



NYSPELRA Newsletter: October 2008

PERB DECISIONS

The following 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 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 recent decisions appear and the agency's forms can be downloaded.

- a unit placement petition is a mini-representation preceding, which entails a non-adversarial investigation and involves the application of the statutory criteria for forming a bargaining unit. A placement petition is premised on the notion that a title that is petition for is not in a particular bargaining unit, but should be. In adjudicating such a petition, the Board will determine whether a community of interests exists between the positions that are sought to be placed in an existing unit and the positions that are in a particular bargaining unit and will review the level of salary and other benefits, whether common lines of supervision exist, the education and training of the employees, their professional status, and whether there is a shared professional mission and work environment. A community of interest may exist even though there may be some differences in the employees' terms and conditions of employment. A unit clarification petition differs, involving only a factual inquiry as to whether a particular position is already encompassed within an existing bargaining unit and seeks a finding confirming such. February 27 ALJ decision in NYS Unified Court System;
- an individual employee lacks standing to file an improper practice charge alleging an employer's failure to negotiate in good faith or alleging an employer's failure to continue the terms of an expired labor agreement. March 25 decision of the Director of Public Employment Practices and Representation in Honeoye Falls-Lima CSD;
- where a department head reports directly to the municipal legislative body, formulates policies and procedures, the ministers negotiated labor agreements, and actively participates in developing municipal bargaining proposals, evaluating union proposals, and participating in negotiations, such an individual is a managerial employee. An assistant to the department head who supervises department employees, assists the department head in developing department policies, and assists the department head in the performance of his or her managerial duties, such an assistant is a managerial employee. February 29 ALJ decision in Town of Hamburg;
- a union does not have an obligation to process any or all grievances on behalf of bargaining unit members. To the contrary, it is entitled to a wide range of discretion and reasonableness in making its determination with respect to an employee's claim that the employer violated a contractual provision. To establish that a union has breached its duty of fair representation with respect to a particular employee, the individual must show that the union's actions were arbitrary, discriminatory, or undertaken in bad faith. February 29 ALJ decision in Rush-Henrietta Employees' Association;
- in general, the procedures to be used to process a grievance constitute terms and conditions of employment and are mandatory subjects of negotiation. Consequently, the transcription which will occur at an arbitration hearing is a mandatory subject. March 17 ALJ decision in Buffalo CSD;

- that certain employees are asked for recommendations prior to negotiations, absent any evidence of further participation in the negotiation process, is an insufficient basis to conclude that the employees are managerial. Employees who serve as members of committees to make recommendations regarding hiring; granting or denying teacher tenure; and involvement in resolving first step grievances are indicators of supervisory status and not managerial status. March 20 ALJ decision in Mount Morris CSD;
- a public employer or its agents engage in an improper practice when there is conduct identified in Civil Service Law, §209-a(1) which is deliberate. If some action which has led to an improper practice charge is knowingly undertaken, it constitutes a deliberate act within the meaning of the law. An employer may commit an improper practice without a specific intent to do so if its actions are inconsistent with its statutory obligations and the statutory rights of its employees. March 21 ALJ decision in NYS Office of Temporary and Disability Assistance;
- a public employer has the right to revert to the terms of a labor agreement, notwithstanding an inconsistent past practice. March 17 ALJ decision in Buffalo CSD and February 15 ALJ decision in Norwich CSD;
- under §204.1(a)(1) of PERB's Rules of Procedure, an improper practice charge must be filed within 4 months of the date of an action alleged to be in violation of the Taylor Law. With respect to a charge alleging a failure to negotiate in good faith, that rule has been interpreted to allow the four-month filing period to run from the actual date the unilateral change occurred or the date on which it could reasonably have been discovered. The time to file begins to run when the bargaining agent's representative has, or can reasonably be expected to have, notice of the employer's conduct. Where an employer issued a written electronic notice to the officers of the unions representing its employees, clearly identifying that a change had occurred and that details of the change were available from a specified employer representative, the unions had sufficient constructive, if not actual, notice of the change. March 27 ALJ decision in Randolph CSD;
- a demand that employees be paid for overtime work and the procedure by which overtime is distributed are mandatory subjects of negotiation. A decision whether to allow or require employees to work overtime is not mandatory subject because the matter goes to the means and methods by which a public employer delivers services to the public. A decision to not require police officers to work mandatory overtime to cover for the use of compensatory time or time off by other employees is not mandatory subject of negotiation. However, new procedures for requesting him to the use of comp time constitutes a mandatory subject of negotiation. February 14 ALJ decision in City of Albany;
- restrictions on employee off-duty conduct in general constitute a mandatory subject of negotiation. A change in an off-duty alcohol consumption policy to impose an 8-hour prohibition on consumption prior to the start of a shift is a mandatory subject and can not be unilaterally imposed. February 14 ALJ decision in City of Albany;
- it has long been held that a public employer cannot unilaterally change a term and condition of employment unless 1) the change has been negotiated in good faith to the point of impasse; 2) there is an urgent need to make a change; and 3) negotiations continue until an agreement is reached. April 3 Board decision in Manhasset UFSD;
- most improper practice charges alleging unlawfully motivated interference with employee rights under the Taylor Law or discrimination against employees because of involvement in activities protected by the Taylor Law require proof by the charging party of unlawful employer motivation that can be proven through direct evidence. Direct evidence is evidence which tends to show, without resort to inference, the existence of a fact in question. When such evidence is presented, the burden of proof then shifts to the respondent employer to establish by a preponderance of the evidence that the activity protected under the Taylor Law was not a motivating factor for its actions. Unlawful

motivation is rarely so obvious or its practices so overt because it is usually accomplished by devious and subtle means. More commonly, unlawful motivation is demonstrated through circumstantial evidence that may include disparity of treatment toward the affected individual, the timing and context of the employer's actions, the resurrection of disciplinary allegations, or a pretextual rationale given to explain the basis for the employer determination. April 3 Board determination in NYC Board of Education; and

- a notice of claim pursuant to §3813(1) of the Education Law is not a precondition to the filing of an improper practice charge. April 3 Board decision in Manhasset UFSD.