



Taylor Law at 50: Bright Spots and Pressure Points Conference

Thursday and Friday, May 10 - May 11, 2018

Thursday, May 10 | 8:45 a.m. - 5:15 p.m.

Friday, May 11 | 8:45 a.m. - 1:30 p.m.

Desmond Hotel and Conference Center

Albany, NY

9.5 MCLE Credits

99.5 Areas of Professional Practice

Sponsored by:

The New York State Public Employment Relations Board

Cornell University's ILR School and Scheinman Institute on Conflict Resolution

New York State Bar Association

Committee on Continuing Legal Education

Labor and Employment Law Section

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Program Description

The New York State Public Employment Relations Board, Cornell University's ILR School and Scheinman Institute on Conflict Resolution, and the New York State Bar Association will be holding a special conference recognizing New York's Taylor Law and its substantial influence on public sector labor relations over the past 50 years. The conference will include presentations by practitioners and scholars that showcase the Taylor Law's significant contributions to New York State public sector labor-management relations, examine and assess areas where the Taylor Law's effectiveness has been weakened, and document and analyze emerging and alternative legal and public policy models and frameworks. The program will include a panel of former Chairs reflecting on their time at PERB and the meaning of the Taylor Law. Keynote addresses will be delivered by Professor Harry Katz from Cornell University and Professor Cynthia Estlund from New York University School of Law.

Program Agenda

Day One – Thursday, May 10th

8:00 – 8:45 a.m.	Registration Continental Breakfast
8:45 – 9:15 a.m.	Welcome - John F. Wirenius, Chair, New York State Public Employment Relations Board
9:15 – 10:35 a.m.	Plenary One: The Taylor Law in Context: National and International Comparisons <i>(1.5 professional practice CLE credits)</i>
10:35 – 10:45 a.m.	Coffee Break
10:45 a.m. – 12:00 p.m.	Plenary Two: The Potential Legal and Legislative Ramifications of <i>Janus v. AFSCME</i> <i>(1.5 professional practice CLE credits)</i>
12:00 – 1:30 p.m.	Lunch and Keynote Address: Harry Katz, Jack Sheinkman Professor and Director, Scheinman Institute on Conflict Resolution
1:30 – 2:45 p.m.	Concurrent 1: Public Sector Labor Relations in Higher Education <i>(1.5 professional practice CLE credits)</i> Concurrent 2: Considering the Optics of Labor-Management Issues in the Age of Instant Information Concurrent 3: Has Workplace Dispute Resolution Gone Astray? Helping the Process Serve the Parties Concurrent 4: New Approaches to Negotiations under the Taylor Law
2:45 – 3:00 p.m.	Coffee Break
3:00 – 3:50 p.m.	Concurrent 1: Half a Century of Managing Collective Bargaining Conflict: The New York Experience and Beyond <i>(1.0 professional practice CLE credit)</i> Concurrent 2: The <i>Triborough</i> Doctrine and Statute: A Catalyst or Hindrance to Harmonious Labor Relations? <i>(1.0 professional practice CLE credit)</i> Concurrent 3: Injunctive Relief Under the Taylor Law: An Update and Discussion <i>(1.0 professional practice CLE credit)</i> Concurrent 4: Arbitration Rationales under 3020-a
4:00 – 5:15 p.m.	Plenary Three: The Taylor Law over the Years: A Discussion with Former PERB Chairs <i>(1.5 professional practice CLE credits)</i>
5:15 – 6:30 p.m.	Cocktail Reception
6:30 p.m.	Dinner

Day Two – Friday, May 11th

7:30 – 8:45 a.m.	Hot Breakfast
8:45 – 10:00 a.m.	Plenary Four: Taylor Law and Impasse Procedure: Creative Resolution Despite Protraction
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11:00 – 11:15 a.m.	Coffee Break
11:15 a.m. – 2:30 p.m.	Concurrent 1: Interest Arbitration and the Taylor Law Concurrent 2: Comparative Public Sector Unionization and Collective Bargaining Concurrent 3: Strategies for Adapting to a post- <i>Janus</i> World <i>(1.5 professional practice CLE credits)</i> Concurrent 4: Expedited Arbitration Procedures: The NY/CSEA Experience
12:30 p.m.	Lunch and Keynote Address: Cynthia Estlund, Catherine A. Rein Professor of Law, New York University School of Law

Accessing the Online Course Materials

Below is the link to the online course materials. Outlines, speaker biographies and supplemental materials are available online at the link below.



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Plenary One

Taylor Law at 50

May 10, 2018 | 9:15 a.m. – 10:35 a.m. | King St Ballroom
1.0 areas of professional practice CLE credit

The Taylor Law in Context: National and International Comparisons

This session will discuss how the Taylor Law, particularly the prohibition on public employees' right to strike and penalties for engaging in strikes, compares with similar laws in other states as well as other countries. Topics discussed will include what, in the absence of a right to strike, provides the "motive power" for collective bargaining under the Taylor Law and the policy implications of the strike prohibition. The session will also offer perspectives from the federal sector regarding the operational and strategic realities of an open shop environment.

Panelists:

Martin H. Malin

Professor of Law and Director, Institute for Law and the Workplace, Chicago-Kent College of Law, Illinois Institute of Technology

Joseph Slater

Eugene N. Balk Professor of Law and Values, University of Toledo College of Law

Todd Dickey, School of Industrial and Labor Relations, Cornell University

Including:

The Motive Power in Public Sector Collective Bargaining

The Motive Power in Public Sector Collective Bargaining
Paper Prepared for The Taylor Law at 50
New York Public Employment Relations Board, May 10-11, 2018
Martin H. Malin*

I. Introduction

George Taylor is reported to have called the strike “the motive power for agreement” in collective bargaining in the private sector.¹ The committee he chaired whose recommendations led to enactment of the statute that bears his name similarly recognized that “the right to strike remains an integral part of the collective bargaining process in the private sector,”² and that public sector union officials maintained that eliminating the ban on public employee strikes would lead to meaningful negotiations thereby reducing strikes.³ Nevertheless, the committee flatly declared, “The strike cannot be a part of the negotiating process.”⁴

Indeed, the governor created the Taylor Committee and the state enacted the Taylor Law in recognition of the failure of the predecessor statute, the Condon-Wadlin Act to prevent strikes by public employees in New York.⁵ The committee concluded that the most effective way to prevent strikes was to enact legislation providing for the orderly recognition of employee collective representatives and an obligation on the part of the government employer to bargain in good faith with the recognized representative. It reasoned that strikes in violation of the Condon-Wadlin Act, were “often caused by a

* Professor and Director, Institute for Law and the Workplace, Chicago-Kent College of Law, Illinois Institute of Technology.

¹ See IRVING RICHTER, *LABOR’S STRUGGLES, 1945-1950: A PARTICIPANT’S VIEW* 52-53 (1994).

² STATE OF NEW YORK, GOVERNOR’S COMMITTEE ON PUBLIC EMPLOYEE RELATIONS, FINAL REPORT 15 (Mar. 31, 1966) [hereinafter Taylor Committee Report].

³ *Id.* at 19.

⁴ *Id.* at 16; see also *id.* at 42 (“We are convinced that the strike must not be used in the field of government service.”).

⁵ The governor charged the committee “to make legislative proposals for protecting the public against the disruption of vital public services by illegal strikes, while at the same time protecting the rights of public employees.” *Id.* at 9.

feeling of futility on the part of public employees because of the absence of other means by which they could participate in the determination of the terms and conditions of their employment.”⁶

But if the “motive power for agreement” relied on in the private sector was to be prohibited in the public sector, what force or forces would take its place. This paper examines the evolution of the motive power in public sector collective bargaining under the Taylor Law and compares it to the motive power in five other states, including three where public employees have a right to strike. It analyzes the policy concerns and trade-offs presented by the different approaches.

II. The Motive Power in New York Public Employee Collective Bargaining

A. From Condon-Wadlin to Taylor

New York enacted the Condon-Wadlin Act in 1947, the same year that Congress enacted, over President Truman’s veto, the Taft-Hartley Act. The immediate precipitator of the Condon-Wadlin Act was a week-long strike by teachers in Buffalo.⁷ The statute prohibited strikes by public employees and backed the prohibition with severe penalties, including immediate termination of strikers who, if they were reinstated, were ineligible for pay increases for three years and were on probation for five years.⁸ The penalties were so draconian that they were rarely enforced. Through 1964, although there were 21 strikes, the law was invoked only seven times and only a total of 17 employees were dismissed.⁹ In 1963, the legislature amended the statute, reducing the disqualification period for pay raises to six months

⁶ *Id.* at 42.

⁷ See Stuart R. Wolk, *Public Employee Strikes – A Survey of the Condon-Wadlin Acts*, 13 N.Y.L. FORUM 69, 70 (1967); Jason A. Zwara, *Left in the Dark: How New York’s Taylor Law Impairs Collective Bargaining*, 31 HOFSTRA LAB. & EMP. L.J. 193, 195 (2013).

⁸ N.Y. Civ. Serv. L. § 108(4), (5) (McKinney 1959).

⁹ See Mildred Warner, Cornell Univ. School of Architecture, Art & Planning, *Restructuring Local Government: Taylor Law History*, <http://www.mildredwarner.org/gov-restructuring/special-projects/taylor-law> (last accessed Mar. 4, 2018); see also Zwara, *supra* note 7, at 195 (observing that public employers regularly waived the penalties).

and the probation period to one year but adding a fine of two days' pay for every day on strike.¹⁰ The amendment expired by its own terms two years later.

The Condon-Wadlin Act's ineffectiveness was on display in 1965 when 6,000 Department of Welfare workers struck for 28 days and, as part of the settlement, all strike penalties were waived.¹¹ On January 1, 1966, New York City Transit workers struck for 12 days, costing the city's economy \$100 million per day. As part of the settlement, the state legislature passed an amnesty waiving all strike penalties.¹² Three days later, the governor appointed the Taylor Committee.¹³

The committee recommended that a process be developed, administered by a new agency to be established, to ensure employees the right to be represented for collective negotiations with their employer. As discussed above, the committee emphatically rejected allowing public employees to strike. It recognized that to guard against strikes, a substitute must be provided for resolution of bargaining impasses. Reflecting back on the committee's recommendations, George Taylor wrote:

A strike probation in public employment should be effective if ways and means other than the strike are available to insure a fair and equitable disposition of employee claims. We know from experience that finding a substitute for the strike is the formula successfully followed in other situations in which the work stoppage method of settling differences gave unsatisfactory results.¹⁴

The Taylor Committee considered and rejected interest arbitration as the strike substitute. The committee reasoned that mandating interest arbitration would chill collective negotiations, encouraging

¹⁰ See Warner, *supra* note 9; Zwara, *supra* note 7, at 195 n.15.

¹¹ See Warner, *supra* note 9.

¹² Zwara, *supra* note 7, at 196.

¹³ *Id.*

¹⁴ George W. Taylor, *Strikes in Public Employment*, 85 GOOD GOVERNMENT, Spring 1968 at 9, 13.

parties to take extreme positions, leaving it to the arbitrator to impose terms.¹⁵ The committee also doubted the legality of mandated interest arbitration “because of the obligation of the designated executive heads of government departments or agencies not to delegate certain fiscal and other duties.”¹⁶

Instead, the committee proposed that if the parties had not reached agreement 60 days prior to the employer’s budget submission date the Public Employment Relations Board (PERB), upon finding that the parties are at impasse would assist the parties with mediation. If mediation did not result in agreement, PERB would appoint a factfinding board of three neutrals who would make recommendations for settlement within 15 days of the budget submission date.¹⁷ The committee was optimistic that the factfinding process itself would often lead to agreement:

Fact-finding requires the parties to gather objective information and to present arguments with reference to these data. An unsubstantiated or extreme demand from either party tends to lose its force and status in this forum. The fact-finding report and recommendations provide a basis to inform and to crystalize thoughtful public opinion and move media comment.¹⁸

However, if factfinding did not lead to voluntary agreement, in keeping with democratic principles of legislative supremacy, the committee urged that final resolution of the matter should rest with the employer’s legislative body.¹⁹ The committee recommended that if either party rejected the factfinding recommendations, the employer’s legislative body hold a public hearing at which the parties

¹⁵ Taylor Committee Report, *supra* note 2, at 37-38, 46.

¹⁶ *Id.* at 46.

¹⁷ *Id.* at 37-38.

¹⁸ *Id.* at 37.

¹⁹ *Id.* at 38.

would be afforded the opportunity to show cause as to why the recommendations should not be adopted. The ultimate resolution would be made by the legislative body.²⁰

As initially enacted, the Taylor Law did not provide for legislative resolution of impasses that remained after factfinding.²¹ That was changed by amendments in 1969.²² When the dust settled, the motive power for collective bargaining under the Taylor Law was mediation, factfinding and legislative determination. The statute provides for PERB to appoint a mediator upon a finding that the parties are at impasse.²³ If impasse continues, PERB appoints a factfinding board of up to three members who must render recommendations for resolution 80 days before the end of the employer's fiscal year, which are made public five days later.²⁴ "[S]hould either the public employer or the employee organization not accept in whole or in part the recommendations of the fact-finding board, (i) the chief executive officer of the government involved shall, within ten days after receipt of the findings of fact and recommendations of the fact-finding board, submit to the legislative body of the government involved a copy of the findings of fact and recommendations of the fact-finding board, together with his recommendations for settling the dispute; (ii) the employee organization may submit to such legislative body its recommendations for settling the dispute; (iii) the legislative body or a duly authorized committee thereof shall forthwith conduct a public hearing at which the parties shall be required to explain their positions with respect to the report of the fact-finding board; and (iv) thereafter, the legislative body shall take such action as it deems to be in the public interest, including the interest of the public employees involved."²⁵

²⁰ *Id.* at 39.

²¹ *See Zwara supra* note 7, at 199.

²² *Id.* at 201. In 1974, educational institutions were exempted from the legislative determination provision and law enforcement and fire personnel was provided with compulsory interest arbitration. *See* NYPERB, Timeline of Notable Events, <http://perb.ny.gov/timeline.asp> (last accessed Mar. 4, 2018).

²³ N.Y. Civ. Serv. L. §209(3)(a).

²⁴ *Id.* §§ 209(3)(b), (c).

²⁵ *Id.* § 209(3)(e).

These procedures are coupled with strong penalties for illegal strikes. The most significant penalties are the bargaining representative's loss of dues checkoff,²⁶ and the penalizing of striking employees two days' pay for each day on strike, collected by the employer.²⁷ Unlike the Condon-Wadlin Act, the Taylor Law's strike penalties have been imposed after most of the strikes since the law was enacted.²⁸ The harsh penalties may be counterproductive. In at least one instance, the loss of dues checkoff so severely interfered with the union's ability to carry out its representational duties that PERB removed it.²⁹ The two-for-one penalty imposed on striking employees exacerbates tensions which were already high enough to motivate workers to strike in the face of such strong deterrents.³⁰ In a study published in 1981, Craig Olson and colleagues concluded that the Taylor Law's strike penalties shifted the parties' strike costs so dramatically that unions generally had no choice but to concede to the employer because of the union's strong need to avoid a strike.³¹ However, the motive power in New York public employee collective bargaining has evolved significantly since then.

A. The *Triborough* Doctrine and the Evolution of the Motive Power in New York Public Employee Collective Bargaining

In 1972, PERB decided *Triborough Bridge and Tunnel Authority*.³² PERB held that the employer breached its duty to bargain in good faith when it discontinued paying seniority-based wage increases after the collective bargaining agreement providing for such increases expired. Whereas

²⁶ *Id.* § 210(3)(a).

²⁷ *Id.* § 210(2)(f).

²⁸ See Robert F. Worth, *The Transit Showdown: The Taylor Law; A Powerful Tool to Use Against Striking Employees*, N.Y. TIMES, Dec. 13, 2002, <http://www.nytimes.com/2002/12/13/nyregion/transit-showdown-taylor-law-powerful-tool-use-against-striking-employees.html>. In 2005, the United Federation of Teachers reported that unions lost dues check-off in two-thirds of the strikes conducted since 1967 and employees suffered the two-for-one penalty in 80% of strikes since 1969. United Federation of Teachers, *The History of the Taylor Law: How Teacher Strikes Became Illegal*, NY TEACHER NEWSPAPER, June 9, 2005, <http://www.uft.org/labor-spotlight/history-taylor-law>.

²⁹ United Federation of Teachers, Local 2, 15 N.Y.P.E.R.B. ¶ 3091 (1982).

³⁰ See Zwara, *supra* note 7, at 234.

³¹ CRAIG A. OLSON ET AL., STRIKES AND STRIKE PENALTIES IN THE PUBLIC SECTOR: FINAL REPORT PREPARED FOR THE U.S. DEPT. OF LABOR 90, 129 (1981).

³² 5 P.E.R.B. ¶ 3037 (1972).

in the private sector, an employer may make unilateral changes in mandatory subject of bargaining after bargaining has reached impasse,³³ PERB reasoned that under the Taylor Law, the union may not respond to such changes with a strike and thus is at a systematic disadvantage. Consequently, PERB held that an employer commits an improper practice if it “unilaterally alter[s] existing mandatory subjects of negotiations while a successor agreement is being negotiated.”³⁴ PERB subsequently held that if the union engages in an illegal strike, the employer may make unilateral changes.³⁵ PERB reasoned that because the prohibition on unilateral employer action was intended to offset the disadvantage the union is under by not being allowed to strike, “only employees who do not strike are entitled to the maintenance of the status quo during negotiations.”³⁶

The New York Court of Appeals considered the *Triborough* doctrine in *Board of Cooperative Educational Services v. PERB*.³⁷ The court held that the rationale for the general *Triborough* rule did not apply to step increases after the contract has expired, reasoning that “it should not apply where the employer maintains the salaries in effect at the expiration of the contract but does not pay increments.”³⁸

Unions reacted to the court’s decision by advocating for amendments to the Taylor Law. Unions maintained that after the court’s decision, employers were prolonging negotiations to pressure employees and unions, and to rid themselves of provisions in the expired contract that did not concern mandatory subjects of bargaining.³⁹ In 1978 and 1979, the legislature passed bills that would have made it an improper practice for an employer “to refuse to continue all of the terms of

³³ See *NLRB v. Katz*, 369 U.S. 736 (1962).

³⁴ *Id.* at 3065.

³⁵ *Local 342, Long Island Pub. Serv. Employees Union*, 6 P.E.R.B. ¶ 3076 (1973).

³⁶ *Id.* at 312. See generally Mary Helen Moses, *Scope of Bargaining and the Triborough Law: New York’s Collective Bargaining Dilemma*, 56 Albany L. Rev. 53, 77-81 (1992).

³⁷ 363 N.E.2d 1174 (N.Y. 1977).

³⁸ *Id.* at 1177.

³⁹ See Moses, *supra* note 36, at 82.

an expired agreement until a new agreement is negotiated,” but the governor vetoed the bills.⁴⁰ In 1982, however, the governor signed such a bill. In an extraordinary session of the legislature in December 1982, an exception was added specifying that the provision did not apply if the union engaged in a strike.⁴¹ Thus, current Section 209 a-1(e) makes it an improper practice for an employer “to refuse to continue all the terms of an expired agreement until a new agreement is negotiated, unless the employee organization which is a party to such agreement has, during such negotiations or prior to such resolution of such negotiations, engaged in conduct violative of subdivision one of section two hundred ten of this article;” i.e. engaged in a strike.⁴² This provision is often referred to as the “Triborough Law.”⁴³

Unlike the original *Triborough* decision which froze the status quo with respect to mandatory subjects of bargaining, the Triborough Law freezes the status quo with respect to all provisions in the expired contract, including permissive subjects of bargaining. Moreover, the Appellate Division has held that when the employer’s legislature is presented with a bargaining impasse after rejection of factfinding recommendations, it may not “impose a settlement which diminishes employee rights under an expired collective bargaining agreement.”⁴⁴ Although PERB has held that a union waives this protection to the extent that it opts to participate in the legislative process,⁴⁵ there is little incentive for a union to do so. The Taylor Law appears to provide a significant incentive for a union to refrain from striking. As long as it does not strike, the Union is able to maintain the freeze on the

⁴⁰ *Id.* at 83.

⁴¹ *Id.*

⁴² N.Y. Civ. Serv. Code § 209a-1(e).

⁴³ See *Uniform Firefighters of Cohoes v. Cuevas*, 714 N.Y.S.2d 802, 806 App. Div. 2000).

⁴⁴ *County of Niagra v. Newman*, 481 N.Y.S.2d 563 (App. Div. 1984).

⁴⁵ *City of Buffalo*, 19 P.E.R.B. ¶ 3023 (1986).

status quo. Indeed, defenders of the Taylor law point to a substantial decrease in the incidence of strikes since its enactment.⁴⁶

What is clear is that since the Triborough Law, the motive power in New York public sector collective bargaining is the frozen status quo coupled with a heavy dose of mediation by PERB. The urgency that would be provided by a strike deadline is not present and even the lesser urgency that might be provided by a pending interest arbitration or a legislative resolution hearing does not exist. Of course, there are tools that skillful mediators may employ to deal with this.⁴⁷ Nevertheless, bargaining under this model is likely to be prolonged with substantial periods where the parties have no contract. Perhaps the poster child for this is the Buffalo teachers who went more than nine years without a contract.⁴⁸

As it has evolved, the Taylor Law may be comparable to the Railway Labor Act (RLA).⁴⁹ Although the RLA recognizes workers' right to strike, it lists as its first purpose "avoid[ing] any interruption to commerce or to the operation of any carrier engaged therein."⁵⁰ At any time after a party serves notice on the other party of a desire to modify the collective bargaining agreement, either party may request the National Mediation Board to appoint a mediator. The parties then are under a duty to maintain the status quo – the union may not strike and the employer may not change any terms and conditions of employment until the NMB mediator determines that further mediation would be fruitless, has offered the parties arbitration, at least one party has rejected the offer and a thirty-day cooling off period has expired.⁵¹ Even then, if the NMB determines that a strike would deprive any section of the country of essential transportation services, it reports such finding to the President

⁴⁶ See, e.g., Richard E. Casagrande & Deborah Milham, *Why We Defend Triborough*, NYSUT UNITED, Mar. 2011, available at <https://www.nysut.org/news/nysut-united/issues/2011/march-2011/why-we-defend-triborough>.

⁴⁷ See DEBORAH KOLB, *THE MEDIATORS* (1983).

⁴⁸ See Zwara, *supra* note 6, at 221-24.

⁴⁹ 45 U.S.C. §§ 151-88.

⁵⁰ *Id.* § 151a.

⁵¹ §§ 155, 156.

who appoints a Presidential Emergency Board (PEB). The status quo remains frozen while the PEB conducts its proceedings and makes recommendations for resolution. If either party rejects the recommendations, the parties must continue to maintain the status quo for another 30 days.⁵² Thus, although ultimately the union may strike and the employer may make unilateral changes, the RLA's emphasis is on coupling the freezing of the status quo with a heavy dose of mediation to avoid resort to economic warfare. The NMB mediator enjoys very broad discretion in deciding when to release the parties from mediation and the statute envisions prolonged negotiations and mediation as a tool for avoiding strikes and bringing about agreements,. The D.C. Circuit has explained:

It may well be that the likelihood of successful mediation is marginal. That success of settlement may lie in the realm of possibility, rather than confident prediction, does not negative the good faith and validity of the [Mediation] Board's effort. The legislature provided procedures purposefully drawn out, the Board's process may draw on them even to the point that the parties deem "almost interminable."⁵³

Defenders of the Triborough Law argue that the freezing of the status quo and mandating of continued step increases after contract expiration are necessary to offset the bargaining disadvantage that the Taylor Law's strike prohibitions place on unions.⁵⁴ Critics maintain that the Triborough Law has inappropriately tilted the bargaining advantage to unions,⁵⁵ although at least one management advocate has observed that employers can gain bargaining leverage from resisting union efforts to make improvements in wages and benefits retroactive and insisting that step

⁵² *Id.* § 160.

⁵³ *Int'l Ass'n of Machinists v. NMB*, 425 F.2d 527, 540-41 (D.C. Cir. 1970).

⁵⁴ *See, e.g.,* Casagrande & Millham, *supra* note 46.

⁵⁵ *See, e.g.,* TERRY O'NEIL & E. J. MCMAHON, TAYLOR MADE: THE COSTS AND CONSEQUENCES OF NEW YORK'S PUBLIC SECTOR LABOR LAWS 21 (2007), available at <https://www.empirecenter.org/wp-content/uploads/2013/06/Taylor-Made.pdf>; Moses, *supra* note 63; Zwara, *supra* note 6.

increases be considered a cost in calculating the contract settlement.⁵⁶ Regardless of whether the balance requires recalibration, and I do not attempt to address that issue, it is clear that under the Taylor Law as it has evolved the motive power in collective bargaining is the freezing of the status quo plus a heavy dose of mediation. The policy judgment has been made to trade off prolonged contract negotiations for significant reduction in strike incidents.

The next Part examines the Pennsylvania statute which, on its face, is vastly different from the Taylor Law. Whereas the Taylor Law flatly rejects a public employee right to strike under any circumstances and backs that rejection with draconian penalties, the Pennsylvania statute has a relatively liberal public employee right to strike. Yet, as the statute has evolved through labor board and court interpretations, the collective bargaining process closely resembles the Taylor Law's.

III. The Motive Power in Pennsylvania Public Employee Collective Bargaining

In 1970, Pennsylvania enacted its Public Employee Relations Act, also known as Act 195.⁵⁷ As originally enacted, the statute conferred a right to strike on all Pennsylvania public employees except police and firefighters who are covered by another statute which provides for interest arbitration,⁵⁸ and prison and mental hospital guards and court personnel who are granted interest arbitration by Act 195.⁵⁹ In 1972, Pennsylvania enacted Act 88,⁶⁰ which provides separate impasse procedures for public school employees. This paper focuses on Act 195 rather than the special school employee procedures.

⁵⁶ Karlee S. Bolanos, *Understanding Triborough: It is not Just a Complex of Bridges in the City*, MUNI BLOG, June 28, 2012, <https://www.harrisbeach.com/new-york-municipalities-blog/understanding-triborough-it-is-not-just-a-complex-of-bridges-in-the-city/>.

⁵⁷ Pa. Stat. Ann. Tit. 43, §§ 1101.101 - .2301.

⁵⁸ *Id.* § 1101.301(2) (excluding police and firefighters who are covered by another statute which provides for interest arbitration).

⁵⁹ *Id.* § 1101.1001.

⁶⁰ Pa. Stat. Ann. Tit. 24, §§ 11-1101-A to 1172-A.

Act 195 permits mediation if a "dispute or impasse" exists following "a reasonable period of negotiation."⁶¹ It further provides that if no agreement has been reached "21 days after negotiations have commenced, but in no event later than 150 days prior to the 'budget submission date'. . . both parties shall immediately" request the Pennsylvania Bureau of Mediation to intervene.⁶² If the parties do not reach agreement twenty-one days after the start of mediation "or in no event later than 130 days prior to the 'budget submission date,'" the Bureau of Mediation must so advise the Pennsylvania Labor Relations Board (PLRB), which has discretion to invoke factfinding.⁶³ As a matter of policy, the PLRB has invoked factfinding only when the parties jointly request it or the mediator indicates that factfinding would be helpful in settling the dispute.⁶⁴

The PLRB and the courts have interpreted Act 195 to place on the union the burden to take the initiative to ensure that mediation is exhausted prior to a strike. If the employer refuses to join in a request for mediation, the union must seek it unilaterally.⁶⁵

Mediation does not begin until the parties actually meet with the mediator, regardless of the length of time which passes between the mediator's appointment and the first meeting. Strikes which occur less than twenty days after the first mediation session are illegal.⁶⁶ The mandatory mediation period runs twenty calendar days following the first mediation session, however, regardless of whether there are any further mediation sessions held during that period.⁶⁷ If the PLRB fails to invoke factfinding

⁶¹ *Id.* Tit. 43, § 1101.801.

⁶² *Id.*

⁶³ *Id.* § 1101.802.

⁶⁴ See Martin H. Malin, *Public Employees' Right to Strike: Law and Experience*, 26 U.Mich. J. L. Ref. 313, 354 (1993).

⁶⁵ See N. Clarion Cnty. Sch. Dist., 15 Pub. Emp. Rep Pa. ¶ 15208 (PLRB 1984).

⁶⁶ Port Auth. of Allegheny Cnty. v. Amalgamated Transit Union, Div. 85, 383 A.2d 954 (Pa. Commw. 1978); United Trans. Union v. Southeast Pa. Trans. Auth., 347 A.2d 509 (Pa. Commw. 1975).

⁶⁷ Peters Township Sch. Dist. v. Peters Township Fed'n of Teachers, 501 A.2d 237 (Pa. Commw. 1985).

21 days after mediation began, the union may assume that the PLRB has decided that factfinding would not be helpful and the union may lawfully strike.⁶⁸

Act 195 provides for employers to sue to enjoin illegal strikes.⁶⁹ Employer unfair labor practices are not defenses to actions to enjoin illegal strikes.⁷⁰ Employees who defy strike injunctions are subject to prosecution by the employer for contempt and, thereafter, the employer may suspend, demote or discharge the employee.⁷¹ The employer, however, may not engage in self-help against illegally striking employees. It must obtain an injunction followed by a contempt finding if the employee defies the injunction.⁷²

Legal strikes in Pennsylvania may be enjoined upon petition by the employer and a court finding that the strike poses a clear and present danger to public health, safety or welfare.⁷³ As discussed *infra*, this standard makes injunctions more readily available in Pennsylvania than in Illinois and Ohio which require a showing of a clear and present danger to public health and safety. Prior to the 1992 removal of public education from coverage of the bargaining provisions of Act 195, a practice developed whereby strikes in public education that, if continued, would have precluded the school district from complying with the mandate of having 180 school days were enjoined routinely.⁷⁴

With respect to the motive power in Pennsylvania public sector collective bargaining, the most significant development came in 1993 when the Pennsylvania Commonwealth Court decided *Philadelphia Housing Authority v. PLRB*.⁷⁵ The court rejected the analogy to the private sector under the National Labor Relations Act where an employer may unilaterally change terms and conditions of

⁶⁸ Bellefonte Area Educ. Ass'n v. Bd. of Educ., 304 A.2d 922 (Pa. Commw. 1973).

⁶⁹ Pa. Stat. Ann. Tit. 43, § 1101.1002.

⁷⁰ *Id.* § 1101.1004.

⁷¹ *Id.* § 1991.1995,

⁷² City of Scranton v. PLRB, 505 A.2d 1360 (Pa. Commw.1986).

⁷³ Pa. Stat. Ann. Tit. 43, § 1101.1003.

⁷⁴ See Malin, *supra* note 64, at 357-58.

⁷⁵ 620 A.2d 594 (Pa. Commw. 1993).

employment after bargaining to impasse, and approved a PLRB holding that under Act 195 an employer commits an unfair labor practice when it unilaterally changes a mandatory subject of bargaining, even after impasse unless the employees have gone on strike. The court quoted favorably the PLRB's rationale:

In our view, it would not serve the legislature's declared goal of promoting orderly and constructive relationships between public employers and their employees through good faith collective bargaining to allow a public employer to implement its final offer when the employees in the unit have not disrupted the continuation of public services by striking. Unilateral action by an employer during a period of no contract while employees continue to work serves to polarize the process and would encourage strikes by employees who otherwise may wish to continue working under the terms of the expired agreement while negotiations continue.⁷⁶

In other words, the court accepted the PLRB's concern that allowing employers to make unilateral changes after reaching impasse would increase the incidence of public employee strikes. Dissenting Judge Collins expressed a different concern. In his view, not allowing unilateral employer changes following impasse would, in times of fiscal stress, prolong negotiations to the detriment of the public fisc. He wrote:

[T]he ramifications of the instant opinion create a precedent that compels municipal corporations or authorities to continue to operate indefinitely under expired labor agreements regardless of the financial impossibility of doing so. To compel any municipality to maintain financial commitments in perpetuity in the face of a declining population or a shrinking tax base

⁷⁶ *Id.* at 600.

or any other adverse circumstance, creates a precedent in this Commonwealth which is most dangerous and is contrary to the public interest.⁷⁷

Experience since *Philadelphia Housing Authority*, has shown both the majority and the dissent to be correct. Data available from the Pennsylvania Bureau of Mediation goes back only to 2004, but it shows that strikes under Act 195 have become relatively rare events. The data in Table 1 is current through February 8, 2018.

Table 1 Strikes Under Pa. Act 195

Year Contract Expired	Number of Expiring Contracts for Which Notices Were Filed	Strikes for Contracts that Expired This Year
2004	305	1
2005	290	4
2006	296	7
2007	244	2
2008	294	0
2009	282	5
2010	283	0
2011	317	1
2012	285	0
2013	294	1
2014	308	0
2015	280	2
2016	321	1

⁷⁷ *Id.* at 601-02 (Collins, J., dissenting).

2917	290	0
Average	292	1.71

An average of just 1.71 strikes per year with an average of 292 contracts expiring each year over a 14-year period is nothing short of amazing. However, there is also evidence of prolonged negotiations which may have stressed public employer budgets. Over a dissent by Chief Justice Castille, the Pennsylvania Supreme Court rejected a petition by the City of Philadelphia for extraordinary relief that would have enabled the court to consider the rule established in *Philadelphia Housing Authority*.⁷⁸ Negotiations for a new contract between the parties had been going on for four years but, because the union had not struck, wages and working conditions were frozen at levels provided for in the expired agreement.⁷⁹

The calibration of the balance of interests under Act 185 is somewhat different from the calibration under the Taylor Law and the Triborough Law. The status quo is frozen only with respect to mandatory subjects of bargaining and employees are not entitled to step increases provided in the expired contract.⁸⁰ Furthermore, Act 195 evolved from a very different starting point, i.e. reliance on a right to strike as the motive power, than the Taylor Law. However, they have ended up in the same place. It appears that under *Philadelphia Housing Authority*, the motive power in collective bargaining under Act 195 has evolved from relying on a right to strike to the freezing of the status quo even after impasse, until agreement is reached, as long as the union does not strike. In both New York and Pennsylvania the policy trade-off has been significant reduction in the incidence of strikes versus

⁷⁸ *City of Philadelphia v. AFSCME Dist. 33*, 68 A.3d 323 (Pa. 2013).

⁷⁹ *See id.* at 324 (Castille, J. dissenting).

⁸⁰ *See Neshaminy Fed'n of Teachers Local Union 1417 v. PLRB*, 986 A.2d 908 (Pa. Commw. 2009); *Pa. State Park Officers Ass'n v. PLRB*, 854 A.2d 674 (Pa. Commw. 2004).

prolongation of collective negotiations. The next Part considers Illinois and Ohio, two states where the right to strike provides a good deal of the motive power in public sector collective bargaining.

IV. The Motive Power in Public Sector Collective Bargaining in Illinois and Ohio

In 1983, Illinois and Ohio enacted their public sector collective bargaining statutes which took effect in 1984. Both states recognized a right to strike for most of their public employees, but had markedly different conditions for a lawful strike to occur. The two states thus provided an unintended but natural experiment in public sector collective bargaining.

Illinois has separate statutes and separate labor relations boards governing public education and the rest of the public sector. The Illinois Educational Labor Relations Act (IELRA)⁸¹ is administered by the Illinois Educational Labor Relations Board (ILRB).⁸² The Illinois Public Labor Relations Act⁸³ is administered by the Illinois Labor Relations Board, which is divided into two panels, a Local Panel with jurisdiction over Chicago, Cook County and other specialty districts serving the city and county, and a State Panel with jurisdiction over the state and all other units of local government.⁸⁴ Most Illinois public employees have the right to strike. Excepted are law enforcement, firefighters, security employees (primarily corrections officers) and paramedics employed by fire departments, all of whom have a right to interest arbitration.⁸⁵

Until 2011, the requirements for a lawful strike under both statutes were essentially the same. The employees had to be represented by an exclusive representative, the collective bargaining agreement must have expired or no collective bargaining agreement was ever in effect, mediation had been used unsuccessfully, there was no agreement to use interest arbitration, and at least five days'

⁸¹ 115 ILCS 5/1 to 5/21.

⁸² *Id.* 5/5.

⁸³ 5 ILCS 315/1 to 315/28.

⁸⁴ *Id.* 315/5.

⁸⁵ *Id.* 315/14.

notice of intent to strike was given.⁸⁶ In 2011, the legislature amended the strike provisions of the IELRA. For all jurisdictions, other than the Chicago Public Schools, after the parties have been in mediation for at least 15 days, either party or the mediator may initiate a posting process. Each party provides the mediator with its final offer and a cost analysis of the offer. The mediator transmits them to the IELRB which posts them on its website. The final offers remain posted on the IELRB website until an agreement is reached.⁸⁷ The union may lawfully strike after the final offers have been posted for at least 14 days and the union has given at least 10 days' notice of its intent to strike.⁸⁸

Since 2011, for a strike by employees of the Chicago Public Schools to be lawful, the parties must first resort to factfinding. The issuance of the factfinder's recommendations and their rejection by either party leads to the publication of the recommendations and a 30-day cooling off period.⁸⁹ For the strike to be lawful, it must be authorized by a vote of at least 75% of the union's members.⁹⁰ The union must also give at least 10 days' notice of intent to strike.⁹¹

At the time the special rules for the Chicago Public Schools were enacted, proponents declared that the requirement of strike authorization from at least 75% of the union membership meant that the Chicago Teachers Union would find it impossible to strike.⁹² They were wrong. Indeed, the strategy of deterring strikes by requiring a 75% authorization vote likely backfired.

⁸⁶ *Id.* 315/17(a); 115 ILCS 5/13.

⁸⁷ 115 ILCS 5/12(a-5).

⁸⁸ *Id.* 5/13(b)(2), (b)(3).

⁸⁹ *Id.* 5/12(a-10), 13(b)(2.5).

⁹⁰ *Id.* 5/13(b)(2.10).

⁹¹ *Id.* 5/13(b)(3).

⁹² See STEVEN K. ASHBY & ROBERT BRUNO, A FIGHT FOR THE SOUL OF PUBLIC EDUCATION: THE STORY OF THE CHICAGO TEACHERS STRIKE (2016).

In the first collective bargaining negotiations after the new rules took effect, the Chicago Teachers Union struck for seven school days. The strike began on Monday, September 10, 2012.⁹³ The parties reached a tentative agreement in the ensuing weekend. However, on Sunday, September 16, the union's House of Delegates did not endorse the tentative agreement.⁹⁴ The union leadership suspended the meeting until the following Tuesday, September 18. At the reconvened meeting, the delegates endorsed the tentative agreement and the schools reopened the following day.⁹⁵

What happened? The new requirement of a 75% strike authorization vote presented the union leadership with a challenge. They had to motivate the overwhelming majority of union members to vote. To do this, the union leadership engaged in a very effective internal organizing campaign.⁹⁶ They motivated the rank-and-file emotionally as well as intellectually and maintained the fervor throughout the strike with massive rallies.⁹⁷ The leadership became victims of their own success. The fervor of the membership made it impossible for the leadership to sell the tentative agreement to the House of Delegates on the first try that Sunday.

Lawful strikes in Illinois may be enjoined upon a showing that the strike poses a clear and present danger to public health and safety.⁹⁸ During the debates over the IPLRA, the legislature expressly rejected the Pennsylvania approach of enjoining strikes posing a clear and present danger to the public health, safety or welfare, in favor of the narrower public health & safety standard.⁹⁹ Thus,

⁹³ See Noreen S. Ahmed-Ullah et al., *Picket Lines Up After Teachers, CPS Fail to Prevent Strike*, CHI. TRIB., Sept. 10, 2012, http://articles.chicagotribune.com/2012-09-10/news/chi-chicago-public-schools-chicago-teachers-union-contract-talks-strike_1_picket-lines-teachers-strike-president-david-vitale.

⁹⁴ See Monica Davey, *As Chicago Strike Goes On, Mayor Digs In*, N.Y. TIMES, Sept. 17, 2012, <http://www.nytimes.com/2012/09/18/education/chicago-teachers-strike-enters-second-week.html?action=click&contentCollection=U.S.&module=RelatedCoverage®ion=Marginalia&pgtype=article>.

⁹⁵ See Monica Davey & Steven Yaccino, *Teachers End Chicago Strike on Second Try*, N.Y. TIMES, Sept. 18, 2012, <http://www.nytimes.com/2012/09/19/us/vote-scheduled-on-chicago-teachers-contract.html>

⁹⁶ See ASHBY & BRUNO, *supra* note 92.

⁹⁷ *Id.*

⁹⁸ 5 ILCS 315/8; 115 ILCS 5/13.

⁹⁹ See Martin H. Malin, *Implementing the Illinois Educational Labor Relations Act*, 61 CHI.-KENT L. REV. 101, 131-33 (1985).

unlike Pennsylvania where a pattern developed of enjoining strikes in public education when their duration threatened the ability to have a 180-day school year,¹⁰⁰ efforts to enjoin strikes in Illinois public education have been rare and unsuccessful.

In the 2012 Chicago teachers strike, after the union's House of Delegates failed to endorse the tentative agreement, the city sued the next day, Monday, and moved for a temporary restraining order. The court denied the motion and scheduled it for hearing the following Wednesday, i.e., the day after the scheduled reconvening of the union's House of Delegates. The House of Delegates' approval of the tentative agreement on Tuesday rendered the law suit moot.¹⁰¹ During a strike in fall 2017 by support staff in Palatine Township Elementary School District 15, a circuit court judge issued a temporary restraining order finding that the absence of nurses and special education aides posed a clear and present danger to special education students' health and safety,¹⁰² but dissolved the injunction a week later finding that the school district failed to establish the clear and present danger.¹⁰³

Outside of public education, the IPLRA requires an employer seeking to enjoin a lawful strike to petition the ILRB for a determination that the strike poses a clear and present danger and allows a suit to enjoin the strike only upon ILRB authorization.¹⁰⁴ If a court grants the injunction request it may order a return to work only by those employees necessary to avoid the clear and present danger and the bargaining unit must proceed to interest arbitration.¹⁰⁵ As I have previously summarized:

[T]he Illinois statutes rely primarily on the threat and use of economic weapons to settle bargaining impasses. The statutes minimize labor board and court intervention and place

¹⁰⁰ See *supra* notes 73-74 and accompanying text.

¹⁰¹ See Emmeline Zhao, *Chicago Teachers Strike Suspended, Students Head Back to School Wednesday*, HUFFINGTON POST, Sept. 18, 2012, https://www.huffingtonpost.com/2012/09/18/chicago-teachers-strike-s_n_1895082.html.

¹⁰² See Bob Sunsjara, *Judge Orders District 15 Nurses, Aids Back to Work*, DAILY HERALD, Oct. 17, 2017, <http://www.dailyherald.com/news/20171017/judge-orders-district-15-nurses-aides-back-to-work>.

¹⁰³ See *Judge Dismisses Case, Reaffirms Workers' Right to Strike*, IEA-NEA Press Release, Nov. 7, 2017, <https://ieane.org/2017/11/07/judge-dismisses-case-reaffirms-workers-right-to-strike/>.

¹⁰⁴ 5 ILCS 315/18(a).

¹⁰⁵ *Id.*

maximum control in the hands of the parties. Although both statutes require prestrike mediation, the parties control the timing of mediation and whether they will use any other third-party assistance.¹⁰⁶

Most public employees in Ohio have a right to strike after exhausting statutory impasse procedures. Exceptions are law enforcement, firefighters, emergency medical or rescue personnel, exclusive nurse's units, employees of the state school for the deaf or the state school for the blind, employees of any public employee retirement system, corrections officers, guards at penal or mental institutions, psychiatric attendants employed at mental health forensic facilities, and youth leaders employed at juvenile correctional facilities, all of whom have a right to interest arbitration.¹⁰⁷

Fifty days prior to the expiration date of a collective bargaining agreement, either party may petition the State Employment Relations Board (SERB) to intervene and 45 days prior to the expiration date, SERB must appoint a mediator.¹⁰⁸ Anytime thereafter, either party may initiate factfinding and SERB must appoint a factfinding panel of up to three members within 15 days of a request.¹⁰⁹ SERB provides the parties with a list of five factfinders and the parties have seven days to notify SERB of their selection of one to three factfinders. If the parties fail to so notify SERB, SERB appoints a single factfinder.¹¹⁰ No later than 14 days following appointment, the factfinder(s) issue(s) findings of fact and recommendations for settlement and serve(s) them on the parties and SERB.¹¹¹ Upon receipt the union must make the findings and recommendations available to all of its members and schedule an election within seven days.¹¹² The election must be by secret ballot.¹¹³ Within 24 hours of the vote tally, and not

¹⁰⁶ Malin, *supra* note 64, at 342.

¹⁰⁷ Ohio Rev. Code § 4117.14(D)(1).

¹⁰⁸ Ohio Rev. Code § 4117.14(C)(2).

¹⁰⁹ *Id.* § 4117.14(C)(3).

¹¹⁰ Ohio Adm. Code § 4117-9-05(B).

¹¹¹ *Id.* § 4117-9-05(L).

¹¹² *Id.* § 4117-9-05(M).

¹¹³ *Id.*

later than 24 hours following the seven-day period after issuance of the findings and recommendations, the union must serve on the employer and SERB the results of the vote. Failure to serve notice of rejection of the recommendations in a timely manner constitutes acceptance of the recommendations.¹¹⁴ A similar timeline applies to the employer which must submit the findings and recommendations to its legislative governing body upon receipt.¹¹⁵ The legislative body must vote within seven days and the employer must serve the results of the vote on the union and SERB within 24 hours and not later than 24 hours following the seven-day period. Failure to serve notice of rejection in a timely manner constitutes acceptance of the recommendations.¹¹⁶

Rejection of the recommendations requires a vote by three-fifths of all eligible voters, i.e. all members of the legislature and all members of the union.¹¹⁷ If either party rejects the recommendations, SERB publicizes them for seven days.¹¹⁸ The union may then strike, provided it gives ten days' notice of its intent to strike.¹¹⁹ In *East Cleveland Education Association*, SERB held that intermittent strikes are not authorized by the statute.¹²⁰

An employer may sue to enjoin an illegal strike and employer unfair labor practices are not a defense.¹²¹ The employer may also petition SERB for a determination that the strike is not authorized by the statute and SERB must rule within 72 hours.¹²² If SERB finds the strike unauthorized, the employer must give striking employees 24 hours' notice, after which if the employees remain on strike, the

¹¹⁴ *Id.*

¹¹⁵ *Id.* § 4117-9-05(N).

¹¹⁶ *Id.*

¹¹⁷ *Id.* § 4117-9-05(O).

¹¹⁸ Ohio Rev. Code § 4117(C)(6)(a).

¹¹⁹ *Id.* §4117(D)(2).

¹²⁰ 11 Ohio Pub. Employee Rep. ¶ 1333 (SERB 1994).

¹²¹ Ohio Rev. Code §§ 4117.15(A),(B)

¹²² *Id.* §4117.23(A).

employer may suspend or terminate the strikers, freeze their compensation for a year and deduct from their wages two days' pay for each day on strike. The penalties are appealable to SERB.¹²³

As in Illinois, lawful strikes may be enjoined if they pose a clear and present danger to public health and safety.¹²⁴ An employer may obtain a temporary restraining order from the court of common pleas which may last no longer than 72 hours.¹²⁵ During the period that the order is in effect, SERB must determine whether the clear and present danger standard has been met. If SERB finds a clear and present danger, the court may extend the injunction to a total maximum period of 60 days.¹²⁶ During the period the injunction is in effect, SERB mediates and the mediator may decide to make the mediation sessions public. After 45 days, the mediator may issue a public report including each party's position statement and offers for settlement.¹²⁷ I previously contrasted the Ohio approach to Illinois's:

In general, Ohio's approach to public sector impasse resolution differs considerably from Illinois' approach. Ohio places such substantial restraints on the parties' use of economic weapons that it does not rely on the fear of economic warfare as the primary method of settling bargaining impasses. Rather, it relies primarily on fact-finding and on public pressure to bring the parties to an agreement. The extent of the reliance on fact-finding is evident from the requirement of fact-finding and the specific procedural detail required to reject fact-finder recommendations. A minor procedural error results in the recommendations being deemed accepted. The extent of the reliance on publicity is evident from the requirement that the OSERB publicize the fact-finder's recommendations, and from the authorization of public mediation sessions and public mediator reports following the enjoining of strikes which endanger public health and safety. This

¹²³ *Id.* § 4117.23(B).

¹²⁴ *Id.* § 4117.16.

¹²⁵ *Id.* § 4117.16(A).

¹²⁶ *Id.*

¹²⁷ *Id.* § 4117.16(B).

contrasts markedly with the Illinois labor boards' rules, which provide for private negotiations and mandate mediator confidentiality.¹²⁸

In 1993, I published a study of the effects of legalizing public employee strikes in Illinois and Ohio.¹²⁹ Although the pre- and post-legalization raw data were not completely comparable, the raw data clearly showed a reduction in strikes in both states despite an increase in bargaining. I summarized the raw data:

[T]he experiences in Ohio and Illinois run counter to the expectation that enactment of comprehensive public sector bargaining laws containing a right to strike would increase the incidence of strikes. Despite an increase in bargaining activity in the first eight years under the Ohio statute, strikes averaged 13.75 per year, compared with an average of 55.71 strikes per year from 1974 to 1980. In the first eight years of the Illinois statute, strikes averaged 15.75 throughout public education, despite an increase in bargaining, compared to an average of 24.56 strikes per year among K-12 teachers prior to the IELRA.¹³⁰

After comparing the raw data, I factored in the inflation and unemployment rates for each year. Single and multivariate analyses of the Ohio data showed a very strong correlation between the change in the law and the reduction in strikes in that state.¹³¹ The change in the law was consistently associated with a decrease of more than 35 strikes per year.¹³² In Illinois, the correlation was much weaker with the change in the law being associated with decreases of between seven and eleven strikes per year and the result, except in one instance, was not statistically significant.¹³³ I concluded that the data “do not firmly support a conclusion that the legalization of public employee strikes in Illinois and Ohio caused

¹²⁸ Malin, *supra* note 64, at 348.

¹²⁹ Malin, *supra* note 64.

¹³⁰ *Id.* at 372-73.

¹³¹ *Id.* at 374.

¹³² *Id.* at 374 n.301.

¹³³ *Id.* at 374-76.

their frequency to decrease . . . [but] there is no evidence that legalization caused strikes to increase in frequency.”¹³⁴

Why was the correlation between the change in the law and the reduction in strike incidence so much stronger in Ohio? One major difference between the two statutes was Ohio’s requirement of factfinding and rejection of the factfinder recommendations in accordance with stringent procedural requirements compared to Illinois’s requirement of resort to mediation. A key difference in the experience under the two statutes was in strike duration. In Illinois, more than 60% of all strikes lasted ten days or fewer and only one strike lasted more than 30 days, whereas in Ohio, fewer than half of the authorized strikes were over in ten or fewer days and more than 16% lasted more than 30 days.¹³⁵ A Chi Square analysis looking at strike duration in five-day intervals showed that strikes in Ohio were of significantly greater duration with the result being significant below the .01 confidence level.¹³⁶

It is likely that the longer duration of strikes in Ohio is due to the requirement of pre-strike factfinding. As I explained in my 1993 article:

Although Ohio's fact-finding process has contributed to the settlement of many contracts without a strike, it also is likely that when a party rejects a fact finder's report and a strike ensues, the fact-finding process adds to the difficulty of settling the strike. A fact-finding hearing is litigation and is therefore adversarial in nature. Parties are likely to perceive the fact finder's report in terms of whether they have won or lost. Certainly, a party that votes to reject a fact finder's report believes that it has lost. The party that has not rejected it is likely to react by saying, “Why should I change anything? A neutral objective fact finder found what is right and fair.”

¹³⁴ *Id.* at 378.

¹³⁵ *Id.* at 380.

¹³⁶ *Id.*

Thus, the fact-finding may serve to further polarize the parties, making the impasse more difficult to settle. This polarization can be particularly acute if the party that did not reject the fact finder's report views the report as vindicating its position. . . . At a minimum, the requirement of fact-finding injects a new issue at the bargaining table--why should we deviate from the fact finder's recommendations?--which diverts attention from the settlement issues. The fact-finding also may polarize the parties further and make it more difficult for the party that did not reject the fact finder's recommendation to change its position.¹³⁷

Other data reinforced the link between mandatory pre-strike factfinding and increase in strike duration. Ohio allows parties to adopt their own mutually agreed dispute settlement process (MAD),¹³⁸ and in Ohio a primary reason for adopting a MAD was to eliminate the factfinding process.¹³⁹ A comparison of the experience with negotiations pursuant to a MAD and negotiations under the statutory procedure revealed that there were more strikes under MADs.¹⁴⁰ Although strikes under MADs were equally likely to be resolved within ten days as strikes under the statutory procedures, over one-fourth of strikes under the statutory procedure lasted more than 30 days compared to less than one-eighth of strikes under MADs.¹⁴¹ A chi square analysis comparing strike duration in five day increments found strikes under the statutory procedure lengthier than strikes under MADs with the difference being significant at the .025 confidence level.¹⁴²

Data from Pennsylvania reinforced the link between factfinding and strike duration. In Pennsylvania, PLRB has discretion to impose pre-strike factfinding and does so when the parties or the mediator indicates it could be helpful. Yet strikes without factfinding were twice as likely as strikes

¹³⁷ *Id.* at 383-84.

¹³⁸ Ohio Rev. Code § 4117.14(C).

¹³⁹ Malin, *supra* note 64, at 384.

¹⁴⁰ *Id.* at 385.

¹⁴¹ *Id.* at 386-89.

¹⁴² *Id.*

following factfinding to be resolved within ten days and strikes following factfinding were more than twice as likely to last more than 30 days as strikes without it. A chi square analysis found strikes following factfinding were significantly longer with the result significant at the .05 confidence level.¹⁴³

In Illinois, the motive power in public sector collective bargaining is the strike. In Ohio, it is a combination of factfinding and a limited right to strike. Experience in the two states shows a clear policy trade-off: fewer strikes when the right to strike is limited by a requirement that the parties first resort to factfinding but those strikes that do occur last significantly longer.

Recent experience in Illinois and Ohio is particularly interesting. Data from SERB's annual reports show that Ohio had a total of 209 strikes during the fourteen year period through Fiscal Year 2008, which ended on June 30, 2008, or an average of approximately fifteen strikes per year. As the economy declined, so did the number of strikes, with only two in Fiscal Year 2009 and none in Fiscal Year 2010. There were none again in Fiscal Year 2011, One in Fiscal Year 2012, two in Fiscal Year 2013, one in Fiscal Year 2014 and two in Fiscal Year 2015.¹⁴⁴ Thus, strikes came close to disappearing in Ohio during the recession and have not come back.

In Illinois, the annual reports of the Illinois Educational Labor Relations Board are summarized in Table 2.

Table 2 Strikes Under the IELRA

Fiscal Year	Strikes	Strike Notices
1998-99	9	43
1999-2000	9	43
2000-01	7	50

¹⁴³ *Id.* at 390-93.

¹⁴⁴ Unfortunately, SERB stopped publishing strike data with its 2016 annual report.

2001-02	10	40
2002-03	7	47
2003-04	10	46
2004-05	4	36
2005-06	5	36
2006-07	3	24
2007-08	9	34
2008-09	1	11
2009-10	4	13
2010-11	2	23
2011-12	5	19
2012-13	6	23
2013-14	3	21
2014-15	3	14
2015-16	5	11
2016-17	5	14

Here too, there was a dramatic decline in strikes and in notices of intent to strike with the Great Recession. This is particularly noteworthy, as the recession marked a highly concessionary negotiating environment. This is likely due to the nature of a strike in the public sector. Whereas in the private sector, a strike is an economic weapon, in the public sector a strike does not interrupt the primary source of the employer's revenues – collection of taxes. In public education, where states mandate 180 school days as a condition of school district receipt of state aid, the prevalent practice of making up strike days means that neither the employer nor the striking workers are likely to lose revenue.

Consequently, in the public sector, the strike is primarily a political weapon. Success depends on the union's ability to garner support for its strike effort. During the recession, unions realized that a strike when unemployment was in double digits would not likely garner much public support. The decline in the number of notices of intent to strike reflects that unions were not even threatening to strike during these difficult economic times. In contrast, the use of interest arbitration by employees prohibited from striking increased dramatically during the recession.¹⁴⁵

Since the recession, unemployment rates have plummeted but wages have remained stagnated. Consequently, recognition of the low likelihood that strikes will garner public support has continued to keep strikes and threats to strike low. The high point for strikes in Illinois education since the recession came in 2012-13. The IELRB reports strike data by fiscal year but the state's fiscal year runs July 1 – June 30. Hence, the fiscal year reports roughly parallel the school year. The first strike in the 2012-13 school year was the Chicago Teachers Union strike against the Chicago Board of Education. The union did a masterful job of garnering public support. It emphasized such issues as overcrowded unairconditioned classrooms and the use of excessive classroom time for standardized testing, issues that garnered considerable public support. The union also worked closely with community groups and staged public rallies to maintain public support. The strike was very successful.¹⁴⁶ It is possible that the Chicago Public Schools strike inspired others. That inspiration, however, appears to have worn off by the next school year.

In New York and Pennsylvania, the motive power is the freezing of the status quo until agreement is reached. This trades off a lower rate of strikes for more prolonged bargaining. In Illinois, the motive power of a right to strike provides an urgency not present in New York and Pennsylvania. But just as strikes still occur in New York and Pennsylvania, prolonged bargaining can still occur in

¹⁴⁵ See Martin H. Malin, *Two Models of Interest Arbitration*, 28 Ohio State J. Disp. Resol. 145, 154-55 (2013).

¹⁴⁶ See Ashby & Bruno, *supra* note 92.

Illinois. The outlier in this regard is the AFSCME – State of Illinois negotiations which have been going on since 2015.¹⁴⁷

The collective bargaining agreement expired on June 30, 2015. The parties began negotiations for a successor on February 9, 2015. They entered into agreements to negotiate in good faith without threat of strike or lockout until reaching impasse. They further agreed that if there was a dispute over whether impasse had been reached, they would jointly submit the issue to the ILRB.

On January 8, 2016, the State declared impasse, presented its final offer and broke off negotiations. A week later the State filed unfair labor practice charges alleging that AFSCME's refusal to join the State is petitioning the ILRB to determine whether the parties were at impasse amounted to a failure to bargain in good faith. The State sought a declaration from the ILRB that it was free to implement its final offer. Interestingly, although there is dicta stating that an employer may unilaterally implement following impasse, no authority in Illinois has expressly so held.¹⁴⁸

On February 22, 2016, AFSCME filed unfair labor practice charges against the State, alleging, among other things that the State breached its duty to bargain when it cut off negotiations on January 8. AFSCME's charges enabled the ILRB to reach the impasse issue. It made the State's claim that the parties were at impasse, in effect, an affirmative defense to the failure to bargain charge. Had AFSCME not filed the charge, the ILRB would have to have decided whether it had authority to, in effect, provide a declaratory judgment or advisory opinion.¹⁴⁹

¹⁴⁷ The following description of the AFSCME – State negotiations comes from the decisions of the ILRB Administrative Law Judge and the Board, State of Ill. Dept. of Central Mgmt. Servs. and AFSCME Council 31, Nos. S-CB-16-017 & S-CA-16-087 (ILRB ALJ Sept. 2, 2016), *aff'd in part, rev'd in part*, Nos. S-CB-16-017 & S-CA-16-087 (ILRB Dec. 13, 2016) and from Martin H. Malin, *The AFSCME – State of Illinois Negotiations: Traveling in Uncharted Waters*, ILL. PUBLIC EMPLOYEE RELATIONS REP., Winter 2017, at 2.

¹⁴⁸ See Malin, *supra* note 147, at 14-16. The ILRB, in finding that the parties were at impasse, expressly disclaimed deciding whether the State was free to unilaterally implement all or even part of its final offer. *Id.* at 14.

¹⁴⁹ See *id.* at 9.

The ALJ found that the parties were at impasse on certain issues but were still making progress on others. With respect to a third group of issues, she found any impasse that might exist was tainted by the State's failure to provide AFSCME with relevant information that the union had requested. She rejected AFSCME's position that she order the parties to resume bargaining on all issues but also rejected the State's position that the issues on which she found impasse were sufficiently critical to the overall negotiations that the State was free to implement its final offer unilaterally. Instead, she recommended an order allowing the State to implement with respect to those issues on which the parties were at impasse but requiring that they resume bargaining on all others and that the State provide the requested information.

Both parties filed exceptions with the ILRB. The ILRB adopted the single critical issue doctrine developed under the National Labor Relations Act, found that the parties were at impasse over subcontracting which was a single critical issue and dismissed AFSCME's charge that the State had breached its duty by breaking off negotiations on January 8, 2016. The ILRB declined to rule on whether the State could unilaterally implement because that issue was not before it. Both parties appealed and on March 1, 2017, the Illinois Appellate Court granted AFSCME's motion for a stay.¹⁵⁰ The stay has stopped the State from unilaterally implementing and there is not likely to be any further progress in negotiations until after the gubernatorial election in November.

The extraordinary, for Illinois, duration of the AFSCME-State negotiations appears attributable to a high level of risk aversion on each side. AFSCME appears to be very reluctant to strike, probably realizing that in times of generally stagnant wages, a strike has a high risk of not garnering public support. The State appears unwilling to act unilaterally unless it has the prior approval of the labor board. The result is the current stalemate.

¹⁵⁰ State of Ill. v. AFSCME Council 31, 2017 Ill. App. (4th) 160827 (Mar. 1, 2017).

The other major outlier in Illinois's experience with the strike as motive power in its public sector negotiations poses more substantial policy issues. It occurred in what was then the Homer School District in rural Champaign County in 1986. The strike began on October 17, 1986 and did not end until after the end of the school year. The resulting contract did not resolve two of the issues that precipitated the strike. The students lost essentially a year of schooling, the school district lost considerable state aid and ultimately had to merge with another district and most of the striking teachers never returned to their jobs.¹⁵¹ Policymakers evaluating a right to strike as the motive power must determine whether to run the risk of an outlier strike such as Homer.

The true antidote to strikes is interest arbitration. As demonstrated in a comprehensive study of police and firefighter interest arbitration under the Taylor Law,¹⁵² interest arbitration provides almost total immunity to strikes. The next section examines Florida and Michigan which have neither a right to strike, a Triborough Law, nor interest arbitration.

V. Florida and Michigan: What Motive Power in Public Sector Collective Bargaining?

The Florida approach to impasse resolution is quite similar to what the Taylor Committee recommended. Florida prohibits strikes by all public employees.¹⁵³ Strikes may be enjoined by the circuit court.¹⁵⁴ Defiance of a court's injunction is punishable by fines for contempt of up to \$5,000 for the union and \$50 to \$100 per day for union leaders.¹⁵⁵ Striking unions may be liable to the employer for damages incurred by the employer because of the strike.¹⁵⁶ The Florida Public Employment

¹⁵¹ See Malin, *supra* note 64, at 397-98; Tim Mitchell & Rebecca Mabry, *Two Decades Later, Homer Teachers Strike Still Sore Subject*, THE NEWS-GAZETTE, Dec. 12, 2006, available at <http://www.news-gazette.com/news/education/2006-11-12/two-decades-later-homer-teachers-strike-still-sore-subject.html>.

¹⁵² Thomas Kochan et al., *The Long Haul Effects of Interest Arbitration: The Case of New York State's Taylor Law*, 63 INDUS. & LAB. REL. REV. 565, 569 (2010) (finding that in the thirty years since New York adopted interest arbitration there was not a single complete work stoppage among police or firefighters in the state).

¹⁵³ Fl. Stat. § 447.505.

¹⁵⁴ *Id.* §§ 447.507(1),(2)

¹⁵⁵ *Id.* § 447.507(3).

¹⁵⁶ *Id.* § 447.507(4).

Relations Commission (PERC) may suspend or revoke the striking union's certification, revoke its dues checkoff and fine it up to \$20,000 per day for each day of the strike or an amount equal to the cost to the public of the strike.¹⁵⁷ PERC may also, after hearing, discharge striking employees or subject them to probationary periods of 18 months and disqualify them from raises for one year.¹⁵⁸

After a reasonable period of negotiations, either party may secure the appointment of a mediator, except that mediation is prohibited when the governor is the employer.¹⁵⁹ Thereafter, upon the request of either party, PERC appoints a "special magistrate," who is, in effect, a factfinder, except no magistrate is appointed where the governor is the employer.¹⁶⁰ The parties may agree to waive the special magistrate step in the process.¹⁶¹ The magistrate conducts hearings and issues recommendations for resolution. Parties may reject all or part of the recommendations but if they fail to do so within 20 calendar days, the recommendations are deemed accepted.¹⁶² When recommendations are rejected, the employer's chief executive officer and the union submit their positions, along with the magistrate's recommendations to the employer's legislative body which holds hearings and takes "such action as it deems to be in the public interest, including the interest of the public employees involved."¹⁶³ The parties must incorporate the legislature's determinations into their collective bargaining agreement and the union must submit the agreement for employee ratification. If the employees fail to ratify, the legislative resolution goes into effect anyway but only for the first fiscal year that was the subject of the negotiations.¹⁶⁴

¹⁵⁷ *Id.* § 447.507(6).

¹⁵⁸ *Id.* § 447.507(5).

¹⁵⁹ *Id.* § 447.403(1).

¹⁶⁰ *Id.* § 447.403(2).

¹⁶¹ *Id.*

¹⁶² *Id.* § 447.403(3).

¹⁶³ *Id.* § 447.403(4).

¹⁶⁴ *Id.* § 447.404(4).

PERC and the Florida courts have treated the legislature as a quasi-adjudicative body for impasse proceedings. For example, during the legislative resolution process, neither party may engage in ex parte contacts with the legislators.¹⁶⁵ Moreover, the chief executive, such as the mayor, has no authority to veto the legislature's resolution.¹⁶⁶ The Florida District Court of Appeal has recognized that often the legislators will also be the negotiators, creating a situation fraught with peril:

[F]requently, the negotiator and the legislative body are one and the same body wearing two hats. In this case, the Orlando City Commission is the public employer responsible for negotiating, in an adversary setting, a collective bargaining contract with the City's firefighters. Yet once a contract impasse occurs, the City Commission must put on its legislative hat because it is also the legislative body. It must depart from its adversary role and suddenly become neutral, an awkward position because the City Commission must adjudicate disputes as a legislative body to which it is a party in interest as a public employer. This situation becomes very difficult in cases of acrimonious contract disputes where the sides have polarized and waged political war through the news media.¹⁶⁷

When the employer is the governor, there is no special magistrate proceeding. Instead, the issues in dispute are referred to a legislative committee which conducts hearings, followed by legislative resolution of the contested issues.¹⁶⁸ Moreover, because the governor's veto power is rooted in the Florida Constitution, the governor may veto the legislative determination, at least when that determination is part of an appropriations bill.¹⁶⁹

¹⁶⁵ City of Jacksonville, 15 F.P.E.R. ¶ 2237 (PERC 1989).

¹⁶⁶ Dade Cnty. Police Benevolent Ass'n v. Miami-Dade Cnty. Bd. of Cnty. Comm'rs, 160 So.3d 582 (Fla. App. 2015).

¹⁶⁷ City of Orlando v. Int'l Ass'n of Fire Fighters Local 1365, 384 S.2d 941, 945 (Fla. App. 1980) (citation omitted).

¹⁶⁸ Fla. Stat. §§ 447.403(2)(b), (5)(a). The constitutionality of these provisions was upheld in Florida Pub. Employees Council 79, AFSCME v. Bush, 860 So.2d 992 (Fla. App. 2003).

¹⁶⁹ Int'l Ass'n of Fire Fighters Local S-20 v. State, 221 So.3d 736 (Fla. App. 2017).

The Florida approach which largely embodies the approach recommended by the Taylor Committee is not true collective bargaining. It is the employer that ultimately determines the resolution of negotiation impasses. The Taylor Committee recognized this and expressly declined to label what it recommended as collective bargaining.¹⁷⁰ Furthermore, it is important to realize that the Taylor Committee did not view affording employees a voice in determining their terms and conditions of employment as an end in itself; rather it was a means to the ultimate end of preventing strikes. Vesting final authority over employees' terms and conditions of employment with the legislature recognized the democratic principle of legislative supremacy.

The Taylor Committee, and the Florida approach, however, do not take into account a key reason for public employee collective bargaining. When employees' wages and working conditions are left to be decided in the political process, employees and their unions are inherently outnumbered by members of the public who as users and purchasers of the employees' services desire greater and better services at the lowest possible cost.¹⁷¹ Viewed in this light, a strike puts pressure on the very users and purchasers who outnumber the employees, causing them to reevaluate their cost-benefit calculations.¹⁷²

The recent West Virginia teachers strike illustrates this phenomenon. Public employees in West Virginia have no collective bargaining rights and strikes are prohibited. Teacher compensation is set by state statute. When the state legislature, catering to the desires of the majority of the public who desired to keep the costs of public education to a minimum, enacted pay raises of 2% in the first year

¹⁷⁰ Taylor Committee Report, *supra* note 2, at 11 ("The term 'collective bargaining' has thus come to denote a type of joint-determination by unions and private management which . . . cannot be transferred literally to the public employment sector. An objective evaluation of the questions before us will be assisted, we believe, by use of the term 'collective negotiations' to signify the participation of public employees in the determination of at least some of their conditions of employment . . .").

¹⁷¹ See Clyde W. Summers, *Public Employee Bargaining: A Political Perspective*, 83 YALE L.J. 1156 (1974).

¹⁷² See Clyde W. Summers, *Bargaining in the Government's Business: Principles and Politics*, 18 U. TOL. L.REV. 265, 27-79 (1987).

and 1% in the following two years, raises that were offset by increases in the cost of health insurance,¹⁷³ teachers struck shutting down schools state-wide for nine days. This caused the public through their legislative representatives to reevaluate their cost-benefit calculations. The strike ended when the governor signed legislation giving teachers a 5% raise.¹⁷⁴

The motive power in public sector collective bargaining in Michigan has changed over the years. In 1947. As New York was enacting the Condon-Wadlin Act, Michigan enacted the Hutchinson Act which similarly prohibited public employee strikes.¹⁷⁵ However, in *School District for the City of Holland v. Holland Education Association*, the Michigan Supreme Court held that an illegal strike is not automatically enjoined.¹⁷⁶ The court opined that it was contrary to the state's public policy to enjoin a labor dispute in the absence of violence, irreparable injury or breach of the peace.¹⁷⁷ The court vacated an injunction issued by the trial court and suggested that on remand, the trial court "inquire into whether, as charged by defendants, the plaintiff school district has refused to bargain in good faith, whether an injunction should issue at all, and if so, on what terms and for what period in light of the whole record to be adduced."¹⁷⁸

After the *Holland* case, it became very difficult to enjoin illegal public employee strikes, particularly teacher strikes. As a result, the strike became the motive power, particularly in education employee collective bargaining. But everything changed in 1994.

¹⁷³ See Update: West Virginia House Passes Amended Bill to Give 2% Raise to Teachers, State Police Officers, WSAZ, WDTV, Feb. 13, 2018, 3:15 p.m., <http://www.thenewscenter.tv/content/news/Possible-PEIA-cutbacks-concern-teachers-public-employees-470180613.html>.

¹⁷⁴ See Jess Bidgood, *West Virginia Raises Teachers' Pay to End Statewide Strike*, N.Y. TIMES, Mar. 6, 2018, <https://www.nytimes.com/2018/03/06/us/west-virginia-teachers-strike-deal.html>.

¹⁷⁵ See *Sch. Dist. v. Holland Educ. Ass'n*, 157 N.W.2d 206, 207 (Mich. 1968).

¹⁷⁶ *Id.* at 210.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 211.

John Engler was elected governor in 1990, defeating a Democratic incumbent, and re-elected in 1994, in part by demonizing the Michigan Education Association (MEA).¹⁷⁹ Under Engler, Michigan abolished property taxes for education and prohibited prohibited local school districts from raising additional funding through millages. In signing such legislation, Engler declared the end of the “power and control the teacher unions have had over education policies . . .”¹⁸⁰

In 1994, Michigan enacted P.A. 112 which mandated fines of one day’s pay for each day a public education employee is on strike, prohibited strikes over unfair labor practices and mandated that courts enjoin strikes in public education.¹⁸¹ The act also prohibited bargaining on the identity of a school district’s group insurance carrier, the starting day of the school term and the amount of required pupil contact time, composition of site-based decision-making bodies, decisions whether to provide interdistrict or intradistrict open enrollment opportunities, the decision to operate a charter school, the decision to contract out noninstructional support services, the decision to use volunteers for any services, and decisions to use instructional technology on a pilot basis.¹⁸²

Contemporary media commentary suggests that the act was a backlash aimed primarily at the MEA.¹⁸³ In urging support for the bill, the *Grand Rapids Press* editorialized that the MEA’s “longstanding stranglehold on the bargaining process has given Michigan teachers a Rolls-Royce health-insurance plan, some of the highest school salaries in the country and virtual immunity from the state law forbidding public employee strikes. A consequence is that Michigan school costs from 1980 through ’92 rose an

¹⁷⁹ See William Lowe Boyd, David N. Plank & Gary Sykes, *Teacher Unions in Hard Times*, in *CONFLICTING MISSIONS? TEACHER UNIONS AND EDUCATIONAL REFORM* 174, 176-77 (Tom Loveless ed. 2000).

¹⁸⁰ *Id.* at 179.

¹⁸¹ M.C.L.A. § 423.202a. The requirement that courts automatically enjoin teacher strikes was struck down as a breach of the separation of powers between the legislature and the courts and apparently is now of no effect. See Andrew Nickelloff, *Marching Headlong into the Past: 1994 PA 112 and the Erosion of School Employee Bargaining Rights*, 74 MICH. B. J. 1186 (1995).

¹⁸² M.C.L.A. § 423.215(3).

¹⁸³ See, e.g., John Foren, *Engler-GOP Drive to Cut School Costs Aims at MEA*, GRAND RAPIDS PRESS, Mar. 19, 1994, at A1.

average of 8.1 percent a year, with the difference being passed along to citizens in their property-tax bills.”¹⁸⁴ A stated rationale for restricting these subjects of bargaining was to foreclose disputes over these subjects from creating impasses in negotiations.¹⁸⁵

In 2011, Michigan expanded its list of prohibited subjects of bargaining. It added to the list: placement of teachers; reductions in force and recalls; performance evaluation systems; the development, content, standards, procedures, adoption and implementation of a policy regarding employee discharge or discipline; the format, timing and number of classroom visits; the development, content, standards, procedures, adoption and implementation of the method of employee compensation; decisions about how an employee performance evaluation is used to determine performance-based compensation; and the development, format, content and procedures of notice to parents and legal guardians of pupils taught by a teacher who has been rated as ineffective.¹⁸⁶ Additionally, in 2011, Michigan prohibited for all public employees any step increases after the collective bargaining agreement has expired, required that following contract expiration prior to reaching agreement on a new contract, employees bear all increases in costs of health insurance and prohibited making increases in wages retroactive to the expiration date of the prior contract.¹⁸⁷

Sixty days prior to the expiration date of the collective bargaining agreement, the parties are required to notify the Michigan Employment Relations Commission (MERC) of the status of their negotiations for a successor agreement.¹⁸⁸ Thirty days thereafter, MERC is required to appoint a

¹⁸⁴ *Senate’s Turn on School Costs: House-passed Bill Shifts Control from MEA to Taxpayers,. Boards*, GRAND RAPIDS PRESS, Apr. 19, 1994, at A8.

¹⁸⁵ See Michael Matheson, Note, *Have Michigan Public School Teachers Lost Their Ability to Strike Under 1994 PA 112?*, 75 U. DET. MERCY L. REV. 415, 430 (1998).

¹⁸⁶ 2011 Mich. Pub. Act 103 (codified at M.C.L.A. § 432.215(3)(j)-(p)).

¹⁸⁷ 2011 Mich. Pub. Act. 54 (codified at M.C..A. § 432.215b).

¹⁸⁸ M.C.L.A. § 423.207(b).

mediator, if one has not yet been appointed.¹⁸⁹ Authority for factfinding is found in the Michigan Labor Mediation Act.¹⁹⁰ MERC Rules govern the appointment of a factfinder and the factfinding process.¹⁹¹ Police and firefighters have access to interest arbitration but for all other public sector bargaining units, factfinding is the final impasse resolution step available.¹⁹² Following receipt of the factfinder's recommendations, the parties are required to meet at least once within 60 days.¹⁹³ When the parties have reached impasse, the employer may implement its last best offer unilaterally.¹⁹⁴

The model of collective bargaining in Michigan is in marked contrast to the model under the Taylor Law. Whereas under the Taylor Law, all provisions of the expired contract remain in effect until a new agreement is reached, step increases continue and even the legislative body may not impose terms that detract from employee rights under the expired agreement, in Michigan, wages are frozen at their levels in the expired agreement, step increases are prohibited, following expiration the employees bear all increases in health insurance costs and agreements may not provide for wage increases to be retroactive. The motive power in Michigan is employer power. Unions are pressured to accept the employer's terms because the longer they go beyond contract expiration without an agreement, the worse off the employees are and, although the union may initiate factfinding, the employer may reject factfinder recommendations and unilaterally implement anyway.

VI. Conclusion

This exploration of different models with different motive power in public sector collective bargaining developed policy issues that legislators must confront in choosing among the models. Although they differ in how they calibrate the balance between unions and employers in the

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* § 423.25.

¹⁹¹ Mich. Adm. Code R. 423.131 to 423.138.

¹⁹² See MICHIGAN EMPLOYMENT RELATIONS COMMISSION, GUIDE TO PUBLIC SECTOR LABOR RELATIONS LAW IN MICHIGAN 23 (2013).

¹⁹³ See Stephen O. Schultz, Helen "Lizzie" Mills, & Steven L. Koski, *Public-Sector Collective Bargaining: Labor Relations in the Public Eye*, Mich. Bar J., Sept. 2015, at 26, 28.

¹⁹⁴ See, e.g., Kalkaska Cnty. Rd. Comm'n, 29 MPER ¶ 65 (MERC 2016).

negotiations process, Florida and Michigan follow a model that relies on factfinding and ultimate employer determination of terms and conditions of employment to supply the motive power. The model was developed by the Taylor Committee. It does not provide for full collective bargaining but relies on a lesser form of worker voice, what the Taylor Committee called “collective negotiations,” combined with stiff penalties to prevent strikes while recognizing the supremacy of elected officials. But it ignores a major reason for public sector collective bargaining, that with respect to their wages and working conditions, public employees are at an inherent disadvantage in the general political process because they are outnumbered by the users and purchasers of their services who want more and better service at less cost.

New York and Pennsylvania rely on a freeze in the status quo coupled with mediation as the motive power for collective bargaining. Here too, the states differ on the precise calibration of power in the bargaining process, but they both trade off lengthier negotiations due to the absence of any source of urgency for reductions in strikes. In contrast, Illinois and Ohio rely on the strike as the motive power and trade off shorter negotiations for, depending on the political and economic climate, potentially greater strike activity. In states that rely on the strike as the motive power, there is another policy tradeoff concerning procedural requirements such as factfinding and mandatory strike authorization votes, which reduce the number of strikes but make those that occur more difficult to resolve.

The strongest inoculation against strikes is to mandate interest arbitration. Evaluation of the different approaches to interest arbitration is beyond the scope of this paper.¹⁹⁵ It is noteworthy, however, that most jurisdictions that mandate interest arbitration confine the mandate to those employees, primarily police and firefighters, where a strike has a great risk of disastrous consequences for public safety.

¹⁹⁵ For my views, see Malin, *supra* note 145.

Speaker Biographies

Taylor Law at 50

May 10, 2018 | 9:15 a.m. – 10:35 a.m.

Plenary One:

The Taylor Law in Context:
National and International Comparisons

MARTIN H. MALIN

Martin H. Malin is professor and director of the Institute for Law and the Workplace at Chicago-Kent College of Law, Illinois Institute of Technology. He joined the Chicago-Kent faculty in 1980 after serving for two years on the business school faculty at The Ohio State University and two years as law clerk to U.S. District Judge Robert DeMascio in Detroit, where he worked on, among other cases, *Bradley v. Milliken*. He has published more than 70 articles and seven books, including *Public Sector Employment: Cases and Materials* (West 2004, 2d ed. 2011, 3d ed. 2016), the leading law school casebook on public sector labor law. He has been an arbitrator and mediator since 1984 and served as Vice President of the National Academy of Arbitrators from 2015-17. In 2015-16, he mediated the collective negotiations between the Chicago Teachers Union and the Chicago Board of Education. The negotiations resulted in an agreement without a strike. Malin is a Fellow of the College of Labor and Employment Lawyers and served on its Board of Governors from 2011-16. He is a past secretary of the ABA Section on Labor and Employment Law, and a past chair of the Association of American Law Schools Section on Labor Relations and Employment Law.. From 1984-86, he was a consultant to the Illinois State, Local and Educational Labor Relations Boards and drafted their regulations implementing the newly-enacted Illinois public sector labor relations acts. From 2003-08, he was the reporter for the Neutrality Project of the Association of Labor Relations Agencies which produced a treatise on labor board and mediation agency impartiality. In October 2009, President Obama appointed Malin as a Member of the Federal Service Impasses Panel; President Obama reappointed him in January 2014. He served until President Trump removed him and the other Obama appointees in May 2017. In November 2016, Malin received the ABA's Arvid Anderson Award for lifetime contributions to public sector labor law.

JOSEPH SLATER

Joseph Slater is a Distinguished University Professor and the Eugene N. Balk Professor of Law and Values at the University of Toledo College of Law. He holds a B.A. from Oberlin College, a J.D. from the University of Michigan Law School, and a PhD in history from Georgetown University. Before coming to Toledo in 1999, he practiced labor and employment law in Washington, D.C. for over a decade. Since coming to Toledo, he has published numerous books and articles on labor and employment law, especially in the area of public-sector labor law. Selected publications include: *PUBLIC SECTOR EMPLOYMENT: CASES AND MATERIALS* (with Marty Malin, Ann Hodges, and Jeffrey Hirsch) (West Publishing, 3rd ed. 2016); *MODERN LABOR LAW IN THE PRIVATE AND PUBLIC SECTORS* (with Seth Harris, Anne Lofaso, and Charlotte Garden) (Carolina Academic Press, 2nd ed. 2016); "Will Labor Law Prompt Conservative Justices to Adopt a Radical Theory of State Action?" 96 *NEBRASKA L.REV.* 62 (2017); *MASTERING LABOR LAW* (with Paul Secunda, Jeffrey Hirsch, and Anne Lofaso) (Carolina Academic Press, 2014); "The Strangely Unsettled State of Public-Sector Labor Law in the Past Thirty Years," 30 *HOFSTRA LABOR AND EMPLOYMENT LAW JOURNAL* 511 (2013); and *PUBLIC WORKERS: GOVERNMENT EMPLOYEE UNIONS, THE LAW, AND THE STATE, 1900-62* (Cornell U. Press, 2004).

Professor Slater has presented many papers on public-sector labor law at conferences of practicing lawyers (including three national ABA conferences) and of academics (including the annual meeting of the American Association of Law Schools and many law school symposia). He has made numerous media appearances on public-sector labor issues, including interviews on NPR's "Morning Edition" and "Marketplace," and in national media including the Washington Post, the Chicago Tribune, the Atlantic MSNBC.com, Reuters, Fortune, Bloomberg, and the blogs Salon and Think Progress. He is a member of the Labor Law Group, an invitation-only group of labor and employment law scholars, and of the College of Labor and Employment Lawyers, an invitation-only group of practitioners and academics specializing in labor and employment law.

TODD DICKEY

Todd Dickey is a visiting scholar at The George Washington University's School of Business and Ph.D. candidate in Industrial and Labor Relations at Cornell University. He will join the Department of Public Administration and International Affairs at Syracuse University's Maxwell School as an assistant professor in August 2018.

Todd's current research explores innovation and change in federal sector civil service institutions and labor relations. In 2016, he served as the neutral chair of the Impact Working Group of the National Council on Federal Labor-Management Relations.

Plenary Two

Taylor Law at 50

May 10, 2018 | 10:45 a.m.-12:00 p.m. | King St Ballroom
1.5 areas of professional practice CLE credit

The Potential Legal and Legislative Ramifications of *Janus v. AFSCME*

This session will combine a look at the jurisprudential roots of the *Janus* case with an examination of litigational and legislative strategies to respond to the Supreme Court's ultimate ruling while preserving collective bargaining and its benefits.

Introduction:

Danny Donohue, CSEA President

Moderator:

William A. Herbert, Distinguished Lecturer, Hunter College, and Executive Director of the National Center for the Study of Collective Bargaining in Higher Education, New York City

Panelists:

John H. Gross, Partner, Ingerman Smith

Judith Rivlin, General Counsel, American Federation of State, County and Municipal Employees (AFSCME)

Charlotte Garden, Co-Associate Dean for Research and Faculty Development and Professor of Law, Seattle University School of Law

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The Potential Legal and Legislative Ramifications of *Janus vs. AFSCME*

William A. Herbert, Esq.
Distinguished Lecturer and
National Center Executive Director
Hunter College, City University of New York
<http://www.hunter.cuny.edu/ncscbhpep>
425 East 25th Street, Box 615
New York, New York 10010-2547
(212) 481-7550 (office)
(518) 605-4402 (cell)
wh124@hunter.cuny.edu
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Janus v. AFSCME

History of Dues Check-Off and Agency Fees

- **1956:** Voluntary dues check-off instituted for NYC workers prior to the grant of collective bargaining rights.
- **1958:** Executive Order 49: grants NYC workers the right to form, join, or assist a union or refrain from doing so.
- **1958:** Gen. Mun. Law §93-b permits membership dues deduction authorization to employee organizations.
- **1967:** Taylor Law and NYCCBL: grants public employees the right to form, join, and participate in unions as well as the right to refrain from doing so.

Janus v. AFSCME

History of Dues Check-Off and Agency Fees

- **1967:** Taylor Law: membership dues deduction and forfeiture as a penalty for union engaging, causing, instigating, encouraging or condoning a strike.
- **1968:** OLR General Counsel recommends support for state or local law to permit an agency shop.
- **1968:** Corp Counsel examines policy and legal issues associated with an agency shop.
- **1968:** Agency fees are a major stumbling block in settling the Ocean-Hill Brownsville strike by the UFT.

Janus v. AFSCME

History of Dues Check-Off and Agency Fees

- **1969:** Select Joint Legislative Committee on Public Employee Relations recommends amending the Taylor Law to permit the negotiability of an agency shop as a deterrent to strikes.
- **1969:** City-DC 37 reach written agreement imposing an agency fee for all non-members but Corporation Counsel concludes that it is not enforceable under state law.
- **1969:** Mayor Lindsay submits a legislative proposal to the State Legislature to permit New York City to negotiate an agency fee shop to “promote labor harmony and responsibility.”

Janus v. AFSCME

History of Dues Check-Off and Agency Fees

- **1970:** Hawaii becomes first state to mandate agency fees for non-members, followed by Rhode Island.
- **1970:** *Monroe-Woodbury Board of Education*, 3 PERB ¶3104 (1970), *pet. dismissed*, *Farrigan v. Helsby*, 68 Misc. 952 (Alb. Co., 1971) *aff'd*, 42 A.D. 2d 265 (1973).
Courts in other states reach similar conclusion finding that negotiated agency fee violated right to refrain from participating in a union under state law.
- **1972:** NYCCBL amended to permit the negotiability of agency fee.

Janus v. AFSCME

History of Dues Check-Off and Agency Fees

- **1977:** Shortly after *Abood v. Detroit Board of Education*, Taylor Law amended to mandate an agency shop for bargaining units of state workers, and making it a mandatory subject of bargaining in local government.
- **1980:** NYCCBL amended to make agency shop a mandatory subject of negotiations
- **1992:** Taylor Law amended to mandate agency fee deductions for non-members in all unit units represented by a certified or recognized public sector union. Subject to forfeiture if union organizes, supports, or condones a strike.

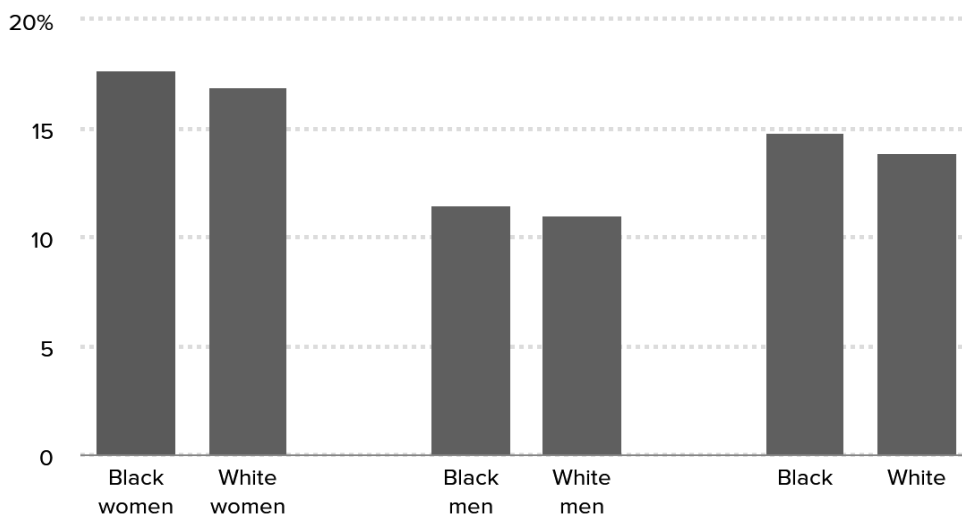
Janus v. AFSCME: Changes

- **Potential Changes to the Taylor Law and NYCCBL**
 - Modify Exclusive Representation for Grievances, etc.
 - Modify the Scope of the Duty of Fair Representation Concerning Discipline and Non-Contractual Issues
 - Require Non-Members to Pay a Fee to a Non-Profit.
 - Mandate Union Access and Employee Information
 - Create Members-Only Unions
 - Public Funding of Bargaining Fees for Non-Members
- **Pressure to Encourage Non- Members to Join**
 - Decreased Resources
 - Must Represent Non-Members Without Charge

Janus: Who Will Be the Most Adversely Impacted?

Black women have the highest share of workers in the public sector

Share of public sector employment, by gender and race, 2016



Source: EPI analysis of Current Population Survey Outgoing Rotation Group, 2016

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William A. Herbert, Esq.
Distinguished Lecturer and Executive Director
National Center for the Study of Collective Bargaining
in Higher Education and the Professions
Hunter College, City University of New York
<http://www.hunter.cuny.edu/ncscbhep>
425 East 25th Street, Box 615
New York, New York 10010-2547
(212) 481-7550 (office)
(518) 605-4402 (cell)
wh124@hunter.cuny.edu
Follow Us: [@HigherEd_CB](#)

The Potential Demise of the Agency Fee and Its Impact on Management and Unions

John H. Gross, Esq.
Ingerman Smith, LLP
150 Motor Parkway
Suite 400
Hauppauge, New York 11788

This paper is based upon a presentation at the annual meeting of the Council of School Attorneys of the
National School Boards Association in Nashville, Tennessee, in 2014

Teachers unions have been part of the fabric of American society since the late 1800s. Beginning in 1857 with the creation of the National Education Association (“NEA”) until today, teachers unions have played an important role in shaping the public educational landscape in the United States. Like most private sector unions in the last two decades, teachers’ unions in many States have been faced with a dilemma of mortality; right to work statutes which undermine union finances by prohibiting union security agreements. Even in states like Wisconsin with long histories of public sector collective bargaining and permitted union security provisions such as agency fee, the future of labor unions has become seriously uncertain.

The Supreme Court was put to task in determining whether its seminal holding in *Abood v. Detroit Board of Education*,¹ which permitted the collection of compulsory agency fee dues to public-employee unions for non-political purposes, would remain the prevailing authority. Or, would it and its subsequent progeny be overturned by the facts of *Harris v. Quinn*² and a new “right to work” *qua* union described “free rider” normal be promulgated.

Ultimately, the Court in *Harris* declined to extend *Abood* to what the majority coined as “partial public employees” while for the time being upholding *Abood* to the extent that the First Amendment rights of those persons considered “full public employees” were not violated by a “fair share” requirement. However, the majority opinion written by Justice Samuel Alito, also sharply criticized *Abood*, opining that the analysis undertaken by the *Abood* Court was, “questionable on several grounds.”³ The majority’s apparent dissidence with *Abood* suggests that the continuing challenge raised first in *Friedrichs v. California Teachers Association*,⁴ and now in

¹ *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209 (1977).

² *Harris v. Quinn*, 573 U.S. ___, 134 S. Ct. 2618 (2014).

³ *Harris*, 573 U.S. at ___, (slip op. at 2), 134 S. Ct. at 2621.

⁴ *Friedrichs v. Cal. Teachers Assoc.*, -- U.S. ---, 136 S.Ct. 1083 (Mem) (2016).

Janus v. American Federation, et al. to compulsory union dues may lead to the demise this once-landmark decision and financially cripple public sector unions.

After the 4-4 deadlocked decision in *Friedrichs*, the challenge to compulsory agency fees on First Amendment grounds is pending a decision of the Court in *Janus v. American Federation*. On September 28, 2017 the Court granted Janus' Petition for writ of certiorari.⁵ The case was argued on February 26, 2018. This paper discusses the potential effects of overturning *Abood* and whether examines this judicial assault on public sector unions.

I. *ABOOD V. DETROIT BOARD OF EDUCATION*,⁶ ITS PROGENY, AND THEIR ALLEGED FALLACIES

Until recently, the holding in *Abood* has been black letter labor relations law since the Supreme Court promulgated its decision in 1977. *Abood's* seminal holding arose in an action in Michigan state court brought by public school teachers in Detroit. The plaintiff teachers opposed the various political and ideological activities of their union, and sought to declare the "agency shop" provision of their collective bargaining agreement invalid under state law and the United States Constitution as a deprivation of freedom of association protected by the First and Fourteenth Amendments.⁷ The clause, made permissible by a Michigan statute, required every member of the bargaining unit represented by the union, even if not a union member, to pay, as a condition of employment a service charge equal in amount to union dues.⁸ The litigant teachers argued that the First Amendment protected them from having to pay fees to a union which they did not support.⁹

⁵*Janus v. Am. Fed'n of State, Cnty., and Mun. Emps.*, 138 S.Ct. 54 (Mem) (2017). On November 13, 2017 the Court denied cert in a case seeking to impose a heightened First Amendment scrutiny test on a government declaration that a certain labor organization is the exclusive bargaining representative of employees. *Hill v. Service Employees International Union, Healthcare Illinois, Indiana Missouri Kansas et al.*, 138 S.Ct. 446 (Mem) (2017).

⁶ *Abood*, 431 U.S. 209.

⁷ *Id.* at 209.

⁸ *Id.*

⁹ *Id.*

Ultimately, the Supreme Court upheld the constitutionality of the agency shop fees insofar as the agency fees charged to non-members were used for the purposes of financing collective bargaining, contract administration, and grievance adjustment purposes. The union was required as a quid pro quo for exclusivity to represent all bargaining unit members whether union members or not. The Court determined that the agency fees were justified by the need to prevent employees from “free riding” on the union’s collective bargaining activity, which also benefited non-members, and by the need to preserve “labor peace” by preventing dissension among competing unions.¹⁰ However, in order to address the First Amendment concerns raised by the Appellants, the Court also held that non-members were not required to subsidize expenditures by the organization which aided activities considered political or ideological in nature and which were only incidentally related to the terms and condition of employment.¹¹ Since the Court’s decision in *Abood*, it has remained a preeminent authority for the management of workforces by government entities.¹² Indeed, its holding has been applied in other circumstances including for instance state imposed mandatory bar association membership.¹³

Arguably, *Abood* and its progeny stand for the proposition that a public-sector collective bargaining agreement can only require a non-member to financially support the union’s collective bargaining within the confines of a “chargeable activity.” The agreement must also require the same non-members to “opt-out” of all other activities deemed political and/or ideological in nature. However, despite *Abood*’s over 40 year reign, recent decisions coming down from the *Roberts*’

¹⁰ *Id.* at 220-222.

¹¹ *Abood*, 431 U.S. at 210, 238-241; Although the Court in *Abood* did not define such political activities, later decisions by the Supreme Court parsed out such activities to include, compelling employees to fund, “legislative lobbying or political activities outside the limited context of contract ratification or implementation,” extra-unit litigation, or expenditures for the purpose of public relations. *Lehnert v. Ferris Faculty Ass’n*, 500 U.S. 507, 521, 526 (1991).

¹² *Harris*, 573 U.S. at ____, 134 S. Ct. at 2644-45 (Dissent of J. Kagen, Slip Op. at 2).

¹³ *Harris*, 134 S. Ct. at 2643 (citing *Keller v. State Bar of Cal.*, 496 U.S. 1, 5, 110 S. Ct. 2228 (1990)).

Court have decidedly begun to rebuke the Court’s landmark decision and the foundation of its holding. For example, prior to *Harris* in 2012, the Supreme Court held in *Knox v. SEIU Local 1000*,¹⁴ that a union representing government employees may assess money from the employees whom it represents *only if* those employees first “opted-in” to support political expenditures.¹⁵ In that case, the union had come under legal fire after seeking to collect a special assessment fee deemed for political purposes in lieu of a mid-year notice.¹⁶ Non-members argued that the union was required to give them notice and a chance to “opt-in” to the special assessment and its failure to do so was tantamount to a violation of the non-members’ First Amendment rights. The Supreme Court agreed and no-longer was an annual “opt-out” notice in these instances constitutionally sound.¹⁷ Thereafter, in *Harris*, the Supreme Court’s most recent decision in this line of cases, the majority declined to extend compelled agency fees to workers considered, “partial public employees,” under the notion that the Court’s holding in *Abood* was “anomalous.”¹⁸ Ultimately, Justice Alito’s majority opinion all but extirpates *Abood*’s constitutional analysis for upholding compelled agency fees and, following closely on the heels *Knox*, has arguably left *Abood* and its legacy barely breathing.

II. *HARRIS V. QUINN*

On June 30, 2014 the Supreme Court handed down its decision in *Harris*.¹⁹ Although the holding in *Harris* left the Court’s decision in *Abood* operative, the dicta of the decision written by Justice Alito, suggests that a near or actual majority of judges now sitting on the Supreme Court

¹⁴ *Knox v. Serv. Employees Intern. Union, Local 1000*, 132 S. Ct. 2277 (2012).

¹⁵ *Knox*, 132 S. Ct. at 2293.

¹⁶ *Id.* at 2281.

¹⁷ *Id.* at 2282.

¹⁸ *See generally id.* at 2284.

¹⁹ *Harris*, 573 U.S. ____, 134 S. Ct. 2618 (2014).

raise serious question whether compulsory agency fee is constitutionally impermissible as a restraint on free speech for public employees.

In *Harris*, Appellant home healthcare workers in Illinois challenged the fair-share (agency fee) provision contained in their collective bargaining agreement, alleging that it violated their First Amendment rights by requiring a compelled fee to be paid to a union they did not politically support.²⁰ Appellants, hired as “personal assistants” for Medicaid recipients who would otherwise require institutionalization, were hired as part of a statewide rehabilitation program.²¹ In March 2003, Governor Blagojevich issued Executive Order 2003-08 which called for State recognition of a union as exclusive representative for the personal assistants, for the purpose of collective bargaining with the State.²² Following a vote, the SEIU Healthcare Illinois and Indiana (“SEIU-HII”) was designated as the exclusive representative for the State’s personal assistants and the union and the State subsequently entered into collective-bargaining agreements that required all non-union members to pay a “fair share” of the union dues.²³ These dues were deducted directly from each personal assistant’s Medicaid payments.²⁴

Ultimately, the Court rested upon the relationship between the personal assistant and the Medicaid recipient, considering the patient as a customer of the personal assistant, who retained control over most aspects of the employment relationship, including hiring, firing, training, supervision, and discipline of the personal assistants.²⁵ The Court held that since the State’s only role was to provide compensation to the personal assistants, the personal assistants were

²⁰ *Id.* at 2626-27.

²¹ *Id.* at 2623-26.

²² *Id.* at ____ (Slip Op. at 6), 134 S. Ct. at 2626. Several months later the Illinois Legislature codified Governor Blagojevich’s executive order by amending the Illinois Public Labor Relations Act (“PLRA”).

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* at ____ (Slip Op. at 3), 134 S. Ct. at 2624, 2636-37.

considered to be “partial public employees,” to which the agency shop provision was not applicable.²⁶

However, the critical importance of *Harris* is not necessarily the Court’s failure to extend *Abood* to this particular class of employees, but rather Justice Alito’s studied and rather tenacious attempt to undermine the core principles of this seminal case, in anticipation of the “right case” for finding agency fees unconstitutional appearing on the Supreme Court docket. In rationalizing its decision to both limit *Abood* and subvert its analysis, the Court first lays out the history behind, what it considers to be, *Abood*’s “anomalous holding,”²⁷ and then delves into the decision’s “questionable analysis.”²⁸

To begin, the *Harris* Court acknowledged that in order to determine why the Court’s analysis in *Abood* was incongruous, it was first relevant to determine how the *Abood* Court came to its decision. Its starting point: *Railway Employees v. Hanson*.²⁹ In *Hanson*, employees on the Union Pacific Railroad Company challenged a provision of their collective bargaining agreement which required employees to join, and remain members of the union as a condition of their continued employment. Employees who did not want to join the union argued that the provision violated the Nebraska Constitution, which guaranteed the “right to work.”³⁰ The employees also argued that such agreement, notwithstanding any state law, violated the First and Fifth Amendments of the Federal Constitution. The issue, which ultimately came before the Supreme Court, was whether the union-shop agreements were “germane to the exercise of the power under

²⁶ *Harris*, 573 U.S. at ____ (Slip Op. at 3), 134 S. Ct. at 2622.

²⁷ *Abood*, 431 U.S. at 210, 238-241. As the *Harris* Court points out, *Abood* is considered an anomaly. The Court found that in holding, “that the primary purpose of permitting union to collect fees from non-members...is to prevent non-members from free-riding on the union’s efforts, sharing the employment benefits obtained by the union’s collective bargaining without sharing the costs incurred,” the case was incongruous with the law because, as they set forth in *Knox* “...free-rider arguments...are generally insufficient to overcome First Amendment objections.” 132 S.Ct. at 2289.

²⁸ *Harris*, 573 U.S. ____ (Slip op. at 17), 134 S. Ct. at 2621.

²⁹ 351 U.S. 225 (1956).

³⁰ *Hanson*, 351 U.S. at 225.

the Commerce Clause.”³¹ The *Hanson* Court held, in an opinion written by Justice Douglas, that the challenged provision “stabilized labor-management relations” and thereby furthered “industrial peace.”³² Despite the First Amendment claims by employees, that a “union shop agreement forces men into ideological and political associations which violate their right to freedom...of association, and freedom of thought,”³³ the Court failed to explore this argument and dismissed it with a single sentence: “[o]n the present record, there is no more infringement or impairment of First Amendment rights than there would be in case of a lawyer who state law is required to be a member of the integrated bar.”³⁴ This determination had no basis in law at the time.³⁵ Next, the majority opinion analyzed the Court’s decision in *Machinist v. Street*.³⁶

In *Street*, employees of the Southern Railway System argued that their First Amendment rights had been violated because a substantial part of their dues were being used for political candidates and causes they did not support.³⁷ The *Street* Court, however, never reached the Constitutional question and instead, construed the Railway Labor Act to forbid unions from using compelled agency fees for causes not supported by employees.³⁸

Ultimately, using *Hanson* and *Street* as its authority, the *Abood* Court dismissed the constitutional issues at bar, holding that the judgments in those cases allowed, constitutionally, for such “interference as exists” justified by “the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress.”³⁹ However, as the decision in *Harris* points out, the *Abood* Court erred in using *Hanson* and *Street* as controlling;

³¹ *Hanson*, 351 U.S. 225, 233-234; *Harris*, 573 U.S. at ____ (Slip op. at 10), 134 S. Ct. at 2628.

³² *Id.*

³³ *Hanson*, 351 U.S. 225, 236; *Harris*, 573 U.S. at ____ (Slip op. at 11), 134 S. Ct. at 2628.

³⁴ *Hanson*, 351 U.S. 225, 236; *Harris*, 573 U.S. at ____ (Slip op. at 11), 134 S. Ct. at 2629.

³⁵ *Harris*, 573 U.S. at ____ (Slip op. at 11), 134 S. Ct. at 2629.

³⁶ 367 U.S. 740 (1961).

³⁷ *Street*, 367, U.S. at 742-765; *Harris*, 573 U.S. at ____ (Slip op. at 12-13), 134 S. Ct. at 2631-32.

³⁸ *Street*, 367, U.S. at 768-769.

³⁹ *Harris*, 573 U.S. at ____ (Slip op. at 15), 134 S. Ct. at 2631.

Street failed to reach the constitutional question and *Hanson*'s narrow holding, which simply *authorized* the imposition of an agency fee, was misconstrued.⁴⁰ Unlike either case before it, in *Abood*, the Detroit Board of Education, which actually *imposed* an agency fee was also a state instrumentality.⁴¹ This, the *Harris* Court determined, posited "a very different question" than that which was posed in either *Hanson* or *Street*, given the important differences between bargaining in the public and private sectors.⁴² Nevertheless, the *Abood* Court dismissed the constitutional question as already well-settled,⁴³ and instead, focused on upholding union-shop agreements based on the "desirability of labor peace" and the problem of "free-ridership."⁴⁴

Next, the *Harris* majority condemned the *Abood* Court for failure to appropriately distinguish between core union speech in the public and private sectors.⁴⁵ First, Justice Alito opined that the *Abood* Court failed to appreciate the differences between involuntarily subsidized speech in the public sector versus the private sector because in the public sector, core issues such as wages, pensions, and benefits are important *political issues* and in the private sector they are not.⁴⁶ However, given that state and local expenditures on employee wages and benefits "have mushroomed"⁴⁷ in recent years, the Court noted that this distinction is clearly *not* without a difference.⁴⁸ Along the same lines, Justice Alito opined that the *Abood* Court failed to anticipate the difficulty in demarcating between expenditures made for collective bargaining purposes and "those made to achieve political ends."⁴⁹ In the public sector, "both collective-bargaining and

⁴⁰ *Harris*, 573 U.S. at ____ (Slip op. at 17), 134 S. Ct. at 2631-32.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Abood*, 431 U.S. at 220-222; *Harris*, 573 U.S. at ____ (Slip op. at 15), 134 S. Ct. at 2621.

⁴⁴ *Abood*, 431 U.S. at 220-222; *Harris*, 573 U.S. at ____ (Slip Op. at 15), 134 S. Ct. at 2621.

⁴⁵ *Harris*, 573 U.S. at ____ (slip op., at 17-18), 134 S. Ct. at 2621.

⁴⁶ *Id.* (emphasis added).

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Harris*, 573 U.S. at ____ (slip op., at 17-18), 134 S. Ct. at 2632.

political advocacy and lobbying are directed at the government”⁵⁰; the same is not true for the private sector.

Likewise, the majority opinion maintained that the *Abood* Court did not seem to anticipate that problems associated with classifying union expenditures as either “chargeable” or “non-chargeable,” including the problems that objecting non-members would face in challenging a Union’s declaration of expenditures both legally and substantively.⁵¹ Although the Court noted that there have been myriad attempts to define “chargeable activities,”⁵² the test often requires a judgment call on the part of the union due to the fluidity of defining “activities germane to collective bargaining.”⁵³ As such, given the lack of oversight as to the “correctness” of those categorizations, the majority opined that, employees who suspect that a union has wrongfully put expenses in the “germane” category, face a practically insurmountable legal battle which could be fiscally difficult and equally uncertain.⁵⁴ For example, although a union’s books must be audited, “auditors themselves do not review the correctness of the union’s categorization,” they simply “verify that the expenditures made, were in fact made for the purposes claimed....”⁵⁵

Ultimately, Justice Alito’s arguments seem to admonish *Abood* for failure to acknowledge that public sector collective bargaining wholly addresses matters of public concern, and therefore, the process itself is imbued with the very topics of political speech that the First Amendment is designed to protect in the first place, and for which compelled agency fees will burden regardless if the activity is deemed “chargeable” or not.

⁵⁰ *Id.*

⁵¹ *Harris*, 573 U.S. at ____ (Slip op. at 19), 134 S. Ct. at 2633.

⁵² *Harris*, 573 U.S. at ____ (Slip op. at 18), 134 S. Ct. at 2633.

⁵³ *Id.* at 19, 134 S. Ct. at 2633.

⁵⁴ *Id.*

⁵⁵ *Id.*; See also American Federation of Television and Recording Artists, Portland Local, 327 N. L. R. B. 474, 477 (1999).

Lastly, the Court takes issue with the *Abood* Court’s “unsupported empirical assumption ... that the principle of exclusive representation in the public sector is dependent on a union or agency shop fee.”⁵⁶ The *Harris* Court points out that the *Abood* Court’s reliance on “labor peace” as a justification for compelling the payment of agency fees misses the point; Appellants did not challenge the exclusive authority of the union to represent them, they simply maintained that they did not want to be forced to contribute to a union with which they politically disagreed.⁵⁷ Justice Alito also asserts that some federal agencies allow for exclusive representation but do not require an employee to join the union or pay union fees.⁵⁸ Ultimately, the Court’s majority opinion casts much doubt on the alleged “inextricable link” between exclusive representation and compelled agency fees as a policy justification to overcome any First Amendment infringement.⁵⁹

Consequently, the Court’s decision in *Harris* suggested that if certiorari is requested by a full-fledged public employee, at least four of the justices would grant such a review and seek full deliberation on the prospect of overturning *Abood* by ruling that compulsory union dues are prohibited under the First Amendment.

The first opportunity for review of *Abood* after *Harris* was presented to the Court in *Friedrichs v. California*.

III. *FRIEDRICHS V. CALIFORNIA*

In *Friedrichs v. California Teachers Association*, a group of public school teachers challenged the constitutionality of the California Education Employment Relations Act that authorizes agency shop fees in California’s public school districts. Like the appellants in *Harris*, the teachers claimed that agency shop fees violated their First Amendment rights of free speech

⁵⁶ *Harris*, 573 U.S. at ____ (Slip op. at 20), 134 S. Ct. at 2634.

⁵⁷ *Id.* at ____ (Slip op. at 31), 134 S. Ct. at 2621, 2640.

⁵⁸ *Id.*

⁵⁹ *Id.*

and association insofar as the agency shop arrangement forces them to contribute to union expenditures to which they do not agree.⁶⁰ Appellants also maintained that the union’s procedure, which required employees to “opt out” on an annual basis in order to avoid contributing to the union’s political and ideological causes, was unconstitutional. The Appellants in this case affirmatively acknowledged that *Abood* is the controlling precedent regarding compulsory agency fees for public sector employees and in a departure from *Harris*, specifically asked the Supreme Court to overturn the seminal case.⁶¹

Oral argument was held in January 2016.⁶² However, after the death of Justice Antonin Scalia in February 2016, the Court issued a deadlocked 4-4 decision issued in March 2016.⁶³ Thus, the judgment of the circuit court finding Supreme Court precedent controlled was affirmed.⁶⁴

a. *Arguments Raised in Friedrichs*

1. *The Agency Shop Fee*

Under California Law, a union becomes the exclusive bargaining unit for “public school employees” by demonstrating that it has the support of a majority of the employees in the unit.⁶⁵ Once a union becomes the exclusive representative it has the responsibility to represent all public school employees in the unit for collective bargaining purposes and is authorized to bargain over myriad terms and conditions of employment including, but not limited to wages, hours, health, and class size.⁶⁶ In California, teachers must join a recognized union or pay an agency shop fee as a condition of employment.⁶⁷ Non-union employees are required to pay fees to support union

⁶⁰ Brief for Plaintiffs-Appellants at 2, *Friedrichs v. Cal. Teachers Ass’n*, 2014 WL 10076847 (No. 13-57095) (9th Cir. 2014) (hereinafter, “*Friedrichs* Brief for the Appellant”).

⁶¹ See generally *Friedrichs* Brief for the Appellant.

⁶² *Friedrichs v. California Teachers Association*, SCOTUSblog, <http://www.scotusblog.com/case-files/cases/friedrichs-v-california-teachers-association/> (last visited March 12, 2018).

⁶³ *Friedrichs v. Cal. Teachers Ass’n*, 136 S. Ct. 1083 (2016).

⁶⁴ *Id.*; *Friedrichs*, 2014 WL 10076847 (9th Cir. 2014).

⁶⁵ See CAL. GOV’T CODE §§ 3544, 3544.1.

⁶⁶ *Id.* at §3543.1(a).

⁶⁷ *Id.* at §3546(a).

activities that are “germane” to collective bargaining, however, under California regulations it is the union’s responsibility to determine which expenses incurred are considered not to be germane and therefore “non-chargeable.”⁶⁸

i. The Agency Shop Fee Violates Appellants’ First Amendment Rights

In *Friedrichs*, Appellants first argued that compelled agency shop fees for non-union bargaining unit members is a violation of the First Amendment because the bargained-for benefits in their collective-bargaining agreement are the same as those topically addressed in legislation, including health and welfare benefits, leave, transfer and reassignment policies, safety conditions of employment, class size, and employment-evaluation procedures.⁶⁹ Appellants asserted that, fundamentally, collective bargaining involves the exercise of protected First Amendment activities since government is petitioned.⁷⁰ Based on that notion, Appellants challenged the Court’s rationale for allowing mandated agency fees for topics that are collectively bargained, arguing that the topics should be “non-chargeable” given bargaining for a benefit that may be topically addressed in legislation *is the same act* as lobbying a public official to pass legislation.⁷¹ In both instances, Appellants reason, “the Unions are pressuring the government officials to take official action in service of public policies favored by the Union.”⁷²

Finally, the Appellants argued that even if local unions focus narrowly on collective-bargaining activities, and it is determined that collective bargaining falls outside of the exercise of First Amendment rights, national entities such as the California Teachers Association (“CTA”) or the National Education Association (“NEA”) should not be entitled to an affiliate fee.⁷³ According

⁶⁸ See generally REGS. OF CAL. P.E.R.B. § 32992(b)(1).

⁶⁹ *Friedrichs* Brief for the Appellant at 14.

⁷⁰ *Id.* at 14-15.

⁷¹ *Id.*

⁷² *Friedrichs* Brief for the Appellant at 15 (emphasis added).

⁷³ *Id.*

to Appellants, these entities generally claim that approximately 65% of their expenditures are “chargeable” – thus, germane to their duties of collective bargaining. However, given neither the CTA nor NEA actually collectively bargain within a particular school district, Appellants claim that the mandatory portion of the affiliate fee should not be charged.⁷⁴

ii. *Abood*’s Justifications for Allowing an Agency Shop are Untenable

Appellants next asserted that *Abood*’s justification for allowing an agency shop fee, in order to prevent “free riding” and promote “labor peace” does not justify its burden on the First Amendment.

First, Appellants contended that the Supreme Court, by its own accord, prohibits subsidies for lobbying “even though the potential for “free-riding” is the same as it is for bargaining.”⁷⁵ Given that “free-riding” in the context of lobbying is rejected and using the general notion that individuals cannot be forced to endow private group or private speech,⁷⁶ Appellants claimed that collective bargaining efforts which vicariously benefit non-members of a unit, should not be sufficient justification for compelled subsidization of those efforts.⁷⁷ Likewise, Appellants claimed that agency fees used for collective bargaining purposes, but for demands which non-members feel harm them in the workplace, although not an issue contemplated by *Abood*, burdens the First Amendment.⁷⁸ In other words, the very choices made by a union in asserting particular issues at the bargaining table may be seen by non-union unit members as harmful to them.

Second, the Appellants challenged the premise of exclusive representation, a hallmark of labor law for the last eighty years. Appellants argued that the unprecedented power bestowed on

⁷⁴ *Friedrichs* Brief for the Appellant at P. 16.

⁷⁵ *Friedrichs* Brief for the Appellant at 18; *See Generally Lehnert*, 500 U.S. at 522.

⁷⁶ *Friedrichs* Brief for the Appellant at 17; *See Knox*, 132 S. Ct. at 2295.

⁷⁷ *See generally Friedrichs* Brief for the Appellant at 17-18.

⁷⁸ *Friedrichs* Brief for the Appellant at P. 18-19. Issues such as including issues of compensation based on seniority and tenure and basic matters of education policy.

Unions to bind all employees in a bargaining unit to employment policies and conditions “that the union believes best serves most employees’ collective interests” is a blatant deprivation of non-members’ First Amendment rights to free association.⁷⁹ Appellants pointed out that “not only are non-members compelled to associate with the union *via* contract and accept (often disadvantageous) terms that the unions negotiate; they must *also* devote a portion of their wages to *support* the unwanted collective-bargaining efforts.”⁸⁰ Thus, compelled agency fees do not protect unions from free riders but in fact exacerbate the suppression of a non-member’s First Amendment rights.⁸¹

Lastly, Appellants claimed that compelled agency fees fail to invoke a so-called “labor peace.” In *Harris*, Justice Alito largely undermined the *Abood* Court’s justification for compelled agency fees as a means of promoting “labor peace,” by determining that given employees in other contexts, including certain federal agencies, are not required to join a union or pay union fees, “a union’s status as exclusive bargaining agent and the right to collect an agency fee from non-members are not inextricably linked.”⁸² In that regard, and as previously noted, Justice Alito further opined that the respondents in *Harris*, largely miss the point with their “labor peace” argument because there, petitioners were not claiming that they had a First Amendment right to form a rival union nor were they challenging the authority of SEIU as the exclusive representative.⁸³ Based on this rationale, Appellants maintain that a “labor peace” justification for agency fees in their case also warrants no deference.⁸⁴ Appellants further argue that a State’s

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Friedrichs* Brief for the Appellant at P. 19. However, it is important to note that despite Appellants argument, the *Harris* Court’s opinion also notes that while “labor peace” for home health care workers is diminished due to the fact that participants do not work together in a common facility, “exclusion of a rival union may reasonably be considered as a means of insuring labor-peace within the schools.” *Perry Ed. Assn v. Perry Local Educators’ Assn.*

⁸² *Harris*, 573 U.S. at ____ (slip. op., at 31), 134 S. Ct. at 2640.

⁸³ *Id.*

⁸⁴ *Friedrichs* Brief for the Appellant; *Harris v. Quinn*, 573 U.S. at ____ (slip. op., at 31), 134 S. Ct. at 2640.

interest in bargaining with one union (as to prevent conflict amongst union members) fails to justify compelling non-union members to pay fees to such a union in order to establish labor-peace when the issue of conflict is rendered moot in the first instance by the conferral of exclusive representation on the union winning a majority vote of the members of a bargaining unit.⁸⁵

2. *Appellants Challenge the “Opt-Out” Regime*

Under an “opt-out” system, the union makes the assumption that all persons are members of the union unless and until he or she affirmatively “opts out” of the union. The Appellants argued that this practice is invalid for three reasons.

First, the “opt-out” requirement wrongfully places the burden on the party whose constitutional rights are at stake: the non-union employee. The Appellants maintained that the union’s presumptive entitlement to compelled agency fee funds flies in the face of both the First Amendment and a fundamental tenant of the Courts to not “presume acquiescence in the loss of fundamental rights.”⁸⁶

Second, Appellants argued that the “opt-out” system fails to serve a compelling interest of the State because “there is no state interest in shifting the advantage of ... inertia away from employees who wish to exercise their First Amendment rights and onto unions that have no right to non-members’ funds.”⁸⁷ As an example, Appellants point out that the State is not allowed to automatically transfer funds from employees’ paychecks to fund political agendas – they must request donations.⁸⁸ Thus, the same should be true for unions; unions should be required to ask for funds and not automatically benefit unless and until an employee decidedly opts out.

⁸⁵ *Friedrichs* Brief for the Appellant at 20.

⁸⁶ *Coll. Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.* 527 U.S. 666, 682, (1999).

⁸⁷ *Friedrichs* Brief for the Appellant at P. 22; *See also* *South Carolina v. Katzenback*, 383 US 301, 328 (1966), *Davenport v. Wash. Educ. Ass’n*, 551 US 117, 185 (2007) (internal quotations and citations omitted).

⁸⁸ *Friedrichs* Brief for the Appellant at. 22.

Lastly, Appellants reasoned that even in the event that the union had a legitimate interest in burdening non-members' First Amendment rights, such a compelling interest is "broader than necessary to serve that interest."⁸⁹ Given that the agency shop fee imposes a heavy burden on the First Amendment rights of objecting employees,⁹⁰ requiring employees to annually "opt-out" of the union provides an added burden to objecting employees.⁹¹ The Appellants suggested eliminating such a burdensome risk by requiring unions to obtain affirmative consent from all public employees before commandeering payments.⁹²

IV. Next Up: JANUS V. AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES ("AFSCME")

This matter, involving the same statute as was reviewed in *Harris*, originally began in the United States District Court for the Northern District of Illinois on a complaint brought by Bruce Rauner, Governor of Illinois against labor organizations representing state employees, including AFSCME. The Governor sought a declaration that the "fair share contract provisions" of the Illinois Public Labor Relations Act, (IPLRA), 5 ILCS 315/6(e), were unconstitutional and violated the First Amendment "by compelling employees who disapprove of the union to contribute money to it."⁹³ The Governor had also issued Executive Order 15-13 directing the state agency that negotiates on behalf of the State not to comply with IPLRA or the collective bargaining agreement. By way of this action, the Governor sought a declaration that this Executive Order was enforceable.

The IPLRA provides that the labor organization chosen by a majority of public employees in a bargaining unit is the exclusive collective bargaining representative for the employees with

⁸⁹ *Knox*, 132 S.Ct. at 2291

⁹⁰ *Harris v. Quinn*, 573 U.S. at ____ (slip. op., at 37), 134 S. Ct. at 2643.

⁹¹ *Friedrichs* Brief for the Appellant at 22.

⁹² *Friedrichs* Brief for the Appellant at 23.

⁹³ *Rauner*, 2015 WL 2385698 at 2.

respect to rates of pay, wages, hours and other conditions of employment.⁹⁴ Employees are not required to join the union, but the statute’s “fair share provision” allows a labor organization to include in its collective bargaining agreement (“CBA”) a requirement that non-member employees covered by the CBA must “pay their proportionate share of the costs of the collective bargaining process, contract administration and pursuing matters affecting wages, hours and conditions of employment.”⁹⁵ The statute further requires state agencies to deduct the proportionate share from the employees’ salary to pay to the union.⁹⁶ By its terms, the statute, and any CBA, prevail and control over any other law or executive order.

Non-union member public employees, including Mark Janus, sought to intervene as plaintiffs after the defendant labor organizations moved to dismiss the Governor’s complaint for lack of standing and for failure to state a claim. The federal district court dismissed the Governor’s complaint for lack of standing but to avoid the unnecessary delay and expense of requiring the employees to commence a new action, the district court allowed them to intervene and the case to proceed under the employees’ complaint.⁹⁷

Thereafter, the defendant unions moved to dismiss the employees’ second amended complaint that challenged the constitutionality of the compulsory collection of union fees on First Amendment grounds.⁹⁸ The defendants argued for dismissal based on *Abood*. The district court dismissed the employees’ action noting

Plaintiffs brought the suit hoping that Abood would be reversed in a matter then pending before the Supreme Court in which the continued validity of Abood was challenged. Friedrichs v.

⁹⁴ *Id.*, at 1.

⁹⁵ *Id.* at 2, *quoting*, IPLRA at 5 ILCS 315/6(e).

⁹⁶ *Id.*

⁹⁷ *Id.* at 3-4.

⁹⁸ *Janus and Trygg v. American Federation of State, County, and Municipal Employees, Council 31; General Teamsters/Professional & Technical Employees Local Union No. 916; Michael Hoffman, Director of the Illinois Department of Central Management Services, in his official capacity*, Order of Hon. Robert W. Gettleman U.S.D.J., Case No. 15 C 1235 (September 13, 2016) at 1.

California Teacher Association, ___ U.S. ___, 126 S.Ct. 1083 (2016). In Friedrichs an equally divided Supreme Court affirmed the Ninth Circuit's decision upholding the fair share fees based on the reasoning in Abood. Id. As a result, Abood remains valid and binding precedent.⁹⁹

Plaintiffs Mark Janus and Brian Trygg appealed the dismissal of the case to the Seventh Circuit. The circuit court affirmed the district court's order of dismissal but distinguished the circumstances of the two plaintiffs. The court found that Trygg's claims warranted dismissal on the ground of claim preclusion. This plaintiff had previously brought a challenge to his compelled payment of the union's "fair share" fees claiming the Illinois statute allowed a person who has a religious objection to paying a union fee could instead pay the fee to a charity. Trygg was successful in that challenge and the Seventh Circuit determined that since Trygg could have raised the First Amendment claim in the previous action, he was now precluded from litigating again.¹⁰⁰

However, with respect to Janus' claim, the Circuit Court held his claim "was properly dismissed, though on a different ground: that he failed to state a valid claim because, as we said earlier, neither the district court nor this court can overrule *Abood*, and it is *Abood* that stands in the way of his claim."¹⁰¹

On September 28, 2017 the United States Supreme Court granted Janus' petition for certiorari.¹⁰² With the addition of Justice Neil Gorsuch to fill the seat made vacant by Justice Scalia's death in 2016, this term may see the end of *Abood* and compulsory agency fees.

In his petition for writ of certiorari ("Petition"), Janus characterized his challenge to the constitutionality of the Illinois statute as the same question that was before the Court in *Friedrichs*, *i.e.*, "should *Abood* be overruled and public-sector agency fee arrangements be declared

⁹⁹ *Id.*

¹⁰⁰ *Janus and Trygg*, 851 F.3d 746, 748 (7th Cir. 2017)

¹⁰¹ *Id.*

¹⁰² *Janus v. American Federation, et al.*, 138 S.Ct. 54 (Mem) (2017).

unconstitutional under the First Amendment?”¹⁰³ Janus noted in his petition that the Illinois statute “tracks” the framework in *Abood* that public employees may be required to pay a fee to a union for bargaining and administering the CBA but cannot be forced to pay for political or ideological union activities.¹⁰⁴ Janus is asking the Court to “overrule *Abood* and declare Illinois’ agency fee law unconstitutional.”¹⁰⁵ Janus points out in his petition that his case concerns the same statute as was challenged in *Harris* brought by “full-fledged” public employee.¹⁰⁶ Janus is not challenging the constitutionality of exclusive representation.¹⁰⁷

A review of the arguments presented to the Court by Janus and AFSCME in support and in opposition to the Petition for certiorari provides a guide to some of the issues that will be considered by the Court.

a. *Petition for Certiorari: Janus’ Arguments for Review of Abood*

Janus claimed in his Petition agency fees are “compelled speech and association” that should be required to satisfy heightened constitutional scrutiny. According to Janus, such fees “significantly impinges on the First Amendment Rights of each and every employee who did not choose to subsidize the union’s advocacy” and employees cannot choose the speech that is worthy of his or her support.¹⁰⁸ Janus alleged the fees “support speech designed to influence governmental policies.”¹⁰⁹ Janus pointed to language in *Harris* and *Knox* to argue that public sector labor issues, including wage and employment benefits, are political issues and the function of unions is “quintessential lobbying.”¹¹⁰

¹⁰³ Petition for Cert. at (i), *Janus v. American Federation of State, County and Municipal Employees, Council 31, et al.*, 2017 WL 2546472 (U.S.).

¹⁰⁴ *Id.* at 6-7.

¹⁰⁵ *Id.* at 8.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 9.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

Janus urged that *Abood* must be reconsidered and overruled because it failed to apply the proper level of scrutiny to compelled agency fees and is thus not consistent with the Court's decisions regarding the constitutional scrutiny applicable to compelled association and speech. Janus argued that an agency fee statute should serve a "compelling state interest" or be subject to "strict scrutiny."¹¹¹ Janus further argued that the judicial tests for determining which union activities can be covered by compelled fees is unworkable and presents "administrative problems."¹¹²

After arguing that agency fee statutes should be required to satisfy heightened constitutional scrutiny, Janus then went on to posit that such statutes cannot meet that higher, more rigorous standard. Interestingly, Janus does not challenge the statute's exclusive representation requirement. Rather, the challenge is to compulsory agency fees since, according to Janus, such fees "are not necessary" because exclusive representation and the benefits of that exclusivity assist the union in recruiting and retaining members."¹¹³

Finally, Janus argued that *Abood* was incorrect in stating that agency fees fairly distribute the costs of a union's activities and counteract an incentive for an employee to become a "free rider" by refusing to contribute while obtaining the benefits of union representation.¹¹⁴ Janus suggested that employees should instead be considered "forced riders" who are required to subsidize unwanted advocacy by the bargaining agent.¹¹⁵ According to Janus, "[o]verall *Abood* got it backwards by presuming that exclusive representation burdens unions and benefits nonmember employees."¹¹⁶

¹¹¹ *Id.* at 9-10.

¹¹² *Id.* at 9-10.

¹¹³ *Id.* at 11.

¹¹⁴ *Id.* at 13.

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 14.

b. AFSCME's Opposition to the Petition

AFSCME opposed the Petition and overruling *Abood* on various jurisdictional and substantive grounds. AFSCME first argued in its Brief in Opposition to the Petition, as an initial matter, that the Court lacks subject matter jurisdiction given the peculiar origins of the case where the district court allowed the employee plaintiffs' intervenor case to continue even though the Governor's underlying complaint was dismissed for lack of standing. AFSCME also argued against granting the Petition since there was no factual record developed by the district court and no analysis by the Court of Appeals.¹¹⁷

On the merits, AFSCME took the position that *Abood* was correctly decided and should remain settled law: "*Abood's* rule is sound and underlies important and longstanding tenets of this Court's First Amendment jurisprudence. At its core, *Abood* acknowledges that certain labor-relations interests justify the small intrusion on employees' First Amendment interests that fair-share payments represents."¹¹⁸ AFSCME claimed fair share provisions fall within the government's authority to regulate speech when it acts as an employer. According to AFSCME, "[t]he constitutional balance struck in *Abood* accords with the balancing test for considering the employment-related First Amendment claims of public employees...."¹¹⁹ AFSCME also argued that the government interest in "labor peace" supports any limited infringement on constitutional rights of nonmembers and that the decision established a First Amendment principal that the government may require union fees as a condition of employment.¹²⁰

¹¹⁷ Brief in Opposition For Respondent American Federation of State, County and Municipal Employees, Council 31 at 11-12, 16, *Janus v. Am. Fed'n of State, Cnty., and Mun. Emps., Council 31*, 138 S. Ct. 54 (2017) (No. 16-1466), 2017 WL 3500027.

¹¹⁸ *Id.* at 17.

¹¹⁹ *Id.* at 18.

¹²⁰ *Id.*

AFSCME also pointed to the application of *Abood* outside the context of union dues contending the decision has been recognized “for the principle that, where the government is constitutionally permitted to advance valid government interests through private associations (*e.g.*, state bars), it may also oblige the beneficiaries to share the costs of supporting the endeavor’s core purpose.”¹²¹ According to AFSCME, *Abood* correctly held the vital policy interests of public employers “in fairly allocating the costs of the services provided by the union outweigh the comparatively modest limitations on public employees’ expressive freedom.”¹²²

Oral argument for the *Janus* case was held on February 26, 2018.¹²³ Based on the questions asked and comments made during oral argument, one can determine that the Justices are sticking to the positions they held in the *Harris* decision and in the *Friedrichs* tie. Those positions are as follows: Chief Justice Roberts and Justices Kennedy, Thomas, and Alito leaning toward overruling *Abood*, and Justices Ginsburg, Breyer, Sotomayor, and Kagan defending agency fees.

However, the newest Justice, Justice Gorsuch, who essentially will be the deciding vote, chose to remain silent on the issue by not commenting or asking any questions during oral argument. Therefore, his views remain unknown. During his closing remarks, the attorney for Respondent AFSCME warned of an “untold specter of labor unrest throughout the country” if *Janus* prevails.¹²⁴ Unfortunately, we will have to wait until a decision is rendered sometime near the end of June to find out whether that argument will prove effective with the Court, or whether the “deciding” Justice, Justice Gorsuch, will instead follow in the footsteps of Justice Scalia, whom Justice Gorsuch succeeded.¹²⁵

¹²¹ *Id.* at 19.

¹²² *Id.* at 21.

¹²³ Transcript of Oral Argument, *Janus v. Am. Fed’n of State, Cnty., and Mun. Emps., Council 31*, 138 S. Ct. 54 (2017) (No. 16-1466), 2018 WL 1050563 (U.S.).

¹²⁴ *Id.* at 67-68.

¹²⁵ Amy Howe, *Argument Analysis: Gorsuch Stays Mum on Union Fees*, SCOTUSBLOG (Feb. 26, 2018, 3:23 PM) <http://www.scotusblog.com/2018/02/argument-analysis-gorsuch-stays-mum-union-fees/>.

V. *HILL v. SEIU, et al.*¹²⁶

This case also sought to overturn *Abood* however the issues presented in *Hill* included 1) whether the government may declare an organization the “exclusive representative” of employees for any rational basis or only if it satisfies heightened First Amendment scrutiny, and 2) if exclusive representation is subject to First Amendment scrutiny whether it is constitutional for the government to require employees who are not full-fledged public employees to accept an exclusive representative.¹²⁷ The case also challenged the same Illinois statute as involved in *Janus* and was brought by workers who no longer have to pay dues and are not subject to automatic deductions from their earnings as a result of the Court’s decision in *Harris*.

The Seventh Circuit Court of Appeals affirmed the lower court’s dismissal of the complaint for failing to state a claim holding that the statute’s exclusive bargaining provisions did not create constitutionally problematic associations and thus was not subject to heightened scrutiny under the First Amendment. The Circuit Court further noted that “[n]egotiating with one majority-elected exclusive bargaining representative seems a rational means of serving these interests.”¹²⁸ On November 13, 2017 the Supreme Court denied the Petition for a writ of certiorari.¹²⁹

VI. THE POTENTIAL EFFECTS OF OVERTURNING *ABOOD*

Janus is requesting a tall-order from the Supreme Court: a finding that agency fees statutes are unconstitutional under the First Amendment. If the Supreme Court ultimately finds in his favor - the equivalent to overturning *Abood* - the face of labor relations will vastly change in the United States.

¹²⁶ *Hill v. Service Employees International Union (SEIU)*, 850 F.3d 861 (7th Cir. 2017).

¹²⁷ Petition for Cert. at (i), *Hill v. Service Employees International Union, Healthcare Illinois, Indiana Missouri Kansas et al.*, 2017 WL 2591420 (U.S.)

¹²⁸ *Hill v. Service Employees International Union, Healthcare Illinois, Indiana Missouri Kansas et al.*, 850 F.3d 861, 865 (7th Cir. 2017).

¹²⁹ *Hill v. Service Employees International Union, Healthcare Illinois, Indiana Missouri Kansas et al.*, --- S.Ct. ---, 2017 WL 2559023 (Mem).

The Supreme Court's decision in *Abood* has stood at the heart of First Amendment jurisprudence for over forty years. Thus, overturning the decision and elimination of agency fees will have substantial impact on the well-settled doctrine *Abood* has generated, including a potential destabilizing impact on all unions across the country and a decline in union strength, resources, membership, and political power.¹³⁰ Ultimately, the overturning of the core tenants of *Abood* would create a regime akin to a national right-to-work law. However, if the Court also declares exclusive representation unconstitutional, the consequences could dramatically change the workplace.¹³¹

a. *The Impact on Public Sector Organization*

If the Supreme Court decides to rule in favor of Janus, the decision's impact could be substantial. If the Supreme Court overturns *Abood* and finds agency fees unconstitutional, the impact on organizing in the public sector and the delivery of union services will ostensibly mirror States which currently have right-to-work laws.

i. *A National Right-to-Work Regime?*

If a decision by the Supreme Court determines that compelled agency fees regimes are unconstitutional, States which are currently considered to have "forced unionism" will quickly find themselves operating under the same norms as States which are exclusively "right-to-work." Based on that assumption, one likely consequence of the Supreme Court's determination would be a decline in public union membership and financial resources; although arguably the two premises are inextricably linked.¹³² First, unions would no longer have the ability to compel

¹³⁰ JANIE SCULL, AMBER M. WINKLER & DARA ZEEHANDELARR, *How Strong are U.S. Teacher Unions? A State by State Comparison*, Thomas B. Fordham Institute (October 2012).

¹³¹ Charles Morris, *Members-Only Collective Bargaining, Get Ready For an Old Concept with a New Use* (August 2, 2013) <http://portsIde.org/print/2013-08-02/members-only-collective-bargaining-get-ready-old-concept-new-use#sthash.G7vrdjun.dpuf>

¹³² See generally SCULL ET. AL, *supra* note 88.

financial support from employees. Although employees may still pay voluntarily, unions will be barred from using threat of unemployment as a means to coerce both fees and membership. As a result, presumably the fiscal resources of unions will decline and union-represented members, who believe they do not benefit from their union-negotiated contract, will not be incentivized to join resulting in a decrease in resources to the union. The same would be true for teachers unions. For example, after Michigan recently passed its right to work law in August 2014, an estimated 1% or 1,500 teachers immediately “opted out” of their teachers union.¹³³ Although the number may appear paltry, the union expects the numbers to grow, given the initial “opt-out” deadline was not publicized. Similarly, after Wisconsin passed its “right-to-work” law in 2011, approximately one-third of teachers dropped their union membership.¹³⁴ The same is true after right-to-work laws were passed in Oklahoma, Indiana, and Iowa.¹³⁵ Ultimately, the fiscal advantage that unions now enjoy in mandatory-bargaining states could be reduced by as much as 60%, causing them to engage in the same amount of work with substantially less funding.¹³⁶ As a result, union presence in the States could decline and leave States with a resulting boon in management.

Correspondingly, there is a potential impact to the balance of political power. As Justice Alito’s majority decision points out, “*Abood* failed to appreciate the conceptual difficulty of distinguishing in public-sector cases between union expenditures that are made for collective bargaining purposes and those that are made to achieve political ends. In the private sector, the line is easier to see...[b]ut in the public sector, both collective bargaining and political advocacy and lobby are directed at the government.”¹³⁷ Although this part of the decision stands for the

¹³³ Aaron Crowe, *State of the Unions This Labor Day: Losing Battles in the States*, (August 29, 2014, 3:42 PM) <http://www.dailyfinance.com/2014/08/29/state-of-the-unions-labor-day-losing-battles-states/>.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209.

logic that given the confluence of the issues, coercing union dues from public employees, inherently means forcing them to engage in political speech they may not want to support, it also stands for the proposition that a decline in union resources can create a reduction in the amount of money that can be spent on union political activities leading to a decrease in the leverage of a local union.¹³⁸ Without proposing a sequence of events in perpetuity, the reduction of political leverage at the local level could theoretically create a trickle-up effect to state organizations which would ultimately lessen those organizations' power. As a result, State organizations would be unable to infuse political power back to their local affiliates and thus provide them with additional strength to expand bargaining rights – and so on.¹³⁹

On the contrary, there is research to suggest that a union can maintain their prevalence through other means. A recent study, which engaged in a state-by-state comparison of teachers unions, has shown that even in light of the foregoing, no single attribute of a union defines its strength.¹⁴⁰ Rather, the strength of a union results from an amalgam of leadership, relationships, initiatives, prior effectiveness, and resources.¹⁴¹ For example, in States which allow agency fees, unions are enabled to accumulate increased financial resources than their counterparts.¹⁴² However, due to the interrelationship between these attributes, it is also possible that a union, without significant financial compensation may acquire strength through closed-door conversations with their adversaries.¹⁴³ For example, although Alabama prohibits agency fees and is firmly anti-labor, its teachers union has one of the highest organization rates and generates a significant amount of revenue per teacher. In fact, even after Alabama passed its right-to-work

¹³⁸ SCULL ET. AL, *supra* note 88 at 25.

¹³⁹ *Id.* at 38.

¹⁴⁰ *Id.* at 20.

¹⁴¹ *See generally*, SCULL ET. AL, *supra* note 88.

¹⁴² *Id.* at 22.

¹⁴³ *Id.*

laws, 80% of teachers voluntarily maintained their union membership.¹⁴⁴ Consequently, while a Union's ability to garner extensive resources is significant, and the inability to collect agency fees may weaken a union, there is evidence to suggest that States which are right-to-work are able to amass resources and exert authority using other channels of influence.¹⁴⁵

b. *The Impact on Management Organizations*

Not only will a decision by the Supreme Court determining that compelled agency fees regimes are unconstitutional have a major impact on unions, but it will also affect management organizations and government employers. The United States Supreme Court has already recognized an employer's interest in dealing with an exclusive representative when establishing workplace terms and conditions. The Court specifically noted in *Minnesota State Board for Community Colleges v. Knight* that "the goal of reaching agreement makes it imperative for an employer to have before it only one collective view of its employees when negotiating."¹⁴⁶ The Court in *Abood* also noted that "confusion and conflict" could result from negotiating with multiple groups of employees.¹⁴⁷

Exclusive representation provides many benefits to employers that will be lost if agency fees are declared unconstitutional, such as consolidation of the "process of bargaining about individual terms and conditions of employment into a single collective endeavor," preventing strikes in the public sector, and efficiently resolving workplace disputes and labor issues through an experienced union representative.¹⁴⁸ Management's ability to efficiently resolve labor issues,

¹⁴⁴ *Teachers Can No Opt Out of Unions* (August 29, 2014), News Channel 3.
<http://www.wwmt.com/news/features/top-stories/stories/Teachers-can-now-opt-out-of-unions-28984.shtml#.VKQNmnnu19B>.

¹⁴⁵ SCULL ET. AL, *supra* note 88 at 25.

¹⁴⁶ *Minnesota State Bd. for Cmty. Colleges v. Knight*, 465 U.S. 271, 291 (1984).

¹⁴⁷ *Abood*, 431 U.S. at 220-21.

¹⁴⁸ Brief for Respondents Lisa Madigan and Michael Hoffman, *Janus v. Am. Fed'n of State, Cnty., and Mun. Emps., Council 31* at 38-39, 138 S. Ct. 54 (2017) (No. 16-1466), 2018 WL 481593.

particularly grievances, will be injured if agency fees are declared unconstitutional because experienced and knowledgeable union representatives help facilitate a timely and satisfactory resolution of the dispute since they organize and prioritize employees' concerns in the workplace.¹⁴⁹ An exclusive representative is specifically beneficial to the collective bargaining process because he/she efficiently and reliably conveys information about employee preferences to government employers by organizing and channeling the concerns and priorities of employees, and reconciling conflicting views.¹⁵⁰ Furthermore, exclusive representatives enable the government and other employers to establish employment terms in a more durable and stable manner than if those terms were imposed unilaterally.¹⁵¹

Under the exclusive representation model of collective bargaining, unions must equally, and in good faith, represent every employee in a bargaining unit, whether the employer is a union member or not.¹⁵² Although not sought in *Janus*, if exclusive representation is ultimately eliminated by the Supreme Court in a subsequent case, or by state statutory amendment of bargaining duties, then the duty of fair representation likely gets eliminated with it. “Without [the] duty of fair representation, government employers would lose the benefit of bargaining with a single party that represents all employees, and would be faced with the workplace dissension and resentment that predictably would arise if unions could act solely in the interests of their own members.”¹⁵³ In strongly pro-labor states like New York the Taylor Law will continue to exist. Should significant membership disaffection grow, will public sector unions seek to be released

¹⁴⁹ Brief for the State of N.Y. et al. as Amici Curiae in Support of Respondents at 19-21, *Janus v. Am. Fed’n of State, Cnty., and Mun. Emps.*, Council 31, 138 S. Ct. 54 (2017) (No. 16-1466), 2018 WL 529839.

¹⁵⁰ Brief for Respondents Lisa Madigan and Michael Hoffman, *supra* note 148, at 38.

¹⁵¹ *Id.*

¹⁵² Rachel Levinson, *The Duty of Fair Representation*, (AAUP July 2007), available at, <https://www.aaup.org/NR/rdonlyres/522E23C3-FF7E-443C-A843-AE1527B3EBF8/0/DFR.pdf>; Civil Service Law § 209-a(2); *Matter of Minaya*, 39 PERB 4601 (2006).

¹⁵³ Brief for Respondents Lisa Madigan and Michael Hoffman, *supra* note 148, at 41.

from the responsibilities of exclusivity? Will there then grow a plethora of unions for management to deal with?

Another problem that arises for management if the collection of agency fees are declared unconstitutional is employers will have to determine if collective bargaining agreements remain valid and binding in the absence of agency-fee provisions.¹⁵⁴ Determining whether or not a contract remains valid and binding is a very complex question that involves the interpretation of severability clauses and state-law principles in contract law.¹⁵⁵ Therefore, if the Supreme Court rules in favor of *Janus* it will beg the questions: what does management do with contracts that are currently in effect? Do employers risk a contract violation or a violation of the First Amendment? In order to avoid such violations, employers and government agencies may choose to renegotiate collective bargaining agreements, which is very costly and will divert management's attention from other pressing matters.¹⁵⁶ Additionally, a decision declaring compelled agency fees as unconstitutional will destabilize labor-management relations that union security clauses in contracts were created to promote.¹⁵⁷ Such a decision has the potential to damage business operations by "sowing disharmony in ... workforces and allowing free riders to enjoy the benefits and securities provided by labor agreements without paying their fair share for representation."¹⁵⁸

Lastly, if the Supreme Court declares compelled agency fees to be unconstitutional, such decision is likely to cause a breakdown in collective bargaining which will in turn damage important public services like education. For example, in 2011, the State of Wisconsin decided to

¹⁵⁴ Brief for Governor Tom Wolf, State and Local Officials, and Local Gov'ts as Amici Curiae in Support of Respondents at 11, *Janus v. Am. Fed'n of State, Cnty., and Mun. Emps.*, Council 31, 138 S. Ct. 54 (2017) (No. 16-1466), 2018 WL 527962.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 11-12.

¹⁵⁷ Brief for Crown Bldg. Maint. Co. & Crown Energy Servs., Inc. et al. as Amici Curiae in Support of Respondents at 12, *Janus v. Am. Fed'n of State, Cnty., and Mun. Emps.*, Council 31, 138 S. Ct. 54 (2017) (No. 16-1466), 2018 WL 527959.

¹⁵⁸ *Id.*

restrict bargaining and eliminate agency fees, which led to lower compensation rates, an increase in turnover rates, and a drop in teacher experience.¹⁵⁹ Furthermore, the elimination of compelled agency fees will predictably strain workplace relations and undermine the effective management of schools.¹⁶⁰ Such elimination will lead to a substantial decrease in revenue for unions, which means teacher unions will need to focus on generating additional revenue rather than improving teaching and learning.¹⁶¹ As a result, the collaborative relationships that currently exist between teachers and school administrators will likely become impaired, less cooperative, and possibly even confrontational.¹⁶²

IV. POTENTIAL STATUTORY AMELIORATIVES TO THE SUPREME COURT’S DECISION IN JANUS

As stated above, if the petitioner in *Janus* receives a favorable decision from the Supreme Court, *Abood* will be reversed and as a result the open shop will become a federal constitutional mandate. In other words, a ruling in Janus’ favor would require public sector unions to represent non-members for free, while still being subject to duty of fair representation claims by dissatisfied non-members. There are certain statutory remedies that states may take in order to ameliorate the effect of the potential *Janus* decision. For example, states may follow the statutory approaches that are currently used in Florida and California.

The state of Florida is an open shop state. However, Florida’s public sector collective bargaining law includes a provision that modifies exclusive representation by not requiring a union to process or arbitrate grievances by non-members.¹⁶³ Such modification, lessens the financial

¹⁵⁹ Brief for the Nat’l Educ. Ass’n et al. as Amici Curiae in Support of Respondents, *Janus v. Am. Fed’n of State, Cnty., and Mun. Emps.*, Council 31, 138 S. Ct. 54 (2017) (No. 16-1466), 2018 WL 529843.

¹⁶⁰ Brief for Am. Fed’n of Teachers as Amici Curiae in Support of Respondents, *Janus v. Am. Fed’n of State, Cnty., and Mun. Emps.*, Council 31 at 30, 138 S. Ct. 54 (2017) (No. 16-1466), 2018 WL 529841.

¹⁶¹ *Id.* at 28, 30.

¹⁶² *Id.* at 30-31.

¹⁶³ Fla. Stat. Ann. § 447.401 (West 2017).

burden on a union in an open shop state with respect to non-members. Section 447.401 of the Florida State Labor Law specifically states “that certified employee organizations shall not be required to process grievances for employees who are not members of the organization.”¹⁶⁴ The language of the Florida statute grants wide discretion to public sector unions in determining whether to provide representation for grievances filed by non-dues-paying unit members.¹⁶⁵ Additionally, since unions are granted wide discretion under the Florida law, a union may decide “to pursue a grievance by a non-member or ... intervene in an arbitration when the [end result] might have unit-wide consequences.”¹⁶⁶ States who choose to follow the Florida law model may wish to expand such model by amending public sector collective bargaining laws to grant more discretion to unions. For example, states may wish to include in their laws that a union is “not required to represent a non-member during disciplinary interrogations and hearings, during meetings with supervisors, or with respect to the pursuit of statutory workplace claims.”¹⁶⁷

Another alternative model states may consider adopting is the model used in California. Under section 3556 of the California Government code, public employers are required to provide exclusive representatives with notice and access to new employee orientations.¹⁶⁸ This law requires the parties to negotiate the structure, time, and manner of access to new employee orientations, and it also mandates the reopening of all existing contracts for “the limited purpose of negotiating an agreement regarding access ... to new employee orientations.”¹⁶⁹ Should the parties’ negotiations concerning access result in an impasse, the issue shall be resolved through

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ National Center for the Study of Collective Bargaining in Higher Education and the Professionals, *January 2018 E-Note Newsletter*, HUNTER THE CITY UNIVERSITY OF NEW YORK, <http://myemail.constantcontact.com/January-2018-E-Note--News--Updates--and-Analysis.html?soid=1102372137664&aid=hZ8nn-tOyaI#A5> (last visited March 12, 2018).

¹⁶⁷ *Id.*

¹⁶⁸ Cal. Gov’t Code § 3556 (West 2017).

¹⁶⁹ *Id.* § 3557.

compulsory interest arbitration, which can be demanded by either party.¹⁷⁰ The California law also mandates public employers to provide all unions representing a bargaining unit with information about all new and current employees in the unit, such as each member's name, address, job title, department, work location, telephone numbers, and any personal email address on file.¹⁷¹ The information concerning new employees must be provided to the union within 30 days of the date of hire or by the first pay period of the month following commencement of employment.¹⁷² Additionally, such information must be provided to the union every 120 days unless the parties have negotiated an agreement stating otherwise.¹⁷³ California's statutory grant of union access to new employee orientations and certain information has the potential to lead to more employee participation in collective activities concerning workplace issues.

V. CONCLUSION

In declining to extend *Abood* to the Appellants in *Harris v. Quinn*, the Supreme Court's majority opinion openly suggests that given the right circumstances the Court may hold that *Abood* and its progeny are no longer decisive. As the Court prepares to decide *Janus*, a case that seeks to overturn decades of judicial decisions, the future ramifications are still unclear. Most pertinent are the imminent effects to established public-union organizations and collective bargaining paradigms currently in use in over twenty states.

¹⁷⁰ *Id.*

¹⁷¹ *Id.* § 3558.

¹⁷² *Id.*

¹⁷³ *Id.*

Speaker Biographies

Taylor Law at 50

May 10, 2018 | 10:45 a.m.-12:00 p.m.

Plenary Two:

The Potential Legal and Legislative Ramifications
of *Janus v. AFSCME*

JOHN H. GROSS

Mr. Gross is a graduate of the Cornell School of Industrial Labor Relations and the Cornell Law School. He has been actively involved in representing school districts, colleges, nonprofit organizations and municipalities in matters involving municipal law, education law, public sector labor law, employment law and corporate matters as general and labor counsel for over forty years. In addition to having an active court litigation and appellate practice, Mr. Gross frequently litigates appeals before the Commissioner of Education, teacher tenure discharge tribunals, the State Division of Human Rights, labor, commercial and construction arbitration tribunals, the courts, and the New York State Public Employment Relations Board. He has negotiated scores of labor contracts during the past thirty-five years. He has represented chief school officers including a Chancellor of the City School District of the City of New York and several Superintendents of large city school districts throughout the country. Mr. Gross has addressed numerous organizations and has participated in a great number of seminars and instructional programs concerning municipal law, public sector labor relations, labor negotiations and education law. In addition, Mr. Gross has taught courses on the subjects of education law, collective bargaining, and labor law. He has served as an adjunct professor with New York University and as a member of the faculty of the Cornell University Industrial and Labor Relations Program in New York City. Mr. Gross served as President of the 3,500-member Suffolk County Bar Association. He has been a member of the New York State Bar Association House of Delegates, its statewide Nominating Committee, and has served as Suffolk County Bar Association's delegate to the American Bar Association. He is a member of the Suffolk, Nassau and Westchester County Bar Associations and the American Bar Association. He served as Chairperson of the New York State Bar Association Alternative Dispute Resolution Committee. In 1999, New York State Chief Judge Judith Kaye appointed him a founding member of the New York State Judicial Institute on Professionalism in the Law. Mr. Gross continues as a board member of that organization. He is the Treasurer of the New York State Fair Trial-Free Press Conference. He has served for several years as a member of the House of Delegates and the Finance Committee of the New York State Bar Association. Mr. Gross was a member at large of the New York State Bar Association Executive Committee and thereafter served for three years as the Vice President of the State Bar Association for the Tenth Judicial District. Mr. Gross is counsel to the Suffolk County Bar Association and has represented the New York State Bar Association. He is counsel to the Suffolk County Board of Ethics. He is President of the New York Bar Foundation, the philanthropic arm of the New York State Bar Association.

Mr. Gross is married and resides in Northport. He served as an officer in the United States Army, Military Police Corps. Mr. Gross is the Senior Managing Partner of Ingerman Smith, L.L.P.

JUDY RIVLIN

Judy Rivlin is AFSCME's General Counsel. She is a long-time Union attorney: before joining AFSCME, Judy served as the Associate General Counsel of the United Mine Workers of America for more than 20 years, and with the Sheet Metal Workers before that. She is also an experienced mediator who serves as a volunteer mediator for the federal district court in Washington, DC.

Judy began her legal career in the federal government working at both the NLRB and the Occupational Safety & Health Review Commission. Over her career, Judy has developed experience in a wide range of issues arising in both private and public-sector labor-management relations, as well as internal union affairs.

Judy received a B.A. with Honors, from Grinnell College in Grinnell, Iowa, and her law degree from Washington University School of Law in St. Louis, Missouri.

CHARLOTTE GARDEN

Charlotte Garden is an expert in labor law and the regulation of work & workers. She is an Associate Professor at the Seattle University School of Law, where she teaches Labor Law, Constitutional Law, Appellate Litigation and Legislation & Regulation. She is also the Litigation Director at the School's Korematsu Center for Law & Equality.

Professor Garden's scholarship focuses on the intersection of work/labor law and the Constitution. Her articles have appeared in the *Emory Law Journal*, *Boston University Law Review*, *George Washington Law Review*, *Fordham Law Review*, *William & Mary Law Review*, and the *Harvard Civil Rights-Civil Liberties Law Review*. She regularly writes opinion and analysis pieces for non-academic audiences at popular outlets such as *The Atlantic*, *SCOTUS blog*, *Salon* and the blog of the American Constitution Society. Her legal analysis has been featured in the mainstream media, on platforms such as the *New York Times*, *APR's Marketplace*, *Bloomberg News*, the *Washington Post*, *The Nation*, and *Politico*. Professor Garden is a co-author of a Labor Law casebook, with collaborators Seth Harris, Anne Marie Lofaso, and Joe Slater. She also regularly authors amicus briefs in cases affecting unions and workers, most recently in *Janus v. AFSCME*, *Vergara v. California*, *Friedrichs v. California Teachers Association*, *M&G Polymers USA, LLC v. Tackett*, and *Harris v. Quinn*.

Before joining Seattle University, Professor Garden was a teaching fellow in the Appellate Litigation Clinic at Georgetown University Law Center, where she argued cases before the Fourth and D.C. Circuits. Professor Garden then clerked for Judge Thomas L. Ambro of the U.S. Court of Appeals for the Third Circuit. A graduate of NYU School of Law and McGill University, Professor Garden also spent several years in practice as a public interest litigator.

From 2005-2008, she was an associate at the union-side labor law firm Bredhoff & Kaiser, PLLC in Washington, D.C. Before that, she was a guardian ad litem at the Children's Law Center in Washington D.C., and held the Abraham Fuchsberg Fellowship at Public Citizen Litigation Group.

WILLIAM A. HERBERT

William A. Herbert is a Distinguished Lecturer and Executive Director of the National Center for the Study of Collective Bargaining in Higher Education and the Professions at Hunter College, City University of New York.

Bill's scholarship and teaching focus on labor law, history, and policy. He is a co-editor of the book Lefkowitz on Public Sector Labor and Employment Law and he has published and lectured on public sector labor history, collective bargaining, and other subjects.

Prior to joining the Hunter College faculty, Bill was PERB's Deputy Chair from 2007 to 2013. Before his tenure at PERB, Bill practiced labor and employment law before PERB, NLRB, and state and federal courts. For close to two decades, he worked directly with Jerry Lefkowitz.

DANNY DONOHUE

CSEA President Danny Donohue is one of the most influential and well-respected leaders in the American labor movement. Donohue was the first Long Islander elected to a CSEA statewide office when he won a five-way race for Executive Vice President in 1988. In 1994, he became CSEA's 23rd Statewide President.

Under Donohue's leadership, CSEA has been at the forefront of many public policy issues, including fair and responsible budgets, workplace safety and health, affordable prescription drug coverage, preserving quality health care and improving public education. Donohue has also significantly strengthened the union's role and influence in both the AFL-CIO and AFSCME, where he serves with distinction as an International Vice President. The union has grown stronger under Donohue's presidency, achieving unprecedented organizing success in the public and private sectors and today maintains a membership nearly 300,000 strong.

Donohue has long been active in the State Employees Federated Appeal and has helped to raise millions of dollars for United Way and other charities. Under his leadership, CSEA was recognized as the 1999 recipient of the Governor's Community Service Award. Donohue also serves on the Board of the International Foundation of Employee Benefit Plans and has received numerous awards and honors over the years, including the New York State Martin Luther King Institute's Leadership Award, Irish Northern Aid's James P. Connelly Award and the NYCOSH (New York Committee for Occupational Safety and Health) Award. Most recently, Donohue was awarded the Governor Hugh L. Carey award by the Irish American Heritage Museum for his contribution as a highly respected and generous community leader.

Concurrent One

Taylor Law at 50

May 10, 2018 | 1:30 p.m. – 2:45 p.m. | Fort Orange Ballroom 7 & 9
1.5 areas of professional practice CLE credit

Public Sector Labor Relations **in Higher Education**

This session will examine challenges to unionization efforts by faculty and graduate students at public colleges and universities.

Moderator:

Risa L. Lieberwitz, Professor of Labor and Employment Law, Cornell University School of Industrial and Labor Relations, General Counsel of the American Association of University Professors

Panelists:

Frederick E. Kowal, President, United University Professions

Raymond Haines, former SUNY Associate Vice Chancellor for Employee Relations

Robert Scholfield, Partner, Whitemen, Osterman & Hanna

Luke Elliott-Negri, Doctoral Student, Sociology, CUNY Graduate Center

Including:
Distinctive Issues in Higher Education under the Taylor Law

“The Taylor Law at 50” Conference

Panel: Public Sector Labor Relations in Higher Education:

Distinctive Issues in Higher Education under the Taylor Law

May 10, 2018

Panelists:

Risa L. Lieberwitz (moderator)

Luke P. Elliott-Negri

Raymond L. Haines

Frederick E. Kowal

Robert T. Schofield

I. Introduction

“Through its first few years, PERB would be primarily occupied by the first objective of the Taylor Law: organizing local unions and holding representation elections. [B]y the mid-1970s, with representation issues largely settled, applying the collective bargaining and impasse provisions of the Taylor Law would become the focal point.” Jason A. Zwara, *Practitioners' Note: Left In The Dark: How New York's Taylor Law Impairs Collective Bargaining*, 31 Hofstra Lab. & Emp. L.J. 193, 200-01 (2013).

II. Employee rights under the Taylor Law

- A. “The similarity in language between...public sector statutory provisions and Sections 7, 8(a)(1), (2) and (3) of the National Labor Relations Act has led to extensive reliance upon federal precedents.” Richard Kirschner, *Labor Management Relations in the Public Sector: An Introductory Overview of Organizing Activities, Bargaining Units, Scope of Bargaining, and Dispute Resolution Techniques*, ALI-ABA Course of Study Materials (June and July 1999), see, e.g., Sec. 202.

Sec. 202. Public employees shall have the right to form, join and participate in, or to refrain from forming, joining, or participating in, any employee organization of their own choosing.

- B. Lack of protection for “concerted activities” under the Taylor Law.

1. William Herbert describes the 1984 decision from the New York Court of Appeals in a community college case: “In *Rosen v. New York Public Employment Relations Board*, 526 N.E.2d 25 (N.Y. 1988), the New York Court of Appeals sustained an administrative determination by the New York State Public Employment Relations

Board (NYPERB) that a community college teacher who presented grievances on behalf of herself and a group of other employees to the associate dean did not engage in a protected activity under the Taylor Law because there was no evidence that the teachers were in a union, were seeking to form a union, or were being represented by one. The Rosen holding demonstrates that, in contrast to the standard set forth in Meyers I and Meyers II [under the NLRA], a New York public employee ‘bringing truly group complaints to the attention of management’ is unprotected unless the complaint is related to forming, joining or participating in a union.” William A. Herbert, *Can't Escape from the Memory: Social Media and Public Sector Labor Law*, 40 N. Ky. L. Rev. 427, 465 (2013).

2. In the absence of protection for “concerted activities” unrelated to unionization, academic freedom is important for protecting faculty concerted/group activity. Sources of academic freedom: constitutional rights of freedom of speech; university policies; collective bargaining agreements.
3. Excerpt from the UUP/SUNY Collective Bargaining Agreement (2011 – 2016)

Academic Freedom

§9.1 It is the policy of the University to maintain and encourage full freedom, within the law, of inquiry, teaching and research. In the exercise of this freedom faculty members may, without limitation, discuss their own subject in the classroom; they may not, however, claim as their right the privilege of discussing in their classroom controversial matter which has no relation to their subject.

§9.2 The principle of academic freedom shall be accompanied by a corresponding principle of responsibility.

§9.3 In their role as citizens, employees have the same freedoms as other citizens. However, in their extramural utterances employees have an obligation to indicate that they are not institutional spokespersons.

III. Scope and make up of bargaining units

A. Significance of bargaining unit determination

“Unit determinations serve a dual function in both the public and private sectors: they (1) determine the constituency for purposes of selecting the majority representative; and (2) mold the structure of collective bargaining which takes place after a representative, if any, is selected.” Kirschner, *supra*.

Under the Taylor Law, factors to determine appropriate bargaining units: “(1) the community of interest among the employees to be included in the unit; (2) whether the officials of the government at the level of the unit have the power to agree to the terms and conditions of employment upon which the employees desire to negotiate; and (3)

whether the unit is compatible with the joint responsibilities of the public employer and public employees to serve the public.” Kirschner, *supra*.

B. Managerial Employees

1. Unlike the NLRA, supervisors are considered “employees” under the Taylor Law, with rights to unionize and engage in collective bargaining. Similar to the NLRA, “managerial employees” are excluded from the definition of “employee” under the Taylor Law. Section 201.7(a).
2. A key distinction between the category “managerial employees” as applied to faculty in higher education in the private and public sectors.
 - a. Since the 1980 U.S. Supreme Court decision of *NLRB v. Yeshiva University*, 444 U.S. 672 (1980), many tenure-track/tenured faculty have been considered managerial employees excluded from protection under the NLRA. Contingent faculty (full-time and part-time nontenure-track faculty) will likely be considered employees covered by the NLRA. Under the Taylor Law, all faculty are employees with rights to unionize and collectively bargain.
 - b. “While the court's decision in *Yeshiva* has resulted in the decertification or voluntary withdrawals of some 25 faculty unions at various private colleges and universities, including four in New York State, it has not lead to the decertification of a single unit in the public sector, despite their having similar collegial governance policies and practices.” Sid Braufman, *Coping with Arbitrability: Private Industry v. Academia*, 48 Arbitration Journal 42 (March 1993).

C. Teaching Assistants and Research Assistants

1. Under the NLRA, employee status of teaching assistants and research assistants (whether graduate students or undergraduate students) has been an issue that has seesawed back and forth, depending on whether the NLRB majority was appointed by a Democratic or Republican administration (*NYU* (2000) employee status; *Brown University* (2004) no employee status; *Columbia University* (2016) employee status).
2. Under the Taylor Law, TAs and RAs are considered employees.

D. Scope of bargaining units.

1. A significant issue concerning the scope of bargaining units in colleges and universities under the Taylor Law is whether a “wall-to-wall” bargaining unit is appropriate; i.e. a unit that includes nontenure-track faculty, tenure-track/tenured faculty, and graduate assistants (TAs; RAs). Is there a community of interests

sufficient to include all these groups in a single bargaining unit, or separate bargaining units appropriate?

2. *Cayuga Community College Part-Time Faculty Association and Cayuga Community College, and County of Cayuga* (2016) (PERB upheld ALJ finding that separate bargaining unit of part-time faculty was appropriate due to lack of strong community of interests with full-time faculty and conflicts between part-time and full-time faculty).
3. *In the Matter of Tompkins Cortland Community College Adjunct Association, NYSUT, NEA, AFT, AFL-CIO and Tompkins Cortland Community College, and County of Tompkins and County of Cortland*. 50 PERB ¶4001 (ALJ 2013) (separate bargaining unit of adjunct faculty was appropriate because of conflicts of interests with full-time faculty).
4. The Professional Staff Congress (PSC), the union representing full and part-time faculty, professional staff and graduate student-workers, across some two dozen urban campuses at the City University of New York (CUNY), was chartered as an American Federation of Teachers local in 1972, through the merger of two previously existing unions. See, Luke Elliott-Negri, “Wall to Wall: Industrial Unionism at the City University of New York, 1972 – 2017,” In *Professors in the Gig Economy*, Kim Tolley editor (2018), documenting the history of the PSC with respect to contingent faculty (adjuncts). Rather than making a final assessment with respect to whether adjuncts have more power in a wall-to-wall unit like PSC-CUNY’s or in their own union (as is the case at many universities, especially in the private sector), Elliott-Negri argues that there are, simply, *trade-offs* involved in “wall to wall” unionism: adjuncts benefit from the dues base and lobbying power of full time faculty, but tend to find their goals submerged.

IV. Collective bargaining issues

A. Defining Mandatory and Nonmandatory Subjects of Bargaining

1. Introduction

- a. “The main public sector justification for excluding a legal topic from the mandated bargaining process is that the demand involves a significant public policy question which should not be determined in the...collective bargaining process....” Kirschner, *supra*.
- b. Courtlyn G. Roser Jones contrasts private sector collective bargaining, where employers resist discussing permissive subjects, with public sector collective bargaining, where unions, “have proved immensely successful in bargaining over these permissive subjects, particularly as they relate to collaborative policy roles for their professional employees.” Courtlyn G. Roser-Jones, *Reconciling Agency*

Fee Doctrine, The First Amendment, and the Modern Public Sector Union, 112 NW. U. L.Rev. 597, 628 (2018). Roser-Jones cites teachers unions as being “at the forefront of this, negotiating provisions in collective bargaining agreements related to the length of school days, student--teacher ratios, instructional and preparation time, the use of performance indicators, school safety provisions, and professional qualifications for hire.” *Id.*

c. Roser-Jones continues:

“Widening the typical scope of bargaining topics to influence organizational policy was a fundamental early victory for public sector unions. That collectively-bargained-for agreements in the public sector still generally encompass a broader scope of activities remains a modern distinction between public and private sector collective bargaining mechanics. Although most state statutes regulating public sector collective bargaining also distinguish between permissive and mandatory subjects, government officials who bargain on the other side of the table with public sector unions have (up until very recently) been more willing to discuss permissive topics than private sector employers. Unlike in private sector bargaining, a combination of social and political pressures made avoidance of permissive topics in the public sector unpopular.” *Id.* at 629.

2. Mandatory and nonmandatory subjects under the Taylor Law

- a. Kirschner, *supra*, notes “how incredibly fine-lined some of the distinctions can be” in defining mandatory, nonmandatory, or prohibited subjects of bargaining under the Taylor Law. (citing, *Mandatory/Nonmandatory Subjects of Negotiation*, New York State Public Employment Relations Board (May 31, 1988)).
- b. *Mandatory/Nonmandatory Subjects of Negotiation*, New York State Public Employment Relations Board 38 (May 31, 2007), provides case descriptions and citations of mandatory and nonmandatory subjects of bargaining, including the following that concern issues relevant to collective bargaining in higher education:

Tenure reviews and job security:

A substantive limitation on the authority of a board of education to grant or deny tenure violates public policy that such boards have sole authority to make tenure decisions. It is not a term or condition of employment subject to mandatory negotiations. However, procedural safeguards preliminary to a tenure determination are mandatorily negotiable. *Cohoes City Sch Dist v Cohoes Teachers Assn*, 40 NY2d 774, 9 PERB ¶ 7529 (1976); *Conte v Board of Educ Town of Hinsdale, Cattaraugus County*, 58 AD2d 219, 10 PERB ¶ 7532 (4th Dept 1977); *Board of Educ Elwood Union Free Sch Dist v Elwood Teachers' Alliance*, 94 AD2d 692, 16 PERB ¶ 7517 (2d Dept 1983).

Procedural aspects of an evaluation system are mandatorily negotiable, especially where the implementation of the evaluation system involves employee participation. *County of Nassau*, 35 PERB ¶ 4566 (2002).

A demand for union approval of evaluation forms is a mandatory subject since it relates to evaluation procedures. *Somers Faculty Assn*, 9 PERB ¶ 3014 (1976).

Requirements of a written statement of evaluation criteria and of written rationale for denial of promotion, reappointment or tenure are mandatory subjects. *Orange County Community Coll*, 9 PERB ¶ 3068 (1976).

A demand that unit employees determine their own evaluation system is a nonmandatory subject; due process in the application of an evaluation system is a mandatory subject. *Orange County Community Coll*, 9 PERB ¶ 3068 (1976).

The identity of persons or members of a committee who will evaluate is not a term and condition of employment of the employees to be evaluated and, therefore, their designation is a nonmandatory subject. *Board of Educ of the City Sch Dist of the City of New York*, 5 PERB ¶ 3054 (1972); *Board of Educ of the City Sch Dist of the City of New York*, 7 PERB ¶ 3028 (1974); *Orange County Community Coll*, 9 PERB ¶ 3068 (1976), *Orange County Community Coll Faculty Assn*, 10 PERB ¶ 3080 (1977); *Onondaga Community Coll Fedn of Teachers, Local 1845 and Onondaga Community Coll*, 11 PERB ¶ 3045 (1978).

Standards or criteria for evaluation are nonmandatory subjects. *Somers Faculty Assn*, 9 PERB ¶ 3014 (1976); *Elwood Union Free Sch Dist*, 10 PERB ¶ 3107 (1977); *Roswell Park Cancer Institute*, 36PERB ¶ 4518 (2003).

A demand to preclude the layoff of unit employees is a nonmandatory proposal for job security. *Hudson Valley Community Coll Faculty Assn and Hudson Valley Community Coll*, 12 PERB ¶ 3030 (1979); *Onondaga Community Coll Fedn of Teachers, Local 1845 and Onondaga Community Coll*, 11 PERB ¶ 3045 (1978).

Demands regarding the order of retrenchment or layoff are mandatory. *Hudson Valley Community Coll Faculty Assn and Hudson Valley Community Coll*, 12PERB ¶ 3030 (1979).

Course content and teaching materials:

A demand for faculty input into the courses they will teach is nonmandatory. *Orange County Community Coll Faculty Assn*, 10 PERB ¶ 3080 (1977).

Courses (curriculum) to be offered relates to educational policy and are nonmandatory. *Orange County Community Coll*, 9 PERB ¶ 3068 (1976); *Yorktown Faculty Assn and Yorktown Cent Sch Dist*, 7 PERB ¶ 3030 (1974).

A demand that textbooks and other teaching materials be selected by unit employees deals with educational policy and is nonmandatory. *Orange County Community Coll*, 9 PERB ¶ 3068 (1976).

A demand that time limits be set on the promulgation of required textbooks to give teachers preparation time for their usage is mandatory. *Orange County Community Coll Faculty Assn*, 10 PERB ¶ 3080 (1977).

Due process in disciplinary procedures:

Arbitration as the last step of disciplinary procedures relating to tenured teachers is a mandatory subject. *Board of Educ of Union Free Sch Dist No. 3 Town of Huntington v Associated Teachers of Huntington*, 30 NY2d 122, 5 PERB ¶ 7507 (1972).

Intellectual Property:

The portions of an intellectual property policy which relate to compensation, dispute resolution and grievances are mandatorily negotiable. *Matter of City Univ. of New York*, 36 PERB ¶ 4547 (2003), *revd in part* 37 PERB ¶ 3006 (2004), *revd and remanded sub nom. Matter of Professional Staff Congress-City Univ of New York v Pub. Empl Relations Bd.*, 21 AD3d 10, 38 PERB ¶ 7009 (1st Dept 2005), *motion to dismiss on the ground of mootness denied*, 7 NY3d 780, 39 PERB ¶ 7008, *revd* 7 NY3d 458, 39 PERB ¶ 7010 (2006).

B. Factors influencing the scope of bargaining, outside legal definitions under the Taylor Law

1. Parties' relationship in collective bargaining.

Kirschner, *supra*, notes: "Personal experience and involvement in the dynamics of collective bargaining in a variety of public sector settings, confirms the truth that, in many instances, bargaining results are not primarily determined by the legal rules related to the scope of bargaining. This does not mean, however, that the law which defines scope is irrelevant to the bargaining process...At times, legal doctrines relating to scope may be used as a sword by a weak union or weak management to provide additional bargaining leverage or as a shield to provide some protection against granting undesired bargaining concessions. Moreover, in the 'real' bargaining world, parties usually seek to arrange workable tradeoffs. These may be easier to arrange when there is a broad scope of bargaining which gives the parties greater flexibility."

2. "Matters which are nonmandatory in nature may become mandatorily negotiable between the parties to a collective bargaining agreement that already contains such matters. This 'conversion theory of negotiability' effectuates the fundamental policies of the Public Employees' Fair Employment Act (Act) and avoids continuing litigation

of disputes which should be resolved through good faith negotiations.”

Mandatory/Nonmandatory Subjects of Negotiation, New York State Public Employment Relations Board (May 31, 2007), *citing*, *City of Cohoes*, 31 PERB ¶ 3020 (1998), *confirmed sub nom. Uniform Firefighters of Cohoes, Local 2562, IAFF, AFL-CIO v Cuevas*, 32 PERB ¶ ~7026 (Sup Ct Albany County 1999), *affd*, 276 AD2d 184, 33 PERB ¶ ~7019 (3d Dept 2000); *Iv denied*, 96 NY2d 711, 34 PERB ¶ 7018 (2001); *City of Utica*, 31 PERB ¶ 3075 (1998), *affd*, 32 PERB ¶ 7005 (Sup Ct Albany County 1999); *Greenburgh No 11 Union Free Sch Dist*, 32 PERB ¶ 3023 (1999).”

3. **Collective bargaining and shared governance.**

There may be overlapping issues of wages, hours, and terms and conditions of employment (i.e. mandatory subjects of bargaining) and issues deliberated on by Faculty Senates or other shared governance bodies. Further, the parties may agree to engage in collective bargaining over nonmandatory subjects of bargaining (see above for examples of PERB and/or ALJ decisions). Such nonmandatory subjects may also be deliberated on by Faculty Senates or other shared governance bodies as policy matters of interest to the faculty.

C. **Alternative dispute resolution processes during collective bargaining**

1. Taylor Law section 209(3)(f) only applies where “the public employer is a school district, a board of cooperative educational services, a community college, the state university of New York, or the city university of New York.” In these educational institutions, at the point of impasse, the parties are not required to enter binding interest arbitration and there is no requirement that the impasse be resolved through legislative intervention.
2. Kirschner, *supra*, quotes a Buffalo Teachers Federation representative’s statement in a 2010 consultant report, that “there is no purpose in [declaring impasse] since the dispute would go to a Fact Finder. The Fact Finder’s Report would then be submitted to the School Board and to Union leadership. No purpose would be served since the process lacks binding arbitration... .” Contrast with other parts of the public sector: In “emergency service” sectors, including police and firefighters, section 209(4) subjects the parties to binding interest arbitration after negotiations reach impasse. In all other parts of the public sectors, section 209(3) the impasse and arbitration process ends with a legislatively imposed agreement.
3. Examples of long negotiations for renewal of a new collective bargaining agreement:
 - a. David W. Chen, “Tentative Contract Deal at CUNY Ends Stalemate and Strike Threat,” *New York Times* (Jun. 16, 2016).
 - b. Keshia Clukey, “SUNY Employees Rally for New Contract,” *Politico* (Albany) (Nov. 16, 2017), <http://uupinfo.org/communications/docs/PoliticoAlbanyContractRallyNov17.jpg>

D. Effect of Triborough Amendment

1. The Triborough Amendment (1982): It is an improper practice “to refuse to continue all the terms of an expired agreement until a new agreement is negotiated... .” Section 209-a(1)(e)
 2. *Prof'l Staff Congress-City Univ. of N.Y. v PERB*, 799 N.Y.S.2d 7, 15 (App. Div. 1st Dep't 2005), rev'd on other grounds 857 N.E.2d 1108 (N.Y. 2007) (“the Triborough doctrine is primarily a protection for employee representatives and not, as PERB views it, an imposition of reciprocal obligations to maintain the status quo.”). (see, Zwara, *supra* at 175 n. 68)
 3. Does the Triborough Amendment have a distinctive impact on collective bargaining in educational institutions that are not required to engage in binding arbitration due to 209(3)(f) of the Taylor Law? See, Kirschner, *supra*.
- E. Potential impact of *Janus v. AFSCME*, currently pending in the U.S. Supreme Court, concerning a First Amendment challenge to agency fee provisions in public sector collective bargaining agreements.

V. Enforcement of the collective bargaining agreement: Distinctive issues in higher education.

A. Dispute resolution processes for different types of grievances.

1. Braufman describes “[t]he most significant difference between the two models [industrial and academia].... [W]hile virtually all kinds of controversies and disputes in industry, with very few exceptions, can be appealed to arbitration, grievances challenging exercises of academic judgment are sharply restricted. Thus, where such critical matters as appointment, reappointment, promotion, termination and tenure are concerned, the tendency in academia is to limit arbitrability severely. The arbitrator's authority is greatly curbed with respect to both the scope of examination and the remedy. More specifically, the examination must focus exclusively on procedural matters, while the remedy is confined solely to a remand order.” Sid Braufman, *Coping with Arbitrability: Private Industry v. Academia*, 48 Arbitration Journal 42 (March 1993)
2. Braufman also describes the more complex nature of grievance procedures in higher education CBAs: “Relatively speaking, industry takes a rather simple approach to its grievance and arbitration machinery, with virtually all disputes, regardless of type, being subject to the same procedure. In higher education, however, that is clearly not the case. All procedures applicable to the full-time faculty comprise at least three separate and distinct systems. One deals with discipline, one involves academic judgment and the ARPT [appointment, reappointment, promotion, and tenure] process, and still another concerns all

other disputes. And, that doesn't even take into account the usual peer-review or other appeals processes available to the complainant, not part of the regular grievance and arbitration process.” *Id.*

B. Procedures concerning appointment, reappointment, promotion, and tenure.

1. The CBA may limit the arbitrator’s authority.

Example from PSC/CUNY CBA (2007-2010):

(b) For purposes of this sub-paragraph, "academic judgment" shall mean the judgment of academic authorities including faculty, as defined by the bylaws and the board (1) as to the procedures, criteria and information to be used in making determinations as to appointment, reappointment, promotions, and tenure and (2) as to whether to recommend or grant appointment, reappointment, promotions and tenure to a particular individual on the basis of such procedures, criteria and information. In the arbitration of any grievance or action based in whole or in part upon such academic judgment, the arbitrator shall not review the merits of the academic judgment or substitute his/her own judgment therefor, provided that the arbitrator may determine (i) that the action violates a term of this agreement, or (ii) that it is not in accordance with the bylaws or written policies of the board, or (iii) that the claimed academic judgment in respect of the appointment, reappointment, promotion or tenure of a particular individual in fact constituted an arbitrary or discriminatory application of the bylaws or written policies of the board.

(c)(1) In cases involving the failure to appoint, promote or reappoint an employee in which the arbitrator sustains the grievance, except as specifically provided by sub-par. (d) below, the arbitrator shall not, in any case, direct that a promotion, appointment or reappointment with or without tenure be made, but upon his/her finding that there is a likelihood that a fair academic judgment may not be made on remand if normal academic procedures are followed, the arbitrator shall remand the matter to a select faculty committee of three tenured full or associate professors of the City University of New York....

2. The CBA may limit use of grievance/arbitration in procedures concerning appointment renewals:

Excerpts from the UUP/SUNY Collective Bargaining Agreement (2011 – 2016)

§33.1 Definitions

- a. “Professional staff” shall mean all persons occupying positions designated by the Chancellor as being in the unclassified service.
- b. “Initial academic review” shall mean a review and recommendation by a committee of academic employees at the departmental level or, in the event academic employees are not organized along departmental lines, at the division, school, college or other academic employee organizational level next higher than the departmental level, which may exist for the purpose of evaluating an academic employee for continuing appointment.
- c. “Subsequent academic review” shall mean a review and recommendation by a committee of academic employees at the division, school, college or other academic employee organizational level next higher than the initial academic review committee which may exist for the purpose of evaluating an academic employee for continuing appointment.

§33.4 Procedure for Review

- a. Within 10 working days following receipt by an employee of notification, in writing, by the College President of the right to a review of the reasons for non-renewal, such employee may submit to the Chancellor a request, in writing, that the Chancellor, or designee, review the reasons for such notice of non-renewal. It is recommended that the employee enclose a copy of the College President’s letter providing the reasons for the non-renewal with the request to the Chancellor.
- b. Within 10 working days following receipt by the Chancellor of the employee’s request for review submitted pursuant to subdivision (a) of this Section, the Chancellor, or designee, shall acknowledge the employee’s request and shall notify both the employee and the College President that a review of the matter shall take place by an ad hoc tripartite committee of members of the professional staff at the employee’s campus, to be known as the Chancellor’s Advisory Committee.

* * *

The scope of the review conducted by the Chancellor’s Advisory Committee shall not exceed the following:

1. Where the reasons for the notice of non-renewal were the employee's performance or competence, the Chancellor's Advisory Committee may review the substance of the judgments relating to such performance or competence.

2. Where the reasons for the notice of non-renewal involved matters of program, the review conducted by the Chancellor's Advisory Committee shall be limited to the sole question of whether the notice of non-renewal was in fact based upon such considerations when issued. The Chancellor's Advisory Committee shall not be empowered to determine the correctness of determinations of the College President involving matters other than the employee's performance or competence, but shall satisfy itself that the matters of program were the reasons for the decision and shall so state to the Chancellor.

* * *

§33.7 Neither provisions of this Article nor any review conducted pursuant thereto shall be subject to the provisions of Article 7, Grievance Procedure, of this Agreement.

3. Procedures concerning disciplinary actions;

a. For grievances dealing with disciplinary actions (e.g. suspension or discharge), in academia, the norm is that a hearing by peers precedes such disciplinary actions cannot be implemented without some form of hearing by faculty peers. This contrasts with traditional industry settings, where the grievance/arbitration process follows management's imposition of discipline.

Example: Art. 21.10 of the contract between the Professional Staff Congress (PSC) and City University of New York (CUNY): "Any person against whom charges have been made may, at any time during the pendency of the charges, be suspended by the president of the college. Such suspension shall be without loss of pay."

c. A CBA may provide faculty member with option of going to arbitration or taking the disciplinary grievance to a faculty governance body.

d. Excerpts from the UUP/SUNY Collective Bargaining Agreement (2011 – 2016) regarding grievance/arbitration for disciplinary actions.

§19.4 Disciplinary Procedure

a. Discipline shall be imposed only for just cause. Where the College President, or designee, seeks to impose discipline, notice of such discipline shall be made in writing and served upon the employee in person or by registered or certified mail, return receipt requested, to the employee's address of record. The conduct for

which discipline is being imposed and the penalty proposed shall be specified in the notice. The notice served on the employee shall contain a detailed description of the alleged acts and conduct including reference to dates, times and places.

b. The penalty proposed may not be implemented until the employee (1) fails to file a disciplinary grievance within 10 days of service of the notice of discipline, or (2) having filed a disciplinary grievance, fails to file a timely appeal to disciplinary arbitration, or (3) having appealed to disciplinary arbitration, until and to the extent that it is upheld by the disciplinary arbitrator, or (4) until the matter is settled.

Speaker Biographies

Taylor Law at 50

May 10, 2018 | 1:30 p.m. – 2:45 p.m.

Concurrent One:

Public Sector Labor Relations in Higher Education

RISA L. LIEBERWITZ

Risa L. Lieberwitz is a Professor of Labor and Employment Law in the Cornell University School of Industrial and Labor Relations (ILR), where she has been a professor since 1982. She is an associate in the Worker Institute at Cornell and a co-director of the Cornell University Law and Society minor.

Professor Lieberwitz currently holds an appointment as General Counsel of the American Association of University Professors (AAUP). She has also served as a member of AAUP Committee A on Academic Freedom and Tenure.

Professor Lieberwitz teaches a wide range of courses, including Labor and Employment Law, Constitutional Aspects of Labor and Employment Law, Employment Discrimination Law, Arbitration, and Theories of Equality and Their Application in the Workplace. Her research addresses these areas, with a current focus on academic freedom in higher education.

Professor Lieberwitz's publications include articles on academic freedom in the university, as well as articles on labor law and on constitutional issues of freedom of speech, due process, and search and seizure in the employment setting. Her current research focuses on the "corporatization" of the university and the implications of these developments on academic freedom and the role of higher education in a democratic society. Ongoing research projects include a study of collective bargaining to protect academic freedom and faculty governance in higher education. Her research projects also include a comparative study of "research assessment" and academic freedom in the U.S. and U.K.

FREDERICK E. KOWAL, PH.D.

Running on a platform to make United University Professions a dynamic and progressive force, Frederick E. Kowal of Warnerville, NY won election as UUP President in May 2013.

UUP is the nation's largest public higher education union and represents more than 35,000 academic and professional faculty on the State University of New York's 29 state-operated campuses.

Kowal served as UUP Chapter President at SUNY Cobleskill from 1993 to 2003 and again from 2011 until his election as statewide president. Since 1985, Kowal has also taught political science and Native American studies at Cobleskill.

In October 2013, Kowal was appointed as a vice president for the American Federation of Teachers. He also serves as chair of AFT's Higher Education Program and Policy Council.

In April 2016, Kowal was appointed to the National Wildlife Federation's board of directors. In November, he was honored by the Labor-Religion Coalition of New York State. Kowal will receive the American Labor Studies Center's 2017 Kate Mullany Medal in December.

Kowal's statewide UUP experience includes service as the elected Membership Development Officer from 1999 to 2002 and as an Executive Board member from 1995 to 2002, and from 2012 to the present. He has also been active in UUP's legislative advocacy efforts, pressing for UUP's legislative and political action priorities.

Kowal served on the UUP Negotiations Team that bargained with New York State for the 1999-2003 contract, and has held leadership roles in several statewide committees including: Chapter President Release Time (Chair); Technology Sector (Co-Chair); Elections and Credentials; and the Constitutional Task Force.

As chapter president at SUNY Cobleskill, Kowal faced and fought the threat of the campus's closure during the mid '90s, working with the chapter Executive Board to persuade state lawmakers to keep the college open. Later, after dozens of faculty members received notices their positions were being "retrenched," Kowal led successful efforts to prevent any job losses. Since 2011, he has inspired new members at Cobleskill to become chapter activists and directed the revamping of the chapter's system of representation across the campus.

Kowal grew up in the mill town of Chicopee, MA, the son of working class, union-represented parents. He earned a Bachelor of Arts in economics from Western New England University, a master's in economics at American University and a doctorate in political science from UAlbany.

"My central goal as UUP president will be to build this union for the future, drawing in new energy while preserving the foundation on which UUP was built," Kowal says.

RAYMOND L. HAINES, JR.

Ray retired in 2017 after forty-one years of service with the State University of New York (SUNY). His overall responsibilities included the supervision of four other public sector labor law specialist attorneys in the SUNY System Administration Office of Employee Relations. That Office, on behalf of the Chancellor, provides all aspects of the University's labor relations program for the system's twenty-nine State-operated campuses. SUNY has an aggregate workforce of approximately fifty-seven thousand employees, of which all but about twelve hundred of whom belong to one of nine bargaining units represented by seven separate unions.

He joined SUNY in 1976 after previously serving an internship with the Governor's Office of Employee Relations. Ray came to System Administration in late 1978 after serving as the Assistant to the President for Labor Relations and Legal Affairs for SUNY Oswego College Presidents James Perdue and Virginia Radley. Prior to becoming the Associate Vice Chancellor for Employee Relations, he held the titles of Employee Relations Associate, Director of Employee Relations for Professional Staff, Director of Employee Relations and Assistant Vice Chancellor for Employee Relations.

Ray has served as the Chief University Negotiator on the State's teams for negotiations with the Professional Staff Negotiating Unit represented by United University Professions and the Graduate Student Employees Union unit represented by the Communication Workers of America/Graduate

Student Employees Union. He wrote most of the operational provisions in both of those Agreements and was also responsible for the design and implementation of various sections of the SUNY Policies of the Board of Trustees as published in the New York Code of Rules and Regulations pertaining to terms and conditions of employment.

He has been as a resource on collective bargaining issues for management representatives of other higher education systems throughout the country and participated as a panelist and/or presenter for various organizations and conferences. Ray is the recipient of the SUNY Human Resources Association Edward S. Barber Distinguished Service Award, the SUNY Business Officers Association Outstanding Performance Award, the SUNY Police Chiefs Association Service Award and the SUNY Human Resources Association John Cummings Lifetime Achievement Award.

ROBERT T. SCHOFIELD

Robert T. Schofield is a partner in Whiteman Osterman & Hanna's Labor and Employment Law, Education, and Litigation, Arbitration and Mediation Practice Groups. His areas of expertise include public sector labor and employment issues, education law, and general litigation, as well as State Court practice. Mr. Schofield has been with Whiteman Osterman & Hanna LLP since 2000.

Mr. Schofield is a past President of the Albany County Bar Association and the Albany County Bar Foundation. He is a member of the House of Delegates of the New York State Bar Association, and a past member of the State Bar's Committee on Attorney Professionalism. He has served as the President of the NY Capital Chapter of the Labor and Employment Research Association, an organization of practitioners and arbitrators in the labor-management community. He is a member of the New York State School Boards Association Council of School Attorneys.

Mr. Schofield is a member of the City of Albany's Industrial Development Agency and of the Boards of Capital Region Chamber of Commerce and its subsidiary, the Albany-Colonie Regional Chamber of Commerce, where he also served as co-chair of its Leadership Tech Valley Program. He previously co-chaired the former Capital Leadership Program and was a member of the Capital Leadership Class of 2002. In 2007, he was named one of the Capital Region's "40 Under Forty" by The Business Review newspaper. In 2008, Mr. Schofield was appointed to the City of Albany's Comprehensive Plan Review Board and in 2011 to its Community Advisory Committee on Sustainability. In 2010, Mr. Schofield was awarded the New York Library Association's Outstanding Advocate of Libraries Award. He has served on the Board of Habitat for Humanity of the Capital District and currently serves as a Director of the Plattsburgh College Foundation.

Prior to joining the Firm, Mr. Schofield was the law clerk to the Hon. Justices Bernard J. Malone, Jr. and Joseph Harris of the New York Supreme Court, and previously served as an Appellate Court Attorney for the New York Supreme Court, Appellate Division, Third Department. Mr. Schofield graduated, magna cum laude, from Syracuse University College of Law, where he was an editor of the Syracuse Law Review. He holds a Master of Public Administration degree from Syracuse University's Maxwell School of Citizenship and Public

Affairs, as well as a Bachelor of Arts degree from Plattsburgh State University. He is admitted to practice in New York and in the United States District Courts for the Northern and Southern Districts of New York, the United States Court of Appeals for the Second Circuit, and the United States Supreme Court. He has been listed in the upstate editions of Best Lawyers in America and New York Super Lawyers, and is a fellow of the New York State Bar Foundation.

LUKE P. ELLIOTT-NEGRI

Luke P. Elliott-Negri is a Doctoral Candidate in Sociology at the CUNY Graduate Center (2018 expected). His publications include "Wall to Wall: Industrial Unionism at the City University of New York 1972 – 2017." In *Adjunct Higher Ed: The Unionization of Contingent Faculty in the United States*, edited by Kim Tolley. Baltimore, MA: Johns Hopkins University Press (forthcoming), and "Good For Business? Connecticut's Paid Sick Leave Law." Washington: Center for Economic and Policy Research. (March 6th) Accessed on January 8th 2018: <http://www.cepr.net/documents/good-for-buisness-2014-02-21.pdf>, with Appelbaum, Eileen, Ruth Milkman, and Teresa Kroger. 2014

Concurrent Two

Taylor Law at 50

May 10, 2018 | 1:30 p.m. – 2:45 p.m. | High Street Conference Center
1.5 areas of professional practice CLE credits

Considering the Optics of Labor- Management Issues in the Age of Instant Information

The ability to communicate to a large audience instantaneously, coupled with widespread attacks on public sector employees and government have presented unique challenges to practitioners addressing issues of “traditional” labor relations. This session will explore these types of issues and discuss how the parties and agencies deal with the optics of labor relations and the potential for unwarranted adverse public reactions.

Panelists:

Susan Panepento, Chair, New York City Office of Collective Bargaining

Catherine Creighton, Partner, Creighton, Johnson & Giroux

Susan Davis, Partner, Cohen, Weiss & Simon

Neil Abramson, Partner, Proskauer Rose

Matthew C. Van Vesse, Partner, Goldberg Segalla

Including:

Managing Optics of Labor Management Issues
in a Media Rich Environment

Union Corporate Campaigns: An Assessment

News Articles

(Available online at www.nysba.org/taylorlawcoursebook/)

Managing Optics of Labor Management Issues in a Media Rich Environment

Taylor Law 50th Anniversary Program
Desmond Hotel
May 10, 2018
Albany, New York

Moderator:

Susan J. Panepento, Chair, NYC Office of Collective Bargaining

Panelists:

Neil Abramson, Proskauer Rose, New York, New York
Catherine Creighton, Creighton, Johnson & Giroux, Buffalo, New York
Susan Davis, Cohen, Weiss & Simon, New York, New York
Matthew C. Van Vessel, Goldberg Segalla, Buffalo, New York

Introductionⁱ

Government and public-sector labor unions have always navigated public opinion and public pressure when resolving labor management issues. In the past, newspapers, press releases and press conferences served as the primary means of mass communication regarding collective bargaining matters, allowing for a controlled and deliberate presentation of information. Over the past decade, the growth of new media and social media outlets have made communication with a large audience practically instantaneous and effortless. In this sense, new media outlets have expanded the environment in which public employers and unions operate. Combined with the broader cultural shift in opinion regarding the government and its employees, the management of public sector labor relations issues is highly susceptible to public criticism or opposition. Considering the significant developments in media, practitioners are faced with new questions. Does the current media environment present unique challenges to practitioners addressing issues of “traditional” labor relations? Does the future of public sector collective bargaining rest on the ability of the parties to control these new methods of communication? Or are

these merely superficial changes to an environment that contains the same opportunities and dangers as before? How can advocates effectively advise clients on how to deal with the effects of public pressure and opinion at the bargaining table? Ultimately, does winning public support in the new media environment result in favorable bargaining outcomes?

Background

Public opinion has always played a role in private and public sector collective bargaining. In the private sector, marshalling public opinion and pressure to influence the outcome of union organizing, bargaining and workplace issues has been a tool widely used by unions since the 1970s. “Corporate campaigns,” as they are called, were initially used to publicize large union organizing efforts, but later expanded to include the planned and coordinated publication of workplace disputes. They have been used with some success to achieve positive outcomes for employees and their bargaining representativesⁱⁱ These types of efforts have demonstrated that how an employer or union chooses to publicize a dispute or issue can affect how the problem is publicly perceived. For example, in publicizing a 2016 work stoppage by Verizon employees, the unions emphasized that their bargaining issues included the company’s outsourcing of labor in unionized call centers and the loss of ‘good paying American jobs.’ⁱⁱⁱ The effect of this message is debatable. Nevertheless, in the end, the agreement that settled the work stoppage included continued use of bargaining unit members in call centers, a reduction in call center closings and a commitment to create new call center jobs.^{iv}

Arguably, given the direct affect that public sector collective bargaining has on taxpayers, it has been subject to a higher level of media attention and public scrutiny than

private sector labor issues. Over the years, there have been many instances when a newspaper or magazine article or television news report has influenced public sector collective bargaining by creating pressure on the parties for a particular result. For example, an in-depth and widely publicized 2009 *New Yorker Magazine* article criticized the NYC Department of Education's "Rubber Room," or reassignment centers, where teachers accused of wrongdoing or incompetence would report without any assigned duties and draw full salaries. One year later, New York City and the United Federation of Teachers negotiated an agreement that effectively eliminated the reassignment centers. Announcing the agreement to eliminate the reassignment centers, Mayor Bloomberg said, "Given the amount of press that this subject has gotten, to say that this is a big deal is probably an understatement." ^v

At times, public sector unions and employers have used public opinion to advance their positions.^{vi} However, the current media environment presents new tools and new challenges in public relations. Social media has made it faster and easier for public employers and unions to communicate directly with the public and union members. Rapid-fire communications, frequent repetition of messages and the broad audience available through social media is a double-edged sword. The potential for the disruption of "business as usual" is exponentially greater with the use of new media. Labor relations issues that were traditionally handled without any public comment, i.e. a disciplinary matter involving only one employee, can instantly become a viral topic, creating unforeseen consequences for all parties involved. If an employer or union does not have the technological capabilities to address such topics, it becomes virtually impossible for them to influence public perception as they were able to in the past. Therefore, these

new forms of communication require public employers and unions to become more adept at using public relations and social media as their disputes, both large and small, are subject to public scrutiny.

Pitfalls and Best Practices

Labor relations advocates are experiencing the consequences of this new media environment in their regular practice. As a result, it is important for legal counsel to be familiar with modern media outlets and the effects that these communications can have on desired labor relations outcomes. Advocates and their clients must be mindful of the incredible speed of the modern news cycle. Not only can information be disseminated quickly, but the public attention for any story can be very short. This has increased the need to promptly respond to contribute to the public dialogue. In addition, employers and unions should consider the possibility that unauthorized messages or messages from persons outside of the collective bargaining process may gain traction or go viral. These communications are difficult to predict and can have a significant impact on the parties' relationship. Social media posts can mischaracterize facts or the employer or union's position. In addition, the public preference for provocative news may encourage unusual actions by an employer, union or third party that are taken to merely ameliorate or manage the spotlight on a labor relations issue.^{vii} Similarly, this preference can lead to the publication and repetition of misinformation. However, because of the speed of the social media dialogue, a public employer or union may be unable to respond promptly. This can lead to several undesirable outcomes: the misinformation becomes the last word on the issue, the persuasive effect of any response is undermined by the lapse of time, or the response is ignored because the issue is no longer a topic of public interest.

Given such potential detrimental outcomes, counselling clients to prepare in advance for media coverage and consequently, potential public pressure, could improve their ability and effectiveness in communicating their position on an issue. The planning and execution of media campaigns or public announcements should fall to experienced public relations and social media professionals to minimize unexpected public responses and/or help to contain pressure to achieve an outcome and protect the bargaining process.

As in the past, a strategic and well-executed public relations response can have positive results. Keeping this potential in mind, public employers and unions are using community partners, who often have large and established social media networks, to gain support for bargaining issues. Community partners who share common goals with a public employer or union can promote an outcome outside of the context of bargaining and often gain the interest of a wider audience. Examples of these partnerships include: fair housing groups' desire for improved state funding for public housing and infrastructure repairs align with union bargaining goals to protect or improve staffing; civil rights' advocates and elected officials' goals to improve police officer accountability gain public support for officer body cameras; union collaborations with "Fight for 15" groups lend support to some public sector wage negotiations. Further, public employers and unions may be influenced by the successful legislative efforts of community partners. For example, legislation that mandates paid sick and/or parental leave for private sector employees may make it politically necessary for public employers or unions to advance bargaining proposals for similar benefits and create public pressure for agreement on these benefits.

Finally, one aspect of managing public opinion that has not changed with the expansion of media outlets is the challenge of translating public support into successful collective bargaining outcomes. The mere fact that a party has gained the advantage of public support has never guaranteed a win at the bargaining table. Elected public officials are often faced with competing interests that they must manage. For example, public support for employee pay increases can have limited effect in areas where the budget and legislative body is restricted by tax caps. Additionally, there may be instances where a union, the public and an elected official support a proposal, but implementation of such of measure is counter to first line management's operational experience. Consequently, the expansion of media outlets and social media has not necessarily made using public opinion easier.

Legal Issues

Thus far, the use of social media has not made a significant appearance in the Public Employment Relations Board's (PERB) jurisprudence. No case has expressly addressed how statements made on social media would be viewed under the Taylor Law. This is also true in New York City, where the City and its unions are governed by the New York City Collective Bargaining Law (NYCCBL). Decisions issued by both PERB and the New York City Board of Collective Bargaining (BCB) suggest that, like the National Labor Relations Board, the analysis of social media or other internet communications would be no different than the analysis of union or employer speech on radio, television or in print media. For example, in *New York City Transit Authority*, 48 PERB ¶ 4604 (ALJ 2015), *aff'd*, 49 PERB ¶ 3021 (2016), an employee alleged retaliation for prior improper practice filings when his employer purportedly assisted in publishing a defamatory *New York Post* article that was also posted on a Metropolitan Transit

Authority Facebook page. In both the ALJ decision dismissing the charge, and the PERB decision affirming it, there was no separate treatment for the Facebook post. The legal analysis focused solely on the content of the article, and because the charging party could not connect the employer to the substance of the article, the related charge was dismissed. Similarly, in *LEEBA*, 7 OCB2d 21 (BCB 2014), the allegations of a rival union included purportedly false statements made by an incumbent union during an election campaign and posted on a union-affiliated Facebook group page. In dismissing the petition, the BCB did not distinguish between those statements made in the Facebook post and those made elsewhere. Instead, it focused on whether the allegedly false statements were threatening or coercive.

This limited treatment of social media suggests that the legal analysis that will be applied to social media communications will be consistent with the standards applied to labor and management's use of older media outlets. As a result, when utilizing social media, parties should be mindful of the existing standards for determining when statements may be deemed protected by the Taylor Law. PERB has consistently held that the Taylor Law protects a wide range of employee speech because "the labor relations process must tolerate robust debate of employment issues" *Village of Scotia*, 29 PERB ¶ 3071, at 3070 (1996). However, employee speech on labor relations issues may lose the protection of the Taylor Law and be the basis for discipline if the content of the communication is found to be inappropriate. While merely inaccurate statements are protected by the statute, those that are intentionally false or malicious may lose legal protection. See *Binghamton City Sch. Dist.*, 22 PERB ¶ 3034 (1989) (union president's statement that employer representative lied was protected in the absence of "an intent to falsify or maliciously injure the respondent"); *State of NY (Dep't of Corr. Servs. — Great Meadow Corr. Facility)*, 35 PERB ¶ 4514 (ALJ 2002) (deliberately false statement made

by a grievant in an arbitration not protected). Statements that fall within protected union activity have included “robust” or “heated” speech. *See Village of Scotia*, 29 PERB ¶ 3071; *Oyster Bay*, 23 PERB ¶ 3031 (1990). Nevertheless, when the communication is found to be threatening or violent, it is not protected. *See New York City Transit Auth.*, 30 PERB ¶ 4564, at 4637 (ALJ 1997) (union representative’s “cursing, yelling, and violent threatening actions” at a grievance hearing fall outside of acceptable “zealous and forceful” union advocacy). Moreover, employee statements that are made solely for their own personal interests or benefit may not be considered protected union activity. *See County of Ulster*, 34 PERB ¶ 4546 (ALJ 2001) (union official’s newspaper interview advancing personal interests was not protected activity); *McNeil*, 10 OCB 2d 8 (BCB 2017); *UFA*, 1 OCB2d 10, at 21 (BCB 2008).

Similarly, employers are given latitude when speaking about labor management issues. In examining the content of employer statements alleged to violate the Taylor Law, PERB has said, “[b]oth parties to a bargaining relationship have substantial privileges under the Act to communicate their opinions regarding employment issues to persons outside of that immediate bargaining relationship, including unit employees.” *Town of Greenburgh*, 32 PERB ¶ 3025, at 3054 (1999). Accordingly, an employer’s communications on labor relations issues are permissible unless a “reasonable employee would view the speech as threatening or coercive in the context in which the speech is delivered.” *Id.*; *Buffalo City School Dist.*, 47 PERB ¶ 4501 (ALJ 2014) (superintendent’s letter and speech found coercive where it promised employee layoffs would be averted if the union abandoned a grievance and encouraged employees to pressure the union to do so). Statements that merely express the employer’s position are permissible under the Taylor Law and New York City Collective Bargaining Law. *See Town of Greenburgh*, 32 PERB ¶ 3025 (employer memorandum to employees questioned union

motivations and expressed its opinion regarding the merits of a grievance did not violate the Taylor Law in the absence of improper threats or promises); *PBA*, 77 OCB 10 (BCB 2006) (a party “has a right to disseminate information and to express any views, argument, or opinion in any media form”). However, both PERB and BCB have held that an employer’s communications should not “impermissibly bypass[] the employee organization for the purpose of negotiating or attempting to negotiate with an employee or a group of employees aimed at reaching an agreement on the subject under discussion.” *DC 37*, 2 OCB2d 28, at 10 (BCB 2009) (quoting *Dutchess Comm. College*, 41 PERB ¶ 3029, at 3129 (2008), and citing *County of Cattaraugus*, 8 PERB ¶ 3062 (1975); *City of Schenectady*, 26 PERB ¶ 3047 (1993); *Town of Huntington*, 26 PERB ¶ 3034 (1993); *CUNY*, 38 PERB ¶ 3011 (2005)).

As new media presents practitioners and parties with new terrain, the practical and legal ramifications are still unfolding. The precedent regarding more traditional forms of communication can serve as a foundation to develop best practices for addressing issues that may arise in the future.

ⁱ This paper is a compilation of historical references and comments made by the panelists and moderator in preparation for the presentation. The paper does not reflect the opinion of the NYC Office of Collective Bargaining or any single participant in the panel.

ⁱⁱ See, Paul Jarley & Cheryl L. Maranto, "Union Corporate Campaigns: An Assessment," *ILR Review*, Cornell University, ILR School, vol. 43(5), pages 505-524, October 1990.

ⁱⁱⁱ See, <http://money.cnn.com/2016/04/13/technology/verizon-strike/index.html>.

iv <https://www.nytimes.com/2016/05/31/business/verizon-reaches-tentative-deal-with-unions-to-end-strike.html>

v <https://www.newyorker.com/magazine/2009/08/31/the-rubber-room>,
<http://www.nytimes.com/2010/04/16/nyregion/16rubber.html>.

vi Some examples are: Memphis, Tennessee sanitation workers successfully engaged the assistance of civil rights leader, Martin Luther King, to support their drive for better pay and working conditions in 1968. The City of Memphis and union entered into a collective bargaining agreement containing wage improvements shortly after King's supportive speech and assassination.

https://www.washingtonpost.com/news/retropolis/wp/2018/02/12/i-am-a-man-the-1968-memphis-sanitation-workers-strike-that-led-to-mlks-assassination/?utm_term=.2e69bfdb3ac8. In 1975, the NYC PBA and Uniformed

Coalition attempted to gain public support for their pay issues distributing leaflets to passengers arriving at NYC airports advising them that NYC was not safe.

<https://www.nytimes.com/1975/06/14/archives/unions-put-off-to-monday-giving-out-fear-leaflets-25-unions-put-off.html>. The unions' actions were enjoined by the court and did not lead to increased pay in part due to constraints from the fiscal crisis. In 2005, when the NYC Transit Workers (TWU) went on strike, the MTA quickly sought and obtained an injunction declaring the strike unlawful. Widespread disruption to public transportation was the news of the day and the City and Mayor championed the favorable court ruling. <http://www.nytimes.com/2005/12/21/nyregion/nyregionspecial3/citywide-strike-halts-new-york-subways-and-buses.html>. Most recently, the well-publicized 2018 strike by West Virginia teachers gained wide spread support. After nine days, the strike was resolved with an agreement that included a one-time 5% pay raise. Some speculate that ultimately legislators will use the agreement to ensure that there is anti-strike backlash because public service cuts will be needed to fund the raises.

<https://newrepublic.com/article/147307/cost-west-virginia-teachers-strike>

vii NYC PBA picketed the home of a neutral arbitrator in 2015 after his decision was issued on a contract impasse. <http://abc7ny.com/news/thousands-of-nypd-officers-protest-at-arbitrators-home/1069485/>. It also purchased full page advertisements in local newspapers denouncing the award and attacking the integrity of the neutral arbitrator.

http://thechiefleader.com/news/open_articles/pba-leader-denounces-contract-award-as-an-insult-to-cops/article_f101deba-71de-11e5-8de0-c7c880db3bdd.html

NYC COBA releases photos of members injured by inmates in seeking to challenge Corrections Department jail reforms in 2017.

<http://www.nydailynews.com/new-york/nyc-correction-officers-union-claims-jail-reforms-add-work-risks-article-1.3087667>.

UNION CORPORATE CAMPAIGNS: AN ASSESSMENT

PAUL JARLEY and CHERYL L. MARANTO*

The authors examine 28 labor disputes occurring during the period 1976-88 in which the unions involved publicly declared they conducted "corporate campaigns." They distinguish three types of campaigns—complements to traditional organizing drives, complements to strikes, and substitutes for strikes—and argue that fundamental differences among these campaigns result in different prospects for success. Organizing-related campaigns, they find, were more likely to yield gains for the union than were bargaining-related campaigns. Strike complement campaigns resulted in the largest number of unequivocal failures; and several strike substitute campaigns appear to have played only limited roles in achieving contract settlements.

IN 1976, the Amalgamated Clothing and Textile Workers Union (ACTWU) used a pioneering strategy—the corporate campaign—to obtain a settlement with J. P. Stevens. Designed by Ray Rogers, the ACTWU's corporate campaign represented an unprecedented assault on Stevens' top management and business relationships. Many believed this campaign was instrumental in achieving the subsequent settlement at Stevens, which included a collective bargaining agreement and provided for extension of the contract terms to newly organized bargaining units. It appeared that David had brought Goliath to his knees.

Since the Stevens campaign, much attention has been given by the AFL-CIO and the popular press to corporate campaigns.

* Paul Jarley is Assistant Professor, Department of Industrial Relations and Human Resources, College of Business Administration, University of Iowa, and Cheryl Maranto is Assistant Professor, Department of Management, Marquette University. The authors thank Jack Fiorito and John Delaney for comments on an earlier draft. Correspondence regarding this study should be addressed to the first author.

The AFL-CIO Committee on the Evolution of Work called for the development of "research and other capabilities needed to mount an effective corporate campaign" and recommended that "organizers should be trained in the various types of corporate campaign tactics" (AFL-CIO 1985:21). *Business Week* noted that corporate campaign tactics represent "a transformation in union tactics that poses a serious new challenge to employers" (Bernstein and Pollock 1986:112). The *Christian Science Monitor* (Belsie 1989:7) reported that corporate activism by some unions is becoming "a routine part" of organizing and bargaining strategies.

Although corporate campaigns have been prominently featured in the popular and business press, they have received rather limited attention in the academic literature. In the most thorough study to date, Perry (1987) found that an employer's sensitivity to adverse publicity and a union's ability to escalate a conflict "beyond the level of a simple labor dispute" were the primary determinants of union success in the ten corporate campaigns he

studied. In this study, we conduct a comprehensive review of 28 corporate campaigns, distinguishing between organizing, strike complement, and strike substitute campaigns. We extend Perry's work not only by studying more campaigns but also by identifying the strategic use of labor boards, strong national union support, and the economics of campaign settlement as additional determinants of corporate campaign success.

What Is a Corporate Campaign?

Although the origin of the term "corporate campaign" can be traced to the Stevens dispute, the strategy defies simple definition. The major architects of corporate campaigns have defined them in different ways on different occasions. Ray Rogers, now head of Corporate Campaign Inc. (CCI), a consulting firm specializing in union corporate campaigns, has stated:

Here is the definition that I always gave in the Stevens case. The corporate campaign focused primarily on Stevens' corporate headquarters and on those institutions heavily tied to Stevens' financial interests through interlocking directors, large stock holdings, and multi-million dollar loans. The goal of the campaign was to cause those institutions tied to Stevens to exert their influence on the company to recognize the rights and dignity of the workers and sit down and bargain. (Houser and Howard 1982:49)

In contrast to Rogers' emphasis on financial ties and secondary pressure, Susan Kellock of the Kamber Group, an independent consulting firm for unions, emphasizes the public relations aspects of corporate campaigns. She stresses the importance of researching the company's image and developing good media relations. Kellock notes that although a "good relationship with the media is not necessarily the essence of a corporate campaign, it is a [critical] component" (Datz et. al 1987:106).

The existing academic literature provides a somewhat different view of corporate campaigns. Kochan, Katz, and McKersie (1986:195-97) view corporate campaigns as union attempts to influence

strategic business decisions by placing public pressure on the firm's top policy-makers. They see the strategy as moving the labor dispute beyond traditional collective bargaining toward the firm's strategic decision-making level in the hope of producing a long-term shift in firm practices that affect union objectives. More in line with Kellock's view, Perry (1987:3-6, 123-24) and Heckscher (1988:172) regard such campaigns mainly as attempts to elicit public support for traditional union goals through the application of sophisticated public relations techniques. Although they also note the potential economic consequences of campaign activities, they see the ability to forge coalitions with other influential interest groups as critical to campaign success. Thus, although each academic view stresses the public image rather than economic dimensions of corporate campaigns, the authors emphasize somewhat different goals and campaign approaches.

The lack of consensus on the basic character of corporate campaigns makes it difficult to construct an operational definition of the term. In addition, corporate campaigns lack a unique identifying feature that distinguishes them from other forms of union action. Strikes are defined by the use of a particular tactic: the collective withholding of labor by a group of workers. Organizing drives may use a variety of tactics, but are defined by their common goal: achieving employer recognition of a union as the employees' bargaining representative. In contrast, corporate campaigns cannot be defined by either a unique common goal or universal tactic. In fact, the Industrial Union Department (IUD) of the AFL-CIO (1985:4-10) lists ten tactics that may be used separately or in any combination by unions employing corporate campaigns, and all are viewed as appropriate for the pursuit of several union goals.¹ Although the full-

¹ These tactics are: (1) building coalitions with other labor and non-labor groups; (2) public relations activities; (3) legislative initiatives; (4) appeals to regulatory agencies; (5) legal actions; (6) consumer actions; (7) pressuring lenders and creditors; (8)

scale campaigns can be distinguished from other union actions by the use of multiple nontraditional tactics, the IUD's inclusion of "mini-campaigns" that use only one or two tactics, some of which are rather traditional, further blurs the term's distinctiveness.

In essence, the term corporate campaign is no more than a label indicating the union's intent to utilize nontraditional tactics in an attempt to pressure the firm to change its behavior. Simply put, the firm is informed by the campaign announcement that the union intends to "up the ante." Consistent with this view, we rely on the union's corporate campaign announcement to identify the implementation of this strategy. As a result, our analysis is restricted to those instances in which a union publicly labeled its actions a "corporate campaign" during the course of the dispute.²

This identification criterion may lead to two types of errors. On the one hand, several boycotts (that of Coors, for example) have utilized highly visible and sophisticated public relations techniques (Burns 1987) without being described as corporate campaigns. At least some of these boycotts may in fact have been part of a corporate campaign strategy that the union chose not to make public.³ On the

other hand, sometimes union actions defined as a corporate campaign during the course of a dispute are redefined afterward. For example, during its dispute with Echlin/Friction Materials, the ACTWU initiated a corporate campaign that, it claimed, was instrumental in obtaining a first contract (*Labor Unity* 1989). At least one ACTWU official, contacted months after the conclusion of the dispute, however, maintained that the union simply instituted an isolated stockholder action concerning worker safety and health problems and that this action was unrelated to the organizing campaign (Patterson 1989). Nonetheless, our selection criterion—whether a union publicly labels its actions a corporate campaign during the course of a dispute—requires that the union's nontraditional activities against Echlin/Friction Materials be treated as a corporate campaign, while similar activities by other unions be treated as "pure boycotts," outside the scope of this analysis.

A corporate campaign typology. Table 1 presents a summary of the 28 campaigns that we identified as corporate campaigns based on their designation as such in the popular or labor press. The first of these campaigns took place in 1976, and the last in 1988.⁴ Corporate campaigns were initi-

threats to withdraw pension fund assets; (9) stockholder actions; and (10) in-plant actions.

² It should be noted that the term "corporate campaign" has undergone an evolution. Several groups, including the Food and Allied Service Trades (FAST) Department of the AFL-CIO, now prefer the label "comprehensive campaign" for these activities (Harbrant 1989). Also, the labeling of a dispute can be influenced by the involvement of specific individuals or organizations. Disputes involving FAST, IUD, CCI, or Kamber tend to carry the corporate campaign label irrespective of the tactics used. Other union officials involved in disputes may use similar tactics, but prefer more conventional labels such as "boycott."

³ Robert Harbrant, President of FAST, has argued that some successful corporate campaigns are never made public (Harbrant 1990). Anonymity during corporate campaigns may provide certain advantages. Unions may be able to implement the initial stages of the campaign in the absence of company resistance. A union may orchestrate media coverage of alleged company wrongdoing without revealing its own role or interest. In addition, the

union may be able to operate through surrogates. This last technique appears to have been used against the Hanes Corporation. The main activities were undertaken by a religious order, although the company had reason to believe the ACTWU was responsible for the campaign. For an account, see Perry (1987:195-205).

⁴ The corporate campaigns included in our sample were initially identified by a survey of the business and labor press. Union officials were also contacted to assist in the identification of specific campaign activities and settlements. Corporate campaign activities were defined as the implementation of tactics not traditionally part of a labor dispute. It should be noted that our selection criterion probably resulted in a sample weighted toward large-scale national campaigns, since most local campaigns do not receive national press coverage.

Although no management representatives were interviewed, we believe this omission does not bias our analysis. Campaign activities and settlements were verified from published sources and did not rely solely on union interviews. Interviews with union officials focused on gathering factual information that could be verified by other sources. As a result,

ated in three types of situations. Ten campaigns (J. P. Stevens, Seattle First National Bank [Seafirst], New York Air, Litton, Beverly Enterprises, Campbell Soup, Blue Cross-Blue Shield, Toyota, Food Lion, and Echlin/Friction Materials) were initiated mainly to complement organizing drives.⁵ The majority of these campaigns were aimed at securing neutrality agreements or other procedural concessions from the employer, with the ultimate goal of obtaining representation status and a first contract.

The remaining campaigns were launched in response to a bargaining impasse. Within this group, nine campaigns were initiated after strikes or lockouts began (Brown and Sharpe, Louisiana Pacific, Continental Airlines, General Dynamics, Ogden/Danly, Phelps Dodge, BASF, Occidental/IBP, and International Paper II) with the goal of increasing the employer's strike costs to compel firms to settle substantive bargaining issues. The other nine campaigns were initiated prior to a strike (*Kansas City Star*, International Paper I, Harper and Row, Post/Dedham Transcript, RCA/NBC,

Hormel, American Airlines, Eastern Airlines, and Pittston) and were designed to be strike substitutes—that is, they were attempts to bring about bargaining concessions without the union having to endure strike costs. Strikes eventually occurred, however, at Hormel, Eastern, and Pittston.⁶

Table 1 also provides a brief summary of campaign outcomes as of the end of 1989, with an emphasis on union gains that were immediately realized in exchange for cessation of the campaign.⁷ In

⁶ The classification of three of the campaigns requires some explanation: (1) In the case of Campbell, a strike was in progress at the time of the campaign announcement, but it was an organizational strike.

(2) The Seafirst campaign is the most difficult to classify. It began when a dispute developed over recognition of an independent union after it affiliated with what became the United Food and Commercial Workers Union (UFCW). The unit was engaged in protracted bargaining with Seafirst at the time. Since the issues of the corporate campaign primarily focused on recognition and not the terms of the agreement, we place it among the organizing-related campaigns. Although this assignment could be criticized, placing Seafirst among the organizing campaigns produces inferences *at odds* with our main assertion: that corporate campaigns are more effective in organizing-related disputes.

(3) The United Electrical, Radio, and Machine Workers (UE) had won representation rights at Litton, but it had failed to obtain a first contract. We consider attainment of a first contract to be an organizing/recognition issue. In addition, available evidence suggests that at that time other unions were also experiencing strong resistance to organizing at Litton, prompting the AFL-CIO eventually to play a leading role in the campaign.

It should also be noted that three campaigns—New York Air, Continental, and Eastern—all involved Texas Air Corporation. Because the campaigns had distinct starting dates and different goals, they are treated separately.

⁷ We recognize that other standards may be used to evaluate corporate campaign success. Several union officials stressed that obtaining written procedural or substantive agreements is not the only measure of corporate campaign success. Henry Vitale (1989) noted that the work done by CCI was instrumental in the sale of the Dedham press and the initiation of legal suits against past owners. Susan Kellock noted that often the goal of the campaign is to "build a base for negotiations down the road" rather than to achieve immediate substantive gains (Verespej 1987). Robert Harbrant (1989) noted that the impact of the campaign on other employers may be significant. Although these alternate standards may be valid, using them to evaluate the success of corporate campaigns would be a subjective exercise or

few facts or insights were obtained that were not available in the large amount of published information on these campaigns. Finally, we were able to learn of management reactions to many campaigns from Perry (1987) and several of the articles cited in the references.

Corporate campaign techniques have also been utilized in grievance disputes. For example, the UFCW used an advertising campaign to persuade Albertson's to end a back-pay dispute (Bernstein and Pollock 1986). Such "mini-campaigns" were excluded from our analysis because public information on them is sparse.

⁵ It should be noted that two campaign targets (Campbell and Toyota) were not the employers of the workers involved in the labor disputes. Campbell was the primary purchaser of the tomatoes and cucumbers grown by the Ohio and Michigan farmers involved in an organizing dispute with the Farm Labor Organizing Committee (FLOC). Toyota was the company for which Ohbayashi, a Japanese construction firm, was building the plant in question; the dispute involved Ohbayashi's hiring of nonunion construction workers below the union scale.

These campaigns could be viewed as directed against secondary employers, because they had greater name recognition, and economic and political vulnerability, than the primary employers. Since the corporate campaigns were targeted directly at Campbell and Toyota, however, those firms are viewed here as primary employers.

Table 1. Characteristics of 28 Corporate Campaigns Initiated in 1976-1988.

Firm	Union(s)	Campaign Coordinator	Date Campaign Made Public	Outcome/Status as of 12/31/89
Type 1: Organizing				
J. P. Stevens	ACTWU	ACTWU	2/76 ^a	First contract and framework for extension of contract terms to new units certified next 18 months: 10/19/80.
Seafirst	UFCW	FAST/CCI	9/78	Ongoing. NLRB issued duty to bargain order 7/29/88. Seafirst appeal pending.
New York Air	ALPA	CCI	4/81	New York Air remains nonunion. Campaign faded with PATCO strike.
Litton	UE	IUD	10/81	Union agreed to formation of labor-management committee to study Litton practices 12/10/83. First contract at Sioux Falls, S.D., signed 9/10/84.
Beverly Enterprises	UFCW/SEIU	FAST	5/82	Employer agreement on noncoercive atmosphere for organizing and joint labor-management committee in exchange for end of campaign: 3/5/84.
Campbell Soup	FLOC	FLOC/CCI	9/84	Contract settlements and an established framework for representation elections: 2/21/86.
Blue Cross	AFSCME/ CWA/ OPEIU/ UAW/ IUE/ USW/UFCW	COST	8/85	Neutrality agreement achieved by OPEIU in Mass. OPEIU later pulled out before an election, and IUE lost election 11/23/88. Disputes continue in other states.
Toyota	BCTD	BCTD Kamber	7/86	Project Agreement signed 11/25/86. All future construction workers to come from union hiring halls.
Food Lion	UFCW	FAST	12/87	Ongoing. Worldwide boycott of parent Delhaize. Rolling strikes instituted in Europe 8/29/88.
Echlin/Friction Materials	ACTWU/ UBC	ACTWU/UBC	12/87	NLRB Election certified 2/88. Contract settlement 3/89.
Type 2: Strike Complement				
Brown and Sharpe	IAM	IAM/CCI	7/82	CCI's contract terminated 8/82. Strike called off 8/12/85. ULP charges pending.
Louisiana-Pacific	UBC	UBC/IUD	12/83	Ongoing. Sixteen decertifications by June 1986.
Continental Airlines	ALPA	Kamber	12/83	Strike ended 11/4/85; ALPA accepted bankruptcy award. Continental withdrew recognition of ALPA (and IAM).
General Dynamics	UAW	UAW	2/84	Contract settlement 8/24/84; strikers rehired at expense of replacements.
Ogden/Danly	USW 15271	Kamber	7/84	Contract settlement 1/29/85. Decertification defeated.
Phelps-Dodge	USW	IUD	8/84	All 12 unions decertified by final decision of NLRB, 2/27/86. Douglas Smelter shut down 1/15/87.
BASF	OCAW	OCAW/IUD	1/85	Contract settlement 12/18/89. Maintenance workers rehired as production workers with seniority.

(Continued)

Table 1. (Continued)

Firm	Union(s)	Campaign Coordinator	Date Campaign Made Public	Outcome/Status as of 12/31/89
Occidental/IBP	UFCW	UFCW/Kamber	12/86	Contract settlement ratified 7/26/87. Health and safety language and fringes improved.
International Paper II	UPIU	Kamber/CCI	6/87	Ongoing. Strike broken 10/10/88. One unit decertified. More decertifications pending.
Type 3: Strike Substitute				
Kansas City Star	ITU	Kamber	2/83	Contract settlement 12/2/84, with both sides moving from their original positions.
International Paper I	UPIU	CCI	4/83	Contract settlement 4/83. Established regular meetings between union and management.
Harper and Row	UAW Dist. 26	CCI	8/83	Contract settlement 8/87 after sale of firm to Murdoch's News Corp.
Post/Dedham Transcript	ITU	CCI	2/84	Work transferred 5/86; ULP charges pending.
RCA/NBC	NABET	CCI	6/84	Contract settlement 12/1/84. Union gained job security provision.
Hormel	UFCW P-9	CCI	10/84	Local placed in trusteeship 5/9/86. National negotiated contract ratified 9/86.
American Airlines	APFA	APFA/CCI	2/87	Contract settlement 12/22/87 as strike deadline approached.
Eastern	ALPA/IAM/TWU	IUD/CCI Kamber	2/88	Ongoing. Strike by IAM 3/3/89 with ALPA support. Sympathy strike ended 11/23/89.
Pittston	UMW	UMW	12/88	Ongoing. Strike 4/5/89. Parties in mediation

Abbreviations: ACTWU—Amalgamated Clothing and Textile Workers Union; AFSCME—American Federation of State, County, and Municipal Employees; ALPA—Air Line Pilots Association; APFA—Association of Professional Flight Attendants; BCTD—Building and Construction Trades Department, AFL-CIO; CCI—Corporate Campaign Inc.; COST—Comprehensive Organizing Strategies and Tactics Office, AFL-CIO; CWA—Communication Workers of America; FAST—Food and Allied Service Trades Department, AFL-CIO; FLOC—Farm Labor Organizing Committee; IAM—International Association of Machinists; ITU—International Typographical Union; IUD—Industrial Union Department, AFL-CIO; IUE—International Union of Electronic Workers; Kamber—Kamber Group; NABET—National Association of Broadcast Employees and Technicians; OCAW—Oil, Chemical, and Atomic Workers; OPEIU—Office and Professional Employees International Union; SEIU—Service Employees International Union; TWU—Transport Workers Union; UAW—United Auto Workers; UBC—United Brotherhood of Carpenters and Joiners; UE—United Electrical, Radio, and Machine Workers; UFCW—United Food and Commercial Workers; UMW—United Mine Workers; UPIU—United Paperworkers International Union; USW—United Steel Workers of America.

^a Date of establishment of special AFL-CIO executive subcommittee to examine Stevens situation. AFL-CIO boycott of Stevens 3/76.

Sources: A copy of the full list of references for this paper is available from the authors on request.

general, few corporate campaigns seem to have produced observable gains.⁸

Procedural gains (such as employer neutrality pledges, extension of bargain-

would demand an inquiry well beyond the scope of this analysis.

⁸ Any conclusions concerning the relative efficacy of corporate campaigns in various types of disputes is complicated by the inability to observe what would have happened in the absence of the campaign. As a result, we cannot determine the increase in the probability of success, however defined, due to the institution of a corporate campaign and whether this increment differs across campaign types. Any ob-

served differences could be due to differences in baseline probabilities (in the absence of a corporate campaign) of success among the three types of disputes, rather than to the differential efficacy of corporate campaigns. Separating out differences in baseline probabilities would require a larger set of corporate campaigns than has been identified to date, along with considerable information on a sample of acrimonious disputes that did not involve corporate campaigns.

ing terms to new units, and establishment of joint labor-management committees) were obtained in the organizing disputes with Stevens, Beverly, Campbell, Litton, and Blue Cross.⁹ Whether corporate campaigns altered contract settlements is more difficult to evaluate. First contracts, the ultimate goal of organizing campaigns, were achieved at Stevens, Campbell, Beverly, Litton, and Echlin, but not at Blue Cross. The Toyota settlement provided that all new workers would be hired from union hiring halls and at union wages, thereby extending prevailing conditions to the job site and enhancing union contractors' ability to obtain work (BNA 1986a). Cessation of the campaign was tied to contract settlements at Stevens, Campbell, and Toyota, but not at Litton, Beverly, or Echlin.

In contrast to these successes, three organizing-related campaigns have yet to achieve observable results. New York Air continued to fly nonunion. The Seafirst campaign has been under way for 11 years

without producing a settlement and is still tied up in the courts as of this writing (Sauter 1989). The more recent Food Lion campaign has also failed to score a victory by the end of 1989.

Bargaining agreements were also eventually achieved in nine of the remaining 18 bargaining impasse disputes: the strike complement campaigns at General Dynamics, Ogden/Danly, Occidental/IBP, and BASF, and the strike substitute campaigns at *Kansas City Star*, International Paper I, Harper and Row, RCA/NBC, and American Airlines. In several of those cases, management refused to assign the corporate campaign any role in obtaining a contract settlement (for example, BNA 1985a:70-71; BNA 1989b). Unions, on the other hand, cited changes in bargaining positions, the inability of the company to break the union, or both as indicators of corporate campaign success (for example, Ogden/Danly; see BNA 1985e:A-2).

Among the strike complement campaigns, only the Occidental/IBP and BASF campaigns appear to have significantly influenced their respective contract settlements. At Occidental/IBP, the union obtained improvements in fringe benefits, an expanded role for the union's safety committee, and the rehiring of 2,800 strikers at the expense of 3,000 replacement workers, at least partly in exchange for ending the campaign (BNA 1987c; Bernstein and Atchison 1988). The "understanding" that developed between the company and the union during that contract negotiation has also been credited with creating an environment under which IBP voluntarily recognized the UFCW at its Joslin, Illinois plant (Bernstein and Atchison 1988). As for the BASF campaign, although it did not prevent the subcontracting of maintenance work and the settlement was not explicitly conditioned on the end of the corporate campaign, it seems likely that the rehiring of maintenance workers into production jobs, five and a half years after their lockout (BNA 1989b) and contrary to the company's stated position (Reisch 1989), was the result of campaign activities.

The remaining two strike complement

⁹ The agreement with Blue Cross was limited to Massachusetts. There, the Office and Professional Employees International Union (OPEIU) obtained an agreement that management would "cease and desist" from tactics the union found objectionable and would not contest the union's bargaining unit proposal in exchange for dropping its boycott request to the state AFL-CIO as well as unfair labor practice charges filed with the NLRB (BNA 1987b). The OPEIU pulled out prior to an election, however, alleging continued unfair resistance by Blue Cross. The International Union of Electronic Workers (IUE) then took over the organizing drive and eventually lost the election (BNA 1988a). A second neutrality pledge also appears to have been achieved in northern Ohio, without producing much further campaign activity. For a detailed account of the Blue Cross Campaign, see Northrup (1990) (this issue). He notes that only one bargaining unit has been established since the start of the campaign. National coordination of the Blue Cross campaign has ended, but individual unions are still involved in disputes with Blue Cross (Calibrese 1990).

It should also be noted that the nature of the settlement at Beverly is somewhat in dispute. Although the union characterized the agreement (never made public) as "encouraging a noncoercive atmosphere during election campaigns," the company insisted that it retained the right to actively oppose organizing attempts (BNA 1984c). In addition, Beverly continues to be the focus of unfair labor practice complaints (BNA 1988b).

campaigns that ended in contract settlements are best described as union non-defeats. In these cases, the union was not broken, but the campaign did not appear to produce clear gains. At General Dynamics, the firm did rehire strikers at the expense of replacements, but as Perry noted (1987:110), this concession may have been made in preparation for the more important UAW-General Dynamics Tank Division talks. Similarly, United Steelworkers Local 15271 signed a concessionary agreement with Ogden/Danly and survived a close decertification battle in which 440 of the 600 voters were *not* union members (*Chicago Tribune* 1985).

There were also several clear union defeats among the strike complement campaigns. In four of these campaigns (Louisiana Pacific, Continental, Phelps Dodge, and International Paper II), the union lost recognition for one or more locals.¹⁰ In another, the national union ended support for the strike against Brown and Sharpe and is pursuing its case with the NLRB (BNA 1985b; Hernstadt 1990).

Among the strike substitute campaigns, only International Paper I appears to have produced tangible results, with the firm promising not to transfer certain work out of unionized plants and to stay out of decertification elections in exchange for an end to the corporate campaign, changes in the pension formula, and the break-up of centralized bargaining among six southern IP mills (*Business Week* 1983; Beck 1989). In contrast, the *Kansas City Star* campaign ended with the union accepting changes demanded by management a year earlier, and the local union president noted that the campaign appeared to have had little economic impact on the target firm—another union non-defeat (Fitzgerald 1984; BNA 1984a).

¹⁰ The issue of ALPA's representation status at Continental is still the subject of legal challenges. The company withdrew recognition in 1985 and bargaining has not resumed. The union asserts that recognition cannot be withdrawn under the Railway Labor Act regardless of whether it was granted voluntarily or was pursuant to the union's formal certification (Cohen 1989).

The remaining three contract settlements were spurred primarily by events outside the scope of these corporate campaigns. Both the RCA/NBC and American Airlines settlements came in the face of strike threats that would have disrupted service at crucial times for the target firms—presidential election night for RCA/NBC (BNA 1984b) and the Christmas holiday for American Airlines (BNA 1987a). The Harper and Row settlement came after the sale of the firm to Rupert Murdoch's News Corporation, an event unaffected by the corporate campaign. At least one union official, however, believes the AFL-CIO-sponsored boycott played a significant role in bringing the new management to the bargaining table (Slesarchik 1989).

Union defeats are less prominent among the strike substitute campaigns. An exception is Hormel, where the campaign ended when the local was placed in trusteeship and the national negotiated a contract that did not meet the campaign's initial goals. Although the Post/Dedham Transcript campaign continues, the membership has been laid off for years, and that battle has largely shifted to the courts (Harrington 1989). The campaigns at Eastern and Pittston are more recent, but as of the end of December 1989, they too had failed to achieve their ultimate goals.¹¹

In sum, five organizing-related campaigns (Stevens, Beverly, Campbell, Litton, and Toyota) achieved some clear procedural or substantive gains. (The Blue Cross campaign achieved only short-term results.) Although contract settlements can be found in half of the bargaining-related campaigns, the corporate campaign strategy appears to have significantly influenced the outcome in only a minority of these situations. Among the strike comple-

¹¹ As of the end of 1989, the UMW and Pittston were involved in negotiations with the assistance of an FMCS mediator. A tentative settlement was announced on January 1, 1990. Reports indicate that although the parties have an agreement in principle, several technical issues still remain unresolved, and the package will not be made public until the Mine Workers have the opportunity to vote on the contract (BNA 1990g).

ment campaigns, only the Occidental/IBP and BASF campaigns appear to have been influential in their settlements; and among the strike substitute campaigns, the only one to produce clear gains was that at International Paper I. Across all three categories, only 8 of the 28 campaigns appear to have produced some tangible success.

Overall, our analysis suggests that corporate campaigns are most likely to achieve some degree of success when they complement traditional organizing drives. Strike complement campaigns have resulted in the largest number of unequivocal failures, and although strike substitute campaigns have frequently ended in settlements, most of those settlements appear to have been owing to reasons unrelated to campaign activities. The factors that may account for the apparent differential success of the corporate campaign types are discussed below.

The Determinants of Campaign Success

An obvious way to begin an examination of corporate campaign success is to analyze campaign tactics (such as public demonstrations, attendance at stockholder meetings, boycotts, and union-instigated regulatory investigations). The initiation of campaign tactics is the major observable activity of corporate campaigns, and such actions can trigger management reactions and ultimately settlement. Variation in the use of campaign tactics could explain variation in outcomes across campaign types.

Yet, an examination of tactics used in different campaigns and the success of those campaigns fails to show a consistent relationship between the two. There are only minor differences in the tactics used across different types of campaigns, and few if any appear to be related to inherent differences in campaign types.¹² Varia-

¹² In fact, the main difference in campaign tactic incidence that can be directly attributed to differences in campaign types involves strategic NLRB actions, which are attempts to change the manner in

tions in campaign tactic incidence appear to be more a function of campaign coordinator than of campaign type,¹³ and an examination of campaign outcomes by campaign coordinator does not reveal dramatic differences in success rates.¹⁴

In addition, as Perry noted in his study of ten campaigns (1987:123), few tactics by themselves have produced immediate and *tangible* changes in firm behavior. The handful of cases in our sample in which the union may have achieved that kind of result can be quickly described:

—Several resignations from boards of directors were achieved during the Stevens campaign, and Ray Rogers contended that Stevens was ultimately forced to the bargaining table when Metropolitan Life, a major Stevens creditor, was faced with the prospect of having to spend several million dollars to conduct a contested election for its board of directors (Bronson and Birnbaum 1980; Houser and Howard 1982).

—Union-initiated stockholder resolutions have never received the support of 40% of the shares cast, but a union-backed

which the NLRB views or regulates the target firm. Such actions may take the form of a request for a review of company policies (see our discussion of Litton, below) or coordinated ULP charges (see our discussion of Stevens, below). Strategic NLRB actions occurred in 22% of the organizing campaigns, compared to only 6% of the bargaining-related campaigns. The higher incidence of these actions among the organizing campaigns is clearly related to the greater remedial power of labor boards in organizing disputes than in bargaining disputes, a point we shall return to below. A table summarizing tactic incidence by campaign type is available from the authors on request.

¹³ Overall, 85% (11/13) of campaigns in which Ray Rogers' firm, Corporate Campaign Inc. (CCI), played a role used pressure against secondary firms, compared to only 27% of the remaining 14 campaigns. The prominent role that secondary actions play in CCI campaigns stems from Rogers' belief that such activities not only threaten the target firm's financial relationships, but also help build support for the union's actions among groups with grievances against financial institutions (such as farmers and anti-apartheid groups) (Rogers 1989).

¹⁴ Three of the 13 campaigns primarily conducted by Rogers or CCI (Stevens, Campbell, and International Paper I) and 5 of the remaining 15 campaigns (Litton, Beverly, Toyota, Occidental/IBP, and BASF) have produced significant results.

stockholder resolution at Litton did bring a management counter-offer, which ended the campaign (BNA 1983a).¹⁵

—By the company's own admission, the Campbell Soup boycott (BNA 1986e), particularly a Catholic bishop boycott of Campbell's "labels for education program" (Perry 1987:84), hurt its image, and union officials believe the boycott was a key factor in inducing the firm to settle the dispute.

—The Building and Construction Trades Department (BCTD) of the AFL-CIO successfully lobbied Congress to eliminate tax breaks estimated to be as high as \$100 million for Toyota's Kentucky plant. The negotiations that brought a resolution to the BCTD-Toyota conflict began shortly thereafter (*Wall Street Journal* 1987b). Although Toyota has never publicly admitted that the Congressional action served as a catalyst to the settlement, the circumstantial evidence suggests that it did.

—Finally, both the United Food and Commercial Workers Union (UFCW) and the Oil, Chemical, and Atomic Workers (OCAW) had some success in the regulatory arena. Occidental/IBP settled with the UFCW after a union-instigated OSHA investigation of the Dakota City, Nebraska, plant led to over \$5.6 million in proposed fines (Bernstein and Atchison 1988). OCAW believes its numerous environmental charges against BASF hampered company expansion plans and eventually compelled settlement (Leonard 1990).

In contrast, several campaigns achieved intermediate success without producing settlements. For example, it has been suggested that an ALPA-induced FAA

investigation of Eastern decreased ridership and led management to moderate its bargaining stance (Bernstein, Engardio, and Power 1988), but it did not bring about an offer acceptable to the unions. The United Paperworkers International Union convinced some investment firms to advise their clients against the purchase of IP stock (Beck 1988), and the city of Jay, Maine, to pass three ordinances that hampered IP's operation at that location (BNA 1987c), but the campaign continues in the aftermath of a broken strike. Similarly, pressure from Boston Typographical Union No. 13's various tactics resulted in the resignation of the Post Corp. chairman from the First National Bank of Appleton's board of directors and contributed to the sale of the paper six times in a two-year period. Yet, the membership worked without a contract until they were laid off in May 1986 (Vitale 1989).

Although it is tempting to argue that successful campaigns simply discovered a unique tactic that exploited special firm vulnerabilities and that these isolated cases are concentrated among the organizing-related campaigns by chance, we believe a deeper analysis is required. In almost every successful campaign, a particular incident closely coincided with the campaign settlement or the start of serious negotiations. Yet, with the exception of Toyota and possibly BASF, it is difficult to argue that the costs imposed by these isolated campaign incidents *alone* were substantial enough to produce the observed changes in firm policy. In addition, some successful campaign outcomes did not closely coincide with the application of a specific campaign tactic (Beverly, International Paper I), and other campaigns that had intermediate success with specific tactics (for example, International Paper II, Eastern, and Post/Dedham Transcript) failed to produce contract settlements.

A superficial examination of specific tactics that preceded campaign settlements creates the impression that successful campaign outcomes are idiosyncratic. A more careful analysis suggests that the role of campaign tactics is better under-

¹⁵ The Pittston dispute has generated a close proxy battle over two union-backed proposals involving secret shareholder balloting and a poison pill plan endorsed by Pittston's Board (BNA 1989a). The company announced that the union-backed proposals gained 36% of the eligible shares, but the union has challenged the vote count in federal district court (Zinn 1989). In late 1989, a federal district court ruled that Pittston had indeed improperly counted the votes; at this writing, the court is still deliberating over what remedy to declare (BNA 1989a).

stood in terms of their cumulative effect. Under proper conditions the continued application of corporate campaign tactics can escalate costs (or expected costs) and thereby influence firm behavior. As will be discussed below, many of the factors that create a favorable climate for corporate campaigns appear to be more salient in organizing campaigns than in bargaining campaigns.

Conflict escalation. As Perry (1987) has described in detail (pp. 20–31), conflict escalation—that is, expanding the scope of a labor dispute from one of narrow self-interest to one of broad social significance—is a key element of corporate campaigns. Conflict escalation generates pressure on the target, lends legitimacy to the union effort, and aids in garnering wider community support. Campaigns have attempted to escalate the conflict via one or more of three broad allegations: (1) that the target is unfair to organized labor; (2) that it is a corporate outlaw; or (3) that it profits from human misery. In order to engage in effective conflict escalation, the union must demonstrate to the public that the claims are true and that the union can play a key role in remedying the social injustice.

The potential to exploit all three themes tends to be greatest in organizing disputes involving low-wage workers operating in unsafe workplaces. Free choice in the decision about union representation, particularly for low-wage workers, appears to carry a legal and moral imperative that disputes over specific contract terms lack. In contrast, claims of “unfair to labor” or “corporate outlaw” are more difficult to legitimize in bargaining disputes, in which both the NLRB and the general public have difficulty distinguishing between “hard-nosed” and “bad-faith” bargaining. The potential for conflict escalation was far greater at Campbell, Stevens, and (to a lesser extent) Beverly and Echlin, where unions were attempting to organize low-wage workers, or those operating under unsafe conditions, or both, than at International Paper II, Hormel, or Continental,

where relatively highly paid workers faced employer demands for concessions.¹⁶

The Eastern dispute represents a slightly different twist on conflict escalation. Rather than emphasizing the substance of their dispute, ALPA and the Machinists characterized the conflict as workers trying to save their airline from a corporate raider using Eastern as a cash cow. Attention focused on the potential economic and social consequences of unconstrained mergers and acquisitions. Texas Air's chairman, Frank Lorenzo, was characterized as the embodiment of the failure of a laissez-faire merger policy in much the same way that J. P. Stevens was used as an example of the failure of American labor law to guarantee free employee choice regarding union representation. This characterization of the Eastern dispute received considerable media attention at the start of the Machinists' strike, but seemingly failed to generate the public pressure necessary to force Lorenzo to sell the airline on terms acceptable to the unions.

The difficulty of using substantive bargaining issues as a means of conflict escalation has led a number of the unions involved in bargaining-related disputes to seize non-labor issues for this purpose: the environment (Phelps Dodge, General Dynamics, BASF, Louisiana Pacific, and International Paper II), cost overruns on government contracts (General Dynamics), air safety (Continental, Eastern, American Airlines), and investment in South Africa (American Airlines). Non-labor issues were also raised in three organizing-related disputes: air safety (New York Air), patient care (Beverly), and Japanese business practices (Toyota).

Attempts to escalate the dispute *solely* on the basis of these issues often failed to generate broad support for the union,

¹⁶ It should be pointed out that the employee safety issue also came up in a number of bargaining disputes (for example, BASF, Continental, Hormel, International Paper II, Louisiana-Pacific, and Phelps Dodge). In these instances, “employee safety” was tied to operating with replacement workers, a union charge that may be viewed as self-serving by the public.

perhaps because even where such union allegations proved to be true, the public did not see the link between unionism and the resolution of these non-labor issues. Generating public support for union objectives along these lines requires that the union demonstrate it can do something valuable for the community that the company cannot or will not do (Leonard 1990). Demonstrating such a link apparently is difficult (BASF being an exception), and conflict escalation on the basis of non-labor issues does not generally appear to be a good substitute for a labor dispute cast in stark social terms.

Sensitivity to public image. Conflict escalation is most effective against firms that are particularly sensitive to their public image. Such sensitivity may stem from a belief either that a socially responsible image has marketing value or that anonymity, if not a good public image, serves to ward off unwanted governmental intrusion. Perry (1987:119-20, 123-25) placed primary emphasis on such sensitivity when explaining variations in outcomes for the campaigns he reviewed. He noted that Beverly and, to a lesser extent, Litton and General Dynamics were all concerned about corporate campaign publicity influencing their relationships with governmental agencies. Beverly and Campbell were concerned that the campaigns might affect consumers' attitudes. Sensitivity to adverse publicity also played a role in the Toyota dispute, in which both the Japanese automaker and its contractor, Ohbayashi, seemed concerned about the anti-Japanese tone of the campaign (BNA 1986a).

Our findings on the 28 campaigns reviewed in this paper, however, suggest that such sensitivity is neither a necessary nor a sufficient condition for campaign success. For example, the airlines in our sample (New York Air, Continental, Eastern, and American) are clearly vulnerable to regulatory intervention, but in all four instances union allegations about air safety failed to compel settlement. Perhaps most significant, resolution of the Stevens and Occidental/IBP disputes was achieved despite the fact that neither firm faced a

unique regulatory environment or cultivated a "clean image" prior to its labor dispute. In fact, both Stevens and Occidental/IBP took the "no more Mr. Nice Guy" approach, which Perry describes as an effective management position (1987:126). Settlements were eventually achieved in both instances, not because the firms were sensitive to adverse publicity per se, but, in part, because union legal challenges were upheld by regulators willing to fully utilize their powers to obtain compliance.

Strategic use of labor boards. Beyond normal enforcement of statutory requirements, labor boards (for example, the NLRB, NMB, and OSHA) can play a critical role in corporate campaigns through their impact on the union's ability to engage in conflict escalation. The role of the NLRB in conflict escalation can best be illustrated by comparing the Stevens and Seafirst cases. In Stevens, an NLRB sympathetic to the union took extraordinary action to ensure statutory compliance. Not only was Stevens found guilty of numerous unfair labor practices, but the Board sought a national 10(j) injunction against the firm (BNA 1977; BNA 1978b).¹⁷ The frequent and consistent findings of the Board, coupled with its willingness to seek extraordinary remedies, legitimized the union's claim that Stevens was determined to deny workers their representation rights.

In contrast, similar charges by the UFCW against Seafirst were vitiated when an unsympathetic NLRB ruled that the bank could question the union's representation status based on voter turnout and denial of participation of nonunion bargaining unit employees in an affiliation election. This extraordinary Reagan Board ruling, reversing a previous NLRB decision in the same case, was overturned by the Supreme Court in February 1986, and the NLRB issued a duty to bargain order in July 1988, which is currently under appeal (Sauter 1989).¹⁸ Thus, for a period

¹⁷ This injunction request was later dropped in exchange for Stevens' cooperation in the resolution of several unfair labor practices (BNA 1978a).

¹⁸ *Seattle First National Bank*, 265 NLRB No. 55,

of almost six years Seafirst was able to effectively counter charges of illegal union avoidance with a supportive NLRB decision, and it continues to avoid the NLRB bargaining order through its appeal. One can only speculate on the outcome of the Seafirst campaign had the original NLRB ruling remained in effect, but it is difficult to argue that the union's ability to achieve its objectives would not have been greater.

Labor boards may also play a strategic role in labor disputes, fundamentally altering the regulatory climate the target firm faces. Labor boards have greater remedial power in representation cases, where they may make bargaining unit determinations, institute procedural remedies during representation election campaigns, and award representation status, than in bargaining disputes. As a consequence, labor boards are more instrumental in organizing-related corporate campaigns than in bargaining-related campaigns.

Strategic labor board actions were taken in the organizing-related campaigns at Stevens and Litton as well as the pre-strike campaign at Eastern. During the Stevens campaign, the NLRB awarded the ACTWU access to all Stevens plants and ordered Stevens to reimburse the union for its organizing and litigation expenses (BNA 1979). Such treatment arguably changed the balance of power between union and employer. Because of the NLRB, the ACTWU had a tangible bargaining chip to trade for Stevens' agreement to do what it had vowed it never would: sign a contract containing grievance arbitration, seniority, and dues check-off provisions (BNA 1980; *Business Week* 1980).

Had the UE's attempt to persuade the NLRB to treat all Litton subsidiaries as a single employer succeeded, it would also have fundamentally shifted the balance of power (Kovach 1984). Although never fully realized, the union's strategy sensi-

tized the NLRB to Litton's labor policy, making it riskier for the firm to engage in the coordinated labor policy that the union claimed it was committed to (BNA 1983b). Whether such a coordinated policy existed is open to argument, but Litton's offer to form a labor-management committee to investigate its labor policies played a pivotal role in the cessation of the campaign (BNA 1983a).

If the IAM, TWA, and ALPA's attempt to get the NMB to rule that Continental and Eastern are a single employer under the Railway Labor Act had been successful, it would have produced a single bargaining unit and thereby limited the carrier's ability to divide and conquer the pilots at the two airlines (BNA 1988f). If the NMB had ruled in the 11 months between the unions' initial request and the strike, the course of the dispute might have been different.¹⁹

National union resources and internal dissent. The majority of bargaining impasse campaigns in our study involved employer demand for concessions. Perhaps as a result of union reluctance to agree to concessionary demands, and the inevitable disagreements between national and local union officials regarding the wisdom of granting them, such bargaining disputes are sometimes fraught with internal dissension. The emergence of labor consulting groups that are independent of national unions has enabled aggressive local union officials who may disagree with national union policy to initiate corporate campaigns. The national union then has the choice of supporting or tolerating the campaign, or making the internal union disagreement public.

The divisive dispute between the UFCW

¹⁹ This motion is still pending, although the NMB is reluctant to rule as long as Eastern is in bankruptcy court (Cohen 1989).

Non-labor agencies may also be used to legitimize union claims and strategically alter the firm's regulatory climate. Yet, few campaigns were successful in their attempts to utilize non-labor agencies in this manner (BASF being an exception). In some cases these failures may have stemmed from the agencies' unfamiliarity or lack of sympathy with the union claims, and in other cases the union claims may simply have lacked merit.

Nov. 18, 1982; *NLRB v. Financial Institution Employees of America Local 1182*, U.S. Sup. Ct. No. 84-1493, Feb. 26, 1986; *Seattle First National Bank*, 290 NLRB No. 72, July 29, 1988.

and its Hormel Local P-9 over the latter's bargaining stance and corporate campaign was detrimental to both the interests of organized labor and the settlement of the contract dispute. No other campaign to date has created such open internal dissent, but there is evidence to suggest that other campaigns were initiated mainly at the urging of local union leaders and operated without the full financial or moral support of the national union (for example, International Paper II and Post/Dedham Transcript). Without the vigorous support of the national union and its accompanying resources, local union actions appear to be at a disadvantage.

The economics of the settlement. Another factor that may make success more likely in organizing-related campaigns than in bargaining-related campaigns is the nature of the trade-off facing the firm. The procedural agreements that accompanied the campaign settlements at Stevens, Beverly, and Litton were not available options in the bargaining-related campaigns. These concessions only increased the likelihood of unionization at these three firms, they did not guarantee it.²⁰ The firms received certain benefits in exchange for uncertain costs. For example, although the Stevens settlement provided for automatic extension of the contract terms to new units organized over the next 18 months, no new election victories were achieved during that time frame.²¹ In exchange for these concessions, ACTWU not only ended the campaign, but agreed to forgo use of the nationwide access to Stevens plants granted to the union by the NLRB and upheld by the Supreme Court. In general, these procedural concessions had the effect of de-escalating the conflict by removing the charges that representation or recognition was being unfairly withheld from employees or the union. The union

still faced the task of turning procedural concessions into more substantive bargaining gains.

Contrary to the trade-off facing firms in organizing-related campaigns, settlement of a bargaining-related campaign requires the firm to trade certain bargaining concessions for the uncertain future benefits of ending the campaign. Strike substitute campaigns must generate expected costs to the firm that exceed the costs of the improvements in the management offer necessary to achieve a settlement. This purpose can be accomplished directly by the successful application of corporate campaign tactics, or indirectly by signaling the firm that the union is serious enough about its demands to engage in a prolonged strike. Only in the case of International Paper I did the presence of the corporate campaign appear to directly influence management's cost-benefit analysis. In addition, the viable strike threats at RCA/NBC and American Airlines may have been enhanced by corporate campaigns, but these settlements appear to have hinged more on the strategic timing of the strike threats.²²

Strike complement campaigns must increase the costs of the dispute above those imposed by the strike enough to alter the firm's cost-benefit analysis. The data presented in Table 1 strongly suggest that strike complement campaigns generally have not been able to generate adequate economic pressure. Only two of the nine strike complement campaigns appear to have realized any gains (Occidental/IBP and BASF). In addition, some of the firms involved in these disputes (for example, Continental and Phelps-Dodge) were under considerable financial constraints, mak-

²⁰ The Campbell dispute is an exception. In agreeing to the election process, the union made it clear that it would not end its campaign until contracts were in place (BNA 1986b).

²¹ The first post-1980 election victory at Stevens did not occur until 1987; it involved an automobile carpeting facility in Michigan (see *AFL-CIO News* 1987).

²² The notion that strike substitute campaigns may have a major impact on outcomes by signaling potential strike activity has some appeal. In three of the nine strike substitute campaigns, however, strikes actually occurred, suggesting that any increased strike threat signaled by the campaign did not persuade the employer to settle. In addition, three campaigns (*K. C. Star*, Post/Dedham Transcript, and Harper and Row) involved unions that could not or would not use the strike (*Editor and Publisher* 1983; Vitale 1989; BNA 1986d).

ing them more present-oriented and likely to emphasize current and certain labor costs over uncertain future benefits.

Summary. The above analysis suggests that the corporate campaigns with the highest likelihood of success are those that complement traditional organizing activities, because (1) the nature of the dispute in such campaigns is more amenable to conflict escalation based on labor issues; (2) labor boards can be better utilized in organizing-related disputes both to add legitimacy to union allegations and to engage in strategic actions designed to alter the long-term balance of power between labor and management; (3) organizing campaigns typically enjoy the full support and financial resources of the national union; and (4) these campaigns often seek procedural concessions that are of uncertain cost to the target firm. In those instances where the target firm is particularly sensitive to its public image, or has some other unique vulnerability that can be exploited by specific campaign tactics, campaigns waged in support of organizing objectives seem to maximize the pressure placed on the target firm, and hence the likelihood of achieving some success. Among the successful organizing campaigns examined in this study, only the Toyota campaign lacked most of the advantages noted above. Conversely, most of these elements were uncharacteristically present in the successful strike complement campaign at Occidental/IBP. Furthermore, the clear union defeats in the organizing campaigns at Seafirst and New York Air can be understood by the absence of many of these elements.

We do not mean to suggest that campaigns with all of the above elements are certain to succeed. The lessons of the past should serve as a reminder that any gains may be modest and achieved at considerable financial cost to the union. The cost of the typical corporate campaign, as estimated in public reports (which should, of course, be viewed with considerable caution), is about a million dollars per year. (For example, see *Business Week* 1980; BNA 1985e:A-1; BNA 1981:A-8.) Unions would be well advised to weigh

both the probable cost of a corporate campaign and the probability of its success (based on the record of such campaigns to date) before embracing a corporate campaign strategy. David may have brought Goliath down with a sling-shot, but the odds were against him.

AFL-CIO spokesmen have recognized some of these points. In commenting on the creation of the AFL-CIO's Comprehensive Organizing Strategies and Tactics (COST) office, a unit specializing in the application of corporate campaign techniques to organizing disputes, Charles McDonald, the Federation's organizing director at the time, stated that corporate campaigns "have been an effective means of organizing recently." On the other hand, he noted that corporate campaigns had often been used "as a salvage measure generally in reaction to employers attempting to decertify a union" (BNA 1986c: A-1). Corporate campaigns are not successful in this context, he argued, because unions threatened with decertification generally do not have the time to plan a campaign. The ability to engage in extended planning may be another factor in explaining why different types of campaigns enjoy different rates of success. Whereas organizing and strike substitute campaigns can be planned in advance, the crisis situation surrounding strike complement campaigns places severe constraints on the planning process.

McDonald also seemed to recognize the potential divisiveness created by local union corporate campaigns coordinated by outside consultants. He noted that the COST office would provide national affiliates with in-house capabilities and help avoid the problems that exist when local unions hire consultants who run campaigns that are "inconsistent with national union goals and strategies." Despite the AFL-CIO's announced emphasis on organizing-related corporate campaigns, half of all campaigns since 1985 (Occidental/IBP, International Paper II, Eastern, and Pittston) have targeted firms demanding

concessions.²³ It appears that the frequency of corporate campaigns will continue to depend on the prevalence of employer concessionary demands.

Recent Developments

As noted, our research has concentrated on events occurring through December 1989. We add here a brief postscript on some recent developments, with the warning that we have not studied subsequent events as thoroughly as we studied developments prior to 1990.

The most significant event has been the Pittston settlement announced February 20, 1990 (BNA 1990e). Although a union official credits the corporate campaign with bringing Pittston back to the bargaining table (Zinn 1990), its role in the substance of the settlement is less clear. Both sides achieved some of their publicly stated objectives, providing each with the opportunity to claim success. The UMW points to Pittston's promise to maintain health benefits for active and retired miners and to provide laid-off UMW-represented miners preferential hiring at nonunion Pittston coal subsidiaries as major victories. For its part, Pittston gained changes in work rules, the ability to buy out of one of the industry-wide benefit and pension plans, and other deviations from the industry-wide agreement. Both parties agreed to resolve outstanding NLRB charges and to work to dismiss more than \$64 million in court-imposed fines against the union. The settlement also coincided with an announcement by Secretary of Labor Elizabeth Dole to establish a commission to review and make recommen-

dations on health care and pension benefit funds in the industry.

Although the Pittston campaign was not organizing-related, its apparent success is broadly consistent with our analytic framework. The UMW placed the full financial resources of the union behind the campaign. The very nature of the Pittston dispute provided the UMW with an opportunity to escalate the conflict via a labor issue: the health care of current and retired miners. The union position received broad support among community groups and generated several acts of civil disobedience in support of the strikers (Moberg 1989). In addition, international trade union support for the strikers helped to legitimize the union's claims, and union officials have asserted that an international trade union delegation embarrassed the Bush Administration into appointing a mediator to end the dispute (AFL-CIO News 1989a; Moberg 1989; Zinn 1990). These factors, combined with a costly strike, may have convinced Pittston that substantive concessions were warranted.

The Seafirst campaign also appeared to get a boost in early 1990 when the ninth circuit court affirmed an NLRB duty-to-bargain order²⁴ and the bank stated that it was ready to bargain with the UFCW (BNA 1990f). Although the campaign against Seafirst and its parent, BankAmerica, has continued throughout the many years of the dispute, Seafirst's offer to negotiate may be more a function of its exhaustion of legal options than of its capitulation to corporate campaign pressure. Face-to-face negotiations are scheduled to begin on March 22, 1990 (AFL-CIO News 1990).

In contrast, most recent events at Eastern do not bode well for the unions involved. On March 1, 1990, a court-appointed examiner in the Eastern bankruptcy case found that its parent company, Texas Air, had provided Eastern with less than fair compensation for several transfers of assets that occurred prior to its March 1989 bankruptcy filing.

²³ The COST office is no longer in operation. A former COST staff member noted that corporate campaigns designed to complement organizing drives are most common among unions that have in-house corporate campaign capabilities. He noted that few unions were willing to pay for outside expertise in these situations. AFL-CIO corporate campaign expertise has been more actively sought in situations where the existing membership is threatened. Such expertise is provided by a number of AFL-CIO departments, most notable FAST and the IUD (Calibrese 1990).

²⁴ *Seattle First National Bank v. NLRB*, United States Court of Appeals, CA-9 Nos. 88-7416, 7547, Dec. 21, 1989.

Nonetheless, the examiner refused to seek a court-appointed trustee to manage Eastern—a long-time union goal (BNA 1990d). On March 7, the House of Representatives dealt the unions another significant defeat when it failed to override President Bush's November 21, 1989 veto of a four-member bipartisan commission to investigate the Eastern dispute (BNA 1990c). Finally, on March 22, ALPA agreed to temporary wage and benefit cuts in exchange for Eastern's pledge not to delay seeking further cost reductions through the bankruptcy courts (BNA 1990a). The interim pact will expire July 1 unless replaced by an earlier permanent agreement.

Union prospects are no better at International Paper. There, a second bargaining unit has been decertified and a tentative agreement covering replacement workers at Jay, Maine, faces an uncertain future, with a complicated ratification process and a possible decertification election pending (BNA 1990b). The settlement provides for modest increases in pay and appears to have been achieved without any promise by the Paperworkers to end their corporate campaign against the firm.

Without some means of escalating these conflicts based on labor issues or unexpected help from the NMB or NLRB, a favorable settlement of the Eastern and IP campaigns from the unions' point of view appears unlikely.

Prospects

Predicting the future is always risky, and a number of factors may affect the frequency and success of future corporate campaigns. Although the need for corporate campaigns may be greater when unions are operating in a hostile regulatory environment, the prospects for campaign success are significantly improved when labor boards are supportive of unions. Whether the Bush Administration will curtail the Reagan Board's aggressive attempts to shift the balance of power under the NLRA remains to be seen, but a change in NLRB policy could increase the potential for corporate campaigns.

The U.S. Supreme Court's *Debartolo* decision²⁵ broadened the scope of legal secondary activities by protecting a wide range of peaceful, noncoercive actions under the free speech provisions of the First Amendment. Within three months of this decision, the Paperworkers announced boycotts against three financial institutions and one other firm with ties to International Paper (BNA 1988e:A-12; BNA 1988d:A-11; BNA 1988c:A-3). Although the *Debartolo* decision clearly influenced the choice of tactics in that campaign, such activity did not appear to alter the firm's bargaining position, nor did it change the secondary firms' strategy of publicly proclaiming their neutrality. Whether organizing campaigns may be better able to utilize the *Debartolo* protections to portray future disputes as pitting the interests of the downtrodden against those of "monopoly business" is unclear.

On a more pessimistic note for unions, employers have become more sophisticated in responding to corporate campaigns. A comparison of the first and second International Paper campaigns suggests that firms are learning how to cope. Whereas the first International Paper campaign produced a quick settlement, the second was a clear union defeat.

More tangibly, some employers are taking the offensive. In May 1988, Texas Air charged in a court suit that ALPA and the Machinists were running a smear campaign against Eastern designed to damage its reputation and allow the unions to buy the airline at a bargain-basement price. The suit, filed under the Racketeer Influenced and Corrupt Organizations Act (RICO), reportedly seeks damages of 1.5 billion dollars (BNA 1988g; Ruben 1989). A similar approach was taken by American Airlines, which filed a suit alleging that use of a corporate campaign is evidence of bad-faith bargaining (*Wall Street Journal* 1987a).²⁶ Although

²⁵ *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building and Construction Trades Council*, U.S. Sup. Ct. No. 86-1461, Apr. 20, 1988.

²⁶ BASF made a similar charge under the National Labor Relations Act. These charges were eventually

the merits of both cases appear questionable, the unions involved were forced to expend resources in mounting a defense, adding costs to already expensive campaigns.

Finally, rule changes instituted by the Securities and Exchange Commission in 1983 have limited labor's ability to bring proxy challenges, both by permitting the omission from proxy statements of resolutions that pertain to the ordinary business of the company and by increasing voting thresholds for resubmission of failed resolutions (Thompson 1988:51). These rules appear to have reduced the number of union-initiated stockholder resolutions, limiting the union's ability to take its case directly to stockholders.

Whether these developments will enhance or hinder labor's ability to implement successful corporate campaigns is open to speculation. Yet, it is our opinion that corporate campaigns that complement traditional organizing efforts will continue to hold the highest probability of success. Where the elements identified in this paper as advantages for the union are present, corporate campaigns may hold the key to gaining the procedural concessions necessary to gain representation status in the face of management resistance. Recent developments have not altered the rather stark economics of bargaining-related corporate campaigns. Before a firm will negotiate, it still must be convinced that the costs inflicted by such a campaign will exceed the costs of the substantive bargaining concessions sought by the union.

Corporate campaigns have been con-

dismissed by the NLRB General Counsel (BNA 1986b).

ceptualized in strategic terms by some observers. Of the various actions unions have taken to alter strategic business decisions, perhaps the most promising are attempts to influence the purchase of the firm. Although outside the corporate campaign umbrella, such attempts are broadly consistent with the principle of moving union actions beyond the confines of traditional bargaining activity. This approach played a significant role in the Eastern dispute. Eastern's unions continue to support efforts by Joseph Ritchie to buy the carrier and have offered loan guarantees and temporary wage concessions (AFL-CIO 1989) in the event of his success. Such a maneuver appears to be part of a small, but increasing trend among unions to replace hostile ownership or management through union-initiated take-overs (Bernstein 1987). Still, unions cannot yet be said to have developed a consistently effective tool for engaging management at the strategic level of decision-making.

A distinguishing feature of industrial relations in the 1980s has been the increased importance of financial markets and non-labor statutes in the determination of industrial relations outcomes. Merger mania, deregulation, and bankruptcy have shifted the arena in which many labor relations outcomes are determined. Yet, most successful corporate campaigns to date appear to have met management on familiar union turf (such as labor boards, OSHA, and the media) and extracted concessions based on appeals involving traditional labor issues (such as representation rights, standard wages, and employee safety). We anticipate that this pattern will continue.

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Speaker Biographies

Taylor Law at 50

May 10, 2018 | 1:30 p.m. – 2:45 p.m.

Concurrent Two:

Considering the Optics of Labor-Management Issues
in the Age of Instant Information

SUSAN J. PANEPENTO

Susan Panepento was appointed as the fifth Chair of the Board and Director of the Office of Collective Bargaining on March 1, 2015 and reappointed to a second term in January 2018. For ten years prior to serving as Chair, Ms. Panepento was OCB's Deputy Chair for Dispute Resolution functioning as the principal mediator of disputes and overseeing the arbitration process administered by the agency. During that time, she successfully resolved numerous contract, arbitration and improper practice disputes. Throughout her tenure at OCB, Ms. Panepento has provided significant guidance to the parties and promoted improved conflict resolution skills and sound labor relations. She joined OCB's staff in 2001 as the Director of Representation. Prior to joining OCB, Ms. Panepento was primarily involved in private sector labor relations. She served as a Field Examiner and Attorney with the National Labor Relations Board in Brooklyn, New York. Also she practiced with the New York City law firm Cohen, Weiss and Simon, where she represented both national and local unions in federal and administrative proceedings, negotiations and grievance arbitrations. Ms. Panepento is a graduate of Cornell University - NYS School of Industrial and Labor Relations and Brooklyn Law School.

CATHERINE CREIGHTON

Catherine Creighton is a graduate of Cornell University's School of Industrial & Labor Relations and Boston University School of Law. Before the formation of Creighton, Pearce, Johnsen & Giroux in 2002, Ms. Creighton was a partner at Lipsitz Green and prior to coming to Buffalo she was a Field Attorney for the NLRB in Brooklyn, New York.

Ms. Creighton has over 20 years of experience representing private and public sector unions in NLRB and PERB matters, arbitration, contract negotiations, withdrawal liability, and individual clients in discrimination matters, Federal and State litigation, employment contracts, severance agreements, and cases at the Merit Systems Protection Board.

Ms. Creighton is involved in community service and social justice issues. She was appointed by New State Governor David Patterson to serve as a Director of the Erie County Fiscal Stability Authority, and by Cornell ILR Dean Harry Katz to serve as Chair of the Buffalo Living Wage Commission. She serves on the Coalition for Economic Justice's Workers' Rights Board, is on the Board of Directors of the Lawyers Coordinating Committee of the AFL-CIO, the Advisory Board of the Labor and Employment Relations Association of Western New York, has served on the Board of Neglia Ballet, and as an adjunct instructor in the Labor Studies program for the Cornell University ILR Extension. She has lectured for Continuing Legal Education programs for the AFL-CIO, Cornell University and the National Labor Relations Board and has written for legal publications.

Ms. Creighton was awarded the Coalition for Economic Justice Rev. Robert Beck Award and the Communications Workers of America, Western New York Council Eugene J. Mays Citizenship Award.

SUSAN DAVIS

Susan Davis joined the firm in 1982 and became a partner in 1992.

Ms. Davis specializes in the representation of national, regional and local labor unions in all aspects of collective bargaining, litigation, mergers and affiliations, organizing, strategic planning and internal union governance. She currently serves as general or chief outside counsel to unions in the entertainment, health care and public sector arena, and has represented unions in a wide variety of industries including sports, transportation and communications.

Prior to joining Cohen, Weiss and Simon LLP, Ms. Davis was a clerk for the Honorable Constance Baker Motley in the U.S. District Court for the Southern District of New York.

Ms. Davis is a fellow of the College of Labor and Employment Lawyers, a member and former co-chair of the American Bar Association's Section on Labor and Employment Law Committee on Practice and Procedure under the National Labor Relations Act, and a member of the Council of the American Arbitration Association. She serves on the AFL-CIO Lawyers Advisory Panel and is an Advisory Board Member of the Cornell University ILR School. Ms. Davis has been named as both a Super Lawyer for Employment and Labor Law and one of the Top Women Attorneys in the Metropolitan New York area. Ms. Davis was a 2013 Peggy Browning Fund Honoree.

Ms. Davis has written for and lectured extensively at bar association, attorney and union meetings on a wide variety of issues facing unions and their members. Ms. Davis graduated with honors from the University of California at Berkeley in 1976. She received a law degree with high honors from Rutgers University in 1981, winning the West Publishing Company's annual jurisprudence award and leading the Rutgers moot court team to the American Bar Association's national moot court finals.

NEIL H. ABRAMSON

Neil Abramson is the co-chair of the Labor & Employment Law Department and head of the Public Sector Group. He handles all types of employment litigation, including discrimination claims, claims for breach of contract and claims arising from the collective bargaining relationship, as well as arbitrations, administrative proceedings and collective bargaining.

Neil regularly handles complex collective bargaining disputes for private and public sector employers, including litigating matters before the New York State Public Employment Relations Board, various public interest arbitration panels, private grievance arbitrators and the National Labor Relations Board. Neil leads the legal representation of the Metropolitan Transportation Authority in its collective bargaining disputes with transit and railroad workers and the City of New York in its collective bargaining disputes with teachers, police, fire, nurses and hospital staff. Neil also regularly handles collective bargaining disputes for such clients as Major League Baseball, The New York Times, Pratt Institute and The Broadway League. He also provides advice and guidance to clients, counseling employers on how to avoid litigation and achieve their

employee relations objectives. Neil also has litigated single and multiple plaintiff matters in the state and federal courts of New York and a number of other jurisdictions and has extensive appellate advocacy experience.

Among the clients Neil has represented are major corporations in such diverse fields as financial services, higher education, news media, transportation, sports, energy, entertainment and health care, as well as numerous public benefit and public service corporations.

MATTHEW VAN VESSEM

Matthew Van Vessem is a partner in Goldberg Segalla's Employment and Labor Practice Group. He concentrates his practice in the areas of labor and employment litigation, employee discipline, collective bargaining, New York State Education Law, General Municipal Law Section 207-a and 207-c, and municipal law.

Matt represents private and public sector clients — including many of the largest employers in Western New York — in administrative and legal proceedings, including labor arbitrations, agency hearings, and state and federal court litigation. These clients include numerous cities, towns, and other municipalities; school districts and boards of education; and police and fire departments, hospitals, and transit authorities. Before entering private practice, Matt was assistant corporation counsel for the City of Buffalo.

A graduate of the State University of New York at Buffalo Law School, Matt has been selected for inclusion in Best Lawyers in America, Employment Law and Labor Law, and Upstate New York Super Lawyers.

Concurrent One

Taylor Law at 50

May 10, 2018 | 3:00 p.m. – 3:50 p.m. | King St Ballroom
1.0 areas of professional practice CLE credit

Half a Century of Managing Collective Bargaining Conflict: The New York Experience and Beyond

This session analyzes PERB's historical involvement in managing public sector collective-bargaining disputes and analyzes trends in the number of impasses and strikes that occurred each year. Historical data will be used as a model to offer a prediction of the level of collective-bargaining discord that PERB might anticipate in the future.

Panelists:

Anthony Zumbolo, Public Service Professor, Rockefeller College, University at Albany, former Executive Director, NYS Public Employment Relations Board

Matthew W. Burr, Human Resources Consultant, Burr Consulting, LLC

Richard A. Curreri, Arbitrator & Mediator

Including:

The Acceleration and Decline of Discord:
Collective Bargaining Impasses in New York State

The Challenges and Shortcomings in the United States:
A Comparative Analysis of Public Sector Labor Union Dispute Resolution Mechanisms

The Acceleration and Decline of Discord: Collective Bargaining Impasses in New York State

By Anthony Zumbolo

Social dissonance during the 1960s, as manifest in racial, gender, artistic, and employment upheaval, shaped America's Cultural Revolution. During this period workplaces experienced increasing labor management conflict, especially in the public sector. Often, the vanguard striving for one social improvement joined with others to more vividly expose intertwined perceived injustices. One of the most well known examples of this social fusion was the Memphis sanitation workers strike of 1968. Dr. Martin Luther King, Jr. lent the vigor of the civil rights movement to the workers in their struggle to overcome deplorable working conditions at the sanitation department in the City of Memphis, Tennessee. It was during this strike that Dr. King was assassinated.

Workplace disruption by public employees had become fairly widespread earlier in the decade. Several states recognized the conflicts as symptoms of cultural injustice that needed to be addressed with progressive solutions rather than prosecution. For example, in 1959 Wisconsin, then Connecticut and Michigan in 1965, each afforded segments of their public workforce collective bargaining rights. Then in 1967 New York became the first state to legislatively grant this opportunity to virtually all public employees, regardless of governmental jurisdiction or job classification. The Public Employees' Fair Employment Act (commonly called the Taylor Law) allowed public employees to determine if they wished to be represented by a bargaining agent in negotiations. Subsequently, more than half the states granted similar rights to public employees.

Background

Turmoil paved the way for passage of the Taylor Law. Post World War II workplaces were fraught with strife. The easing of economic and political restrictions after 1946 gave rise to increased worker unrest. Public employees were not timid in their efforts to improve terms and conditions of employment after years of wartime suppression. As an illustration, between 1920 and 1943 there were thirteen public school teachers strikes nationwide, whereas between February 1946 and May 1947 there were twenty-nine. Beginning on February 24, 1947, twenty-four hundred schoolteachers in Buffalo, New York engaged in a week-long strike.¹ In March 1947, New York's Condon-Wadlin Law was enacted as an antistrike measure. The statute included severe penalties for public employees that engaged in work stoppages.

Condon-Wadlin remained in place for nearly twenty years with disparate enforcement applied to more than twenty-one strikes or job actions that occurred during that period.² Disruptions tapered off for awhile but the decade of the 1960s brought renewed vigor to workplace unrest. New York City schoolteachers conducted a one-day strike in November 1960 and again in 1962; also in 1962, two thousand New York City motor vehicle operators engaged in a work stoppage; a one-day wildcat strike by 648 New York ferryboat workers occurred in 1964; in January 1965, six thousand New York City welfare workers struck for twenty-eight days and the New York City Transit Workers Union rang in New Year 1966 by shutting down the entire transit system for

¹ Donovan, Ronald, "Administering the Taylor Law". 2, 3-4. (Donovan, 1990).

² Rosenzweig. Stefan, *The Condon-Wadlin Act Re-examined*. ILR Research 11(1), 3-8. (Rosenzweig, 1965).

twelve days.³ The relative tranquility that shrouded public employment in New York during the 1950s, quickly gave way to a tumultuous 15-plus year period.

Within days of when the transit workers strike ended, Governor Nelson Rockefeller appointed the Committee on Public Employee Relations “to make legislative proposals for protecting the public against the disruption of vital public services by illegal strikes, while at the same time protecting the rights of public employees.”⁴ The committee’s recommendations, issued on March 31, 1966, became the cornerstone of the Taylor Law. The committee recommended that: the Condon-Wadlin strike prohibition be continued; public employees have the right to organize and be represented by an agent of their choosing; public employers must collectively negotiate; and a dispute resolution system be designed to assist employee organizations and employers if they were unable to reach agreement by direct negotiations. Sections 9 and 10 of the 1966 report listed steps for mediation, fact-finding, and “In the event of the rejection of a fact-finding board’s recommendations...the appropriate State or local legislative body (or committee) should hold a form of ‘show cause’ hearing...prior to final legislative action”.⁵ The recommendations became the Taylor Law’s Section 209 - Resolution of Disputes in the Course of Collective Negotiations.

From Framework to Practice

The impasse resolution procedures of Section 209 have been amended and modified several times; however, mediation as the initial intervention has

³ Donovan, 1990. 6-7, 9, 12, 16, 19.

⁴ *New York State Governor’s Committee on Public Employee Relations, Final Report*, March 31, 1966. 9. (Report, 1966).

⁵ Report, 1966. 7-8.

remained unaltered. The procedures that follow mediation when it fails to lead parties to agreement have been revised. Two major modifications to the impasse resolution procedures occurred in 1974, both eliminating the ability of a legislative body to alter terms and conditions of employment. In educational jurisdictions the right to impose contract terms after the rejection of fact-finding recommendations was abolished. This impacted the greatest number of public employees in the state because, when combined, school districts and other educational organizations employ the most civil servants. As a result, bargaining between school districts and their employees continues until a new agreement is negotiated. The authority of other legislative bodies to change working conditions without employee organization agreement occurred when the state enacted compulsory binding arbitration of contract terms for units of public safety personnel, primarily police and firefighters. When mediation fails to produce a settlement in police and fire negotiations, a tri-partite panel of arbitrators establishes wages and benefits.

Criticism of compulsory interest arbitration produced a 2013 statutory amendment to the Taylor Law impasse procedure requiring greater attention be afforded to fiscal consequences of awards, especially in regard to “fiscally eligible municipalities”. “Fiscally eligible municipalities” are identified by the State Comptroller as those having an average full value property tax rate in the highest 25% of all municipalities and an average fund balance of less than 5%. Scope, implementation, procedural and other provisions necessary to define the impact of these substantive modifications constitute the entirety of the legislative

adjustment to the Taylor Law's Resolution of Disputes in the Course of Collective Negotiations article.

In addition to statutory changes over the years, the Taylor Law impasse procedures have been altered through policy and administrative action. These changes have been influenced by research into best practices, economics, and demographics, as well as geographic and political considerations. For example, beginning in 1967 mediation and, when necessary, fact-finding services were delivered by different individuals. However, the frail economy of the mid and late 1970s offered Chairman Harold Newman the opportunity to combine the two dispute resolution assignments so that the same individual would perform both functions. Chairman Newman strongly supported the notion that mediation offered the best means of providing the negotiating parties with the tools to resolve their dispute and that public fact-finding recommendations should be offered as a means of effectuating a voluntary settlement, not as judicial dictum. The mediator/fact finder could direct the parties toward a settlement with both spoken words during mediation and written recommendations, if necessary.

What Occurred

Since September 1967, PERB has assisted public employers and the organizations that represent their employees in negotiating collective bargaining agreements. The parties are free to establish their own resolution procedures, however, absent such an agreed upon process, the Taylor Law defines a statutorily mandated conciliation course of action. Upon mutual or unilateral request of both or either party, PERB determines if an impasse exists when a Declaration of Impasse is

filed. PERB may also make such a determination on its own if it discovers that the parties are having difficulty reaching agreement.

Once a determination has been made that an impasse in negotiations exists, the Director of Conciliation assigns a mediator or mediator/fact finder to assist the parties in their bargaining. The mediator has no authority to impose settlement terms, but facilitates discussions, addresses issues of miscommunication, provides general collective bargaining information and relies on the power of persuasion to lead the parties toward agreement. If mediation is unsuccessful, alternative resolution techniques are used depending on the classification of employees and type of employer. For public safety and a few other bargaining units, a tripartite interest arbitration panel can be appointed to award terms and conditions of employment that are binding on the parties. In educational institutions, a mediator/fact finder or fact finder may issue recommendations for settlement after accepting documents and/or hearing testimony from each party in support of its position. All other bargaining situations require the local legislative body to conduct a hearing into the dispute, address the fact-finding recommendations and “take such action as it deems to be in the public interest, including the interest of the public employees involved.”⁶ However, “It shall be an improper practice for a public employer or its agents deliberately... to refuse to continue all the terms of an expired agreement until a new agreement is negotiated...”⁷

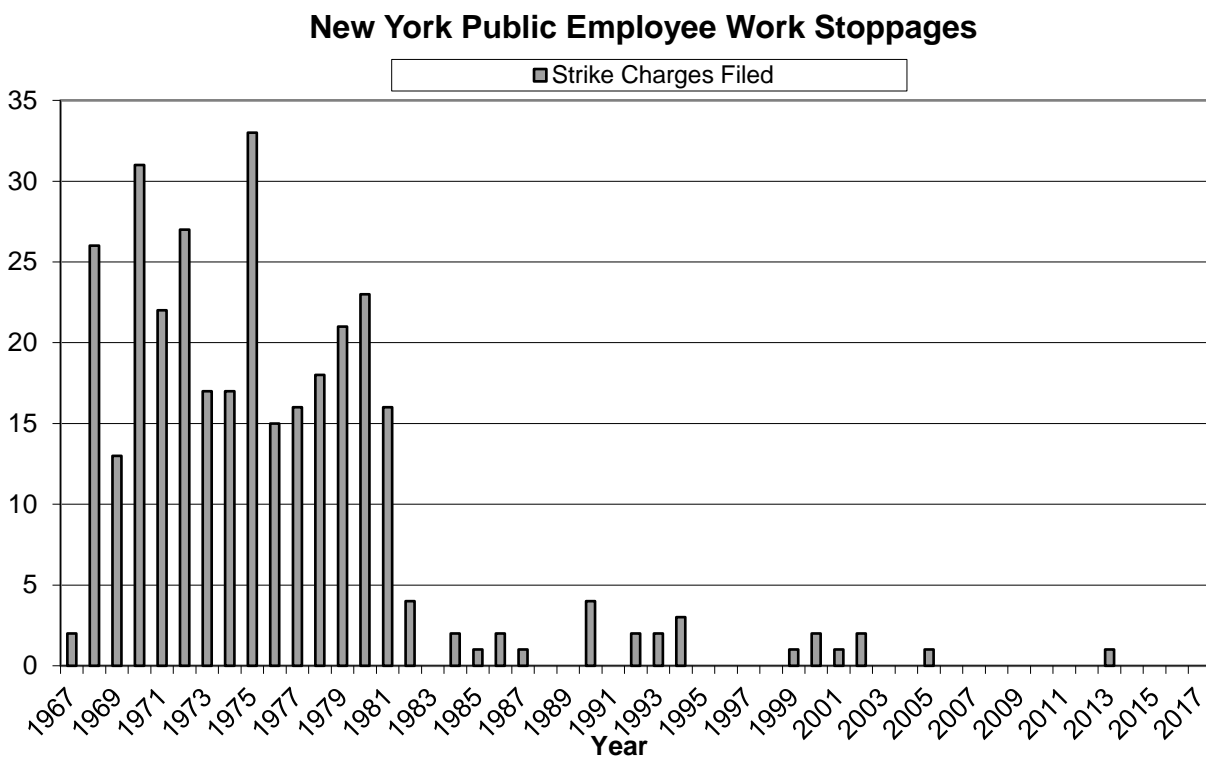
Public sector collective bargaining discord is considered to be a breakdown in negotiations that requires third-party intervention by PERB, regardless of whether a

⁶ Public Employees’ Fair Employment Act, Sec. 209.3(e)(iv). (New York State, 1967),

⁷ Ibid, Sec. 209-A.1(e).

strike ensues. Since strikes were depicted as a driving force for enactment of the Taylor Law, they will be one of two measures utilized to illustrate the level of bargaining discord in New York over the past 50 years. The number of strike charges filed since enactment of the Taylor Law is shown in Figure 1.

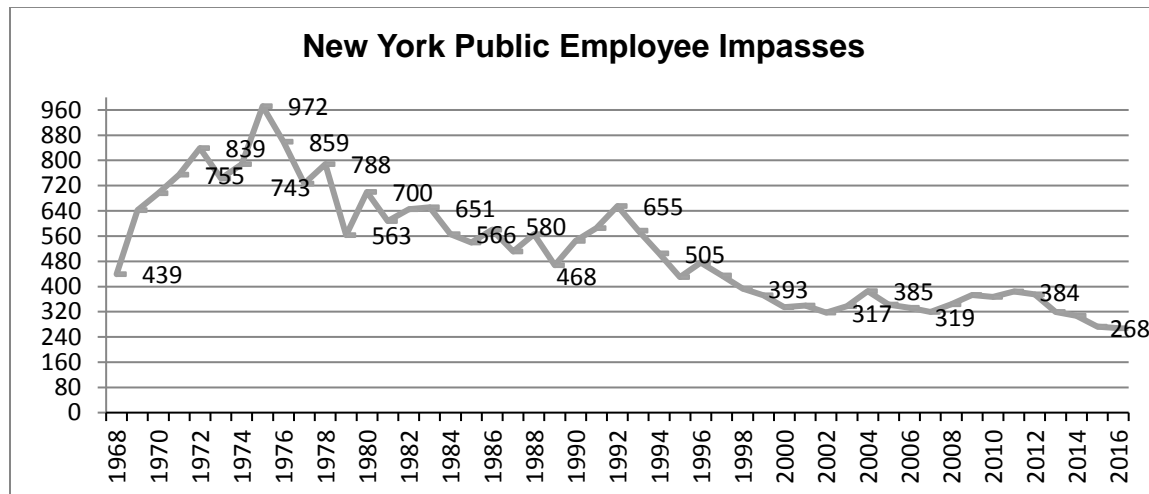
Figure 1



The other, and arguably a better gauge, will be the number of contract impasses that PERB reported in each of those years. Impasses rather than strikes more accurately reflect dissatisfaction with terms and conditions of employment because the penalties for striking in New York deter all but the most distressed employees from engaging in such activity. Therefore, the number of impasses presents a more complete set of negotiations that experience discord. Figure 2 charts the number of impasses processed by PERB's Office of Conciliation during each year since 1967.

The PERB News, its Statistical Yearbook, and the Office of Conciliation are the sources of the data for strikes and impasses. The annual reporting periods were January through December until 1977, then New York State's fiscal year, April through March, thereafter.^{8 9}

Figure 2

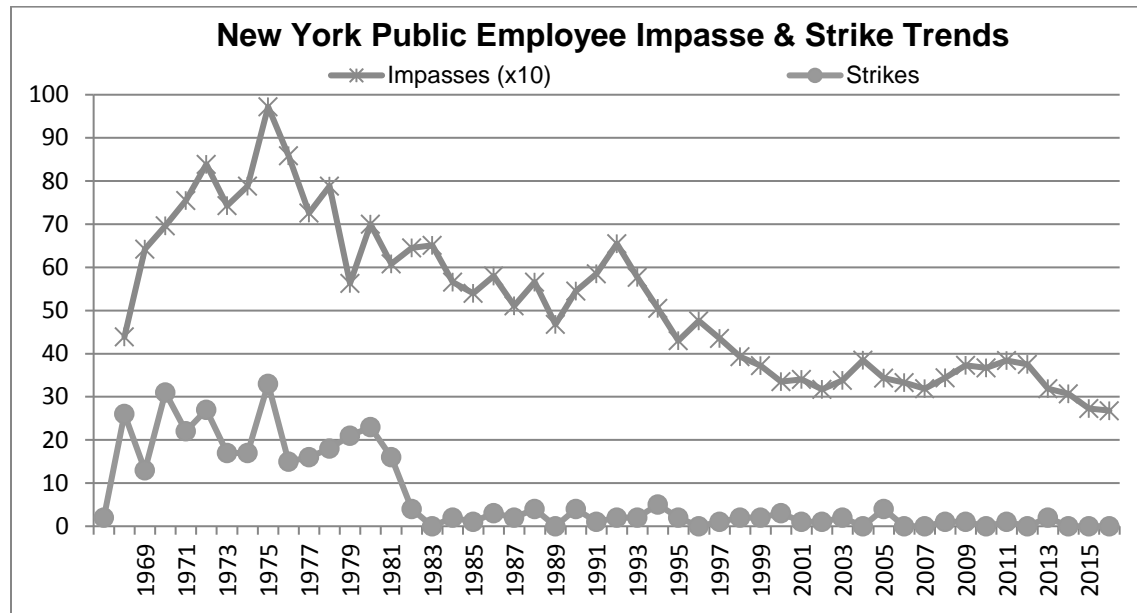


To compare the 50 year trends of impasses and strikes they have been plotted together in Figure 3. So that both measures are adequately displayed, the annual number of impasses was scaled back by a factor of 10. Not surprisingly, the picture illustrates corresponding increases and decreases in impasses and strikes. Impasse and strike activity is not in lockstep for individual years, mostly because impasses are counted in the year in which the Declaration of Impasse is received and a strike charge is recorded on the date it is docketed. Typically, impasses are reported in one year and a strike, if one occurs in those negotiations, does not take place until the subsequent reporting year.

⁸ New York State Public Employment Relations Board, *PERB News*, Vol.5-Vol.42. (NYS PERB, 1972-2009).

⁹ New York State Public Employment Relations Board, *PERB by the Numbers*. (NYS PERB).

Figure 3



The illustration depicts the rise and fall of impasse and strike activity during the life of the Taylor Law but offers no insight into what may cause such disputes.

Thomas Kochan and Todd Gick presented a theory that public sector bargaining is “affected by economic, political, legal, structural, organizational, interpersonal, and personal forces. Impasses may arise from one or any combination of these forces as well as from the parties' behavior in negotiations.”¹⁰

Have any of these forces impacted the level of bargaining conflict in New York since 1967? The personal, interpersonal, behavioral and organizational elements are unique to each set of negotiations. These distinctive characteristics certainly contribute to whether an impasse is declared or a strike occurs. Unfortunately, no matter how big an impact these situational characteristics may play in causing an impasse, they cannot be adequately measured to apply to this aggregate trend analysis.

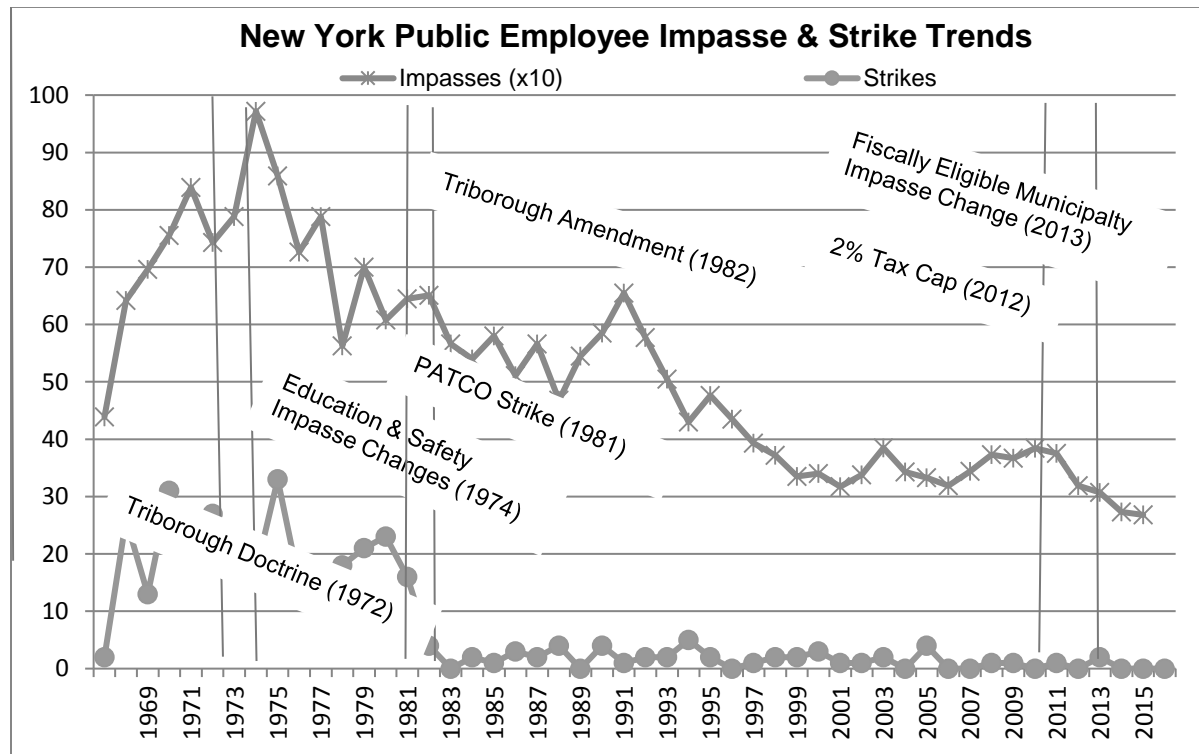
¹⁰ Kochan, Thomas A. and Todd Gick, *The Public Sector Mediation Process: A Theory and Empirical Examination*, Journal of Conflict Resolution, Vol. 22 No. 2, June 1978. (Kochan, 1978).

External factors can be identified and they help explain the trends. The economic expansion of the 1950s prompted workers in both the private and public sectors to seek a more equal share of prosperity through social action. In New York, the most direct political and legal impact on collective bargaining was Governor Rockefeller's efforts to enact the Taylor Law. Immediately following the implementation of the statute, impasses and strikes began climbing. The largest number of Taylor Law strikes (33) and impasses (972) occurred in 1975. Both strikes and impasses have trended downward ever since, with the fewest impasses declared in 2016 (268). Other changes to the law over the last 50 years that likely impacted impasses and strikes were: the Triborough Doctrine (1972 Board decision), which limited a public employer's ability to unilaterally make changes in terms and conditions of employment; statutory amendments to the impasse procedures that abolished the legislative hearing in educational jurisdictions and replaced the hearing with compulsory interest arbitration for police and firefighter bargaining units (1974); enactment of the Triborough Amendment (1982) making it illegal for an employer to unilaterally change any term of an expired agreement until a new agreement is negotiated; and amendments to constrain interest arbitration panels when "fiscally eligible municipalities" are involved in the negotiations (2013).

Showing these legal milestones, along with the impasse and strike trends, in Figure 4 helps illustrate how negotiations conflict was impacted by these changes to the law. Two additional actions are included on the chart to highlight significant political and legal events affecting contract negotiations in New York, even though they did not modify the Taylor Law directly. First, it is widely believed that the termination of striking

air traffic controllers by President Reagan in 1981 had the political impact of dramatically dispiriting private and public sector employees' enthusiasm to engage in work stoppages. Second, the 2011 enactment of a 2% property tax cap in New York has buttressed the demand for tempered wage adjustments in negotiations.

Figure 4



Going forward, strikes have been omitted from the charts. There are several reasons for this: 1) to make comprehension of the illustrations clearer, 2) impasses likely are a better measure of workplace conflict than strikes because the sway of strike penalties is omitted, 3) the framers of the Taylor Law saw the dispute resolution procedures as a substitute for engaging in an illegal strike, 4) declaring an impasse is the first indication of conflict, 5) the dearth of strikes for all but the first 15 years of the period makes the measure less significant over time, 6) and the strike trendline mirrors that of impasses.

Economic factors frequently affect collective bargaining and subsequent strife. Three economic variables regularly identified as impacting bargaining and conflict are: general economic well being, cost of living, and supply and demand of labor.¹¹ To examine the influence of these variables on impasses, the following measures are used: annual change in Gross Domestic Product (GDP) describes general economic wellbeing; cost of living is measured by the annual unit change in the consumer price index (CPI) from year-to-year in the Northeast (not the percentage change from the previous year, which is another common measure); and annual unemployment rates portray the supply and demand of labor. Figure 5 superimposes the history of impasses under the Taylor Law (in 100s) on measures of national GDP¹², the Northeast's CPI¹³, and the unemployment rate in New York State¹⁴.

The information shown here supports a common theory regarding the relationship between the economy and union efforts. Generally, when the economy is faltering and unemployment is high, conflict at the bargaining table increases; however, when the economy is doing well and unemployment is low, employers tend to accommodate employee demands.¹⁵ Since 1967 there have been six recessions evidenced by falling GDP and rising unemployment. Figure 5 shows that Taylor Law impasses increased during the hard times experienced in 1970, 1974/75, 1980-82, 1991/92, 2001, and 2008/09. During most of these recessions, increasing CPI

¹¹ Kearney, Richard, "Labor Relations in the Public Sector (4th)", 149-150. (Kearney, 2009).

¹² U.S. Bureau of Economic Analysis, "Table 1.1.5 Gross Domestic Product", January 28, 2018. (Bureau of Economic Analysis, 2018).

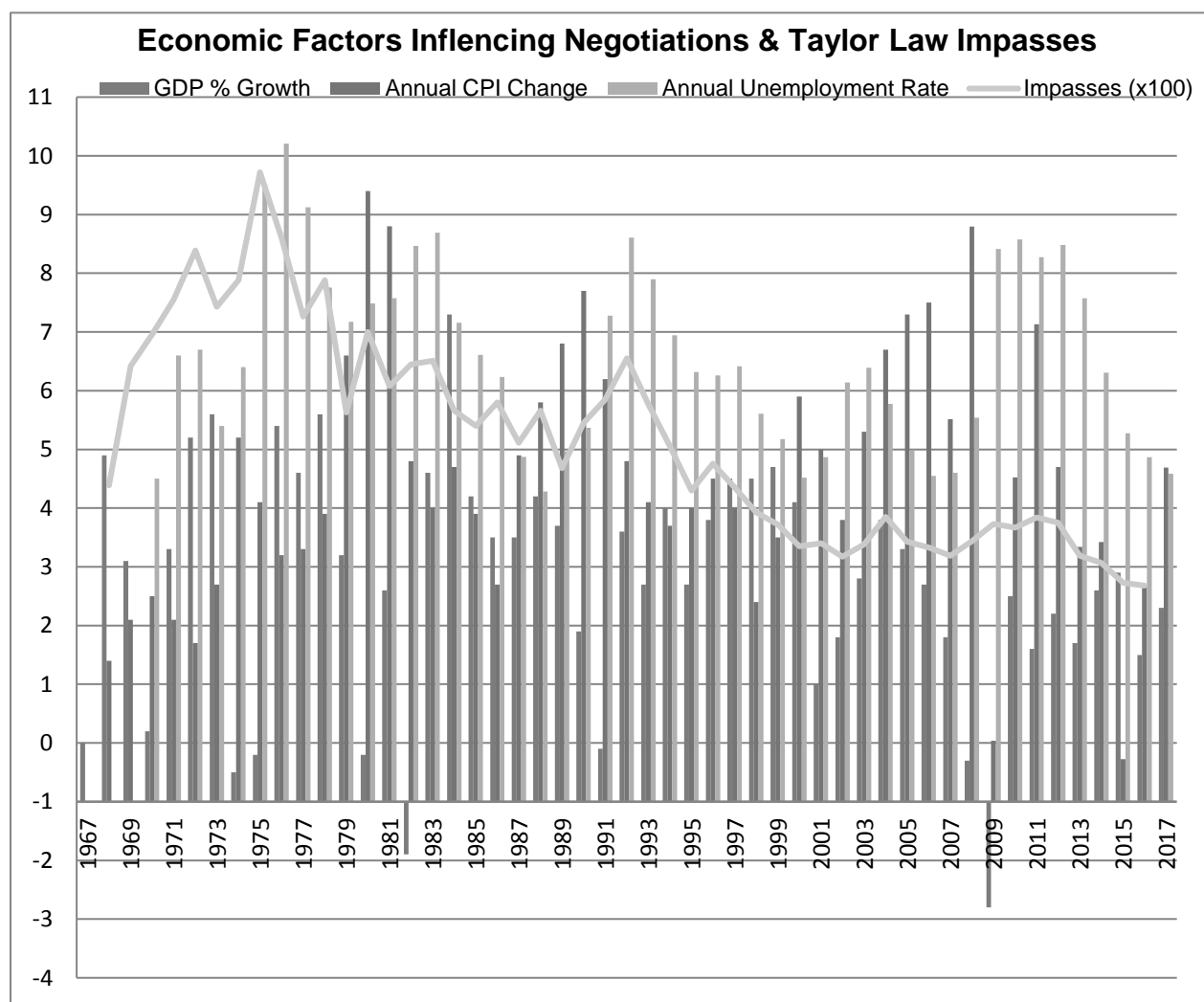
¹³ U.S. Department of Labor, Bureau of Labor Statistics, "Consumer Price Index", February 20, 2018. (U.S. Department of Labor, Bureau of Labor Statistics, 2018).

¹⁴ New York State Department of Labor, "Current Population Survey Data New York State: 1970-2016" and "Average Annual Unemployment Rate: 1976-2017", February 20, 2018. (New York State Department of Labor).

¹⁵ Kearney, 2009,3.

compounded the misery resulting from the GDP and unemployment damage. Conversely, during the periods of economic expansion experienced after the recessions, impasses in New York's public sector fell. The two most obvious examples of this are the decade of the 1990s and the years following the Great Recession of 2008/09. After the 1991/92 recession, a prolonged period of recovery brought with it fewer annual impasses each year, except in 1996, until the 2001 downturn in the economy. Then, beginning in 2011, with the worst economic conditions since the Depression waning, impasses began falling to an all-time low.

Figure 5



What's Next

Recognizing the role that historical social, political, legal and economic events played in influencing collective bargaining conflict in New York, can any predictions be made concerning the number of impasses that PERB might expect over the next five years? It is widely recognized that establishment of the legal right for public employees to collectively bargain is closely related to the level of public sector bargaining leading to negotiations and potential disagreement.¹⁶ Clearly, the enactment of the Taylor Law prompted an explosion in the number of public sector contract negotiations. Along with the increase in bargaining came conflict, measured in impasses and strikes, especially during the first decade of the statute's existence. Over the past 50 years, nearly all public sector employees that can legally be organized into bargaining units in New York are now negotiating with their employers.

One legal change that could have a significant downward impact would be the abolition or severe restriction on the right of these employees to bargain. Such precedent was set in 2011 when Wisconsin upended its law of more than 50 years that endorsed public sector unionization. The impact was stunning, "no state has lost more of its labor union identity since 2011 ... Union members made up 14.2% of workers before Act 10, but just 8.3% in 2015."¹⁷ The fewer union members were mostly teachers and other public workers.

In the last ten years, other states have also legislated workplace changes, such as restrictions on who can negotiate or what can be bargained and right-to-

¹⁶ Ibid, 30.

¹⁷ Umhoefer, Dave, "For Unions in Wisconsin, a Fast and Hard Fall Since Act 10", Milwaukee Journal Sentinel, November 27, 2016. (Umhoefer, 2016).

work laws that adversely affect union membership. An expected ruling by the U.S. Supreme Court in *Janus v. AFSCME* will prohibit unions from collecting representation fees from nonmembers who object to paying for services in the public sector. It is unclear what, if any, impact such a ruling will have on the number of impasses filed under the Taylor Law. If it results in fewer bargaining units engaging in negotiations, impasses may decline because there would be less opportunity for deadlocks to occur. Alternatively, an increase in workplace militancy may be the union's reaction, thus leading to an increase in impasse activity. Another potential source for an upswing in impasses would be enactment of reactionary legislation abandoning bargaining agent exclusivity, which would lead to more than one bargaining agent for a unit of employees, creating more opportunity for negotiations to result in impasse. It is also conceivable that the Supreme Court's decision would have no effect on public sector bargaining in the state and the number of impasses would be unaffected.

Another more restrictive tax cap law could potentially change the bargaining landscape. It is impossible to forecast what will be legislated or imposed, however, the retrenchment on bargaining rights during this decade portends change in New York. This is particularly true since the two most recent New York legislative actions addressing negotiations under the Taylor Law, i.e., the 2% property tax cap and considerations for "fiscally eligible municipalities", have imposed restrictions on bargaining. Correspondingly, impasses have declined steadily since 2012 when the tax cap became effective. The "fiscally eligible municipalities" legislation appears to have had little impact on impasses.

History indicates that additional constraints on bargaining would likely continue to hold impasses in check.

Each set of negotiations has distinct characteristics that help determine whether an impasse may result. For example, animosity between negotiators may predetermine impasse or maybe long-standing practices of tolerance and cooperation throughout an organization may preordain settlement. Regardless of how important these situational factors may be, as well as others such as negotiator conduct, interpersonal, behavioral, and organizational traits, they cannot be measured to help predict future unrest. This leaves the economic variables to help predict future impasses.

Historical GDP, CPI, and unemployment data have tracked the impasse trend quite closely and there is no reason to believe the future will be any different, unless momentous social, political and/or legal disruptions occur. If relatively constant values for each of these economic variables are assumed over the next five years, impasses can be expected to remain steady or continue to decline.

However, it is expected that the economy will become sluggish and unemployment in New York will tick upward, thus causing negotiation conflict to reverse the current trend. Now that there has been nearly 10 years of economic improvement since the 2008/09 recession, business cycle theory suggests a recession looms, which would bring with it an increase in bargaining conflict. Using different methods of analysis, the International Monetary Fund (IMF),¹⁸

¹⁸ Dagher, Jihad, *Regulatory Cycles: Revisiting the Political Economy of Financial Crises*, International Monetary Fund, Working Paper No. 18/8. January 15, 2018. (Dagher, 2018).

Guggenheim Investments,¹⁹ and New York Times economic reporter Eduardo Porter,²⁰ conclude that the economy is ripe for a recession. After examining economic conditions surrounding ten worldwide financial crises going back centuries, the IMF report posits that the current situation in America exhibits many of the same characteristics as past misfortunes. Guggenheim Investments relies on six economic indicators to calculate that the next recession will begin in late 2019 to early 2020. Today's American political enthusiasm for business deregulation and the historical consequences of such action is the basis for Porter's prediction. A 2019/20 recession would likely produce a pattern of bargaining strife akin to that of 1991/92. A concurrent spike in inflation would boost the likelihood that impasses will grow.

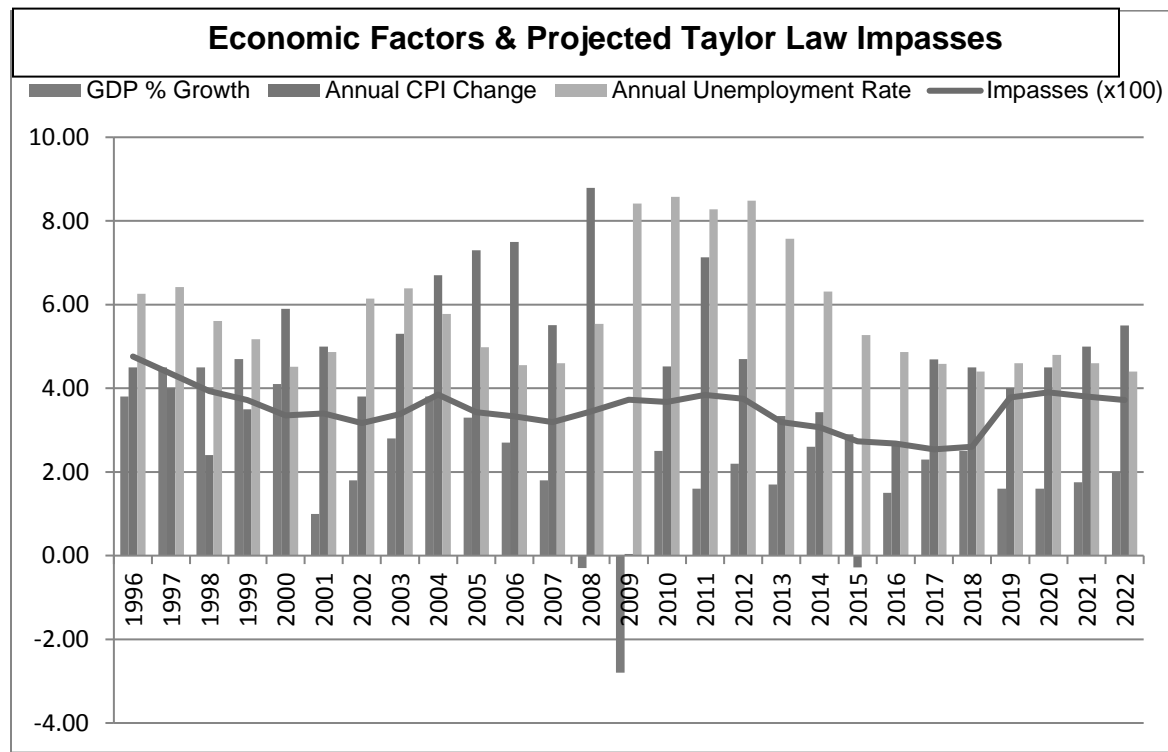
Multivariate regression using the values for GDP, CPI, and unemployment presented in Figure 5 as independent variables provides an estimate of impasses over the next five years.²¹ The model assumes that a modest recession with small decreases in GDP and increasing unemployment will set in for two years beginning in 2019, followed by a very modest recovery. The results are presented in Figure 6. The chart depicts rising impasse activity as GDP falls, unemployment rises and recession creeps in. The illustrated impasse trendline is quite illuminating.

¹⁹ Guggenheim Investments, *Forecasting the Next Recession*. <https://www.guggenheiminvestments.com>. November 29, 2017. (Guggenheim Investments, 2017).

²⁰ Porter, Eduardo, *Come the Recession, Don't Count on that Safety Net*, New York Times. February 20, 2018. (Porter, 2018).

²¹ Kerlinger, Fred N., "Foundations of Behavioral Research (3rd edition)". 1986, 531-536. (Kerlinger, 1986).

Figure 6



Conclusion

The Taylor Law was born from the social, political, and economic unrest of the 1960s. Public employee strikes challenged the then existing laws governing employee relations in New York. The flawed Condon-Wadlin Act was replaced by the Taylor Law, which protects the right of public employees to collectively bargain with their employers, while retaining the prohibition on strikes. A negotiations dispute resolution procedure was included in the law offering employees a process to settle contracts without resorting to strikes. The statute and dispute resolution system immediately underwent a baptism by fire as impasses and strikes escalated until 1975 and then steadily declined until today.

Three sources of impasses and strikes are political and legal actions, situational characteristics, and economic conditions. Without a legal foundation

for public sector collective bargaining, few contracts are negotiated, so there are limited opportunities to bargain to impasse. Enactment of the Taylor Law vastly expanded the possibility for negotiations to result in impasse, and a large proportion did, because every public employer was open to an obligation to bargain. Similar statutory frameworks in other states produced like results. After the first ten years of testing the law and PERB's administration of it, the impact of the legislation began to give way to the influence of situational and economic factors.

After 1975, the number of impasses may well have become more dependent on the immediate climate in which individual negotiations were conducted. Negotiators' challenging each other's skills and attempts to exploit organizational weaknesses likely exerted greater pressure on negotiations. As bargaining relationships became more mature over time, much of the testing was completed and parties are now more comfortable with each other and the process. PERB, especially its Office of Conciliation and neutrals, have played a role in the parties' maturation that has led to less dissension. Over the years, PERB's mediators and fact finders adapted their approaches to help parties resolve their disputes. As they worked with negotiating committees they provided them with tools to help avoid impasses. These PERB conciliation efforts undoubtedly influenced the downward trend in impasses and strikes.

Consequently, the third source of impasse, economic factors, probably has become the most important element in determining impasse activity. The number of Taylor Law impasses increased during periods of recession and declined as the

economy recovered. Future impasse activity is apt to mirror future GDP, CPI, and unemployment indicators. This assessment may be altered dramatically if a major political, legislative, or judicial intrusion into New York's collective bargaining stasis occurs. In that case the crystal ball used for this prognostication becomes very cloudy.

Appendix

Table 1: Strikes and Impasses Under the Taylor Law

Year	Strikes	Impasses		Year	Strikes	Impasses
1967	2			1993	2	577
1968	26	439		1994	3	505
1969	13	642		1995	0	430
1970	31	696		1996	0	476
1971	22	755		1997	0	435
1972	27	839		1998	0	393
1973	17	743		1999	1	372
1974	17	788		2000	2	335
1975	33	972		2001	1	340
1976	15	859		2002	2	317
1977	16	726		2003	0	338
1978	18	788		2004	0	385
1979	21	563		2005	1	343
1980	23	700		2006	0	333
1981	16	608		2007	0	319
1982	4	645		2008	0	344
1983	0	651		2009	0	373
1984	2	566		2010	0	367
1985	1	540		2011	0	384
1986	2	580		2012	0	375
1987	1	511		2013	1	319
1988	0	566		2014	0	307
1989	0	468		2015	0	273
1990	4	545		2016	0	268
1991	0	585		2017		
1992	2	655				

Table 2: Economic Factors Influencing Negotiations*

Year	Annual GDP Growth	Annual CPI Change	Annual CPI % Change	Annual NYS Unemployment Rate	Year	Annual GDP Growth	Annual CPI Change	Annual CPI % Change	Annual NYS Unemployment Rate
1967					1993	2.70	4.10	2.78	7.90
1968	4.90	1.40	4.12		1994	4.00	3.70	2.44	6.94
1969	3.10	2.10	5.93		1995	2.70	4.00	2.58	6.32
1970	0.20	2.50	6.67	4.5	1996	3.80	4.50	2.83	6.26
1971	3.30	2.10	5.25	6.6	1997	4.50	4.00	2.44	6.42
1972	5.20	1.70	4.04	6.7	1998	4.50	2.40	1.43	5.61
1973	5.60	2.70	6.16	5.4	1999	4.70	3.50	2.06	5.18
1974	-0.50	5.20	11.18	6.4	2000	4.10	5.90	3.40	4.52
1975	-0.20	4.10	7.93	9.5	2001	1.00	5.00	2.79	4.87
1976	5.40	3.20	5.73	10.21	2002	1.80	3.80	2.06	6.14
1977	4.60	3.30	5.59	9.13	2003	2.80	5.30	2.82	6.39
1978	5.60	3.90	6.26	7.76	2004	3.80	6.70	3.46	5.78
1979	3.20	6.60	9.97	7.18	2005	3.30	7.30	3.65	4.98
1980	-0.20	9.40	12.91	7.48	2006	2.70	7.50	3.61	4.55
1981	2.60	8.80	10.71	7.58	2007	1.80	5.51	2.56	4.60
1982	-1.90	4.80	5.27	8.47	2008	-0.30	8.79	3.99	5.54
1983	4.60	4.00	4.18	8.69	2009	-2.80	0.04	0.02	8.42
1984	7.30	4.70	4.71	7.16	2010	2.50	4.53	1.97	8.58
1985	4.20	3.90	3.73	6.61	2011	1.60	7.13	3.05	8.28
1986	3.50	2.70	2.49	6.23	2012	2.20	4.70	1.95	8.48
1987	3.50	4.90	4.41	4.88	2013	1.70	3.34	1.36	7.58
1988	4.20	5.80	5.00	4.28	2014	2.60	3.42	1.38	6.31
1989	3.70	6.80	5.58	4.97	2015	2.90	-0.28	-0.11	5.28
1990	1.90	7.70	5.99	5.37	2016	1.50	2.66	1.06	4.87
1991	-0.10	6.20	4.55	7.28	2017	2.30	4.69	1.84	4.58
1992	3.60	4.80	3.37	8.61					

*/_ Annual CPI % Change is presented as additional information since it is a common reference statistic for cost of living.

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The Challenges and Shortcomings in the United States:

A Comparative Analysis of Public Sector Labor Union Dispute Resolution Mechanisms

INTRODUCTION

Organizations will always be faced with workplace conflict. The way in which conflict is resolved continues to change as the workplace has evolved. Conflict resolution processes continue to differ from state to state and country to country. Processes also vary based on rules, regulations, and legislation. As public sector unions, have increased in percentage density throughout the United States, conflict between union and administration has also increased. Rules governing public sector unions and conflict resolution procedures vary, as rules and regulations are often passed through legislative action specific to local, state, federal or country governing entities. Governments throughout the world continue to face unique and not so unique challenges in resolving workplace conflict, while maintaining fiscally conservative budgeting practices.

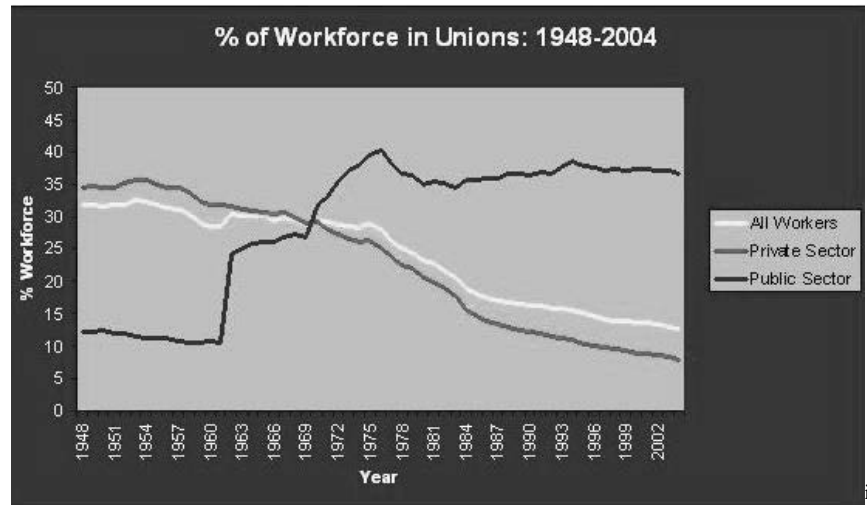
This comparative analysis will focus on three main arguments. The first, conflict resolution processes are not perfect. The second, procedural and settlement precedent are crucial in resolving and potentially eliminating future conflict; efficiently and timely, with archival systems of past settlements. And the third, Alternative Dispute Resolution (ADR) is underutilized in the United States (New York and Illinois) and other countries (Ireland and Germany). The analysis will focus on two states within the United States and two countries; New York State and the State of Illinois, comparing the conflict resolution procedures to those found in Germany and Ireland.

While focusing on dispute resolution, the analysis will center on contract negotiations, grievance resolution procedures and impasse procedures as outlined in the respected state or country laws and regulations. The focus is where we see the most conflict between labor and management. The comparison will begin with a brief description of labor union activity,

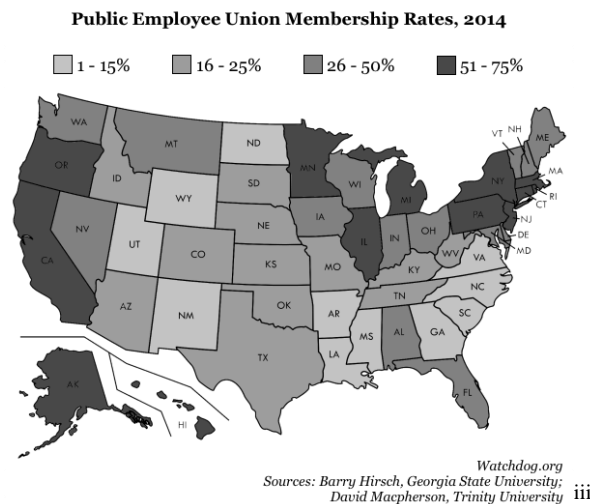
reasoning for state and country selection, followed by the procedural analysis of each state and country, while defining and comparing conflict resolution practices.

Labor union activity has evolved in the United States throughout the last half of the 20th century and into the 21st century. Union activity has grown significantly in the public sector. In the United States alone, “In 2015, 7.2 million employees in the public sector belonged to a union, compared with 7.6 million workers in the private sector. The union membership rate for public-sector workers (35.2 percent) was substantially higher than the rate for private-sector workers (6.7 percent). Within the public sector, the union membership rate was highest for local government (41.3 percent), which includes employees in heavily unionized occupations, such as teachers, police officers, and firefighters.”ⁱ The increase is significant as; local, state and federal employees adhere to differing legislation, contracts, procedures, rules and regulations. These significant differences add to the complexity of managing labor contracts and resolving disputes. Conflict resolution has an impact on the budgeting process, as mediators, fact-finders, arbitrators and attorneys are hired or employed full-time to resolve disputes, causing increased funding for conflict management processes.

Comparing this to the private sector employee unionization rate, there continues to be a steady decline over the past fifty years. Falling significantly in the 1970’s and 1980’s. The chart below shows the percentage of unionized employees in the public sector and private sector 1948-2004. Until recently the trend was continuing a steady downward slope, leveling off in late 2014 and early 2015 as rules and regulations regarding elections and unionization have changed to be more pro-employee/pro-union.



New York State and the State of Illinois were chosen for this paper specific to public sector union density and their differing laws for conflict resolution. In 2014, both New York State and the State of Illinois were 51-75% unionized in the public sector, as shown on the map below.



New York State does not allow public sector employees to strike, under current legislation, while the State of Illinois does allow public sector employees to strike. The unique rules and regulations governing each state will provide perspective into a strike versus non-strike

legislation and the conflict resolution procedures in place, while comparing current statistics on successful resolution of disputes. Does strike language change dispute resolution?

Germany and Ireland were selected for the comparative analysis due to the similarities and unique differences in conflict resolution processes and procedures. Both countries do allow public sector unions to strike (with certain restrictions in Germany). We will explore and compare both Germany and Ireland to New York and Illinois in later sections.

Germany has many branches of public sector unions throughout the country. Covering a range of employees, both professional and trade. “The main trade union confederation in Germany is the DGB, which aims to recruit all types of worker. It is by far the largest confederation and the unions affiliated to it have 6,104,851 members (2014).”^{iv} DGB originally organized trade and industrial unions but has grown into the private sector, now covering finance and retail. “Ver.di was created in 2001 from a merger of five unions, covering transport and a range of public services, retail and finance, post and telecommunications, the graphical and media sector and a non-manual confederation, the DAG, which had previously been outside the DGB. For a period after the merger it was the largest union in the DGB but, following membership losses, it is now in second place with 2,039,931 members (end 2014). Ver.di seeks to organise service workers in both the private and public sector.”^v

In Germany, there are many small union associations that cover both industrial and public sector unions. DGB and Ver.di are similar to the AFL-CIO, each organization consists of many labor unions and act as the political arm for both public and private sector unions. Public sector labor unions in Germany do not have the right to bargain over conditions and pay. These decisions are made at the legislative level.

Union density in the Republic of Ireland is significant, as density in the public and private sector is higher than those in the United States. The second largest union in the Republic of Ireland is IMPACT, the public-sector labor union. “The public services union IMPACT, with 63,566 (all but 60 in the Republic of Ireland)”^{vi} members. “The household survey does not break down union membership between the public and private sectors. However, separately compiled figures from the National Workplace Survey show that unions are much stronger in the public sector – where more than two-thirds of employees are members (68.7%) – than in the private sector – where the proportion is about a quarter (24.9%).”^{vii} Other bargaining groups include trade unions, nursing unions, technical unions and retail or service sector unions.

There is no simple answer in resolving conflict and disputes, the likely answer is, it will depend. It will depend on the issue, the city, the state, the country, the legislation, political party in power, bargaining opportunities and fiscal budgets. Attempting to resolve conflict proactively and efficiently will add value to any local, state, federal and national government. The analysis will focus on the three arguments and recommendations to improve the conflict resolution process. In Section 1, I will define current processes for resolving conflict.

SECTION 1

New York State: The Taylor Law at Age 50

New York State has specific laws and regulations that guide employee, manager and legislative body through the complexities of dispute resolution and collective bargaining in the public sector. The current law, is known as The Taylor Law. The Taylor Law was adopted on September 1, 1967 and has evolved over the last half century. The Taylor Law as defined, is “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.”^{viii} The Taylor Law as designed, grants public sector employees the rights to form unions and select a bargaining organization of their own choosing. It provides employees with the ability to negotiate certain terms and conditions of employment. Compensation adjustments and healthcare are addressed at a local level, while changes to the New York State Pension Fund are decided by legislative bodies.

The law established impasse procedures for the resolution of collective bargaining disputes and grievance mechanisms. The law prohibits public sector employees from striking and established a state agency known as the Public Employment Relations Board (PERB). This agency administers the law and assists in the resolution of collective bargaining and grievance conflict.

Since the law was passed in 1967, there continues to be labor peace throughout New York State. Labor peace has a broad definition, contracts and grievances can go unsettled and unresolved for years. The union(s) can continue to work under expired contract terms until agreement or resolution is agreed upon. Recently, a contract involving the city of Buffalo, NY and the teacher’s union went unsettled for 13 years, prior to an agreed upon contract in October of 2016.

The Taylor Law provides multiple avenues for parties to resolve conflict; “The law allows the parties to develop their own impasse procedures, in which event they assume the costs...prescribes specific impasse procedures to be followed absent such agreement, in which event PERB assumes most costs.”^{ix} The Taylor Law prescribes three separate impasse procedures, throughout the state.

With the complex process of dispute resolution for public sector employees throughout New York State, the law was modified in 2003 to streamline the process and ensure consistency throughout the state. “The first two steps in the dispute resolution process, mediation and fact-finding, are the same for all disputes except those involving police, fire fighters, certain transit employees, and the state police, state security services and law enforcement personnel, and deputy sheriffs who are policy officers engaged in law enforcement. In those, the parties go directly from mediation to arbitration except as to those issues that are statutorily excluded from arbitration.”^x Which may be brought to fact-finding.

The first step of impasse in the resolution procedure is mediation. “Either or both parties may request mediation assistance by filing a “Declaration of Impasse” with the board (PERB).”^{xi} The board (PERB) employs both staff and panel mediators (such as myself) to assist labor and management in the resolution of the bargaining dispute. If mediation is unsuccessful, the next step in the process is fact-finding.

Fact-finding “is a procedure by which a third party examines the cause and status of an impasse through oral and/or written presentation by the parties, and issues written recommendations for settling the dispute.”^{xii} The fact-finder can resolve the dispute through further mediation if the individual feels it is an appropriate step prior to a fact-finding session.

The fact-finding process consists of the steps below:

- “Hold a hearing
- Take testimony of witnesses
- Accept data, statistics, briefs, etc., from the parties
- Make written, nonbinding recommendations for settling the dispute to the parties

- Make the report and recommendations public within five days after transmission of the report to the parties”^{xiii}

PERB assigns mediators and fact-finders, based on geographical location. They maintain a log of per diem on-call mediators and fact-finders, dispensed throughout the state.

If both mediation and fact-finding are unsuccessful at resolving the respected impasse, one of three options remains to resolve the dispute, as outlined below:

1. Employees of Educational Institutions

“PERB may afford the parties an opportunity to explain their positions with respect to the fact-finding report at a meeting where the legislative body or its duly authorized committee may be present...The legislative body may take such action as is necessary and appropriate to reach an agreement, but may not impose terms and conditions of employment in order to end the dispute...PERB may provide such assistance as may be appropriate. In its discretion, PERB will often appoint a “conciliator” to provide further mediation efforts.”^{xiv}

2. For Police, Fire Fighters, State Police, Certain Transit Employees, State Security and Law Enforcement Personnel and Deputy Sheriffs

The issues covered by the panel varies depending upon the type of eligible employees, i.e. Sheriff’s deputies are limited to core economic issues. “In all cases, the arbitration panel is made up of; one member appointed by the employer, one member appointed by the employee organization and one public member selected jointly by the parties, who serves as a chairperson.”^{xv}

The panel follows a similar process as outlined under fact-finding; hold hearings, take written and oral testimony and can defer back to bargaining or further mediation. The

arbitration process for this group ends “by majority vote, make a determination and award which is final and binding on the parties.”^{xvi}

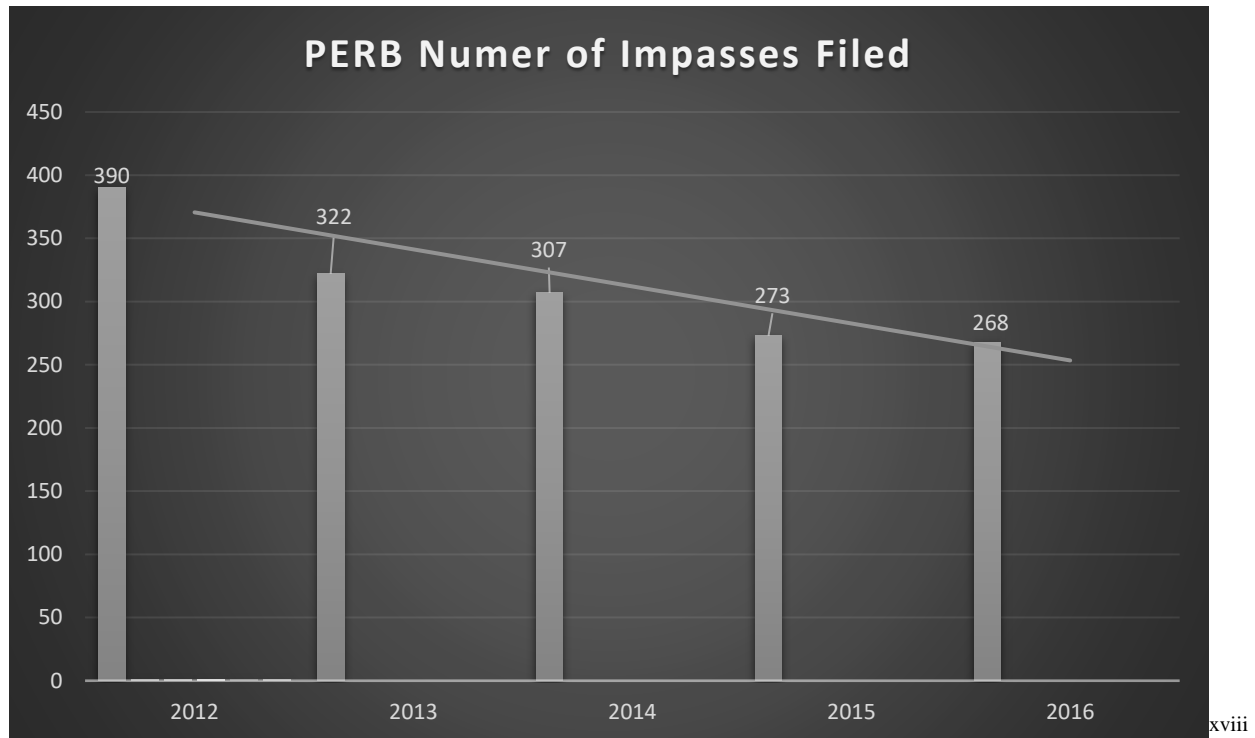
3. For All Other Public Employees

If either or both parties reject all or some of the fact-finding report, the process may at either party’s discretion move to a legislative hearing. Unions engage on the merits of their case at their own peril as such action could waive Triborough protection, “the legislative body thereafter takes such action as it deems to be in public interest, including the interest of the public employees involved. The parties may be direct to resume negotiations, or the legislative body may choose to impose employment terms...such imposition may be for no more than a single fiscal year.”^{xvii}

Is the Taylor Law successful? There have been almost 50 years of no-strike language, which has resulted in continued operation of government entities, school districts and emergency services. However, unresolved contracts and disputes can undermine the effectiveness of the Taylor Law and the no-strike language. Forced settlements and arbitration rulings can cause added conflict or issues as future contracts expire.

Below is a chart outlining PERB cases from 2012-2016. Current data only provides information related to the number impasses filed throughout New York State. There is no clarification on how many cases were resolved in the current year or carried over to proceeding years. In most cases and in my personal experience, mediation has proven successful when resolving conflict between labor and management in New York State. As the statistics provide

evidence that conflict and impasses filed continues to drop significantly over the 4-year period.



The Taylor has evolved over the last half century, but the processes as defined by the legislative body have remained status quo. The dispute resolution process is far from perfect. An example is allowing workers to continue working under old contracts with no resolution mandates or forced settlement.

During the mediation, fact-finding or arbitration processes; there is no precedent setting mechanism or archival system to research past settlements. Currently, there is access to fact-finding settlements throughout the state on PERB website. However, mediation settlements are not published. Therefore, one small town can have a similar dispute as another small town and there is no way to utilize that information to resolve the current dispute and develop consistency. The process has worked in resolving most disputes at mediation.

Alternative Dispute Resolution is now in it's infancy in New York State. Until recently, the dispute resolution process has been followed per The Taylor Law and collective bargaining

agreements in New York State. PERB is now implementing alternative forms of dispute resolution within the public sector. 80% of public sector disputes are settled during the mediation process. However, implementing new processes is a proactive step in resolving current and future disputes, prior to a disagreement moving forward to mediation.

SECTION 2

The State of Illinois: Illinois Public Labor Relations Act

In comparing the State of Illinois's conflict resolution processes and procedure to The Taylor Law in New York State, there are distinct similarities and differences.

The State of Illinois granted public sector employees the right to form unions and bargain in 1984, almost 20 years after the Taylor Law. The act in Illinois, known as Illinois Public Labor Relations Act was enacted to, "grant public employee's full freedom of association, self-organization, and designation of representatives of their own choosing for the purpose of negotiating wages, hours and other conditions of employment or other mutual aid or protection."^{xix} The Illinois Public Relations Act is similar in comparison to the Taylor Law regarding the regulation of labor relations of public sector employees. The employee's ability to choose a bargaining representative, negotiation of wages, hours and other working conditions, are contained within the Act.

For the comparative analysis, the focus in this Section 2 will be "Subpart C: Impasse Procedures for Public Employee Units."^{xx} Each section in The State of Illinois rules and regulations is similar in relation to the language contained within The Taylor Law. However, under Subpart C, this rule grant employees the right to strike.

Subpart C states, “This Subpart governs employees with the right to strike, provided that certain conditions are met. The Act requires that the parties attempt to mutually resolve their bargaining disputes prior to resorting to a strike. To facilitate amicable settlement between the parties, the Board shall provide, in accordance with this Subpart, services of mediators, interest arbitrators and fact-finders. All costs of such services shall be shared equally by the parties.”^{xxi}

When comparing New York and Illinois, mediation is also the first step in impasse resolution process. The parties will be provided a panel list of 7 mediators to choose from, they have 7 days to select (or strike the list as is done in arbitration), and if no decision is made in 7 days a mediator is assigned to the case. In the State of New York, mediators are directly assigned to the case through PERB, first asked if they would like the case, but then directly assigned to the mediation, with no input from the governing body or the local union. If mediation is unsuccessful at resolving the impasse, fact-finding is the next step in the process.

“e) The fact-finding hearing shall be conducted as follows:

- 1) The person appointed as fact-finder shall immediately establish the dates and place of hearing.
- 2) Upon request, the Board shall issue subpoenas for hearings conducted by the fact-finder.
- 3) The fact-finder may administer oaths. (Section 13(b) of the Act) f)

The fact-finder shall issue a report and findings as follows:

- 1) The fact-finder shall serve these findings and report on the parties and the Board within 45 days after the fact finder's appointment, unless the parties mutually agree to extend the time period.

2) Within 5 days after service of the findings and report, the fact-finder shall mail the findings and report to all newspapers of general circulation in the community as mutually designated by the parties, unless the parties mutually request otherwise.”^{xxii}

The next step in the impasse resolution process is voluntary interest arbitration. Both parties must agree to interest arbitration in writing. As collective bargaining contracts vary throughout the State of Illinois, the arbitrator will follow the rules and regulations as outlined in the respected agreement. Arbitration awards are to be submitted 30 days after the hearing has taken place between the parties.

Arbitration procedures in New York State and the State of Illinois vary. The ruling in New York State is final and binding, whereas, in the State of Illinois it is voluntary, if no resolution is agreed upon, public sector employees have the right to strike under certain conditions:

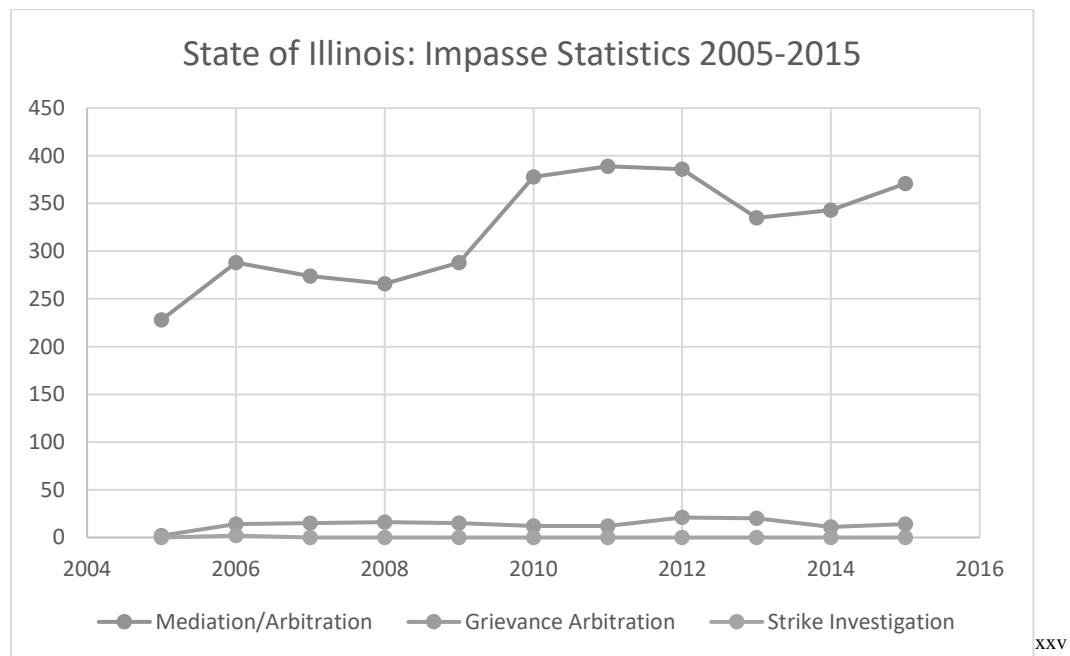
- “a) The employees are represented by an exclusive bargaining representative (Section 17(a)(1) of the Act) that has been certified by the Board or that has a valid claim to status as an historical bargaining representative pursuant to Section 3(f) of the Act.
- b) The collective bargaining agreement between the public employer and the public employees, if any, has expired, or such agreement does not prohibit the strike. (Section 17(a) (2) of the Act) Pursuant to Section 8 of the Act, a collective bargaining agreement must contain provisions prohibiting strikes for the agreement's duration and providing for a grievance procedure culminating in final and binding arbitration of disputes over the interpretation of the agreement unless the parties agree to forgo these provisions.

- c) The public employer and the labor organization have not mutually agreed to submit the disputed issues to final and binding arbitration. (Section 17(a) (3) of the Act)
 - d) The exclusive representative has requested a mediator pursuant to Section 12 of the Act and Section 1230.150 of this Part and mediation has been used. (Section 17(a) (4) of the Act)
 - e) At least 5 days have elapsed after a notice of intent to strike has been given by the exclusive representative to the public employer. (Section 17(a) (5) of the Act)
- A copy of the notice shall be filed with the Board and shall reference the contract number in cases of negotiations for successor contracts or the certification case number in cases of negotiations for initial contracts. The 5-day time period shall be calculated in accordance with 80 Ill. Adm. Code 1200.30(a) and (b).”^{xxiii}

In the event of a union strike in the State of Illinois, the governing body has the right to petition the state labor board to stop the labor strike and resume normal operation. The governing body must submit evidence to the board that the strike, “clear and present danger to the health and safety of the public.”^{xxiv} From this point, the board will investigate the threat of strike or actual strike to determine if there is evidence of clear and present danger to the health and safety of the public and rule on the legality of the strike.

The graph below provides statistics on current resolution procedures in the State of Illinois from 2005-2015. The average number of mediation and arbitration in the State of Illinois during the 10-year period is 322. Grievance arbitration also spiked in 2012 and 2013, overall the number has not increased as significantly as mediation and arbitration cases related to the labor contract. The average number of grievance arbitration cases fell just below 14 per year during the 10-year period. Surprisingly, there were only 2 strike investigations or an average of 0.18,

during the 10-year period, both occurring in 2006. The other 9-years of data showed no strike investigations. In comparison, both states resolve conflict during the mediation step.



The significant difference is the use of the economic weapon, a strike. Even with the ability or opportunity to use the economic weapon, over the 10-year period there were only two investigations into a strike or threat of a strike in the State of Illinois.

Illinois faces many of the same challenges as New York State in precedent setting settlements. With different mediators, fact-finders and arbitrators assigned to multiple cases and resolving many disputes, there is no clear process in establishing precedent or archival system(s) to research for future disputes or consistent settlements throughout the state.

In my research, there is no evidence of other means of ADR (prior to mediation, fact-finding, etc.) currently being utilized in The State of Illinois. As ADR continues to evolve and redefine the way in which disputes are resolved, there is opportunity to trial new resolution techniques throughout the public-sector.

The systems are far from perfect and resolution processes can be improved upon. As we did see in 2014, teacher union strikes in Illinois play a significant role on public education and unresolved contracts in New York can drag on for years. The systems have proven successful at resolving disputes early in the process.

SECTION 3

Germany: The Act on Collective Agreements

German processes and procedures have similarities and differences when comparing to those used in the United States. German unions are perceived differently than those in the United States, not as an adversarial enemy but as an integral partner in conflict resolution and organizational decision making.

The Act on Collective Agreements was adopted in 1969 in Germany, this legislation governs the process of collective bargaining and labor relations throughout the country. Germany has many specific laws governing public and private sector labor unions. Labor courts are the mechanism of dispute and impasse resolution for the private sector. Public servants as known in Germany are excluded from the labor court, “the relationship between career public servants and the state is not a private contractual relationship, but is defined by, and based on, public law. Therefore, the law on career public servants (Beamtenrecht) is a special section of public law. Disputes concerning career public servants are not settled by labour courts, but by administrative courts.”^{xxvi}

The “role of the administrative court is not an administration control with a general goal, but the protection of the individual rights before the public authorities. The constitution guarantees an individual a subjective right against violation of his/her rights by administrative

action. Illegality of action may consist in an intervention against his/her rights or in a refusal of his/her legal right by the administration.”^{xxvii} The administrative courts not only provides service to the public-sector unions, but citizens throughout the country. The efficiencies of the court proceedings is determined by specific laws and regulations. If the court rules the law is unconstitutional, the case will be remanded for additional hearings at a higher-level court or recommended for legislative action.

Comparable to the New York States arbitration process; the hearing can be decided by a sole judge or a panel of three judges. “The chamber must generally hand over a dispute to one of its members, adjudicating as a sole judge, at the level of the administrative courts for first hearing, when the case is not showing any particular difficulties and has no scope for principle. In asylum application procedures, a sole judge adjudicates in 90 % of cases. For other Law fields, no statistical data is available; the volume of decisions delivered by a sole judge should be on average inferior to 50 % of the Länder.”^{xxviii} The speed of the process again will vary based on a sole judge or tripartite of judges and the current case backlog.

In Germany, public sector union regulations have similarities to those in the State of Illinois. Most significantly the right to use an economic weapon. Some (not all) German unions can use an economic weapon and strike if conflict is unresolved after proceeding through the resolution steps.

German conflict resolution processes are far from perfect. The system can be slow and inefficient by court and legislative proceedings, which can cause additional turmoil on top of existing conflict. The positive attribute of the German system is precedent setting. The German conflict resolution process guarantees precedent through court and legislative action. Conflict

will vary. However, the precedent can be utilized for efficient, timely and proactive resolution to existing disputes.

Opportunities for Germany include; ADR, mediation and fact-finding. In my research, there was no statistical information related to ADR or other dispute resolution techniques being utilized in the public sector, only legislative and court action. With a growing trend in ADR usage, the trialing of ADR has many potential benefits in Germany.

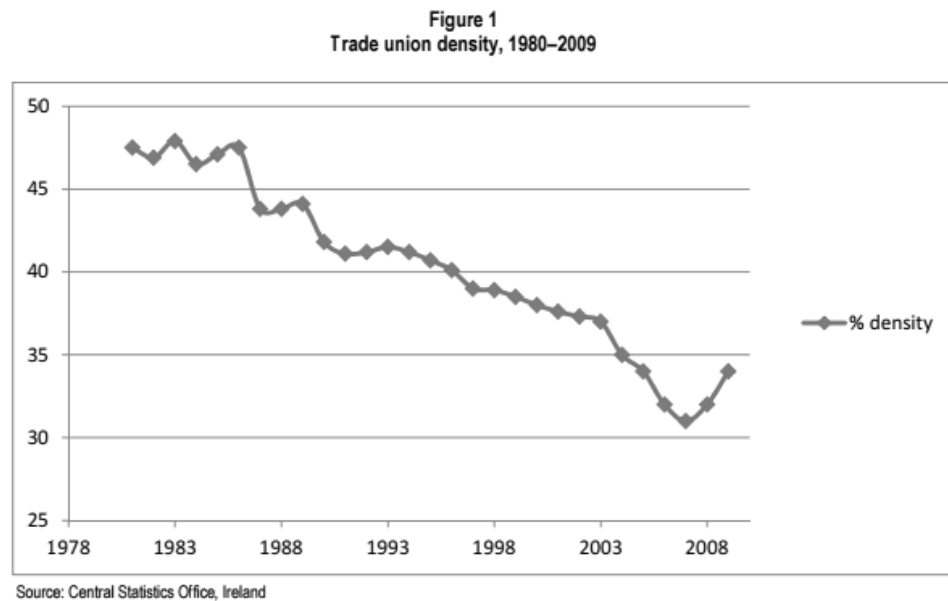
SECTION 4

The Republic of Ireland: Conciliation Service Division

The Republic of Ireland was selected for the comparative analysis for two reasons. The first being, the percentage of unionized workers throughout the Republic of Ireland. The second being, the similarities of dispute resolution techniques to those used in both New York and Illinois.

The Republic of Ireland (excluding Northern Ireland) has multiple labor unions representing the public sector; The Irish Municipal, Public and Civil Trade Union “IMPACT” and the Civil Public & Services Union “CPSU” are the two largest. IMPACT formed in 1991, currently has over 35,000 members in civil service, education, health, local authorities, municipal employers and non-commercial state agencies. CPSU formed in 1922, currently has over 13,000 members working in the clerical and administrative grades of civil service, semi-state bodies and the private sector. “The household survey does not break down union membership between the public and private sectors. However, separately compiled figures from the National Workplace Survey show that unions are much stronger in the public sector – where more than two-thirds of employees are members (68.7%) – than in the private sector – where the

proportion is about a quarter (24.9%).”^{xxxix} The chart below shows current statistics through 2008 on trade union density in Ireland.



xxx

In the Republic of Ireland, the dispute resolution process comparable to what is used in the United States. “The Irish employment dispute resolution system is currently made up of a variety of agencies. The oldest dispute resolution body is the Labour Court, a tripartite industrial relations tribunal and not a court of law. It was set up in 1946 and provides a range of services for the resolution of collective and individual employment disputes: (1) it hears both sides in trade disputes and then issues Recommendations setting out its opinion on the dispute and the terms on which it should be settled. While these Recommendations are not binding on the parties concerned, the parties are expected to give serious consideration to them. Ultimately, however, responsibility for the settlement of a dispute rests with the parties; (2) in relation to cases involving breaches of registered employment agreements, the Labour Court makes legally binding orders; (3) also, the Court’s determinations under the Employment Equality, Pensions and Organisation of Working Time, National Minimum Wage, Industrial Relations

(Amendment), Protection of Employees (Part-Time Work), Protection of Employees (Fixed-Term Work) and Safety, Health and Welfare at Work Acts are legally binding.”^{xxxix}

The Republic of Ireland Conciliation Service Division comparable to Public Employee Relations Board (PERB) in New York State, with the one significant difference. The Conciliation Service Division assists both public and private sector employers in resolving disputes. In the United States, we see federal agencies (FMCS, American Arbitration Association) working with private sector management and unions to resolve conflict. The Conciliation Service Division uses 7 methods in resolving disputes:

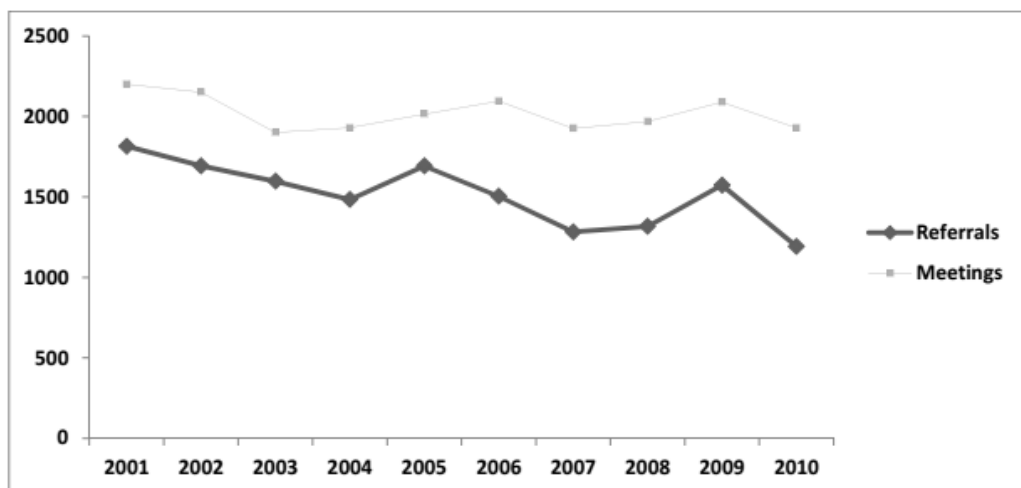
1. “Preventative dispute resolution: Averting conflict at work by creating procedures that promote cooperative management-employee interactions.
2. Early neutral evaluation: Where a third party neutral reviews aspects of a dispute and renders an advisory opinion as to the likely outcome.
3. Expert fact finding: Where a third party neutral examines or appraises the facts of a particular matter and makes a finding or conclusion. This procedure may be binding or non-binding.
4. Facilitation: A third party neutral assists disputants in reaching a satisfactory resolution to the matter at issue. The neutral has no authority to impose a solution.
5. Mediation: The neutral is neither a decision maker nor an expert adviser.
6. Non-binding arbitration: The third part may advise on a possible settlement, but recommendation is not binding on the parties.”^{xxxix}

Mediation is pursued after facilitation and fact-finding, a significant difference in resolution process as compared with New York State and the State of Illinois.

The Conciliation Service Division employs a staff of 13 conciliators, with the goal of efficient and timely conflict resolution. “In 2010, a total of 1,193 collective disputes were referred to the Conciliation Service, which although representing a 24 per cent decline on the 2009 figure, is still a high number. Moreover, the Conciliation Division chaired 1,783

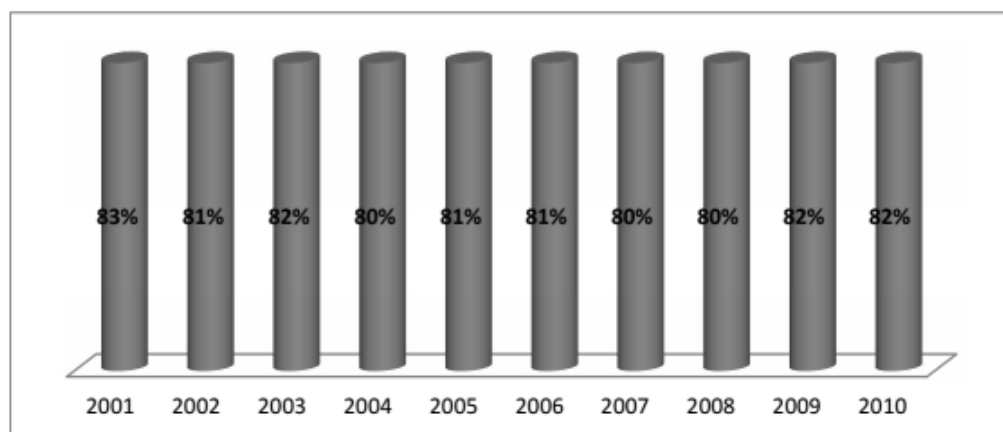
conciliation conferences over the course of 2010. Thus, the workload of the Conciliation Division, particularly in terms of formal meetings convened, has remained consistent over the years.”^{xxxiii} The graphs below represent the conciliation activities, success rates and days lost due to industrial action; strike or lockout. The conciliation service has a success rate of over 80%. The Republic of Ireland has been stable with minimal industrial action in both the public and private sectors.

Figure 3
Conciliation Service activity, 2001–2010



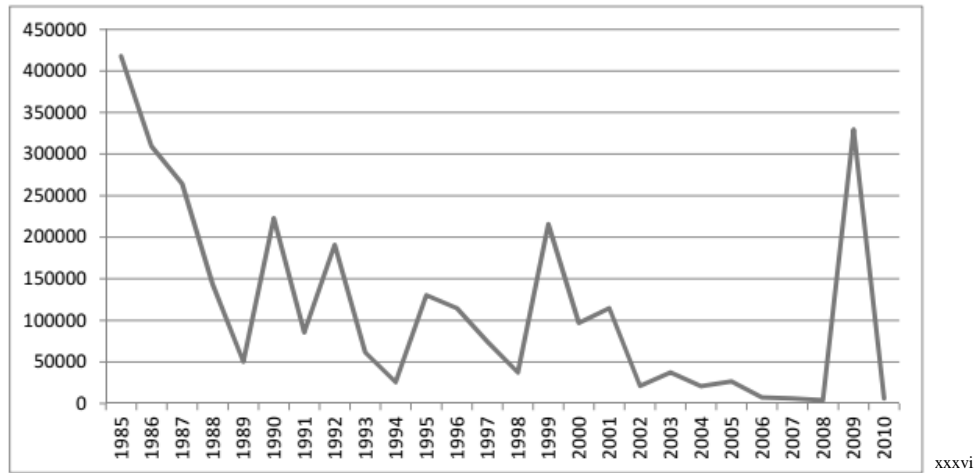
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Figure 4
Conciliation Service settlement rate, 2001–2010



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Figure 2
Annual days lost due to industrial action, 1985–2010



The conciliation service is successful in the Republic of Ireland and is now in the evolutionary process. Implementing alternative dispute resolution techniques. The ADR practices include; open-door policies, ombudsman, review panels, assisted bargaining, interest-based bargaining with facilitation and increased communication within organizations. The proactive implementation of ADR techniques in both the private and public sector throughout Ireland is a sign that established dispute models can evolve.

The system is not perfect. Throughout Ireland we do see strikes, lockouts and lost days due to unresolved conflict. However, Ireland is continuing to reinvent the process by implementing new techniques, ensuring adequate and timely resolution to disputes.

Ireland is faced with the same challenges as New York and Illinois, settlements are not precedent setting and vary. The archival and precedent setting processes could significantly impact future disputes.

SECTION 5

Comparison: Similarities, Differences and Shortcomings

There are similarities and differences as we compare New York and Illinois to Germany and Ireland. The dispute resolution processes and procedures throughout the world have varying levels of success, most of which have been resolved at the lower steps in the varying processes. Overall, the systems can be deemed as a success based on the resolved dispute statistics.

The first argument, conflict resolution processes are not perfect. Illinois, Germany and Ireland have had strikes and currently allow strikes, while New York public sector employees can and do work without an agreed upon contract, sometimes for years. Most disputes are resolved at the lower levels of the process, but others take years to resolve. This adds increased costs to the sovereignty and potential for additional conflict and turmoil, adding burden to the fiscally strapped governing bodies. There is no formula for a perfect process to resolve disputes. Continuous evolution and embracing change will bring each group closer to sound process.

The second argument, the need for precedent setting settlements and an archival system. In New York, Illinois and Ireland, the system as currently utilized does not support precedent setting decisions in mediations, fact-finding or arbitration. Each agreement is specific to the union and governing body. There is no process in place currently to research or utilize past settlements to resolve current or future disputes. Germany settles public sector union disputes in the court system or through legislative channels, this does establish a precedent setting process. Thus, assisting in maintaining consistency in settlements and resolution. The downfall to a precedent setting process such as Germany's is the inefficiencies related to the

court systems and legislative changes. Precedent can be both good and bad, it is a double-edged sword. Precedent can add additional costs and complexity to bargaining and dispute resolution.

The underutilization of archival systems in the public sector slows resolution processes. With the implementation of an archival system, resolution can be more efficient and consistent. Conflict will vary and should be respected as such. However, archival systems can be utilized to offer proactive suggestions while working through the resolution process throughout the state and/or country.

The third and final argument is the underutilization of Alternative Dispute Resolution in New York, Illinois and Germany. The conciliation service in Ireland has taken proactive steps in implementing and trialing ADR. The work environment has evolved and so to should the processes we use to resolve disputes. Until new processes and procedures are trialed, we will never know the success rates of Alternative Dispute Resolution throughout the public sector.

ADR Techniques to Consider for the Public Sector:

1. *Ombudsman*: Designate an ombudsman or neutral to assist in resolving conflicts. The position should be rotated every three years, to ensure neutrality.
2. *Review Panels*: Design a process to review disputes or grievances at a lower level, prior to mediation, fact-finding or arbitration. Offer recommendations or considerations.
3. *Standing Umpire*: Designate a mediator or arbitrator to oversee the collective bargaining agreement. The individual will develop a relationship with the union, management and will fully understand the contract and history of the conflict. The individual can potentially have full authority to render a decision or mediate a settlement.

4. *Conflict Resolution Training for Supervisors:* Train and retrain the workforce in communication, conflict resolution and other forms or dispute resolution techniques.

CONCLUSION

The comparative analysis examined the challenges and shortcomings faced in resolving disputes in the public-sector employment relationship, while focusing on three main arguments.

There is not a perfect conflict resolution process. As the analysis, has shown, states and countries utilize different techniques when resolving disputes and each system has both positive and negative attributes. Each state or country has found successes within the current systems. Evolution is necessary to resolve disputes efficiently and proactively.

Precedent is a double-edged sword, it can create a consistent, fair and timely resolution process. However, precedent can be a liability to future bargaining agreements and resolutions. Past resolutions should be viewed as recommendations for current or future conflict and to know the history of the issues. An archival system has the potential of increasing the efficiency in which disputes are resolved.

Alternative Dispute Resolution is designed to resolve disputes at the lowest possible level in any organization. There are opportunities to resolve disputes, decrease costs and increase procedural efficiencies through alternative dispute resolution techniques. Evolving dispute resolution systems will provide a more proactive, consistent, and efficient relationship building system to manage and resolve conflict. Evolution of these systems will take time. Both labor and administration must embrace change.

Labor and management will always be challenged with varying levels of conflict. Conflict should not be avoided, but welcomed and managed accordingly. Without conflict, we would not see change in the workplace or throughout the world. Conflict is necessary for progress. How we manage conflict is a choice.

“Conflict is inevitable, but combat is optional.”

-Max Lucade^{xxxvii}

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Speaker Biographies

Taylor Law at 50

May 10, 2018 | 3:00 p.m. – 3:50 p.m.

Concurrent One:

Half a Century of Managing Collective Bargaining Conflict:
The New York Experience and Beyond

ANTHONY ZUMBOLO

Anthony Zumbolo has spent his entire professional career working in the field of labor and employment relations, the last 34 plus years with the New York State Public Employment Relations Board. In 1982 he joined PERB as a Public Employment Mediator Trainee and subsequently served as a Mediator, Supervising Mediator, and retired in November 2016 as the Agency's Executive Director. For the past 15 years, he has been a Public Service Professor in the Department of Public Administration and Policy at the Rockefeller College of Public Affairs and Policy. Prior to joining PERB, he was a business representative for a local union.

Mr. Zumbolo has degrees in economics from the University at Buffalo (BA) and University at Albany (MA). He completed his Doctorate in Organizational Behavior and Public Management at Rockefeller College of Public Affairs and Policy, State University of New York at Albany. His dissertation examining decision-making in negotiations and mediation won the national Labor and Employment Relations Association's Best Dissertation Award.

MATTHEW W. BURR

Matthew Burr has over eleven years of experience working in the human resources field, starting his career as an Industrial Relations Intern at Kennedy Valve Manufacturing to most recently founding and managing a human resource consulting company; Burr Consulting, LLC. Prior to founding the consulting firm, the majority of his career was spent in manufacturing and healthcare. He specializes in labor and employment law, conflict resolution, performance management, labor and employment relations. Matthew also has a generalist background in HR and provides strategic HR services to his clients, focusing on small and medium sized organizations. In July 2017, Matthew started as an Associate Professor of Business Administration at Elmira College, he teaches human resources management, organizational behavior and management information systems. Matthew is also the SHRM Certification Exam Instructor at the institution. Matthew works as a trainer Tompkins Cortland Community College, Corning Community College, Broome Community College and Penn State University. He also acts as an on-call Mediator and Fact-Finder through the Public Employment Relations Board in New York State, working with public sector employers and labor unions.

Matthew has publications at the Cornell HR Review, Business Insider, Expert 360 (in Australia). He recently published his first book, "\$74,000 in 24 Months: How I killed my student loans (and you can too!)."

Matthew has an associate's degree in business administration from Tompkins Cortland Community College, a bachelor's of science degree in business management from Elmira College, a master's degree from the University of Illinois School of Labor and Employment Relations in Human Resources & Industrial Relations, a Lean Six Sigma Green Belt certification, both the SPHR and SHRM-SCP. He recently completed an MBA, with a specialization in entrepreneurship from Syracuse University December 2017.

Matthew has been featured on CNN Money, Fast Company, Student Loan Hero, Smart Sheet and CEO Blog Nation.

RICHARD A. CURRERI

Richard A. Curreri served as Director of Conciliation for the New York State Public Employment Relations Board for 22 years before retiring in August of 2012, and now maintains a private arbitration and mediation practice. Mr. Curreri was responsible for the administration and implementation of statutory dispute resolution procedures, including mediation, fact-finding and interest arbitration, applicable to the 4,000 collective bargaining units in the State, local government and education sectors in New York. He supervised the activities of a full-time professional mediation staff in the agency's Albany, Buffalo and Brooklyn regional offices, along with those of hundreds of mediators, fact finders and arbitrators who serve the agency on an ad hoc basis.

Mr. Curreri personally mediated some of the highest profile State, municipal, school district and public authority contract disputes throughout New York. Most notable and publicized of these efforts was his role as head of the mediation team that intervened during the December, 2005 strike by 36,000 New York City transit workers; the team's work was widely credited for quickly getting employees back on the job and settling a seemingly intractable dispute that was costing the City an estimated \$300-400 million per day. He was also instrumental in settling a number of other major strikes, including the Buffalo teachers in 1999 and Yonkers teachers in 2000.

Mr. Curreri is a graduate of Cornell University's College of Arts and Sciences and of Albany Law School, from which he received its Excellence in Government Service Award in 2008. He is a former President of the Association of Labor Relations Agencies, and is a charter member of the Board of Advisors of Cornell University's Scheinman Institute on Conflict Resolution.

Concurrent Two

Taylor Law at 50

May 10, 2018 | 3:00 p.m. – 3:50 p.m. | Fort Orange Ballroom 5
1.0 areas of professional practice CLE credit

The *Triborough* Doctrine and Statute: A Catalyst or Hindrance to Harmonious Labor Relations?

This session will discuss the history and impact of the *Triborough* doctrine and statute, their impact on labor relations and negotiations from both the labor and employer perspective, and current and future issues, including the meaning and impact of *City of Ithaca*, 49 PERB ¶ 3030 (2016).

Panelists:

Angela M. Blassman, Administrative Law Judge, NYS Public Employment Relations Board

Richard K. Zuckerman, Esq., Partner, Lamb & Barnosky, L.L.P.

Michael Krauthamer, Esq., Labor Relations Specialist, NYSUT

Including:
The Impact of *Triborough*: A Catalyst or Hindrance
to Harmonious Labor Relations?

The Impact of Triborough: A Catalyst or Hindrance to Harmonious Labor Relations?

By Angela M. Blassman

I

Introduction: The Taylor Law's Triborough Amendment

The New York State Public Employees' Fair Employment Act, known as the Taylor Law, was amended in 1982 to address what occurs when the term of a collective bargaining agreement between a public employer and a public employee organization expires.¹ Section 209-a.1(e) of the Taylor Law, known as the "Triborough Amendment," makes it an improper practice for a public employer, or its agents, deliberately to "*refuse to continue all the terms of an expired agreement until a new agreement is negotiated,*" [emphasis added].²

The statute includes a "strike exception;" an employee organization is not entitled to the continuation of the terms of an expired agreement if, during negotiations for a new agreement or before those negotiations are resolved, it engages in, causes, instigates, encourages, or condones a strike during or prior to such resolution of such negotiations, engaged in conduct violative of subdivision one of section two hundred ten of this article."³ If that occurs, the employer's refusal to continue to the terms of the expired agreement will not violate the Act.⁴

¹ The New York State Public Employees' Fair Employment Act, New York State Civil Service Law Article 14, is alternatively referred to in this paper as the "Taylor Law" and the "Act."

² The Triborough Amendment has been referred to as the "continuation-of-benefits clause." *Assn of Surrogates and Supreme Court Reporters within the City of New York v. State of New York*, 25 PERB ¶ 7502, at 7507.

³ Taylor Law, § 210.1.

⁴ Taylor Law § 209-a.1 states:

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 conduct violative of subdivision one of section two hundred ten of this article.

II

Historical Background to Enactment of the Taylor Law and the Triborough Amendment

1935 National Labor Relations Act - The US Congress passed the NLRA, also known as the Wagner Act, obligating *private sector employers* to bargain collectively with unions selected by a majority of employees. Public employees were *not* included in that legislation.

Public Sector Strikes. Public employees engaged in strikes before and after World War II. The end of World War II saw an increase in public sector labor activism, including strikes.⁵

1947 – Taft-Hartley Act of 1947. The U.S. Congress enacted the Taft-Hartley Act in reaction to a rash of strikes. That Act prohibited public sector strikes and established strict penalties (immediate dismissal and a 3-year bar to reemployment) for striking public sector employees.⁶

1947 – NYS Condon-Wadlin Act. The Condon-Wadlin Act was passed in reaction to strikes in Rochester, Yonkers, and Buffalo, and a threatened strike by the New York City Transport Workers Union.⁷ To deter strikes by government employees, the Condon-Wadlin Act also mandated severe penalties, including dismissal of striking workers. The Condon-Wadlin Act, however, quickly came to be viewed as unenforceable and an impediment to the settlement of labor disputes, so that its penalties were often not imposed.⁸

1960s Strikes – In 1960, 5,500 teachers in New York City walked out for one day when the City refused to recognize their union. In 1961, evening high school teachers staged a three and one-half week strike. In 1962, 22,000 teachers walked out for one day over a contract deadlock. In April 1962, approximately 20,000 New York City teachers engaged in a one-day strike, which closed most of the city's schools.⁹

1963. Temporary Amendment. The Condon-Wadlin Act was amended to ease the mandatory penalties.¹⁰ The amendment expired in 1965, causing a return to the heavy mandatory penalties.

1965 NYC Strikes. In January 1965, New York City Department of Welfare employees began a work stoppage that lasted 28 days, the longest public employee strike in New York City's

⁵ *Lefkowitz on Public Sector Labor & Employment Law*, 4th Ed. (hereafter, “*Lefkowitz*”) § 1.9.

⁶ *Id.* at § 1.17, p. 23.

⁷ *Lefkowitz*, §§ 1.15 and 1.18.

⁸ *Lefkowitz*, § 1.20.

⁹ See Steven Greenhouse, *Charles Cogen Dies at 94; Led Teachers in New York*, New York Times, February 20, 1998 (available at <http://www.nytimes.com/1998/02/20/nyregion/charles-cogen-dies-at-94-led-teachers-in-new-york.html>) (accessed March 21, 2018). *Lefkowitz*, § 1.20, p. 26.

¹⁰ *Id.*

history. Over 5,000 workers were dismissed and union officials were jailed. Part of the negotiated settlement was a suspension of strike penalties.¹¹

1966 Transit Strike. On January 1, 1966, the TWU led New York City transit workers in a 12-day strike that resulted in economic losses estimated to be as much as \$ 100 million each day. The transit strike was the impetus for Nelson Rockefeller to appoint, on January 15, 1966, a five-member Committee on Public Employee Relations, chaired by Professor George W. Taylor from the Wharton School at the University of Pennsylvania, and composed of labor relations experts.¹²

April 21, 1967. Nelson A. Rockefeller signed the Taylor Law, giving New York State public employees the statutory right to organize and negotiate collective agreements. It continued to prohibit strikes, but with lesser penalties, and created the Public Employment Relations Board.¹³

September 1967. the Taylor Law became effective and replaced the Condon-Wadlin Act.

July 28, 1972 – Triborough Doctrine. PERB issued *DC 37 and Local 1396, AFSME, AFL-CIO v. Triborough Bridge and Tunnel Authority*,¹⁴ enunciating its “Triborough” doctrine.

1975 – New York City Financial Crisis. In 1975, New York City was on the brink of filing bankruptcy. Although it did not file bankruptcy, its finances were subject to the Emergency Financial Control Board until 1986.¹⁵

May 12, 1977 – The New York State Court of Appeals limited the *Triborough* doctrine in *BOCES of Rockland County v. NYSPERB* (hereafter, *BOCES of Rockland County*), 41 NY2d 753 (May 12, 1977).¹⁶

1982 – The Triborough Amendment. The Taylor Law was amended to include the § 209-a.1(e).

¹¹ Lefkowitz, §1.24, p. 28.

¹² Lefkowitz, § 1.17, p. 23. See also *New York State Taylor Law: History*, Cornell University, College of Architecture, Art, and Planning, Restructuring Local Government, <http://www.mildredwarner.org/gov-restructuring/special-projects/taylor-law> (accessed March , 2018). William A. Herbert, *Jerome Lefkowitz: A Pragmatic Intellect and Major Figure in Taylor Law History*, fn 6 (available at <http://perb.ny.gov/pdf/lefkowitz.pdf>) (accessed March 12, 2018). Lefkowitz, § 1.27.

¹³ New York City preceded the State in passing legislation granting representational rights to public sector employees. In 1958, Mayor Robert F. Wagner’s Executive Order No. 49 granted collective bargaining rights to New York City’s municipal workers for the first time. In 1967, the New York City Collective Bargaining Law was, enacted, succeeding the Wagner Executive Order. Lefkowitz, §§ 1.30 -1.31.

¹⁴ 5 PERB ¶3037 (July 28, 1972), *affirming*, 5 PERB ¶ 4505 (1972).

¹⁵ *Financial Control Board Loses Most of its Control*, New York Times, June 30, 1986, p. B3.

¹⁶ 8 PERB ¶ 3018 (1975), *remedy modified*, 50 AD2d 832, 8 PERB ¶ 7017 (2nd Dept 1975), *judgment of the Appellate Div modified by annulling and vacating PERB’s determination*, 41 NY2d 753, 10 PERB ¶ 7010 (1977).

Strikes Before & After Passage of the Triborough Amendment:

The number of strikes per annum declined after the enactment of the Triborough Amendment.¹⁷ As stated by one researcher:

In the first 15 years after the Taylor Law was enacted in 1967, the state Public Employment Relations Board was asked to intervene in 299 walkouts, the vast majority involving teachers' unions. Strikes averaged 20 a year in the 1970s, despite PERB's willingness to impose the Taylor law's full sanctions on striking workers and their unions in roughly two-thirds of those cases.

The trend abruptly changed in the early 1980s. Since 1983, PERB has recorded only 41 strikes of government workers in New York—an average of fewer than two per year. Compared to the tumultuous 1960s and 70s—with some significant exceptions—the last quarter-century has been an era of labor tranquility in the state and local government throughout New York.¹⁸

The question becomes whether that change was a result of the Triborough amendment. Different commentators have answered that question differently. E.J. McMahon, a conservative commentator, gives the Triborough amendment at least “some,” but not all the credit for the reduction in strikes. He notes other possible factors, such as the general decrease in strikes nationwide in the 1980s in both the public and private sectors; the increase in global competition; the 1981 tough federal response to the air traffic controller strike; and the general post-WW II increase in pay and benefits of public employees, as other explanations.¹⁹

¹⁷ Lefkowitz § 1.15.

¹⁸ E.J. McMahon, *Taylor Made: The Cost and Consequences of New York's Public-Sector Labor Laws*, Empire Center reports (October 17, 2007), available at <https://www.empirecenter.org/publications/taylor-made-the-cost-and-consequences-of-new-yorks-public-sector-labor-laws/> (accessed March 20, 2018).

¹⁹ *Id.*

III

1972 - Triborough Decision

The Triborough Amendment took its name from the Board case that dealt with the issue before the New York State Legislature enacted § 209-a.1(e) of the Act: *District Council 37 and Local 1396, AFSME, AFL-CIO v Triborough Bridge and Tunnel Authority* (hereafter, the “*Triborough decision*”).²⁰

The issue in that case was the employer’s failure to pay a contractual increment due under the expired contract for years of service. The employer maintained employee salary and fringe benefit levels, but refused to pay increments to employees whose anniversaries occurred after June 30, 1971, the expiration of the contract’s term. Further, the contract itself was silent regarding whether the increment provision was intended to survive the contract’s term.

The Board’s decision was based on alleged violation of § 209-a.1(d) of the Act, the duty to negotiate in good faith. Of course, § 209-a.1(e) of the Act, requiring the continuation of the terms of an expired agreement had not yet been enacted.

Analysis of the Board’s Triborough Decision

Most of the issues currently raised with respect to the Triborough amendment were raised during the litigation of *Triborough* case, including whether the failure to pay an increment constitutes a unilateral change and the financial burden imposed on the employer during times of financial contraction. Those issues were subsequently revisited in *Board of Cooperative Educational Services of Rockland County v. New York State Public Employment Relations Board* (hereafter, “*Rockland County BOCES*”).²¹ As discussed more fully below, in that case the New York State Court of Appeals viewed the issues differently from the Board, and limited the doctrine’s application.

²⁰ 5 PERB ¶ 3037 (July 28, 1972), *affirming*, 5 PERB ¶ 4505 (1972).

²¹ 8 PERB ¶ 3018 (1975), *remedy modified*, 50 AD2d 832, 8 PERB ¶ 7017 (2nd Dept 1975), *judgment of the Appellate Div modified by annulling and vacating PERB’s determination*, 41 NY2d 753, 10 PERB ¶ 7010 (1977).

a. *Triborough Decision*: Maintaining the Status Quo & Prohibition on Self Help

The *Triborough* decision emphasizes the principal that the status quo must be maintained during the hiatus period between contracts as a *quid pro quo* for the Act's prohibition on strikes, a remedy that private sector employees can exercise and that changes the power balance during negotiations. Both a strike by labor and an employer's undertaking a unilateral change in terms and conditions are viewed by the Board as prohibited "self-help." The Board stated:

the statutory prohibition against an employee organization resorting to self-help by striking imposes a correlative duty upon a public employer to refrain from altering terms and condition of employment unilaterally during the course of negotiations. This duty of an employer in the public sector to refrain from self-help is greater than is the similar duty of private sector employers. Accordingly, the hearing officer found "that an employee organization which does not strike is entitled to the maintenance of the *status quo* during negotiations" and ruled that "an employer cannot unilaterally alter existing mandatory subjects of negotiations while a successor agreement is being negotiated."

When the Board issued its *Triborough* decision, not that many years had passed since the Taylor Law was proposed and enacted. When the bill was proposed, there were strong objections by labor organizations because it included a strike prohibition, which they viewed to as improperly restricting employees' right to "withhold their labor." The terms "Slave Labor Act" and "Rat Bill" were used in opposition to the bill. A union rally was held on May 23, 1967 in Madison Square Garden and the statute was condemned as an "evil law."²²

²² See *Jerome Lefkowitz: A Pragmatic Intellect and Major Figure in Taylor Law History*, by William A. Herbert. As recently as November 2011, an international labor organization issued a report concluding that the Taylor Law's strike prohibition violated international freedom of association principles and argued that New York State should conform to internationally recognized principles and prohibit strikes only workers of essential services in the strict sense of the term. *Lefkowitz*, at § 1.16, p. 22.

b. *Triborough Decision*: Was there a Unilateral Change?

In *Triborough*, the employer argued that it had not changed any term or condition of employment, because it maintained the salaries and fringe benefits provided under the expired agreement and only withheld increments, a matter that it viewed as “a cost item to be taken into account by the parties as part of negotiations for the successor contract.”²³ The employer further argued that the Board should consider the parties’ practice, as evidenced by their past dealings. The employer noted that, during the prior two periods between contracts, it had not paid the increment, although it later paid it retroactively.²⁴

However, both the ALJ and the Board decisively viewed the matter as involving a unilateral change in the status quo. The Board further stated that the obligation to maintain the status quo was not dependent upon the existence of a right in an expired contract, but existed since it was a benefit enjoyed by the employees.²⁵

c. *Triborough Decision*: Cost of Maintaining the Status Quo During Periods of Financial Contraction

The Board discussed in *Triborough* the employer’s concern that imposing a freeze on terms and conditions of employment would impose a hardship during periods of economic downturn. The Board held that that employer’s argument lacked merit, since the Act includes a statutory scheme to resolve impasses. The Board stated:

In its brief, respondent expresses concern that the hearing officer's decision would prevent an employer from ever changing the terms and conditions of employment contained in an expired agreement absent the concurrence of the employee organization and argued “the irrevocable nature of benefits might prove tolerable during periods of sustained economic growth or continued inflation. At a time of economic contraction, however, or because of austerity mandated by some other cause, the precedent would operate effectively to prevent the managers of public agencies from conforming to changed circumstances and operating those agencies in a business-like manner.” Respondent's concerns are not

²³ 5 PERB ¶ 4505 at p. 4521.

²⁴ *Id.* at pp. 4521-4522.

²⁵ 5 PERB ¶ 3037, at p. 3065. The ALJ noted that, if a benefit that existed when the contract expired was not in the contract, the duty was to maintain “the law of the shop.” 5 PERB ¶ 4522, at footnote 7.

borne out by the statute. Civil Service Law Section 209 prescribes negotiation procedures which under some circumstances include mandatory mediation and fact-finding. Section 209-a.1(d) clearly imposes upon an employer a duty to negotiate in good faith during the pendency of these procedures.

Paragraph (e) of subdivision 3 of Section 209 prescribes procedures for determining terms and conditions of employment in the event that negotiations, including conciliation procedures, do not produce an agreement. In the instant case, respondent acted unilaterally during negotiations and not after their completion when it could have done so in accordance with the statutory scheme.

IV

Cases Post-Triborough Decision & Before Triborough Law

a. Third Dept – Arbitration Clause Expires with Contract’s Term

In **1974**, the Third Department held, in *Board of Education of the City School District for the City of Poughkeepsie*,²⁶ that an expired contract’s provision for arbitration did not continue in effect beyond the contract’s agreed upon term. No mention is made in *Poughkeepsie* of the *Triborough* case.

The Third Department affirmed the lower court’s decision, which granted the employer’s petition to stay the arbitration of a grievance that had been filed after the contract’s expiration. The lower court stated that the Legislature intended the impasse procedures in § 209 of the Act to resolve bargaining disputes, and that

[t]o declare that an agreement continues beyond its stated expiration date would run counter to the [Legislature’s] plan and upset the balance between public employers and employees which has been established by statute.²⁷

²⁶ *Board of Educ of the City Sch Dist for the City of Poughkeepsie*, 75 Misc2d 931, 6 PERB ¶ 7518 (Supreme Court, Dutchess County June 26, 1973); *affd*, 44 AD 2d 598, 7 PERB ¶ 7504 (2d Dept 1974).

²⁷ *Id.* As set forth below, the public policy grounds expressed in *Poughkeepsie* were superseded by the Legislature’s passage of § 209-a.1(e) of the Act. See *City of Long Beach*, 51 PERB ¶ 3005 (Feb 2018) (U-33449).

b. *Malone* - Parties Can Agree to Continue Terms & Extend Arbitration Clause

PERB held, in *Board of Education of **Malone** Central School District*, 8 PERB ¶ 3043 (July 1, 1975) that the grievance-arbitration procedure in the parties' expired contract continued in effect during the hiatus between contracts because the parties had agreed to continue all contract terms that were not challenged during negotiations by either party. PERB distinguished the Third Department's *Poughkeepsie* case, *supra*, based on the existence of the parties' agreement to continue the terms of the expired contract. In reaching that conclusion, the Board reiterated that the obligation imposed by *Triborough* was not predicated on "the existence of a prior contract but applies to all terms and conditions of employment however established including the grievance/arbitration procedure between the parties."²⁸ The Board also noted the following policy concern:

To hold otherwise (particularly in the absence of the employee organization's right to strike) would be potentially disruptive of the promotion of harmonious employee/employer relations as contemplated by the Act.

V

**Judicial Limitation of the *Triborough* Case
*BOCES Rockland County***

PERB's *Triborough* doctrine was limited by the New York State Court of Appeals in *Rockland County BOCES*,²⁹ a case factually similar to *Triborough*. In that case, as in *Triborough*, the employer continued to pay unit employees their salary pursuant to the expired agreement, but did not pay the increment that would have become due during the hiatus period.

The facts in in *Rockland County BOCES* case, arguably, more strongly supported a finding that the status quo between the parties included the payment of the increment during the hiatus period, because that, after the expiration of the first three

²⁸ 8 PERB ¶3048, at pp. 3074-3075.

²⁹ 8 PERB ¶ 3018 (1975), *remedy modified*, 50 AD2d 832, 8 PERB ¶ 7017 (2nd Dept 1975), *judgment of the Appellate Div modified by annulling and vacating PERB's determination*, 41 NY2d 753, 10 PERB ¶ 7010 (May 12, 1977).

contracts between the parties, the employer paid the automatic step increments, even if a successor agreement had yet to be reached; but that it did not do so after the fourth agreement expired, which led the union to file the improper practice charge.

In deciding *Rockland County BOCES*, the Board reiterated its *Triborough* doctrine, stating:

The *sine qua non* of negotiating in good faith is refraining from imposing unilateral changes in terms and conditions of employment during negotiations. This proposition is the essence of our *Triborough* doctrine. In the *Triborough* case, we held that the expectation of an annual increment based upon a long standing and continual practice of its having been paid is a term and condition of employment that cannot be altered unilaterally during negotiations. For this purpose, it makes no difference whether or not such practice was ever embodied in an agreement.³⁰

The Board ordered BOCES to negotiate in good faith and to pay the increment to the employees who were entitled to it under the expired agreement.

a. *Rockland County BOCES* and the Status Quo

The Court of Appeals annulled and vacated PERB's determination, stating:

We hold that, after the expiration of an employment agreement, it is not a violation of a public employer's duty to negotiate in good faith to discontinue during the negotiations for a new agreement the payment of automatic annual salary increments, however long standing the practice of paying such increments may have been.³¹

The Court of Appeals reasoned that such increments did not maintain the status quo, but change the relationship between the parties. It stated that the *Triborough* doctrine was based on the erroneous assumption that the parties' existing relationship was being preserved, but that, "in reality, such payments extend or change the relationship established by the parties."

³⁰ 8 PERB ¶ 3018 (1975).

³¹ *BOCES, Rockland County*, 41 NY2d 753, at 754,

b. Rockland County BOCES and the Financial Distress Argument

The Court of Appeals also saw the employer's financial distress argument differently from PERB. The Court's decision was influenced by the municipal financial difficulties that were then evident.³² The Court specifically notes that it was, at that time, presented with various cases arising from the municipal financial pressures of the 1970s:

The reasons for not giving effect in these circumstances to the so-called "Triborough Doctrine" should be apparent. Involving a delicate balance between fiscal and other responsibilities, its perpetuation is fraught with problems, equitable and economic in nature. As a reward and by encouraging the retention of experienced personnel in public positions, the concept of increments based on continuance in service, properly exercised, is creditable for the public entity and the citizenry are better served, and time losses suffered because of training periods and inefficiency in performance are likely to be reduced. The concept of continual successive annual increments, however, is tied into either constantly burgeoning growth and prosperity on the part of the public employer, or the territory served by it, or a continuing general inflationary spiral, without admeasurement either of the growth or inflation and without consideration of several other relevant good faith factors such as comparative compensation, the condition of the public fisc and a myriad of localized strengths and difficulties. In thriving periods the increment of the past may not squeeze the public purse, nor may it on the other hand be even fair to employees, but in times of escalating costs and diminishing tax bases, many public employers simply may not be able in good faith to continue to pay automatic increments to their employees.

To say that the *status quo* must be maintained during negotiations is one thing; to say that the *status quo* includes a change and means automatic increases in salary is another. The matter of increments can be negotiated and, if it is agreed that such increments can and should be paid, provision can be made for payment retroactively. The inherent fallacy of PERB's reasoning is that it seeks to make automatic increments a matter of right, without regard to the particular facts and circumstances, by establishing a rule that failure by a public employer to continue such increments during negotiations is a violation of the duty to negotiate in

³² Two years earlier, in 1975, New York City had been on the brink of filing bankruptcy and its finances were subject to control by a control board until 1986.

good faith. No such principle appears in the statute, nor should one exist by administrative fiat. Therefore, without expressing complete disapproval of the “Triborough Doctrine,” we hold that it was error for PERB to determine that BOCES had violated its duty to negotiate in good faith solely because of its failure to pay increments after the expiration of an employment agreement.³³

According to certain commentators, during the ten years between the enactment of the Taylor Law and *Rockland County BOCES*, teacher unions often treated increases due to service steps and educational attainment as “old money,” and insisted that only raises applied to base salary was “new money” that reflected the increase being given in a new agreement.³⁴ *Rockland County BOCES* was viewed as providing relief to employers because the elimination of step raises during the interim period “meant that all pay increases were truly negotiable.”³⁵

VI

Triborough After Rockland County BOCES

a. *Port Chester-Rye* - PERB Held that the Employer has No Duty to Proceed to Arbitration Upon a Contract’s Expiration

Section 208.1(a) of the Act provides that an employer must extend to an employee organization, upon certification or recognition, the right to represent unit employees, both in “negotiations,” and in “*the settlement of grievances*” [emphasis added]. Based on that statutory right, the Board held in *Port Chester-Rye Union Free School District*, 10 PERB ¶ 3079 (September 15, 1977), that the employer has a

³³ *Rockland County BOCES*, *supra*, at 748-759.

³⁴ Citing to 2010-2011 data, commentators have stated that teacher salary schedules in New York State often include 20 to 30 annual pay “steps” and additional increments based on educational credits. E.J. McMahon and Terry O’Neil, “*Triborough Trouble, How an obscure state law guarantees pay hikes for government employees – and raises the tax toll on New Yorkers*,” Empire Center for New York State Policy, Modern Press Albany, NY, <https://www.empirecenter.org/wp-content/uploads/2013/09/Triborough-Final2.pdf> (accessed April 5, 2018).

³⁵ *Id.*

statutory duty to adjust grievances. That right exists irrespective of the existence of a grievance procedure in the parties' contract.

Relying on *Poughkeepsie, supra*, the Board in *Port Chester* further held that the Act does not include any obligation to take a grievance to arbitration. The grievance procedure, including the arbitration provision, was held to have expired with the contract's term, and the employer was found to have no obligation to proceed to arbitration once the contract was expired. The Board distinguished *Malone, supra*, noting that in that case the parties had specifically agreed that the contract terms, unless either party proposed an amendment or modification, would continue during the hiatus period.

The finding in *Port Chester*, that a contract's arbitration provision does not survive the expiration of an agreement, was based on public policy grounds that were superseded by the Legislature's passage of § 209-a.1(e) of the Act. The Board explicitly overruled *Port Chester* in that regard in a recent decision, *City of Long Beach*, 51 PERB ¶ 3005 (Feb 2018) (U-33449).

a. *Niagara Wheatfield* – Court of Appeals – Neither a Raise Provision Nor the Continuation of Benefits Clause Violated Public Policy

In *Niagara Wheatfield Administrators Association v. Niagara Wheatfield Central School District*, 44 N.Y.2d 68, 11 PERB ¶ 7512 (March 28, 1978), the Court of Appeals held that public policy did not prevent a school board from agreeing to continue the terms of an agreement after its expiration, including a "tie-in" clause that provided that administrators' would receive an increase if the teachers received one. The contract's continuation clause provided:

The current negotiated agreement and established fringe benefits between the Board of Education and the NWAA (association) shall remain in effect until modified or changed by mutual agreement in subsequent negotiations.

In that case, the administrators filed a grievance seeking an increase in pay based on the contract's tie-in clause, which it argued was continued by the contract's continuation clause. The arbitrator held that the administrators were entitled to the raise. On appeal from a decision confirming the award, the school district argued that

the award violated public policy. The Court of Appeals found no violation of public policy.

VII

The 1982 “Triborough Amendment” -- Civil Service Law § 209-a.1(e)

When the Triborough amendment was first enacted, it did not include the strike exception. However, the Governor’s Memorandum upon signing the bill indicated that both houses of the legislature had assured him that they would pass an amendment to the bill clarifying that it was not intended to mandate any new or additional benefits, that the protection was revoked in the case of a strike, and that a resolution by impasse procedures would supersede the terms of the prior agreement (McKinney’s Session Laws of NY, 1982, pp. 2631-2632). In *partial* fulfillment of that promise, Chapter 921 of the Laws of 1982 (effective December 20, 1982) was enacted amending § 209-a.1(e) of the Act to clarify that an employee organization that engages in conduct violative of the “no strike” provision of the Act (§ 210.1) is not afforded the “freeze” protection of § 209-a.1(e) of the Act.³⁶ That bill, which was proposed by the Governor, initially provided that the status quo imposed by § 209-a.1(e) of the Act would also cease to apply when negotiations are resolved pursuant to the procedures in § 209 or § 212 of the Act. The bill as initially proposed was rejected by the Legislature in order to satisfy union opposition to the proposed amendment.³⁷

a. Scope of the Triborough Amendment

Section 209-a.1(e) of the Act requires the employer to continue *all* the terms of an expired agreement until new terms and conditions of employment are either

³⁶ Section 210.1 of the Act provides:

No public employee or employee organization shall engage in a strike, and no public employee or employee organization shall cause, instigate, encourage, or condone a strike.

³⁷ The Board’s set forth in detail the legislative history with respect to the amendment of § 209-a.1(e) of the Act in *Niagara County Legislature and County of Niagara*, 16 PERB ¶ 3071 (1983), *annulled sub nom. County of Niagara v New York State Public Employment Relations Board*, 122 Misc2d 749, 17 PERB ¶ 1703 (Sup Ct, Niagara County 1984); *judgment of Supreme Court reversed and petition to stay enforcement of PERB’s decision dismissed*, 104 AD2d 1, 17 PERB ¶ 7021 (4th Dept 1984).

negotiated or achieved through impasse procedures contained in § 209 and § 212 of the Act. The Board's *Triborough* doctrine, however, only maintained the status quo of mandatorily negotiable subjects of negotiations.³⁸ Therefore, contractual terms that addressed non-mandatory or "permissive" subjects of bargaining, were not frozen by the *Triborough* decision and an employer could unilaterally change those terms upon a contract's termination without violating the Act. The statute, therefore, is more expansive regarding the preservation of contractual terms. However, § 209-a.1(e) of the Act only preserves the terms of an expired agreement and does not address the status quo of non-contractual terms and conditions of employment.

b. The Strike Exception in the Triborough Amendment

The strike exception, codified in § 209-a.1(e) of the Act, was previously enunciated by PERB in *Triborough*. PERB specifically stated that an employee organization lost the right to the continuation of the status quo if it engaged in a strike.³⁹ PERB applied that exception in subsequent cases, such as the *Village of Valley*

³⁸ "Mandatorily negotiable" matters are defined by § 201.4 of the Act as "terms and conditions of employment," which include

salaries, wages, hours and other terms and conditions of employment provided, however, that such term shall not include any benefits provided by or to be provided by a public retirement system, or payments to a fund or insurer to provide an income for retirees, or payment to retirees or their beneficiaries. No such retirement benefits shall be negotiated pursuant to this article, and any benefits so negotiated shall be void.

Sections 203, 204, and 209-a.1(d) and .2(b) of the Taylor Law authorize and require public employers and employee organizations to negotiate in good faith over mandatorily negotiable terms and conditions of employment. An employer may not act unilaterally with respect to a mandatory subject. In *Lynbrook v New York State Public Employment Relations Board*, 48 NY2d 398 (1979), the Court of Appeals stated:

In public employment law, "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; though neither party must continue to bargain on a permissive issue to the point of impasse, once it becomes the subject of an agreement, it is fully binding.

³⁹ 5 PERB ¶ 3037, at p. 3064.

Stream.⁴⁰ In that case, the employer unilaterally changed the hours of work of sanitation collectors after they engaged in a work slow-down. The Board sustained the ALJ's finding that the union could not rely on the employer's duty to maintain the status quo during negotiations because it supported the slow down which, the Board noted, had already altered that status quo.

A union's allegation that the employer engaged in "extreme provocation," leading to the employees' strike, is not an exception to the statute's strike prohibition and does not protect a union from a strike charge. It is merely a mitigating factor to be considered when imposing a strike penalty.⁴¹

c. Compelling Need Exception is Not Applicable Under § 209-a.1(e)

The same year that *Triborough* was issued, the Board held that an employer does not violate the Act if it unilaterally changes a term and condition of employment under the following circumstances: (i) the employer negotiated with the union on the issue to a point of impasse before it undertook unilateral action, (ii) compelling reasons existed for the timing of the employer's action, and (iii) after its unilateral action the employer recognized a continuing obligation to negotiate on the issue until agreement.⁴² However, the compelling need doctrine, is not a defense to an allegation that an employer failed to continue the terms of an expired agreement.⁴³ The Board reasoned that the compelling need defense cannot be used to defend an alleged breach of § 209-a.1(e) of the Act, since that statutory provision constitutes an affirmative grant of jurisdiction to PERB to remedy an employer's breach of a term of an expired collectively negotiated agreement.⁴⁴

⁴⁰ 6 PERB ¶ 3076 (1973).

⁴¹ See Act, §201.3(f).

⁴² *Wappingers Cent Sch Dist*, 5 PERB ¶ 3074 (1972).

⁴³ See *County of Erie and Erie County Medical Center Corp*, 43 PERB ¶ 3008 (2010).

⁴⁴ *Id.* at p. 3026.

VIII

Development of the Law After the Enactment of §209-a.1(e)

Nov. 1982 – “*Maplewood-Colonie*” - Court of Appeals

a. Grievance Procedures Continue after Contract Expiration Public Policy Under §209-a.1(e) Does Not Bar Payment of Increment

Soon after § 209-a.1(e) was enacted, the Court of Appeals applied it in *Maplewood-Colonie Teachers' Association v. Board of Trustees of Maplewood-Colonie Common School District*, 15 PERB ¶ 7516 (3d Dept 1981). In that case, the Appellate Division, Third Department, stayed arbitration of a grievance seeking to enforce the contractual increment provision in an agreement. On public policy grounds, the Third Department held that the employer acted properly when it refused to pay the increment, even though the contract included a continuation of benefits clause that provided that the contract's terms would be valid until beyond its expiration.

The Court of Appeals reversed the Third Department and denied the stay of arbitration. The Court clearly held in *Maplewood-Colonie* that the § 209-a.1(e) has the effect of *continuing an expired contract's grievance procedure*.

It appears, however, that the Court of Appeals also addressed the substantive public policy issue. Although the Court's decision was terse, it specifically states that it was addressing the public policy issue addressed by the lower court--that is--whether it is contrary to public policy for an employer to pay a contractual increment during the hiatus period. In *Maplewood-Colonie*, therefore, the Court held that the Legislature's enactment of § 209-a.1(e) of the Act overturned the public policy argument against payment of an increment due during the interim period, at least when, as in that case, the expired agreement includes a continuation of benefits clause.

June 1983 – “Cobleskill”

b. PERB finds § 209-a.1(e) Requires Payment of Steps During Interim

In *Cobleskill Central School District* (hereafter “Cobleskill”),⁴⁵ the Board stated that the public policy expressed in *Rockland County, supra*, had been reversed by the legislature’s enactment of §209-a.1(e) of the Act, which expresses the “statutory policy governing a public employer’s conduct during the interim, or hiatus period, between collective bargaining agreements,” and extends a public employer’s obligation to continue all terms of an expired agreement during the contractual hiatus period to the payment of salary increments. In *Cobleskill*, the Board found that the employer violated §209-a.1(e) of the Act when it failed to pay unit employees salary increments based upon years of service as required by the salary schedule included in the expired agreement.

1992 – Surrogates and Supreme Court Reporters

c. Constitutional Protection Afforded to Extended Contracts Terms

The New York Court of Appeals held, in *Association of Surrogates and Supreme Court Reporters Within City of N.Y. v. State of New York* (hereafter, *Surrogates*),⁴⁶ that the terms of an expired labor agreement that are extended by § 209-a.1(e) are protected by the Contract Clause of the United States Constitution.⁴⁷ The Court found that, in passing § 209-a.(1)(e), the Legislature created private rights of a contractual nature enforceable against the State. The contract continues after its stated term is complete and those extended terms are afforded protection under the contract clause of the Federal Constitution.

In *Surrogates*, the State attempted to offset anticipated budget shortfalls by enacting an amendment to the State Finance Law implementing a five-day lag payroll where nonjudicial employees of the Unified Court System were paid for nine days,

⁴⁵ 16 PERB ¶3057, *affd sub nom. Cobleskill Cent Sch Dist v Newman*, 16 PERB ¶7023 (Sup Court Albany County 1983), *affd*, 105 AD2d 564, 17 PERB ¶7019 (3d Dept 1984), *motion for leave to appeal denied*, 64 NY2d 610, 18 PERB ¶7006 (1985).

⁴⁶ 79 N.Y.2d 39, 25 PERB ¶ 7502 (1992).

⁴⁷ US Const, Art I, § 10, cl 1. “The Contract Clause of the United States Constitution prohibits a state from passing any law impairing the obligation of contracts.”

rather than 10, in each biweekly salary check over five payroll periods. The wages were deferred and to be paid in lump sums when employees' service was terminated by either retirement or death. The Court held that §209-a.(1)(e) created a "valid and subsisting contract" beyond the agreement's stated term.

1992 – Clarkstown

d. Board distinguished Wage Increases vs Wage System

In *Clarkstown Central School District*, 25 PERB ¶3082 (1992), the Board found that the lump sum increases provided for in each year of an expired, three-year agreement were not subject to continuation pursuant to §209-a.1(e) of the Act upon that agreement's expiration because the lump sum increases were granted instead of, and were the same as, annual percentage wage increases.

The Board's decisions make it clear that there is a difference between a negotiated wage increase, whether that increase is created pursuant to a formula or is a flat increase, and the component parts of a salary schedule, referred to as a wage system. It is the wage system that continues in effect after the expiration of an agreement pursuant to §209-a.1(e) of the Act, unless the parties' agreement includes language indicating that they intended the wage system to end, or "sunset,"⁴⁸ after the agreement's expiration.

In determining whether an agreement's term sunsets, the same rules of contractual interpretation apply as when interpreting any other term:

It is...the nature of the parties' specific agreement as to a given term of their contract which determines the employer's post-expiration obligations with respect to that term under §209-a.1(e) of the Act. In ascertaining the nature of the parties' agreement, the character of the evidence necessary to establish an agreement to a term of a contract for purposes of §209-a.1(e) is no different than the character of the evidence necessary to establish an agreement to any other term of an agreement for any other purpose under the Act... As with any agreement, a sunset agreement can exist in any circumstance in which it can be concluded reasonably that the

⁴⁸ In *Waterford-Halfmoon*, *supra*, at 3162, note 1, the Board explained that a sunset provision "is an agreement between the parties to a bargaining relationship under which one or more terms of a collective agreement are terminated at a specified time, typically upon expiration of the contract, or upon a specified condition."

parties intended to restrict or condition a given term of their collective bargaining agreement.⁴⁹

e. 1994 - Waterford-Halfmoon - Wage System & Sunset

In *Waterford-Halfmoon Union Free School District* (hereafter “*Waterford-Halfmoon*”), 27 PERB ¶3070 (1994), the involved two issues, a salary increment based on years of service and increases based on a formula that took into account salary data from surrounding school districts and led to the creation of a schedule. In *Waterford-Halfmoon* PERB held that the employer was obligated pursuant to § 209-a.1(e) of the Act to advance unit employees on the steps under the last salary schedule created pursuant to the expired agreement, the Board explained:

A salary schedule reflects simultaneously both an individual’s rate of pay for a given year and a wage system. The individual’s rate of pay is represented by the dollar amounts assigned for a given year to each step of the schedule. The wage system exists in the calculation of wage rates based upon component factors. In *Cobleskill*, the component factors of that salary system were education and years of service; here, the component factor of the wage system is years of service only. The particular factors in a wage system may vary by employer, but it is the wage system in whatever its form which is the term of the agreement subject to continuation.”⁵⁰

However, the Board found that the employer was *not* required to create a new schedule with increased salaries using a formula that took into consideration salary data from surrounding school districts because that portion of the agreement was clearly meant to reflect the means of calculating yearly wage increases that the parties did not intend to continue beyond the agreement’s expiration.

f. Waterford-Halfmoon - Contract References to Years Do Not Necessarily Sunset an Increment Provision

In *Waterford-Halfmoon*, *supra*, the Board rejected the argument that “a reference to the years the salary schedules covered sunsetted the wage system represented by the two component parts of those salary schedules.” Further, in *Waterford-Halfmoon*,

⁴⁹ *Id.* at 3160.

⁵⁰ *Id.* at 3161.

the Board also specifically reversed its prior holding in *Suffolk County*⁵¹ where it had held that the reference in an agreement to specific years when increment steps were to be paid sunsetted that term:

We cannot conclude that a simple reference to the years covered by salary schedules reflects an intent to terminate the wage system embodied therein without similarly concluding that a contract's general duration clause serves to sunset all of the terms of the contract upon expiration. The former is merely a more particularized version of the latter and to have a contract's duration clause sunset all terms of that contract obviously defeats the very purpose of §209-a.1(e) of the Act.

g. 2011 – Deer Park - No Violation by Failure to Pay Increment

In *Deer Park Union Free School District*, 44 PERB ¶ 3032 (2011), the charge alleged that the school district violated § 209-a.1(e) of the Act when it failed to pay a vertical step increment on September 5, 2008. The expired contract showed that vertical step advancements were due on July 1, 2005, 2006, and 2007. The Board narrowly construed the pleading and found no violation on the ground that the expired agreement did not impose an obligation to advance unit members a vertical step on the specific date pled, September 5, 2008. The Board also noted that the union had failed to plead or prove alternative theories establishing a past practice or a statutory obligation under § 209-a.1(d) or (e) to continue the timing of those payments.

VII

Triborough, Interest Arbitration, and Legislative Determination **“Standing” on Triborough Rights**

November 1984 – “County of Niagara” (a/k/a “promises, promises”)

a. The Appellate Division held that an Employer Cannot Unilaterally Impose New Contract Terms pursuant to § 209 of the Act

County of Niagara v New York State Public Employment Relations Board, 104 AD2d 1, 17 PERB ¶ 7021 (1984), is important to understanding how § 209-a.1(e) of the Act came to limit employers' authority under § 209 of the Act to engage in legislative imposition and achieve finality of the bargaining process.

⁵¹ 18 PERB ¶4528, *affd*, 18 PERB ¶3030 (1985), *appeal dismissed sub nom. Faculty Assn of Suffolk Community College v New York State Pub Empl Rel Bd*, 18 PERB ¶7016 (Sup Ct Suffolk County 1985), *affd*, 125 AD2d 307, 20 PERB ¶7002 (2d Dept 1986).

Section 209 of the Taylor Law provides elaborate procedures for resolving negotiation impasses. Section 209.3(e)(iv) of the Act allows an employer's legislative branch, in certain circumstances, to unilaterally impose terms and conditions of employment as the final step in the negotiation procedure (referred to as legislative imposition).⁵² In *County of Niagara*, the Fourth Department reinstated PERB's determination in that case, finding that an employer's legislative body is precluded by § 209-a.1(e) of the Act from exercising its right to change terms and conditions of employment through legislative imposition.

In *County of Niagara*, the Fourth Department based its interpretation of § 209-a.1(e) of the Act on the plain language of that statute, and specifically on the language providing that the duty to maintain terms and conditions applies "until a new agreement is negotiate." Citing to § 201.12 of the Act, which defines the term "agreement," the Fourth Department held that "[r]esolving an impasse by legislative action is not the same as negotiating an agreement." *Id.* at p. 3.

The Fourth Department also based its decision on the legislative history of the Triborough Amendment. As set forth above, when signing the initial version of the Triborough Amendment, the Governor's Memorandum indicated that he had received assurances from both legislative houses that the bill would be amended to clarify that terms of an expired collective bargaining agreement would continue only until a new agreement is negotiated—or—"*negotiations are resolved pursuant to the procedures established in section two hundred and nine*" [emphasis added]. Although such a bill was introduced into legislative session, it failed passage (McKinney's Session Laws of NY, 1982, pp. 2631-2632). The Fourth Department, therefore, concluded that the "Legislature is precluded from imposing a settlement which diminishes employee rights

⁵² Section 209.3(e) of the Taylor Law permits the imposition of terms and conditions of employment by a legislative determination where the public employer is a government other than an educational institution (see also § 209.3(f) of the Taylor Law, which applies to educational institutions). Section 209.4 of the Taylor Law permits the imposition of terms and conditions of employment by an arbitration panel where the public employees are police officers, firefighters and certain other employees who work for certain departments of local government.

under an expired collective bargaining agreement.” *County of Niagara, supra*, 104 AD2d 1, at p. 3. As to public policy, the Fourth Department stated:

To hold otherwise would ignore the public policy and purpose of the Taylor Law to “promote harmonious and cooperative relationships between government and its employees and to protect the public by assuring *** the orderly and uninterrupted operations and functions of government” (Civil Service Law, § 200). The power of the Legislature to resolve negotiations unilaterally gives the public employer a decided edge in negotiations. Nevertheless, this power is deemed necessary in the interests of concluding negotiations, particularly since public employees do not enjoy the right to strike as do employees in the private sector. Some means of resolving an impasse is, therefore, necessary. As a limitation on the legislative body, however, section 209-a grants some measure of protection to employees, who will at least be assured of maintenance of the status quo until a new agreement is negotiated.⁵³

**b. PERB’s Decision in *County of Niagara & City of Batavia*
Limitations of § 209 and Legislative Imposition**

In a footnote in its decision in *County of Niagara*,⁵⁴ the Board explained its reading of § 209.1(e) of the Act and stated that its ruling did not effectively repeal § 209 of the Act, since

a legislative body is still free to impose terms and conditions of employment not dealt with in the expired agreement. It may also impose the terms and conditions of employment contained in the prior agreement for an additional year, thereby foreclosing further negotiations for that period. (See *Bethlehem CSD #6*, 5 PERB ¶ 3010 [1972].) Further, an employee organization may consent to the issuance of a legislative determination by a legislative body or to a determination by a public arbitration panel, in which event it would waive its right to require the

⁵³ *Id.*

⁵⁴ *Niagara County Legislature and County of Niagara*, 16 PERB ¶ 3071 (1983), *annulled sub nom. County of Niagara v New York State Public Employment Relations Board*, 122 Misc2d 749, 17 PERB ¶ 1703 (Sup Ct, Niagara County 1984); *judgment of Supreme Court reversed and petition to stay enforcement of PERB’s decision dismissed*, 104 AD2d 1, 17 PERB ¶ 7021 (4th Dept 1984).

public employer to abide by the terms of the expired agreement. Finally, if an employee organization strikes, a public employer is need not abide by an expired agreement thereafter.

The Board referenced the foregoing analysis from *County of Niagara*, in *City of Batavia*, 17 PERB ¶ 3007 (1984). In that case, the employer filed a charge alleging that the union violated § 209.1(d) of the Taylor Law when it submitted a petition for interest arbitration pursuant to 209.4 of the Taylor Law covering nonmandatory subjects of negotiation. The employer also argued in that case that the union violated the Act because the subject matter of the petition covered matters in the parties' expired agreement, and the enactment of § 209.1(e) of the Taylor Law prevented it from implementing an eventual arbitration award.

The Board again held that "an employee organization waives its right to complain under § 209.1(e) when it consents to a determination by a public arbitration panel or by a legislative body," and that the authority of an arbitration panel appointed pursuant to § 209.4, and pursuant to the union's petition, "would not be diminished by the provisions of § 209-a.1(e)." The Board in *Batavia*, therefore, made it clear that, when an employee organization files a petition for interest arbitration, it consents to the issuance of a determination by a public arbitration panel, and waives its right under § 209-a.1(e) to require the public employer to abide by the terms of the expired agreement.

c. *City of Kingston* - Employer Cannot Unilaterally Proceed to Interest Arbitration

In *City of Kingston*, 18 PERB ¶ 3036 (1985), the Board addressed the issue of whether § 209-a.1(e) of the Act precludes a public employer from changing terms and condition of employment pursuant to an arbitration award. In that case, the City had filed a petition for interest arbitration, seeking to resolve an impasse in negotiations with the union representing its firefighters. The union objected to the petition, and filed an improper practice charge alleging that the City's mere filing of the petition for interest arbitration, without its consent, violated § 209-a.1(e) of the Act.

The Board recognized at the outset of its decision, that the union appeared to be more interested in the retaining the benefits in its expired agreement, which included

benefits that were not mandatorily negotiable, than in the potential new benefits it might win at arbitration. *Id.* at p. 3074. Nonetheless, the Board extended its ruling in *Batavia* (which addressed legislative imposition), to arbitration awards issued in police and fire impasse resolutions. The Board stated:

It is clear that the legislative history which persuaded us that legislative determinations may not be imposed upon unconsenting unions also applies to interest arbitration awards.

As in *Batavia*, the Board in *City of Kingston*, also based its decision on the plain language of § 209-a.1(e), which makes it an improper practice for an employer deliberately “to refuse to continue all the terms of an expired agreement until a new agreement is negotiated.”

The Board reiterated in *City of Kingston* that, by petitioning for arbitration, a union consents to the process and thereby waives its right to “*stand on the expired agreement.*” The Board also reiterated that “a union that consents to the interest arbitration process is bound by whatever resolution emerges from that process.” *Id.* at p. 3074. The Board noted in *City of Kingston* that, in the absence of a valid consent, the employer could only be held to have violated § 209-a.1(e) of the Act “if it actually altered the terms of an expired agreement pursuant to such an arbitration award.” The Board therefore held that the City did not violate the Act by merely filing a petition for interest arbitration. However, the interest arbitration panel was found to lack power to resolve the deadlock with respect to the subjects contained in the expired contract, unless the union agreed to the submission of those issues to the panel.

d. What about *City of Ithaca* and Interest Arbitration, and a Union’s Right to Stand on Its § 209-a.1(e) Rights?

In *City of Ithaca*, 49 PERB ¶ 3030 (2016) (appeal pending), the City filed an improper practice charge alleging that the PBA violated its duty to negotiate in good faith, in violation of § 209-a.2(b) of the Act when, after the PBA opposed the City’s petition seeking interest arbitration for the period January 2011 to December 2013, the PBA declined to negotiate with the City for an agreement for the period beginning 2014.

In that case, the City and the PBA had engaged in collective negotiations for an agreement for the period beginning January 2012. When the matter was not resolved

after the parties' participation in mediation pursuant to the Act's impasse procedures, the City filed a petition seeking binding interest arbitration. In its response to the petition, the PBA opposed interest arbitration, stating that it would not participate in the arbitration phase of the Act's impasse procedure and was electing, instead, to "stand on the continuation of the expired agreement for the two year period over which an Interest Arbitration Panel would have had jurisdiction, namely 2012 and 2013." *Id.* Based on the PBA's position, PERB declined to process the City's petition for interest arbitration.

Thereafter, the City sent a letter to the PBA advising that it was the city's position that the terms and conditions for 2012 and 2013 had been resolved "by virtue of the PBA electing to stand on the expired agreement by refusing to participate in binding interest arbitration process," and sought to begin negotiations with the PBA for an agreement that would begin January 1, 2014. The PBA responded to the City with a letter stating that it disagreed that it had, by its refusal to participate in the arbitration process, forfeited its right to negotiate contract terms for the period covering 2012 and 2013 and it demanded negotiations for the period beginning January 1, 2012, and not January 1, 2014, as sought by the City. Thereafter the City filed the charge alleging that the PBA had violated § 209-a.2(b) of the Act when it refused its request to negotiate for the terms of an agreement beginning January 1, 2014.

More than once in its decision, the Board emphasizes the Act's interest in finality and that finality was not achieved despite the fact that the parties negotiated in good faith and exhausted PERB's impasse procedures. The Board also notes that the employer's efforts to achieve finality were "thwarted" by the PBA's electing to stand on its rights under § 209-a.1(e) of the Act:

although the parties here are entitled to a final determination of their contractual rights through mandatory interest arbitration, one party can, by standing on its *status quo* rights, prevent such a final determination from taking place.

The Board further states that "the process designed to achieve finality was effectively thwarted, despite the City's best efforts to achieve that finality." *Id.* The Board again repeats that the City negotiated in good faith and that "only the PBA's

exercise of its right to decline to participate in interest arbitration prevented such a final resolution.” *Id.*

The Board then finds as follows:

As a result, the corollary question arises of whether the other party, which has exhausted all statutory negotiation and conciliation processes in good faith, can be compelled to negotiate over the *status quo* period even though agreement was prevented by external circumstances wholly outside that party’s control. We find, as explained more fully below, that the duty to negotiate in good faith over the *status quo* period, here 2012 and 2013, has been satisfied. *Id.*

The Board repeats that finding, stating that the City satisfied its duty to negotiate “for the applicable duration of an interest arbitration award,” that is, for calendar years 2012 and 2013. The Board’s analysis in *Ithaca* makes no mention of the legislative history that drove the analysis in both *County of Niagara*⁵⁵ and *City of Kingston*.⁵⁶

However, the Board’s decision in *Ithaca* may be seen as consistent with *County of Niagara* to the extent that, in that case, the Board stated that its reading of § 209.1(e) of the Act did not effectively nullify the impasse procedures of § 209 of the Act. Since *Niagara* dealt with legislative imposition, the Board in that case held that a *legislative* body

is still free to impose terms and conditions of employment not dealt with in the expired agreement. *It may also impose the terms and conditions of employment contained in the prior agreement for an additional year, thereby foreclosing further negotiations for that period* [emphasis added].

The Board’s decision in *Ithaca*, therefore, might be seen as an extension of the analysis of *County of Niagara* to cases involving binding interest arbitration. That is, the interest arbitration panel, as the legislative body, may impose the terms and conditions of employment contained in the prior agreement. The variation in the period of

⁵⁵ *Niagara County Legislature and County of Niagara*, 16 PERB ¶ 3071 (1983), *annulled sub nom. County of Niagara v New York State Public Employment Relations Board*, 122 Misc2d 749, 17 PERB ¶ 1703 (Sup Ct, Niagara County 1984); *judgment of Supreme Court reversed and petition to stay enforcement of PERB’s decision dismissed*, 104 AD2d 1, 17 PERB ¶ 7021 (4th Dept 1984).

⁵⁶ 18 PERB ¶ 3036 (1985), *and petition to stay enforcement of PERB’s decision dismissed*, 104 AD2d 1, 17 PERB ¶ 7021 (4th Dept 1984).

imposition, two years instead of the one year, can be accounted for by the differences in those procedures.

Additionally, in *Ithaca*, the Board takes the added step of discussing what occurs when a union includes in its demands for negotiations proposals that pertain to terms and conditions of for the period of imposition of the terms of the prior contract. The Board, finds that a union does not violate the Act by doing so, as long as it does not impose the negotiations of those terms as a condition on bargaining, and as long as it does not insist on those terms “to impasse.” In other words, the Board treats the demand for negotiations of the period of imposition as a nonmandatory, but permissive subject of negotiation.

Speaker Biographies

Taylor Law at 50

May 10, 2018 | 3:00 p.m. – 3:50 p.m.

Concurrent Two:

The *Triborough* Doctrine and Statute:
A Catalyst or Hindrance to Harmonious Labor Relations?

ANGELA M. BLASSMAN

Angela M. Blassman has been an Administrative Law Judge with the PERB's Brooklyn office since 1993. Before joining PERB, she worked in a New York City law firm, handling a wide range of legal matters, including labor and employment cases, criminal and civil litigation and appellate work. She has participated as a speaker for the New York State Bar Association and at other programs addressing Taylor Law issues and is a member of the New York State Bar Association's Labor and Employment Law Section. She graduated with honors from Brooklyn Law School in 1986, where she was a member of the International Law Journal.

RICHARD K. ZUCKERMAN

Richard K. Zuckerman represents management in all public and private sector labor and employment law areas, including collective bargaining, discipline and litigation-related matters. His public sector clients include school districts, libraries, cities, counties, towns, villages and fire and ferry districts. He also serves as general counsel to school districts and as a hearing officer in General Municipal Law Section 207-a and 207-c disputes.

Mr. Zuckerman is the Chair of the New York State Bar Association (NYSBA's) Local and State Government Law Section and a former Chair of the NYSBA's Labor and Employment Law Section, as well as a former President of the New York State Association of School Attorneys. He has also served as a member of the NYSBA's House of Delegates. Mr. Zuckerman is a Fellow of the Governors of The College of Labor and Employment Lawyers, a Fellow of the American and New York Bar Foundations, and an Inaugural Member of the Board of Advisors for the St. John's University School of Law Center for Labor and Employment Law. He is one of the co-editors for the New York State Bar Association's treatise "Lefkowitz on Public Sector Labor and Employment Law, Fourth Edition," as well as its Third Edition and Supplements, and was an editor for the American Bar Association's treatise "Discipline and Discharge in Arbitration" and Supplement. In addition, he was a contributing author to the 6th edition of the ABA's contract arbitration treatise "How Arbitration Works" (Elkouri & Elkouri), and has co-authored numerous articles, including those entitled "Romance in the Workplace: Employers Can Make Rules if They Serve Legitimate Needs" and "Romance in the Workplace: To What Extent Can Employers Dictate the Rules?"

Mr. Zuckerman has been named as a Best Lawyer in America© since 2012 and was the Best Lawyers' 2017 "Lawyer of the Year: Labor Law – Management" for Long Island and the 2015 New York City "Labor Law – Management "Lawyer of the Year." He has repeatedly been named a New York Super Lawyer® in Labor and Employment Law, a Who's Who in American Law®, and a Long Island Business News' Who's Who in Labor Law. He has presented at numerous programs regarding various labor, education and employment law-related topics. He is admitted to practice before the United States Supreme Court, the federal Second Circuit Court of Appeals and the Eastern and Southern Districts of New York, as well as New York State courts. Mr. Zuckerman is a graduate of the Columbia University School of Law, where he served as Director of the First Year Moot Court program. He graduated summa cum laude from the State University

of New York at Stony Brook, where he was elected to Phi Beta Kappa in his junior year and received the William J. Sullivan Award, the University's most prestigious academic and service award.

MICHAEL KRAUTHAMER

Michael Krauthamer has worked primarily in the area of public sector labor relations since 1995. He is currently employed by the New York State United Teachers (NYSUT) as a Labor Relations Specialist working out of NYSUT's Suffolk County Regional Office. Mike represents both public and private sector unions in collective bargaining, grievance arbitration, disciplinary matters, civil service issues and matters before the PERB and the NLRB.

Mike was previously a partner in the Melville law firm Lamb & Barnosky where he represented municipalities including school districts, counties, towns and villages in all types of labor and employment matters. Prior to that, Mike was a labor arbitrator, mediator and hearing officer in the public and private sectors, counsel to the Suffolk County Public Employment Relations Board and a Labor Relations Specialist for the Civil Service Employees Association.

Mike has lectured extensively for the NYS Bar Association on public sector employment law issues and has appeared on News 12, Channel 55 and NBC's Today in New York on labor law issues and was listed in Long Island Business News 2010 Who's Who in Labor Law on Long Island. He is an editor of Impasse Resolution Under the Taylor Law 2d edition, published by the New York State Bar Association. He has also served as an instructor at Dowling College on labor management relations and dispute resolution and taught School Policy and Law for the Sage Colleges as part of its educational doctorate program.

He received his law degree, cum laude, from Suffolk University Law School in Boston, Massachusetts and his undergraduate degree, cum laude, from the University of Massachusetts, Amherst.

Concurrent Three

Taylor Law at 50

May 10, 2018 | 3:00 p.m. – 3:50 p.m. | Fort Orange Ballroom 7 & 9
1.0 areas of professional practice CLE credit

Injunctive Relief Under the Taylor Law: An Update and Discussion

This session will discuss the history of injunctive relief under the Taylor Law, its early cases, and an update of cases over recent years, including PERB's denials and petitions for injunctive relief in court. Panelists will provide insight into developing applications and responses, difficulties encountered, and how the proceedings help or hinder settlements or the litigation of the underlying improper practice charge.

Panelists:

David P. Quinn, General Counsel, NYS Public Employment Relations Board

Ed Aluck, General Counsel, NYS Public Employees Federation

Amy Petragnani, Associate Counsel, NYS Governor's Office of Employee Relations

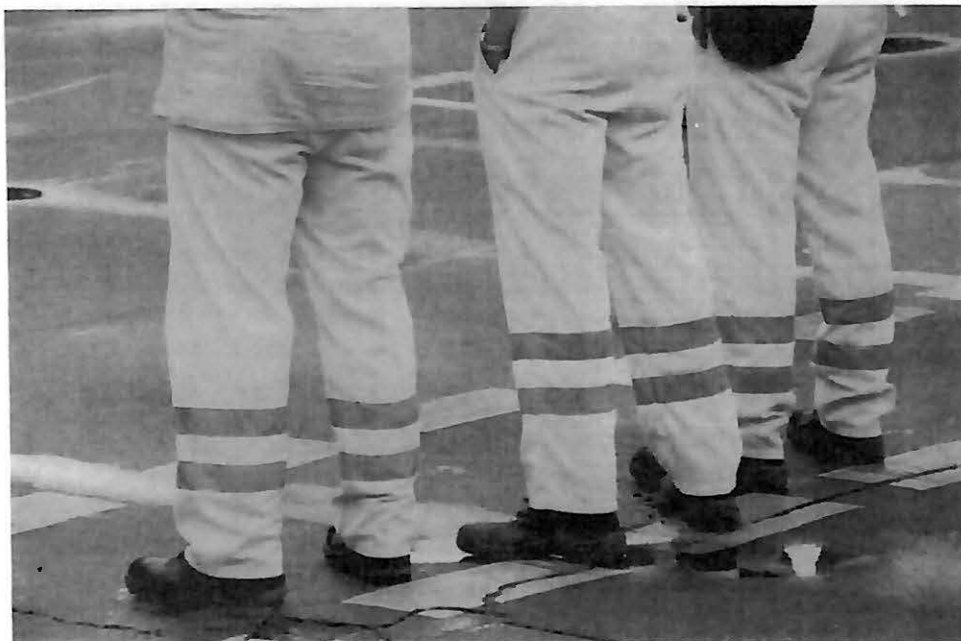
Including:

Injunctive Relief under the Taylor Law: A Primer

New Rules Governing Applications for Injunctive Relief

Decisions of Interest

(Available online at www.nysba.org/taylorlawcoursebook/)



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 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 optional³⁰ 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

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

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 Union of N.Y. (Profit 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).



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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.

Speaker Biographies

Taylor Law at 50

May 10, 2018 | 3:00 p.m. – 3:50 p.m.

Concurrent Three:

Injunctive Relief Under the Taylor Law:
An Update and Discussion

DAVID P. QUINN

Mr. Quinn is General Counsel for the New York State Public Employment Relations Board and head PERB's Office of Counsel. He has been with PERB since January 1984, serving 15 years as an Administrative Law Judge, 8 years as Assistant Counsel, and 8 years as Associate Counsel and Director of Litigation. He received his J.D. from Albany Law School in 1982, an M.A. from the Cooperstown Graduate Programs of the State University at Oneonta in American Folk Culture, and a B.A., *cum laude*, from the State University at Albany. He is a member of the New York State Bar Association, Labor and Employment Section, and has been a contributor to each edition of Public Sector Labor and Employment Law, published by the New York State Bar Association.

EDWARD ALUCK

Edward Aluck is the General Counsel of the New York State Public Employees Federation, AFL-CIO.

Edward's role is to manage and oversee the function of PEF's Office of General Counsel, which serves as PEF's in-house legal department to PEF members in the Professional, Scientific & Technical unit of employees of New York State. His responsibilities include providing strategic and tactical legal advice and representation on all matters relating to PEF. This includes providing training, guidance and support to PEF's attorneys in all aspects of their job, including representing union members in litigation, employee disciplinary proceedings, administrative matters and various legal inquiries. He also handles union governance issues, provides advice and training to various PEF departments, and responds to inquiries from officers, members and staff on a wide variety of topics of importance to the organization, and represents PEF in its role as employer and self-insured health care plan.

Prior to being appointed as General Counsel, he served as PEF's Deputy General Counsel for over five years. Before that, he began with PEF in 1999 as a law clerk and then, upon being admitted to the New York State Bar, he served as an Associate Counsel for approximately 11 years, where he regularly managed a caseload that primarily involved representing PEF and individual union members in labor, employment, civil service, and other related matters. He has also represented hundreds of PEF members in employee disciplinary proceedings. Edward is a graduate of Albany Law School and the State University of New York. He is admitted to the Bar of New York State, Connecticut, and the Northern, Southern and Eastern Federal Districts of New York.

AMY M. PETRAGNANI

Amy M. Petragnani is Acting Deputy Counsel to the New York State Governor's Office of Employee Relations (GOER), a position she has held since June of 2009. As Acting Deputy Counsel, Amy is responsible for overseeing the day to day operations of GOER's Counsel's Office, which is responsible for, among other things, representing Executive Branch agencies in contract grievance arbitrations, improper practice charges before the Public Employment Relations Board, and in binding interest arbitration proceedings. Amy also provides legal advice to GOER's General Counsel and to Executive Branch agencies in all matters involving public sector labor

law, including issues related to discipline, negotiations, litigation, application of State and federal laws, and the application and implementation of Statewide and agency policies and legislation.

Prior to becoming Acting Deputy Counsel, Amy served as Associate Counsel and Assistant Counsel with GOER. She is a graduate of Albany Law School and Boston College.

Plenary Three

Taylor Law at 50

May 10, 2018 | 4:00 p.m. – 5:15 p.m. | King St Ballroom
1.5 areas of professional practice CLE credit

The Taylor Law over the Years: A Discussion with Former PERB Chairs

Panelists:

Seth H. Agata, William A. Herbert, Michael R. Cuevas, Pauline R. Kinsella

Moderator:

John F. Wirenius

Including:
The Taylor Law at 50

The Taylor Law at 50

John F. Wirenius,
Chair, NYS PERB

I

“The Rest is Procedural”

In 1969, Jerome Lefkowitz, then Deputy Chair of the Public Employment Relations Board (“PERB”), used the story of the pagan who asked the great Jewish sage Hillel to explain the substance of Judaism—while standing on one foot—to make a point. As Jerry retold the story, Hillel raised one foot, and quickly answered, “The substance of Judaism is to love thy neighbor as thyself. All the rest is procedural. Now you must go and study the procedures so as to be able to accomplish the substance.”¹ Jerry then drew the parallel:

The substance of the Taylor Law can also be stated briefly. It is that public employees have the right to join or not to join any employee organization of their own choosing, and that public employers are required to negotiate with the employee organizations which have been chosen by their employees to represent them. All the rest is procedural.²

This statement holds true today, a half century after the enactment of the Taylor Law.³

The relegation of “all the rest” to “procedure” may seem jarring, but bear in mind that “sometimes substantive values cannot be achieved except by reshaping the process for an area of law. Thus, in addition to substantive rules arising from procedural

¹ Jerome Lefkowitz, “The Taylor Law, Discrimination and Nontenured Teachers,” *Labor Law Journal*, Sept. 1969 575, 575 (Chicago, CCH 1969). The story as given by Jerry is a variant of Talmud Shabbat 31a. See 1 THE BABYLONIAN TALMUD: TRACT SABBATH (Michael L. Rodkinson. tr. (1903)).

² *Id.*

³ The Public Employees’ Fair Employment Act, Article 14 of the Civil Service Law was enacted April 21, 1967, and effective on September 1, 1967. L. 1967, c. 392. The statute is generally known as the “Taylor Law” as it is based upon the recommendations in a report to the Governor of a committee headed by Professor George W. Taylor of the University of Pennsylvania.

opportunities or shortcomings, procedural rules often serve substantive objectives.”⁴

Or, as Oliver Wendell Holmes put in as long ago as 1881, “whenever we trace a leading doctrine of substantive law far enough back, we are very likely to find some forgotten circumstance of procedure at its source.”⁵ From almost the dawn of the Anglo-American system, through the enactment of the Federal Rules of Civil Procedure in 1938 and beyond, substantive legal reform has been accomplished by crafting procedures that “nudge” or steer the parties to a desired outcome.⁶

The Taylor Law is just such a statute; it creates what has been called a “choice architecture”⁷ system, one that guides the parties to a desired outcome. In the Taylor Law, that preferred outcome is for the parties to collectively negotiate terms and conditions of employment and to resolve differences at the bargaining table, until it is clear that no such resolution is possible at that time. Only in the last resort, and only for employees in specific public safety positions, is arbitration available to settle a contract, and even that is for a sharply limited time.⁸

⁴ Scott M. Matheson, “Procedure in Public Person Defamation Cases: The Impact of the First Amendment,” 66 Tex. L. Rev. 215, 224 (1987).

⁵ Oliver Wendell Holmes, THE COMMON LAW 253, 252-254 (1881).

⁶ See Joseph Biancalana, “For Want of Justice: Legal Reforms of Henry II,” 84 Colum L Rev 433, 434 (1988); Paul Brand, “Henry II and the Creation of the Common Law,” in Christopher Harper-Bill & Nicholas Vincent, eds., HENRY II: NEW INTERPRETATIONS 215-240 (2007); Stephen N. Subrin, “How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective,” 135 U. Penn L. Rev. 909 (1987).

⁷ Richard H. Thaler, Cass R. Sunstein & John P. Balz, “Choice Architecture,” in Eldar Shafir, THE BEHAVIORAL FOUNDATIONS OF PUBLIC POLICY, 428, *et seq.* (2012); see generally, Richard H. Thaler, Cass R. Sunstein, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WELFARE, AND HAPPINESS (2008).

⁸ For most other non-pedagogical employees, if no agreement results after fact-finding, the appropriate legislative body may, for one budget period, “take such action as it deems to be in the public interest, including the interest of the public employees involved.” Civ Serv. Law § 209.3 (e) (iv). However, under the so-called “Triborough Amendment,” which made it an improper practice for an employer to “to refuse to continue all the terms of an expired agreement until a new agreement is negotiated,” the “legislative body is precluded . . . from imposing a settlement which diminishes employee rights under an expired collective bargaining agreement.” *County of Niagara v. Newman*, 104 AD2d 1, 4, 17 PERB ¶ 7025, 7054-7054 (4th Dept 1984), citing 1982 Laws c. 921, adding § 209-a (1) (e). For pedagogues, the Taylor Law only allows negotiation, with statutory non-binding impartial assistance, until agreement is reached. § 209.3 (f).

At the core of the Taylor Law, as Jerry's parable suggests, are two correlative values—the recognition of the right of employees to be represented and to bargain collectively, and the duty on both the employer and the selected employee organization to negotiate over terms and conditions of employment. As Governor Nelson A. Rockefeller phrased it in his memorandum approving the bill, the Taylor Law's "primary impact will be to impose upon the public employer, the public employee and the employee organization a joint responsibility for solving employment relations without injury to the public interest."⁹ Professor George W. Taylor, who chaired the committee that proposed the law that is called by his name, agreed. For Taylor, the law's reciprocal expansion of employee rights, which was concomitant with reaffirming employee organizations' duty to the public, made it a landmark: "*Effective participation by employees in the determination of their conditions of employment*," he emphasized (quite literally), "*is the basic idea behind the new law*."¹⁰

That basic idea of employee input through collective bargaining has flourished in New York, as has the value of mutual, reciprocal duties owed by both management and labor not only to each other, but, ultimately, to the people of the State. New York's Taylor Law has respected those reciprocal duties, with the vast majority of public sector employees' terms and conditions of employment being negotiated between management and labor, while collective negotiations have also ensured the delivery of services with almost no interruptions due to workplace disputes.

⁹ L. 1967, "Public Employees' Fair Employment Act of 1967," Governor's Memoranda, at 1528. Those reciprocal duties are acknowledged as well in the statute's text; for example, § 207 (c), provides that in determining the appropriate composition of a bargaining unit, "the unit shall be compatible with the joint responsibilities of the public employer and public employees to serve the public."

¹⁰ George W. Taylor, "Strikes in Public Employment," *Good Government* (vol. 85: 1), 9, 10 (1968) (italics in original); see also GOVERNOR'S COMMITTEE ON PUBLIC EMPLOYEE RELATIONS FINAL REPORT, 19.

The achievement of the Taylor Law is especially impressive in the light of the performance of its predecessor, the Condon-Wadlin Act, in effect from 1947 until its repeal and replacement by the Taylor Law in 1967.¹¹ Condon-Wadlin simply barred strikes, and deemed strikers to have abandoned their jobs, allowing the employer to re-hire those employees if it chose to, but requiring the erstwhile strikers to serve a five-year probationary period, and barring any pay raises for three years after their re-hiring.¹² While Condon-Wadlin was formidable on paper, “[t]he prevailing viewpoint, however, was that the act had been unenforceable.”¹³ The problem of enforcement was not restricted to New York and Condon-Wadlin; as the great legal scholar Glanville Williams summarized:

Attempts have been made to make strikes illegal by statute in Australia and New Zealand and also in England when the National Arbitration Order was in force. Such attempts remain virtually dead letters because of the practical difficulties of enforcement. It is not practical politics to imprison or fine hundreds of thousands of strikers; and even if legal action is directed against their leaders, the result generally is to turn them into martyrs and prolong the dissension.¹⁴

Under the Taylor Law, unilateral action—whether by management or by labor—is heavily disincentivized; the statute prohibits employers from “refus[ing] to continue all the terms of an expired agreement until a new agreement is negotiated”—unless the union has violated its own obligation not to strike.¹⁵ Unilateral action (i.e., a strike) by a union results in fines and forfeiture of agency fee and dues deduction privileges, as well

¹¹ 1947 N.Y.Laws ch. 392; see William A. Herbert, Philip L. Maier, & Richard Zuckerman, eds, 1 LEFKOWITZ ON PUBLIC SECTOR EMPLOYMENT LAW 24 (4th Ed 2016).

¹² Herbert, *et al*, LEFKOWITZ ON PUBLIC SECTOR EMPLOYMENT LAW at 24.

¹³ *Id* at 25.

¹⁴ Quoted in Theodore W. Kheel, REPORT TO SPEAKER ANTHONY J. TRAVIA ON THE TAYLOR LAW 12-13 (Feb. 21, 1968).

¹⁵ Civil Service Law §§ 209-a.1 (e); 210.

as freeing management to act unilaterally pursuant to the Triborough Amendment. Again, the point of the statute is to draw the parties toward a negotiated resolution. This reflects former Board Chair Pauline Kinsella's description of "the basic social contract which underlies the public policy in favor of collective bargaining: the employer gives up some of its power to employees, and, in return, work will be performed efficiently and without disruption."¹⁶

Controversial as it was at the time, the prohibition of strikes was seen by the framers of the Taylor Law as a necessary precondition of productive collective negotiation between public employers and employees. However, it is fair to note that the authors of the Taylor Law, and its early implementers at PERB, had strongly held general philosophical objections to strikes against government employers. Professor Taylor declared that the prohibition of strikes, "I believe, is designed not simply as protection against the interruption of vital services, but—even more importantly—to preserve the processes of representative democratic government to which we are dedicated."¹⁷

Likewise, Robert Helsby, PERB's first Chair, viewed "a strike against the government [a]s in the nature of insurrection, or at least civil disobedience."¹⁸ He also contended that the stakes were fundamentally different, explaining that "government, unlike private employers, . . . cannot liquidate its business and reinvest the funds elsewhere; it is obliged by law to provide specified services, some essential, others less

¹⁶ Pauline R. Kinsella, "The Challenges Faced by the Collective Bargaining Process," PERB-Cornell-NYS OCB Conference, Dec. 2, 1997, p. 4.

¹⁷ George W. Taylor, "Strikes in Public Employment" at 10 (emphasis in original).

¹⁸ Robert D. Helsby, *Report to the Select Joint Legislative Committee on Public Employees' Relations* at 3 (1970).

essential.”¹⁹ Finally, Helsby was concerned that “the injury which a strike by government employees inflicts upon innocent victims is greater than that which follows most strikes in the private sector.”²⁰

Jerry Lefkowitz put the matter more bluntly, describing “collective bargaining, insofar as it relies upon the strike threat,” as a “throwback” to “Ordeal by Battle,” and that “in labor disputes, Ordeal by Battle is more likely to hurt innocent bystanders” than had been the case at common law.²¹ Pointing out that the “history of jurisprudence has been the gradual displacement of such tests of strength by rational judgments,” Jerry maintained that, unlike a private sector strike, which he described as a “test of economic strength,” a public sector strike is “a political challenge,” an effort to “change the public climate” by inflicting discomfort on the citizenry.²² Indeed, Jerry wrote that an illegal strike should be viewed as an act of civil disobedience, but not a justified one absent “a situation where a government by its provocative conduct may precipitate a situation which suppresses the dignity of its employees.”²³ Apart from their rule of law and democratic-theory based dislike for strikes, Lefkowitz, Taylor, Helsby, and Rockefeller all viewed strikes as subverting the bargaining relationship by violating the reciprocal duties inherent in the right to negotiate.

¹⁹ *Id.*

²⁰ *Id.* at 3-4.

²¹ Jerome Lefkowitz, “Civil Servants and the Strike,” *Good Government* (vol. 85: 1), 15, 16 (1968). Although Jerry was not a member of the Taylor Committee and did not have any role in drafting the statute, he served as Deputy Chairperson from the agency’s formation until 1987. In that capacity, he was the architect of PERB’s Rules of Procedure.

²² *Id.* at 18.

²³ *Id.* at 20. Lefkowitz did acknowledge that provocation arising to a denial of the fundamental dignity of labor could justify or excuse a strike. Absent such provocation, Lefkowitz rather harshly opined that “for government employees to engage in civil disobedience in order to fatten their pay envelopes by a few dollars” was “an abuse of the technique.” *Id.*

In the past half-century, unilateral action by either labor or management has greatly diminished. Public employers throughout the state have successfully acclimated to negotiating terms and conditions of employment, and unions have found their best recourse at the table, not in the streets. While the advertising disclaimer that past performance is no guarantee of future results must be borne in mind, the overwhelming majority of public employers and employee organizations have healthy, well-functioning relationships, as established by the two metrics that matter: reaching agreements and resolving disputes.

II

A Neutral, Independent Agency

Writing about those early years after the enactment of the statute and the formation of PERB to administer the law, Jerry noted that the future of both “did not appear very promising”:

Passed by a reluctant legislature under pressure from an aggressive governor, it was opposed by most local governments and practically all public sector unions. The local governments were disturbed that the statute’s policy of fostering collective bargaining would compromise the authority of elected government to manage municipal affairs. The unions, for their part, were unwilling to settle for a law that continued to deprive them of the right to strike, and they were convinced that a law administered by an agency the heads of which were appointed by the governor, the boss of the largest contingent of public employees, could not be trusted.²⁴

²⁴ Jerome Lefkowitz, “Joseph Crowley—A Dedicated Public Servant,” 54 Ford. L. Rev. 468, 469 (1986).

Despite these bleak circumstances, “the Taylor Law and the Board became accepted fixtures within a few years after the statute took effect.”²⁵ The late labor historian Ronald Donovan wrote that PERB’s handling of the hotly contested representation proceedings for state employees in 1967-1969 “was absolutely critical in determining the future of the agency.”²⁶ Had the agency been overly deferential, “the result would have confirmed the allegations of the law’s greatest critics.”²⁷ Instead, Donovan wrote, PERB “came through a difficult period with its independence and its integrity secured,” noting that a “good deal of the credit for this success belongs to PERB’s chairman, Robert Helsby.”²⁸

After he left PERB, Bob Helsby explained his vision of how PERB was meant to function:

At the heart of a responsible labor relations system is an independent and impartial group of professional neutrals who decide the controversial issues with consistency and integrity on the basis of objectivity and merit. These professionals must, of course, be allowed to be insulated from political interference and lobbying.²⁹

Harold Newman, who succeeded Bob as Chair, hewed to the same vision of his role. As he put it, “We see our role as implementers of the statute, not as policymakers in any sense that we shall try to influence major changes in the law,” adding that “We try to maintain our neutrality and objectivity, and leave the public policy questions to the

²⁵ *Id.*

²⁶ Ronald Donovan, *ADMINISTERING THE TAYLOR LAW: PUBLIC EMPLOYEE RELATIONS IN NEW YORK*. 100 (Ithaca, NY: ILR Press) (1990).

²⁷ *Id.*

²⁸ *Id.* In memorializing Board member Joseph Crowley, Lefkowitz described Helsby as “a man of rectitude, and a superb administrator,” who “organized a strong staff and motivated it to perform in accordance with the principles that he and Joe had set.” Jerome Lefkowitz, “Joseph Crowley—A Dedicated Public Servant,” 54 *Ford. L. Rev.* 468, at 469.

²⁹ Robert D. Helsby, “One Man’s View of the Taylor Law—Thirteen Years Later,” Governor’s Conference on Public Sector Bargaining, at 7 (November 12, 1980).

Governor and the Legislature.”³⁰ PERB’s Executive Director, Ralph Vatalaro, agreed, emphasizing that “[t]he best we can do is to gain the respect of the two parties to a dispute, that we do our jobs in an objective and fair manner.”³¹ Vatalaro pointed out the classic neutral’s dilemma: “We cannot expect to have both sides to a specific controversy like what we do—because in virtually all that we do there is a winner and a loser, and somebody, PERB, usually, has to make the pronouncement.”³²

At times, this has created heat for PERB and its personnel—Alton Marshall, an alumnus of the Rockefeller Administration, remembered that “Helsby was considered a god-damned Benedict Arnold;”³³ at around the same time, the editor of *The Civil Service Leader* denigrated Jerry Lefkowitz and Director of Representation Paul Klein as would-be “Labor Messiahs” and demanded their firing.³⁴ Even George Taylor “often remarked, somewhat ruefully, that the resulting enactment was called the Taylor Law only because the politicians knew that Taylor would never run for office.”³⁵

In the early years, denunciations by labor as well as friction with employers was common; Helsby noted that “[w]ithin a month after the Taylor Law was passed, some 15,000 unionists gathered in Madison Square Garden to denounce the Law and establish a fund for its repeal.”³⁶ At around the same time, labor leader Victor Gotbaum

³⁰ “Fifteen Years of the Taylor Law,” *The Chief/Civil Service Leader*, August 27, 1982 at p 1, 3.

³¹ *Id.* Ralph Vatalaro was appointed Director of Information and Education upon the founding of the agency; he subsequently served as Executive Director from 1970 to 1990.

³² *Id.*

³³ Summary of Interview with Alton Marshall, April 30, 1985, at p 6; see Donovan, ADMINISTERING THE TAYLOR LAW, at 77.

³⁴ Donovan, ADMINISTERING THE TAYLOR LAW, at 85.

³⁵ Helsby, “One Man’s View of the Taylor Law—Thirteen Years Later,” at 4.

³⁶ Robert D. Helsby, “Labor Relations in the Public Sector—A Political Approach for a Democratic Society,” presented at the IRRA Annual Spring Meeting at p. 10 (May 3, 1973).

condemned the Law's anti-strike provisions at the Tri-County Long Island Labor-Management Institute forum.³⁷

Currently, and for the past four decades, no such ructions disfigure PERB's relationships with the parties. That is not to say that specific decisions have not been controversial, or that both sides to a given dispute are always pleased with the outcome of any given case; I recall as Deputy Chair attending a public meeting at which PERB's non-intervention in a matter in which no proceeding had been commenced was scathingly criticized. The most supportive statement in the room was that I was "a nice man who shouldn't be blamed for the Board's mistakes." (I suspect I have since lost that immunity.)

Case-specific unhappiness with particular outcomes, though, does not remotely resemble the systemic objections to the Taylor Law and to PERB itself that marked the early days. In large part, I believe, this reflects the agency's success in preserving its integrity and its neutrality. While this reflects great credit on the staff and Board members of PERB over the years, it also reflects on the architectonic structure of the agency. Put more simply, neutrality and freedom from political pressure are baked into the structure of PERB.

As former Executive Director Ralph Vatalaro said in an interview almost 30 years ago, "PERB is independent with built-in safeguards to keep politics out of the Board."³⁸ Board members "are appointed for six-year terms, one each on odd numbered years."³⁹ In addition to the staggered terms, the Taylor Law provides that "Not more than two

³⁷ Sy Safransky, "Taylor Act Denounced by Labor," *Long Island Press*, October 18, 1967, at p 14.

³⁸ "PERB Neutrality Important," *The Public Sector*, December 13, 1978, at p 7 (internal quotation marks omitted).

³⁹ *Id.*

members of the board shall be members of the same political party,” another check against political pressure.⁴⁰

Most importantly, however, as Vatalaro noted in 1978, the “governors have made it a practice to appoint only highly qualified and experienced people to the Board.”⁴¹ In fact, “all the board members (since 1967) have been experienced in labor relations, arbitration, mediation, and/or labor law prior to their appointments.”⁴² Two years later, Helsby wrote that:

We in New York have been fortunate to have had Governors who have understood the collective bargaining process and the need for a neutral agency of this type. There has been no attempt to politicize its organization, its procedures, operations, or the substance of its decisions. . . . Likewise it [New York] has every right to be proud of the high caliber of the members it has appointed to the Board and the reputation the Board has earned for competence and integrity, not only in New York, but across the Nation.⁴³

From my position as Chair in 2017, I firmly agree with Bob Helsby that the independence, integrity and quality of the Board and its members—and I would add its Directors, Administrative Law Judges, and Conciliation staff—are the hallmarks of PERB. I also agree with Pauline Kinsella that they are the primary reasons for its success and the success of the Taylor Law for fifty years.

⁴⁰ Civil Service Law § 205 (1).

⁴¹ “PERB Neutrality Important,” *The Public Sector*, December 13, 1978, at p 7.

⁴² *Id.*

⁴³ Helsby, “One Man’s View of the Taylor Law—Thirteen Years Later,” at 8.

III

“Accomplishing the Substance”

According to PERB’s internal statistics, 85% of public employers reach agreements with the unions representing their employees. 15% of impasses involve public safety employees, and approximately 40-45% of these go to binding arbitration.⁴⁴

Additionally, the Taylor Law has virtually eliminated strikes—since 2012, only one declared strike has taken place, involving adjunct faculty at Nassau Community College in 2013.⁴⁵ While there have been several strike charges filed in the past decade, most have involved equivocal behavior such as suspected slowdowns or sick outs. Such charges have averaged approximately two or fewer per year, and have been settled without adjudication.

Finally, 80% of improper practice claims are settled without a decision with the mediation efforts of PERB’s Administrative Law Judges; the rest are resolved by binding decisions. Over the last decade, exceptions to the Board have been filed in about one-third of the cases in which ALJs have issued decisions. By the time an appeal to the Board has been filed, settlement is much less likely; the Board has issued, on average, one-third the number of decisions the ALJs have. From this admittedly rough handling of PERB’s internal and published data, an imprecise but salient portrait—not a photograph, perhaps, but at least a water color—of labor relations in New York State

⁴⁴ Conciliation Statistics:

- Approximately 2100 contracts are negotiable each year
- Approximately 15% of negotiations reach impasse (300-350) each year
- Approximately 70 % of all impasses settle in mediation
- Approximately 15% of the cases involve police and firefighters where Interest Arbitration is the final step - slightly fewer of these cases settle in mediation (55-60%).

⁴⁵ See *Nassau Community College*, 36 PERB ¶ 3006 (2014).

can be glimpsed. That picture is one of a system that is largely successful, with most disputes being settled, rather than going to a binding decision. That picture represents the Taylor Law functioning as intended.

Conciliation

The fact that the vast majority of bargaining units (85%) and employers are able to reach collective bargaining agreements without PERB intervention alone reflects a fundamentally healthy system of collective bargaining throughout the State. For those units and employers, Bob Helsby's maxim that "the best agreement is one which the parties reach themselves" has been brought to fruition.⁴⁶

Strangers to PERB's conciliation processes might find the path leading to reaching binding interest arbitration counter-intuitive. In other contexts under New York state law, the Court of Appeals has stated that "arbitration is considered so preferable a means of settling labor disputes that it can be said that public policy impels its use."⁴⁷

Despite this general preference by the courts in other circumstances, the Taylor Law only makes compulsory binding arbitration available to create a final resolution when the parties cannot reach a collective bargaining agreement for a subset of public employees, whose work involves public safety.⁴⁸ That is not for lack of an alternative model; the New York City Collective Bargaining Law, enacted together with the Taylor Law, makes impasse arbitration (that law's equivalent process) available to all public employees and employers falling under its jurisdiction.⁴⁹

⁴⁶ Helsby, "One Man's View of the Taylor Law—Thirteen Years Later," at 8.

⁴⁷ *Matter of Associated Teachers of Huntington v. Board of Educ., Union Free School Dist. No. 3, Town of Huntington*, 33 N.Y.2d 229, 236 (1973); see also *City of Oswego v Oswego City Firefighters Assn., L.* 2707, 21 NY3d 880, 882 (2013) (Lippman, CJ, dissenting) (quoting *Huntington*).

⁴⁸ Civil Service Law §§ 209.2 & 209.3.

⁴⁹ New York City Collective Bargaining Law, 12 NYC Admin Code, ch. 3, §12-311(c).

Both the limited availability of interest arbitration and the steps required to invoke that right are examples of the “choice architecture” embedded in the Taylor Law. Even for the subset of public employees and employers who are eligible for binding interest arbitration, the Taylor Law and PERB’s Rules of Procedure provide that “interest arbitration is only available under the [Taylor Law] when efforts of the parties themselves to reach agreement through true negotiations and conciliation procedures have actually been exhausted.”⁵⁰ Those conciliation procedures must be pursued in good faith by both parties before empaneling an interest arbitration panel.⁵¹

The goal of the process is to steer all but the most entrenched parties toward jointly resolving their differences through collective bargaining, rather than having a resolution imposed by an external arbitrator. This preference in the Taylor Law is supported by several rationales, and has functioned effectively since 1974.

Asked in 1979 if he maintained his previously expressed belief that “final and binding arbitration should be used only as a last extreme, the last method,” PERB Chair Harold Newman answered:

Yes, I don’t like binding arbitration. First of all, I don’t know any labor relations professional who would not argue that the best kind of agreement is an agreement made by the parties themselves, without the intervention at all of any third party neutral.

But if indeed a genuine impasse does occur, and the parties are unable to reach agreement by themselves, then certainly the favored way from my point of view for achieving a settlement is through the device of mediation, because they are the parties who are still making their own agreement as an extension of the collective bargaining process, and the mediator is simply serving as a kind of marriage counselor.

⁵⁰ *City of Ithaca*, 49 PERB ¶ 3030, 3097 (2016); see Civil Service Law § 209.3.

⁵¹ *Id.*

In fact-finding, I would like to think that again that since the fact-finding report can be accepted or rejected by the parties, there is a kind of mediation with recommendations, and that too is more acceptable to me than arbitration. Arbitration means the parties have turned their responsibility for their contract terms over to somebody else.⁵²

In another article, he explained that collective bargaining is inherently preferable to binding arbitration, on the ground that “[n]o labor neutral, no matter what his or her background, skills, education, or experience, can know as much about the parties’ needs as they do.”⁵³ Moreover, “the neutral doesn’t live with the contract—the parties do.”⁵⁴

As a result, Newman cautioned that:

[T]hose of us who head neutral agencies and are responsible for the appointment of mediators, arbitrators, and factfinders should always be on guard against intervening too early in negotiations. We should strive to be certain that exhaustive good faith effort by the parties to achieve agreement on their own has been made before providing the services of an impartial.⁵⁵

The other “major attack on binding arbitration made by its critics is that it will have a ‘chilling’ effect upon the bargaining process.”⁵⁶ Binding arbitration “will inevitably undermine collective bargaining, it is argued, whenever either party anticipates that they might gain more from arbitration than from negotiation;” this “‘narcotic’ effect supposedly

⁵² “Viewpoint: Harold R. Newman, PERB Chairman,” *NYS Public Employees Communicator* (vol. 3, no. 1) (February 1979) at 4.

⁵³ Harold Newman, “Interest Arbitration: Impressions of a PERB Chairman,” 37 *The Arbitration Journal*, (vol. 37, no. 4), 7, 8 (1982).

⁵⁴ *Id.*; see also William Simkin, “The Mediator’s Role,” at 16-17.

⁵⁵ *Id.*

⁵⁶ Charles M. Rehmus, “Interest Arbitration,” in Robert D. Helsby, Jeffrey Tener & Jerome Lefkowitz, *THE EVOLVING PROCESS—COLLECTIVE NEGOTIATIONS IN PUBLIC EMPLOYMENT* 249, 257 (Assn of Lab Rels Agencies; Labor Relations Press) (Ft. Washington, Pa: 1985); see also Rehmus, “Interest Arbitration,” in John L. Bonner, ed., *LABOR-MANAGEMENT RELATIONS IN THE PUBLIC SECTOR: REDEFINING COLLECTIVE BARGAINING* 196-213 (Assn of Lab Rel Agencies) (Horsham, Pa.: LRP Publications) (1999) (same; updated).

leads to ever-increasing reliance on arbitration.”⁵⁷ In describing early experience in Wisconsin with arbitration, Zel Rice concluded that “wide open arbitration has discouraged collective bargaining.”⁵⁸ Even the limited interest arbitration provisions under the Taylor Law are not entirely immune; as then-Chair Pauline Kinsella pointed out in 1993, PERB’s impasse resolution proceedings “are not, however, intended, as they are sometimes being used, as a substitute for collective bargaining and as a means to shift elsewhere the responsibility for making decisions.”⁵⁹

In another example of “choice architecture,” PERB’s interest arbitration panels are tripartite in nature—each side appoints one member, who together jointly select the public member.⁶⁰ Under the Taylor Law, the parties’ appointed members effectively advocate for their respective clients. This means that the process is only one of arbitration in the last resort, after the parties, first directly, and then through their panel members, have failed to agree. Up until that moment, interest arbitration is effectively mediation under another name.

Again, Newman:

Tripartite interest arbitration is certainly a misnomer. No neutral arbitrator can chair a panel with two partisan arbitrators and function as anything but a mediator. This is not necessarily bad, but we ought to recognize tripartite

⁵⁷ *Id* at 257-258. See also, Gary E. Bolton & Elena Katok, “Reinterpreting Arbitration’s Narcotic Effect: An Experimental Study in Repeated Bargaining,” 25 Games & Economic Behavior 1 (1998) (describing “substantial field evidence that bargaining with arbitration lessens the likelihood that bargainers will reach a settlement on their own”); Zel S. Rice, “The Mediator’s Role,” in THE PUBLIC INTEREST AND THE ROLE OF THE NEUTRAL IN DISPUTE SETTLEMENT: PROCEEDINGS OF THE INAUGURAL CONVENTION OF THE SOCIETY OF PROFESSIONALS IN DISPUTE RESOLUTION 25-26 (1974); Hoyt N. Wheeler, “Compulsory Arbitration: A ‘Narcotic Effect’?,” 14 Industrial Relations, 117-120 (1975).

⁵⁸ Rice, “The Mediator’s Role,” at 26.

⁵⁹ Pauline R. Kinsella, “Public Sector Labor Developments” (1993), at 2.

⁶⁰ Civil Service Law § 209.4. Again, this is not the only direction in which the Legislature could have gone—or indeed, did go. The New York City Collective Bargaining Law provides that the parties nominate members of the impasse panel, but the Chair of the Board of Collective Bargaining, in her capacity as Director of the Office of Collective Bargaining itself appoints the panel members unless the parties’ nominations coincide. NYCCBL § 12-311 (c) (2).

arbitration for what it is—more mediation than arbitration. Heaven forbid that any arbitrator without mediation experience and skill undertake chairing a tripartite panel.⁶¹

Once again, the Taylor Law nudges the parties to craft their own solution.

By leaving so much responsibility in the hands of the parties, the Taylor Law allows for the risk of ongoing deadlock when a relationship breaks down, as when, in 2016, the Buffalo City School District and the Buffalo Teachers Federation completed negotiations, “resulting in the first collective bargaining agreement in over a decade” between the parties.⁶² That this case was an outlier, as demonstrated by the statistics cited above, does not mean that the fundamental trust in the parties to reach agreement is without cost—though that cost is ameliorated by the *status quo* provision of the Taylor Law.

Moreover, the “choice architecture” and nudging of the Taylor Law and PERB’s Rules can be effective even with parties who have evidenced the narcotic effect of interest arbitration. Such parties can break through and reach agreement, often as a result of the successful deployment of PERB’s mediators. The New York City Police Department and the New York City Patrolmen’s Benevolent Association had, in the last five rounds of bargaining prior to the 2016 negotiations, gone to interest arbitration four times.⁶³ The result of that fourth interest arbitration was acrimonious, with the PBA-appointed member of the panel issuing a dissent objecting to the process and describing the ultimate award as an “odious decision and callous mistreatment of the

⁶¹ Harold Newman, “Interest Arbitration,” 37 Arb J., at 8 (1982).

⁶² *Buffalo City Sch Dist*, 49 PERB ¶ 3029, 3089 (2016).

⁶³ Richard Steier, “Arbitration Looms Again in PBA Wage Dispute,” *The Chief*, Aug. 28, 2014 (archived at http://thechiefleader.com/arbitration-looms-again-in-pba-wage-dispute/article_9cfa6776-127e-11e4-af63-001a4bcf6878.html) (visited on April 11, 2017).

City's 23,000 Police Officers.”⁶⁴ Protests took place outside the home of the public member of the panel, an unprecedented event.⁶⁵

Despite this unpropitious setting, when the parties reached impasse for the next contract in 2016, intensive mediation by PERB's Director of Conciliation and a long-standing member of PERB's mediation panel, himself an eminent arbitrator, helped the parties to reach agreement. Mayor Bill De Blasio, at the press conference announcing the agreement, thanked:

[The] mediators who performed a crucial role in this process. And perhaps our mediators don't get a lot of headlines, but they do extraordinarily important work and they help sides even when there is some disagreement come together and found common ground. I want to thank Kevin Flanigan from the Public Employ[ment] Relations Board for his exceptional work and Marty [Scheinman], who . . . played a crucial role as well.⁶⁶

A half a century after the passage of the Taylor Law, PERB's Office of Conciliation is effectively resolving the vast majority of contracts that do not settle without assistance. And it still does so with the mediator's philosophy that the “opportunity to attempt to persuade—in the long run—is more potent and viable than the power to order.”⁶⁷

“Rep” and the Business of the Board

Returning to Jerry Lefkowitz's summary of the Taylor Law, it had three prongs: (1) that public employees have the right to join or not to join any employee organization

⁶⁴ PERB Case No. IA2014-009, dissenting opinion of Panel member Jay W. Waks at 2 (Feb. 12, 2015).

⁶⁵ Lorena Mongelli, “NYC Police Union Protests Small Raises Outside Arbitrator's House,” New York Post, Nov. 5, 2015, archived at <http://nypost.com/2015/11/05/nyc-police-union-protests-small-raises-outside-arbitrators-home/> (visited April 11, 2017).

⁶⁶ Transcript, “Mayor DeBlasio and Patrolmen's Benevolent Association Announce Tentative Five-Year Agreement,” Jan 31, 2017, archived at: <http://www1.nyc.gov/office-of-the-mayor/news/062-17/transcript-mayor-de-blasio-patrolmen-s-benevolent-association-tentative-five-year> (Visited April 11, 2017).

⁶⁷ Simkin, “The Role of the Mediator,” at 16.

of their own choosing; (2) that public employers are required to negotiate with the employee organizations which have been chosen by their employees to represent them; and (3) the procedures by which these two rights are protected.

Matters involving mediation, fact-finding, and interest arbitration which the Office of Conciliation facilitates do not, as a general matter, come before the Board. They are indicative of the second component of the summary—helping the parties to reach an agreement.

By contrast, the matters decided in the first instance by the staff of PERB's Office of Public Employment Practices and Representation (known as the "Rep Department" or just "Rep" internally) are the Board's daily fare. In large part, this is because those cases that go to decision in the Rep Department are essentially legal in nature. That is, they are binding decisions involving questions of the Taylor Law, as it has been construed by the Board and the courts as applied to facts found by PERB's Administrative Law Judges ("ALJs"), or its Director or Assistant Director of Rep (each of whom hear cases in addition to their administrative roles).

The questions of representation—unit definition and clarification, as well as determining what union will represent a group of employees—are handled in the first instance by the Rep Department, and then by the Board. So too are challenges to the threshold question of whether employees are entitled to representation.

Under the Taylor Law, employees are presumed to be eligible for representation for collective bargaining. Unlike the broad exclusion for "supervisors" under the National Labor Relations Act, only employees determined by PERB to be "managerial" or "confidential" under § 201 (7) of the Taylor Law are barred from representation and

collective bargaining. Under the statute, employees are “managerial” if “they are persons (i) who formulate policy or (ii) who may reasonably be required on behalf of the public employer to assist directly in the preparation for and conduct of collective negotiations or to have a major role in the administration of agreements or in personnel administration provided that such role is not of a routine or clerical nature and requires the exercise of independent judgment.” Under the same section, employees may be designated as confidential only if they are persons who assist and act in a confidential capacity to managerial employees engaged in labor relations on behalf of the employer as described in clause (ii).

Improper practice charges are also handled by Rep. As is the case with Conciliation, Rep’s ALJ’s successfully resolve through settlement the vast majority of improper practice charges that come before them. To again use an imperfect measure, for the period from 2009-2010 through 2014-2015, an average settlement rate computed by averaging cases filed per year and cases pending at the beginning of each year with cases settled yields an approximate settlement rate of 80%.⁶⁸ For the same time period, ALJs have issued, on average, 126 decisions per year.⁶⁹

From 2009 through 2015, the Board decided, on average, 30 improper practice cases per year.⁷⁰ Additionally, it has issued in each year, on average, five

⁶⁸ Figures drawn from 2015 NEW YORK STATE STATISTICAL YEARBOOK at 314 (39th Ed. 2016). Calculating from reported figures from 2009-2010 through 2014-2015, the average 812 cases filed per year, with 663 settled or withdrawn cases, yields an average settlement rate of 82%. An average of the year-by-year settlement rates measured against actual number of settled/withdrawn cases per year yields an approximate settlement rate of 78% for the same time period. Averaging these two admittedly imperfect figures yields an average settlement rate for the period of 80%.

⁶⁹ *Id.*

⁷⁰ *Id.* A pure average from 2009-2010 through 2014-2015 gives a slightly higher average, that is, 34 cases per year. However, in 2011-2012, the Board decided 51 improper practice cases, an aberrantly high number for that period that skews the average in a misleading way.

representation decisions, 21 certification decisions, and two unit placement or unit clarification decisions; in the same time period, the Board issued one managerial/confidential decision.⁷¹ In sum, about a quarter of improper practice decisions by ALJs are appealed to the Board, and most of these go to decision.⁷²

Because the Board functions as an appellate body, there are no statutory or regulatory mechanisms to promote settlement once a case goes before it. Also, the parties often choose to appeal decisions to the Board to clarify the Taylor Law's application to difficult or unprecedented facts, or to obtain clarity as to how the Law's policies or prior cases should be followed when they are in tension. In such cases, unlike the mediator's ideal, the answer can be more valuable than the settlement.

When the Taylor Law was first enacted, PERB was not explicitly given jurisdiction over improper practices by either management or labor. In 1967, Jerry Lefkowitz "took the lead in preparing PERB's rules of procedure," including drafting the first prohibition of improper practices, which was struck down by the courts in 1968.⁷³ The following year, the Legislature amended the Taylor Law statute to add § 209-a, which defines improper practices on the part of both labor and management.⁷⁴ The Taylor Law gives PERB "exclusive, non-delegable jurisdiction" over improper practice charges.⁷⁵

It is an improper practice for an employer to:

- Interfere with, restrain or coerce public employees in the exercise of their rights under the Taylor Law for the purpose of depriving them of such rights;

⁷¹ *Id.*

⁷² 2015 NEW YORK STATE STATISTICAL YEARBOOK at 314.

⁷³ Ronald Donovan, ADMINISTERING THE TAYLOR LAW, 64; 77;123. See *CSEA v Helsby*, 21 NY2d 541, 1 PERB ¶ 702 (1968).

⁷⁴ L. 1969, ch. 24.

⁷⁵ Civil Service Law § 205.5 (d).

- dominate or interfere with the formation or administration of any employee organization for the purpose of depriving them of such rights;
- discriminate against any employee for the purpose of encouraging or discouraging membership in, or participation in the activities of, any employee organization;
- refuse to negotiate in good faith with the duly recognized or certified representatives of its public employees;
- 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 strike-related conduct as prohibited by 210(1) of the Taylor Law;
- utilize any state funds appropriated for any purpose to train managers, supervisors or other administrative personnel regarding methods to discourage union organization or to discourage an employee from participating in a union organizing drive; or
- fail to permit or refuse to afford a public employee the right, upon the employee's demand, to representation by a representative of the employee organization when at the time of questioning by the employer of such employee it reasonably appears that he or she may be the subject of a potential disciplinary action.⁷⁶

It is an improper practice for a union to:

- Interfere with, restrain or coerce public employees in the exercise of the rights to form, join and participate in, or to refrain from forming, joining, or participating in, any employee organization of their own choosing;⁷⁷
- to refuse to negotiate collectively in good faith with a public employer; or
- to breach its duty of fair representation to public employees.

The Board's decisions with respect to improper practice charges are subject to judicial review as to whether the decision "was affected by an error of law or was arbitrary and capricious or an abuse of discretion," or not "supported by substantial

⁷⁶ Civil Service Law § 209-a (1)-(g).

⁷⁷ Civil Service Law § 209-a (2) (a), incorporating by reference § 202.

evidence.”⁷⁸ The Board “is accorded deference in matters falling within its area of expertise.”⁷⁹

The Board’s primary purpose is, as it has been since the beginning, deciding those questions of law that *don’t* get resolved by settlement or collectively bargained agreements. In deciding cases, the Board has the additional responsibility of providing guidance for the parties and their representatives. The Board must flesh out the necessarily broad language of the Taylor Law—whether a union’s demand to bargain over a specific term and condition of employment is a mandatory subject of bargaining, or does it fall within management’s right to assign duties, select equipment, and organize how those assignments are performed?

PERB’s experience, and the extent to which its decisions have been accepted by the parties and stood the test of time, have vindicated Pauline Kinsella’s judgment that:

I believe that without strong governmental agencies which are respected by all parties, the process of collective bargaining is placed in extreme jeopardy. I don’t believe the parties will police themselves, and I don’t believe *ad hoc* arbitrators will adequately focus on the public interest as they review cases brought by specific parties. I believe governmental agencies should provide law enforcement functions.⁸⁰

PERB has successfully provided those functions since it was granted improper practice jurisdiction in 1969. Part of how it has done so is by fostering a jurisprudential consistency and consensus as to the guiding principles it sets out.

⁷⁸ Civil Service Law § 213; the standard of review is provided in Civil Practice Law and Rules § 7803.

⁷⁹ *Kent v. Lefkowitz*, 27 NY3d 499, 505 (2016).

⁸⁰ Pauline R. Kinsella, “Privatizing the Public Interest: Who Needs the Impartial Agencies?” (Speech, July 27, 1997) at p. 6.

The Board has, throughout its history, sought to achieve consensus among its three members.⁸¹ Dissents are welcome where a principled disagreement cannot be reconciled, of course, and have sometimes been prophetic.⁸² However, the members of the Board, present as well as past, prize the virtue of providing clear, non-partisan guidance. The virtue of clarity is best served when all of the members of the Board can agree on a final articulation of a result that serves the Taylor Law, and the Board's members work to consensus in the vast majority of cases. This culture of consensus inherently stabilizes the Board. While members come, and go, bringing with them their own experience and viewpoints, the Board is not noted for the partisan swings that some scholars see in decisions of the National Labor Relations Board.⁸³ Indeed, that has long been the case; Ronald Donovan wrote in 1990 that:

[w]hereas observers of the National Labor Relations Board often speak of the Eisenhower, Kennedy, or Reagan Board as a shorthand way of indicating a particular labor policy orientation associated with the political views of the incumbent president, the policies of PERB have been remarkably constant over its history, irrespective of state administration, agency leadership, or board composition.⁸⁴

In deciding cases, the Board explains its results in written opinions, and relates them to prior Board decisions, old and new. Like any common law system, the Taylor Law, as supplemented by its Rules of Procedure, requires careful, fact-driven decisions

⁸¹ See Donovan, ADMINISTERING THE TAYLOR LAW at 153-157.

⁸² *Id.* at 157-159.

⁸³ See Joan Flynn, "A Quiet Revolution at the Labor Board: The Transformation of the NLRB, 1935-2000," Ohio St. L. J. 1361, 1365-1366, *et seq.* (2000) ("The most recent appointees from the management and union sides, moreover, have compiled particularly lop-sided voting records, in which 'votes for the 'other' side's position are few and far between") (editing marks omitted); Zev J. Eigen & Sandro Garofalo, "Less Is More: A Case for Structural Reform of the National Labor Relations Board," 98 Minn. L. Rev. 1879, 1884 (2014) ("The [National Labor Relations] Board's approach is—some might say 'notoriously'—marked by frequent shifts in precedent when the administration changes, combined with a policy of non-acquiescence with federal appellate court rulings until the Supreme Court ultimately decides an issue").

⁸⁴ Donovan, ADMINISTERING THE TAYLOR LAW, at 154.

explaining why the material facts at issue mandate the result the Board has arrived at. The Board's decisions serve the additional purpose of persuasion, of demonstrating that a given result is rooted in the Taylor Law and in the caselaw that has developed over the years, and not a result of favoring one party over another.

Our written opinions also make us, as former Chair Pauline Kinsella put it, "publicly accountable" because "our decisions are in the public eye and they are carefully scrutinized. The public nature of what we do makes a difference."⁸⁵

Two other institutional constraints on the Board are the record compiled by the ALJs and the scope of appeal of their decisions to the Board. The ALJs conduct the hearings, where necessary; they weigh the credibility of witnesses, and apply the Taylor Law and the Rules, as well as the Board's prior decisions. The Board defers to the ALJ's factual findings, especially when they are based in whole or in part on the ALJ's weighing of the credibility of the witnesses' testimony on a disputed factual question.⁸⁶ The ALJ's written opinion also frames the issues before the Board; under PERB's Rules, parties must file specific exceptions to an ALJ decision, and questions of law or fact not raised before the ALJ and excepted to before the Board are waived.⁸⁷

Where no Board decisions address the precise matter at issue, the ALJs may consult the published decisions of their predecessors and colleagues as ALJs. Sometimes, they must do their best in the absence of any guidance at all.

⁸⁵ Kinsella, "Privatizing the Public Interest," at 4.

⁸⁶ *Mt. Pleasant Cottage Union Free Sch Dist*, 50 PERB ¶ 3002 (2017), citing, *inter alia*, *Fashion Institute of Technology v Helsby*, 44 AD2d 550, 7 PERB ¶ 7005, 7009 (1st Dept 1974).

⁸⁷ Rules of Procedure, § 213.2 (b) (4); see also *NYCTA (Burke)*, 49 PERB ¶ 3021, 3072, n. 4 (2016).

In such cases, the importance of the Board's review is clear. Only the Board can provide clarity—an ALJ decision, however well thought out and persuasive, only binds the parties to that decision, even if no appeal is filed.⁸⁸

The effect of these Rules is not to make appeal to the Board a technicality-strewn minefield. Rather, it makes sure that an appeal is a review of the facts and issues presented to the ALJ, and not a second bite at the apple.

Recent Chairs have steadily sought to reduce the technical nature of pleading before PERB. Under Jerry Lefkowitz, who returned to PERB, this time as Chair, in 2007, and served until January, 2015, the Directors and the Deputy Chair began a thorough review of PERB's Rules. This Rules revision was the first since 1999, and the proposed amended Rules were thoroughly reviewed and revised again under Seth Agata, my immediate predecessor as Chair. When I was appointed Chair in 2016, I inherited the work begun by Jerry and Bill Herbert (with the help of Kevin Flanigan, Monte Klein, David Quinn, and Anthony Zumbolo), and continued under Seth (with my input as Deputy Chair, and that of all the Directors who had served under both Jerry and Seth). With additional valuable contributions of Deputy Chair Sarah Coleman, the Rules were formally adopted on August 2, 2017.

Under these new Rules, pleading is less technical, electronic filing has been adopted, and is being phased in. Likewise, practices, some of which were reflected in the Board's decisions, others simply known to experienced practitioners before the

⁸⁸ *State of New York (SUNY Buffalo)*, 50 PERB ¶ 3001, n. 42 (2017), citing *County of Nassau*, 48 PERB ¶ 3023, 3089, n. 89 (2015) ("a decision of an ALJ is not binding on the Board and has no precedential value").

Agency, but not to newer practitioners or individuals without representation, are now incorporated into the Rules.

In the same time period, the Board has moved to eliminate technicalities that harmed both management and labor. So, for example, the Board has overruled precedent penalizing both labor and management for failing to recite a precise formula of words in its pleadings when the essence of the claim or defense is clear from the pleadings.⁸⁹

Likewise, we continue to reduce our backlog of undecided cases, promoting more efficient resolution of disputes. As we have hired new staff to fill the places of those who have retired, we at PERB intend to resolve cases with full consideration, but to ensure that processing of cases can be done in a timely basis, so that our remedies actually make the parties whole, and promote the policies and values of the Taylor Law.

As PERB moves forward into its second half-century, the agency is cultivating a new generation of staff, as well as encountering a new generation of clientele and constituents. This anniversary year is not just a celebration but it is the beginning of a new era, as many experienced practitioners and parties retire or move on to other concerns. At the same time, changes at the national level, and the revitalization of communities throughout the State, present new challenges to State and local employers, and to the individuals comprising their workforces, as well as the unions representing them.⁹⁰ The post-World War II settlement, the latter years of which birthed

⁸⁹ *County of Nassau*, 49 PERB ¶ 3001 (2016) (management mislabeling defense of “duty satisfaction” as one of “waiver” not fatal); *County of Suffolk*, 49 PERB ¶ 3005 (2016) (reversing an ALJ’s finding that a union had failed to timely plead repudiation as an improper practice when it asserted a contractual claim, only to be met with a deferral claim).

⁹⁰ Former PERB Chair Pauline Kinsella noted the beginning of some of these trends in the public sector in 1997. See “The Challenges Faced by the Collective Bargaining Process,” at 2-5.

PERB, has ended. The challenges of the nascent era in which we start this second half-century are starkly different from those of the first.

As we begin to address those challenges—which are, at heart, nothing less than facilitating the efficient delivery of services to the people of the State of New York, while respecting the inherent dignity and value of all those whose work is a part of those services—we at PERB must also raise our own standards. As new participants from both management and labor come to the bargaining table, they will need to learn to manage the intricate, relationship-driven, but ultimately productive, arts of labor relations. As an agency, we intend to use this anniversary year as a catalyst to re-launch our long dormant educational mission, for the benefit of the parties, and the people, as provided for by the Taylor Law.⁹¹ But teaching how things *were* done is not sufficient in itself. We intend to continue to advance and learn how to adapt the values of collective bargaining and of dispute resolution, to continue “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.”⁹²

And then we continue to do just that—get out and promote harmonious and cooperative relationships between government and its employees—in the field, at the bargaining table, and, where necessary, in our legal processes. At its best, the Board and the Agency strive to uphold both sides of the reciprocal duties owed by the parties to each other, but ultimately to the people of the State of New York.

⁹¹ Civil Service Law § 205.

⁹² Civil Service Law § 200.

All of these initiatives and resolutions, as well as our revised Rules, are intended to protect the two substantive rights provided by the Taylor Law—the right to representation and to negotiate terms and conditions of employment. The Taylor Law created PERB as a referee and facilitator to ensure that employees entitled to representation can exercise that right if they so choose; that the parties' negotiations are conducted in good faith, without coercion or the fear of reprisal; that all subjects that are mandatorily negotiable can be negotiated to fruition; and to assist the parties when their negotiations break down despite their good faith efforts.

As a wise man once wrote, the rest is all procedural.

Speaker Biographies

Taylor Law at 50

May 10, 2018 | 4:00 p.m. – 5:15 p.m.

Plenary Three:

The Taylor Law over the Years:
A Discussion with Former PERB Chairs

JOHN F. WIRENIUS

John Wirenius was nominated by the Governor and confirmed by the Senate as the Chairperson of the Public Employment Relations Board (“PERB”) in June 2016, after having served as PERB’s Deputy Chair and General Counsel for two years. Prior to joining PERB, he was for eight years the Deputy General Counsel for the New York City Office of Collective Bargaining, and earlier in his career represented both management and labor. He has published numerous scholarly articles on topics ranging from the First Amendment to labor law, and two books. He is a 1990 graduate of the Columbia University School of Law, where he was a Harlan Fiske Stone Scholar. He received his undergraduate degree *summa cum laude* from Fordham College in 1987.

SETH H. AGATA

Seth H. Agata was appointed Executive Director of the Joint Commission on Public Ethics in March 2016. He previously served as Chairperson of the New York State Public Employment Relations Board and Acting Counsel to the Governor and as well as First Assistant Counsel and Ethics Officer to the Executive Chamber. Before joining the Governor’s staff, he was Assistant Secretary for Program and Policy (with oversight of the Assembly Codes, Correction, Election Law, and Judiciary Committees) and Senior Associate Counsel in the Office of Counsel to the Majority for the New York State Assembly. He served as Counsel for Investigations in the Office of State Comptroller, Assistant District Attorney for Columbia County, and a trial examiner in the New York City Office of Collective Bargaining and was in private law practice in New York City and Columbia County. He co-authored *The History of the New York Court of Appeals, 1932-2003* (Columbia U. Press, 2006) and has written on other topics. Mr. Agata is a graduate of the New York State School of Industrial and Labor Relations at Cornell University and the Cornell Law School. He is a member of the New York State Bar Association and the American Bar Association.

WILLIAM A. HERBERT

William A. Herbert is a Distinguished Lecturer and Executive Director of the National Center for the Study of Collective Bargaining in Higher Education and the Professions at Hunter College, City University of New York.

Bill’s scholarship and teaching focus on labor law, history, and policy. He is a co-editor of the book *Lefkowitz on Public Sector Labor and Employment Law* and he has published and lectured on public sector labor history, collective bargaining, and other subjects.

Prior to joining the Hunter College faculty, Bill was PERB’s Deputy Chair from 2007 to 2013. Before his tenure at PERB, Bill practiced labor and employment law before PERB, NLRB, and state and federal courts. For close to two decades, he worked directly with Jerry Lefkowitz.

MICHAEL CUEVAS

Michael R. Cuevas is Of Counsel at Roemer Wallens Gold & Mineaux. Michael was born in Brooklyn, New York on December 29, 1953. He has an extensive background and experience in the public sector, having served for four years as Corporation Counsel for the City of Schenectady, three years as Chairman of the New York State Unemployment Insurance Appeals Board and eight and one-half years as Chairman of the Public Employment Relations Board (PERB) of the State of New York.

PAULINE R. KINSELLA

Ms. Kinsella served as a staff attorney for the Massachusetts Commission Against Discrimination from 1973 until 1975, when she entered private practice as an associate and later shareholder at Roemer and Featherstonhaugh, PC. In Albany, New York, specializing in labor and employment law from 1976 until 1987. In 1987, Ms. Kinsella was appointed Deputy Chair and Counsel to the NYS Public Employment Relations Board, and served as the Board's Chairwoman from 1991 until 1998. She became Director of Field Services for New York State United Teachers, a large labor organization, in 1998, and in 2003 was appointed as its Executive Director, where she served until 2013.

Ms. Kinsella was admitted to practice in Massachusetts in 1973, and in New York in 1976. She has appeared before numerous administrative agencies and state courts; in the Eastern, Southern and Northern Districts of New York; and in the 2d Circuit Court of Appeals. She is a graduate of Brown University and Boston University School of Law.

Concurrent One

Taylor Law at 50

May 11, 2018 | 10:10 a.m. – 11:00 a.m. | Town Hall Amphitheater
1.0 areas of professional practice CLE credit

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

This session will distinguish the three distinct but related defenses of duty satisfaction, contract reversion, and waiver. The session will review recent cases and will provide union and management representatives with an understanding of when such defenses are appropriate and the evidence necessary to overcome such a defense.

Moderator:

Melanie Wlasuk, Director, Office of Public Employment Practices and Representation, NYS Public Employment Relations Board

Panelists:

Jonathan Rubin, Director of Field and Affiliate Services, NYSUT

Douglas Gerhardt, Esq., Harris Beach PLLC

Monte Klein, Esq., Arbitrator

Including:
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:

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.

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.

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.

Speaker Biographies

Taylor Law at 50

May 11, 2018 | 10:10 a.m. – 11:00 a.m.

Concurrent One:

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

JONATHAN D. RUBIN

Jonathan D. Rubin has been a professional advocate for public sector unions since 1995. He has been employed by NYSUT as a Labor Relations Specialist from 2000-2015 working in both the Elmsford Regional Office covering the lower Hudson Valley and in the Suffolk Regional Office. In September 2015, Mr. Rubin was promoted to the position of Director of Field and Affiliate Services in which he oversees and administers NYSUT's statewide program of labor relations support for its more than 1,300 affiliated local unions and their 630,000 members. Prior to joining NYSUT, Mr. Rubin performed similar duties as a Labor Relations Specialist with the Civil Service Employees Association in its Long Island office and also as a Uniserv Representative with the Connecticut Education Association representing teachers unions in Greenwich and Stamford, CT.

As a field advocate for over 20 years, Mr. Rubin routinely represented local unions in collective bargaining, grievance arbitration and before state and federal agencies, along with providing training and leadership development for activists.

In addition to the traditional role of supervising field staff operations, Mr. Rubin is heavily involved in organizational development activities, including the use of strategic planning to drive goal setting and measurement.

From 2012-15, Mr. Rubin was also a Board member of the Long Island Chapter of Labor and Employment Research Association (LERA.) LERA is a national organization founded to promote discussion, analysis and discourse of issues among all stakeholders and practitioners in the sphere of labor relations.

DOUGLAS E. GERHARDT

Douglas has a diverse statewide practice focusing on labor and employment law, particularly representing school districts in a wide range of issues, including general education matters, labor and human resources. Douglas serves as general counsel, special counsel and public sector labor counsel to school districts across New York state, including some of the largest.

He frequently advises clients on complicated employment issues, student matters, First Amendment free speech issues and common business practices. Douglas is integrally involved in counseling on new laws and rules impacting educational institutions and is a frequent lecturer on legal issues affecting school districts, public employers and labor relations.

Douglas also works with not-for-profit corporations on a range of solutions, from day-to-day legal issues to more nuanced matters involving governance and policy development. He has formed numerous not-for-profits including successfully navigating through the Internal Revenue Service's 501(c)(3) charitable exemption process.

An integral aspect of Douglas's practice is his extensive experience drafting and negotiating contracts for public and private sector clients. Douglas is frequently called upon to assist others in the firm on these matters, as well as take the lead.

Douglas is familiar with representing clients in litigation in multiple forums including courts as well as before a variety of state government agencies, including the New York State Division of Human Rights, New York State Education Department, the state Liquor Authority, the Attorney General's Office and Comptroller's Office.

Douglas taught Education Law for many years, first at the Thelma P. Lally School of Education at The College of St. Rose and more recently at Union Graduate College, now part of Clarkson University.

Prior to joining Harris Beach, Douglas was general counsel to the New York State Council of School Superintendents where he supervised all aspects of the organization's legal services. He negotiated contracts, worked through complicated public employment and school law issues as well as offered discrete counsel on personnel matters. He was integrally involved in the implementation of new rules impacting school district audits and retiree hiring practices. In 2006, Douglas oversaw the council's involvement as amicus curiae before the United States Supreme Court in *Arlington Central School District Board of Education v. Murphy*, 548 U.S. 291 (2006). Before working at the council, Douglas was director of government relations and assistant counsel for the School Administrators Association of New York State (SAANYS), litigating matters for administrators in disciplinary actions, court and Public Employment Relations Board proceedings, as well as collective bargaining. He also served as SAANYS' chief lobbyist and liaison on all government relations matters. Douglas began his legal career as counsel to Assembly Speakers Saul Weprin and Sheldon Silver.

MONTE KLEIN

Monte Klein, Esq. is currently an arbitrator and mediator of labor relations disputes. He was the Director of Public Employment Practices and Representation at the New York State Public Employment Relations Board from 1996-2016 and an administrative law judge at PERB from 1978-1996. He has also served as Impartial Chair of the Waterfront Commission Employment Relations Panel for the Waterfront Commission of New York Harbor from 2008-2016. Monte is a member of the PERB public and private sector grievance arbitration panels and is named as a permanent umpire in several collective bargaining agreements. Monte received his J.D. from Albany Law School of Union University in 1978 and a B.S. degree from the New York State School of Industrial and Labor Relations at Cornell University.

MELANIE WLASUK

Melanie Wlasuk is Director of the Office of Public Employment Practices and Representation at the New York State Public Employment Relations Board. Prior to becoming Director in 2016, she was an Administrative Law Judge at PERB for 9 years.

Concurrent Three

Taylor Law at 50

May 11, 2018 | 10:10 a.m. – 11:00 a.m. | Fort Orange Ballroom 5
1.0 areas of professional practice CLE credit

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

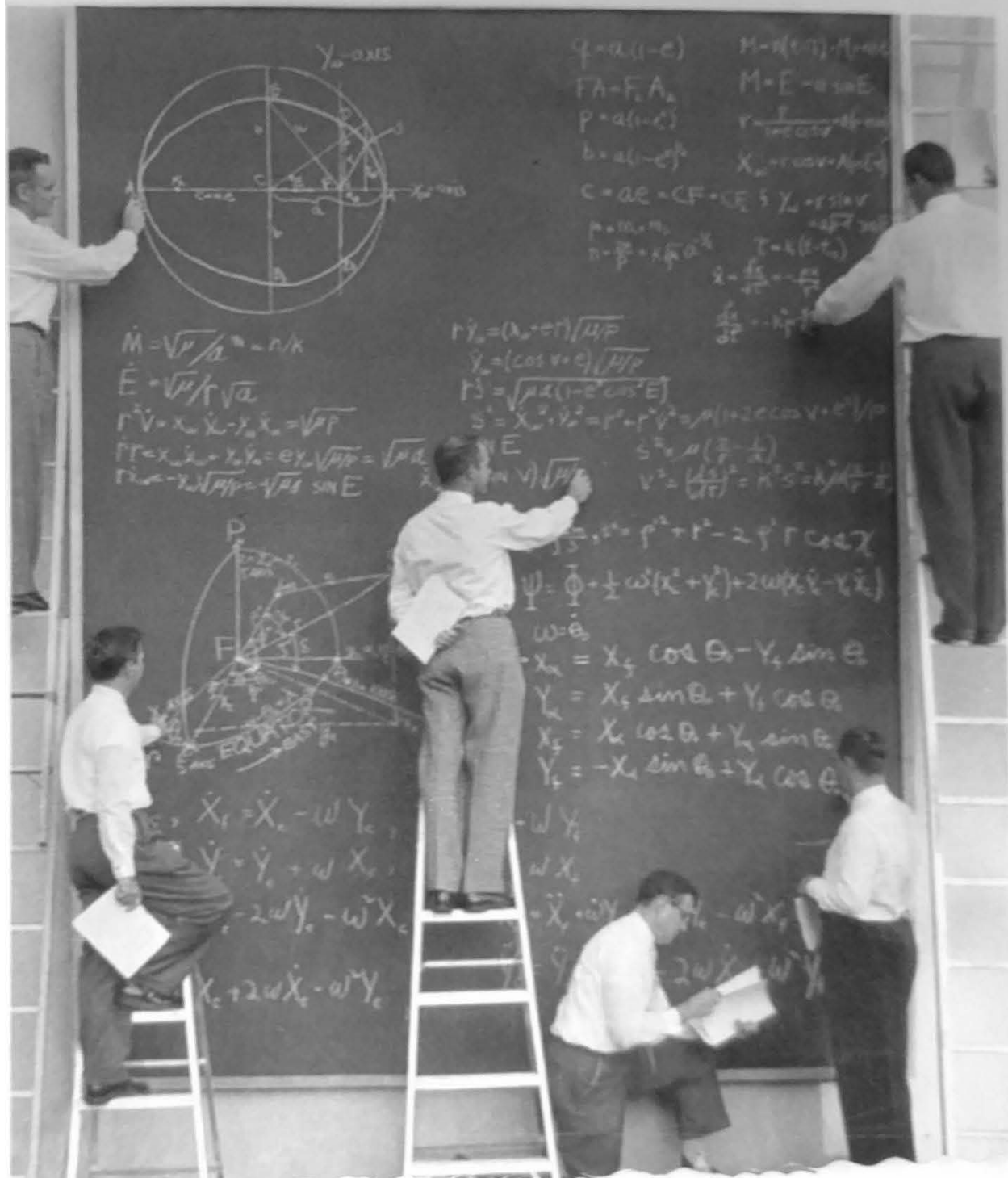
Steven M. Klein, Esq., CSEA

Including:

Jurisdictional Evolution: A Panel Discussion Concerning 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).

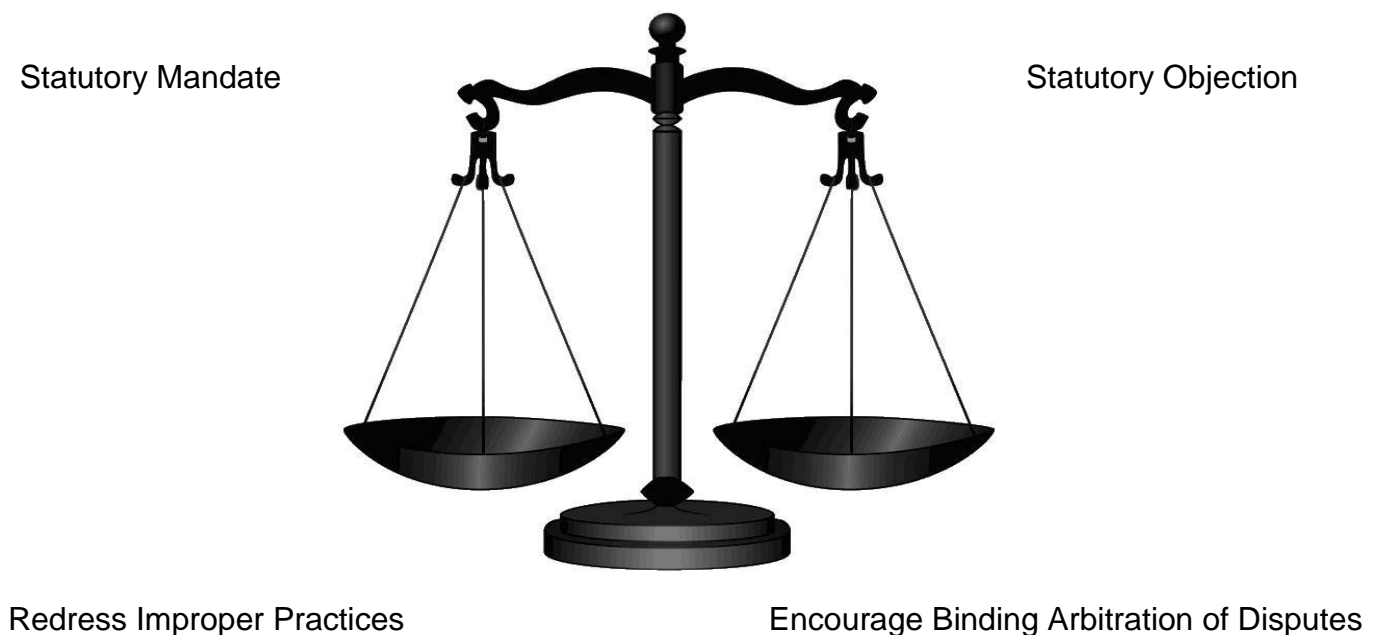
Notably, however, this jurisdictional restriction is not absolute. Rather, PERB retains exclusive non-delegable jurisdiction over improper practices as mandated by the following additional language contained in Section 205.5:

"...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 outside 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.



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 Harvester 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 on 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 arbitrator's 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.

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 interpretation 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 inquiries:

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.”

Speaker Biographies

Taylor Law at 50

May 11, 2018 | 10:10 a.m. – 11:00 a.m.

Concurrent Three:

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

EDWARD A. TREVVETT, ESQ.

Mr. Trevvett represents clients in both the public and private sector, focusing his legal practice on providing counsel to employers in all areas of labor and employee relations. His work includes defending employment discrimination claims and Department of Labor matters of all types, along with representing employers in proceedings before administrative agencies including the National Labor Relations Board, New York Public Employment Relations Board, Equal Employment Opportunity Commission, New York State Division of Human Rights, and the New York State Education Department. His active practice assists clients with negotiating collective bargaining agreements, arbitrating grievances, drafting employment agreements, training managers in sexual harassment and other workplace issues, along with reviewing, revising, and developing employee handbooks and policies. Ed provides day-to-day guidance and advice to human resources managers on a variety of employee relations concerns including Family and Medical Leave Act, Americans with Disabilities Act, wage and hour law, progressive discipline and discharge, drug and alcohol testing, and unemployment insurance benefits.

Ed received his Juris Doctorate degree, magna cum laude, from Syracuse University College of Law in 1990 and his Bachelor of Arts degree from University of Notre Dame in 1983.

Ed is admitted to practice in New York as well as United States District Court – Western and Northern Districts of New York, United States Court of Appeals, and District of Columbia Circuit.

STEVEN M. KLEIN, ESQ.

Mr. Klein has been a Senior Associate Counsel in the CSEA Legal Department since 2014. In his practice, Steve represents the union and its members in both disciplinary and contract interpretation arbitrations, in court, and in various administrative proceedings, including those held by PERB. Prior to coming to CSEA, Steve served as an Associate Counsel for the New York State Public Employees Federation from 1990 until 2014. He also worked as an Attorney Advisor for the NLRB from 1988 to 1990.

In addition to his practice, Steve is an Adjunct Professor of Law at Albany Law School, from where he graduated in 1988 after earning a Bachelor of Arts degree in American History from SUNY Albany.

Steve is admitted to practice in New York State and also in all four New York Federal District Courts.

JOSEPH E. O'DONNELL

Judge O'Donnell joined PERB's Buffalo office in March 2015. Prior to accepting his appointment as an Administrative Law Judge, he served as a Senior Partner in the Buffalo law firm of Reden and O'Donnell LLP, since 1996. Early in his career, he worked as a Management Labor Relations Representative for General Motors Corporation before moving on to serve as an Associate Counsel in CSEA's Legal Department during the late 1980's, where he had the distinct privilege of working with Jerome Lefkowitz, then CSEA's Assistant General Counsel.

Judge O'Donnell received his Juris Doctorate degree from California Western School of Law, San Diego, California, in 1984, and his Bachelor of Science degree in Industrial Administration from General Motors Institute (now Kettering University) in 1979.

Judge O'Donnell is admitted to practice in New York, California, and Washington D. C.

Concurrent Four

Taylor Law at 50

May 11, 2018 | 10:10 a.m. – 11:00 a.m. | Fort Orange Ballroom 7 & 9
1.0 areas of professional practice CLE credit

Police Officers and Collective Bargaining: How Limited Should Bargaining Be About Discipline?

This session will discuss case law from PERB and the Court of Appeals that impacts bargaining over the discipline of police officers and will explore whether any further restrictions should be imposed on police officer unions' ability to bargain over discipline.

Panelists:

Lee Adler, Senior Extension Associate, School of Industrial and Labor Relations, Cornell University

Mike Mazzeo, President of the Rochester Locust Club

Maxwell Leighton, New York City Law Department, Office of the Corporation Counsel

David Quinn, General Counsel, NYS Public Employment Relations Board

Including:
Negotiability of Police Disciplinary Procedure

NEGOTIABILITY OF POLICE

DISCIPLINARY PROCEDURES

PUBLIC POLICY UNDERLYING THE TAYLOR LAW

The Taylor Law (Civil Service Law Article 14 [hereinafter “CSL”]) provides an unambiguous statement of public policy in CSL § 200:

The legislature of the state of New York declares that 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.

With equal clarity, the Legislature expressly declared that those public policies are “best effectuated” by, among other means, “encouraging such public employers and such employee organizations to agree upon procedures for resolving disputes” (CSL § 200 [c]).

Accordingly, the Court of Appeals has held that collective negotiations concerning procedures to resolve labor disputes, including disciplinary disputes, effectuate the policies of the Taylor Law and are, thus, mandatorily negotiable and enforceable. *See New York City Trans Auth v Transport Workers Union of*

America, Local 100, AFL-CIO, 99 NY2d 1 (2002); *Binghamton Civ. Serv. Forum v City of Binghamton*, 44 NY2d 23 (1978); *Board of Educ of Yonkers City School Dist v Yonkers Fedn of Teachers*, 40 NY2d 268 (1976); *Board of Educ of Union Free Sch Dist No. 3 of Town of Huntington v Associated Teachers of Huntington*, 30 NY2d 122 (1972). Indeed, the Court of Appeals has observed that the public policies favoring collective negotiations concerning dispute resolution procedures are “strong and sweeping.” *See, e.g., City of Watertown v New York State Pub Empl Relations Bd*, 95 NY2d 73, 78 (2000).

PERB AND COURT DECISIONS

City of Albany, 9 7 PERB ¶ 3078 (1974), 7 PERB ¶ 3079 (1974), *confirmed on other grounds sub nom. Matter of City of Albany v Helsby*, 48 AD2d 998 (3d Dept 1975), *affd* 38 NY2d 778 (1975)

PERB held: that procedures associated with discipline and discharge is a mandatory subject of negotiations so long as the proposal does not deny employees an opportunity to utilize CSL Sections 75 and 76.

Matter of Auburn Police Local 195, Council 82, AFSCME v Helsby, 62 AD2d 12 (3d Dept 1978), *affd on opinion below* 46 NY2d 1034 (1979)

Rejecting PERB’s limitations on the negotiability of alternatives to § 75 disciplinary procedures under *Albany, supra*, Court held that alternatives to procedures specified in CSL §§ 75 and 76 are mandatorily negotiable without limitations. Noting that individual unrepresented employees may

waive such rights, the Court reasoned that they may do so collectively under the strong and sweeping policies favoring collective bargaining under the Taylor Law.

Amherst Police Club, Inc., 12 PERB ¶ 3071 (1979).

Relying on *Auburn, supra*, the Board held that a negotiation demand seeking a contractual disciplinary procedure for town police officers are mandatorily negotiable. The Board rejected the employer's argument that such procedures are rendered non-mandatory by Town Law §155.

Matter of Patrolmen's Benevolent Assn of the City of New York, Inc. v New York State Pub Empl Relations Bd, 6 NY3d 563 (2006)_(hereinafter "NYCPBA")

Nearly three decades after *Auburn*, the Court of Appeals considered the negotiability of disciplinary procedures for New York City police officers, and whether to stay the disciplinary arbitration of a Town of Orangetown police officer under a collectively negotiated disciplinary procedure. In contrast to *Auburn*, the Court held that the disciplinary procedures for New York City police officers and officers employed by the Town of Orangetown are "prohibited" subjects; that is, they are foreclosed from negotiations under the Taylor Law, and any such negotiated procedures are unenforceable.

In an unambiguous declaration, the Court stated: "We hold that police discipline may not be a subject of collective bargaining under the Taylor

Law when the Legislature has expressly committed disciplinary authority over a police department to local officials.” *NYCPBA* at 570.

As relevant to the matter before it, the Court reasoned:

Section 434 (a) of the New York City Charter provides: “The [police] commissioner shall have cognizance and control of the government, administration, disposition and discipline of the department, and of the police force of the department.” New York City Administrative Code § 14-115 (a) provides that, in cases of police misconduct: “The commissioner shall have power, in his or her discretion, . . . to punish the offending party.” Though these two provisions are now New York City legislation, both were originally enacted as state statutes; the Charter provision was adopted by the State Legislature in 1897 (L 1897, ch 378, enacting NY City Charter § 271), and the Code provision in 1873 (L 1873, ch 335, §§ 41, 55). Thus, they reflect the policy of the State that police discipline in New York City is subject to the Commissioner's authority.

The Legislature has provided similarly for the discipline of town and village police forces, including those in Rockland County, where Orangetown is located. Section 7 of the Rockland County Police Act (L 1936, ch 526), similar in its wording to more general statutes, Town Law § 155 and Village Law § 8-804, provides in part:

The town board shall have the power and authority to adopt and make rules and regulations for the examination, hearing, investigation and determination of charges, made or preferred against any member or members of such police department. Except as otherwise provided by law, no member or members of such police department shall be fined, reprimanded, removed or dismissed until written charges shall have been examined, heard and investigated in such manner or by such procedure, practice, examination and investigation as the board,

by rules and regulations from time to time, may prescribe.

Thus, the Legislature has committed police discipline in Orangetown to the “power and authority” of the Orangetown Town Board. *NYCPBA* at 573–74.

Thus, the Court concluded in *NYCPBA* that the disciplinary procedures for the at-issue police officers are “prohibited” subjects. In reaching that conclusion, the Court emphasized that the new York City Charter and Administrative Code governing New York City police departments, as well as the Rockland County Police Act governing the officers employed by the Town of Orangetown, survived the procedures in CSL §§ 75 and 76, a general law enacted in 1958, because of the grandfathering provision in CSL § 76.4.¹ Nevertheless, the Court observed that “where CSL §§ 75 and 76 apply, as in *Auburn*, police discipline may be the subject of collective bargaining.” *NYCPBA* at 573. In that regard, the Court emphasized: “In general, the procedures for disciplining public employees, including police officers, are governed by Civil Service Law §§ 75 and 76.”

See also *Matter of the City of New York v Patrolmen’s Benevolent Assn.*, 14 NY3d 46 (2009)

¹ CSL § 76.4 states, in relevant part: “Nothing contained in section seventy-five or seventy-six of this chapter shall be construed to repeal or modify any general, special or local law or charter provision relating to the removal or suspension of officers or employees in the competitive class of the civil service of the state or any civil division.”

Reaffirming that where CSL § 75 applies, disciplinary procedures are mandatorily negotiable (*id.*, at n. 13), the Court of Appeals held that procedures to determine drug use by police officers are prohibited subjects.

Tarrytown Patrolmen's Benevolent Association, 40 PERB ¶ 3024 (2007)

PERB construed *NYCPBA* to reflect the Court of Appeals' intent that the holding was the exception to the general rule that disciplinary procedures for municipal police officers are mandatorily negotiable under the Taylor Law. At issue there was whether Unconsolidated Law § 5711-q (9), a special law applicable to villages in Westchester County, prohibits negotiations concerning disciplinary procedures for police officers employed by such villages. Because the law was a "special law" the Board held that negotiations for alternative procedures were prohibited, as in *NYCPBA*.

Matter of City of Middletown v City of Middletown PBA, 43 PERB ¶ 7002 (Sup Ct Albany County 2010), *affd* 81 AD3d 1238 (3d Dept 2011)

Appellate Division confirmed PERB's determination that the Legislature's pre-1958 adoption of the City's charter, a special law, rendered disciplinary procedures for police officers prohibited subjects. However, it annulled PERB's determination that disciplinary procedures are mandatorily negotiable for City police officers who are honorably

discharged veterans or volunteer firefighters, rejecting PERB's opinion that because they, unlike other City police officers, are entitled to the disciplinary procedures specified in CSL §§ 75 and 76, alternatives to which are mandatorily negotiable under *Auburn* and *NYCPBA*.

-- Volunteer Firefighters and Honorably Discharged Veterans --

Notwithstanding the Legislature's adoption of the City's charter in 1942 containing disciplinary procedures for police officers, City police officers who are honorably discharged veterans or volunteer firefighters have a statutory preference which grants them disciplinary procedures under CSL §§ 75 and 76 (*see*, CSL § 75 [1] [b]). Indeed, as with the policies underlying *NYCPBA*, the policies giving rise to the grant of the special preference for honorably discharged veterans and volunteer firefighters have their genesis in the 19th century, and they have been consistently reaffirmed by the Legislature ever since (*see*, General Laws, L. 1899, c. 370; L. 1909, c. 15, later codified as CSL § 22; L. 1923, c. 177 [regarding honorably discharged veterans], extended to volunteer firefighters in 1930 pursuant to L. 1930, c. 214; both preferences later codified in CSL § 75 [1] [b] pursuant to L. 1958, c. 790, § 1). Thus, in *Matter of Morris v Neider*, 259 AD 49 (4th Dept 1940), a chief of police, an honorably discharged veteran, was entitled to the CSL procedures, not the procedures contained in the Geneva City Charter, which had been adopted by the Legislature in 1897. Likewise, in *Matter of Eisle v Woodin*, 205 AD 452 (4th Dept 1923), *aff'd* 238 NY 551 (1924), the Court held that a police officer who was a volunteer fireman was entitled to the disciplinary procedures provided in CSL § 22, not the procedures specified in the Dunkirk City Charter, which had been adopted by the Legislature in 1909. Indeed, in *People ex rel. Reilly v Hoffman*, 98 AD 4 (1st Dept 1904), the Court held that an honorably discharged veteran was entitled to the preference, notwithstanding inconsistent provisions in the New York City

Charter. See also, *Town Bd of Town of Wallkill v Owen*, 127 AD2d 589 (2d Dept 1987); *Matter of Owen v Town of Wallkill*, 94 AD2d 768 (2d Dept) *lv denied* 60 NY2d 560 (1983); *Rizzo v Town of Hempstead*, 1 AD2d 906 (2d Dept 1956); *O'Brien v Hughes*, 270 AD 1072 (4th Dept 1946); *Matter of Dickinson v Monroe*, 180 Misc 714 (Sup Ct Wayne County, 1943). Comparable preferences under the NYS Military Law have also been upheld, notwithstanding express conflicts under the New York City Administrative Code. See, *Peterson v City of New York*, nor., 1998 WL 247530 (S.D. N.Y. 1998) (maximum age limit for police officer candidates under the NYC Administrative Code does not trump Military Law § 243 which extends the maximum age for such candidates up to 5 years for honorably discharged veterans).

The Appellate Division declined to accept PERB's determination that volunteer firefighters and honorably discharged veterans have negotiable disciplinary procedures while others in the same bargaining unit do not.

***Town of Wallkill (Town of Wallkill Police Benev Assn, Inc.)*, 42 PERB ¶ 3017 (2009), confd sub nom. *Matter of Town of Wallkill v New York State Pub Empl Relations Bd*, 43 PERB ¶ 7005 (Albany County Supreme Court 2010) (hereinafter, "PERB-Wallkill")**

In an improper practice proceeding before PERB, PERB held that Town Law §§ 155, a general law enacted in the mid-twentieth century did not foreclose negotiations under the Taylor Law, a later enacted general law. Although the Town Law commits the establishment of disciplinary procedures to local officials, PERB held that, unlike the public policies reflected in the special laws at issue in *NYCPBA*, the public policies favoring

negotiations under the Taylor Law permitted negotiations concerning disciplinary procedures for town police officers. There, PERB analyzed the legislative history of CSL § 209.4 as it relates to the general duty to negotiate concerning police disciplinary procedures under the Taylor Law. PERB concluded that the Legislative history of CSL § 209.4 supported its conclusion that Town Law § 155 does not override the duty to negotiate concerning police disciplinary procedures under the Taylor Law.

--- Legislative history of CSL § 209.4 ---

Until 1995, New York state troopers were not entitled to the compulsory interest arbitration procedures available to municipal police officers under CSL § 209.4. In 1995, the Legislature enacted CSL § 209.4 (e), extending interest arbitration to state troopers. However, the Legislature expressly excluded non-compensatory, albeit mandatorily negotiable, terms and conditions of employment from the subjects that troopers could submit for consideration by the interest arbitration panel, including “disciplinary procedures and actions.” *See* L. 1995, c 432 § 3.² Because non-mandatory and prohibited subjects are not arbitrable (*see* 4 NYCRR § 205.6 [a] [1]; *NYCPBA*), the Board observed that there would have been no need for the Legislature to specifically exclude disciplinary procedures and actions from the subjects that state troopers could submit to interest arbitration if it did not understand and intend them to be mandatorily negotiable in the first place.

² As enacted in 1995, CSL § 209.4 (e) states, in relevant part:

“[T]he provisions of this section shall only apply to the terms of collective bargaining agreements directly relating to compensation, including, but not limited to, salary, stipends, location pay, insurance, medical and hospitalization benefits; and shall not apply to non-compensatory issues, including, but not limited to. . . *disciplinary procedures and actions.*” [Emphasis added.]

The Board bolstered its construction of the Legislature's intent by emphasizing the supporting memorandum for the new bill by then Assembly Majority Leader Michael Bragman, which the Board considered to demonstrate that the amendment was not intended to impair the negotiability of disciplinary procedures for members of the State Police:

Sections 1 and 2 of this bill amend sections 209(2) and (4) of the civil service law, the State's binding arbitration law, to include members of the State Police. Section 3 of this bill limits binding arbitration to compensation issues (including such items as salary, overtime, vacation pay, etc.). Other issues will be subject to existing collective bargaining procedures. New York State Bill Drafting Commission, Legislative Retrieval System, c 432, Memorandum in Support of Bill No. A07370A (1995).

According to the Board, Majority Leader Bragman's reference to "other issues" that are "subject to existing collective bargaining procedures" refers to disciplinary procedures and other non-compensatory issues that, although specifically excluded from resolution at compulsory interest arbitration, remain negotiable under the Taylor Law and subject to the impasse resolution procedures applicable to non-police units.

In 2001, the Legislature amended CSL § 209.4 (e) by deleting the exclusion of disciplinary procedures and other non-compensatory subjects that state troopers could submit to compulsory interest arbitration. *See*, L. 2001, c 587. Here, again, the Board determined that the supporting memorandum revealed the Legislature's understanding and intent that disciplinary procedures for police officers are mandatorily negotiable:

Local police officers and Firefighters currently are afforded full binding arbitration (that is compensatory and non-compensatory issues are subject to binding arbitration). The legislation would simply grant all State Police officers equal treatment with respect to their local counterparts. [*See*, 2001 McKinney's Session

Laws of N.Y., Vol. 2, L. 2001, c 587, Memorandum in Support of Bill No. A. 8589.]

According to the Board, the “equal treatment with respect to their local counterparts” referenced in the memorandum shows that by restoring disciplinary procedures and other non-compensatory terms and conditions of employment to the scope of subjects that state troopers could submit to interest arbitration, the Legislature understood and intended that disciplinary procedures and actions are proper subjects for interest arbitration and, thus, mandatorily negotiable for troopers, as they are for bargaining units of police officers employed by any “police force or police department of any county, city, town, village or. . . police district.”

CSL § 209.4 (e) was amended again in 2002, reinstating the exclusion of “issues relating to disciplinary procedures and investigations” from the subjects that state troopers can submit to compulsory interest arbitration. *See*, L. 2002, c 232. Again, the Board observed that if “issues relating to disciplinary procedures and investigations” were not mandatorily negotiable, there would have been no need for the Legislature to expressly exclude those issues from the subjects that troopers could submit to interest arbitration.

City of Albany (NYS Law Enf Officers Union),

42 PERB ¶ 3005 (2009)

[Same holding as *PERB-Wallkill*, except Second Class Cities Law was raised as the defense to negotiability]

Matter of Town of Wallkill v Civil Serv Empls Assn,
19 NY3d 1066 (2012)

While *PERB-Wallkill* was being considered by PERB, and unbeknownst to the Board, the parties were engaged in a CPLR Article 75 proceeding concerning the arbitrability of a disciplinary dispute under their contractual

disciplinary procedure. That proceeding, in which PERB was not a party, led to the Court of Appeals' decision in *Wallkill*. There, the Court of Appeals applied the prohibition in *NYCPBA* to police officers employed by towns that are subject to Town Law § 155, stating:

We agree that [*NYCPBA*] is dispositive. There, we confronted the tension between the strong and sweeping policy of the State to support collective bargaining under the Taylor Law and the policy favoring strong disciplinary authority for those in charge of police forces. We held that police discipline may not be a subject of collective bargaining under the Taylor Law when the Legislature has expressly committed disciplinary authority over a police department to local officials. *Wallkill*, at 1067 [internal quotations and citations to *NYCPBA* omitted].

Therefore, the Court held that the contractual disciplinary procedures for the Town of Wallkill's police officers were unenforceable (and, thus, not negotiable under the Taylor Law), effectively annulling *PERB-Wallkill*.

Matter of City of Schenectady v New York State Pub Empl Relations Bd., 30 NY3d 109 (2017)

Although § 137 of the Second Class Cities Law commits certain aspects of police discipline to the discretion of the City's Public Safety Commissioner, in confirming PERB's determination, the Appellate Division relied on Second Class Cities Law Art. 2, § 4, which states that the provisions contained therein shall apply only "until such provision is superseded

pursuant to the municipal home rule law, was superseded pursuant to the former city home rule law *or is or was otherwise changed, repealed or superseded pursuant to law*” [emphasis added]. Applying principles of statutory construction, the Appellate Division concluded that § 4 of the Second Class Cities Law expressly authorized the City to enter into a collective bargaining agreement concerning police disciplinary procedures pursuant to collective bargaining mandated by the Taylor Law. The Court of Appeals reversed, holding that the “supersession” language in the Second Class Cities Law had not more relevant meaning than the “except as otherwise provided by law” language in Town Law § 155; i.e. none. As for the legislative history of CSL § 209.4, the Court observed that disciplinary procedures for police officers are arbitrable if they are mandatorily negotiable under *NYCPBA* and its progeny.

City of Long Beach, 51 PERB ¶ 3005 (2018)

Section 47 of the City’s Charter, as enacted by the New York State Legislature in 1922, provides that “[t]he powers and duties of the commissioner which shall be performed and exercised as herein provided and in accordance with the laws of the state and the ordinances of the city,” includes that the commissioner “shall assume and exercise supervision of the police department and make all proper rules for the government and

discipline thereof.” Therefore, as in *Middletown, supra*, the Board held that disciplinary procedures for police officers employed by the City of Long Beach are prohibited.

Speaker Biographies

Taylor Law at 50

May 11, 2018 | 10:10 a.m. – 11:00 a.m.

Concurrent Four:

Police Officers and Collective Bargaining:
How Limited Should Bargaining Be About Discipline?

DAVID P. QUINN

Mr. Quinn is General Counsel for the New York State Public Employment Relations Board and head PERB's Office of Counsel. He has been with PERB since January 1984, serving 15 years as an Administrative Law Judge, 8 years as Assistant Counsel, and 8 years as Associate Counsel and Director of Litigation. He received his J.D. from Albany Law School in 1982, an M.A. from the Cooperstown Graduate Programs of the State University at Oneonta in American Folk Culture, and a B.A., *cum laude*, from the State University at Albany. He is a member of the New York State Bar Association, Labor and Employment Section, and has been a contributor to each edition of Public Sector Labor and Employment Law, published by the New York State Bar Association.

LEE H. ADLER

Lee H. Adler is a Cornell ILR Lecturer and Legal Practitioner. Mr. Adler was born in Pittsburgh, Pennsylvania and is a Phi Beta Kappa graduate of the University of California, Berkley. He received his J.D. from the Golden Gate University in 1975. He was admitted to the bar in West Virginia in 1975 and in New York State in 1989.

During the years 1969 to 1975, Mr. Adler was a Union taxi-driver in New York City and intermittent rank-and-file organizer. In 1976, Mr. Adler began focusing his practice on rank-and-file coal miner matters, federal court cases, many state court murder defenses, and represented the state teachers union as well as individual state police and deputy sheriffs and municipal police officers in discipline cases.

Since 1991, he has facilitated Cornell ILR Union trainings across New York and in several other states for CWA (communication workers/Verizon), CSEA (public employees throughout NYS), IAM (Machinists union), NYSUT (teachers), NYS AFL-CIO, USW (Steel Workers), and PEF (white collar public employees). Additionally, since 1997, Mr. Adler has created and taught as graduate level seminars at Cornell's ILR School six different Legal and Union/Worker sensitive courses (Public Sector Labor Law and Collective Bargaining).

Beginning in 2011, Mr. Adler has also been a national commentator of ILR School about a variety of labor and public-sector issues, nationwide.

MICHAEL D. MAZZEO

Mike is a 32-year veteran of the Rochester Police Department on full release time as Union President of the Rochester Police Locust Club serving in that capacity for over ten years. He has also served as the Vice-President, Treasurer and several other representative positions for over 25 years. He has extensive experience in contract negotiations, grievance arbitrations and representing police officers in disciplinary matters.

In addition, Mike is a frequent speaker at Cornell University's ILR School regarding issues related to representing police officers and he has sat on numerous panels discussing labor, police/community relations, human/labor trafficking and on other social and labor issues as well.

Mike holds a Master of Science degree in Labor Studies from the University of Massachusetts Amherst's Labor Center and a Bachelor of Science degree from the Rochester Institute of Technology.

Mike also serves as an area Vice President for the National Association of Police Organizations (NAPO), a Rochester Director for Upstate NY Police Benevolent Association and is a Representative-at-Large for the Executive Board of the AFL Finger Lakes Labor Council.

MAXWELL LEIGHTON

Maxwell Leighton is a senior counsel and supervising attorney in the Labor and Employment Law Division of the New York City Law Department. He has worked for the New York City Law Department, also known as the Office of the Corporation Counsel, since 2007, and, during that time, he has handled a wide array of litigated labor law and employer/employee-related disputes arising between the City of New York and its considerable and varied workforce. Since 2014, he has served as an adjunct professor at Benjamin N. Cardozo School of Law, where he instructs and oversees students within a labor and employment law clinic and Law Department externship. Mr. Leighton is a graduate of the City University of New York School of Law.

Concurrent Three

Taylor Law at 50

May 11, 2018 | 11:15 a.m. – 12:30 p.m. | Fort Orange Ballroom 7 & 9
1.5 areas of professional practice CLE credits

Strategies for Adapting to a post-*Janus* World

This session will examine practical ways in which unions and employers might react to the anticipated ruling in *Janus v. AFSCME*. Topics discussed will include the state of affairs prior to the agency fee becoming a statutory mandate as well as the experiences of public sector employers and unions in a right-to-work state.

Panelists:

John F. Wirenius, Chair, NYS Public Employment Relations Board

James Roemer, Founding Partner, Roemer Wallens Gold & Mineaux, LLP

Kate Luscombe, CSEA Director of Field Operations

Sarah Cudahy, Executive Director, General Counsel and PIO, Indiana Education Employment Relations Board

Including:
Strategies for Adapting to a post-*Janus* World

Figuring out the Future Fee Fallout:
An Indiana-Centric Insight into Public Sector Agency Fees

Statutes and Decisions
(Available online at www.nysba.org/taylorlawcoursebook/)

STRATEGIES FOR ADAPTING TO A POST-JANUS WORLD

Panelists:

Sarah Cudahy, Executive Director, General Counsel and PIO, Indiana Education Employment Relations Board

Kate Luscombe, CSEA Director of Field Operations

James Roemer, Founding Partner, Roemer Wallens Gold & Mineaux, LLP

OUTLINE OF DISCUSSION ISSUES¹

I. What was the state of affairs in New York State prior to agency fees becoming a statutory mandate?

II. What role, if any, should New York State policy makers take to provide the framework for stable public-sector labor relations in a post-*Janus* environment?

III. Employer and Union Obligations Regarding the Provision of Data and Transmission of Dues

A. What will the employer's obligation be to provide employee data or transmit dues to the union?

The Taylor Law requires an employer to recognize the rights of a certified employee organization "to represent the employees in negotiations notwithstanding the existence of an agreement with an employee organization that is no longer certified or recognized, and in the settlement of grievances..." N.Y. Civ. Serv. Law § 208(1). Currently, the employer is required to provide the union with information necessary to collectively negotiate and administer the contract. *Bd. Of Ed. Of City of Albany*, 6 PERB ¶ 3012 (1973) ("An employee organization may request, and is entitled to receive, information which is necessary for the preparation for collective negotiations, for example, number of job titles, salary schedules, and information necessary for the administration of a contract including the investigation of grievances.")

The Taylor Law also provides for the transmission of union dues and agency fees to the recognized employee organization. N.Y. Civ. Serv. Law § 208(3).

B. *Should* different disclosure standards apply for release of members' data vs. non-paying bargaining unit members?

¹ All cases and statutes cited herein are included with this outline and materials.

IV. How will the “duty of fair representation” be defined post-*Janus*?

The Supreme Court defined the duty to fair representation in *Vaca v. Sipes*, 386 U.D. 171 (1967), which was adopted by the New York State Court of Appeals in *Baker v. Bd. Of Educ. Of the W. Irondequoit Cent. Sch. Dist.*, 70 N.Y.2d 314, 20 PERB 7512 (1987). The duty of fair representation is defined as “the exclusive agent’s statutory authority to represent all members of a designated unit includ[ing] a statutory obligation to serve the interest of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct.” *Vaca v. Sipes*, 386 U.D. 171 (1967).

V. Representation Obligations in Disciplinary and Other Employment Related Procedures

A. What will the union’s obligation be to provide representation for union members vs. non-dues paying members of the recognized bargaining unit with respect to disciplinary proceedings?

New York State Civil Service Law provides procedures for discipline of public sector employees. N.Y. Civil Service Law §§ 75, 76. These procedures provide the employee with the right to representation by the certified or recognized employee organization at an investigatory interview conducted in contemplation of discipline. N.Y. Civ. Serv. Law § 75(2). The statute also requires that the employee, upon request, be permitted “to be represented by counsel, or by a representative of a recognized or certified employee organization...” Id.

Alternatively, Section 76 of the Civil Service Law permits employers and employee organizations to negotiate procedures to supplement, modify, or replace these provisions. N.Y. Civ. Serv. Law § 76.

B. *Can and should* these obligations differ for employees who are subject to the procedures set forth in Sections 75 and 76 of the Civil Service Law, as opposed to those covered by contractually negotiated disciplinary procedures?

C. What will the union’s obligation be to provide representation for union members vs. non-dues paying members of the recognized bargaining unit in proceedings to separate an employee from service based on a disability?

New York State Civil Service Law § 72 sets forth procedures by which an employer may separate an employee from service who is physically or mentally unable to perform their job duties by reason of disability, and states that the employee “may be represented” at any hearing upon that matter “by counsel or a representative of a certified or recognized employee organization.” N.Y. Civ. Serv. Law § 72.

VI. How could a decision in *Janus* potentially erode the concept of bargaining unit exclusivity?

New York State Civil Service Law Section 204 sets forth the statutory rights that accompany bargaining unit exclusivity. The statute provides that “[w]here an employee organization has been certified or recognized..., it shall be the exclusive representative...of all the employees in the appropriate negotiating unit.” N.Y. Civ. Serv. Law § 204(2). The statute further requires the employer to negotiate collectively with such employee organization regarding “wages, hours, and other terms and conditions of employment” of the public employees. *Id.*

VII. Could a decision in *Janus* encourage the growth of open-source unionism? What about national “No-Raid Agreements” and the AFL-CIO Articles of Protection?

VIII. Possible Rise of Fee-Based Services for Non-Union Members

A. Will fee-based services for non-paying bargaining unit members be a model for unions to consider?

B. Would these models be permissible under statutes such as New York State Civil Service Law Section 75, 76 and 72?

IX. What rights and exposures will attach to non-majority unions?

X. What are the labor relations implications for employers in a post-*Janus* environment?

Figuring out the Future Fee Fallout: An Indiana-Centric Insight into Public Sector Agency Fees

By

Sarah Cudahy & John Henry¹

I. Introduction

“Unions are confronted with an existential crisis” the Economist recently declared.² And it is not alone in predicting the potential demise of public sector bargaining if the Supreme Court prohibits agency fees in its pending *Janus* case.³ The truth is more complicated. Public sector bargaining comes in all shapes and sizes.⁴ Indeed, teachers have not paid agency fees in Indiana since 1995. Yet 20 years later, a majority of teachers belong not only to a union, but to their exclusive representative.

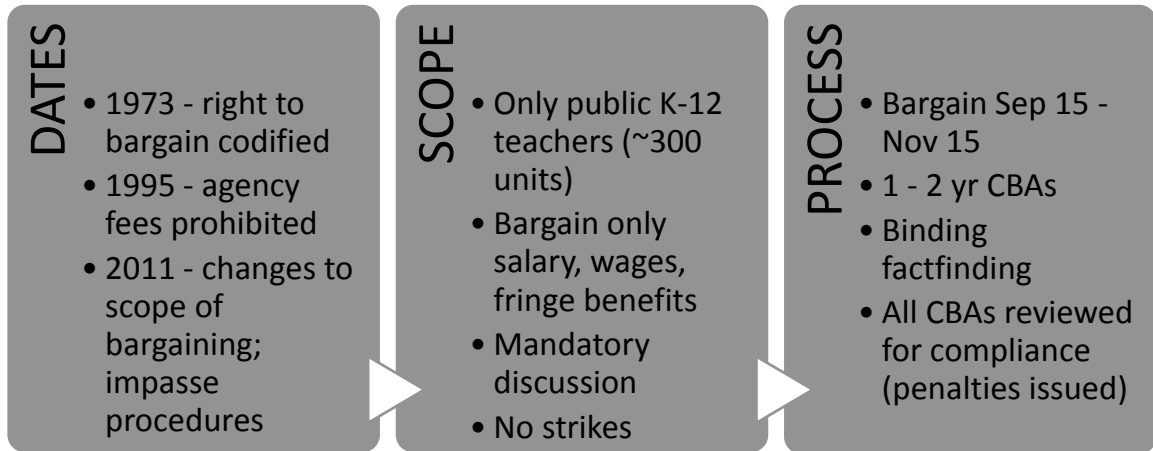
Indiana is not an outlier – many states already prohibit agency fees in the public and private sector. One estimate is that only 5 million – out of 20.9 million public-sector workers – would be affected, and it is likely lower.⁵ Even for those affected by *Janus*, the scope of the impact will be determined by the response of employees and unions. State legislatures will continue to significantly impact public sector bargaining, arguably more than the outcome of *Janus*.

This article is intended to provide information regarding agency fees to agencies and practitioners in states that currently allow public sector agency fees, including information on the current status of agency fees, how the prohibition of agency fees has impacted union membership, possible union responses, and recent state legislation regarding collective bargaining. This article does not include information on the cumulative effects of a complete prohibition in union-dense states and its potential impact on national unions.⁶

This article should not be read to advocate for or endorse any particular position or action.

As many of the examples in this article are from Indiana, a brief introduction to Indiana public sector bargaining may be helpful. State employees were granted the right to bargain by executive order in 1990; this right was revoked in 2005. Public safety employees were granted the right to meet and confer in 1995.⁷ Currently, the only guaranteed bargaining rights for public sector employees are for K-12 teachers.⁸ Teacher bargaining is overseen by the Indiana Education Employment Relations Board (“IEERB”).

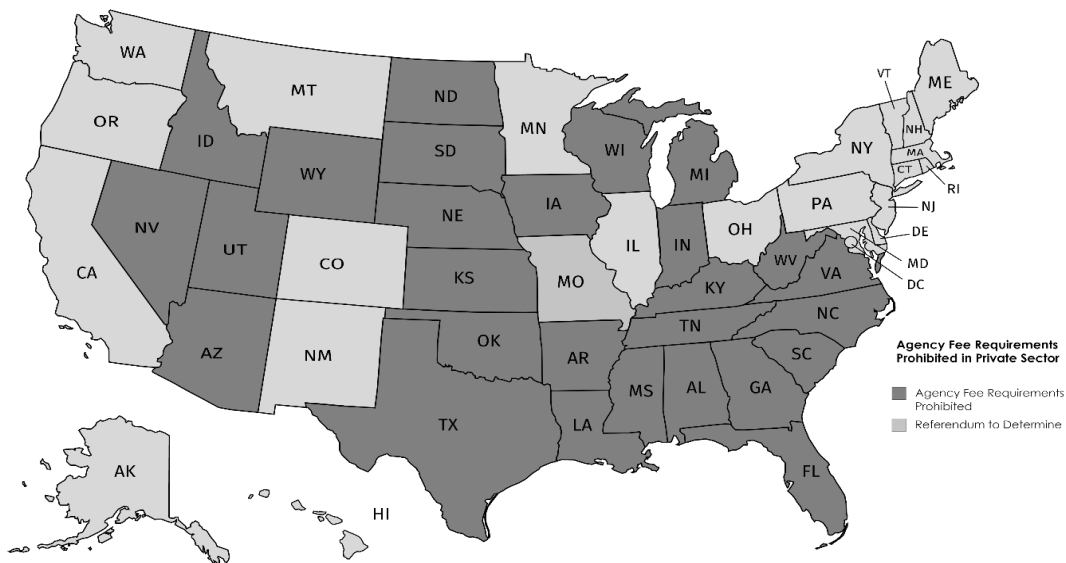
Indiana Teacher Bargaining Basics



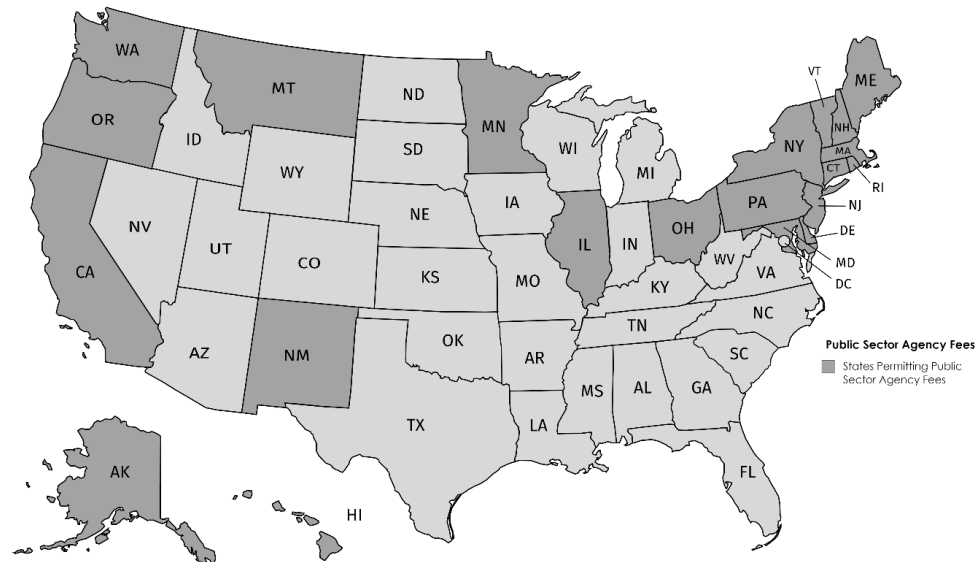
II. Agency Fees

It is easy to get lost in the jargon surrounding agency fees. Also called fair-share fees, agency fees refer to payments made by nonunion employees to “... pay the union for the union’s representational expenses.”⁹ On February 26, 2018, the United States Supreme Court held oral argument in *Janus v. AFSCME*. The question presented is whether public-sector employees can be required to pay agency fees for a union’s services.¹⁰ This article provides information relevant to what might happen if the Supreme Court prohibits agency fees.

Most of the publicity around agency fees is in the private sector with “right-to-work” laws. “Right-to-work” laws refer to laws prohibiting agency fees. Indeed, as of the date of this publication, a majority of states have prohibited agency fees in private sector bargaining.¹¹

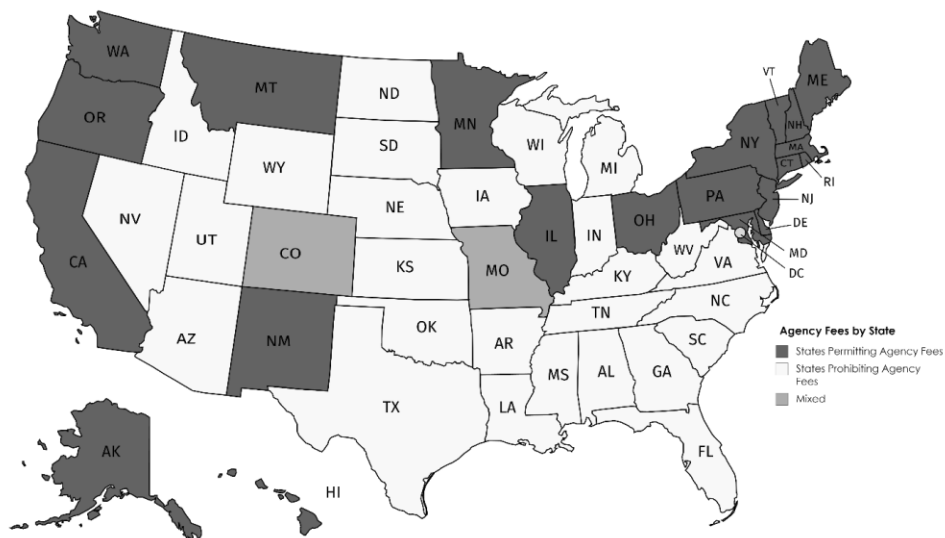


The public sector is similar. Federal employees do not have to pay agency fees.¹² And roughly only half of states allow agency fees. Below is a chart that shows states that permit agency fees for at least some public-sector (non-federal) employees.¹³



Created with mapchart.net ©

The final chart in this series shows the overlay of agency fees in the public and private sector. The western and northeastern parts of the United States allow agency fees while most of the rest of the country does not.



Created with mapchart.net ©

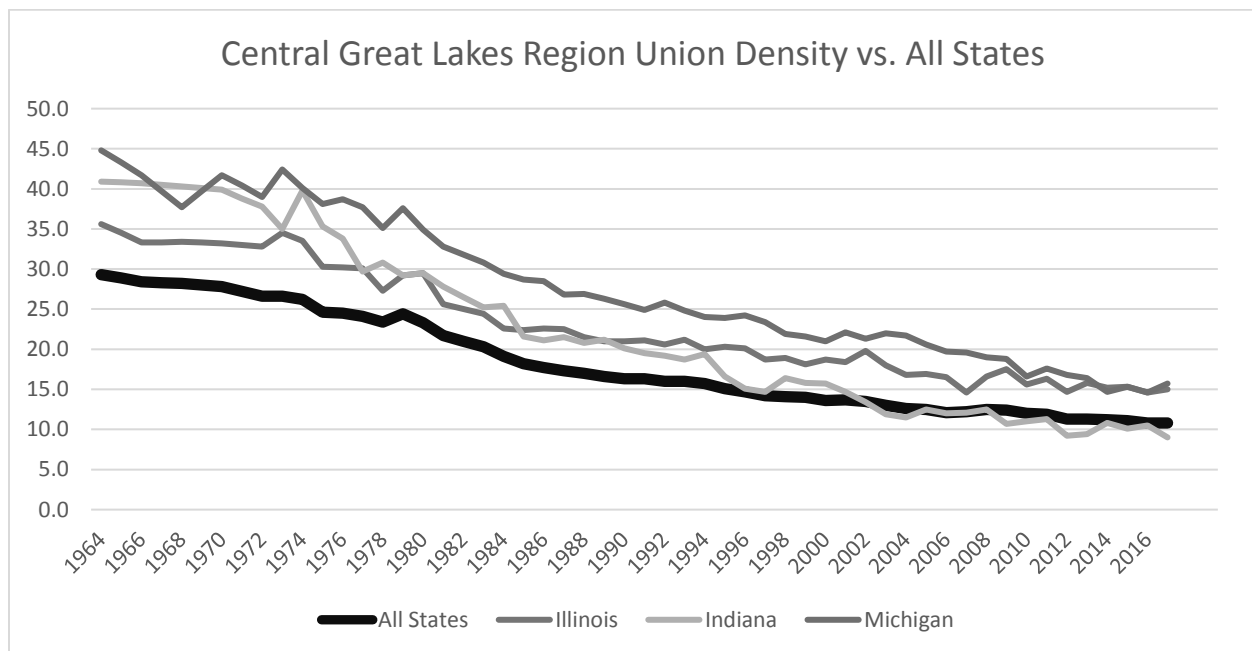
III. The Employee Response

The impact of *Janus* will depend on the response of employees. Although many warn that membership will plummet if agency fees are prohibited, it is possible that there could be no change or even an increase in membership. The experience of a few Midwestern states shows that the most likely outcome is that union membership will drop in the short term but plateau over time. And this drop will not be consistent across industries or units. Employees could also choose alternative ways to participate in work-related issues.

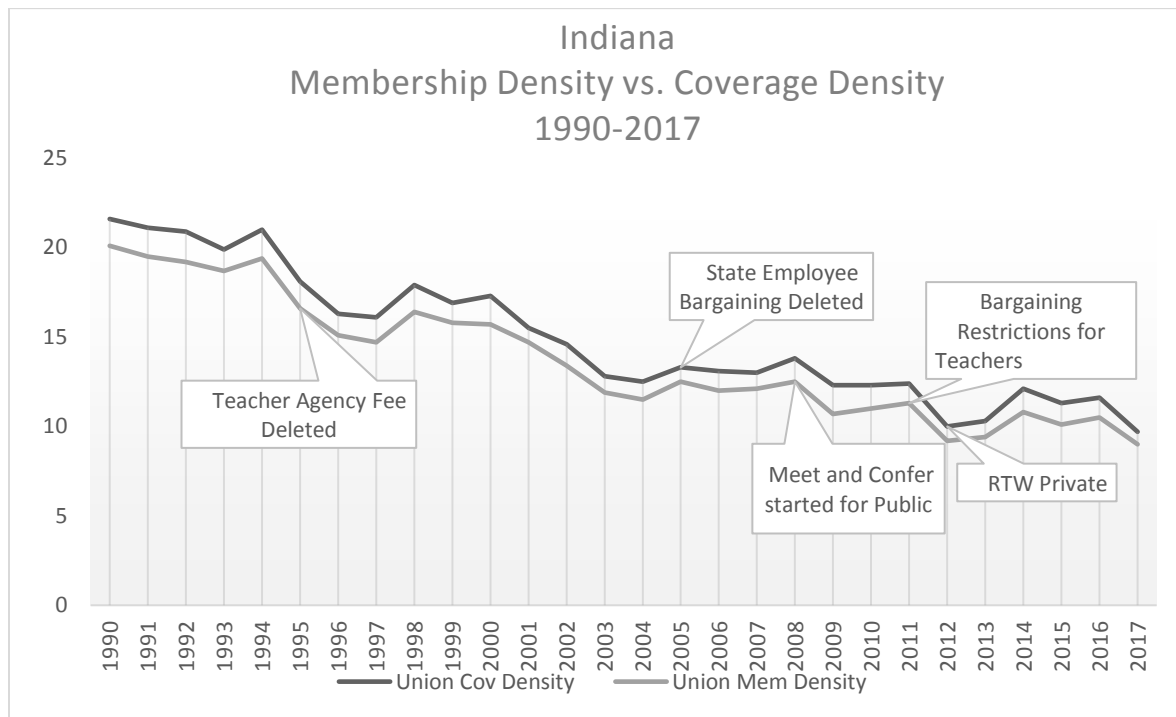
a. Will Employees Pay Membership Dues?

As an initial matter, it is hard to guess with any detail what will happen with union membership because agency fees are not the only reason for membership decline. Union density/membership has been on a steady decline since 1964, before the recent prohibitions against agency fees.¹⁴

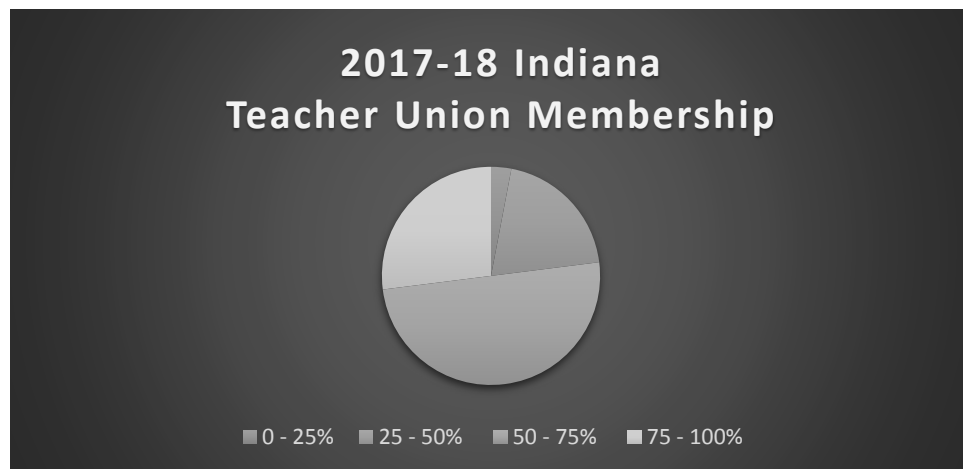
Although density is generally lower in non-agency fee states, it is not always significantly so. The chart below shows union density in one state with agency fees (Illinois) and two without (Indiana, Michigan).¹⁵

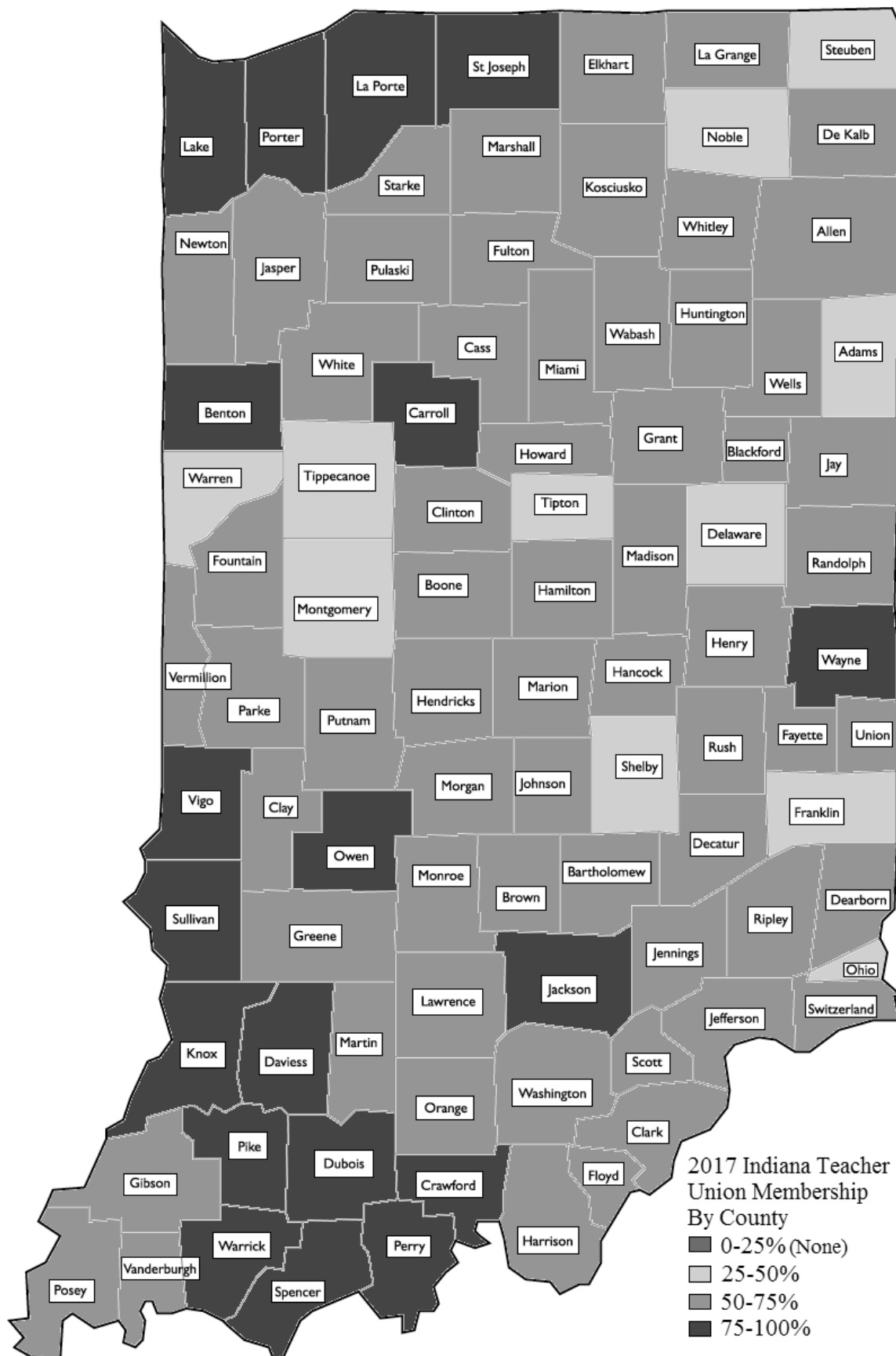


Union membership in Indiana has fluctuated, but not necessarily based on agency fees.¹⁶



Although these charts are a useful scanning tool, they have limited value. The data uses all union membership, so the numbers can appear inflated (e.g., if retirees are union members). Moreover, this data is for both the public and private sector. Finally, these numbers do not show how agency fees may impact individual industries, unions, or units. Union membership varies between industries. Indeed, membership can vary widely within an industry and union; the decline of dues and membership after the loss of agency fees in Wisconsin and Michigan ranged from 6% to 66%.¹⁷ Below are two charts showing current Indiana teacher union membership by unit and county, respectively.¹⁸ Although membership significantly varies, most teachers are union members.





It is possible that membership also will not fall as far as predicted given new growth in labor, although growth appears mostly relegated to the private sector. In a 2017 Pew Research Center study, Pew found that about six-in-ten adults have a favorable view of labor unions.¹⁹ And union membership was up 0.1% in 2017, although that growth was in the private sector.²⁰ Labor organizations have been making some inroads in the fast food industry, such as the “Fight for \$15” campaign, which was initially organized by the Service Employees International Union (“SEIU”).²¹ There also may be emerging labor growth in the tech sector.²²

b. Employee Options Beyond Membership with Their Exclusive Representative

Employees have options for engaging in work-related issues in addition to choosing whether or not to join their exclusive representative. For example, within traditional labor, employees can join a union that is not their exclusive representative, file to change their exclusive representative, or file to decertify the union and have no exclusive representative. In the most recent IEERB election, the new union, which was unaffiliated, received 63% of the vote. Out of 955 eligible voters, only 2 votes were for no representation.²³

Another option may be to strike without the (formal) help of a union. Over 20,000 teachers in West Virginia engaged in a strike on February 22, 2018, for a pay raise (even though West Virginia does not recognize the right to strike or collective bargaining).²⁴ Indeed, in New England, non-unionized employees, managers, and community members successfully protested together against a change in management at a grocery store.²⁵ Employees may also gather together for informal associations like worker centers. Worker centers assist low wage employees that do not belong to a union or are excluded from coverage by labor laws with legal representation and training.²⁶

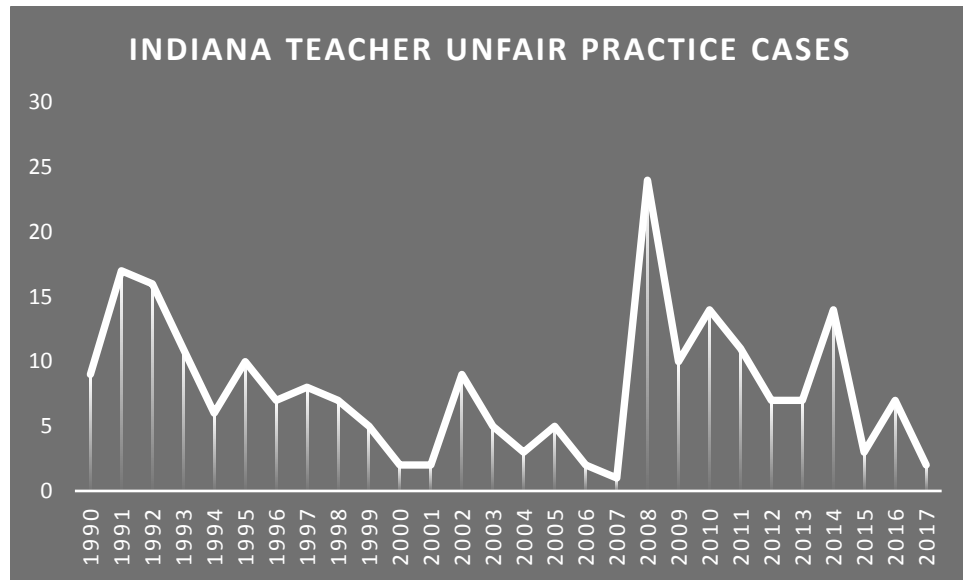
IV. Union Responses to the End of Agency Fees

One of the questions posed in the public sector sphere is how unions will respond to the loss of agency fees in the areas of: 1) member centric issues and rights; 2) organizational changes; and 3) external lobbying or policy changes.

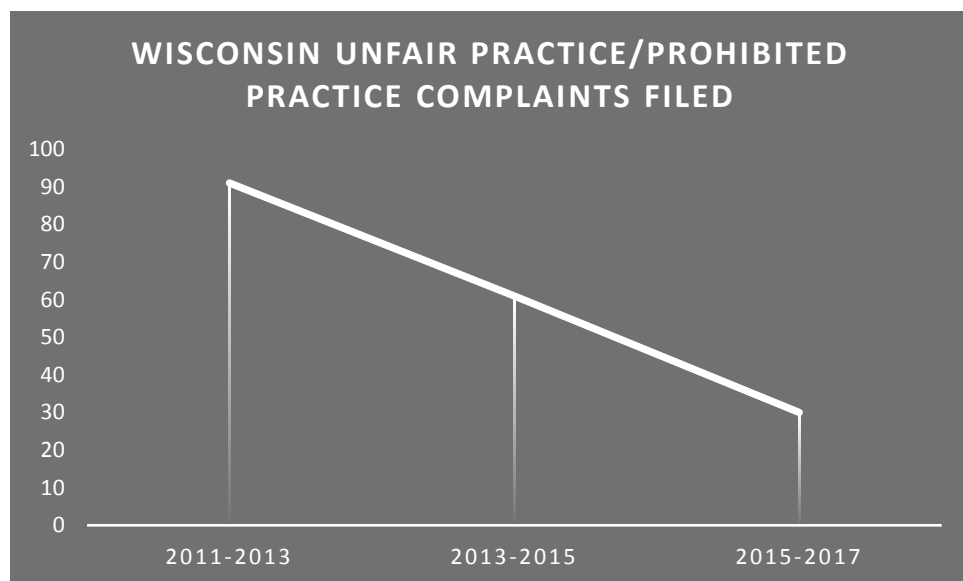
a. Member Issues & Rights

Although some speculate that there will be an increase in the number or frivolousness of claims filed by the union against the employer after the end of agency fees, this does not appear to have occurred in Indiana, Wisconsin, or Michigan.

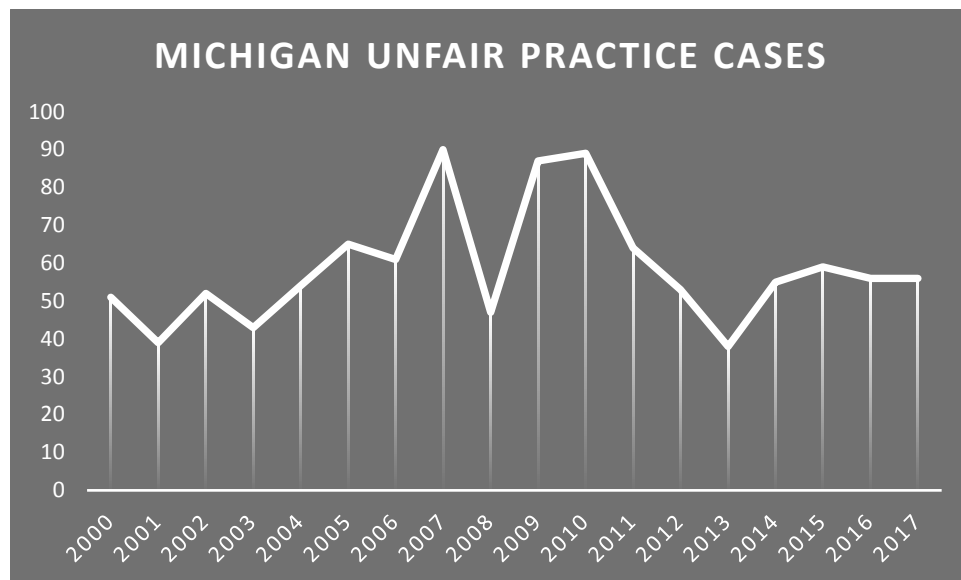
In Indiana, unfair practice cases for teachers did not significantly increase after repeal of agency fees in 1995. Indeed, repeal of agency fees appears not to have impacted the filing of unfair practices in Indiana.²⁷



In Wisconsin, although there was a sharp decline in unfair practice and prohibited practice complaints following the prohibition of agency fees in 2015, the decrease was in line with a preceding decline.²⁸



In Michigan, unfair practice case filings after agency fees were prohibited in 2012 have remained in line with historical trends.²⁹



The data indicates no significant increase in the number of cases brought after the prohibition of agency fees. As for frivolousness, unions may be limited in bringing frivolous claims by state statutes requiring fee shifting for such claims.³⁰ At least in Indiana, IEERB has never made a finding of frivolity against a party.³¹

Similarly, there is speculation that unions may refuse to provide (or require payment for) grievance or other representation for nonunion members. However, courts reviewing the matter have found that pursuing fees or refusing to process grievances for nonmembers would violate the exclusive representative's duty of fair representation. For example, Wisconsin held that exclusive representatives are required to represent members and nonmembers under the duty of fair representation regardless of the existence of agency fees.³² And although binding only in the private sector, the NLRB recently reaffirmed that "absent a valid union-security clause, or in a 'right to work' state, a union may not charge nonmembers for processing of grievances or other related services."³³

It is possible that states could change the unions' duties via statute, or that the union could refuse to undertake certain services for nonmembers outside the scope of the duty of fair representation.

b. Organizational Structure

Unions may respond to the end of agency fees by reorganizing or modifying membership structures. For example, the union could unbundle its membership to allow employees to pay a lower fee for membership and then charge an additional fee for certain services (to the extent allowed, as discussed above).³⁴ In Indiana, the Fraternal Order of Police provides localized collective bargaining services for all unit members. However, union members can opt into the legal defense fund, which covers legal fees related to acts within an officer's duties, or the labor

council, which provides additional collective bargaining and legal services.³⁵ The effectiveness of additional legal coverage may rely on whether employees are guaranteed legal representation or reimbursement of such for acts within the scope of their employment.³⁶ A union could also split into separate legal entities, a bargaining union and a political union.³⁷ Some organizations collect differing dues based upon experience in the profession. For example, the American Bar Association collects different dues based on date of admission to the bar.³⁸

Some unions have started embracing worker centers, which were recently considered rivals. For example, the SEIU formed “Workers Organizing Committees” which function as regional grassroots organizing groups operating much like workers centers to organize and unionize fast food labor.³⁹ And the AFL-CIO currently partners with workers centers in 11 states and advertises its ongoing willingness to partner with similar non-union organizations.⁴⁰

c. External Responses

Unions will determine their external responses to *Janus*. For example, unions will likely continue to lobby for laws to broaden collective bargaining (for more information, see Section V below). Another public act is the strike, a traditional labor tool. Indeed, so far in 2018, there has been a strike in West Virginia, a threatened strike in Pittsburgh, and rumors of another statewide strike in Oklahoma.⁴¹ However, striking may be a difficult or dangerous response for public sector unions. Of large public bargaining groups, it is illegal for firefighters to strike in 46 states, law enforcement officers to strike in 43 states, and teachers to strike in 36 states.⁴² Striking is explicitly legal in only 2 states for firefighters and law enforcement officers and in 12 states for teachers.⁴³ The possible repercussions for illegally striking vary, but can be great. For example, in Indiana striking teacher unions lose dues deductions privileges for one year, while striking public safety unions are prohibited from representing employees for at least 10 years.⁴⁴

Where available, some unions are focusing on ballot measures to provide constitutional protection of collective bargaining rights or to overturn statutes prohibiting collective bargaining or agency fees. In Missouri, for example, ten ballot measures have been proposed for 2018 to provide a state constitutional right to employees to negotiate, enter into, and enforce a collective bargaining agreement, and allow agency fees.⁴⁵ A similar 2012 ballot measure in Michigan failed by a 4% margin. The measure proposed adding a constitutional right to collective bargaining for public and private sector employees, as well overriding state laws regulating hours and conditions of employment when in conflict with a collective bargaining agreement.⁴⁶

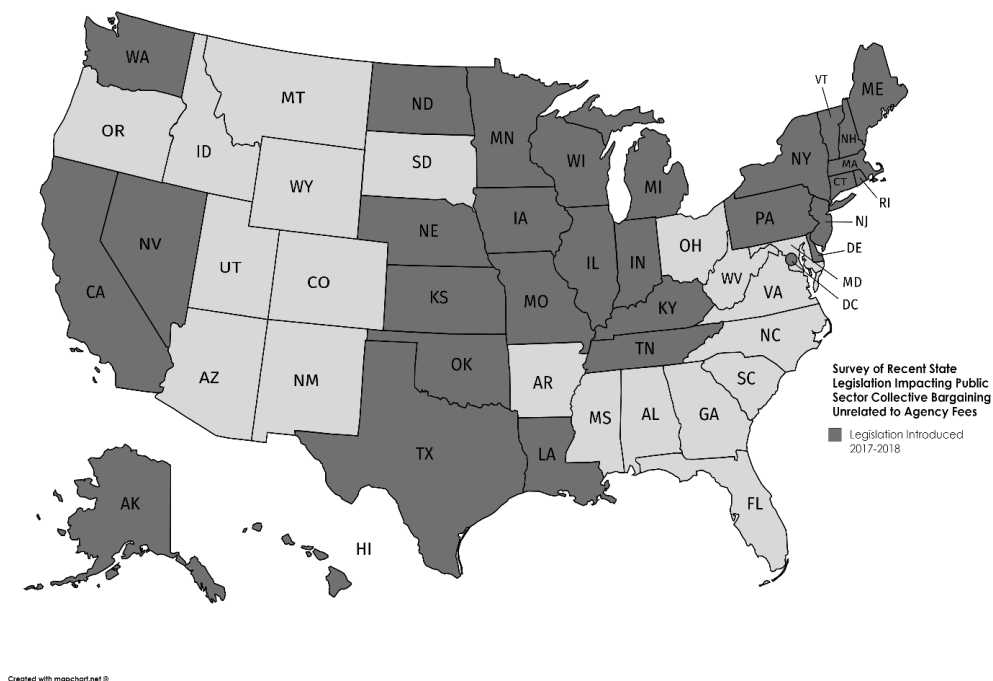
V. State Actions Shape Public Sector Bargaining⁴⁷

States have the ultimate power over public sector bargaining – they can create, modify, or remove the right to it. Therefore, although states will have the opportunity to respond to *Janus*, they will likely also continue to impact public sector bargaining in ways unrelated to agency fees.

States could respond to *Janus* in several ways. As an initial matter, if *Janus* allows agency fees to stand, states can still prohibit them.⁴⁸ Moreover, states – whether agencies, courts, or legislatures – may determine, or be asked to determine, the scope of representation required by the union for non-dues-paying unit members. Specifically, 1) reevaluating the duty of fair

representation, and 2) determining whether the unit must represent nonmember bargaining unit members for grievances/disciplinary matters.⁴⁹

Regardless of the Supreme Court's ruling in *Janus*, states will continue to shape public sector bargaining. It is difficult to make generalizations about public-sector bargaining, even between agency fee and non-agency fee states, as "public-sector labor law and labor relations have been in a state of tumult in the past thirty years. ... not only through varying agency interpretations, but also through significant rewriting of statutes, and the creation and elimination of statutes."⁵⁰ The chart below provides a sampling of states that introduced legislation in 2017 or 2018 that impacted public sector bargaining *aside from* agency fees, including but not limited to, the possible deletion of exclusivity in labor representation.⁵¹ A survey of five types of recent public sector legislation follows.



a. Bargaining Rights & Scope

Who can bargain – and what they can bargain – can change quickly. In California, two bills passed that extended collective bargaining rights to various court employees and student employees.⁵² And California now requires public employers to provide union access to newly hired employees during orientation, as well as contact information for all bargaining unit members.⁵³ In Nevada, school administrators, including principals, can now bargain regardless of salary.⁵⁴ Bills to expand collective bargaining were introduced in New Hampshire (state legislative and judicial branches), New York (farm laborers), and North Dakota (public safety employees).⁵⁵

Other laws sought to restrict bargaining. Iowa limited collective bargaining rights for non-safety public employees.⁵⁶ A Kansas bill proposed to significantly narrow the scope of bargaining for school employees.⁵⁷ And Indiana expanded the subjects for which employers can pay non-bargained bonuses for teachers.⁵⁸

b. Required Recertification

Legislation to require unions to win elections at regular intervals to remain the exclusive representative was introduced in Washington, Maine, New Jersey, Missouri, Florida, Oklahoma, and Illinois.⁵⁹ In Iowa, unions must now receive a majority of unit employees in an election prior to negotiating a new contract.⁶⁰

In Indiana, a bill to require recertification died in committee.⁶¹ However, since 2011, unions must provide membership numbers to schools annually. Starting in 2017, unions also must submit this information to IEERB. If the number of union members is less than a majority of unit members, a letter is sent to every bargaining unit member explaining a teacher's right to representation and to change representatives.⁶² In 2017, close to one-quarter of bargaining units had less than a majority of union members.⁶³

c. Dues Deductions

One of the most common subjects of recent labor legislation is restricting or prohibiting employers from deducting dues from employee paychecks. In Iowa, dues deductions are now banned.⁶⁴ Similar bills were introduced in Maine, Nebraska, New Hampshire, Louisiana, New Jersey, and Texas.⁶⁵ In Kentucky, dues deductions must now be affirmed in writing.⁶⁶ Similar bills were introduced in New York and Missouri.⁶⁷

There are some variations on dues deductions legislation. An Alaskan bill would have allowed the employee – rather than the union – to choose the charity that receives the employee's agency fee equivalent.⁶⁸ A bill in Pennsylvania would have allowed dues deductions only for an amount equal to a fair share fee (i.e., no dues deduction for political contributions or membership dues).⁶⁹ In Tennessee, a bill sought to regulate the size of dues deduction authorization forms.⁷⁰

d. Financial Records

Under federal law, unions must maintain financial records to determine agency fees.⁷¹ Public sector unions in Kentucky must do the same.⁷² Similar bills were introduced in Missouri and Michigan.⁷³

e. Compliance

Since 2015, IEERB has been charged with determining the compliance of teacher CBA's. IEERB is required to provide penalties for non-compliance, including cease and desist and prior agency approval of future contracts.⁷⁴ Similarly, Connecticut now requires the legislature to affirmatively approve all state CBAs and arbitration awards.⁷⁵

VI. Conclusion

Janus is but one piece of a larger puzzle. The prohibition of agency fees will have an impact, but the scope will likely be primarily based on the response of employees and unions. As in Indiana and elsewhere, it is possible that the status quo will continue with lower membership rates. And regardless of the response of employees and unions, state lawmakers will continue to have wide latitude to shape public sector bargaining.

¹ Sarah and John are staff members of the Indiana Education Employment Relations Board. Special thanks to staff members Cheri Spicer and Jacob May for their assistance on this article.

Care has been taken to use neutral terms and to include political terms only for clarification. Any use of politically charged terms is unintentional. Additionally, although great care and research was undertaken to provide current information, please consult state laws or other relevant sources before relying on any information in this article.

² *Unions are confronted with an existential crisis: The Supreme Court is poised to strike a decisive blow*, Economist, Feb. 22, 2018, <https://www.economist.com/news/united-states/21737318-supreme-court-poised-strike-decisive-blow-unions-are-confronted> (last accessed Mar. 26, 2018).

³ See, e.g., *Labour's lost: The Future of Public-Sector Unions Hinges on the Vote of Neil Gorsuch*, Economist, Mar. 1, 2018.; Jess Bravin, *Supreme Court to Decide Fate of Public Sector Unions*, Wall St. J. Feb. 25, 2018, <https://www.wsj.com/articles/supreme-court-to-decide-fate-of-public-sector-unions-1519607316>.

⁴ For a comprehensive look at public sector bargaining state by state, see Milla Sanes & John Schmitt, Center for Economic and Policy Research, *Regulation of Public Sector Collective Bargaining in the States* (Mar. 2014).

⁵ Daniel Disalvo, *Explaining the 'Janus v. AFSCME' Case*, Manhattan Institute (February 15, 2018), <https://www.manhattan-institute.org/html/explaining-janus-v-afscme-case-10956.html> (last accessed on March 26, 2018); U.S. Dept. of Lab. Bureau of Lab. Stat., *Union affiliation of employed wage and salary workers by occupation and industry*, Last Modified January 19, 2018, <https://www.bls.gov/news.release/union2.t03.htm>.

⁶ See Kenneth Giardin, *The Janus Stakes: How a Coming Supreme Court Ruling Could Affect New York's Government Unions*, Empire Center for Public Policy January 2018 at 16, https://www.empirecenter.org/wp-content/uploads/2018/01/Janus-Stakes_1-8-18_FINAL.pdf (last accessed on March 27, 2018).

⁷ There are currently 22 local affiliates of the Indiana Fraternal Order of Police, which serve numerous smaller municipal units. Indiana State Fraternal Order of Police, https://instatefop.org/index.cfm?zone=/unionactive/view_page.cfm&page=Links (last accessed on Mar. 26, 2018). There are 76 local affiliates of the Professional Firefighters Union of Indiana. Professional Firefighters Union on Indiana, <https://www.pffui.com/locals.htm> (last accessed on Mar. 26, 2018). Professional Firefighters Union on Indiana, <https://www.pffui.com/locals.htm> (last accessed on Mar. 26, 2018).

⁸ Ind. Code Article 20-29; www.in.gov/ieerb.

⁹ Fair-Share Clause, Black's Law Dictionary 716 (10th ed. 2014).

¹⁰ Questions Presented, *Janus v. Am. Fed. of State, County, and Mun. Employees, Council 31, et al.*, No. 16-1466 (___ U.S. ___, 2018). More specifically, in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), the Supreme Court held that agency fees are constitutional. Last term the Court split 4 to 4 on whether to overrule *Abood*. *Friedrichs v. Cal. Teachers Ass'n*, ___ U.S. ___, 136 S. Ct. 1083 (2016). The petitioners request that *Abood* be overruled and agency fees be declared unconstitutional under the First Amendment. Other relevant cases include *Harris v. Quinn*, ___ U.S. ___, 134 S. Ct. 2618, 2632-34 (2014); *Knox v. SEIU, Local 1000*, 567 U.S. 298, 309, 132 S. Ct. 2277, 2289 (2012).

¹¹ Right-to-Work States, National Conference of State Legislatures, <http://www.ncsl.org/research/labor-and-employment/right-to-work-laws-and-bills.aspx> (last accessed Mar. 27, 2018); Jackson Lewis P.C., *Missouri to Vote on State's Right-to-Work Law*, National Law Review, Jan. 23, 2018,

<https://www.natlawreview.com/article/missouri-to-vote-state-s-right-to-work-law> (last accessed Mar. 27, 2018).

¹² Exec. Order No. 10,988, 27 Fed. Reg. 551 (Jan. 17, 1962).

¹³ Jeffrey Keefe, Economic Policy Institute, *Eliminating Fair Share Fees and Making Public Employment 'Right-to-Work' Would Increase the Pay Penalty for Working in State and Local Government* (Oct. 2015); Jason Hart, *State, local laws force public employees to pay labor unions*, Watchdog.org (Sept. 24, 2014); Maxford Nelson, Freedom Foundation, *The Effect of Agency Fees on Labor Peace in Public Employment Relations* (Nov. 2017).

Note that this chart is based on articles from 2010 and 2014 and may not reflect recent state developments. It is meant for illustrative purposes only. Moreover, states where agency fees may not be prohibited but where they are not collected, such as Kentucky, are not included on this chart. It is difficult to determine the exact number of states with public sector agency fees for a few reasons. First, the laws are constantly in flux. Many states only let certain public-sector employees – generally teachers and public safety employee – bargain. And some states allow agency fees in some areas but not others. Finally, in some states there is no statute permitting or prohibiting agency fees, so it is either determined through case law or simply as a matter of practice. Therefore, state laws and cases should be consulted before relying on this map to ensure accuracy. Finally, Missouri will have a referendum in 2018 on the issue of agency fees in the private sector. That is noted on the private right to work map, and Missouri is listed as “mixed” on the public-sector map.

¹⁴ Barry T. Hirsch, David A. Macpherson, & Wayne G. Vroman, *Estimates of Union Density by State*, 124 Monthly Lab. Rev., no. 7, 2001, at 51-55. (Underlying data for years following article publication available at www.unionstats.com, last accessed Mar. 20, 2018).

¹⁵ Figures represent the percentage of state’s nonagricultural union employees as compared to all employees. Estimates are based on the 1983-2017 Current Population Survey Outgoing Rotation Group earning files and the 1977-81 May CPS earnings files. Chart compiled using most current data from Hirsch, Macpherson, & Vroman, *supra* note 14.

¹⁶ *Id.* Note that the union membership percentage appears high, which may be partly explained by union members not covered by collective bargaining agreements (e.g., retirees or employees not covered under labor laws).

¹⁷ *Id.*; Kenneth Giardin, *The Janus Stakes: How a Coming Supreme Court Ruling Could Affect New York’s Government Unions*, Empire Center for Public Policy January 2018 at 11-12, https://www.empirecenter.org/wp-content/uploads/2018/01/Janus-Stakes_1-8-18_FINAL.pdf (last accessed on March 27, 2018).

¹⁸ ERO Upload Report for 2017, Indiana Gateway, <https://gateway.ifionline.org> (select “Report Search”; then select “Collective Bargaining”; then select ERO Upload Report). Note that unlike the density charts earlier in the paper, charts based on this information include only members of their exclusive representative (and not, for example, retired employees and employees not covered by a CBA).

¹⁹ Shiva Maniam, *Most Americans See Labor Unions, Corporations Favorably*, Pew Research Center (Jan. 30, 2017), <http://www.pewresearch.org/fact-tank/2017/01/30/most-americans-see-labor-unions-corporations-favorably>.

²⁰ Lawrence Michel, *Overall union membership rises in 2017, union density holds steady*, Economic Policy Institute (January 19, 2018), <https://www.epi.org/blog/union-membership-density-2017/> (last accessed on March 26, 2018); U.S. Dept. of Lab. Bureau of Lab. Stat., *Union affiliation of employed wage and salary workers by occupation and industry*, Last Modified January 19, 2018, <https://www.bls.gov/news.release/union2.t03.htm>.

- ²¹ Kate Andrias, *The New Labor Law*, 125 Yale L.J. 1 (2016).
- ²² See Ruth Berins Collier, V.B. Dubal, and Christopher Carter, Institute for Research on Labor and Employment, IRLE Working Paper #106-17 (Sept. 2017).
- ²³ *Carmel Clay Schools*, R-16-04-3060 (IEERB H.O. 2017).
- ²⁴ Miles Kampf-Lassin, *The Lesson From West Virginia Teachers? If You Want to Win, Go on Strike.*, In These Times (Mar. 7, 2018, 1:57 PM), http://inthesetimes.com/working/emtry/20965/west_virginia_teachers_strike_victory_raise_oklahoma.
- ²⁵ Julina Guo, *A Backgrounder: The Market Basket Strike*, onlabor (Oct. 28, 2014), <https://onlabor.org/a-backgrounder-the-market-basket-strike/>.
- ²⁶ Benjamin Sachs, *Worker Centers and the "Labor Organization" Question*, onlabor (Sept. 1, 2013), <http://onlabor.org/worker-centers-and-the-labor-organization-question/>.
- ²⁷ Data provided by Indiana Education Employment Relations Board on Mar. 20, 2018.
- ²⁸ Data provided by Wisconsin Employment Relations Commission on Mar. 20, 2018.
- ²⁹ Data provided by Michigan Bureau of Employment Relations on Mar. 20, 2018.
- ³⁰ Ind. Code § 20-29-7-1 (2017) (requiring unions to pay attorney fees for discussion cases determined to be frivolous).
- ³¹ *Id.*
- ³² *Int'l Ass'n of Machinists Dist. 10 & Its Local Lodge 1061 v. State*, 903 N.W.2d 141, 151 (Wis. Ct. App. 2017).
- ³³ *United Steel Workers Local 1192 (Gilman Building Products)*, 12-CB-182935 (NLRB 2016).
- ³⁴ For example, the American Bar Association allows members to pay more to join committees. See 2017-18 ABA Membership and Specialty Group Memberships, https://www.americanbar.org/membership/dues_eligibility.html (last accessed on Mar. 26, 2018).
- ³⁵ Indiana Fraternal Order of Police Labor Council, Inc., <https://instatefop.org/docs/labor%20council%20brochure.pdf> (last accessed on Mar. 26, 2018); Indiana State Lodge Fraternal Order of Police Legal Defense Fund, <https://instatefop.org/docs/LDF%20Brochure%20rev2018.pdf> (last accessed on Mar. 26, 2018).
- ³⁶ For example, the Indiana Attorney General must represent teachers for no cost in certain cases. Ind. Code § 4-6-2-1.5. Schools also must reimburse teachers for certain representation costs. Ind. Code § 36-1-17 *et seq.*
- ³⁷ Benjamin I. Sachs, *The Unbundled Union: Politics without Collective Bargaining*, 123 Yale L.J. 148 (2013).
- ³⁸ 2017-18 ABA Membership and Specialty Group Memberships, https://www.americanbar.org/membership/dues_eligibility.html (last accessed on Mar. 20, 2018).
- ³⁹ Jarol B. Manheim, *The Emerging Role of Worker Centers in Union Organizing: An Update and Supplement*, p. 55 U.S. Chamber of Commerce Workforce Freedom Initiative (Dec. 6, 2017), https://www.uschamber.com/sites/default/files/uscc_wfi_workercenterreport_2017.pdf.
- ⁴⁰ *Id.* at 57. *AFL-CIO Worker Center Partners*, <https://aflcio.org/what-unions-do/social-economic-justice/worker-centers> (last accessed on Mar. 20, 2018).
- ⁴¹ Jess Bidgood, *West Virginia Raises Teachers' Pay to End Statewide Strike*, N.Y. Times (Mar. 6, 2018), <https://www.nytimes.com/2018/03/06/us/west-virginia-teachers-strike-deal.html>; Elizabeth Behrman,

Strike averted after Pittsburgh Public Schools, teachers union reach tentative deal, Pittsburgh Post-Gazette (Feb. 27, 2018), <http://www.post-gazette.com/news/education/2018/02/27/Pittsburgh-Public-Schools-Federation-of-Teachers-contract-negotiations-strike-agreement-union/stories/201802270201>; Dana Goldstein, *Their Pay Has Stood Still. Now Oklahoma Teachers Could Be the Next to Walk*, N.Y. Times (Mar. 20, 2018), <https://www.nytimes.com/2018/03/20/us/oklahoma-teachers-strike.html>.

⁴² See Sanes & Schmitt, *supra* note 4.

⁴³ *Id.*

⁴⁴ Ind. Code § 20-29-9-3 (2017); Ind. Code § 36-8-22-15 (2017).

⁴⁵ Missouri Measures 2018-092, 2018-093, 2018-094, 2018-095, 2018-096, 2018-097, 2018-098, 2018-099, 2018-101, and 2018-102.

⁴⁶ Note that state constitutional provisions or other legislative ballot measures regarding public sector agency fees would need to follow *Janus*.

⁴⁷ This section used the following articles and online tools to find most of the bills cited:

Matthew Greer & Charles “Buddy” Wheatley, American Bar Association - State and Local Government Bargaining and Employment Law Committee, *Subcommittee Report: States Without Bargaining Legislation* (Jan. 2017), https://www.americanbar.org/groups/labor_law/committees/slgbcom.html.

Matthew Greer & Charles “Buddy” Wheatley, American Bar Association - State and Local Government Bargaining and Employment Law Committee, *Subcommittee Report: States Without Bargaining Legislation* (Jan. 2018), https://www.americanbar.org/groups/labor_law/committees/slgbcom.html.

<http://www.ncsl.org/research/labor-and-employment/collective-bargaining-legislation-database.aspx>

⁴⁸ A bill to do this recently died in Maine. H. Paper 53, 128th Leg., 1st Reg. Sess. (Me. 2017).

⁴⁹ *International Association of Machinists District 10 et al. v. State of Wisconsin*, 903 N.W.2d 141 (Wis. Ct. App. 2017) (finding that a union still has the duty of fair representation, even without being able to collect agency fees).

⁵⁰ Joseph Slater, *The Strangely Unsettled State of Public-Sector Labor in the Past Thirty Years*, 30 Hofstra Lab. & Emp. L.J. 511, 511–12 (2013).

⁵¹ Some states already have similar laws. See *infra*, notes 52-75. For more information on public sector collective bargaining schemes, see Marilyn Raskin-Ortiz & Emily Martin, American Bar Association - State and Local Government Bargaining and Employment Law Committee, *Bargaining in States without Public Sector Collective Bargaining Legislation* (Jan. 2010), https://www.americanbar.org/groups/labor_law/committees/slgbcom.html; See, e.g., S.B. 302, 119th Gen. Assemb., 1st Reg. Sess. (Ind. 2015); Act of March 23, 2016, Pub. L. No. 127-2016 (Ind. 2016) (urging the legislative council to assign to study committee the issue of feasibility of allowing school corporations and individual teachers to negotiate terms different than those set forth in the applicable CBA); H.B. 4596, Mich. Leg., 2017-2018 Sess. (Mich. 2017).

⁵² Act of Oct. 15, 2017, ch. 835, 2017 Cal. Laws (enacting Assemb. B. 83, Cal. 2017); Higher Education Employer-Employee Relations Act, ch. 854, 2017 Cal. Laws (enacting S.B. 201, Cal. 2017)(codified as amended at Cal. Gov. Code § 3562).

⁵³ Act of June, 27, 2017, ch. 21, 2017 Cal. Laws (enacting Assemb. B. 119).

⁵⁴ Act of June 1, 2017, ch. 265, 2017 Nev. Laws (enacting S.B. 493, Nev. 2017) (codified as amended at NRS 288.170).

⁵⁵ H.B. 1432, N.H. Gen. Ct., 2016 Sess. (N.H. 2016); S. 1291, N.Y. Assemb., 2015-2016 Reg. Sess. (N.Y. 2015); and H.B. 1401, 65th Leg. Assemb., Reg. Sess. (N.D. 2017).

⁵⁶ H. File 291, 87th Gen. Assemb. (Iowa 2017). A legal challenge is pending.

⁵⁷ S.B. 176, Kan. Leg., 2015-2016 Reg. Sess. (Kan. 2015).

⁵⁸ *See Act of Mar. 21, 2018, Pub. L. No. 170-2018 (Ind. 2018)*; *see also* Ind. Code §§ 20-28-9-1.5(a); 20-43-10-3(g).

⁵⁹ *See, e.g.,* H.B. 1607, 65th Leg., Reg. Sess. (Wash. 2017); S. 544, 128th Me. Leg. (Me. 2017); Assemb. 3692, 217th Leg., (N.J. 2016); S.B. 668, 98th Gen. Assemb., 2d Reg. Sess. (Mo. 2015); H.B. 11, 2017 Leg., Reg. Sess. (Fla. 2017); S.B. 597, 56th Leg., Reg. Sess. (Okla. 2017) and H.B. 1767, 56th Leg., Reg. Sess. (Okla. 2017); and H.B. 3219, 100th Gen. Assemb., (Ill. 2017).

⁶⁰ H. File 291, *supra* note 56.

⁶¹ S.B. 538, 119th Gen. Assemb., 1st Reg. Sess. (Ind. 2015).

⁶² *See* Ind. Code §§ 20-29-5-7, 20-29-5-8 (2017).

⁶³ For more information, *see* teacher union membership data available at Indiana Gateway, *supra* note 18.

⁶⁴ H. File 291, *supra* note 56.

⁶⁵ H. Paper 53 (Maine), *supra* note 48; Leg. B. 503, 105th Leg., 1st Session (Neb. 2017); H.B. 438, N.H. Gen. Ct., 2018 Sess. (N.H. 2018); H.B. 543, La. Leg., 2017 Reg. Sess. (La. 2017); Assemb. 574, 217th Leg. (N.J. 2018); S.B. 7, 85th Leg., 1st Called Sess. (Tex. 2017); S.B. 13, 85th Leg., Reg. Sess. (Tex. 2017); S.B. 94, 85th Leg., 1st Called Sess. (Tex. 2017); H.B. 156, 85th Leg., 1st Called Sess. (Tex. 2017); H.B. 510, 85th Leg., Reg. Sess. (Tex. 2017).

⁶⁶ Paycheck Protection Act, Act 6 of 2017 Reg. Sess. (Ky. 2017)(enacted Jan. 9, 2017); *see also* Ind. Code § 20-29-5-6 (2017).

⁶⁷ S. 5778-A, N.Y. Assemb., 2017-2018 Reg. Sess. (N.Y. 2017); H.B. 1891, 98th Gen. Assemb., 2d Reg. Sess. (Mo. 2016)(vetoed by Gov.).

⁶⁸ S.B. 44, 29th Leg., 1st Sess. (Alaska 2015).

⁶⁹ H.B. 1174, Pa. Gen. Assemb., 2017-2018 Reg. Sess. (Pa. 2017).

⁷⁰ S.B. 890, 109th Gen. Assemb., Reg. Sess. (Tenn. 2015).

⁷¹ 29 U.S.C. §431(b) (1959).

⁷² Paycheck Protection Act (Ky. 2017), *supra* note 67.

⁷³ H.B. 4595, Mich. Leg., 2017-2018 Sess. (Mich. 2017); S.B. 599, 98th Gen. Assemb., 2d Reg. Sess. (Mo. 2016)

⁷⁴ *See* Ind. Code § 20-29-6-6.1 (2017).

⁷⁵ Conn. Gen. Stat. § 5-278 (West, Westlaw through 2018 Supp.).

Speaker Biographies

Taylor Law at 50

May 11, 2018 | 11:15 a.m. – 12:30 p.m.

Concurrent Three:

Strategies for Adapting to a post-*Janus* World

SARAH CUDAHY

Sarah was appointed as the first Executive Director of the Indiana Education Employment Relations Board on June 30, 2016, after serving for four years as general counsel. She is a member of the Executive Board of the Association of Labor Relations Agencies and is a Government Fellow for the American Bar Association's State and Local Government Bargaining and Employment Law Committee. Sarah began her legal career as a judicial law clerk for Justice Theodore Boehm of the Indiana Supreme Court. She then worked in Chicago as a Labor & Employment Associate before moving back home to Indiana. Sarah graduated summa cum laude from Boston University with a B.A. in Education, Public Policy, and European Studies. She earned her law degree from Washington University in St. Louis.

JAMES W. ROEMER, JR.

James W. Roemer, Jr. was born in Albany, New York on September 27, 1944, and attended Albany Public Schools, Guilderland Schools and The Milne School for his primary and secondary education. He attended the University of Buffalo, graduating with a B.A. in Economics in 1966. He received his law degree from Albany Law School in 1969 and joined the firm of DeGraff, Foy, Conway, Holt-Harris & Mealey, then counsel to the Civil Service Employees Association (CSEA). As an associate in that firm, he was provided an office at CSEA Headquarters at 33 Elk Street and worked exclusively on Taylor Law matters and all other public sector labor issues on behalf of CSEA and its members. In 1976, he formed the firm of Roemer and Featherstonhaugh, which served as General Counsel to CSEA. During that period of time, Mr. Roemer served as Chief Counsel to CSEA and was the Chief Negotiator for CSEA in the four major state bargaining units – the Professional Scientific and Technical Services Unit (until the Public Employee Federation began representing this unit), the Administrative Services Unit, the Operational Services Unit, and the Institutional Services Unit. During his tenure as CSEA Chief Counsel, Mr. Roemer was responsible for directing all litigation involving CSEA and, in doing so, he appeared before the New York Court of Appeals on 23 occasions. In 1987, CSEA decided to move from a retained counsel model for its legal services to an in-house model. Mr. Roemer, along with his partners who previously had represented CSEA, established a public sector management labor relations practice beginning with no clients and numbering more than 50 today. In 1995, Mr. Roemer, along with partners Bill Wallens, John Mineaux and Elayne Gold, formed his current firm Roemer Wallens Gold & Mineaux LLP. In his 49th year of New York Public Sector Labor Practice, Mr. Roemer continues almost exclusively in the collective bargaining aspect of his firm's representation and as the firm's Senior Partner, he continues to counsel and mentor his younger partners and associates in all aspects of the representation of their many public employer clients. Mr. Roemer has negotiated more than five hundred collective bargaining agreements on behalf of public sector municipal clients and has very successfully appeared before the Public Employment Relations Board, numerous interest arbitration panels, various State Supreme Courts, the four Appellate Divisions and the Court of Appeals on a variety of public sector labor relations and public retirement system issues. Mr. Roemer is also a noted authority in New York State Retirement System matters and has successfully represented numerous professional individuals (attorneys, doctors and accountants) in their disputes with the Retirement System regarding their status as public employees. He resides in Voorheesville, New York with his wife Elaine and

devotes considerable time to their daughters, Amy and Alison, and their respective families, especially his five grandchildren.

KATE LUSCOMBE

Kate has been an advocate for labor and working people for many years. During her career with CSEA, AFSCME's largest affiliate, she been a Labor Relations Specialist, a Region Director and Executive Assistant to the Statewide President.

Currently, Kate is CSEA's Director of Field Operations. In this role Kate coordinates and develops statewide resources and programs for the field representatives and oversees the education and training initiatives of the organization. She also has the responsibility to ensure that CSEA's retiree, member engagement, member benefits, health benefits and safety and health programs and departments continue to grow and expand as valuable resources available to the CSEA membership.

Kate holds a degree in Industrial and Labor Relations from Cornell University and is a 2007 graduate of the Harvard Trade Union Program.

JOHN F. WIRENIUS

John Wirenius was nominated by the Governor and confirmed by the Senate as the Chairperson of the Public Employment Relations Board ("PERB") in June 2016, after having served as PERB's Deputy Chair and General Counsel for two years. Prior to joining PERB, he was for eight years the Deputy General Counsel for the New York City Office of Collective Bargaining, and earlier in his career represented both management and labor. He has published numerous scholarly articles on topics ranging from the First Amendment to labor law, and two books. He is a 1990 graduate of the Columbia University School of Law, where he was a Harlan Fiske Stone Scholar. He received his undergraduate degree *summa cum laude* from Fordham College in 1987.