NYSPELRA Newsletter: December 2006

THE 2006 LEGISLATIVE SESSION ENDS WITHOUT OVERRIDES

The State Legislature reconvened December 13 in a Special Session. Of the numerous bills which had been vetoed by the Governor earlier in the year and which would have either amended the Taylor Law, provided additional retirement benefits, or addressed topics representing mandatory subjects of negotiation, none was overwritten by either house on the 13th. Be assured that all the vetoed bills will be reintroduced for the 2007 Session.

PERB DECISIONS

These decisions have been issued by 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 to assure the decision might be applicable to circumstances in which you may have an interest. In addition, any decision 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 followed. Email your editor at galli14@earthlink.net for a copy of any decision summarized. Use the PERB web site, www.perb.state.ny.us for summaries of decisions can be obtained and the agency's forms can be downloaded.

- whether a particular work rule involves a mandatory or nonmandatory subject requires an identification of the subject matter and then a balancing of the competing interests of the employer and its unionized employees. March 10 Board decision in NYS Department of Correctional Services;
- when a benefit is granted under a stated condition or an express reservation of rights, which is not changed by subsequent negotiations, a modification or discontinuation of the benefit in accordance with the stated condition or the retained right is not susceptible to a failure to bargain charge. March 3 ALJ decision in NYC Transit Authority;
- upon request, an employee is entitled to have a union representative present during an investigatory interview if the employee has a reasonable basis in believing that the interview could lead to disciplinary charges. The burden of proof that such representation was requested falls to the union that represents the employee. The fact that the interview might be conducted by an individual who has no authority to impose discipline is irrelevant if the interviewer clearly has the authority to recommend disciplinary action. February 21 ALJ decision in Ulster County;
- a unit placement petition is a mini-representation proceeding which puts the appropriateness of a unit under §207 of the Civil Service Law in issue. A community of interest and the employer's administrative convenience are relevant in determining unit placement. A community of interest relates to the question of whether terms and conditions of employment are sufficiently similar and no actual or apparent conflict exists which would impact the conduct of meaningful and effective negotiations. While the Board and its staff encourage parties to agree upon the composition of a bargaining unit, any such agreement is not controlling when a unit placement petition is filed. February 15 ALJ decision in Niagara Falls Bridge Commission;
- should terms and conditions of employment of unionized employees not be affected, a public employer has a unilateral right to establish criteria to determine what constitutes sick leave abuse. April 21 ALJ decision in City of New Rochelle;

- a union filing a failure to bargain charge, alleging that a practice involving a mandatory subject was unilaterally altered, must demonstrate both that the practice was unequivocal and was continued on an uninterrupted basis for a sufficient period of time so as to create a reasonable expectation among affected unit employees that the practice would continue unchanged. In determining whether an alleged practice is unequivocal, PERB will examine the nature of the practice to determine whether it affects all unit employees or a more narrow subset. Some practices affect all employees in a unit and others are limited to certain titles or certain circumstances. The scope of the practice must be determined to ascertain the proof required from a union to demonstrate the uniform nature of the practice. Should a practice be title-specific, a lack of proof that the practice has not existed in the entire unit will not defeat the existence of a practice with respect to the certain titles. February 28 ALJ decision in Nassau County;
- when employee can be designated as managerial under the Taylor Law only if the individual, among other things, formulates policy. In government, the formulation of policy would be the development of the particular objectives of a government or a governmental agency in the fulfillment of its mission and the methods, means, and extent of achieving such objectives. Policy formulation can include not only the individual who has the authority or responsibility to select from among options and to put a proposed policy into effect, but also a person who participates with regularity in the essential process which results in a policy proposal and the decision to put such a proposal into effect. April 24 Board decision in City of Rome;
- while some unions can petition for compulsory arbitration to resolve an impasse in negotiations, they are restricted with respect to the demands which may be pursued before an arbitration panel. Only those directly relating to compensation are eligible to be pursued before a panel. Non-compensatory issues, defined as including job security, disciplinary procedures and actions, deployment or scheduling, and overtime eligibility, although mandatory subjects of negotiation, are barred from being pursued before a panel. As a result, a demand relating primarily to scheduling or one relating to paid leave increases would not be arbitrable. On the other hand, a demand addressing how employees are to be compensated for overtime assigned to them does not relate to overtime eligibility, but instead, to compensation for overtime worked. May 3 ALJ decision in Oswego County;
- exceptions exist to allow a unilateral transfer of work exclusively performed by bargaining unit members. One is a change in job quals necessary to perform the work. Such a change means that the employer has decided, in determining how and by whom its work is to be performed, that employees with different quals can perform the work better or that the nature of the work has changed and must be performed by employees with different quals. That tasks which are substantially similar to unit work may be reassigned to employees with different job quals does not mean that the quals for performing the work have changed. It is irrelevant that employees to whom exclusive work has been reassigned also perform different tasks than those whose work was transferred. March 10 Board decision in Erie County;
- the availability of free parking to a unionized employee is an economic benefit and consequently a mandatory subject of negotiation should a change be sought. February 28 ALJ decision in Nassau County;
- in order for an employee to be designated as confidential under the Taylor Law, the individual must assist a managerial employee in the delivery of duties described in §201 (7) (a) (ii) of the Civil Service Law. However, assistance alone is insufficient to warrant a confidential designation. In addition to managerial assistance, the individual for which a confidential designation is sought must be acting in a confidential capacity to the

managerial employee. The first part of this test is duty-oriented, while the second part is relationship-oriented. The two parts of the test are distinct and both must be satisfied in order for an employee to be designated as confidential. A person assisting a managerial employee through the performance of duties confidential in nature is not necessarily the one performing those duties in a position, which has a confidential relationship to the managerial employee. A person in a confidential relationship to a managerial employee might never perform or be expected to perform any of the duties warranting a confidential designation. The relationship-oriented aspect of the test is the one which primarily prevents a public employer from obtaining a confidential designation by assigning duties that might be confidential in nature to an employee without regard to the relationship existing between the employee assigned to those duties and a managerial employee. April 24 Board decision in City of Rome; and

- with respect to a union's duty of fair representation of those employees that it represents, it is not required to file and process grievances upon request, even those that might be meritorious. Instead it must make a fair and reasonable judgment as to whether a particular complaint is worthy of being pursued as a grievance. March 31 ALJ decision in Albany Public Library.