NYSPELRA Newsletter: December 2004

LEGISLATIVE UPDATE

In the past month, the Governor has vetoed these bills:

- S. 3900, which would have extended §207-c benefits to police officers employed by a bi-state commission or authority. Veto No. 282;

- S. 32011-A, which would have provided members of the retirement systems administered by the State Comptroller with retirement service credit for up to a year of time spent on unpaid leave due to a comp injury. Veto No. 289;
- S. 6214, which would have addressed layoffs of employees in the noncompetitive or labor class and provided recall rights. Veto No. 290; and
- S. 6215-A, which would have extended a temporary leave of absence to any employee who might be promoted to a position having a probationary term in order that the employee might return to his or her former position if probationary service were to be deemed unsatisfactory or if the individual so chooses. Veto No. 291

PERB DECISIONS

The following decisions have been issued by either the Public Employment Relations Board or its staff. Any summary that might be of interest should be reviewed as to the facts and circumstances of the case and, if a decision is one by an administrative law judge, whether the decision was appealed to the Board. In some instances, a Board decision may have resulted in litigation. E-mail your editor, John Galligan, at galli14@earthlink.net for a copy of a summarized decision if you do not receive published decisions. Check www.perb.state.ny.us for summaries of decisions since 1986 and for downloading agency forms.

- in adjudicating an improper practice charge alleging a unilateral transfer of bargaining unit work, the prime initial questions are whether the work transferred has exclusively been performed by unit employees and whether the reassigned tasks are substantially similar to those previously performed by unit employees. June 28 ALJ decision in Rockland County;
- a work rule which carries with it the potential for discipline in the event of its breach is a mandatory subject of negotiation and cannot be unilaterally implemented. July 8 ALJ decision in State of New York;
- the Board has historically held that the most appropriate bargaining unit is the largest one permitting for effective and meaningful negotiations. Only where diverse employee interests establish a conflict of negotiating interests, either actual or potential, would smaller bargaining units be warranted. The most appropriate unit need not necessarily be the one proposed by the parties. One factor taken into consideration when a representation petition is filed with PERB is an employer claim that the creation of an additional unit would an administrative burden and consequently, the unrepresented employees that are the subject of the petition with should be placed in an existing unit. June 29 ALJ decision in Port Washington UFSD;
- sick leave is a mandatory subject of negotiation, as are the procedures and policies for either granting or terminating it. A unilaterally adopted requirement that an employee seeking to use sick leave for health care purposes provide the name and phone number of the provider and the time of the appointment is an improper practice because of a failure to bargain. August 25 Board decision in NYS Department of Correctional Services;
- if a public employer's chief executive officer or designated bargaining agent did not grant, acquiesce in, or know of an employer practice involving a mandatory subject of negotiation, there is no past practice. August 6 ALJ decision in NYS Department of Correctional Services;

- employee use of employer equipment for personal purposes amounts to an economic benefit because the employer has provided something of value to its employees. By providing such a benefit that may be not addressed by the negotiated labor agreement, the comfort and convenience of the workplace is affected and the employer has supplemented the negotiated labor agreement. August 25 Board decision in Saratoga County;
- for good business reasons, a public employer may reduce the services it provides to the public. If undertaken in good faith, a reduction in services may justify a reduction in the workload of employees with a commensurate reduction in salary. August 25 Board decision in Onondaga-Cortland-Madison BOCES;
- a unit placement petition hinges upon a comparison of the terms and conditions of employment of the petitioned-for employees with those of similar employees in the bargaining unit. August 24 ALJ decision in Rensselaer, Columbia and Greene Counties BOCES;
- absent a negotiated waiver of the obligation to bargain or unless some other exception applies, a public employer must negotiate over any change in a term and condition of employment, even if the issue is not addressed in the contract between the parties. If a noncontractual term and condition of employment is unilaterally altered or terminated, there likely has been an unlawful refusal to negotiate. That a public employer may gain operational or fiscal advantages by imposing, altering, or terminating noncontractual terms and conditions of employment does not relieve it of the duty to satisfy a bargaining obligation first. August 6 ALJ decision in NYS Department of Correctional Services;
- one element of a past practice is to consistently provide a benefit over a period of time so that affected employees reasonably come to expect that the benefit will continue to be received. To establish that a unilateral change in a practice occurred, the charging party must demonstrate that the practice was unequivocal and uninterrupted for a sufficient period of time so as to create a reasonable expectation that the practice would continue. August 6 ALJ decision in NYS Department of Correctional Services;
- the termination of a past practice involving a mandatory subject of negotiation is not an improper practice, absent some involvement by the chief executive officer or the designated bargaining agent of a public employer. August 6 ALJ decision in NYS Department of Correctional Services;
- to establish a past practice that cannot be unilaterally changed, a union must demonstrate that the practice involves a mandatory subject of negotiation, was unequivocal, and was uninterrupted for a period of time so as to create a reasonable expectation among unit employees that the practice would continue unchanged. September 1 ALJ decision in Nassau County;
- a past practice involving a mandatory subject of negotiation need not affect all members of a bargaining unit in order for it to be subject to a prior bargaining obligation before a change can be imposed. August 6 ALJ decision in NYS Department of Correctional Services;
- the Board has historically fragmented employees with law enforcement responsibilities from a bargaining unit that includes employees not having such responsibilities. August 12 ALJ decision in Nassau County;
- in order to establish a binding past practice, a charging party must first prove that the subject matter involves a mandatory subject of negotiation. August 25 Board decision in Saratoga County;
- a unit clarification petition raises the question of whether a particular title is included within the scope of an existing bargaining unit. It seeks only a factual determination and generally starts with an examination of the recognition clause contained in the negotiated labor agreement. But it is equally important to review the agreement for other terms that might apply to the petitioned-for titles and the treatment of those titles by the parties. September 1 ALJ decision in Village of Fredonia;
- to prove a practice was unequivocal, a union must demonstrate that the practice was authorized by an agent of the employer with sufficient authority to bind the employer to the

practice. The employer must have knowledge of the practice, either through direct negotiations or indirectly through condoning, ratifying, or acquiescing in it. Such an authorization cannot be presumed from an employee's status as a supervisor. September 1 ALJ decision in Nassau County; and

- paid leave is a mandatory subject of negotiation, but when employees receive it is not because the "when" is directly linked to staffing, which is a nonmandatory subject of negotiation. To the contrary, when other forms of compensation are received is a mandatory subject. Consequently, a longstanding practice of granting employee requests for pre-approved sick leave of minimal duration can be unilaterally terminated and a unilateral change in a practice of granting prior approval of minimal amounts of sick leave is not an improper practice. August 6 ALJ decision in NYS Department of Correctional Services.