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Jurisdictional Evolution: A Panel Discussion Concerning PERB's Deferral Policies

This session will provide an overview of both jurisdictional and merits deferral and discuss practical considerations from the perspective of employers, unions, and a PERB ALJ.

Panelists:

Joseph E. O'Donnell, Administrative Law Judge, NYS Public Employment Relations Board

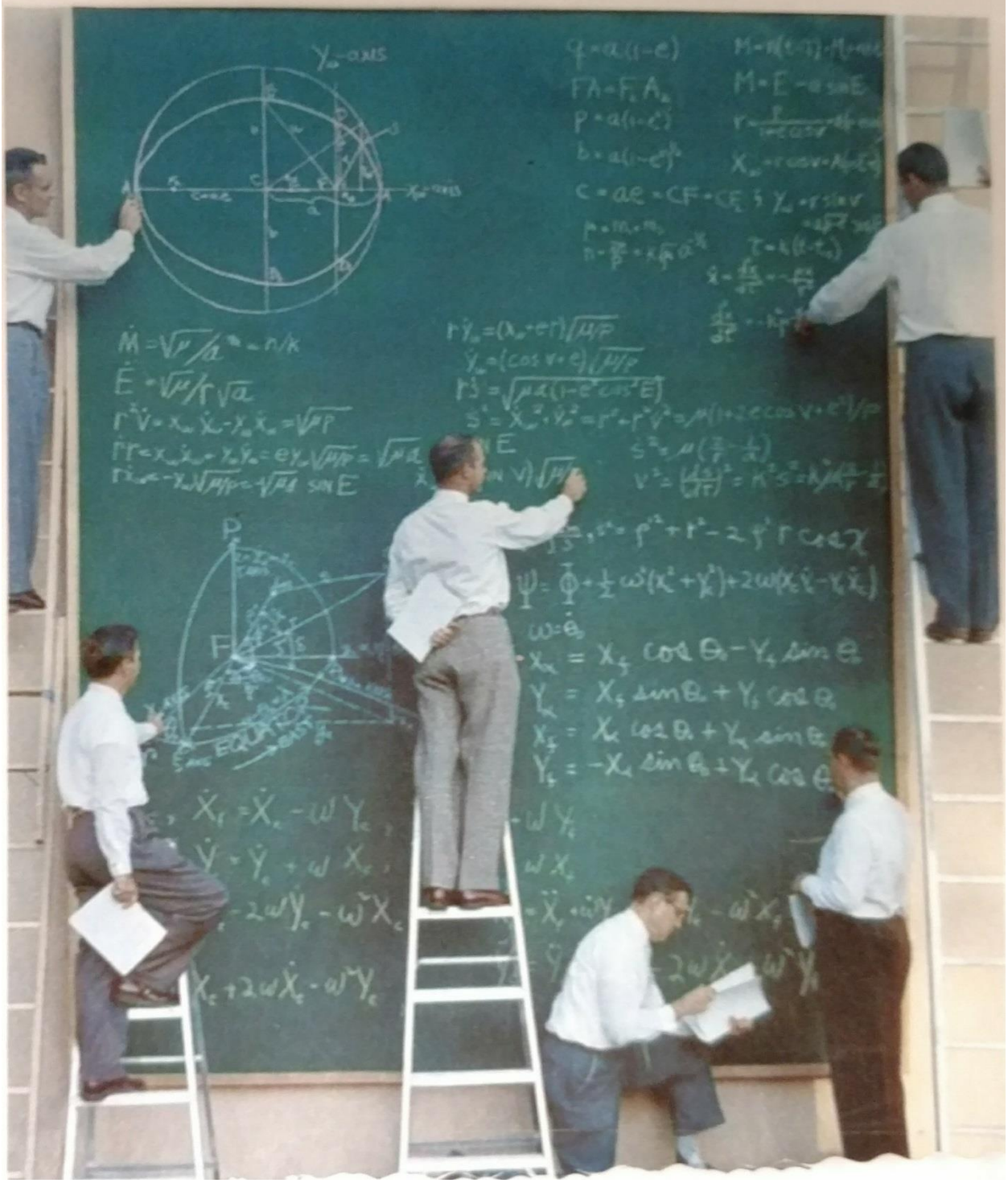
Edward A. Trevvett, Esq., Harris Beach PLLC

Steven M. Klein, Esq., CSEA

Including:
Jurisdictional Evolution: A Panel Discussion Concernign PERB's Deferral Policies

JURISDICTIONAL EVOLUTION

A PANEL DISCUSSION CONCERNING PERB'S DEFERRAL POLICIES



JURISDICTIONAL EVOLUTION

A PANEL DISCUSSION CONCERNING PERB'S DEFERRAL POLICIES

OVERVIEW

Legislative History

Key Concepts:

- Merits Deferral.
- Jurisdictional Deferral.

Significant Board Decisions:

Bordansky, 4 PERB ¶ 3031 (1971); *Town of Orangetown,* 8 PERB ¶ 3042 (1975); *St. Lawrence County*, 10 PERB ¶ 3058 (1977); *Herkimer County*, 20 PERB ¶ 3050 (1987); *City of Rochester*, 26 PERB ¶ 3049 (1993), aff'd 27 PERB ¶ 7003 (1994); *Town of Carmel*, 29 PERB ¶ 3073 (1996); *SUNY Health Science Center of Syracuse*, 30 PERB ¶ 3019 (1997); *Village of Monroe*, 40 PERB ¶ 3013 (2007); *County of Sullivan*, 41 PERB ¶ 3006 (2008); *County of Westchester*, 42 PERB ¶ 3027 (2009); and more recently *NYS Affordable Housing Corp.,* 49 PERB ¶ 3002 (2016) and *County of Suffolk*, 49 PERB ¶ 3005 (2016).

PRACTICAL CONSIDERATIONS

The simple case:

- The parties' cba provides for a dispute resolution procedure that ends in final and binding arbitration;
- Both parties wish to utilize their dispute resolution procedure and consent to PERB's deferral; and
- A conditional deferral is ordered and the issue is resolved pursuant to the parties' agreed upon dispute resolution procedure.

More complex cases:

- Post deferral, the Employer raises issues of arbitrability, including timeliness, which if successful, will preclude a decision on the merits.

- Despite the existence of an agreed upon dispute resolution procedure, one or both of the parties opposes the deferral of the matter.

Fleshing out the jurisdictional issue before deferral is ordered:

- Asking the key questions:

  1. Has the Employer raised a jurisdictional or deferral defense to the charge?

  2. Will the employer waive arbitrability as a defense, including timeliness?

- If arbitrability defenses are not waived, then what?

A PRACTICIONER'S VIEW

Employer perspective – Edward A. Trevvett, Esq., Harris Beach, PLLC, Rochester, New York (bio attached);

Union perspective – Steven M. Klein, Esq., CSEA Local 1000, AFSCME, AFL-CIO, Albany, New York (bio attached).

A VIEW FROM THE BENCH

Joseph E. O'Donnell, Administrative Law Judge
PERB, Buffalo, New York (bio attached).

Guiding principles:

1. Encourage parties to utilize dispute resolution procedures that have been agreed to; e.g., binding arbitration.

2. Prevent redundancy in the judicial process; e.g., discourage forum shopping or the pursuit of the same or similar issues in two or more legal forums at the same time.

QUESTION AND ANSWER SESSION WITH PANEL PARTICIPANTS

BUILDING THE FOUNDATION

Guiding principles:

1. Encourage parties to utilize dispute resolution procedures that have been agreed to; e.g., binding arbitration.

2. Prevent redundancy in the judicial process; e.g., discourage forum shopping or the pursuit of the same or similar issues in two or more legal forums at the same time.

TAYLOR LAW COMMITTEE

Report of the Governor's Committee on Public Employee Relations (1966)

1. Relevant to the first guiding principles above, the Committee said:

"We strongly encourage at all governmental levels that the representatives of the employing agency and the employees work out their own procedures for the handling of grievances *including terminal arbitration*…" (emphasis added).

2. Relevant to the second guiding principle above, the Committee said:

"When the State procedures are introduced or superimposed on those of the city, county or other subdivision; if there has already been a report of some panel, commission, board or individual which includes a finding of facts or recommendations, such report should be given due consideration in the State procedure and the proceedings leading to it not duplicated or repeated. The purpose would be to prevent avoidable delay and also to minimize the likelihood that either party may be tempted to shop around among the available forums seeking some advantage thereby." Report, p. 45.

LEGISLATIVE ACTION – THE TAYLOR LAW (1967)

Regarding the first guiding principle, the Legislature took to heart the Committee's advice and enacted Section 200 of the Act, entitled "Statement of Policy", which declares:

"…it is the public policy of the State and the purpose of this Act to promote harmonious and cooperative relationships between government and its employees and to protect the public by assuring, at all times, the orderly and uninterrupted operations and functions of government. *These policies are best effectuated by . . . (c) encouraging . . . public employers and . . . employee organizations to agree upon procedures for resolving disputes. . ."* (emphasis added).

The Legislature's acceptance of the first guiding principle is further reflected in the language of Section 205.5(d) of the Act, which places a restriction on PERB's subject matter jurisdiction as follows:

> ". . . the board shall not have authority to enforce an agreement between an employer and an employee organization and shall not exercise jurisdiction over an alleged violation of such an agreement *that would not otherwise constitute an improper employer or employee organization practice; . . .*" (emphasis added).

Notably, however, this jurisdictional restriction is not absolute. Rather, PERB retains exclusive non-delegable jurisdiction over improper practices as mandated by the following additional language contained in Section 205.5:

"…the board shall have the following powers and functions: … (d) [t]o establish procedures for the prevention of improper employer and employee organization practices."

Note: Although the Legislature did not specifically incorporate the second guiding principle directly into the statutory language of the Act, PERB has firmly embraced it and has consistently applied it through its case law, (see *infra*).

BALANCING ACT

Hence, from the outset PERB has been faced with the challenge of finding a balance between its statutory mandate to redress improper practices while carrying out the statutory objective of encouraging private dispute settlement procedures.

Statutory Mandate

Statutory Objection

Redress Improper Practices

Encourage Binding Arbitration of Disputes

TRIBOROUGH LAW (1982)

§ 209-a. Improper employer practices; improper employee organization practices; application

1. Improper employer practices. It shall be an improper practice for a public employer or its agents deliberately … *(e) to refuse to continue all the terms of an expired agreement until a new agreement is negotiated, unless the employee organization which is a party to such agreement has, during such negotiations or prior to such resolution of such negotiations, engaged in [a strike or caused, instigated, encouraged or condoned a strike]* (emphasis added).

SIGNIFICANT CASES

BORDANSKY, 4 PERB ¶ 3031 (1971)

Rule: Although not required, the Board will defer to a determination made by an arbitrator so long as the following standard is met:

1. The issues raised by the improper practice charge were fully litigated in the arbitration proceeding;

2. The arbitral proceedings were not tainted by unfairness or serious procedural irregularities; and

3. The determination of the arbitrator was not clearly repugnant to the purposes and policies of the Public Employees Fair Employment Act.[1]

Backdrop:

ALJ Janet Axelrod (March 18, 1971)

- OT issue – Grievance was filed on Bordansky's behalf but stalled at Step 4.

- Bordansky alleged discrimination and filed § 209-a.1(a) and 2(a) violations against the employer and union, respectively.

May 11, 1970	At conference, parties stipulated to adjourn pending outcome of grievance procedure.
August 4, 1970	Arbitration issued award.
October 13, 1970	Hearing scheduled – Motion to dismiss granted ALJ adopted the NLRB's policy regarding the effect of an arbitrator's award.

[1] The Board adopted this standard from the NLRB; cf *International Harvestor Co*. 188 NL-RB 923; enforced sub nom *Ramsey v. NLRB* 327 F.2d 784 (7th Cir) 1964.

TOWN OF ORANGETOWN, 8 PERB ¶ 3042 (1975)

Rule: The denial of a contractual benefit by an employer will constitute an improper practice and thus be subject to the Board's jurisdiction absent any provisions for binding arbitration.

**Strong Dissent – Board Member Joseph P. Crowley

> "The Legislature of this state . . . did not opt, as other jurisdictions did, to make a breach of . . . an agreement an improper practice."
>
> "Once negotiations have resulted in an agreement, the parties may and should agree upon procedures, and absent such agreement, may seek enforcement in the courts."

ST. LAWRENCE COUNTY, 10 PERB ¶ 3058 (1977)

Orangetown is overturned.

Rule: The Board adopts the dissenting opinion of Board Member Crowley, *supra.*

> "In brief, when an employer's obligation to act or not to act is wholly contractual, the enforcement of such obligation should be dealt with either by arbitration (if the parties had so agreed) or by a plenary action."
>
> "NOW, THEREFORE, the petition herein is hereby dismissed."

HISTORICAL NOTE
1977 TO 1987

The Board consistently applied the jurisdictional limitation set forth in *St. Lawrence County*. Consequently, related improper practices were dismissed for lack of jurisdiction *with prejudice*. (emphasis added).

HERKIMER COUNTY BOARD OF COOPERATIVE EDUCATION SERVICES, 20 PERB ¶ 3050 (1987)

**cba was not expired

- A grievance was filed and pending.
- Respondent raised jurisdiction as an affirmative defense.

Below, ALJ Crotty (20 PERB ¶ 4552), consistent with *St. Lawrence County*, dismissed the improper practice for lack of jurisdiction with prejudice.

The Board Sets a New Course
(Jurisdictional Deferral)

> "It appears to us that deferral of the question of whether PERB has jurisdiction over an improper practice charge when there is a pending contract grievance is a more equitable result than outright dismissal of the charge with prejudice. This is so because the public policy against permitting a party to proceed in two separate forums on the merits of its claims would still be protected."
>
> "Deferral of the determination of PERB's jurisdiction accordingly is an appropriate procedure which will not be unduly burdensome on an employer, while still providing some opportunity for a union to obtain a determination on the merits of a perceived adverse employment decision in those circumstances in which the contract coverage is unclear."
>
> "IT IS FURTHER ORDERED THAT the determination of PERB's jurisdiction over so much of the charge as alleges a violation of Section 209-a.1(d) of the Act is deferred, and the charge is conditionally dismissed, with opportunity to the Association to file a timely motion to the Director at the conclusion of the contract grievance procedure to reopen the charge upon the ground that the jurisdictional limitations contained in Section 205.5(d) of the Act do not apply to its charge."

CITY OF ROCHESTER, 26 PERB ¶ 3049 (1993), aff'd 27 PERB ¶ 7003 (1994)

** cba was not expired

Rule: Jurisdictional dismissal with prejudice is still appropriate, post-*Herkimer*, when it is clear that the contract is the source of rights [at issue] and the charge expressly alleges that the employer has violated the parties' contract.

TOWN OF CARMEL, 29 PERB ¶ 3073 (1996)

**Status of vacation pick agreement was unclear (was it in effect or not?).

- No grievance had been filed.
- Deferral was never raised by either party before the ALJ.

Board ordered deferral or its own motion.

Rule: Questions concerning the parties' intent regarding the duration of their agreement are best resolved, if possible, in the context of the parties' grievance arbitration procedure rather than by PERB, even when a grievance has not been filed.

> "We already have an established policy of deferring jurisdictional questions when a contractual grievance has been filed (*Herkimer*). Even though a grievance has not been filed in this case, we advance the policy rationale underlying such deferral by declining to reach, unless later necessary, what is essentially a question of arbitrability arising from the uncertain duration of this agreement and the applicability of the parties' grievance arbitration procedure to this agreement. Should the Town successfully raise in the grievance arbitration context any argument which forecloses a determination regarding the merits of the PBA's grievance, the PBA may move to reopen this charge for a determination regarding the jurisdictional issue raised on the existing record."
>
> "Wholly apart from our jurisdictional deferral policy, we also have had a much longer standing policy of deferring the determination of the merits of refusal to bargain charges within our jurisdiction. When, as here, the disposition of a refusal to bargain charge necessitates an interpretation of an agreement which is arguably a source of right to the charging party, and an award rendered under a binding grievance arbitration procedure is potentially dispositive of the issues underlying the charge, we have been persuaded that the policies of the Act favoring an accommodation of the parties' dispute resolution procedures are again advanced by a conditional dismissal of the charge, even when the charging party union has elected not to invoke the grievance arbitration provisions of its contract. Therefore, even were we willing to assume that the vacation pick agreement expired in 1995, such that we were not presented with any jurisdictional issue, we would still defer any determination regarding the merits of this charge to the parties' uninvoked grievance arbitration procedure. As with the jurisdictional deferral, our merits deferral will permit for a reopening of this charge on motion in appropriate circumstances."

SUMMARY – Applicable to both jurisdictional and merits deferrals:

If the cba provides for:

1. An arguable source of right;

2. Contains a grievance procedure that ends in final and binding arbitration; and

3. An award rendered under a binding grievance arbitration procedure is potentially dispositive of the issues underlying the charge;

then deferral is appropriate (i.e., conditionally dismissed subject to the right to reopen).

STATE OF NEW YORK (SUNY HEALTH SCIENCE CENTER OF SYRACUSE), 30 PERB ¶ 3019 (1997)

**cba was expired.

- Improper practice charge alleged §§ 209-a.1 (d) & (e) violations.

Below, ALJ conditionally dismissed the charge relying on *Herkimer*.

The Board reverses that portion of the ALJ's decision and clarifies the distinction between jurisdictional deferral vs. merits deferral.

> "the ALJ appears to have deferred this charge pursuant to our jurisdictional deferral policy as established in *Herkimer County BOCES*. If so, that was incorrect because no aspect of this charge raises any jurisdictional issue."
>
> "Section 205.5(d) of the Act withdraws from our jurisdiction allegations of contract violation 'that would not otherwise constitute an improper employer or employee organization practice.' The claimed violation or discontinuation of a term of an expired agreement presents no jurisdictional issues. To trigger the jurisdictional limitation in § 205.5(d) of the Act, and our corresponding jurisdictional deferral policy, the agreement in issue must arguably be in effect for purposes of the Act. An agreement is not in effect for purposes of the Act when it is expired by its terms. Each aspect of [the Union's] charge must be considered within this analytical framework."
>
> "Allegations of [a] violation of § 209-a.1(e) of the Act are never subject to jurisdictional deferral because a cause of action under § 209-a.1(e) of the Act is necessarily based upon terms in an agreement which is expired for purposes of the Act."

Rule: If the (d) and (e) violations rest on exactly the same facts, it is appropriate to defer both. However, if a (d) violation rests on the employer's alleged bad faith during negotiations, that is an issue which is not contractual in nature. Hence, even if the cba were in effect, the bad faith negotiations aspect of the charge would not be subject to a jurisdictional deferral because no jurisdictional issue is presented by that allegation.

> "The bad faith negotiations aspect of the § 209-a.1(d) charge is not deferrable because the disposition of that aspect of the charge does not rest on an interpretation of the expired collective bargaining agreement and an arbitrators award will not be dispositive of it."
>
> The Board cautioned, however, that a bifurcated merits deferral policy applied allegation by allegation is not always appropriate.
>
> …"there may well be circumstances in which the 'all or nothing' deferral policy applied in *Connetquot*[2] may be the most appropriate policy choice."

Note: In *Connetquot,* the union filed an improper practice charge alleging §§ 209-a.1(a) and (d) violations due to the District's decision to place a newly hired senior account clerk on Step 6 of the salary schedule, higher than where the Union thought the new hire should be placed under the parties' existing agreement. The ALJ dismissed the charge finding that the (a) violation lacked merit and that the (d) violation "merely seeks interpretation of an agreement and its enforcement and therefore, PERB lacks subject matter jurisdiction."[3] However, the Board, finding potential merit to the (a) violation, reversed and remanded the case to the ALJ noting that under these circumstances, it would be "inappropriate to bifurcate the instant matter."

VILLAGE OF MONROE, 40 PERB ¶ 3013 (2007)

**cba was not expired.

- The Village directed an employee in the PBA bargaining unit to execute a medical confidentiality waiver form, different from the form agreed upon in the parties' cba.
- Grievance was filed.

Below, the ALJ, pursuant to *Herkimer*, deferred the charge to the parties' contractual grievance procedure.

The Board reversed and held that the ALJ erred in finding that the Village did not repudiate the cba.

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[2] *Connetquot Cent School Dist*, 19 PERB ¶ 3045 (1986).
[3] Pre-*Herkimer*.

Remanded

Rule: Exception to jurisdictional deferral under *Herkimer*; i.e., PERB has non-delegable jurisdiction to hear a charge alleging contract repudiation.

COUNTY OF SULLIVAN, 41 PERB ¶ 3006 (2008)

**cba was expired.

- Facts involved the unilateral implementation of a system for recovery of leave accruals and related holiday pay issues.
- Improper practice charge alleged §§ 209-a.1 (a), (c), (d), and (e) violations.
- A grievance was filed and pending.

Below, the ALJ declined to defer the charge to the parties' grievance/arbitration procedure due, in part, to the existence of the (a) violation, and found that the County violated § 209-a.1(d) and (e) of the Act.

On appeal, the Board directed the parties to submit supplemental briefs on the following issues:

> "Whether the Board should apply its authority to defer the charging party's §§ 209-a.1(d) and (e) claims based on the April 2006 grievance that is subject to the parties' contractual dispute resolution procedure that ends in binding arbitration?"

- Both parties stated their opposition to deferral.

Central Issue:

> "In the present case, we must decide whether, pursuant to *Carmel*, it would be consistent with the public policy of the Act for the Board, on its own motion, to defer the §§ 209-a.1(d) and (e) allegations to the parties' grievance procedure, even after the ALJ had dismissed of the §§ 209-a.1(a) and (c) allegations and reached the merits of the §§ 209-a.1(d) and (e) allegations."

Rule: The Board upholds its case by case merits deferral analysis contained in (*State of New York Health Science Center of* Syracuse) and affirms other significant policy determinations, to wit:

> "Section 209-a.1(e) grants PERB exclusive jurisdiction to hear improper practice charges alleging an employer's failure to continue all the terms of an expired agreement until a new agreement is negotiated. This statutory provision constitutes an express exception

to the denial, in § 205.5(d) of the Act, of PERB's jurisdiction over improper practice charges asserting breaches of collectively negotiated agreements. In such cases, PERB is required to interpret the terms of the expired agreement. Balancing the Act's public policy goal of encouraging negotiated procedures for the resolution of disputes with the exclusive jurisdiction granted to the Board under § 209-a.1(e) of the Act leads us to conclude that our case by case analysis of whether to defer the merits of an § 209-a.1(e) allegation continues to be the most appropriate approach. Consistent with *SUNY*, on a case by case basis, when we determine that it is appropriate to defer an alleged violation of § 209-a.1(d) and the alleged violation of § 209-a.1(e) rests upon the same facts, we will ordinarily also defer the § 209-a.1(e) allegation."

"However, we will retain jurisdiction over the merits of an improper practice charge alleging a violation of §209-a.1(e) of the Act at the Board's discretion when the parties have evidenced their mutual preference for PERB to determine the contract issue. This can be established by evidence that a charging party has not filed a grievance, or is holding in abeyance a filed grievance alleging the same contractual violation as set forth in the improper practice charge and where the respondent does not seek deferral."

"But, it will continue to be our general practice to defer alleged violations of § 209-a.1(e), on a case-by-case basis, to a contractual grievance procedure when an arbitrator's binding decision and award is reasonably likely to resolve the contract interpretation issue at the center of the dispute."

"In the present case, another factor that renders a merits deferral of the §§ 209-a.1(d) and (e) claims by the Board inappropriate is that the parties have fully pursued the contract interpresentation issues before the ALJ. Deferral would, therefore, impose wasteful duplication of efforts on the parties. To the extent that the Board's decision in *Carmel* suggests that the Board on its own motion will issue a merits deferral of §§ 209-a.1(d) and (e) allegations following the parties' development of a full record before an ALJ with respect to the merits, it is hereby overruled. We believe this best effectuates the policies of the Act and is in the interest of administrative economy by limiting the parties to the forum of their choosing, but only one forum, for the resolution of their dispute."

COUNTY OF WESTCHESTER, 42 PERB ¶ 3027 (2009)

Charges:

1. Police directed to report acts of domestic violence resulting in police intervention;

2. Access to leave bank frozen pending completion of audit.

**cba was expired.

- Maintenance of benefits provision contained in the contract.
- Respondent raised jurisdiction and deferral as affirmative defenses.
- No grievance(s) were filed.

Below, the ALJ conditionally dismissed the charged (merits deferral).

The charging party took exception to deferral and attempted to expand the Board's ruling in *County of Sullivan* arguing, *inter alia*, that *County of Sullivan* gives the PBA "its choice of forum and that deferral is only appropriate when there is an expressed mutual preference for arbitration."

Rejected:

"Based upon our review of PBA's arguments, it is clear that PBA has substantially misconstrued *County of Sullivan*. Our decision in that case did not constitute a paradigmatic shift, as claimed by PBA, or even a modification in our merits deferral policy. In fact, in *County of Sullivan*, we reaffirmed that merits deferral is ordinarily appropriate, as in the present case, when an alleged violation of § 209-a.1(d) of the Act and an alleged violation of § 209-a.1(e) of the Act rests upon the same set of facts. At the same time, we reiterated that a merits deferral of an alleged violation of §209-a.1(e) of the Act is not always appropriate because PERB has been granted exclusive jurisdiction over such claims and, therefore, deferral will be dependent on the circumstances of each case."

"In the present case, we affirm the ALJ's conclusion that PBA has failed to demonstrate any circumstances warranting our retention of jurisdiction over either charge beyond that which is implicit in *New York City Transit Authority (Bordansky)*. It is clear from the record that there is not a mutual preference by the parties for the Board to retain jurisdiction over the alleged violation of §§ 209-a.1(d) and (e) of the Act."

NYS AFFORDABLE HOUSING CORP, 49 PERB ¶ 3002 (January 25, 2016)

Issues: Merit pay and background checks.

**cba expired

- Improper practice charge alleged §§ 209-a.1(d) and (e) violations.
- No grievance had been filed.

Below, the ALJ denied the respondent's request that the matter be deferred to arbitration and ruled against the Respondent on the merits. Respondents filed exceptions.

Rule: If an (e) violation has been pled and charging party claims that a contract provision has been violated, at least, the ALJ is on inquiry notice that merits deferral may be appropriate. Under these circumstances an ALJ should then make the following inquires:

1. Does the contract grievance procedure end in binding arbitration?

2. If so, will the Respondent lodge procedural objections to a grievance, once filed, including timeliness?

3. If it will not, merits deferral is generally appropriate, particularly when the respondent requests it.

"Our merits deferral policy effectuates the policies of the Act by requiring the parties to use the negotiated dispute resolution procedures that the Act encourages them to enter into in the first place."

"Here, the ALJ denied the Agencies' request for a merits deferral on the sole ground that no grievance had been filed and that any such grievance would be untimely. However, that a grievance had not been filed or that any such grievance would be untimely under the parties' contractual procedure does not bar a merits deferral. Indeed, the third of the aforementioned inquiries regarding a merits deferral – whether the respondent would object to an untimely grievance – contemplates deferral to a potentially untimely grievance that is yet to be filed. Here, while the ALJ observed that any such grievance would be untimely the record does not establish whether the Agencies would waive timeliness objections to a grievance. Thus, the record before us does not permit us to determine whether the requirements for a merits deferral would have been appropriate in the first instance."

"Accordingly, the ALJ's decision is reversed and the matter remanded."

COUNTY OF SUFFOLK, 49 PERB ¶ 3005 (January 25, 2016)

Issue: Subcontracting of highway patrol and enforcement duties on the Long Island Expressway and Sunrise Highway.

**Status of applicable MOA at issue. (Union claimed it was current and enforceable). MOA expressly addressed the subject matter of the charge.

- Improper practice charge alleged a § 209-a.1(d) violation.

Union filed a grievance to halt the transfer of the work at issue.

- Employer basically promised 2 different unions the same work in each of their respective agreements with the employer.

- In defense of the charge, the employer raised deferral but, at the same time, was moving in court to have the applicable MOA declared a nullity.

Below, the ALJ conditionally dismissed the charge.

Board found that deferral was premature; noting the presents of a glaring repudiation issue.

> "… the facts as alleged and established in the record require the ALJ to make a finding as to whether the County has acted inconsistently with the prerequisites for deferral, or repudiated the [Union's] agreement and if so, whether the County's action would render deferral a meaningless act. If the ALJ finds that to be the case, then a determination on the merits of the charge should follow."

> "… the ALJ's deferral of the matter is premature. There can be no deferral of a matter to another forum if that forum does not exist. Such a deferral, under the factual circumstances present in this case, could be illusory in addition to be wasteful. The County is not merely saying that the matter is not arbitrable, it is actively pursuing a course that fundamentally negates the existence of the entire arbitration mechanism while simultaneously asking for deferral to a forum and under an agreement that it alleges is a nullity."