NYSPELRA Newsletter: October 2007

LEGISLATIVE UPDATE

The return of the State Legislature earlier this month did not result in any attempt to override any of several bills which had been vetoed earlier this year by the Governor nor was any other labor relations bill adopted. A bill which would have granted the NYS Department of Labor until next May to develop regulations relating to firefighter safety ropes and would have extended the compliance date for municipalities until next November, S. 6500/A. 9473, passed the Senate, but failed to secure passage in the Assembly. The law is currently effective and municipalities are required to assess the need for safety ropes for any interior structural firefighter, whether paid or volunteer.

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 unilateral change in an alleged past practice can be addressed by filing an improper practice charge with PERB, alleging a failure to negotiate in good faith. In adjudicating a recent case involving an alleged past practice, the Board cited to the standards set forth in Nassau County, 24 PERB ¶3029 (1991), which it claimed to be its most authoritative statement regarding the establishment of a binding past practice: the practice must be unequivocal and have continued on an uninterrupted basis for a sufficient period of time under the circumstances to create a reasonable expectation among affected bargaining unit employees that the practice would continue. The circumstances surrounding each case must be evaluated to determine whether a practice has been established. Chenango Forks CSD, 40 PERB ¶3012 (2007);

• in recent years, there have been Board decisions regarding past practice standards which have varied from the Nassau County decision cited above. These departures were inadvertent and to the degree that Board decisions were intended to modify the test set forth in Nassau County to require additional proof of mutuality of agreement and/or knowledge or acquiescence by a managerial or high-level supervisory employee, those decisions are overruled. Chenango Forks CSD, 40 PERB ¶3012 (2007);

• with respect to an alleged past practice involving retirees and reimbursement for their Part B Medicare premiums, individuals who by definition are not bargaining unit members, the analysis of whether a binding practice exists hinges on the extent to which the union representing current employees and/or the current employees had actual or constructive knowledge of the benefit and therefore had a reasonable expectation that the practice would be continued. Since the parties submitted a stipulated record which was ambiguous with respect to whether the union and/or the employees had knowledge of the retiree benefit, the case was remanded to an ALJ for the further collection of evidence on this point and for a decision based on that evidence. Chenango Forks CSD, 40 PERB ¶3012 (2007);

• although there is no duty to bargain on behalf of those who are not bargaining unit members, including retirees, a benefit for current bargaining unit mem-bers who might retire during the term of a labor agree-ment will generally be a mandatory subject of negotiation if the underlying subject matter is a mandatory subject. Health insurance benefits for current employees and benefits related to health insurance are mandatory subjects of negotiation, regardless whether those employees subsequently retire during the term of an agreement. Chenango Forks CSD, 40 PERB ¶3012 (2007);

• when PERB defers an improper practice charge to arbitration, it will always entertain a motion to reopen the case based on standards set forth in Herkimer County BOCES, 20 PERB ¶3050 (1987). When a case is reopened by the agency, determinations of an arbitrator are not binding on the Board. Chenango Forks CSD, 40 PERB ¶3012 (2007);

• the existence of an extended practice constitutes circumstantial evidence so as to establish a prima facia proof of employer knowledge of the practice which imposes upon the public employer the burden of proof of demonstrating that under the totality of the circumstances he did not have actual or constructive knowledge of the practice. In this case involving a school district, the district had actual or constructive knowledge of the practice of reimbursing retirees for Part B Medicare premiums based upon payments made over several years to multiple retirees, a fact documented in district records, and subject to public review in the annual budgeting process. Chenango Forks CSD, 40 PERB ¶3012 (2007);

• Civil Service Law, §205(5)(d) bars PERB from exercising jurisdiction over an alleged contractual violation, unless the allegation otherwise constitutes an improper practice. When an improper practice charge alleges a failure to continue the terms of an expired agreement, §209-a(1)(e) explicitly grants PERB jurisdiction over such an allegation and no jurisdictional issue exists. Consequently, there would be no basis to invoke PERB's jurisdictional deferral policy set forth in Herkimer County BOCES, 20 PERB ¶3050 (1987). November 9 ALJ decision in New York City Board of Education;

• PERB has a policy whereby it will defer an improper practice charge to arbitration when a contractual grievance has been filed under a procedure which ends in binding arbitration. A merits deferral is premised on the understanding that the contractual grievance is likely to resolve the contract interpretation issue, along with the improper practice charge. Should the issue raised in a charge not be addressed or resolved in an arbitration award, the charge would be subject to being reopened upon a motion for such. November 9 ALJ decision in New York City Board of Education;

• actions taken by a public employer in response to the outcome of a grievance settlement or arbitration award are not a Taylor Law violation, absent improper motivation. It is a union's burden to establish improper motivation by demonstrating that either it or a bargaining unit employee engaged in protective activity, that an employer representative was aware of that activity, and that the actions of the employer were motivated by the protected activity. November 15 ALJ decision in Town of Cheektowaga;

• expressing displeasure over the filing of a grievance, combined with an employer action which could be perceived as retaliatory, can be sufficient to establish a prima facia case whereby the burden of proof then shifts to the employer to offer evidence representing a legitimate business reason which would overcome the presumption. November 15 ALJ decision in Town of Cheektowaga;

• a unit placement petition places the appropriateness of a bargaining unit at issue in what is actually a mini-representation proceeding. What is eventually determined to be the most appropriate bargaining unit is not determined solely by the desires of employees. Instead, there are specific criteria in the Taylor Law which must be used to determine the appropriate unit. In deciding whether placement of one or more titles in a bargaining unit is appropriate, the community of interest standard, codified in Civil Service Law, §207(1), is the most important. In applying this standard, the Board determines whether a petition for title or titles have a similar work environment, salary, and/or benefit structure with the titles in a unit and whether a conflict of interest exists among those in a proposed unit. The administrative convenience of the employer also must be considered, a standard designed to preserve the interest of the public employer against an unnecessary fragmentation of bargaining units. The Board has long held that the most appropriate unit is the largest one permitting for effective and meaningful negotiations, unless there is a conflict of interest. November 1 Board decision in Regional Transit Service;

• the adjudication of any improper practice charge alleging a unilateral transfer of bargaining unit work always begins with the seminal Board decision in Niagara Frontier Transportation Authority, 18 PERB ¶3083 (1985). The initial essential questions are whether the work transferred had been exclusively performed by bargaining unit employees and whether the transferred work was substantially similar to that previously performed by unit employees. Of critical importance is the definition of unit work. For a geographic location to set the discernible boundary for unit work, it is necessary to identify a reasonable relationship between the components of the discernible boundary and the duties performed by unit employees. November 1 Board decision in Village of Rye Brook; and

• when an employer alleges a unilateral right to engage in certain conduct, a demand by the union representing affected employees to bargain the impact of the employers action constitutes a mandatory subject of negotiation. November 1 Board decision in Village of Rye Brook.