The Union's Role and the District: Where are the Boundaries

School Client Conference

January 17, 2025

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Agenda

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Representation in the Public Sector

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The Right to Union Representation

- The Taylor Law (Civil Service Law Article 14), adopted in 1967, first gave public sector employees in New York the right to unionize.
- The 2018 *Janus* decision gave employees the right to decline union membership.
- Public sector unions in New York have distinct rights and restrictions in comparison to private sector unions:
  - Continuation of terms and conditions upon expiration of the CBA (*i.e.*, Triborough);
  - No right to strike;
  - With regard to educational entities, no imposition of contract terms.

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The “Employee Organization”

- An “employee organization” is a union.
  - The Taylor Law, however, does not use the term union to refer to the entity authorized to represent a group of public employees in collective negotiations.
  - Instead, it uses the term “employee organization.”
- There are 2 procedures by which a union can become the authorized representative group of public employees:
  - *Recognition* by the district upon agreement with the union over a unit definition; and
  - *Certification* by PERB after determining the most appropriate unit.

The “Employee Organization”

- Who is entitled to be in the union?
  - There are 3 typical bargaining units in school districts:
    - Administrators and supervisors;
    - Teachers and other instructional staff; and
    - Noninstructional staff.
  - Part-time employees, and employees that are considered “exempt” under Civil Service rules, may still be entitled to be in a union.

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Defining the Bargaining Unit

- When defining a bargaining unit, the positions to be included must have a sufficient "community of interest" based on a variety of factors, such as:
    - Similarity of terms and conditions of employment;
    - Shared duties and responsibilities;
    - Qualifications;
    - Common work location;
    - Common supervision; and
    - Actual or potential conflict of interest between employees of the proposed unit.

Defining the Bargaining Unit

- Common examples:
  - Teaching assistants are most appropriately placed in the same unit that represents teachers.
  - Long-term substitute teachers are generally placed in the same bargaining unit as teachers.
    - Per diem substitutes are generally placed in their own bargaining unit.
  - RNs should generally not be included in a unit of nonprofessional or noninstructional employees.
    - It is appropriate to place RNs in a bargaining unit of teachers.

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Defining the Bargaining Unit

- All employees whose positions fall within the unit's definition are considered members of the unit, regardless of when they are hired.
  - If a new position is created that does not fall within the definition of a unit, the union may file a unit placement petition seeking an order to add the new position to an existing unit.
  - If PERB finds that a particular title has not been included in any unit, then upon a proper petition, PERB may order placement of that title into the appropriate unit.

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Disputing the Bargaining Unit

- What happens if there is a dispute regarding coverage of a particular job title?
  - *Unit placement petition*; or
    - Seeks a determination as to whether unrepresented positions should be added to a pre-existing unit based on whether a community of interest exists between the at-issue positions and the positions in the represented unit.
  - *Unit clarification petition*.
    - Seeks a factual determination as to whether existing personnel are already encompassed within the scope of the existing unit based on a review of the recognition clause in the CBA and other relevant language.
    - This procedure can be used to resolve disputes between units.

Disputing the Bargaining Unit

- If either a unit placement or unit clarification petition is filed by a union, the district has an opportunity to respond.
- PERB's analysis begins with a review of the unit and the CBA that claims to represent the job titles at issue.
  - If the unit recognition clause does not expressly include the job title(s) at issue or is ambiguous, PERB will examine the evidence regarding the intent with respect to the composition of the unit and practices regarding representation of title(s) at issue.
- Districts may not negotiate with an incumbent union while a bona fide question concerning representation is pending.
  - Where such a question involves only some of the unit employees the preclusion of negotiations covers only those employees.

Supervisors and Management

- PERB has declined to automatically place supervisors and rank-and-file employees into separate bargaining units. Instead, PERB will consider factors such as:
  - Whether members of the same unit have significant supervisory responsibility over others;
  - The nature and size of the existing and proposed unit;
  - The nature of the employers and administrative convenience;
  - Evidence of subversion of supervisor responsibilities;
  - Evidence of inadequate representation; and
  - Evidence as to whether there are other existing or potential conflicts of interest among members of the unit.
- Functions such as the imposition of discipline, effective initiation of disciplinary procedures, or the evaluation of a subordinate may indicate a conflict of interest.

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Supervisors and Management

- *Managerial* and *Confidential* employees:
  - The district can reach agreement with a union, through the recognition clause in the CBA or otherwise, on exclusions from the bargaining unit for managerial and confidential employees.
  - If acting unilaterally, districts must file an application with PERB for designation of an employee as a managerial or confidential employee.
  - The school board may not unilaterally make this decision, and civil service classification is not determinative.

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Supervisors and Management

- A *managerial employee* either (1) formulates policy or (2) may reasonably be required on behalf of the district to assist directly in preparing for and conducting collective negotiations or to have a major role in the administration of CBAs or in personal administration.
  - Such a role cannot be routine or clerical and must require the exercise of independent judgment.
  - Such criteria is applied strictly with all uncertainties resolved in favor of coverage.
- A *confidential employee* is someone who assists and acts in a confidential capacity to managerial employees <u>concerning collective negotiations, CBA administration, or personnel administration</u>.

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Supervisors and Management

- Defining *managerial* employees:
  - "Formulating policy" means regularly participating in the essential process involving the determination of the goals and objectives of the district and of the methods for accomplishing those goals and objectives that have a substantial impact upon the affairs and the constituency of the district.
    - It does not extend to the determination of methods of operation that are merely of a technical nature.
  - Employees responsible for CBA administration include employees with a major role in implementing the CBA, such as those with the authority to change the district's procedures or methods of operation.
- NOTE: Building principals, generally, have not been designated as managerial. However, administrators with district-wide responsibilities, may be eligible for such status.

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The Practical Applications of the Union Relationship

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Obligation to Bargain in Good Faith

- The Taylor Law requires that a Public Employer and Union – at all times – negotiate in “good faith.”
  - *See* Civil Service Law, § 204(3).
- Components of the duty to negotiate in good faith:
  - Meet at reasonable times and places (e.g., Employers’ silence for two and one-half months, despite two union requests for negotiations, is a violation [Town of Huntington, 27 PERB ¶ 3039]; c.f., permissible to delay bargaining on economic items while awaiting information on state aid [New Rochelle CSD, 4 PERB ¶ 3060)].
  - Confer in good faith on wages, hours, and other mandatory terms and conditions of employment.
  - No obligation compelling either party to agree to a proposal or to make a concession.

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Obligation to Bargain in Good Faith

- What is “good faith” bargaining – a sincere desire to reach agreement; for example:
  - Must present comprehensible proposals;
  - Must be able to explain the objectives of the proposals; and
  - May have to provide information to substantiate the basis for the proposals.
- However, there is no obligation compelling either party to agree to a proposal or change its position.

Obligation to Bargain in Good Faith

- However, there is ***no obligation*** compelling either party to agree to a proposal or to make a concession.
  - "Hard bargaining" is acceptable and, arguably, encouraged by the Taylor Law.
- On the other hand, "surface bargaining," *i.e.*, going through the motions without intending to reach a final agreement, constitutes an improper practice.
- "Regressive bargaining" may be permissible if explained by intervening circumstances,
  - *e.g.*, decline of budget and/or economic situation, loss of benefit of health insurance cost reductions, etc.
  - However, it cannot be used to retaliate or to "teach a lesson"

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Subjects of Bargaining

- Mandatory Subjects - matters which if raised must be negotiated.
  - Note: Just because a subject is mandatory does not mean that either side is required to agree.
  - *e.g.*, wages, health insurance benefits, paid leave, and subcontracting.
- Non-Mandatory Subjects - matters which if raised need not be negotiated but which may be negotiated by mutual agreement.
  - Sometimes referred to as "permissive."
  - *e.g.*, minimum staffing and other management prerogatives.
  - Note: If a district reaches agreement on a non-mandatory subject, it converts to a mandatory subject.
- Impact Bargaining - Although a school district need not bargain over decisions regarding non-mandatory subjects of negotiations, it must, upon demand, bargain over the impact of such decisions.

“Past Practice” – When does it matter?

- Unions often refer to “past practice” to object to an employer action
- Many CBAs have language regarding “past practice,” which must be evaluated and can be enforced by an arbitrator.
- If the CBA is silent, then PERB has jurisdiction, and may enforce past practices if:
  - It involves a mandatory subject of bargaining; and
  - The alleged practice is unequivocal, consistently long-standing, and there has been no reasonable expectation established that it could change.

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Effectively Managing the Public Debate

- Anticipate and prepare for union pressure tactics, such as armbands and unity clothing, public statements, picketing, direct approaches to board members, and even conduct which may constitute a "strike."
- A school district may communicate directly with union members and/or the general public to explain its Triborough position on union issues and/or to respond to inaccurate statements by the union.
  - However, any such communications which are deemed to constitute "direct-dealing" with employees, or which threaten reprisals for protected activity, may be improper under the Taylor Law.
  - Be factual (*e.g.*, permissible to publish a union's proposals in local newspaper together with analysis of impact on tax rate [Brookhaven CSD, 6 PERB ¶ 3018]).

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Representation in Investigations

- Does the right to union representation also include the right to union representation during questioning by the district?
  - Generally yes, upon an employee's demand, at the time of questioning if it reasonably appears that the employee may be the subject of potential disciplinary action.
  - Commonly referred to as "*Weingarten* rights" after a 1975 U.S. Supreme Court decision on *NLRB v. Weingarten.*
- An employee who requests representation under such circumstances must be afforded reasonable time to obtain it.

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Representation in Investigations

- Be sure to check the collective bargaining agreement!
- Many CBAs have language that applies in some measure to the investigative and disciplinary process.
- Violation of language on notice, representation, and other procedures may lead to the exclusion of any information obtained, or nullification of the ultimate discipline.

- This right attaches when, regardless of the initial nature of the meeting (*e.g.* where the employee is asked whether he/she engaged in alleged "misconduct"), converting the meeting into one to which representation rights attach.
- The union *is not* obligated under the Taylor Law to provide representation to a non-member during questioning by the district.
- In addition, employees subject to Civil Service Law Section 75 protections are entitled to advance written notice of their right to union representation prior to questioning by the district, where it reasonably appears the employee may be subject to discipline.

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Requests for Information

- Under the Taylor Law, a union has a general right to request and thereafter receive from the district documents and information that are reasonably relevant and necessary for representational activities, such as:
  - Collective negotiations;
  - The resolution of negotiation impasse; and
  - The administration of negotiated agreements including for use in investigating a potential grievance and/or the process of a pending grievance and/or arbitration.

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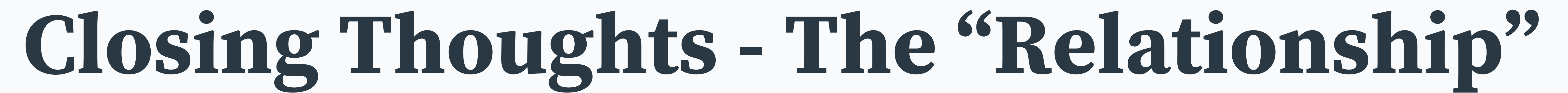
Requests for Information

- The union's right is subject to 3 primary limitations:
  - Reasonableness, which includes the burden on the responding party;
  - Relevancy; and
  - Necessity.
- The district may also refuse to comply with any such requests if the production of the documents and information is prohibited by law.
- But in such an instance employers must still make a good faith effort at accommodating the need for information.

Requests for Information

- Post-Janus Amendment to the Taylor Law requires public employers to provide certain information to unions upon demand.

- A union has additional methods to obtain information:
  - A Freedom of Information Law request;
  - An arbitration subpoena under CPLR Article 75;
  - A subpoena or discovery demand in a legal action or proceeding.



Closing Thoughts - The “Relationship”

- Many outcomes on union issues are the result, in whole or in part, of the state of the relationship between the parties, and not just the application of law.
- That “relationship” can be ever-evolving, particularly when there is a change in district or union leadership.
- The most constructive relationships are typically respectful, honest and communicative.
- But, it must be a two-way street.

Questions?

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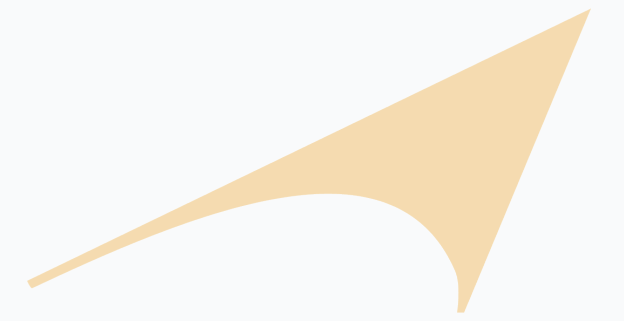

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