NYSPELRA Newsletter: January 2005

THE GOVERNOR'S 2005-06 BUDGET PROPOSALS

In mid-January, the Governor released his proposed budget and these affect public employers:

- require an independent review and public comment period before any changes can be made in either the actuarial funding assumptions or funding methods for the retirement systems administered by the State Comptroller;
- require that the retirement systems' funded status be compared with that of other states when determining employer contribution rates;
- require that a 5-year projection of employer contribution rates be provided by the Comptroller;
- require a compulsory arbitration panel to consider the financial ability of a local government to pay an award without an increase in taxation or, in the case of the State, without increasing taxation or increasing budget deficits;
- require the Comptroller to reconsider actuarial funding changes for the pension bills that are due in February; and
- merge the Public Employment Relations Board and the State Employment Relations Board into a new State Labor Relations Board, with the current PERB Board members to become the members of the new Board and with all employees of both boards to be transferred to the new agency.

The proposals addressing the retirement systems will need to be evaluated against the State Comptroller's constitutional authority to independently administer ERS and PFRS.

ATTEMPT TO ARBITRATE §207-c DISPUTE DENIED

An appellate court has upheld a stay of arbitration arising from a union's attempt to arbitrate a municipal employer's refusal to provide health insurance coverage to an individual receiving municipal disability benefits under §207-c of the General Municipal Law. The court noted that the benefits available to someone on §207-c are exclusive and that, in order to be entitled to contractual benefits, the language of the contract must explicitly so provide. In this instance, the negotiated labor agreement was silent in regard to fringes for a police officer receiving §207-c benefits. Following a 1999 precedent of the Court of Appeals holding that disputes over municipal disability benefits available under §207-a are not subject to the provisions of a contractual arbitration clause unless explicitly so authorized, the court upheld a stay that had been issued to deny arbitration of the dispute in Fortune v. Town of Niskayuna. Editor's note: Most contractual grievance provisions allow an unresolved dispute to be taken to arbitration before a mutually selected neutral. The grievance provisions are often broadly worded and seemingly allow "any" dispute to be taken to arbitration.

Not exactly. The Court of Appeals has repeatedly held that contractual provisions that might seemingly apply to some one receiving §207 benefits do not at all apply, unless the provision explicitly includes those receiving §207-a and §207-c benefits. Both sections of the General Municipal Law, addressing paid firefighters and police officers establish a municipal disability benefit system to provide individuals injured or taken ill in the performance of duty with statutory benefits. Contractual fringes are not included. For a covered individual who is unable to

work because of an injury or illness incurred in the performance of duty, the statutes require that the individual receive a continuation of the full amount of regular wages and coverage for treatment of the injury or illness. The amount is not wages and there are special tax treatments for such a payment. Those municipalities that may have in addition provided contractual fringes to some one receiving §207-a and §207-c benefits MAY have established a practice that would be required to be negotiated before a change could occur. Those with questions, please contact your editor.

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.

- that a contract provision may address a matter that is at issue in the adjudication of an improper practice charge or may serve as a defense to the employer that is defending the charge does not divest PERB of jurisdiction. June 6 ALJ decision in Village of Freeport;
- although a contractual provision may permit an employer to take certain action, there could still be a violation of either §209-a(1)(a) or §209-a(1)(c) of the Civil Service Law if the action taken was improperly motivated. These sections of law prohibit employer interference with the right of employees to engage in conduct protected by the Taylor Law and prohibit employer discrimination against employees who have engaged in protected conduct. June 6 ALJ decision in Village of Freeport;
- in determining whether a public service is being performed by an agent of a public employer, the Board examines the level of control exercised by the employer over the agent. Where the employer has retained control over the services provided, it is not relieved of bargaining obligations arising under the Taylor Law just because of involvement by a third-party. June 23 ALJ decision in Erie County;
- to establish a violation of either §209-a(1)(a) or §209-a(1)(c) of the Civil Service Law, a charging party must prove by a preponderance of the evidence that an employee was engaged in a protected activity, that the employer knew of it, and acted because of that activity. Should the charging party prove a prima fascie case of improper motivation, the burden of proof shifts to the employer to establish that its actions were motivated by legitimate business reasons. June 6 ALJ decision in Village of Freeport;
- a unit clarification petition raises the question of whether a particular title is encompassed 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 labor agreement. However, it is also equally important to review both the agreement for other provisions that might apply to the titles sought to be added to the unit and the treatment of those titles by parties. September 1 ALJ decision in Village of Fredonia;
- with respect to challenges asserting an untimely filing of an improper practice charge, it is well established that notice to a bargaining unit member is not the same as notice to the union. September 8 ALJ decision in Nassau County;
- participation in the essential process of policymaking would exclude an individual from union representation under the Taylor Law. However, only those employees who have a direct and powerful influence on policy formulation at the highest level meet the criteria for being designated a policymaking employee. September 9 ALJ decision in City of Jamestown;

- to establish that a past practice existed that cannot be unilaterally changed by a public employer, a union must demonstrate that the practice was unequivocal, was continued on an uninterrupted basis for a period of time sufficient to create a reasonable expectation among bargaining unit members that the practice would continue unchanged, and must involve a mandatory subject of negotiation. September 8 ALJ decision in Nassau County; and
- that a practice does not affect an entire bargaining unit is irrelevant where the practice is specific only to a singular position in the bargaining unit. September 8 ALJ decision in Nassau County.