



LEGISLATIVE UPDATE

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

- A. 4487-A, a bill which would have allowed Tier 2 members of the Police and Fire Retirement System who were at least age 55 with 30 or more years of service to retire without a pension reduction. According to the the System actuary, an estimated \$8.3 million employer cost which would have been apportioned across those employers hiring either police or paid firefighters who are required to participate in the System. Veto No. 242.
- A. 8377-A, which would have increased the maximum service credit for Tier 2 members of the Police and Fire Retirement System from 30 to 32 years, with a \$16.4 million cost to employers participating in the System. This bill was part of an attempt to incrementally nudge the maximum Tier 2 service credit to 37.5 years which is the Tier 1 benefit. Veto No. 246

Given the unprecedented increases in retirement system contributions to be made by public employers in February 2005 for the systems administered by the State Comptroller, to pass bills to further increase employer pension costs is simply unfathomable. Check the Assembly and Senate web sites to see how your legislators voted on the bill. Practically all voted to pass both. Should you happen to encounter the perpetrators, the question should be "what were you thinking?".

NYSPELRA MEMBER LIST INCLUDED

The list is not circulated to nonmembers. Several e-mail addresses are missing. Those wishing to submit changes in membership information should forward the details to your editor at galli14@earthlink.net.

PERB DECISIONS

The following decisions have been issued by either the Public Employment Relations Board (PERB) 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, reviewed as to 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 any decision summarized in the event you do not subscribe to the service that publishes the decisions issued by the Board or its staff. Check the PERB web site at www.perb.state.ny.us where summaries of decisions issued since 1986 can be obtained and agency forms can be downloaded.

- waiver is potentially an affirmative defense for which the respondent to an improper practice charge bears the burden of pleading and then proving. Section 204.3(c)(2) of the Board's rules requires that the respondent to an improper practice charge include in its answer a specific, detailed statement of an affirmative defense, as well as a clear and concise statement of the facts surrounding such a defense, including the names of individuals involved and the time and place of occurrence of each of the particular acts

- alleged. Pleading that a charging party has "waived its rights" but nothing more is only a conclusory statement and is deficient because it fails to provide the charging party with notice for the basis of the defense. December 30 ALJ decision in Nassau County;
- to establish the existence of a past practice that cannot be unilaterally changed, a charging party must demonstrate that the practice has been unequivocal, has existed substantially unchanged for a significant period of time prior to the change, and could reasonably have been expected by unit employees to have continued unchanged. The practice must also embrace a mandatory subject of negotiation. December 30 ALJ decision in Nassau County;
 - the personal use of an employer vehicle is a mandatory subject of negotiation and triggers a bargaining obligation should a change in a past practice be desired. December 30 ALJ decision in Nassau County;
 - only where the labor agreement is silent on a matter that is a mandatory subject of negotiation may a past practice exist. December 30 ALJ decision in Nassau County;
 - that a past practice may be deemed to exist is not contingent upon proof that the practice was specifically authorized by the chief executive officer of the municipality or its legislative body. A practice can be deemed to have been authorized if evidence is presented that significant employer representatives have in some manner acquiesced, ratified, or condoned the practice. December 30 ALJ decision in Nassau County;
 - that a first-line supervisor may not necessarily be deemed to have incurred liability upon a public employer for a practice adopted by the supervisor is not to imply that higher level supervisors cannot engage in a practice which the employer can unilaterally change. As noted in *City of Schenectady*, 26 PERB ¶ 3038 (1993), an employer can be held responsible for the conduct of its supervisors. The ultimate focus is on the agency relationship, not the supervisory status itself. The pertinent inquiry is whether, in the totality of circumstances, an employer may fairly be said to be responsible for a given individual's actions. December 30 ALJ decision in Nassau County;
 - under the Taylor Law, there is an obligation on both bargaining parties to maintain the status quo until bargaining obligations have been satisfied. That a union does not object to a proposed unilateral change by an employer regarding a mandatory subject of negotiation prior to the change or that it does not demand to bargaining over the change does not result in a loss of the union's right to file a timely improper practice charge alleging a unilateral change. An employer decision to unilaterally alter a mandatory subject of negotiation, unless privileged by contract language, is considered to be a per se rejection of the bargaining process and a refusal to bargain. December 30 ALJ decision in Nassau County;
 - there is no requirement that a legislative body specifically approve a past practice. With limited exceptions, a legislative body has no right or duty to bargain. December 30 ALJ decision in Nassau County;
 - where an alleged past practice is contrary to either an employer's stated policy or the instructions of higher level supervisors or where a practice has been permitted by a low level employee, unknown to policy makers or higher level supervisors, there is no past practice. Nor does the existence of any practice serve to alter negotiated contract language since the employer always has the right to revert to explicit terms contained in a negotiated labor agreement, notwithstanding the existence of a contrary long-term practice. December 30 ALJ decision in Nassau County;
 - absent a prior objection by the other party to negotiations, it is not improper to submit a nonmandatory subject to a factfinder seeking a recommendation. January 7 decision of the Director of Public Employment Practices and Representation in *NYS Troopers*;
 - a parity clause negotiated with a union to provide for providing benefit that might be negotiated with some other union is improper to the extent it might infringe upon the

negotiation rights of a union which is not a party to the agreement containing the clause. January 12 ALJ decision in Village of Hempstead;

- a public employer cannot negotiate an agreement with an incumbent union when a bona fide question concerning representation is pending. Such a question is present when a union files a petition with the Board seeking the decertification of an incumbent union and its own certification. Ratification of a tentative agreement is part of the negotiating process and that may be prohibited when a representation question is pending. However, the policy to prohibiting bargaining is appropriate only with regard to those employees who are directly affected by the representation petition. January 12 ALJ decision in Town of Southampton;
- to establish a violation of §209-a(1)(a) and (c) of the Civil Service Law which prohibits employer interference with the right of public employees to unionize, for the purpose of seeking to deprive them of such a right, and which prohibits discrimination against an employee for the purpose of discouraging union membership or participation in union activities, respectively, the charging party must prove by a preponderance of the evidence that employee had engaged in protected activity, that the employer knew of and acted because of that activity, and that the adverse action taken against the employee would not have occurred "but for" the employee's participation in protected activity. January 30 ALJ decision in Chautauqua County; and
- under Board standards long ago established, an arbitrator's factual conclusions will be accepted in an improper practice proceeding, only if 1) the issues raised by the charge were also raised in arbitration; 2) the arbitration was not tainted by unfairness or serious procedural irregularities; and 3) the arbitral determination was not clearly repugnant to Taylor Law purposes or policies. That an ALJ may reach different conclusions than that of the arbitrator is irrelevant. January 28 ALJ decision in City of Cohoes.