



NYSPELRA Newsletter: March 2004

AN EARLY RETIREMENT OPTION IS UNLIKELY TO BE OFFERED

As indicated in the February issue, the Governor offered several amendments to the State budget, one being an early retirement incentive for local governments and school districts whereby positions could be targeted and eligible individuals could choose to retire with an additional month of service credit for each year of credited service, up to a maximum of 3 additional years of service credit. The amendment is similar to what was last offered in 2002 as Part A of an early retirement incentive. The bill containing the incentive, A. 9556-A/S. 6056-A, requires that if the incentive is offered, a savings must be shown.

However, key legislators have indicated that the incentive is unlikely to be included in the State budget. Those municipalities and school districts with a strong interest in offering the incentive should contact their 2 State legislators to ask that they seek to include the incentive in the State budget.

PERB DECISIONS

The following are summaries of decisions which have been issued by either the Public Employment Relations Board (PERB) or its staff. Any decision reported below that can be appealed to the Board should be researched to ascertain its subsequent disposition, if in fact an appeal was actually made, and further researched to determine if a court appeal occurred. E-mail your editor, John Galligan, at galli14@earthlink.net for a copy of any decision summarized. Check the PERB web site www.perb.state.ny.us at which summaries of decisions issued since 1986 can be obtained and forms can be downloaded.

- the right to ratify an agreement is not statutory but instead derives from an agreement in the form of ground rules that precede substantive negotiations. July 1 ALJ decision in Town of Cicero;
- the Board's holding in City of Cohoes, 31 PERB ¶13020 (1998), upheld by the courts, is premised upon the existence of an agreement and has no application to a nonmandatory past practice that might be unilaterally changed by a public employer. June 26 ALJ decision in Town of Colonie;
- whether and when to create and/or fill a position is not a mandatory subject of negotiation. Consequently, neither is a union demand that an employer honor a full-time employee's request for part-time status. June 26 ALJ decision in Town of Colonie;
- a public employer has no duty to negotiate over its termination of a past practice which is a mandatory subject of negotiation, absent proof that the person who granted the benefit had the authority to commit the employer to an agreement. June 24 ALJ decision in NYS Department of Correctional Services;
- a negotiator's negative vote in the ratification process amounts to a repudiation of the tentative agreement that had been reached in negotiations, is a breach of the duty to negotiate in good faith, results in a waiver of any right to ratify, and will lead to a PERB order to execute the tentative agreement. A belated discovery of the excessive cost of a provision

in the tentative agreement fails to sanction a negotiator's decision to cast a negative vote in the ratification process. July 1 ALJ decision in Town of Cicero. Editor's note: To preserve any right to ratify a tentative agreement, a negotiator who intends to cast a negative vote in the ratification process must have conveyed that conclusion in a bargaining session to the other party to negotiations.

- under the Taylor Law, the Board has an obligation, upon request, to petition in State Supreme Court for injunctive relief regarding an improper practice charge if a conclusion is reached that the charging party has made a sufficient showing that an improper practice has occurred and it appears that immediate and irreparable injury, damage, or loss will occur without a return to the status quo. Under the Board's rules, its Office of Counsel has been delegated the responsibility to make this determination on behalf of the Board. July 10 decision of Associate Counsel in Briarcliff Manor UFSD;
- under §212.4(a) of PERB's rules, an ALJ may be substituted for one previously assigned by decision of the Director of Public Employment Practices and Representation. August 18 Board decision in Town of Ramapo;
- a public employer employing those eligible for the benefits of §207-c of the General Municipal Law can unilaterally make light duty determinations. August 18 Board decision in Village of Hamburg;
- while a unit placement petition and a unit clarification petition may appear to be similar, the adjudicative standards are different. A unit placement petition involves a factual investigation by the Board or its staff in a non adversarial investigation. Such a petition is premised upon a belief that a petitioned-for title is not in a bargaining unit, but should be. In deciding whether to place the petitioned-for title in a unit, the Board will examine the uniting criteria set forth in §207 of the Civil Service Law, one of which involves a community of interest. In determining whether such exists between a petitioned-for title and that of those in the unit seeking to accrete the position, several factors are critical, such as whether there might be common levels of 1) supervision; 2) education and training; 3) professional status; 4) a shared professional mission and work environment; and 5) salary and fringes. A unit clarification petition involves a factual inquiry by PERB as to whether the petitioned-for title is already in a particular bargaining unit. The purpose of such a petition is to secure a determination that it is and the petitioner has the burden to demonstrate that the petitioned-for title has a community of interest with the other titles in the unit for which accretion is sought. July 31 ALJ decision in NYC Transit Authority;
- the Board has for more than 30 years identified the policy making responsibilities necessary to warrant a determination that an employee is a managerial one and thus not eligible to be represented by a union. Such individuals include those having the authority or responsibility to choose among policy options and to implement one and those who regularly participate in that process even though they may not be responsible for adopting a policy. Some one responsible for drafting policy language without meaningful participation in the decisional process or some one who might research policy alternatives is not a managerial employee. August 18 Board decisions in Town of Ramapo and State of New York;
- the mere fact of supervisory responsibilities does not prevent such an employee from being placed in the same bargaining unit as those supervised. The Board or its staff will determine whether there is an actual or potential conflict of interest that would lead to a conclusion that supervisory

employees should not be in the same unit as those supervised. July 31 ALJ decision in NYC Transit Authority;

- when an improper practice charge is filed with PERB, alleging a §209-a.1(a) or §209-a.1(c) violation of the Taylor Law, involving an interference with employees in the exercise of their Taylor Law rights or discrimination against protected employees to discourage participation in union activities, respectively, the charge will not be deferred to a contractual arbitration procedure. August 13 decision in Nassau County;
- once a §207-c light duty decision has been made, a demand to negotiate procedures to review such a decision and how light duty assignments are to be made are mandatory subjects of negotiation. August 18 Board decision in Village of Hamburg;
- a public employer having employees who are potentially eligible for the municipal disability benefits afforded by §207-c of the General Municipal Law has no duty to negotiate over rights afforded to it by law. August 18 Board decision in Village of Hamburg; and
- in establishing a transitional work program to address light duty work assignments for those law enforcement personnel eligible for the municipal disability benefits afforded by §207-c of the General Municipal Law, a municipality has no obligation to bargain over its determination to remove from the program an injured individual for whom a determination has been made that no recovery will occur so as to allow a return to regular duties. August 18 Board decision in Village of Hamburg.