AND ONE MORE

Omitted from previous listings of bills signed into law by the Governor over the last several months was S. 4762-A as Chapter 760 of the Laws of 2005 which amended Public Officers Law, §3(2-a) to allow a member of any municipal sanitation department having 5 or more years of service to reside several counties away from the county in which the municipality is located. Your editor apologizes for the lack of clarity. The bill text deserves an award for obfuscation. It was effective December 20.

COURT OF APPEALS TO REVIEW PERB DECISIONS ADDRESSING THE NEGOTIABILITY OF DEMANDS FOR §207-a ARBITRATION AND DISCIPLINE

On February 8, the Court of Appeals will spend the afternoon hearing arguments in cases that affect many public employers. In an appeal of a PERB decision involving the City of Poughkeepsie, the Court will review a determination that a union demand seeking to have an arbitrator review a municipal §207-a eligibility determination is not a mandatory subject of negotiation. The case is similar to one previously decided by PERB where the union demand was for arbitration de novo. The Board held that since the review process being sought was a substitute for an Article 78 proceeding and since a judge in such a proceeding reviews only for substantial evidence to support the decision being challenged and does not make an independent determination, the de novo demand was not a mandatory subject of bargaining. The union returned with a similar demand, removing the reference to de novo. The Board again held the demand to be nonmandatory, recognizing that unless a restriction is placed upon an arbitrator, an arbitration is always de novo. This time, the union sued to overturn the decision and was granted leave by the Court to appeal from a unanimous decision of an appellate court, upholding the Board's determination.

Argument will also be heard in appeals of two lower court determinations regarding the negotiability of discipline demands. In both cases, one involving the City of New York and the other involving the Town of Orangetown, the issue is whether a bargaining demand to modify a statutory discipline procedure other than the one contained in §75 of the Civil Service Law, is a prohibited subject of bargaining. Numerous public employers will be affected by the determination in these cases since they are governed by disciplinary procedures contained in either a city charter or a statute other than §75. Affected by the latter are towns with a police department, the villages with a police department, villages with a police department in Westchester and Rockland counties, and the State and its troopers.

PERB DECISIONS

The following are summaries of decisions which 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 to assure the decision might be applicable to circumstances in which you may have an interest. In addition, any decision by an ALJ 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 occurred. E-mail your editor, John Galligan, 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 issued since 1986 can be obtained and the agency's forms can be downloaded.

- leave from work, whether paid or unpaid, is a function of hours of work and consequently a mandatory subject of negotiation. August 8 Board decision in NYS Department of Correctional Services;
- any doubt in regard to the managerial status of a particular employee must be resolved in favor of eligibility to unionize. The Taylor Law has specific criteria for making a managerial designation of an employee and only one need be satisfied in order for the Board to make such a designation. August 8 Board decision in Village of Suffern;
- a village clerk who handles the administrative functions of the village, sits at village board meetings including executive sessions when policy matters are discussed, and who, when questioned, provides an opinion on matters to both the board of trustees and to the mayor, and who assigns work to staff and authorizes leaves from work is a managerial employee. August 8 Board decision in Village of Suffern;
- an employee can be designated as confidential under the Taylor Law only when, in the course of assisting a managerial employee who exercises labor relations responsibilities, that employee has access or is privy to information regarding negotiations, contract administration, or other aspects of labor-management relations on a regular basis which is not appropriate for the eyes and ears of unionized workers or their bargaining representative. An employee assisting a managerial employee in the performance of duties confidential in nature is not necessarily performing those duties in a confidential relationship to the managerial employee. August 8 Board decision in Village of Suffern;
- a public employer has an obligation to maintain the status quo once a question concerning union representation of a group of employees arises. The obligation to maintain the status quo starts on the date the employer is presented with a bona fide representation question and continues until the date a wage and benefit package is fixed by collective negotiations with the newly recognized or Board-certified union or until a petition seeking Board certification is dismissed. Changes in the status quo during the pendency of a representation proceeding inherently interfere with fundamental statutory rights to representation which are provided to public employees under the Taylor Law. As the Board has previously noted, such changes in employment conditions inherently chill employees in their protected right to seek representation through an employee organization of their own choosing, influence the employees' choice of bargaining agent, and distort any collective negotiations resulting from the certification of a bargaining agent. That changes in working conditions may have been under consideration prior to the filing of a request for representation does not permit a public employer to implement them. August 8 Board decision in Village of Suffern;
- the substitution of a civilian to perform the work duties of a police officer constitutes a change in job qualifications. Where the union representing the officer files an improper practice charge alleging a failure to negotiate in good faith as the result of a transfer of exclusive bargaining unit work to individuals outside the bargaining unit, a balancing test is triggered whereby the interests of both the public employer and unit employees, both individually and collectively are weighed to determine which predominates. Where the only detriment to the union is demonstrated to be the loss of unit work, combined with a lack of evidence that any unit member has been adversely affected by the change, the employer conduct fails to trigger a failure to bargain. July 15 ALJ decision in Suffolk County;
- that a union has filed a contractual grievance or that the issue raised in its improper practice charge is also addressed in some manner by the contract between the parties is insufficient to require the dismissal of the charge for a lack of jurisdiction by the Board. In order for a dismissal to occur, evidence must be offered that the contract provides the

union with a reasonably argue will source of right with respect to the subject matter of the charge. Namely, some contractual provision must be a source of entitlement to the union. July 7 ALJ decision in Village of Mount Kisco; and

- the Board has previously defined governmental policy as the particular objectives of a government or an agency of government in the fulfillment of its mission and the methods, means, and extent of achieving them. It has further held that those who formulate policy include not only a person who has the authority or responsibility to select from among options and to put the proposed policy into effect, but also a person who participates with regularity in the essential process which results in a policy proposal and in the decision to put such a proposal into effect. A policy formulator is not one who simply drafts language for the statement of policy without meaningful participation in the decisional process, nor does it include one who simply has researched or collected data necessary for the development of a policy proposal. August 31 ALJ decision in NYS Dormitory Authority.