NYSPELRA Newsletter: February 2007

PUBLIC EMPLOYEES HAVE NO WEINGARTEN RIGHT

In a 4-2 majority decision, the Court of Appeals has held that the Taylor Law does not provide public employees with a Weingarten right. The latter term derives from a decision of the U. S. Supreme Court some 30 years ago, upholding a determination of the National Labor Relations Board which had held that the National Labor Relations Act (NLRA) allowed a private sector employee to have union representation at an investigatory interview, should the employee reasonably believe that disciplinary action may occur as a result of the interview. The majority noted what it considered to be significant differences in the statutory language between the NLRA and the Taylor Law with respect to employee rights. Found to be especially lacking in the Taylor Law was a right of employees to engage in concerted activities with respect to mutual aid or protection. The majority also referred to the fact that in 1993, an amendment was added to Civil Service Law, §75 to afford unionized public employees with the right to be notified in advance in writing that union representation was available during questioning, should it appear to the employee that he or she might be the subject of potential disciplinary action. The conclusion of the majority cited legislative intent: if a Weingarten right were to be already contained in the Taylor Law, the modified Weingarten right created by the §75 amendment would have been unnecessary.

Two days after the decision, S. 3071 was introduced in the state Senate to overturn it.

THE GOVERNOR NOMINATES PERB MEMBERS

The Governor has nominated three individuals to fill the vacant seats at the Public Employment Relations Board. Jerome Lefkowitz was nominated to chair the Board. Mr. Lefkowitz played a significant role in the development of the Taylor Law and previously served as Deputy Chair of the Board for nearly 20 years. Most recently, he was Deputy Counsel for the CSEA. Robert S. Hite, a former counsel for Council 82, was nominated as a Board member, as was Eric Schmertz, an arbitrator who previously served as a Board member for several years in the 1990s. The nominations require Senate approval.

A FOLLOW-UP ON POTENTIAL FICA REFUNDS IN CONNECTION WITH 207-a/207-c PAYMENTS

NYSPELRA members working with or for municipalities have previously received information regarding the possibility of recovering municipal FICA contributions made in conjunction with municipal disability payments pursuant to either §207-a or §207-c of the General Municipal Law. In addition to claiming a possible reimbursement of the matching municipal FICA contribution that may have been paid in conjunction with a FICA tax deduction made from a §207-a or §207-c disability payment, it was noted that it would be possible to file for a possible refund of FICA taxes that may have been made from these disability payments on behalf of an individual, provided certain conditions were met. There is a downside to filing for a refund of FICA taxes on behalf of an individual. Should such be done, it would be necessary to issue amended Form W-2 and file Form W-3 with the IRS for each calendar year involved. If only a refund of the matching municipal FICA contribution is sought, no W-2s need to be amended and no W-3s need to be filed. In order for a refund claim involving calendar year 2003 to be timely, the necessary paperwork must be filed with the IRS prior to April 15, 2007.

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 where summaries of decisions can be obtained and the agency's forms can be downloaded.

- a public employer has the prerogative to determine the number of employees in any job category which it needs to operate. However, the means by which employees are assigned to meet the employer's manpower needs is a mandatory subject to negotiation. June 12 ALJ decision in NYS Department of Correctional Services;

- where discipline procedures are addressed in a municipal charter or a statute, those public employees covered by the statute or charter provision are limited to whatever disciplinary rights are available under either. While a demand from a union representing an employee for information needed to help defend the individual who has been charged with disciplinary infractions under a contractual discipline procedure must generally be provided to the union upon demand, if the disciplinary statute or charter provision contains no procedure for the production of information to the employee's bargaining representative, it would not be available. June 7 Board decision in Town of Orangetown;

- in an improper practice proceeding, the charging party has the burden of proof. June 7 Board decision in Ulster County;

- a unit placement petition is a mini-representation proceeding which puts the appropriateness of a bargaining unit under Civil Service Law §207 in issue. The community of interest of the titles sought to be placed in the unit and the employer's administrative convenience are matters which must be considered. In addition, the Board has had a longstanding policy in favor of finding the most appropriate unit, defined as the largest one permitting for effective and meaningful negotiations. Factors considered in determining community of interest include shared terms and conditions of employment, work location, educational requirements, and common lines of supervision. However, if a general community of interest is found to exist, that is terms and conditions of employment are sufficiently similar and no actual or apparent conflict exists that would effect the conduct of meaningful and effective negotiations, the absence of other community of interest factors will not serve to defeat the placement of the petitioned-for titles in the unit. June 1 ALJ decision in Regional Transit Service;

- a union or its leadership must have actual knowledge of some employer conduct which might constitute an improper practice in order for it to be found to have notice upon which the timeliness of an improper practice charge challenging the conduct can be determined. June 7 Board decision in NYC Board of Education;

- establishing a procedure for the evaluation of employees is a mandatory subject of negotiation. Consequently, the unilateral adoption of an employee evaluation procedure is an improper practice for failure to bargain. July 11 ALJ decision in City of Yonkers;

- a discernible boundary with respect to possible exclusive bargaining unit work is found to exist when there is a clearly circumscribed practice within which unit members perform certain clearly

defined work duties. A charging party must establish a discernible boundary to the claimed unit work which would appropriately set it apart from work done by nonunion personnel. In order to determine whether a discernible boundary has been established around certain work which may be deemed exclusive to the bargaining unit, the Board assesses the nature, location, and frequency of the work that bargaining unit employees perform and any tasks incidental to the work. The Board will recognize a discernible boundary when it is able to identify a reasonable relationship between the components of the discernible boundary and the duties of unit employees. July 11 ALJ decision in NYC Board of Education; and

- in determining the most appropriate bargaining unit, the Board will not place in one unit any job titles which are subject to different impasse resolution procedures. A difference in applicable impasse resolution procedures is a significant and important reason for defining a separate unit because it represents a fundamental dissimilarity warranting unit fragmentation. July 24 ALJ decision in State of New York.