



## **NYSPELRA Newsletter: September 2004**

### **LEGISLATIVE UPDATE**

The Governor has vetoed A. 4962-A, a bill which would have required local governments to maintain all health insurance conditions for retirees. A bill that would have imposed the same obligation on local governments was vetoed in 2002. In addition to being yet another mandate on local governments, the wording of the bill linked any changes that could be made for retiree health insurance contributions or coverage to changes made (aka negotiated) for the same group of active employees. That rarely happens. A demand in negotiations for changes in the health insurance package for unionized employees often results in an agreement to protect current employees and have prospective hires effected. The Governor noted a lack of any evidence by the bill's proponents that local governments were taking actions that adversely affected retirees. Veto No. 234. Check the Assembly and Senate web sites to see how your legislators voted on the bill.

### **PERB DECISIONS**

The following 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 litigation. 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. Check the PERB web site at [www.perb.state.ny.us](http://www.perb.state.ny.us) where summaries of decisions issued since 1986 can be obtained and forms can be downloaded.

- in order to be designated as a confidential employee under the Taylor Law and consequently ineligible to unionize, the employer seeking such a designation must prove that the employee not only assists some one who qualifies to be designated as a managerial employee under the law, but also acts in a confidential capacity to that employee. November 24 ALJ decision in NYC Transit Authority;
- that a contract may extend to a retiree the rights of an employee will not serve to extend to the individual any standing in a proceeding before the Board. November 19 decision of the Director of Public Employment Practices and Representation in NYS Insurance Fund;
- an appointing authority may impose an adverse personnel action for a good reason, a bad one, or no reason, provided the motivation is not prohibited by the Taylor Law. December 12 Board decision in City of Syracuse. Editor's note: That may be the Board's standard. However, should there be no reason for an action deemed by an employee to be adverse, the appointing authority or the public employer could well be the defendant in an Article 78 proceeding, alleging an arbitrary and capricious action.
- the proximity between an employee's grievance and an employer action that the employee deems to be adverse may raise a suspicion of a causal relationship. However, timing is insufficient. The charging party must make a prima facie case that a statutory violation has occurred. Should that occur, the burden of proof would shift to the public employer to establish a

legitimate business reason why the adverse action was taken. December 12 Board decision in City of Syracuse;

- a foul mouth encountered in any aspect of the labor relations process does not rise to the level of an improper practice. December 12 Board decision in City of Syracuse, citing Town of Greenburgh, 32 PERB ¶3025 (1999). Editor's note: Nor should it be the basis for disciplinary action, as most arbitrators will not uphold a proposed disciplinary penalty. Should such conduct be encountered, there is a simple solution, aka an exit.
- while a unionized public employee has a statutory right to union representation in the course of an investigatory interview, should the employee conclude that discipline may result from the questioning, that right does not apply to a medical exam directed by the employer. December 12 Board decision in NYC Transit Authority;
- should an improper practice charge be filed alleging a violation of §209-a(1)(d) or (e) of the Civil Service Law, the Board will conditionally defer the charge to the contractual grievance arbitration process, provided the contract calls for the binding arbitration of the grievance. Such a charge is subject to a motion to PERB to reopen the case, should the eventual award fail to satisfy Board standards set forth in NYC Transit Authority. December 8 ALJ decision in City University of New York. See also a similar outcome in Chenango Forks CSD, also a December 8 ALJ decision.
- whether an employee will be designated as confidential by the Board requires that 2 tests be satisfied. The employee must assist and act in a confidential capacity to a managerial employee. The employer seeking a confidential designation must show that the employee has access to financial records, have regular input on budget and staffing issues, or is privy to personnel issues having a significant impact on negotiations. December 30 ALJ decision in Port Washington Police District;
- res judicata is a judicial concept that can be applied to a subsequent proceeding between the same parties. The literal translation is "the thing has been decided". The Public Employment Relations Board applies that standard in regard to factual issues or questions involving law and fact that have been addressed by an arbitrator in reaching an award on a contractual grievance. Collateral estoppel is a related judicial principle, whereby a party will not be allowed to litigate in a subsequent action an issue that has already been litigated and determined in a prior proceeding, even though the forum or the cause of action is different. PERB also applies that standard when the subject of an improper practice charge is found to have been or could have been grieved and is deferred to arbitration. Where it is shown in a union's attempt to reopen a charge that had been deferred to arbitration that an issue of fact or law was clearly raised and decided, collateral estoppel will be applied, provided it is shown that the issue decided was material to the arbitrated grievance and was essential to the arbitral award. December 12 Board decision in NYS Division of State Police; and
- an improper practice charge alleging a violation of §209-a(1)(a) or (c) of the Civil Service Law will not be deferred by the Board to arbitration, even if a contractual grievance has been filed. However, in order to find that a public employer has violated either subparagraph of §209-a(1), there must be proof that the employer's conduct was deliberate. December 12 Board decision in City of Syracuse.

## **JOB VACANCY**

The NYC Board of Education seeks to fill the position of Deputy Director for Research and Negotiation. The individual holding this position will report to the Department's Director of Labor Relations and Collective Bargaining and is responsible for preparing for, assisting in, and in certain cases leading negotiations and labor management meetings with employee unions, including teachers, supervisors, and other pedagogical employees as well as administrative and clerical employees. The Deputy Director is also responsible for researching contract, labor law, and other rules and regulations affecting the Department's employees and act as a liaison with other Department offices.

The salary range for this position is \$82,131 - \$106,569

A minimum of 18 months of managerial, administration or supervisory experience is required along with a degree from an accredited college and 6 years of full-time experience in labor relations, employment, public administration, education management, or a related field. Admission to the State Bar and 5 years legal experience is preferred.

A cover letter, writing sample, and resume describing relevant required experience should be submitted to the Office of Labor Relations and Collective Bargaining; Re: Admin. Ed. Analyst - OLR Deputy Director; 51 Chambers Street - Room 603; New York, NY 10007 or e-mail [rbirry@nycboe.net](mailto:rbirry@nycboe.net) by October 10. The NYC Board of Education is an affirmative action/equal opportunity employer.