorily negotiable).

In *Town of Orangetown*, 40 PERB ¶ 3008 (2007), *confd sub nom. Town of Orangetown v New York State Pub Empl Relations Bd*, 40 PERB ¶ 7008 (Sup Ct Albany County 2007), the Board held that video or audio taping of a medical examination associated with an employer's investigation into a police officer's eligibility to receive benefits under General Municipal Law § 207-c was a mandatory subject of bargaining. *Accord, Town of Ulster*, 47 PERB ¶ 3028 (2014), *confd sub nom. Town of Ulster v New York State Pub Empl Relations Bd*, 49 PERB ¶ 7003 (Sup Ct Albany County 2016) (audio taping disciplinary investigation is mandatorily negotiable).

In *Nanuet Union Free School District*, 45 PERB ¶ 3007 (2009), the Board dismissed an improper practice charge as untimely concerning an employer's unilateral installation of a passive surveillance system to monitor an employee's behavior to

determine whether disciplinary charges may be warranted. There, in dicta, the Board opine on the negotiability of such passive surveillance systems, observing:

> We conclude that, in general, the decision by an employer to engage in videotape surveillance of a workplace for monitoring and investigating employees is mandatorily negotiable under the Act because it bears a direct and significant relationship to working conditions, it requires employees to be video-surveillance participants, and it intrudes upon employee interests including job security, privacy and personal reputation. The data collected and stored can form the basis for counseling, discipline or demotion. It can also reveal protected concerted activities under the Act, and aspects of an employee's personal life such as a workplace romance or embarrassing personal habits, even when the videotaping is limited to the internal public areas of a workplace. Finally, we are mindful that videotape images that can be obtained under the Freedom of Information Law, by subpoena or by other means, could be posted and distributed through the internet.
>
> To determine whether a particular decision to utilize videotape surveillance in the workplace is mandatorily negotiable under the Act, however, requires a fact-specific examination of employer and employee interests. Among the factors that must be considered are the nature of the workplace, and the employer's core mission. For example, in a correctional facility, unlike a civilian workplace, videotaping may be integral to the employer's core mission, and therefore the subject might be nonmandatory if the videotaping is necessary and proportional for meeting that mission. In other workplaces, where videotape surveillance is not integral to the employer's mission, we will balance the respective interests of the employer and the employee to determine whether the videotaping significantly or unnecessarily intrudes upon the protected interests of unit employees. Among the factors that we will consider in applying that balance is the scope and length of the videotaping, and the availability of the images to third parties [internal quotation marks and footnotes omitted]. *Id.*, at 3013.

However, I need not decide whether and to what extent there is reasonable cause to believe that the City's unilateral imposition of the new body-cam policy and

procedure violated CSL § 209-a.1 (d) because I find that the application and supporting documents do not establish the necessary degree of harm warranting injunctive relief.

Olson alleges in his affidavit that he believes that the new body-cam policy

> implicates privacy concerns, may subject the officers to discipline and has a significant cost associated with it, as it impacts the working environment and undoubtedly violates the police officers' constitutional privacy rights – the cameras may capture the police officers' private information, protected union activity and intrude upon the police officers' bodily integrity, as well as impacting mobility and reactions during emergency situations. Olson's affidavit ¶ 11.

However, the policy does not require police officers to activate the body-cams during private conversations or activities. The safety implications associated with the new equipment vaguely alluded to by Olson are comparable to the safety concerns articulated by the union in *City of White Plains*, 9 PERB ¶ 3007 (1976), where the Board held that such safety concerns do not impair the employer's management right to determine the number of employees assigned to a patrol car. There, the Board observed that such safety concerns are separately negotiable.

Moreover, if the City were found to have violated CSL § 209-a.1 (d) by using the data collected by the body-cams for employment related decisions, a remedial order could direct the City to rescind the decisions and have them reconsidered by persons who have not viewed the body-cam data. Indeed, as appropriate, the Board could order the affected employees reinstated with back pay.

Therefore, the PBA's application for injunctive relief is hereby denied.

DATED: May 9, 2016
Albany, New York

David P. Quinn
Counsel

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of the Application of

NEW YORK STATE CORRECTIONAL OFFICERS AND POLICE BENEVOLENT ASSOCIATION, INC.,

Charging Party,

For Injunctive Relief Pursuant to Civil Service Law § 209-a.4.

-against-

STATE OF NEW YORK (Department of Corrections and Community Supervision),

Respondent.

NOTICE OF SUFFICIENT SHOWING PURSUANT TO CSL § 209-A (4) (b)
and
AUTHORIZATION FOR CHARGING PARTY TO PROCEED

Application No. A-00401

DETERMINATION PURSUANT TO CIVIL SERVICE LAW § 209-a.4

STATUTORY FRAMEWORK

Civil Service Law (CSL) § 209-a.4 (a) authorizes the charging party in an improper practice proceeding "to petition the [Public Employment Relations Board ("PERB" or "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."

CSL § 209-a.4 (b) authorizes PERB to petition in Supreme Court for injunctive relief regarding conduct at issue in the underlying improper practice charge if it finds that the elements warranting the injunction are satisfied. *See, e.g., New York State Pub Empl Relations Bd v State of New York*, 29 PERB ¶ 7006 (Sup Ct Albany County 1996). Pursuant to CSL § 209-a.4 (b), if PERB determines that injunctive relief is appropriate, it may authorize the charging party in the underlying improper practice proceeding to petition in Supreme Court for injunctive relief. *See, e.g., Spence v Director of the New York State Office of Information Technology Services*, 48 PERB ¶ 7004 (Sup Ct Albany County 2015). In that event, PERB must be named as a necessary party.

Significantly, under CSL § 209-a.4 (d), if injunctive relief is granted, the Administrative Law Judge assigned to the underlying improper practice charge must conduct all proceedings and issue a decision on the full merits of the charge within 60 days, unless the parties agree to extend that time. Therefore, the legal constraint imposed on the respondent pursuant to the standards warranting such injunctions under CSL § 209-a.4 have a brief, statutorily defined term.

Moreover, PERB has primary jurisdiction to determine improper practices and to fashion a remedy that will effectuate the policies of CSL Article 14. *See* CSL § 205.5 (d); *Uniformed Firefighters Assn of Greater NY v City of New York*, 79 NY2d 236 (1992). Therefore, Courts have deferred to PERB's determinations

whether there is reasonable cause to believe an improper practice has occurred and whether PERB can fashion an appropriate remedial order that will satisfy its mandate under CSL § 205.5 (d) to effectuate the policies of CSL Article 14, including the need to maintain the *status quo ante*. *See, e.g., New York State Pub Empl Relations Bd v County of Monroe*, 42 PERB ¶ 7007 (Sup Ct Albany County 2009); *New York State Pub Empl Relations Bd v Town of Islip*, 41 PERB ¶ 7005 (Sup Ct Albany County 2008); *New York State Pub Empl Relations Bd v City of Buffalo*, 28 PERB ¶ 7008 (Sup Ct Albany County 1995).

As directly relevant here, in *State of New York (Department of Correctional Services) (New York State Correctional Officers and Police Benevolent Association, Inc.)*, 38 PERB ¶ 3008 (2005), PERB held that DOCCS violated CSL § 209-a.1 (d) by unilaterally imposing new restrictions on the number, size and style of parcels that correctional officers were permitted to bring to their workstations within DOCCS's correctional facilities. PERB relied on the well-settled rule that matters affecting employees' comfort and convenience on the job are mandatorily negotiable term and condition of employment.

The Board rejected DOCCS's argument that it should not be required to negotiate concerning the new restrictions because they served its mission-related objective to ensure the security of its facilities by preventing the introduction of contraband. In that regard, the record revealed that DOCCS imposed the new restrictions in response to the events of September 11, 2001 and a recent attempt

by a stranger to bring contraband into a correctional facility in the guise of a correction officer.

Emphasizing that DOCCS was permitted to search all parcels for contraband, the Board held that the new restrictions simply made it easier for DOCCS to effectuate the searches. The Board held that the operational efficiencies obtained by the new restrictions did not outweigh the employees' negotiable interests in their convenience and comfort. Indeed, the Appellate Division, Third Department, has observed that the fiscal and management efficiencies obtained by an employer's legitimate business motives for unilaterally altering mandatorily negotiable terms and conditions of employment "are not relevant to the issue of negotiability of the [subject]." *City of Poughkeepsie v. Newman*, 95 AD2d 101, 103-104 (3d Dept 1983), *appeal dismissed* 60 NY2d 859 (1983), *leave to appeal denied* 62 NY2d 608 (1984).

Simply put, that an employer's unilateral action concerning operations that are related to its mission may be a very good idea does not defeat its bargaining obligations under CSL Article 14. *See Matter of New York City Transit Auth. v New York State Pub Empl Relations Bd*, 19 NY3d 876 (2012) (over dissent, the Court of Appeals held that restrictions on off duty employment were mandatorily negotiable despite employers' belief that such off-duty employment necessarily adversely affects the employer's mission related objective of ensuring the safe operation of subways).

Finally, on a fact-based and detailed analysis of the record in the prior decision, the Board rejected DOCCS's claim that NYSCOPBA acquiesced to the new restrictions during discussions leading to their implementation. The Board held the record did not reveal such a waiver of NYSCOPBA'S right to negotiate concerning the change.

THERE IS REASONABLE CAUSE TO BELIEVE AN IMPROPER PRACTICE HAS OCCURRED

On March 31, 2017, PERB received an application for injunctive relief from the New York State Correctional Officers and Police Benevolent Association, Inc. (NYSCOPBA) pursuant to CSL § 209-a.4 and § 204.15 of PERB's Rules of Procedure (4 NYCRR § 204.15) in association with an improper practice charge that is now pending before the Board. The application, designated case no. A-401, is supported by the affidavit of Erin N. Parker, the charging party's attorney, with exhibits, and further supported by the affidavits of David L. Luther, with exhibits, and Frances Jenkins, each of whom are New York State correction officers employed by the New York State Department of Corrections and Community Supervision (DOCCS), as well as a memorandum of law.

The application seeks to prevent DOCCS from unilaterally implementing new restrictions on the number, size and style of parcels that corrections officers may use to carry their personal belongings into non-secured areas of the correctional facilities (such as employee locker rooms) – conduct that is

substantially similar to that which PERB found to have violated CSL § 209-a.1 (d) in *State of New York (Department of Correctional Services) (New York State Correctional Officers and Police Benevolent Association, Inc.)*, 38 PERB ¶ 3008 (2005), *supra*. Indeed, the only real difference between the restrictions that PERB found to be mandatorily negotiable in the prior case and the restrictions at issue here is that in the prior case the restrictions applied to correctional officers' ability to bring parcels to their workstations within secured areas of the facilities where, here, the new restrictions apply to correctional officers' ability to bring packages and parcels into non-secure areas of the facilities, including employee locker rooms.

As in *State of New York (Department of Correctional Services) (New York State Correctional Officers and Police Benevolent Association, Inc.)*, *id.*, the underlying improper practice charge, designated U-35624, alleges that the new restrictions terminate a long-standing practice of permitting employees to carry their personal belongings into DOCCS's correctional facilities without restriction on the number, size or style of the containers. As before, NYSCOPBA alleges in the instant improper practice charge that DOCCS's conduct constitutes an improper practice under CSL § 209-a.1 (d).

DOCCS filed a verified response to the application for injunctive relief, sworn to by Clay J. Lodovice, Esq., of counsel to Michael N. Volforte, General Counsel for the New York State Governor's Office of Employee Relations,

supported by the affidavits of Joseph Bellnier, the Deputy Commissioner for Correctional Facilities for DOCCS, with exhibits, and Daniel F. Martuscello III, the Deputy Commissioner for Administrative Services for DOCCS, with exhibits, as well as a memorandum of law. None addresses *State of New York (Department of Correctional Services) (New York State Correctional Officers and Police Benevolent Association, Inc.), supra.*

The response and supporting affidavits describe the reasons for the new restrictions, including recommendations of the Inspector General and other consultants, and the legal and factual basis for DOCCS's claim that it has no duty to negotiate concerning the new restrictions. The defenses are, in material respects, substantially the same as those that PERB rejected in the prior case.

First, as in *State of New York (Department of Correctional Services) (New York State Correctional Officers and Police Benevolent Association, Inc.), id.*, DOCCS contends that the new restrictions on the number, size and style of parcels that correctional officers must use to carry their belongings into the correctional facilities serve its mission-related objective of ensuring the security of the correctional facilities by preventing the introduction of contraband. As before, DOCCS argues that the necessity of the new restrictions is revealed by a recent breach in its security measures. However, neither NYSCOPBA nor DOCCS alleges that the packages and parcels are not subject to a meticulous search. Thus, as before, the new restrictions simply make meticulous searches easier to

accomplish. And, as before, such operational efficiencies do not remove the subject from the duty to negotiate under the strong and sweeping policies favoring collective bargaining concerning terms and conditions of employment. *See, e.g., Board of Educ of City Sch Dist of City of New York v New York State Pub Empl Relations Bd*, 75 NY2d 660 (1990) (public interest in ferreting out official corruption pursuant to statutory authority did not overcome duty to negotiate concerning the means of accomplishing those mission-related goals).

Second, as before, DOCCS contends that NYSCOPBA acquiesced to the new restrictions during discussions leading to the imposition of the new restrictions. While that defense was rejected by the Board in the prior decision, as before, DOCCS's defense requires a detailed analysis of a full record after a hearing. That defense does not defeat the need for injunctive relief at this preliminary stage of the proceeding.

Finally, DOCCS argues that Corrections Law § 112 removes the new restrictions from the scope of mandatory collective bargaining. It relies on § 112 (1) of that law, which states, in relevant part, that the Commissioner of Corrections

> shall make such rules and regulations **not in conflict with the statutes of this state,** for the government of the officers and other employees of the department assigned to said facilities, and in regard to the duties to be performed by them, and for the government and discipline of each correctional facility, as he or she may deem proper.... [Emphasis added.]

Under that statutory scheme, the Commissioner of Corrections does not have

authority to unilaterally alter terms and conditions of employment in violation of CSL Article 14. The decisions on which DOCCS relies are misplaced. In each the statutory scheme expressly addressed the specific terms and conditions of employment under consideration. Correction Law § 112 (1) does not expressly address the number, size and style of packages that corrections officers may use to carry their personal belongings into their locker rooms. To the extent the statute authorizes DOCCS to search the parcels for contraband, that right is not at issue here.

In any event, each of the foregoing defenses are properly addressed to PERB in the context of the underlying improper practice proceeding in accordance with PERB's primary jurisdiction to determine their merits.

By reason of the foregoing, and after deliberation on all of the pleadings and papers filed herein, there is, at minimum, reasonable cause to believe that DOCCS's imposition of the new restrictions violates CSL § 209-a.1 (d). *See State of New York (Department of Correctional Services) (New York State Correctional Officers and Police Benevolent Association, Inc.)*, 38 PERB ¶ 3008 (2005).

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.

In assessing the necessary degree of harm warranting injunctive relief under

CSL § 209-a.4, the harm must be considered in the context of PERB's remedial authority under CSL § 205.5 (d), which grants PERB the authority to issue remedial orders that "will effectuate the policies of this article (but not to assess exemplary damages)." In fashioning such orders, PERB endeavors to restore the *status quo ante*. While the private losses suffered by the charging parties in such proceedings are important considerations in determining the *status quo ante*, the remedies are always, ultimately, designed to effectuate the policies of CSL Article 14.

Because there are no compensable losses at issue here, no order of the Board can restore the *status quo ante* with respect to the mandatorily negotiable interests that DOCCS has compromised under the new restrictions. At best, PERB can direct DOCCS to prospectively cease and desist from implementing the new restrictions and to restore the prior practice. Meanwhile, DOCCS will enjoy, with impunity, the fruits of conduct that PERB has reasonable cause to believe constitutes an improper practice. In that regard, PERB accepts NYSCOPBA's representation concerning the effects that the new restrictions have on the employees' mandatorily negotiable interests, including comfort, convenience, privacy, and safety.

While PERB will not always seek injunctive relief where the remedial orders are limited to prospective relief, here, PERB has reasonable cause to believe that DOCCS's conduct is in disregard of the Board's prior decision and order in *State*

of New York (Department of Correctional Services) (New York State Correctional Officers and Police Benevolent Association, Inc.), 38 PERB ¶ 3008 (2005). Indeed, DOCCS does not distinguish that decision from the instant matter.

Therefore, an injunction requiring DOCCS to return to or maintain the status quo is necessary for PERB to issue a remedial order that will effectuate the policies of CSL Article 14 and to provide meaningful relief under its remedial authority pursuant to CSL § 205.5 (d).

NOW, THEREFORE, NOTICE IS HEREBY GIVEN that PERB has determined the charging party has made a sufficient showing pursuant to CSL § 209-a.4 that "there is a reasonable cause to believe" that DOCCS's implementation of the new policy restricting the number, size, and style of parcels that correctional officers are permitted to carry their personal belongings into DOCCS's correctional facilities constitutes an improper practice, 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.

Pursuant to CSL § 209-a.4 (b), NYSCOPBA is hereby authorized to petition in Supreme Court for injunctive relief requiring DOCCS to maintain the status quo regarding the number, size and style of parcels that employees may use to carry their personal belongings in to DOCCS's correctional facilities, and to refrain from

imposing new restrictions on those matters. Said injunction will further direct the assigned Administrative Law Judge to issue a decision on the merits of the underlying improper practice charge within sixty days of issuance of this injunctive relief, unless the parties mutually agree to extend that time.

Pursuant to CSL § 209-a.4 (b), PERB must be named a necessary party in this proceeding.

Dated: Albany, New York
April 10, 2017

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BY CERTIFIED MAIL AND EMAIL

Case No. A-401
(ES)

STATE OF NEW YORK

COUNTY OF ALBANY

DOUGLAS LODGE, being duly sworn, deposes and says that deponent is over the age of 18 years and an employee of the New York State Public Employment Relations Board.

That on APRIL 10, 2017, deponent served the within Notice of Sufficient Showing Pursuant to CSL § 209-A (4) (b) and Authorization for Charging Party to Proceed by certified mail upon:

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at the address(es) designated by depositing a true copy thereof enclosed in a postpaid properly addressed wrapper in an official depository under the exclusive care and custody of the United States Post Office Department within the State of New York.

Douglas Lodge

Sworn to before me this
10th day of April, 2017

Sheila L. Kennedy

SHEILA L. KENNEDY
Notary Public, State of New York
No. 01KE6231328
Qualified in Saratoga County
Commission Expires 11/22/20

50 PERB ¶7004, 50 Off. Dec. of N. Y. Pub. Employee Rel. Bd. ¶7004, 2017 WL 4676290

New York Supreme Court

In the Matter of the Application of MICHAEL POWERS, as President of the New York State Correctional Officers and Police Benevolent Association, Inc., Petitioner,For a Preliminary Injunction Pursuant to Civil Service Law § 209-a(4), against Anthony Annucci, as Acting Commissioner of the New York State Department of Corrections and Community Supervision; the New York State Department of Corrections and Community Supervision; John Wirenus as Chairperson of the New York State Public Employment Relations Board; the New York State Public Employment Relations Board; Michael N. Volforte, Esq., as Acting General Counsel of the New York State Governor's Office of Employee Relations; and the New York State Governor's Office of Employee Relations, Respondents.

Index No. 2550-17

HARTMAN

June 28, 2017

Related Index Numbers

74.37 Types of Orders, Interim Relief
74.373 Types of Orders, Interim Relief, Likelihood of Success
74.374 Types of Orders, Interim Relief, Irreparable Nature of Harm

Appearances:

Erin N. Parker, of Counsel, Attorneys for Petitioner, 54 State Street, Suite 1001, Albany, New York 12207, Lippes Mathias Wexler & Friedman
Eric T. Schneiderman, Attorney General of the State of New York
Lynn Knapp Blake, of Counsel, Attorney for Respondents Anthony Annucci, New York State Department of Corrections and Community Supervision, Michael N. Volforte, Esq., and New York State Governor's Office of Employee Relations, The Capitol, Albany, New York 12224-0341
David P. Quinn, New York State Public Employment Relations Board General Counsel, Attorney for Necessary Party New York State Public Employment, Relations Board, PO Box 2074, Empire State Plaza, Agency Building 2, 20th Floor, Albany, New York 12220-0074

Judge / Administrative Officer

HARTMAN

Case Summary

A trial court denied the benevolent association's application for injunctive relief with respect to a newly enacted directive by the state department of corrections. The directive formalized the department's one-clear-bag policy, which required all employees entering correctional facilities to carry their personal belongings—food, clothing and toiletries—in one department-issued clear, 11-inch by 7-inch by 10-inch plastic container. The association alleged immediate irreparable harm because the directive created employee hardships stemming from restrictions on the amount of items that could be brought into the facility as well as the loss of privacy. In contrast, the employer argued that under Correction Law Section 112, which addresses the rule-making authority of the DOC Commissioner, security-related rules are not mandatory subjects of bargaining. The PERB found that the employer's interest in security did not outweigh matters related to employees' comfort and convenience, mandatory subjects of negotiation, and authorized the association to petition the trial court for a preliminary injunction to maintain the status quo. At the outset the trial court deferred to PERB's determination that there was reasonable cause to believe the one-clear-bag policy was a mandatory subject of negotiation. The trial court explained that the non-negotiated rules about the size and transparency of the containers employees were permitted to bring into the facility were aimed at making it easier for the employer to conduct searches, and thus a step removed from the Commissioner's core decision-making authority. Although the trial court determined negotiation over the one-clear-bag policy was not prohibited as a matter of law, and deferred to the Board's determination that the imposition of the policy was an improper practice, the trial court concluded the association failed to establish that an injunction was necessary for the association to receive meaningful relief. Here, a preliminary injunction would do little to remedy any non-compensable injuries that already occurred and would not be more beneficial than a speedy administrative determination on the improper practice issue, the trial court reasoned.

Full Text

County of Albany

Decision and Order

Hartman, J.

Michael Powers, President of the New York State Correctional Officers and Police Benevolent Association, Inc. petitions pursuant to Civil Service Law § 209-a for a preliminary injunction enjoining respondents Anthony Annucci, Acting Commissioner of the Department of Corrections and Community Supervision (DOCCS), and DOCCS from unilaterally enforcing a policy that limits the containers that employees may bring into correctional facilities to one clear plastic bag of specified size. Respondents

oppose preliminary injunctive relief. Public Employee Relations Board (PERB)[1] supports petitioner's request.

The Court does not conclude that, as a matter of law, the one-clear bag policy is a prohibited subject of collective bargaining. The Court therefore defers to PERB's finding that reasonable cause exists to believe that an improper practice occurred. However, the Court concludes that petitioner has failed to demonstrate irreparable harm that would render a final determination on the merits ineffectual, where the policy has now been in effect for the past two months and where DOCCS has taken steps to ameliorate some of the policy's harsher impacts on DOCCS employees. Accordingly, the petition for a Civil Service Law § 209-a preliminary injunction is denied.

Background

On March 13, 2017, DOCCS issued a memorandum advising employees that, effective April 17, 2017, all employees entering correctional facilities would be required to carry their personal items such as food, clothing, toiletries and the like in one clear, 11-inch by 7-inch by 10-inch plastic container issued by DOCCS, in addition to what they could carry on their person. Before the March 13, 2017 memorandum, DOCCS had imposed no restrictions regarding the type or number of containers an employee could carry into a facility. On April 4, 2017, DOCCS issued Directive 4900 to formalize the one-clear-bag policy. That Directive also set forth the requirement that all employees and their belongings are subject to search before entering DOCCS facilities. Directive 4936, issued the same day, laid out procedures and rules for employee searches and listed the items that employees could bring into the facilities. The measures included in these Directives are among a broad range of security measures instituted by DOCCS, in consultation with NYSCOPBA, to enhance security in the wake of the infamous 2015 escape of two inmates from Clinton Correctional Facility.[2]

Petitioner filed an improper practice charge with PERB alleging that employee comfort and convenience are mandatory subjects of negotiation and that DOCCS thus violated the Civil Service Law by enacting the policy outlined in the March 13, 2017 memorandum. Petitioner also submitted to PERB an application for injunctive relief. Petitioner alleged immediate irreparable injury in the form of employee hardship stemming from restrictions on the amount of items, such as food and work clothing, they can bring into a facility, and from the loss of privacy inherent in a requirement that all items be carried in a clear bag or on the employee's person.

On April 10, 2017, PERB issued a Notice of Sufficient Showing Pursuant to CSL § 209-a (4) (B) and Authorization for a Charging Party to Proceed. PERB recounted that, in a previous determination, it had held that

"DOCCS violated [Civil Service Law] § 209-a.1 (d) by unilaterally imposing new restrictions on the number, size and style of parcels that correctional officers were permitted to bring to their workstations within DOCCS's correctional facilities. PERB relied on the well-settled rule that matters affecting employees' comfort and convenience on the job are [a] mandatorily negotiable term and condition of employment"

(PERB Determ. [4/10/17], at 3). PERB noted that in the earlier matter, DOCCS had argued that security concerns necessitated the restrictions. PERB ruled that DOCCS's interest in security did not outweigh employees' negotiable interests in matters related to their convenience and comfort. PERB found that restrictions in that matter were "substantially similar" to the restrictions here (id. at 6). Regarding irreparable injury, PERB reasoned that, absent an injunction, "at best, PERB can direct DOCCS to prospectively cease and desist from implementing the new restrictions. Meanwhile, DOCCS will enjoy, with impunity, the fruits of conduct that PERB has reasonable cause to believe constitutes an improper practice" (id. at 10). PERB accepted petitioner's arguments that the new policy affects "employees' mandatorily negotiable interests, including comfort, convenience, privacy, and safety" (id.) .Thus, PERB authorized petitioner to petition Supreme Court for a preliminary injunction to maintain the status quo (id.) .

Petitioner commenced this proceeding by order to show cause on April 13, 2017, with a return date of May 4, 2017. The Court held oral argument on June 19, 2017.

Legal Framework

Under the Taylor Law, public employers must negotiate with unions "terms and conditions of employment" (Civil Service Law § 204 [1]). "[T]he obligation to bargain as to all terms and conditions of employment is a broad and unqualified one," to be limited only "where some other applicable statutory provision explicitly and definitively prohibits the public employer from making an agreement as to a particular term or condition of employment" (Bd. of Educ. v Assoc. Teachers of Huntington, Inc., 30 NY2d 122, 129 [1972]). "Prohibited subjects are those forbidden, by statute or otherwise, from being embodied in a collective bargaining agreement. Mandatory subjects are those over which employer and employees have an obligation to bargain in good faith to the point of impasse. Permissive subjects are those as to which either side may, but is not obligated to bargain" (Bd. of Educ. of City Sch. Dist. v N. Y. State Pub. Empl. Relations Bd., 75 NY2d 660, 666 [1990] [internal quotation marks omitted]).

Negotiation of a subject matter may be prohibited by statute, decisional law, or strong public policy (see Matter of Patrolmen ' s Benevolent Assn. of City of N.Y., Inc. v N.Y. State Pub. Empl. Relations Bd., 6 NY3d 563, 572 [2006]; Bd. of Educ. of City Sch. Dist., 75 NY2d at 667; Matter of Lawrence Teachers ' Assn. v N.Y. State Pub. Empl. Relations Bd., ___ AD3d ___, 2017 NY Slip Op 04944 [3d Dept 2017]). When a statute does not on its face prohibit bargaining of a subject, "any implied intention that there not be mandatory negotiation must be plain and clear or inescapably implicit in the statute" (Matter of Bd. of Educ. of the Catskill Cent. Sch. Dist. (Catskill Teachers Assn.), 130 AD3d 1287, 1288 [3d Dept 2015], lv denied 26 NY3d 912 [2015]). "[B]asic policy decisions as to the implementation of a mission of an agency of government are not mandatory subjects of negotiations" (W. Irondequoit Teachers Assn. v Helsby, 35 NY2d 46, 51 [1974]).

PERB is accorded deference in matters falling within its area of expertise (see Matter of Rosen v New York State Pub. Employment Relations Bd., 72 NY2d 42, 47). "In cases involving the issue of mandatory or prohibited bargaining subjects under the Civil Service Law," the scope of the court's review is sharply circumscribed: "so long as PERB's interpretation is legally permissible and so long as there is no breach of constitutional rights and protections, the courts have no power to substitute another interpretation" (Bd. of Educ. of City Sch. Dist., 75 NY2d at 666 [internal quotation marks omitted]; see Chenango Forks Cent. Sch. Dist. v N.Y. State Pub. Empl. Rels. Bd., 21 NY3d 255, 265 [2013]). But whether a statute prohibits a public employer from bargaining with respect to a subject is a matter of pure statutory construction not entitled to deference (Matter of Lawrence Teachers ' Assn., 2017 NY Slip Op 04944).

Failure to bargain with respect to a mandatory subject of bargaining constitutes an improper employer practice (see Civil Service Law § 209-a [1]; Matter of Lawrence Teachers ' Assoc ., 2017 NY Slip Op 04944). When a union believes that an agency action constitutes an improper practice, it may submit an improper practice charge to PERB, which is tasked with determining whether a practice is improper and to take necessary corrective action (see Civil Service Law § 205 [5] [d]). A union petitioning PERB regarding an alleged improper practice may also petition PERB for injunctive relief pending the resolution of the matter by an administrative law judge. The petitioner must show "that: (i) there is reasonable cause to believe an improper practice has occurred, and (ii) . . . 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" (Civil Service Law § 209-a [4] [a]).

If PERB determines that a preliminary injunction is warranted, it may petition Supreme Court, Albany County for a preliminary injunction or it may authorize the charging party

to seek such relief (Civil Service Law § 209-a [4] [b]). The standard set for Supreme Court to grant injunctive relief is identical to the standard set for PERB's preliminary determination: "reasonable cause to believe an improper practice has occurred and that it appeal's 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 (Civil Service Law § 209-a [4] [d]). If Supreme Court grants injunctive relief, the administrative law judge must issue a determination on the merits within 60 days of imposition of the injunction (Civil Service Law § 209-a [4] [d]).

Arguments of the Parties

Petitioner and PERB argue that the one-clear-bag requirement affects employees' comfort and convenience—which PERB precedent establishes as a mandatory subject of bargaining —and that the Court should therefore defer to PERB's determination that reasonable cause exists to believe that an improper practice has occurred (see e.g. Matter of Civil Service Employees Assoc., 46 PERB ¶3029 [2013] [ability to listen to music at work mandatory subject of negotiation]; Matter of N.Y. State Nurses Assoc. v County of Erie, 30 PERB ¶4542 [1997] [cessation of hot meal availability from 2:00 to 4:00 a.m. mandatory subject of negotiation]). Both petitioner and PERB further argue that irreparable injury will occur absent a preliminary injunction because, while the PERB case is pending, employees will be subjected to privacy, safety, and security diminutions not compensable by damages or other remedial measures.

Both petitioner and PERB rely heavily on a 2005 PERB determination involving restrictions on the amount and size of containers a correction officer could bring to a workstation imposed unilaterally by DOCCS. Those restrictions were imposed in 2005 as a security measure motivated by the terrorist attacks of September 11, 2001. PERB found that "restrictions on the size and number of food containers that may be carried to workstations are mandatorily negotiable" (38 PERB ¶ 3008). It further found that the adverse impact on employee comfort and convenience outweighed DOCCS's interest in security because DOCCS's ability to search all containers was uncontested; DOCCS did not need to limit the number of containers in order to ensure facility security.

Respondents argue that petitioners have not established reasonable cause to believe that an improper practice occurred. In the main, respondents rely on Correction Law § 112, which grants the Commissioner the power to make "rules and regulations, not in conflict with the statutes of this state," relating to "government, discipline, policing, contracts and fiscal concerns" of correctional facilities. According to respondents, Correction Law § 112 is analogous to Executive Law § 215 (3), which the Court of Appeals held gave the Superintendent of State Police unilateral authority to make "rules and regulations subject

to approval by the governor for the discipline and control of the New York state police." Respondents also argue that, even if Correction Law § 112 does not prohibit bargaining regarding the one-clear-bag requirement, "the mission of DOCCS to ensure safe and secure correctional facilities and prevent the introduction of contraband into said facilities outweighs the interests of the employees to choose the method by which they bring allowable items into a correctional facility." Respondents argue that the 2015 PERB determination is not controlling because it did not involve a request for a preliminary injunction, because the policy at issue there was not implemented after consultation with employee representatives, and because DOCCS did not raise Correction Law § 112 as a basis for claiming that security-related rules are not mandatory subjects of collective bargaining.

Analysis

The Court acknowledges that the Commissioner of DOCCS has broad authority over instituting measures to enhance the security of correctional facilities. If this case were about the Commissioner's ability to make decisions that go to the core of DOCCS's compelling security concerns, by for example, identifying which items may be brought into the facility and which items are contraband, or whether all incoming containers and persons must be searched, the Court would likely conclude that such decisions are prohibited subjects of collective bargaining. Indeed, counsel for both petitioners and PERB expressly disavow, at least in this proceeding, any challenge to the provisions of the Directives that require searches and define contraband.

But the claimed improper practice here involves non-negotiated rules about the size and transparency of the container that employees may bring into DOCCS' facilities—rules that are aimed at making it easier for DOCCS to conduct the required searches and interdict the defined contraband. Such rules are a step removed from the Commissioner's core decision-making authority embodied in Correction Law § 112. Neither that statute nor public policy definitively prohibits negotiation of the one-clear-bag policy. Because the question before the Court is not a pure question of law, based on the evidence and arguments before it at this early stage of the dispute, the Court defers to PERB's determination that there is reasonable cause to believe that the one-clear-bag policy is a mandatory subject of negotiation. Because petitioner has not demonstrated that irreparable injury will render an ultimate judgment on the merits ineffectual, however, the motion for a preliminary injunction is denied.

Reasonable Cause to Believe an Improper Practice Has Occurred

In the context of whether there is reasonable cause to believe that an improper practice has occurred, the Court first examines whether the one-clear-bag policy is a prohibited subject

of negotiation. Because statutory or public policy prohibition of negotiation is an area of statutory interpretation and the "relative weight to be given to competing policies," PERB's preliminary determination that it is not a prohibited subject of negotiation is not entitled to any deference (see Matter of Patrolmen ' s Benevolent Assn. of City of N.Y., Inc., 6 NY3d at 575).

Correction Law § 112 does not expressly prohibit negotiation of the types and numbers of containers a correction officer may bring into a facility. It is a general grant of power and does not "signal[] the intent of the Legislature to override any statutory conflicts . . . ." (Matter of Lawrence Teachers 'Assoc ., 2017 NY Slip Op 04944). Indeed, as petitioner and PERB argue, the statute contains an express limitation on the Commissioner's power. The Commissioner

"shall make such rules and regulations, not in conflict with the statutes of this state, for the government of the officers and other employees of the department assigned to [correctional] facilities, and in regard to the duties to be performed by them, and for the government and discipline of each correctional facility, as he or she may deem proper"

(Correction Law § 112 [1] [emphasis added]). As such, the Court does not read Correction Law § 112 to expressly prohibit negotiation of the one-clear-bag policy.

Even when a statute does not expressly prohibit negotiation, it may represent a statement of legislative intent or public policy (see Matter of Patrolmen ' s Benevolent Assn. of City of N.Y., Inc., 6 NY3d at 572-573). Here, the expressed intent of the Legislature is to give the Commissioner expansive powers relative to "all matters" relating to "government" and "policing" of correctional facilities. This broad grant of power is congruent with the strong public policy in favor of maintaining the safety and security of prisons (see e.g. Seelig v Koehler, 76 NY2d 87, 95 [1990] ["jail officials must be allowed to use proportionate and constitutional means to prevent, or at least to lessen, the volatile infiltration of drugs into the jails in and on the bodies of the guards themselves"]; King v McMickens, 120 AD2d 351, 353 [1st Dept 1986] [correction officer's "reasonable expectation of privacy as a private citizen must yield to compelling governmental interests when he becomes an officer"], affd 69 NY2d 840 [1987]). Gate security and the interdiction of contraband are part of the core, primary mission of the Commissioner. Thus, if the one-clear-bag policy were "inherently and fundamentally [a] policy decision[] relating" to gate security and the interdiction of contraband, such as a ban on cell phones or knives in the facilities, it would likely be a prohibited subject of negotiation (Lippman, 296 AD2d at 208).

Petitioner argues, and PERB tends to agree, that the one-clear-bag policy is an issue of DOCCS's convenience that does not go to core security and safety concerns. Petitioner does not challenge the authority of the Commissioner to set policy and rules related to contraband

and searches, and has stated: "NYSCOPBA does not object to its members being subjected to a thorough search of their persons and possessions when entering the facilities where they work." Counsel for petitioner similarly stated at oral argument that petitioner does not challenge the Commissioner's authority to define what items that employees may not bring into correctional facilities, such as cell phones, knives with blades longer than 2 inches, more than one pack of cigarettes, more than one day's worth of food, etc. (see Directive No. 4936, Attachment A).

The Court holds that, in the context of this proceeding, respondents have not established that statute or public policy prohibits the negotiation of a policy addressing the size and characteristics of the containers in which employees may transport their belongings into the worksite. The obligation to negotiate terms and conditions of employment under the Taylor Law is broad and may only be abrogated by a clear, unmistakable legislative or policy prohibition of negotiation (see Associated Teachers of Huntington, Inc., 30 NY2d at 129; Matter of Bd. of Educ. of the Catskill Cent. Sch. Dist., 130 AD3d at 1288). This attenuation from the direct regulation of gate searches and particular items that may be brought into correctional facilities prevents the Court from concluding, as a matter of law, that this type of policy is so fundamental to DOCCS's mission that it cannot be negotiated (see Auburn Police Local 195, Council 82, AFSCME v Helsby, 62 AD2d 12, 16-17 [3d Dept 1978], affd 46 NY2d 1034 [1979] [public policy does not prohibit negotiation of police discipline]).

Having determined that negotiation of the one-clear-bag policy is not prohibited as a matter of law, the Court must consider whether there is reasonable cause to believe that DOCCS's implementation of the one-clear-bag policy constitutes an improper practice. This question represents an application of the Taylor Law to the facts of this case, a question that falls squarely within PERB's expertise (Civ. Serv. Empl. Assn., Local 1000, AFSCME, AFL-CIO v State Pub. Empl. Relations Bd., 248 AD2d 882, 884 [3d Dept 1998]). Where a policy both advances the mission of DOCCS and adversely impacts the comfort and convenience of employees, PERB applies a balancing test that "weigh[s] the need for the particular action taken by the employer against the extent to which that action impacts on the employees' working conditions" (Lippman, 296 AD2d at 209). PERB performed just such a balancing in its earlier determination when it ruled that a policy imposing "restrictions on the size and number of food containers that may be carried to workstations" within a correctional facility "adversely impact[ed] the comfort, convenience, and expenses of officers . . . more than it advance[d] DOCS' mission of ensuring safety" (38 PERB ¶ 3008). PERB contends that it is likely to reach the same conclusion after balancing the parties' interests here. Having found no statutory or public policy that precludes such balancing as a matter of law, the Court defers to PERB's determination here that it has reasonable cause to believe that the one-clear-bag policy represents a mandatory subject of negotiation and thus that its imposition was an improper practice.

Irreparable Harm

Petitioner argues that irreparable harm will occur to officers' privacy, safety, health, and comfort interests in the absence of a preliminary injunction that enjoins implementation of the one-clear-bag policy pending resolution of the proceedings before PERB. Petitioner maintains that such injuries are by their nature irreparable because the officers cannot be made whole after the injury occurs. PERB additionally argues that a preliminary injunction is necessary for PERB to effectuate the policies of Civil Service Law Article 14, given DOCCS's "disregard of the Board's prior decision and order" (PERB Determination [April 10, 2017], at 10). Respondents argue that the one-clear-bag policy has now been in effect for two months and that DOCCS has made efforts to ameliorate some of the most undue hardships.

The Court acknowledges that petitioner has made credible allegations of injury to correction officers' privacy interests, particularly of the officers who take public transportation whose belongings will be open to the view of other commuters—including lunch contents, toiletries, medicines and medical devices, and their uniforms (which many do not wear on public transportation for safety reasons). Respondents argue, however, that officers may envelop the DOCCS-issued clear plastic bag in an opaque plastic or cloth bag, which then may be discarded or stored in 3.5-inch by 5.5-inch cell-phone lockers outside the secure area of the facility for re-use. DOCCS asserts that cell phone lockers have been installed at 28 of DOCCS's 54 facilities. At Sing Sing Correctional Facility, where many officers commute by public transportation, DOCCS is allowing employees to place the DOCCS-issued clear bag in an opaque one and to present the opaque bag for inspection at the gate until lockers can be installed there. DOCCS, while conceding that correction officers are discouraged from wearing their uniforms while off duty, argues that they may bring in their uniforms separately, presumably in a discardable or reusable opaque bag, and hand-carry their uniforms through the security checkpoint. To be sure, these options are far less convenient than using backpacks, duffle bags, or shoulder bags to carry such items on public transportation, but they are viable options nonetheless.

Petitioner also argues that the employees' privacy interests are implicated because inmates will be able to view the contents of the clear bag as they walk through the facility. The ability of inmates to view the correction officers' personal items exposes them to the risk that inmates may discover medical conditions or other sensitive information which they could use to target or compromise the officers' ability to do their jobs. Respondents contend that employees may place sensitive items in a small container that is opaque on one side within the clear plastic bag and position it in a way that its contents cannot readily be seen. Regarding employee medical conditions, Respondents point out employees can apply to the Superintendent for approval to deviate from the policy when warranted. Notwithstanding the affidavits submitted by

petitioner, the record before the Court does not present a full picture of the extent to which, across DOCCS's facilities, inmates may have access to areas where officers must carry the clear bags to their locker rooms or workstations once they are inside the facility.

Finally, petitioner argues that the size of the DOCCS-issued clear bag is problematic. DOCCS employees at times must bring enough food for a 16-hour shift, in addition to their clothing and personal items. Furthermore, because the clear plastic bag is not insulated, petitioner expresses concern about spoilage of lunch foods. In response to the concern about spoilage, DOCCS has allowed employees to bring in one cold pack with their lunch in the clear plastic bag. And many facilities have cafeterias, food trucks, or vending machines, reducing the need to bring in food items. Notwithstanding that such options may be available at some facilities, the Court agrees that the size of the clear bag—a mere 11-inches by 7-inches by 10-inches—can be problematic. Counsel for DOCCS produced a DOCCS-issued bag during oral argument. The DOCCS-issued bag appears to the Court to significantly restrict the amount of food, in addition to other necessary items, that an employee can bring to a facility for his or her shift or double-shift.

PERB determined that these facts support a finding of irreparable harm. Giving due deference to PERB's expertise in applying Taylor Law tests to the facts of this case, the Court agrees that petitioner has demonstrated some degree of irreparable harm. Petitioner has not, however, presented sufficient facts to demonstrate the scope of that harm. Indeed, given the limited record before the Court, as well as the exceptions and accommodations DOCCS has made during the two months that the policy has been implemented, it is difficult for the Court to assess the true extent of the harm.

More importantly, however, the Taylor Law requires that to obtain a preliminary injunction, petitioner must demonstrate that the injury is irreparable in the sense that "a resulting judgment on the merits" would be "ineffectual" without a preliminary injunction that would restore the "status quo" (Civil Service Law § 209-a [4] [d]). Neither petitioner nor PERB offers a valid reason why a timely determination by the administrative law judge would not provide a meaningful remedy and therefore be "ineffectual." Because the one-clear-bag policy has already gone into effect, to the extent that any non-compensable injuries have occurred, they have already occurred. A preliminary injunction will do little more to remedy the officers' non-compensable injuries than would a speedy administrative determination. PERB's counsel emphasized at oral argument that, if an injunction were issued, the administrative law judge is bound by the Taylor Law to issue a determination within 60 days of its imposition (Civil Service Law § 209-a [4] [d]). But PERB has offered no reason why a determination could not be issued as quickly in the absence of a preliminary injunction. Assuming the determination requires that the issue be negotiated, DOCCS can be forced at that time to abide by the determination pending any further proceedings to appeal

that determination or negotiate the issue. Such a determination would provide a meaningful and effectual remedy.

In conclusion, the Court holds that reasonable cause exists to believe that an improper practice occurred. It further holds that petitioner has established some measure of harm, but that petitioner has not established that an injunction is necessary for petitioner to receive meaningful relief in the context of the PERB administrative proceeding.

Accordingly, it is

ORDERED that the petition for a preliminary injunction pursuant to Civil Service Law § 209-a is denied.

This constitutes the decision and order of the Court. The original decision and order is being transmitted to respondents' counsel. All other papers are being transmitted to the County Clerk for filing. The signing of this decision and order does not constitute entry or filing under CPLR 2220 and counsel is not relieved from the applicable provisions of that rule respecting filing and service.

Papers Considered

1. Order to Show Cause

2. Verified Petition, with Affidavit of Michael Powers and Exhibits A-D

3. Brief on Behalf of Petitioner

4. Affidavit of Jennifer Hermann-Myers Dated May 1, 2017, with Exhibits A-B

5. Affidavit of Robert Stevens Dated May 1, 2017

6. Affidavit of Michael Powers Dated May 2, 2017

7. Response to Application for Injunctive Relief

8. Respondents' Memorandum in Opposition to Charging Party's Application for Injunctive Relief

9. PERB Appendix 1, with Exhibits 1-9

10. PERB Appendix 2, with Exhibits 1-15,

11. PERB Notice of Sufficient Showing Pursuant to CSL § 209-A (4) (b)

12. Memorandum of Law on Behalf of PERB

13. Application for Injunctive Relief, with 4 Attachments

14. Affidavit of Joseph F. Bellnier, with Exhibits 1-9

15. Affidavit of Daniel F. Martuscello III, with Exhibits 1-16

16. Verified Answer

17. Respondents' Memorandum of Law in Opposition to Petition for Preliminary Injunction

Statutes Cited
209-a

Cases Cited
30 NY2d 122
75 NY2d 660
6 NY3d 563
50 PERB 7003
130 AD3d 1287
26 NY3d 912
35 NY2d 46
72 NY2d 42
21 NY3d 255
30 PERB 4542
38 PERB 3008
76 NY2d 87
120 AD2d 351
62 AD2d 12
46 NY2d 1034
248 AD2d 882

Footnotes

1 The parties agreed at oral argument that PERB had been incorrectly denominated in the petition as a respondent. PERB is not a respondent but a statutorily mandated necessary party (see Civil Service Law § 209-a [b]).

2 The report of the Inspector General on the 2015 Clinton Correctional Facility escape identified multiple gate search practice deficiencies that allowed correction officers and staff to introduce contraband into the facility.

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48 PERB ¶ 7004, 48 Off. Dec. of N. Y. Pub.
Employee Rel. Bd. ¶ 7004, 2015 WL 5678194

NY Supreme Court, Albany County

In the Matter of the Application of WAYNE SPENCE, as President of the New York State Public Employees Federation, AFL-CIO, Petitioner,For a Preliminary Injunction pursuant to Civil Service Law § 209-a (4), against MARGARET MILLER, as Director of the New York State Office of Information Technology Services, THE NEW YORK STATE OFFICE OF INFORMATION TECHNOLOGY SERVICES, MICHAEL N. VOLFORTE, as Acting General Counsel of the New York State Governor' s Office of Employee Relations, and THE NEW YORK STATE GOVERNOR' S OFFICE OF EMPLOYEE RELATIONS, Respondents, and SETH H. AGATA, as Chairperson of the New York State Public Employment Relations Board, and THE NEW YORK STATE PUBLIC EMPLOYMENT RELATIONS BOARD, Necessary Parties.

Index No. 3901-15
RJI No. 01-15-118096
August 13, 2015

Related Index Numbers

43.475 Job Content and Scheduling, Work Rules, Professional Standards
83.26 Injunctive Relief, Criteria for Relief
83.27 Injunctive Relief, Scope of Relief

Appearances:

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Denise Buckley, Assistant Attorney General, Attorney for Respondents, The Capitol, Albany, New York 12224
Stephen Kerwin, Assistant Attorney General, Attorney for Respondents, The Capitol, Albany, New York 12224
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Alicia McNally, Esq., Attorney for Necessary Parties, PO Box 2074, Empire State Plaza, Agency Building 2, 20th Floor, Albany, New York 12220-2678
PRESENT: HON. RICHARD E. SISE Acting Justice
(Supreme Court, Albany County, All Purpose Term)

Case Summary

The trial court enjoined the state employer from implementing fingerprinting and background checks for employees of the Office of Information Technology Services. The employer contended the fingerprinting and background checks were mission-related, and in the alternative fell within its statutory discretion. However, the trial court rejected those arguments, concluding there was reasonable cause to believe that immediate and irreparable injury would result unless implementation of the policy is enjoined during the pendency of a final negotiability determination by PERB. The court noted that even assuming the fingerprinting and background checks involved a policy decision related to the employer' s primary mission, record evidence showed the state employer operated for several years without fingerprinting all of its employees, thereby supporting reasonable cause to believe the employer' s failure to bargain the policy constituted a violation of the Act.

Full Text

Judgment

Sise, J.

In May 2015 the Professional Employees Federation (PEF), the collective bargaining representative for the Professional, Scientific and Technical Services (PST&T) Unit fo State employees, filed an improper practice charge against respondent Office of Information Technology Services (ITS). The charge, filed with the Public Employment Relations Board (PERB), challenged ITS implementation of fingerprinting and background checks of existing ITS employees as a violation of Civil Service Law § 209-a (1) (d). On July 17, 2015 PEF filed an application for injunctive relief with PERB pursuant to 4 NYCRR § 204.15. That same day PERB issued a notice of sufficient showing in which it agreed that an injunction was required to prevent irreparable harm and thereby authorized PEF to petition for an injunction enjoining ITS from implementing the fingerprinting and background checks put at issue by the improper practice charge. Thereafter, petitioner brought this proceeding for a preliminary injunction.

Under Civil Service Law § 209-a(4) (d) injunctive relief may be granted by the court " if it determines 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." Here, petitioners allege as an improper practice the agency' s failure to bargain in good faith over the fingerprinting and background issue. The Taylor Law (Civil Service Law Art. 14) requires public employers to negotiate " terms and conditions of employment." (Civil Service Law § 204 [2]). The phrase " terms and conditions of employment" means salaries, wages, hours and other terms and conditions of employment (Civil Service Law § 201 [4]). There exists a presumption that all terms and conditions of employment are subject to mandatory bargaining and that presumption cannot easily be overcome (Matter of New York City Tr. Auth. v. New York State Pub. Empl. Relations Bd, 19 NY3d 876, 879 [2012]). As the primary issue here does not involve the application of the Taylor Law to particular facts, the determination by PERB is not entitled to deference (Matter of Patrolmen ' s Benevolent Assn. of City of N.Y . , Inc. v New York State Pub. Empl. Relations Bd., 6 NY3d 563, 575 [2006]). Nonetheless, to overcome the presumption, respondents must show that there is no reasonable basis for concluding that the issue involves a mandatory subject of bargaining. Removing the issue from the realm of mandatory bargaining requires some showing that what is involved is cither a prohibited subject, or a permissive subject, of bargaining (Matter of Board of Educ. of City School Dist. v New York State Pub. Empl. Relations Bd., 75 NY2d 660 [1990]). A prohibited subject necessarily involves circumstances where a public policy consideration found in a statute, Constitution or a clear common-law principle forbids the employer from surrendering authority through negotiation (id 667-668). A permissive bargaining subject is addressed to issues that are not mandatorily negotiable because " they are inherently and fundamentally policy decisions relating to the primary mission of the public employer or because the Legislature has manifested an intention to commit these decisions to the discretion of the public employer." (id at 669, citation omitted).

Respondents argue that the fingerprinting and background check issue may fall into either category. First, respondents claim that there are statutes requiring employees with access to the computer servers maintained by ITS to have undergone background checks. While the claim is not disputed, respondents have not pointed to any public policy pronouncement, in statute or otherwise, requiring all ITS employees to be subjected to fingerprinting and background checks. The more viable concern raised by respondents involves the organizational structure of ITS. In October 2014, ITS began to move toward an enterprise model of operation in which all of its technicians would be available to work on all equipment. Given the sensitive nature of some information found on the equipment, the new model requires that all employees be fingerprinted and subjected to background checks. Thus, respondent contends, fingerprinting and background checks of all employees is mission-related and should be subjected to a balancing test in which the competing interest of the employer in managing its affairs is weighed against the bargaining unit members' right

to negotiate the terms and conditions of employment (see Buffalo Sewer Authority, 27 PERB 3002 [1994]).

Even assuming that the issue involves a policy decision related to the primary mission of ITS (Matter of Board of Educ. of City School Dist. v New York State Pub. Empl. Relations Bd. at 669), given the strong presumption in favor of collective bargaining and the fact that ITS operated for a number of years without fingerprinting all employees, there is at least reasonable cause to believe that respondents failure to bargain over the issue is a violation of Civil Service Law § 209-a(1)(d).

In addition, there is reasonable cause to believe that unless the practice is enjoined immediate and irreparable injury will result thereby rendering a judgment on the merits ineffectual. As petitioner correctly argues, unless the practice is enjoined pending a final determination by PERB, the employer will be able to obtain and use sensitive personal information regarding certain employees. In the event the issue is resolved in favor of the bargaining unit, the employer will then be in possession of information to which it is not entitled, but which it cannot ignore, to the detriment of the employee.

Accordingly, it is

ORDERED AND ADJUDGED, that respondents are enjoined from the implementation of fingerprinting and background checks of employees of the Office of Information Technology Services, excluding new employees, employees being promoted and those employees who consent, pending a decision by an administrative law judge finding no improper practice to have occurred or subsequent finding by the Public Employment Relations Board that no improper practice had occurred.

This constitutes the judgment of the Court. The original judgment is returned to the attorney for petitioner. A copy of the judgment and the supporting papers have been delivered to the County Clerk for placement in the file. The signing of this judgment, and delivery of a copy of the judgment shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the applicable provisions of that rule respecting filing, entry and notice of entry.

SO ORDERED AND ADJUDGED. ENTER.

Papers Considered:

1. Order to Show Cause dated July 31, 2015;

2. Verified Petition dated July 31, 2015 with Exhibits A-D annexed;

3. Affirmation of Alicia L. McNally dated August 5, 2015 with Exhibit A annexed;

4. Affidavit of Debra I. Greenberg dated August 6, 2015 with Exhibits 1-3 annexed;

5. Brief of Petitioner dated July 31, 2015;

6. Verified Answer dated August 5, 2015 with Exhibit A annexed;

7. Affidavit of Steven Spalten dated August 5, 2015;

8. Affidavit of David Green dated August 5, 2015;

9. Affidavit of Steven F. Cumoletti dated August 4, 2015;

10. Respondent' s Memorandum of Law dated August 5, 2015;

11. Reply by Public Employment Relations Board dated August 6, 2015;

12. Reply Brief of Petitioner dated August 6, 2015.

Statutes Cited
209-a.1(d)
209-a(4)(d)

Cases Cited
19 NY3d 876
6 NY3d 53
75 NY2d 660

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STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of the Application of

NEW YORK STATE PUBLIC EMPLOYEES FEDERATION, AFL-CIO,

Charging Party,

For Injunctive Relief Pursuant to Civil Service Law § 209-a.4.

against-

STATE OF NEW YORK (OFFICE OF INFORMATION TECHNOLOGY SERVICES)

Respondent.

NOTICE OF SUFFICIENT SHOWING PURSUANT TO CSL § 209-a (4) (b) AND AUTHORIZATION FOR CHARGING PARTY TO PROCEED

Application No. A-00385

Upon an application for injunctive relief (designated A-385) filed by the NEW YORK STATE PUBLIC EMPLOYEES FEDERATION, AFL-CIO ("PEF"), the charging party in an improper practice charge (designated U-34326), supported by the affidavit of Debra Greenberg, PEF's Field Representative, with exhibits, seeking to prevent the STATE OF NEW YORK ("State")[1] from conducting

[1] The improper practice charge and the application for injunctive relief identify the "New York State Office of Information Technology Services" as the respondent, but addressed the Injunctive Relief application to, and served, the Governor's Office of Employee Relations ("GOER"). GOER is the State's collective bargaining agent pursuant to NYS Executive Law, Article 24, § 650. The misidentification is a mere technical error for purposes of this administrative

fingerprinting and background checks of current unit employees at the Office of Information and Technology Services ("OITS") pending disposition of the underlying improper practice charge;

AND upon the details of the charge, filed with the application, sworn to by Debra Greenberg on May 22, 2015, with exhibits, which alleges that the State's unilateral imposition of the at-issue fingerprinting and background checks violates Civil Service Law ("CSL") § 209-a.1 (d);

AND upon the verified response to the application for injunctive relief sworn to by Teresa Newcomb, Esq., of counsel to Michael N. Volforte, Acting General Counsel for the New York State Governor's Office of Employee Relations, with exhibits, supported by the affidavit of David Green, the Director of Labor Relations at OITS, and accompanying memorandum of law[2];

NOTICE IS HEREBY GIVEN that PERB has determined the charging party has made a sufficient showing pursuant to CSL § 209-a.4 (b) that "there is a reasonable cause to believe" that the State's unilateral implementation of the at-issue fingerprinting and background checks constitutes an improper practice (*see Matter of Board of Educ of City School Dist of City of New York v New York State*

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determination.

[2]In its memorandum of law, the State argues that "the application is defective because it was not "in an envelope or container bearing the legend "ATTENTION: CHIEF LEGAL OFFICER" in capital letters on its front," thus violating §204.15(c)(4) of our Rules. The envelope annexed as Exhibit 1 to the State's response bears the legend "ATTENTION: CHIEF LEGAL COUNSEL." In view of the fact that the title of GOER's chief legal officer is given as "Acting General Counsel" on the State's response, I find that the substitution of the title "counsel" for "officer" is not a sufficient error to render the service noncompliant.

Pub Empl Relations Bd, 75 NY2d 660 [1990]), 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" (*see, e.g., New York State Pub Empl Relations Bd v County of Monroe*, 42 PERB ¶ 7007 [Sup Ct Albany County 2009]; *New York State Pub Empl Relations Bd v Town of Islip*, 41 PERB ¶ 7005 [Sup Ct Albany County 2008]; *New York State Pub Empl Relations Bd v City of Buffalo*, 28 PERB ¶ 7008 [Sup Ct Albany County 1995]). Accordingly, PERB has determined that injunctive relief against the State is appropriate. *See, e.g., New York State Pub Empl Relations Bd v State of New York*, 29 PERB ¶ 7006 (Sup Ct. Albany County 1996).

Although Green's affidavit contains conclusory representations regarding the State's need for the fingerprinting and background checks of current ITS employees, contrary to the State's contention the articulated reasons for the directive do not defeat the mere "reasonable cause to believe" that the unilateral implementation of mandatory fingerprinting and background checks constitutes an improper practice under CSL § 209-a.1 (d). *See, e.g., Matter of New York City Trans Auth v New York State Pub Empl Relations Bd*, 19 NY3d 876 (2012); *City of Albany*, 42 PERB ¶ 3005 (2009) (employers failed to adduce sufficient evidence to overcome presumption of bargaining obligation).

The standards warranting injunctive relief, while comparatively low, were

expressly intended by the Legislature under CSL § 209-a.4, and significantly differ from those warranting injunctions under CPLR Article 63. "A preliminary injunction may be granted under CPLR Article 63 when the party seeking such relief demonstrates: (1) a likelihood of ultimate success on the merits; (2) the prospect of irreparable injury if the provisional relief is withheld; and (3) a balance of equities tipping in the moving party's favor." *Doe v Axelrod*, 73 NY2d 748, 750 (1988). *Compare New York State Pub Empl Relations Bd, v Town of Islip, supra*, (Court observed: "The applicable standard for granting injunctive relief [under CSL § 209-a.4] differs significantly from the familiar three-part standard that applies to most requests for injunctive relief"). Accordingly, it is immaterial that the State may ultimately prevail in the underlying improper practice proceeding upon a full administrative record. It is sufficient for purposes of injunctive relief under CSL § 209-a.4 that there is "reasonable cause to believe" that the State's unilateral imposition of the at-issue disclosure obligation constitutes an improper practice, and that no remedial order of the Board can adequately purge the State of the personal and confidential information that it will obtain as a result of the fingerprinting and background checks or restore the privacy interests that the State will have compromised if a violation is found.

Moreover, injunctive relief is necessary to preserve PERB's ability to issue an effective and meaningful – indeed, enforceable – remedial order if a violation of CSL § 209-a.1 (d) is found. *See Town of Islip v New York State Pub Empl*

Relations Bd, 23 NY3d 482 (2014) (the Court of Appeals held that it could not enforce PERB's remedial order as written where no "PERB injunction" was sought preventing the Town from disposing of vehicles that the Board ordered restored to unit employees, and requiring the Town to purchase new vehicles would be unduly burdensome).

THEREFORE, the NEW YORK STATE PUBLIC EMPLOYEES FEDERATION, AFL-CIO, is hereby authorized, pursuant to CSL § 209-a.4 (b), to petition Supreme Court, in Albany County, upon notice to all parties, for an injunction enjoining and restraining the STATE OF NEW YORK from continuing to implement the at-issue fingerprinting and background check requirements in the improper practice charge designated U-34326 pending the disposition of the underlying improper practice charge. Pursuant to CSL § 209-a.4 (b), PERB must be joined as a necessary party in such proceeding.

Additionally, under CSL § 209-a.5 (d), if an injunction is issued by the court in this matter, PERB is required to "conclude the hearing process and issue a decision on the merits within sixty days after the imposition of such injunctive relief."

Dated: Albany, New York
July 27, 2015

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BY CERTIFIED MAIL AND FACSMILE