

Management Rights Under the Taylor Law

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Introduction

The most significant drivers of school district budgets are employee salaries and benefits. Apart from pension costs which are fixed by the New York State Teachers Retirement System and the Employees' Retirement System for non-instructional employees, escalated costs will be derived from labor negotiations with teachers' and non-instructional employees' bargaining units.

Introduction

School board members need to know what management rights are reserved to their school district or BOCES, how to preserve those rights and how changes might impact their collective bargaining agreements.

This presentation will explore these issues and review the developments over the 57 years of negotiations under the Taylor Law.

Overview of Presentation

- Brief Overview of Taylor Law and the Negotiations Process
- Understanding Managements Rights
- Subjects of collective bargaining
 - Mandatory
 - Non-mandatory
 - Prohibited
 - Lawful Unilateral Change in Working Conditions
- Hard bargaining

The Taylor Law

- Requires public employers to negotiate with unions concerning terms and conditions of employment but there is no duty to negotiate non-mandatory subjects
- Establishes impasse procedures for the resolution of disputes in negotiations. If negotiations fail, the parties must submit to mediation and if mediation fails to fact finding.
- There is no finality mechanism should fact finding not enable a settlement, unlike interest arbitration which applies to police and fire negotiations.
- Defines and prohibits improper practices by unions and public employees. Most prominently the failure to negotiate in good faith or charges when management makes unnegotiated unilateral changes.
- See Civil Service Law §§ 209-a.1(d) and 209-a(2)(b)
- Prohibits strike and imposes individual penalties of 2 days' loss of pay for each day of strike activity.

The Negotiation Process

The Parties:

- Superintendent of Schools: Chief Executive Officer with authority to execute collectively negotiated agreement on behalf of the District. (Civil Service Law § 201[10]) Essentially the “bargaining representative”, but cannot bind the District to the expenditure of additional money.
- Board of Education: “Legislative Body” charged with the duty of approving any additional monies necessary to fund the provisions of a successor collectively negotiated agreement. (Civil Service Law § 204-a)
- Union/Employee Organization: Union has the authority to execute a collectively negotiated agreement on behalf of the employees in its bargaining unit. (Civil Service Law § 201(5))

Duty to Bargain in Good Faith

- Duty to Negotiate in good faith means that both parties approach the negotiating table with a sincere desire to reach an agreement - a matter of intent.

“Thus, whether one had approached the negotiating table with a sincere desire to reach agreement can only be determined by this overall conduct in this regard.”
Town of Southampton, 2 PERB 3011 (1969)

- The Duty does not include reaching agreement on any particular subjects
- To determine the Parties’ intent, PERB looks at the overall conduct of parties:
 - Willingness to exchange proposals
 - Willingness to discuss the issues
 - Willingness to explain the rationale of negotiating positions upon request
 - Willingness to accommodate the idea of compromise

Subjects of Bargaining

- **Under the Taylor Law, public employers and unions must negotiate over “terms and conditions of employment”.**
 - Definition of “terms and conditions of employment” is stated as – “salaries, wages, hours, and other terms and conditions of employment.”
- Accordingly, PERB and the courts have been left to interpret this phrase so employers and unions know what can be negotiated versus what must be negotiated.
- Three categories:
 - Mandatory subjects;
 - Non-mandatory or permissive subjects; and
 - Prohibited subjects.

Mandatory Subjects of Bargaining

- Terms and conditions of employment which, when using a balancing approach, **are more central to employee work rights** than the mission of the employer.
- **Must be discussed** if either party brings the issue to the table. Precludes the public employer from taking unilateral action prior to agreement unless after impasse there's a compelling reason to make a unilateral change.
- **Resolved by agreement or withdrawal of such demand.**

Mandatory Subjects of Collective Bargaining

Examples:

- Compensation – salary, longevity pay, overtime pay
- Benefits – health, dental, and optical insurance for current employees, life insurance for current employees, payments to a welfare benefit fund
- Paid and unpaid leaves of absence – sick leave, personal leave, vacation, holidays, bereavement leave
- Retirement benefits for current employees, but not pension selection
- Employment issues – sign-in and sign-out procedures, dress codes, length of work-day and work year, disciplinary procedures

Mandatory Subjects of Collective Bargaining

Examples:

- Health and Safety Committees

White Plains PBA, 9 PERB ¶13007 (1976)

Exception:

- Health and Safety Issues

Mandates imposed by Executive Orders and State and County Departments of Health- prohibited subjects of bargaining (e.g. wearing masks, social distancing/minimum distance, hand sanitizer, etc.)

- Teachers' Comfort

A demand for an employee workroom or lounge and separate lavatory facilities

Unilateral Change of a Non-Contractual Mandatory Subject of Negotiations

If a subject of bargaining is mandatory and not contained within a CBA, the District may change the status quo after negotiating the subject in good faith to true impasse and by continuing to negotiate after the unilateral change has been made. The District **must have a compelling reason** to make the change at the time (e.g. program implementation)- not just to save money.

Wappingers CSD, 5 PERB 3074 (1972)

Non-Mandatory Subjects of Bargaining

A subject which parties may choose to bargain, but there is no legal obligation to do so. Generally, involve **inherent and fundamental policy decisions relating to the primary mission** of the public employer and usually have only an incidental relationship to the district's relationship with its employees.

*The District is not required to bargain over proposals concerning non-mandatory subjects of collective bargaining!

If a non-mandatory subject is covered within the terms of a CBA, it may only be changed through negotiations and reaching an agreement.

*Civil Service Law §209-a.1[e] a/k/a “**Legislative Triborough**”*

Non-Mandatory Subject of Bargaining

Examples:

- ❖ Job descriptions
- ❖ Layoffs
- ❖ Job security
- ❖ Staffing levels
Rye Police Assn., 17 PERB ¶4645 [1984]
- ❖ Starting salary for a new position

Non-Mandatory Subject of Bargaining

- ❖ Class Size

West Irondequoit CSD, 35 N.Y.2d 46 (1975)

- ❖ Method of Instruction: remote instruction when the learning is occurring at home.

Somers CSD, 9 PERB 3005 (1976)

Non-Mandatory Subject of Bargaining

Examples Cont'd:

- ❖ Contracting-Out for Instruction- if through a **BOCES CoSer Agreement**, otherwise a mandatory subject of negotiations.
Webster CSD v. PERB, 75 NY2d 619 (1990)

- ❖ Curriculum
- ❖ Selection of textbooks
- ❖ Number of preps taught
- ❖ Qualifications for positions

Non-Mandatory Subject of Bargaining

Examples Cont'd:

- ❖ PERB considers the time of the workday to be broken down into only two components: [1]duty time and [2]duty free time.
Wyandanch CSD, 16 PERB ¶3012(1984)
- ❖ Unassigned time not contractually denoted as duty free time may be assigned for the performance of duties inherent to teachers' work.
Savona CSD, 20 PERB ¶3055(1987)
- ❖ The number of periods of teaching assigned each day
Greece CSD, 22 PERB ¶3005(1989)
- ❖ The time of day when the public service will be provided.
County of Orange, 9 PERB ¶3068(1976)

Converted Subjects of Bargaining

Conversion theory of negotiability – all non-mandatory terms contained in existing school district collective bargaining agreements are mandatory subjects of bargaining for purposes of negotiating a successor agreement to the existing contract.

Greenburgh No. 11 UFSD, 32 PERB ¶ 3024 (1999)

Impact Bargaining

- **Duty to Impact Bargain** when exercising a management prerogative:

-The Duty to go to the bargaining table to listen for impact.

If agreement isn't reached, the parties are subject to mediation and fact-finding, even on a single issue in dispute.

New Rochelle CSD, 4 PERB 3060 (1970)

Prohibited Subjects of Bargaining

- Those that are **forbidden by statute or public policy from being embodied in a collective bargaining agreement**. If negotiations do occur and agreement is reached on a prohibited subject, such agreement is not enforceable – neither a court nor an arbitrator can give legal effect to the provision.
- The Taylor Law prohibits negotiation concerning the provision of **benefits by a public retirement system** and an employer's consent to strike.
- Other examples:
 - Establishment of classes
 - Payment of salaries before they are earned (Ed Law §3015)
 - Delegation of board's right to grant or deny tenure to teachers.
Matter of Cohoes v. Teachers' Assn., 40 N.Y.2d 774,777 (1976)
 - Delegation of board's right to inspect personnel files
Bd. of Educ. v. Areman, 41 NY2d527 (1977)

Hard Bargaining

Hard bargaining is not a *per se* violation of good faith bargaining.

- A zero increase proposal can be proposed without violating the duty to negotiate in good faith.
- PERB states that a union “misconstrues the duty of good faith negotiations by equating adamancy or hard bargaining with a failure to negotiate in good faith.” As long as the employer’s approach to the negotiations is premised upon a “serious desire to reach an agreement” by making sincere efforts to do so, the duty to negotiate in good faith is satisfied. *Columbia County CSEA*, 10 PERB 3047 (1977)

Other Examples of Permissive Hard Bargaining

- **U-Turns and Regressive Bargaining**

- PERB ruled that changed economic circumstances may justify withdrawal from a partial agreement before full agreement has been reached “where there is no evidence of an intention to frustrate the reaching of a final agreement.” *Town of Newark Valley, 17 PERB 4532 (1984)*.
- PERB also ruled that a material change in circumstances also can justify a party’s submission of new or revised demands during bargaining to meet unanticipated consequences even if such a submission would be otherwise prohibited. *County of Dutchess, 22 PERB 4530 (1989)*.
- PERB sided with the Union contention that the change in circumstances must be unanticipated and material. *Odessa-Montour CSD, 28 PERB 4572 (1995)*.

Other Examples of Permissive Hard Bargaining

- **Negotiation-Related Communication during contentious times**
 - PERB held that the school district did not violate the duty to negotiate in good faith by communicating to members of the bargaining unit the substance of negotiations and mediation session, where the content of the communications was ***(a) merely informative and did not (b) contain threats of reprisal, (c) promise of benefits or (d) otherwise attempt to circumvent the union negotiators.*** Greenburg No. 11 Federation of Teachers, 32 PERB 3035 (1999).
 - PERB allowed the employer to publish a union's demands in the local newspaper together with a commentary on their effect on its school tax rate. Brookhaven CSD, 6 PERB 3018 (1973).

Reopener Provisions

- A provision in a collective bargaining agreement stating the time or circumstances under which a contractual provision can be renegotiated prior to the expiration of the contract. All the other terms of the agreement remain effective.
- There is no duty to reopen a contract for mid-term bargaining, absent a provision in the contract requiring such bargaining.
- A party can still request that the contract be reopened, but other party has the right to say “no!”
- Contract Re-opener provisions can be “conditional” or “operational.”
- During difficult economic times, negotiations of such reopener provisions into the new contract can prove helpful for both parties because of the funding of uncertainties that are essentially outside the control of the employer.

Management's Rights Clauses

- Most contractual Management's Rights Clauses do not allow for unilateral changes to mandatory subjects of collective bargaining because they are too vague to waive the union's right to negotiate such changes.
- Here are examples of effective managements right's clauses allowing for unilateral change by the school district or BOCES:
 - **Garden City UFSD 27 PERB¶ 3029(1994)** The School District shall have the right to contract for performance of any of its services.”
 - **County of Livingston 26 PERB¶3074 (1993)** “To determine whether and to what extent the work required in operating its business and supplying its services shall be performed by employees covered by this agreement...”