



## **NYSPELRA Newsletter: May 2004**

### **THE ANNUAL CONFERENCE IS RAPIDLY APPROACHING**

July will soon arrive and the NYS Public Employer Labor Relations Association's 30th Annual Training Conference will again be held at the Holiday Inn in Saratoga Springs, beginning on Sunday, July 25th through Wednesday noon, July 28th. Registration will be held pool side on Sunday after 4:00 p.m. and inside thereafter at the NYSPELRA registration desk, beginning on Monday at 8:00 a.m.

All members have been mailed program information and registration details. If, for some reason, that you have not received the information or you are a new NYSPELRA member who would not have received the information, call Kathy Wildridge at 716/873-2882 for . A discounted registration fee is available until June 28. To reserve a room at the Inn, call 518/584-4550 or book one through the Inn's web site. Use a search engine for "Saratoga Holiday Inn". For the special Conference rate, mention that you are attending NYSPELRA Conference. NYSPELRA has blocked rooms at a discounted rate through July 3.

The Monday program will begin at 9:30 a.m. with a Welcome and Introduction/NYSPELRA Web site Demonstration. Presenters will be Elayne Gold, Esq., NYSPELRA President; Bill Holcomb, NYSPELRA Secretary/Treasurer, Matthew Iarocci, NPELRA President, and Donald G. Sullivan, NYSPELRA Board member. The remainder of the morning program will involve the federal Fair Labor Standards Act. Jay Rosenblum, Assistant District Director for the U.S. Department of Labor in Albany will address the changes for public employers under the newly issued FLSA Overtime Rules that are scheduled to take effect on August 23. Following that presentation, NYSPELRA member Maureen Seidel, Esq. will address Public Employer FLSA Obligations, focusing on some of the more complicated rules of the U.S. Department of Labor addressing overtime possibilities or liabilities when covered employees travel as directed by their employer, spend time in training, or are on-call.

As the luncheon speaker, Thomas Mitchell, Esq., Deputy Counsel for the NYS Sheriffs' Association will offer his views on Lobbying and the Legislative Process. Some reactions from some one who previously has not spoken before our organization, but who as a lobbyist, approaches the State Legislature with some similar employer interests. Some likely reactions to the decades-long effort to On Monday afternoon, James Walter, CEO for Employee Services, Inc. will focus on Your Workplace Violence Policy, to be followed by a Panel Discussion on Workplace Violence: investigations, background checks, off-duty conduct, discipline, and appropriate employer intervention. The panelists will be NYSPELRA member Ron Mendrick, Esq.; Roger Johnson, Assistant Vice Chancellor for University Police, SUNY; and James Walter, CEO, Employee Services, Inc.

The Tuesday program begins at 9:00 a.m. Matthew W. Iarocci, NPELRA President will comment on The Art of Negotiations and how it is central to all that one involved in representing a public employer does. A panel consisting of NYSPELRA member Ed Piwowarczyk, Esq.; Thomas M. Hines, Arbitrator and Consultant, Sachem Associates, Inc.; and John Gaal, Esq., co-chair, Committee on Ethics and

Professional Responsibility of the Labor and Employment Law Section of the NYS Bar Association will react to the issue of Ethics in Labor Relations.

The Tuesday luncheon also involves the NYSPELRA Business Meeting at which new Association officers are elected. On Tuesday afternoon, Gary Johnson, Esq., PERB Associate Counsel, will offer a PERB Update, reviewing the major cases decided by the Board in the past year. What then follows is a session conducted by NYSPELRA Board member Walt Pellegrini, Esq. captioned as Taylor Law Jeopardy, with attendees featured as participants.

On Wednesday, the program begins at 9 a.m. with a Legislative Update offered by John H. Galligan, staff person for the NYS Conference of Mayors. The exit session is How 'Bout Dem Arbitrators, the annual review, discussion, and critique of arbitrators in their various roles: contract grievances, discipline, and interest arbitration. Moderating this annual melee will be NYSPELRA member Terry O'Neil, Esq., and Bill Holcomb, NYSPELRA Secretary/Treasurer.

The program your Association offers at its Annual Conference has always been a series of excellent presentations. The additional opportunity to meet several fellow members or renew acquaintances who may have encountered an issue you may be addressing is extremely valuable. Should your schedule and resources allow it, sign up if you already haven't.

## **BOARD NOMINEES SOUGHT**

At the July Annual Conference, your Association will need to fill 5 open Board positions. The vacancies will include Regional Vice Presidencies and At-Large Board Memberships of 1 and 2-year terms. NYSPELRA President Elayne Gold and President-Elect Joyce Tarantino are seeking interested, energetic volunteers from our membership ranks to step forward and assist in maintaining the level of professional service we seek from our organization. Board members are called upon to accept tasks such as coordinating regional training meetings, organizing and working at the annual Training Conference, writing assignments, representing NYSPELRA at other organizations' meetings, and conducting surveys on various business topics.

Monthly telephone conference meetings are held by the Board, at which the Association's business is conducted via assignments and reports. The Board meets in person twice per business year: during the annual Training Conference in July and once again, generally in October, at a central location in the State. In recent years, that has been Syracuse.

If you are interested in taking an active role in determining the course of your professional organization, STEP FORWARD NOW. The Chairman of our Nominations Committee is Paul Hutchins who can be e-mailed at [pahutch@nyct.com](mailto:pahutch@nyct.com) or called at 718/694-5352.

## **NEW FLSA OVERTIME RULES TO TAKE EFFECT AUGUST 23**

Although a subsequent vote of the U.S. Senate would grandfather any employee currently eligible for overtime, the U.S. Department of Labor has issued a final rule revising employee overtime eligibility under the federal Fair Labor Standards Act

(FLSA). The new rule generally excludes many highly salaried employees from overtime and automatically includes those with an annual salary of \$23,000 or less. The rule is some 500 pages in length and was published in the Federal Register on April 23, beginning at 69 FR 22122. Further information is available from the Department at 866/487-9243; or TTY 877/889-5627.

Use [www.dol.gov/fairpay](http://www.dol.gov/fairpay) for an excellent source of information on how the new rules will apply and keep informed about possible modifications that might be imposed by Congress. Many have expressed an opinion that the rules are likely to be implemented as scheduled. In the 2003 federal fiscal year, the Wage and Hour Division of the U.S. Department of Labor closed more than 39,000 cases before it and recovered a record \$212 million for employees. In addition, employees can and do sue their employers. Consequently, the proper treatment of employees under the new rule is a must. This issue will be the subject of a session on Monday, July 26 at the Annual Conference.

### **HEIGHTENED RISK BILL INTRODUCED**

A bill that would amend §207-c of the General Municipal Law to restrict an award of benefits to those injured while performing heightened risk law enforcement duties has been introduced in the Assembly as A. 10851. Those with an interest in having this amendment introduced in the Senate should contact their legislator who is a member of the majority to ask that a Senate bill be sponsored.

In 2003, the Court of Appeals decided several cases in which the standard for granting §207-c benefits was at issue. The ruling was that "heightened risk" was not to be used to determine whether §207-c benefits should be awarded. The Court ignored the realities surrounding this lucrative municipal disability benefit. Should someone awarded §207-c benefits be unable to report for work as a result of what municipal officials determine to be a §207-c injury, the individual must be paid the full amount of his or her regular salary or wages and must have all necessary medical treatment paid for by his or her employer. Most transfer the latter liability by covering law enforcement personnel for workers' compensation.

### **PERB DECISIONS**

These decisions 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 and, if a decision is one by an administrative law judge, reviewed as to whether the decision was appealed to the Board. In some instances, a Board decision may have resulted in a court appeal. E-mail your editor, John Galligan, at [galli14@earthlink.net](mailto:galli14@earthlink.net) for a copy of any decision summarized in the event you do not subscribe to the service that publishes the decisions issued by the Board or its staff.

- parties involved in bargaining have a statutory duty to reduce any verbal agreement to writing. A party involved in such bargaining that assumes the obligation to prepare a draft agreement for execution by the parties commits an improper practice when it insists on provisions contained in the draft which were neither bargained for nor agreed to. August 14 ALJ decision in City of Lackawanna;

- upon being newly certified by PERB or upon being newly recognized by a public employer, a union obtains the right to negotiate a successor agreement even though there may still be in existence an unexpired agreement that the employer had entered into with the former representative of its employees. August 18 Board decision in Avon CSD;
- there are 2 differences that exist between an employer's obligation to bargain over the impact of its unilateral determination involving a nonmandatory subject of negotiation and its duty to bargain over a decision involving a mandatory subject of negotiation. One involves when the obligation to bargain arises; the other is the consequence of a failure to bargain. When an employer makes a decision on a nonmandatory subject, the union representing employees affected has the right to demand to negotiate over the impact of the decision, but there is no bar against the employer implementing the decision. A refusal to bargain over that alleged to be the impact of the decision can be a good faith violation and the remedy generally ordered by the Board when a violation is found is a directive to bargain over the alleged impact. With respect to a mandatory subject of negotiation, there is an employer obligation to bargain and reach an agreement before any change is made. The change can be a good faith violation and the remedy generally ordered by the Board when a violation is found is a directive to return to what existed before the change and to bargain the change sought. September 26 Board decision in Niagara Frontier Transit Metro System;
- when a union makes a clear decision to no longer represent the members of a bargaining unit with respect to their employment, the union is defunct for the purposes of the Taylor Law. On the date that occurs, the employees in the unit became unrepresented and the former bargaining agreement was terminated. However, the employer has an obligation to maintain the status quo and not change any terms and conditions of employment until a new agreement is negotiated with a successor representative, should one be certified by PERB or recognized by the public employer. August 18 Board decision in Avon CSD;
- where a job title has been specifically named in a contractual unit recognition clause, a unit clarification petition that seeks a determination that the title is in the unit will be granted. August 28 ALJ decision in Harrison CSD;
- the availability of an employer vehicle is a term and condition of employment for a bargaining unit member. September 29 ALJ decision in Nassau County;
- a unit placement petition will not be accepted by PERB when the number of employees proposed to be added to a unit is 30% or more than the number of employees in the unit when such a petition is filed because the potential enlargement of the unit raises a question about the incumbent union's majority status. The appropriate petition to be filed when such a large potential accretion is at issue would be one for certification or decertification. August 18 ALJ decision in Delaware County;
- upon request, an employee has a right to union representation during a medical exam that is mandated by an employer if the employee has a reasonable belief that exam findings may result in discipline. September 10 ALJ decision in NYC Transit Authority;
- an employer directive that an employee in a disciplinary interrogation not discuss the record of the interrogation with any other unit member is overly broad and interferes with the employee's statutory right to communicate with union officials. September 23 ALJ decision in NYS Division of State Police;

- as is the case with any statutory right, it is only relinquished if there is a clear and unmistakable waiver. A failure to exercise the right in the past never amounts to a waiver of it. September 26 Board decision in Buffalo Board of Education;
- in order to prove before PERB a good faith bargaining violation over a change in a past practice, a union must demonstrate that an employer practice involved a mandatory subject of negotiation which was unequivocal and continued uninterrupted for a sufficient length of time so as to create a reasonable expectation among unit employees that it would continue. September 29 ALJ decision in Nassau County; and
- in analyzing whether a work rule change is a mandatory subject of negotiation, the Board has balanced an employer's right to manage its affairs against the union's right to negotiate over terms and conditions of employment. A rule requiring employee participation in an employer function such as recording attendance is a mandatory subject if no previous employee participation in recording attendance was involved. A change in the manner of recording triggers no bargaining duty. A change from requiring a signature on a credit card slip to requiring a PIN is not a mandatory subject. November 28 ALJ decision in Hudson Valley DDSO.