



## NYSPELRA Newsletter: April 2005

### PERB DECISIONS

The following are summaries of decisions which 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 to assure the decision might be applicable to circumstances in which you may have an interest. In addition, any decision by an ALJ should be researched to ascertain its subsequent disposition, if in fact an appeal to the Board was made, and, if it was, further researched to determine if a court appeal occurred. E-mail your editor, John Galligan, at [galli14@earthlink.net](mailto:galli14@earthlink.net) for a copy of any decision summarized. Use the PERB web site, [www.perb.state.ny.us](http://www.perb.state.ny.us) where summaries of decisions issued since 1986 can be obtained and the agency's forms can be downloaded.

- a demand to have unit employees trained for the use of defibrillators and receive a 3% increase in pay is a nonmandatory one because the demand for compensation is inseparable from the demand for training. The decision to train employees is a managerial prerogative. November 9 Board decision in City of New York;
- although PERB will defer an improper practice charge to arbitration where the charge alleges a failure to negotiate in good faith due to a unilateral change in a term and condition of employment, no such deferral will occur if the charge alleges illegal employer interference under §209-a(1)(a) of the Taylor Law. December 22 ALJ decision in City University of New York;
- an employee's ability to bring personal belongings to work is a mandatory subject of negotiation because it directly affects comfort and convenience while on the job. So too is the ability of an employee to carry food to work in a container, even if the employer has the right to search the container. March 16 Board decision in NYS Department of Correctional Services;
- a demand that seniority be the primary factor for shift selection, discretionary assignments, selection of vacation, and selection of overtime amounts to a mandatory subject of negotiation. November 9 Board decision in City of New York;
- an employer cannot defend a failure to bargain charge with a claim that the affected union must insist upon bargaining after being notified that existing terms and conditions of employment will be changed. December 13 ALJ decision in NYS Department of Correctional Services;
- direct dealing involves an employer's actual or attempted establishment of a negotiating relationship on a term and condition of employment with one or more members of a bargaining unit, without the presence, involvement, or awareness of the exclusive bargaining agent. The reaction of the Public Employment Relations Board is that such conduct is viewed as an impermissible bypass of the bargaining agent and inherently destructive of employee rights under §202 of the Taylor Law. December 22 ALJ decision in City University of New York;
- it is not the mission of the Board to sort through the details of an improper practice charge to identify conduct that has been alleged to be illegal. The burden is on the charging party to articulate facts which can be assessed by an ALJ as to whether improper conduct occurred. November 30 decision of the Director of Public Employment Practices and Representation in Village of Haverstraw;

### William L. Holcomb Award for Public Service in Labor Relations for 2004 - 2005

*NOMINATIONS SOUGHT by June 15, 2005*

#### CRITERIA

The nominee(s) must have demonstrated:

- an extraordinary achievement in the field resulting in significant efficiencies, benefits or savings to their jurisdiction. and/or
- a record of leadership and accomplishment in the field of labor relations. and/or
- demonstrated, long term commitment to public service exhibiting innovation, creativity and positive change in the field of labor relations.

You may direct questions to:

Board Member, Louis Giardina at (716) 851-5900 or Fax (716) 851-4968

President Elect, Walt Pelligrini at (518) 474-4090 or Fax (518) 486-7304

Past President, Elayne Gold at (518) 464-1300, ext. 305 or Fax (518) 464-1010

Letters and nomination forms have been sent to members. Please direct your responses to the address provided on the [nomination form](#).

- an employee's use of an employer vehicle for work commutes is an economic benefit to the employee and as a general rule may not be unilaterally modified by the employer. February 9 Board decision in Nassau County;
- for a union to establish the existence of a past practice that may not be altered unilaterally by the employer, it must prove that 1) the practice involves a mandatory subject of negotiation; and 2) it was unequivocal and existed for a sufficient period of time so as to raise among unit employees a reasonable expectation that the practice would continue unchanged. In order to establish that an alleged practice was unequivocal, the union must prove the employer's knowledge of the practice either through its direct negotiations or by evidence that the employer condoned, ratified, or acquiesced in the practice and that it was not conditional. February 9 Board decision in Nassau County;
- in the adjudication of an improper practice charge alleging a unilateral change in a past practice, where a union has demonstrated that a job title has the implied, if not actual, authority to bind the employer to a practice, the burden of proof then shifts to the employer to establish that it never agreed to the practice or that those holding the job title did not have either the actual or implied authority to act on behalf of the employer. Such authority will not be presumed from an employee's status as a supervisor. February 9 Board decision in Nassau County;
- an employer's established practice with respect to someone outside a bargaining unit will not be treated as binding with respect to a unit member. February 9 Board decision in Nassau County;
- just because a work rule relates to the mission of the employer, it does not authorize the employer to unilaterally act in a manner that it so chooses. In adjudicating an improper practice charge alleging a failure to bargain over a unilaterally adopted rule, a balancing test is applied to determine whether the adoption of the rule significantly or unnecessarily intrudes upon employee working conditions. In order to satisfy this test, an employer must demonstrate that its rule did not extend beyond that necessary to further its mission. March 16 Board decision in NYS Department of Correctional Services;
- while there is a legal obligation to meet at reasonable times and confer in good faith to negotiate a labor agreement, a party's desire to do so is measured by the totality of its conduct at the negotiating table. There is an absolute requirement that the parties meet. A refusal to do so or to predicate bargaining upon an agreement to a prior term and condition of employment is an absolute good faith violation. December 6 ALJ decision in Malone CSD;
- retirees are not individuals covered by the Taylor Law and consequently, a union can not pursue a bargaining demand involving their benefits into compulsory arbitration. November 9 Board decision in City of New York;
- an individual lacks standing to either file a charge on behalf of a class of employees or pursue a public employer's alleged good faith violation. Only the union representing a bargaining unit can file such a charge on behalf of one or several unit members. December 17 decision of the Director of Public Employment Practices and Representation in Mahopac CSD;
- a unit clarification petition raises the question of whether a particular title is already encompassed within the scope of an existing bargaining unit. It seeks only a factual determination and generally starts with an examination of the contractual recognition clause. The Board has long held that it is not bound by an agreement between a public employer and a union with respect to unit composition. Nor does such an agreement on excluded titles preclude the union from seeking to place titles in its unit through a PERB proceeding. On the other hand, a petition for unit placement is similar to a representation proceeding, since it places in issue the appropriateness of a proposed addition to a bargaining unit. In this situation, the statutory uniting criteria set forth in §207.1 of the Taylor Law will be applied. December 29 ALJ decision in Starpoint CSD; and
- to prevail on an improper practice charge alleging a failure to negotiate in good faith because of direct dealing with one or more unit employees, the union filing such a charge must prove that the employer negotiated with an employee for the purpose of reaching an agreement on a mandatory subject of negotiation and in the process, illegally bypassed the union. January 26 ALJ decision in Town/Village of East Rochester;

## **APPLICATIONS SOUGHT**

The Roswell Park Cancer Institute is seeking a highly motivated individual to serve as its Employee and Labor Relations Administrator. This individual assists the Director of Employee and Labor Relations with disciplinary investigations; the issuance of disciplinary charges; grievances and arbitration; the performance evaluation program; EEOC compliance and reporting; and diversity awareness initiatives; assists managers with policy and collective bargaining agreement implementation and interpretation; and serves as the liaison to managers and union officials.

Applicants must have a degree in business administration, HR management, or a related field and 5 or more years of full-time HR-related experience. Preferred candidates will have an MBA in HR management or a JD with a concentration in labor and employment law. Prior experience with EEOC compliance and reporting requirements is also highly preferred. The Institute is an EEO/AA employer and offers a competitive salary and a comprehensive benefit package. Send resume to Michelle Rawleigh via e-mail at [employment@roswellpark.org](mailto:employment@roswellpark.org) or in care of the Institute, Employment Office, Elm & Carlton Streets, Buffalo 14263.