Concurrent One

Taylor Law at 50
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Improper Practice Charges and Collective Bargaining: Duty Satisfaction, Contract Reversion and Waiver

The Taylor Law at 50: Bright Spots and Pressure Points

May 11, 2018 Break-Out Session:

Improper Practice Charges and Collective Bargaining:
Duty Satisfaction Contract Reversion and Waiver

Presented by:

Douglas Gerhardt, Esq. Harris Beach, PLLC
Monte Klein, Esq.
Jonathan D. Rubin, Director of Field and Affiliates Services, NYSUT

In any improper practice charge that involves an allegation of a breach of past practice as the basis for a violation of §209-a.1(d) of Act, there will always be an analysis to determine whether the collective bargaining agreement contains provisions that govern the dispute.

All seasoned practitioners are aware of the basic concepts around past practice enforcement:

- Longstanding of duration
- Consistently applied
- Global awareness between employer and union
- Relate to a mandatory term and condition of employment

As the law has aged though, an increasingly nuanced set of fact patterns have accompanied it, making it consistently more difficult to determine whether an enforceable past practice exists. This is primarily attributable to the parties' bargaining history in an ever-increasingly complex environment.

The challenge facing the parties and PERB alike, is that in applying the foregoing prongs of past practice analysis, collective bargaining—including that which was both bargained as well as the unwritten intentions of the parties—is becoming increasingly hard to separate from the analysis. It is within that framework we examine when the defense (or assertions) of *Waiver*, *Duty Satisfaction* and *Reversion* are applicable.

- Waiver:

Most people think of waiver as to mean "you could have argued something but because of what you did (or didn't do), you lost that right." However, under the Taylor Law, that general concept is more appropriately applied to the concept of duty satisfaction. Rather, under the Taylor Law, a waiver defense means that the parties specifically bargained away the ability to negotiate over a particular issue to which the right to bargain existed.[1]

[1] *Council of Supervisors and Administrators*, 8 PERB 3011 (1975)

This is often occurs within the context of management rights, past practice or other "broad stroke" provisions, such as found in the case cited herein.[2]

As per *City of Ithaca*, 49 PERB 3030 (2016), citing to Orchard Park Central School District

> "Because duty satisfaction and waiver have often been confused, the Board clarified the distinction between them in Orchard Park Central School District:
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> In contrast to duty satisfaction, waiver involves either the express relinquishment of specified rights or the use of language that establishes 'a clear, intentional, and unmistakable relinquishment of the right to negotiate the particular subject at issue' by relieving the other party of the duty to negotiate on that subject. In short, duty satisfaction is found when the duty to negotiate the specific subject at issue has been in fact satisfied, while waiver relieves the beneficiary of the specified statutory duties, including the duty to negotiate under the Taylor Law."[3]

Interestingly, in Orchard Park respondent asserted that duty satisfaction applied not only to the broad *management's rights* and related provisions, but also to the more specific issue at hand pertaining to work assignment, an assertion that PERB rejected.

- Duty Satisfaction:

Duty satisfaction cases much more frequently include an examination of the precise language of the collective bargaining agreement in connection with parol evidence. Generally, in order to overcome a properly-framed Duty Satisfaction defense, testimony around bargaining history, side letter agreements and other items are needed to determine if the parties granted management the discretion take that at-issue action, whether anticipated or not.

A good example of such a fact pattern appears in *City of Rochester*, 49 PERB 4528 (2016). Here, the parties' collective bargaining agreement referenced a long-standing management policy determining which employees could bring city-owned vehicles home. Due to the passage of time certain titles and details within the management policy had modified from when it was incorporated into the collective bargaining agreement. However, the parties had not sought to amend either the provision or the policy as it existed, *inter alia*. As such, the Administrative Law Judge found that the City had satisfied its duty to bargain as any practice was subsumed within the discretion of the employer to modify the policy. It should be noted that the periodic adjustment of the policy was a notable factor in the analysis.

As an aside, in many such cases the parties will agree to a stipulation of facts in lieu of producing witnesses. When so doing, extreme caution is urged as parties will often assert arguments in the post-hearing brief that was not properly introduced into the record.

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[2] Id.
[3] *Orchard Park Central School District* 47 PERB 3029 (2014)

While true for all cases, it is particularly so that in duty satisfaction cases evidence that is not properly introduced can be a fatal flaw.

- Reversion:

An offshoot from Duty Satisfaction is the theory of reversion. The key difference between reversion and duty satisfaction is that in a reversion case, the analysis of whether the parties bargained the issue to closure rests with the almost-exclusive reading of the collective bargaining agreement provision at issue. Parol evidence is only relevant to the extent needed to establish the facts.

In the *Board of Education of the City School District of the City of New York*, 42 PERB ¶3019 (2009), the union established the existence of a discernable and otherwise enforceable past practice of unit members receiving a day's leave to donate blood. PERB found the collective bargaining agreement to be silent on the topic of blood donation leave of absence. PERB dismissed the employer's reversion claim that the existence of Article V, provided a cap to the amount of paid time available as related to leave for blood donation. Article V stated:

> "The Custodian Engineer shall be in attendance at his/her assignment for day school services from 8:00 a.m. to 5:00 p.m. on weekdays, except on stated holidays, on the Friday after Thanksgiving when this day has been declared a non-school day by the Department of Education, on Rosh Hashanah and Yom Kippur when declared administrative office holidays and at such time as official permission has been granted for his absence."

Clearly, there is an "arm's length" connection between a provision that says "you work 8-5 everyday, except on certain, particular days" and a discernable practice that asserts: "and these days too." In affirming the Administrative Law Judge's decision to sustain the charge, PERB set forth the principle that a finding of reversion is not warranted when this "arm's length connection" to the provision is the sole basis for the reversion defense.[4]

Another example where the union overcame the reversion defense is in *Shelter Island UFSD* 45 PERB 3032 (2012). In Shelter Island, an employee served as an elected "employee trustee" of the regional health consortium, but not specifically as a formal representative of the District itself. He had received paid release to attend the plan's quarterly meetings without charge to personal leave for many years. The District unsuccessfully attempted to deny him continued leave with pay arguing that the only paid leave available came from the provision that allotted sick and personal leave. PERB found:

> "Read together, the extrinsic evidence reveals that Emmett's membership and activities on the Board of Trustees is directly related to the District's participation in the multi-employer municipal cooperative health plan. While Emmett is not a representative of the District, as a trustee he functions in a fiduciary capacity to,

[4] It could potentially be subject to duty satisfaction defense, but that requires the broader analysis to make the determination.

> inter alia, the District and other participating school districts in the management, control and administration of the Health Plan. Indeed, his fiduciary activities and responsibilities are equivalent to those of the three Board of Education members and the two Superintendents of Schools who are also trustees. Under these facts and circumstances, Emmett's attendance at the Board of Trustees cannot be construed as a personal activity or as a subject already covered under Article XVII(B) of the agreement."

To emphasize, PERB has found reversion defenses warranted only when there is specific, on-point contractual language that either directly, or with the limited use of parol evidence can clearly determine if the language addresses the specific issue at hand.

An example of a successful reversion defense is found in the very recent decision of County of Sullivan and Sherriff of Sullivan County, 51 PERB 3008 (2018). In this case, which pertained to compensation time in lieu of paid overtime, PERB agreed that the union clearly established the existence of what would have been an enforceable past practice. However, turning to the plain reading of the interconnected collective bargaining agreement provisions, PERB found:

> "The collective bargaining agreement at issue here, like that in Springs Union Free School District, and, for that matter, like that in State of New York (Racing & Wagering Board), addresses overtime and compensation for overtime in specific and comprehensive terms. Section 402 (a) provides that overtime "shall be compensated at time and one-half for all hours in excess of forty (40) hours per week," and is immediately followed by § 402 (b)'s express provision that "[t]he Employer shall make a good faith effort to pay for overtime on the date of payment of issuance of the payroll check in the payroll period next succeeding the payroll period during which such overtime was earned." Likewise, § 401 (b) provides that any employee who is required to work more than 261 days in a year (or more than 262 days in a leap year), "shall be paid compensation at overtime rates as provided in Section 402." Section 403 credits vacation, personal leave, sick leave, and holidays as "time worked for the computation of overtime," but does not allow the hours off on such days to be deemed overtime when combined with hours worked during the days next succeeding such day off. Moreover, while the CBA contains no express definition of "compensation," the entirety of Article III, entitled "Compensation," addresses monies paid to or on behalf of employees. Nowhere in Article III, or anywhere else in the CBA, is compensatory time mentioned.
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> We find that these provisions, taken as a whole, reflect that the parties negotiated comprehensively as to overtime, agreeing that overtime was to be exclusively compensated in monetary remuneration, thereby "implicitly demonstrat[ing] that the parties had reached accord" precluding the election by a bargaining unit member of compensatory time off in lieu of overtime compensation."

Similarly, in *Springs Union Free School District*, 45 PERB 3040 (2012), reversion was found to exist in ending a discernable practice of allowing staff to leave at 10:30 a.m. on the last day of school due to the inclusion of a contractual provision clearly defining the workday from 8:20 a.m. to 3:10 p.m. daily. There was no ambiguity that the last day of school was in fact a work day, thus triggering the successful reversion defense.