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State of New York Public Employment Relations Board Decisions from March 25, 1976

New York State Public Employment Relations Board

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State of New York Public Employment Relations Board Decisions from March 25, 1976

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Comments

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**NEW YORK STATE
PUBLIC EMPLOYMENT
RELATIONS BOARD**



Vol. 9, No. 3 March 1976

#2-5/25/76

News

ANNUAL REPORT EDITION

1973

NEGOTIATING EXPERIENCE

2,500 contracts
1,750-70% settled without third-party assistance
743-30% brought to PERB for assistance

Of 743 brought to PERB

528 Schools
215 Other governments

Of 801 cases closed during 1973

About 54% (433) settled by mediation
About 45%(358) went to fact-finding

Of 358 cases going to fact-finding

28% Settled by mediation during fact-finding
20% Report accepted
52% Report modified before settlement

REPRESENTATION

128 Petitions received
19 Director's decisions
10 Board decisions
47 Board certifications
78 Petitions withdrawn
46 Elections involving 7,799 employees

IMPROPER PRACTICES

111 Cases pending at beginning of year
307 Charges filed
38 Board decisions
280 Charges settled by agreement
100 Cases pending at end of year

MANAGEMENT/CONFIDENTIAL

31 Cases pending at beginning of year
48 Applications received
34 Director's decisions
7 Board decisions
16 Withdrawn after conference
23 Cases pending at end of year

WORK STOPPAGES

18 Strikes
6,370 Employees involved
27,106 Man-days idle
0.12% Percentage of Estimated Working Time
14 Board decisions on dues forfeiture

1974

NEGOTIATING EXPERIENCE

2,600 Contracts
1,800-70% settled without third-party assistance
788-30% brought to PERB for assistance

Of 788 brought to PERB

493 Schools
295 Other Governments

Of 711 Cases Closed during 1974

About 46% (325) settled by mediation
About 54% (381) went to fact-finding

Of 381 Cases going to fact-finding

35% Settled by mediation during fact-finding
34% Report accepted
31% Report modified before settlement

REPRESENTATION

160 Petitions received
33 Director's decisions
12 Board decisions
49 Board certifications
72 Petitions withdrawn
41 Elections involving 13,728 employees

IMPROPER PRACTICES

100 Cases pending at beginning of year
352 Charges filed
40 Hearing officer decisions
30 Board decisions
296 Charges settled by agreement
129 Cases pending at end of year

MANAGEMENT/CONFIDENTIAL

23 Cases pending at beginning of year
33 Applications received
21 Director's decisions
0 Board decisions (No Appeals to Board)
20 Withdrawn after conference
15 Cases pending at end of year

WORK STOPPAGES

*16 Strikes
4,100 Employees involved
19,300 Man-days idle
0.01% Percentage of Estimated Working Time Lost
11 Board decisions on dues forfeiture

1975

NEGOTIATING EXPERIENCE

2,900 negotiating units
1,900 contracts-expiring
928 - 49% settled without third party assistance
972 - 51% brought to PERB for assistance

Of 972 brought to PERB

656 Schools
316 Other Governments

Of 892 Cases Closed during 1975

About 31% (272) settled by mediation
About 68% (605) went to fact-finding
About 2% (15) closed by arbitration

Of 605 Cases going to fact-finding

40% Settled by mediation during fact-finding
20% Report accepted
40% Report modified before settlement (Includes 11% settled by post fact-finding conciliation)

REPRESENTATION

141 Petitions received
46 Director's decisions
16 Board decisions
67 Board certifications
45 Petitions withdrawn
60 Elections involving 48,420 employees

IMPROPER PRACTICES

129 Cases pending at beginning of year
541 Charges filed
46 Hearing officer decisions
26 Board decisions
373 Charges settled by agreement
245 Cases pending at end of year

MANAGEMENT/CONFIDENTIAL

15 Cases pending at beginning of year
45 Applications received
16 Director's decisions
1 Board decision (No appeals to Board)
13 Withdrawn after conference
31 Cases pending at end of year

WORK STOPPAGES

32 Strikes
*77,745 Employees involved
*394,413 Man-days idle
0.17% Percentage of Estimated Working Time Lost
21 Board decisions on dues forfeiture

*Does not include a 3-day strike of approximately 6,000 custodial workers under contract with the New York City Board of Education whose status as public employees is the subject of litigation.

²Includes 63,000 New York City teachers, aides and paraprofessionals who participated in a 5-day strike.

1975 — A Time of Economic Crisis

Last year was a time of crisis in collective bargaining for public employees throughout the country, and likewise in New York State. A new dimension came on the scene — an economic crisis so severe that it resulted in serious government retrenchment and increasing taxpayer resistance.

Public employees, government and the citizenry all found themselves caught in a fiscal web; government was hard pressed to provide necessary and worthwhile services, and many, in response to their taxpayers, initiated lay-offs.

It was in this atmosphere that the Public Employment Relations Board sought to carry out its mission under the Taylor Law "to promote harmonious and cooperative relationships between government and its employees and to protect the public by assuring, at all times, the orderly and uninterrupted operations and functions of government ..."

It is not too surprising, then, in this troubled climate that PERB's caseload in contract disputes, improper practice cases and representation petitions increased significantly or that the number of strikes, particularly in school districts, rose substantially during the year.

In addition to the economic situation, there were two major court decisions which had a serious impact on PERB's role in the collective bargaining arena. One upheld the constitutionality of the binding arbitration section of the Law in impasses involving police and firefighters (**Amsterdam**) and the other limited PERB's power to provide remedies in improper practice cases (**Jefferson County**). Both these decisions will be discussed later in the report.

It would appear, then, that intense negotiations problems occasioned by the fiscal dilemma have been the theme for 1975.

CHANGES IN THE LAW

Only one amendment to the Taylor Law was enacted by the 1975 Legislature. The amendment added BOCES districts, community colleges and the State University to the employers who may not conduct legislative hearings and take subsequent action as the final step in resolving impasses. (In 1974 school district employees were the only ones so affected.)

The Legislature also clarified the legislative intent relating to the definition of managerial and confidential public employees which is discussed in the Managerial/Confidential Section of this report.

CONCILIATION

The troubled economy reflected itself in the substantial increase in caseload for the Conciliation Section during 1975. The number of impasses rose from 788 in 1974 to

972, an increase of 23%. These statistics do not by themselves reflect the extremely difficult negotiations which characterized the year. The pressures of inflation upon both government employers and public employees caused protracted negotiations which required the utilization of substantially more fact-finding and post fact-finding conciliation than ever before. Because many impasses went directly to fact-finding, the fact-finding caseload rose from 381 in 1974 to 605 in 1975, and post fact-finding/conciliation from 55 in 1974 to 69 in 1975. Inevitably, with the economic pressures on both parties there also was a substantial increase in work stoppages. There were 32 strikes in 1975 as against 16 strikes in 1974.

In examining the PERB conciliation experience it is important to recognize that the statute now provides for three different impasse procedures for various classifications of public employees. One covers educational personnel, a second, police and firefighters, and a third, all other state and local government employees.

In the education area, following the removal of the legislative hearing and subsequent action by the legislative body as the final step in the procedures, PERB has ongoing responsibility for conciliation activities to "provide such assistance as may be appropriate." If the fact-finding report is rejected in whole or in part by either party, the PERB Conciliation Office utilizes a variety of procedures including the convening of meetings in various forms, post fact-finding conciliation and other techniques to assist the parties to reach agreement.

In police and firefighter disputes final resolution is the submission of the issues to tripartite arbitration if mediation and fact-finding fail to bring about settlement.

All other public employees still are subject to legislative hearing and subsequent action by the legislative body as the final impasse step should mediation and fact-finding fail to bring about agreement.

Education Employees

As previously noted, there was a substantial increase in the number of work stoppages during calendar 1975 and twenty of the thirty-two strikes involved teachers. The longest strike took place in Nyack and lasted 28 days. Negotiations in school districts differed dramatically in 1975 because of the desire on the part of school boards to bring to the bargaining table substantial demands of their own in connection with contract proposals. This had not been characteristic of school district negotiations in previous years and again probably reflects dollar shortages, inflationary pressures and strong taxpayer protest.

Apart from salary issues the major issues on the bargaining table between school boards and teachers were matters involving job security and "fair dismissal" questions. A substantial surplus of teachers in the labor market and the high rate of unemployment among professionals, especially teachers, brought job security issues to the fore.

Police and Firefighters

The amendment implementing compulsory interest arbitration for police and firefighter impasses took effect on July 1, 1974. The constitutionality of this amendment was challenged and was ultimately upheld in New York's Court of Appeals. Court decisions are discussed later in this report.

In the six months of 1974, PERB received ten (10) compulsory interest arbitration petitions and designated four (4) panels. In 1975, forty-five (45) petitions were received and 41 panels designated. An increase of almost 50% is expected for 1976. PERB anticipated that the arbitration amendment would in its first and second years be heavily utilized and would probably have some effect on the ability to obtain agreements at the earlier stages of conciliation-mediation and fact-finding. It was anticipated the parties would "test the arbitration tool" and see what kind of results would be obtained. There were 67 firefighter contract negotiations; 40 were settled at the bargaining table without PERB assistance; four were settled through PERB mediation, 13 through fact-finding and 10 by arbitration. In the 129 police negotiations 50 were settled without PERB assistance, 25 through mediation, 33 through fact-finding and 21 by arbitration. The awards relied heavily on the fact finders' recommendations and the statutory criteria set forth in the Taylor Law.

This arbitration procedure is a three-year statutory experiment and expires on July 1, 1977 unless the Legislature extends or modifies it. The experience of dispute settlement under the procedure will be carefully studied, analyzed and reported to the Legislature in the coming year.

PERB is cooperating in a two-year study of the impact of this change in the impasse procedures. The research

project, which includes an analysis of experience both before and after enactment of the amendment, is being carried out under a grant from the National Science Foundation under the direction of Thomas A. Kochan, assistant professor at the New York State School of Industrial and Labor Relations at Cornell University. The report is expected to be completed in the fall of 1976.

Preliminary studies of the arbitration procedure indicate that it is not overused, that the arbitration awards are averaging slightly less than negotiated agreements and that the existence of the arbitration procedures has generally not discouraged or chilled the collective bargaining between the parties.

All Other Public Employees

For those public employees not in the education field or under the police/firefighter arbitration procedure, 208 impasses were brought to PERB. Of these, 113 were settled through mediation, 57 through fact-finding, 6 in post fact-finding conciliation and about 20 went to legislative hearing.

The dispute receiving most attention was that involving about 140,000 employees in four of the bargaining units of the State of New York. A three-man fact-finding panel recommended to the parties (CSEA & NYS) a wage increase of 6% as well as a variety of other recommendations. The Governor rejected the fact-finding report with regard to the salary increase indicating that the fiscal restraints of the State did not permit a salary increase and recommended instead a \$250 one time "bonus payment" for state employees. The State Legislature, after hearings by a joint Senate/Assembly Committee, accepted the Governor's recommendations and adopted the \$250 bonus.

MEDIATION AND CONCILIATION

September 1, 1967 thru December 31, 1975

	1975	1974	1973	1972	1971	1970	1969	1968	1967	Total
A) Total Cases Open										
During the Period	1238	954	935	992	909	758	707	429	23	6018*
Impasses Rec. During Period	972	788	743	839	755	696	642	416	23	5874
Total Closed During Period	892	711	801	828	777	630	659	364	10	5672
Closed as % of Open (as of Dec. 31st)	72.1%	74.5%	85.7%	83.5%	85.5%	83.1%	93.2%	84.8%	43.5%	94.3%
B) Method of Closing Cases:										
Mediation	272	325	433	349	374	366	323	212	5	2659 (46.9%)
Fact-Finding	605	381	358	468	385	252	328	133	1	2911 (51.3%)
Closed for Other Reasons	9	5	10	11	18	12	8	19	4	96 (1.7%)
Arbitration	6									6 (0.1%)
C) Closed by Fact-Finding	605	381	358	468	385	252	328	133	1	2911 (100%)
Report Accepted	122	128	106	117	115	81	107	58	-	834 (28.6%)
No Report Issued	242	134	100	167	91	69	51	29	1	884 (30.4%)
Report Modified	241	119	152	184	179	102	170	46	-	1193 (41.0%)

*Total number of cases received and re-opened during the entire period September 1, 1967-December 31, 1974. The figures for each individual year are not additive since there was a carry-over each year after 1967 of cases received, but not closed, in the previous year.

GRIEVANCE ARBITRATION

PERB is the designated agency for the empaneling of arbitrators in grievance disputes in a number of contracts across the state. Many other contracts utilize other arbitration agencies or arbitrator appointment procedures agreed upon by the parties.

In 1974, grievance arbitration cases under the aegis of PERB equaled 179, a 21% increase over the previous year; in 1975, there were 257, or a 43.6% increase over 1974.

IMPROPER PRACTICES

The number of improper labor practice charges brought to PERB during calendar 1975 rose nearly 54% over the previous year. Nearly 90% of the charges were either settled or withdrawn without the necessity of action by the Board.

Negotiating in Good Faith

The Court of Appeals decision in **Jefferson**, which is discussed in a later section of this report, limits PERB's remedial authority in case of a finding of failure to negotiate in good faith. In **Croton-Harmon**, the issue before the hearing officer was whether the employer had failed to negotiate in good faith by refusing to execute a contract and by unilaterally removing certain positions from the unit and reducing their pay. The employer argued that the reallocations had been agreed to by the union. The hearing officer found to the contrary and sustained the subsection (d) violation concerning failure to negotiate in good faith. Relying upon the same facts which evidenced the subsection (d) violation, he went on and found:

"(t)hese circumstances certainly call for an explanation as to why the (employer) felt compelled to act at that precise time, but none was offered. The only inference to be drawn from this is that the (employer) intended to present to (the union) and the employees a fait accompli making clear that ... further attempt to exercise statutory rights would be futile. These actions, in derogation of the rights of (the union) and the rights of the members of the negotiating unit to its representation are so inherently destructive of such rights that the (employer) must be presumed to have that as its purpose."

Thus, finding a violation of subsection (a) and (d), his order required the employer not only to make the employees whole but to sign the contract.

In **Greenwich**, the parties appeared to have reached agreement on a complex salary formula; however, when it was reduced to contractual language, each side had a different understanding of the meaning of one of the key factors in the formula. Crediting the conflicting testimony of both parties' chief negotiators, the hearing officer concluded that no agreement had in fact been reached since there had not been a true meeting of the minds on the meaning and intent of the language.

A hearing officer in another case, **Tarrytowns**, agreed with the employer's contention that it was not required to reopen negotiations once a memorandum of agreement

had been signed. The union's president and the Superintendent of Schools, after lengthy negotiations, had executed such a memorandum. However, before the draft of the formal contract was completed, the union sought further negotiations on a matter never before discussed. The hearing officer found that the memorandum "was the culmination of lengthy negotiations" and represented "an exchange of mutual promises" between the parties and that it was "a binding contract" under the statutory definition of an "agreement."

Triborough Doctrine

During 1975, PERB had several occasions to reaffirm its "Triborough" doctrine under which it is an improper practice to unilaterally change mandatory terms and conditions of employment following expiration of a contract and during negotiations for a new contract. (See, for example, **Rockland BOCES**, which has been affirmed by the Appellate Division, 3rd Dept., **Livingston BOCES**, and **Cattaraugus**.) In **Malone**, the obligation to maintain the *status quo* was found by a majority of PERB to include the continuation of the parties' grievance/arbitration procedure.

Refusal to Negotiate in Good Faith

Several "refusal to negotiate" cases concerned problems arising during the "reduce to writing" stage of negotiations. In **Yonkers**, a PERB majority, relying upon the credibility findings of the hearing officer, found that, as the union had expressly agreed to a new evaluation procedure, the contrary language of the prior contract had to be deleted from the new one. In his dissent, Member Fred L. Denson found that the agreed-upon language was ambiguous, and that its meaning was dependent upon its placement in the contract, which subject the parties had not discussed. Therefore, he would remand the matter for further negotiations as to its placement.

One of the findings by PERB in **City of New York** was that the parties had reached agreement upon exact language for a new productivity provision. The union wanted PERB to rule further that the new language implicitly superseded certain "old" language and that the latter had to be omitted from the new contract. The employer contended that since the parties were negotiating on the basis that all provisions of the old contract were to be carried forward unless expressly deleted, and as there was no mention of the "old" provision in their negotiations, there was no meeting of the minds and no contract. PERB found that it did not have to resolve these additional issues, reasoning that the question of how to reconcile the "old" with the "new" provisions, if reconciliation was necessary, was one of contract interpretation which should be resolved by the parties' grievance/arbitration procedure.

Waiver

The question of waiver has been litigated frequently before PERB and in 1975 two significant decisions were rendered. In **Port Washington**, PERB made it clear that not only can an express statement evidence a waiver but a waiver can also be established by a party's conscious acceptance of conduct by the other side or silence when it would reasonably have been expected to speak out. In

New York City School District, the issue was whether the employer's unilateral change of the compensation rate for per-session work, which was not referred to in the contract, was improper. PERB found merit in the employer's defense of waiver based upon a "matters not covered" clause.

Ratification Procedures

In **Putnam** and **Friendship**, hearing officers found negotiators of the employer and the union to have respectively violated the Act when they repudiated their agreements and failed to seek ratification from their respective principals. Thus, clearly spelled out is the reciprocal and affirmative duty of each side's negotiator to consider himself bound by the negotiated agreement he entered into on behalf of his principal and to seek its ratification.

SCOPE OF NEGOTIATIONS

During 1975, the Board ruled for the first time upon the negotiability of the following items.* Found to be mandatory subjects of negotiations were:

- Air conditioning in cars (Scarsdale)
 - Discretionary discipline procedures (Scarsdale)
 - Use of unsafe equipment (Scarsdale)
- These items were found to be non-mandatory subjects:
- Work schedule posting requirement affecting emergency call in (Scarsdale)
 - Inclusion of statutory provision in contract (Scarsdale)
 - Inclusion in contract of provision contrary to statutory mandate (Scarsdale)
 - Organizational structure (Scarsdale)
 - Removal of unsafe equipment from service (Scarsdale)
 - Notification of results of criminal investigation of unit employees (Scarsdale)
 - Exclusion of unit members from negotiating team (New Rochelle)
 - Prohibition against consultation with unit employees (New Rochelle)
 - New employees to furnish own tools (Nassau County)

REPRESENTATION

In this, PERB's eighth year, with initial uniting patterns already set, the focus of matters brought to PERB shifted to whether a previously established overall unit ought to be continued. In determining whether or not to fragment such a unit, "negotiating history" became a significant and at times determinative consideration. In the leading case of **Smithtown**, the petitioner sought to represent a separate blue collar unit while the employer, claiming administrative convenience, in conjunction with the incumbent negotiating agent, contended that the existing overall blue and white collar unit remained the "most appropriate unit." A PERB majority dismissed the petition. Chairman Robert D. Helsby and Member Joseph R. Crowley observed that if they were now making the

*A full listing of mandatory and non-mandatory subjects of negotiations, as determined by PERB and the Courts, is available upon request.

initial uniting decision, the traditional differences in working conditions between the two "collars" and their presumably divergent negotiating goals and aspirations would warrant separate units. But, as the unit had been in existence for some seven years, they stated that they were now in a position to examine the actual negotiating compatibility of the overall unit and did not have to rely on speculation. On the record evidence they concluded that the "negotiating history" demonstrated that the blue and white collar employees had engaged in meaningful and effective negotiations. Further buttressing their conclusion was the fact that the blue collar employees constituted a majority of the overall unit and this diminished the likelihood that their interests had been or would be sacrificed. In his dissent, Member Fred L. Denson expressed concern that the emphasis being placed on negotiating history might encourage a group of employees intent upon documenting a claim of "disharmony" to disrupt negotiations deliberately. It has been made clear in a number of decisions following **Smithtown** "that a long standing history of meaningful and effective negotiations, as demanded by **Smithtown**, is a predicate to the continuation of an overall unit." (**Madison**).

In **Clinton**, where the petitioner sought a separate unit of deputy sheriffs, the issue was whether a joint employer relationship required the fragmentation of a multi-employer unit into a separate unit of county employees and another for employees of the county and the sheriff. The Director determined that the joint employer relationship does not, *a fortiori*, dictate fragmentation; rather, it is a factor to be considered in determining whether the at issue employees can engage in meaningful and effective negotiations in an overall unit. The Clinton County sheriff had been a participant in negotiations as a member of the county's negotiating team and he was also a signatory of the county-union contract in the existing unit. The key finding of the Director was that over the years the sheriff, although vested with such power by statute, had not seen fit to exercise independent control over labor relations for his deputies and in practice viewed himself as an appointed department head. Then, applying the **Smithtown** tests for unit fragmentation, the Director concluded that a separate unit of deputies was not warranted. The Director's decision has not been appealed to PERB.

The appropriateness of a separate unit of physician interns and residents was at issue in **County of Erie (E.J. Meyer Memorial Hospital)**. In this case, the petitioner sought to fragment a county-wide white collar unit and to represent only those physicians located at the hospital and then in internship or residency. The Director dismissed the petition as seeking too narrow a unit. In a subsequent appeal to the Board, PERB decided that interns and residents were both students and employees. The unique employment characteristic, among other factors considered by the Board, warranted a separate negotiating unit.

Another novel issue — whether a legislative determination should be treated as a bar to a petition — was considered in another **County of Erie** case. The

Director apparently agreed with the concept of a "legislative bar," but observed that a legislative determination would have to finalize all of the substantial terms and conditions of employment at impasse before it could be treated as the equivalent of a one-year contract. As the at issue legislative determination only addressed itself to a few of the matters still in dispute and left many items "open," he found the petition was timely. Subsequent to this interim decision, the parties reached agreement on the unit in dispute.

ELECTIONS

Included within the 60 elections conducted by PERB in 1975 were three mail ballot elections; one for State employees within the professional, scientific and technical services unit (40,000 employees), another for the trooper unit of the New York State Division of State Police (3,200 employees), and, the last for a small unit of adult education teachers in **Great Neck**. Other than in the P.S. & T unit election (57%), the percentage of voter participation in 1975, whether by mail or in person election, remained at about the same level as in prior years (78% in 1975 as to 75% in 1974).

PERB's rules permit certification without an election to determine majority status, if there is only one employee organization seeking to represent the unit. In one case, Clarkstown, an employer sought to eliminate the possibility of certification without an election by contending that an in-person election should be held between the organization seeking to represent the employees as well as the previous negotiating agent. Inasmuch as the prior representative had disclaimed any interest in continuing its representation, the Director found the employer's contention to be without merit and proceeded with certification without election.

Showing of Interest

The language of the rule providing for certification without an election refers to dues deduction authorization cards. In **Islip**, this reference was found by PERB to be merely illustrative of the type of evidence which may be considered in determining majority status; individual signatures on a petition also are acceptable. In this same case PERB made clear its intent to protect the secrecy of the employees' preference by not permitting the employer to examine these evidences; their authenticity is for PERB to determine. Applying the same rationale, the Director in another case (PBA of New York State Police) ruled that neither an employer nor a competing employee organization would be permitted the opportunity to examine a "showing of interest." The Director's ruling that these evidences are "confidential" was recently confirmed by court decision.

MANAGEMENT/CONFIDENTIAL

School Administrators

When the Taylor Law was amended in 1971 to provide for the designation of individuals as managerial or

confidential, the State Legislature issued a statement of intent that the statutory criteria were to be applied in light of a person's current representation status. As interpreted by PERB, this meant, for example, that principals and other school administrators in an existing unit were only to be designated if there was very clear evidence of their exercise of managerial or confidential responsibilities, with all uncertainties resolved in favor of continued Taylor Law coverage. Conversely, those who had not previously exercised their rights under the Taylor Law were to be designated managerial or confidential in the absence of compelling evidence to the contrary. In 1975, a new legislative directive eliminated current representation status as a consideration in these matters. In effect, the directive raises the level of proof necessary to designate school administrators as managerial even if they had not been previously placed in units.

In the first case considered after the directive was issued, **Copiague**, certain unrepresented principals who previously had been designated as managerial sought a negotiating unit of their own. The record established that the employer consulted with them about their problems in administering the contract and in a general sense about the practical implications of certain negotiating proposals. Principals also attended some negotiating sessions but participated neither in caucuses nor table discussions; they were not present when salaries were discussed. In determining that the principals did not meet the criterion of individuals "Who may reasonably be required on behalf of the public employer to assist directly in the preparation for and conduct of collective negotiations," PERB concluded that the principals were observers or, at best, resource personnel, and not part of the decision-making team and declared them entitled to representation.

PERB also had occasion to analyze the type of "policy" a person must "formulate" under the first statutory criterion in order to be found managerial. In **Binghamton**, a PERB majority of Chairman Helsby and Member Crowley held that the term "formulate policy" should be read in the broad sense as meaning matters relating to the employer's mission. In the case of a school district this refers to "educational policy." Member Denson, on the other hand, adopted the more restrictive view that only one who formulates labor relations policy should be denied representation rights. In light of this decision, six administrators were held to be management and confidential.

THE TAYLOR LAW IN THE COURTS

Thirty-six separate judicial proceedings involving PERB were instituted during 1975. In addition in other cases not involving PERB, several decisions were rendered which were of importance to the law of public employment relations under the Taylor Law.

PERB's Remedial Power

A major decision by the Court of Appeals concluded that PERB's power to fashion a remedy for violation of Section 209-a.1(d) and Section 209-a.2(b) (refusals to negotiate) was severely limited by the provisions of

Section 205.5(d) of the law. The Court held that while PERB had jurisdiction to determine that an employer's refusal to pay merit increments called for by its contract with an employee organization violated its Taylor Law duty to negotiate in good faith, PERB exceeded its powers when it ordered the employer to pay the increments. The Court of Appeals concluded that as the statute is presently written, PERB could do no more than direct the employer "to negotiate in good faith," **Jefferson County Board of Supervisors v. PERB**, et al.

Enforcement

Although the Court of Appeals stated that PERB may enter an order requiring an employer to negotiate in good faith, the Appellate Division, Second Department, has denied PERB's request for enforcement of such an order in a case where PERB determined that a school district had violated its duty to negotiate in good faith when it refused to pay salary increments, **Board of Cooperative Educational Services of Rockland County v. PERB**, et al. In this case PERB had applied its so-called Triborough doctrine and found that, notwithstanding the fact that a collective agreement had expired, the school district was obligated to maintain the status quo by paying previously agreed upon salary increments. The Appellate Division's decision appears to be inconsistent in that it specifically confirms PERB's determination that the employer had engaged in an improper practice. Notwithstanding this conclusion, the court refused to grant PERB's request to enforce its direction "to negotiate in good faith." This decision has been appealed to the Court of Appeals.

Mandatory Subjects of Negotiation

In another decision, the courts confirmed a PERB determination that certain issues were mandatory subjects of negotiation. The Court of Appeals affirmed the Appellate Division's decision in **City of Albany v. PERB and Albany Police Officers Union, Local 2841**, which held that PERB was correct in concluding that retirement benefits, work rules and time off for union officials were mandatory subjects of negotiation.

Status of Managerial Employees

In another area, further clarification of PERB's power to define the status of managerial employees was obtained when the Appellate Division, Third Department, confirmed PERB's determination that certain supervisory employees of the Metropolitan Suburban Bus Authority (foremen and dispatchers) were not managerial employees within the meaning of the Taylor Law, **Metropolitan Suburban Bus Authority v. PERB**. The Court of Appeals denied leave to appeal. In its opinion the Appellate Division thoroughly examined the statute and PERB's decisions thereunder and concluded that PERB's interpretation of the statute was reasonable and its decision that the particular employees did not exercise a "major" role in contract and personnel administration, was supported by substantial evidence.

Police/Firefighter Arbitration

The enactment of Section 209.4 of the Taylor Law establishing compulsory arbitration as the final step in negotiation disputes involving police and firemen spawned numerous lawsuits during the year. Two of the several

lawsuits challenging the constitutionality of the statute reached the Court of Appeals where that court upheld the statute against several constitutional attacks. In particular the court rejected the argument that compulsory arbitration violated the Home Rule provisions of the State Constitution. In addition, the court rejected contentions that the Legislature had unconstitutionally delegated its legislative authority to the arbitration panel, that it had unconstitutionally granted the arbitration panel the power of taxation and that the statute violated the one man-one vote principle, **City of Amsterdam v. Robert D. Helsby**, et al. and **City of Buffalo v. PERB**. Another important issue under the arbitration statute is the proper method and scope of judicial review of arbitration awards. Civil Service Law Section 209.4 does not specifically deal with the question of judicial review. As a result differing decisions have been rendered by the courts in New York. Two decisions in cases in which PERB was a party, involving the City of Albany, have held that the appropriate procedure for review and enforcement of arbitration awards is pursuant to CPLR Article 75 and not CPLR Article 78. These cases have been argued in the Appellate Division, Third Department, and decision is pending. In decisions in Erie County and Nassau County, in which PERB was not a party, the courts have concluded that CPLR Article 78 is the appropriate vehicle for judicial review and that PERB is responsible for enforcement of such awards. In the Albany cases, PERB has taken the position that such awards are not orders of PERB and that the parties to the arbitration proceeding may utilize CPLR Article 75 for review or enforcement of the awards.

Joint Employer

In another area of concern the Court of Appeals affirmed the decision of the Appellate Division reversing a determination of PERB that the New York Public Library is a joint public employer with the City of New York. The court concluded that the Library is not a public employer nor a joint public employer within the meaning of the Taylor Law.

Power to Reduce Work Force

During the year several cases in which PERB was not a party dealt with the vital question of the power of a government to voluntarily agree in a collective agreement to limitation of its power to reduce its work force. The Court of Appeals in the **Susquehanna Valley** case held that although such a subject was not a mandatory subject of negotiations under the Taylor Law, it was a subject about which a government could voluntarily agree and if it did, it could be required to submit a dispute relating to such agreement to arbitration under a contractual arbitration provision. The court concluded that there is no statute, case law or public policy which limits the freedom of a government to contract concerning staff size. Notwithstanding this decision, the Appellate Division, Second Department, in a series of decisions has held that in the event of a fiscal emergency, a government may lawfully reduce staff size although it has by contract agreed not to do so. This issue will no doubt be resolved by the Court of Appeals in the near future.

IN THE COURTS

Among the responsibilities of the Office of Counsel is the representation of the Board in all court proceedings. Of the 36 proceedings commenced by or against PERB during the year, 17 were closed. In addition, 17 other proceedings pending at the beginning of the year were closed. The number of court proceedings in 1975 represented an increase of over 50% over the previous years. The following are some of the cases closed during the year:

New York Public Library v. PERB

Court of Appeals rendered its decision during the past year holding that the Public Library was not a public employer or a joint employer with the City of New York.

Jefferson County Bd. of Supervisors v. PERB, et al.

The Court of Appeals rendered its decision during the past year limiting PERB's remedial power in refusal to negotiate cases.

City of Amsterdam v. PERB, et al.

City of Buffalo v. PERB

The Court of Appeals rendered its decision during the past year upholding the constitutionality of the police and firemen arbitration statute.

Subsequent to the Court of Appeals decision, two cases involving the City of Corning and cases brought by the City of Ogdensburg, the Village of Johnson City, the City of Auburn and the City of Niagara Falls were all closed.

Metropolitan Suburban Bus Authority v. PERB

PERB's decision that the Authority's supervisors were not managerial employees was affirmed by the Appellate Division. The Court of Appeals subsequently denied leave to appeal.

Griffin v. PERB and Sheriff of Erie County

This proceeding sought to review PERB's decision that deputy sheriffs are not covered by the police arbitration statute. This case was discontinued upon the stipulation of the parties.

NYC Board of Education v. PERB

This proceeding sought to review PERB's decision that New York City principals are not managerial employees. This proceeding was discontinued upon stipulation of the parties.

diFrancesca v. PERB, et al.

This proceeding sought to enjoin PERB from hearing an improper practice charge. The Supreme Court denied the injunction. This proceeding may be considered closed.

PERB v. Board of Educ., Town of Hempstead

PERB sought and obtained an order enforcing two improper practice orders directed against the Hempstead School District. No appeal was taken.

Middle Island School District v. Middle Island Teachers Assn. and PERB

This was an attempt to stay PERB from hearing an improper practice charge. Supreme Court dismissed the petition. No appeal was taken.

City of Albany v. PERB, et al. (2 cases)

Proceeding to review PERB's scope of negotiations decisions involving Albany policemen and firemen. The Supreme Court's decision annulling PERB's determination was reversed by the Appellate Division and PERB's decision confirmed. The Court of Appeals affirmed the Appellate Division's decision.

Ferrato v. Wilson and PERB

This action in U.S. District Court sought to challenge PERB's Security Services Unit determination on federal constitutional grounds. The case was dismissed by the District Court. On appeal, the Court of Appeals for the Third District affirmed without opinion and awarded double costs. No further appeal was taken.

Joseph L. Benedetto v. PERB

The petitioner sought to review a decision rejecting his claim that his dismissal constituted an improper practice. After the Appellate Division confirmed PERB's decision, the Court of Appeals dismissed his appeal.

City of Corning v. PERB, et al.

This petition sought to challenge the naming of a neutral arbitrator under the arbitration statute. The petition was dismissed by the Supreme Court, Steuben County.

City of Corning v. PERB, et al.

This was a companion proceeding to the above dealing with other issues under the arbitration statute. This petition was also dismissed.

Hornell City School Dist. v. Hornell Teachers Assn. and PERB

This action sought to enjoin PERB from hearing an improper practice charge. Supreme Court, Steuben County dismissed the petition.

Yonkers Federation of Teachers v. PERB, et al.

This proceeding sought to review an improper practice decision (U-1308 & U-1311). Supreme Court, Albany County dismissed the petition and later denied reargument. No appeal was taken.

Richard Vizzini (Uniformed Firefighters Assn., Local 94) v. PERB

This petition sought to stay the holding of an improper practice proceeding. Supreme Court, New York County dismissed the petition.

City of New York (Office of Labor Relations) v. PERB

This proceeding sought to review an improper practice decision (U-1167 & U-1178). Proceeding was discontinued upon stipulation of the parties.

Buffalo PBA v. City of Buffalo and PERB

Supreme Court, Erie County, held that enforcement of an arbitration award could only be sought by PERB. PERB was granted intervention as a party on the appeal to the Appellate Division. The case was subsequently rendered moot after the City complied with the award.

Ogdensburg PBA v. City of Ogdensburg and PERB

This was a petition to review an arbitration award. PERB moved to drop PERB as a party. This motion was granted by Judge Shea (St. Lawrence County). The judge initially also dismissed the petition but on reargument Judge Shea found the award to be arbitrary or capricious and remanded it to the arbitration panel for further consideration. PERB is no longer a party in the case. Apparently no appeal has been taken.

Town of Walkkill Unit CSEA v. Town of Walkkill

PERB appeared as amicus to argue that PERB jurisdiction does not bar arbitration of a grievance. Supreme Court, Westchester County, agreed with this position and granted an order compelling arbitration. The Town appealed to the Appellate Division. We do not contemplate filing an amicus brief in the Appellate Division.

Town of Orangetown v. PERB

Proceeding to review an improper practice decision (U-1052 and U-1130). PERB's motion to dismiss as premature was granted. No appeal was taken.

City of Albany and Albany Police Officers Union and PERB

This was a motion by the City of Albany to quash a subpoena issued by the APOU attorney in a PERB improper practice case. After argument the request was withdrawn.

City of Albany, Council 66, AFSCME and PERB

This was another motion by the City to quash subpoenas issued in a PERB improper practice case. After argument, Supreme Court, Albany County, denied the motion and directed compliance.

N.Y.S. Police Benevolent Assn. v. PERB, et al.

This proceeding sought to enjoin an election in the State Police unit on grounds of failure to provide petitioner with evidence of a showing of interest. Supreme Court, Albany County, dismissed the PBA petition. No appeal was taken.

Triborough Bridge & Tunnel Auth. Sergeants & Lieutenants Assn. v. George Roukis and PERB, et al.

This proceeding sought to enjoin the holding of a fact-finding hearing. After argument, Supreme Court, Kings County denied a stay and dismissed the petition.

City of Hornell v. PERB

This was a proceeding to review an arbitration award. Supreme Court, St. Lawrence County granted PERB's motion to drop PERB as a party.

Auburn Firefighters Assn. v. City of Auburn and PERB

These proceedings sought to enforce and annul an arbitration award. The parties have reached a settlement and the case will be discontinued.

STRIKES

There was a total of 32 strikes in 1975. During this period, the Office of Counsel issued 20 charges against employee organizations for violations of the Taylor Law strike prohibition. In addition, five charges were issued by chief legal officers, as is authorized by the Taylor Law. Counsel's Office investigated four other apparent strikes but no charges were issued. The Board rendered decisions in 22 strike proceedings assessing penalties ranging from three months suspension to indefinite suspensions in the

case of employee organizations previously penalized for an earlier strike violation. In one case, the Board directed no forfeiture of dues deduction rights upon a finding of extreme provocation by the employer.

MINI-PERBs

Of 34 Mini-PERBs previously approved by PERB, only 13 are now in existence. During 1975, two Mini-PERBs, the Village of Port Chester and the Village of Valley Stream, were terminated by the respective local governments. Three petitions were filed with PERB alleging that determinations or conduct of the Mini-PERBs were not in substantial compliance with the requirements of the Taylor Law. These petitions were investigated by Counsel's Office pursuant to PERB's rules. In two, PERB dismissed the petitions; one is still pending.

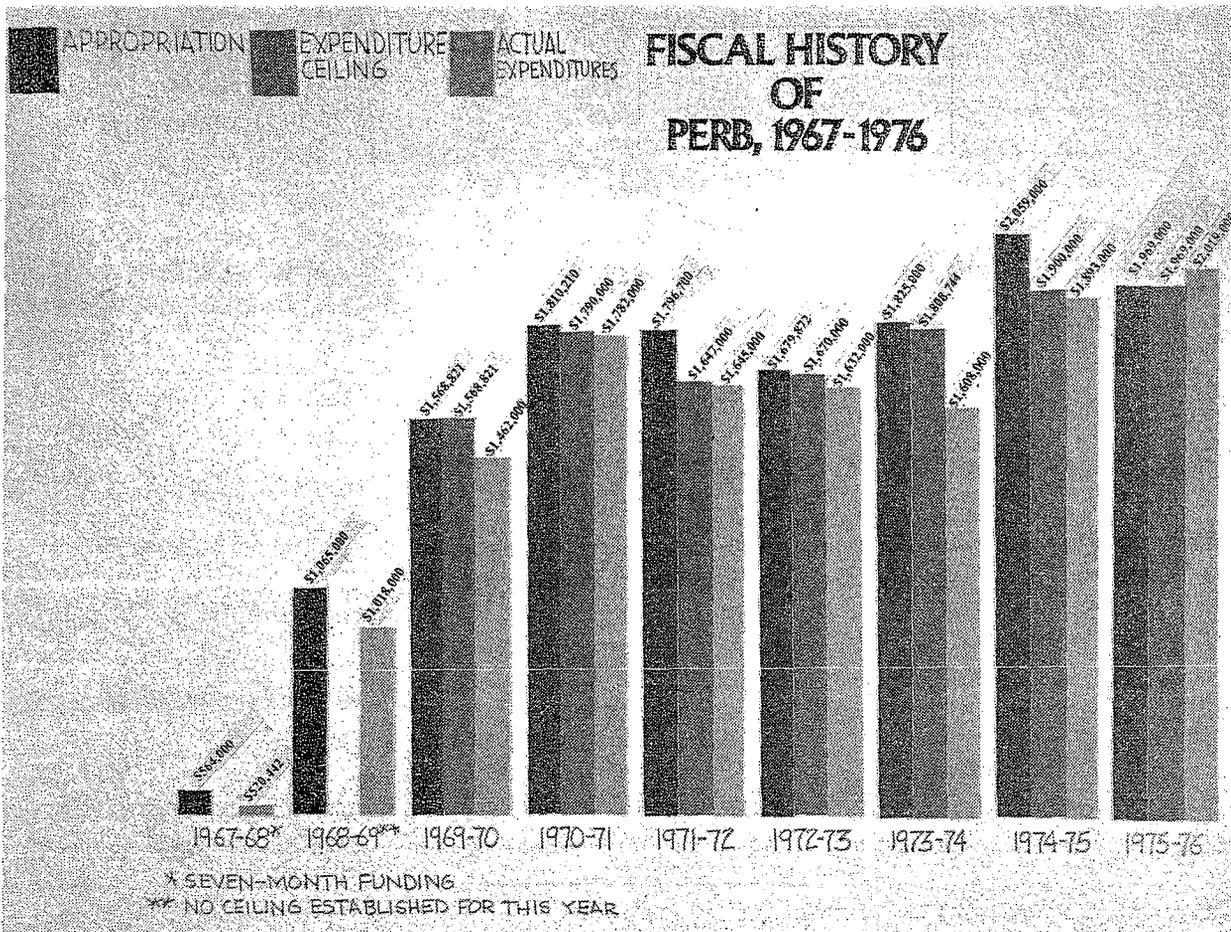
RESEARCH

PERB's research responsibilities, as defined by statute include: compiling data on wages and fringe benefits and other conditions of employment in the public sector, serving as a clearinghouse for such information for the economy as a whole, and undertaking special studies as needed concerned with problems in the administration of the Law.

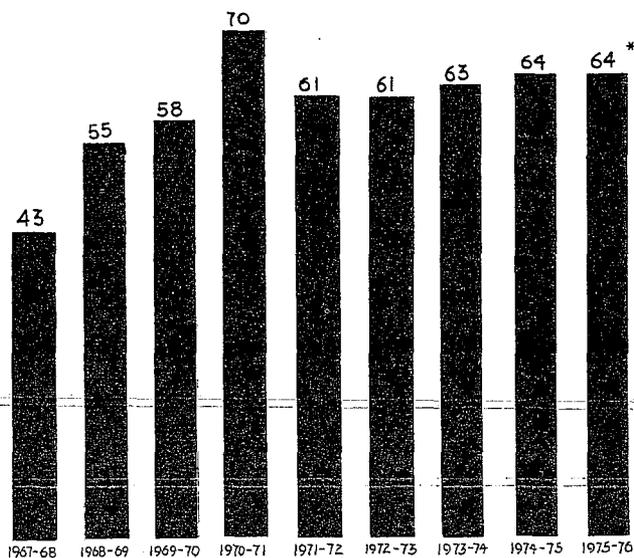
Reporting of current settlements was expanded during 1975. Previously, public reporting of settlements had been confined to teacher disputes and only overall averages were reported. Teacher contracts negotiated in 1975 resulted in an average increase of 6.5 percent in salary schedules statewide, 6.2 percent upstate, and 7.7 percent downstate (suburban New York City counties). Excluding fire and police, local government employees averaged 7.7 percent. Increases in new police contracts averaged 9.7 percent, 10.3 percent for negotiated settlements, 8.7 percent for arbitration awards. Firefighter increases averaged 7.4 percent; 8.1 percent where the settlement was negotiated and 6.7 percent for arbitration awards.

Current settlements are now reported in PERB News as space permits. From time to time trend data on public sector settlements will be published, probably at the end of the third and fourth quarters. Public sector employment constitutes one sixth of total employment nationally; however, no current settlement data are systematically reported for this sector of the economy.

PERB publishes reports on union wages and fringe benefits for various types of public employees in New York State. These reports are compiled from contracts on file and inquiries made to the parties to verify analysis of contracts. Wages and salary reports normally summarize pay schedules. Fringe benefit reports give data on retirement plans, health insurance, sick and illness leave benefits, vacation and holiday policies, and other benefits.



AUTHORIZED STAFFING 1967-1976



In January 1976, authorized staffing was reduced to 59

These reports are updated periodically, usually at the conclusion of the applicable negotiating cycle, so that revised data becomes available at the beginning of or early in the next cycle. When new developments or trends are dictated, special reports are prepared or existing reports are revised to incorporate such new developments.

The following reports were published:

Wages and salaries. Police (city, county, town, and village) firefighters, deputy sheriff, city blue collar, city clerical, county probation officer, county nurses, county blue collar, county clerical.

Fringe benefits. City general employees, police, county employees including sheriffs and medical personnel, fringe benefits for non-institutional school personnel (revised biannually).

Other. Community colleges — salaries, fringe benefits, and related practices.

Data are furnished to both advocates and neutrals in preparation for and devising the positions in negotiations upon direct inquiry. Information supplied upon direct request normally comes from contract files. An attempt is

made to collect on a timely basis all public sector labor contracts. These files are open to the public and are used extensively by labor and management representatives as well as labor relations specialists from the academic community. Within the constraints of staff, budget, and time, copies of contracts are made available.

PUBLIC RELATIONS

The impact of settlements in the public sector and their effect on the economy and the reaction of government and the populace have kept the Taylor Law in the forefront of the news throughout the year. PERB, its staff and its Panel of Mediators and Fact Finders have had more visibility in the newspapers, radio and television than any year since the initial years when PERB was beginning to function.

The State Board has endeavored to communicate to the public and to its clientele as much information as possible on the Law, any changes and how these affect day-to-day operations, decisions and various data from its resource files.

This information was disseminated through the monthly **PERB News**, three basic guides to the Law — the **Taylor Law, Rules of Procedure** and **What Is the Taylor Law — And How Does It Work?**, and a compilation of **Official Decisions, Opinions and Related Matters**.

Several seminars were initiated by PERB with the cooperation of community colleges and the New York State School of Industrial and Labor Relations at Cornell. The community college programs were designed to update information on the Law for both management and employee groups, while the ILR School seminars provided data on new developments for the members of various panels.

RULES OF PROCEDURE

Several amendments were promulgated by PERB to its Rules governing access to records of the Board. The major change dealt with a method of appeal from denial of a request for access to records or a failure to provide access to records within five working days after receipt of a request. Other minor changes dealt with salary records. The changes in the rules were effective on March 1, 1975.

PERB Newsletter

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STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

#1A-3/25/76

In the Matter of
CITY OF NEW YORK,

Respondent,

-and-

PATROLMEN'S BENEVOLENT ASSOCIATION OF THE
CITY OF NEW YORK, INC.,

Charging Party.

BOARD DECISION AND ORDER

CASE NO. U-1723

This matter comes to us upon the exceptions of the City of New York (City) and the cross-exceptions of the Patrolmen's Benevolent Association of the City of New York, Inc. (PBA) to a decision of a hearing officer issued on January 15, 1976. The charge in this case filed by PBA on August 1, 1975 alleged that since April 3, 1975 the City had refused to negotiate in good faith on the subject of "duty charts" in violation of CSL Section 209-a.1(d) in that the City had engaged in surface bargaining, failed and refused to furnish information, declared impasse prematurely and declared that certain aspects of the duty charts are non-mandatory subjects of negotiation. Among the defenses raised by the City was the allegation that those matters about which it declined to negotiate on the ground that they were non-mandatory subjects of negotiation were, in fact, not mandatory subjects of negotiation. The hearing officer decided in favor of PBA on the scope of negotiations issues. Reasoning that the allegations of surface bargaining and refusal to furnish information were related, he determined that, on these charges, too, the City was in violation. Finally, he determined that the evidence did not substantiate the allegation that the City's declaration of an impasse was premature.

The City excepted from so much of the hearing officer's decision as found that it was in violation of CSL Section 209-a.1(d) and PBA excepted to that part of the decision that dismissed its charge that the City declared impasse prematurely. The New York City Office of Collective Bargaining sought and obtained permission to intervene in the appeal from the hearing officer's determination. Such intervention was restricted to jurisdictional issues. On these issues, OCB is allied in interest with the City.

At the time of the hearing officer's decision, the impasse between the City and PBA was before an impasse panel appointed by OCB pursuant to Section 1173.7-0 of the New York City Collective Bargaining Law. Upon the consent of both parties, and because of their desire for a quick resolution of the issues so as to facilitate the continuance of negotiations and/or procedures before the impasse panel,¹ we waived the filing of written exceptions and held oral argument on January 27, 1976, at which time the parties stated the nature of their exceptions. They also presented oral arguments, a record of which was kept in lieu of written briefs. OCB, however, availed itself of an opportunity to file a written brief three days later. PBA objected to our consideration of that brief on the ground that it dealt with matters other than the jurisdictional issue for which it was permitted to intervene. We sustain this objection of PBA. In reaching our determination, we have considered the oral arguments of the three parties, the written briefs of the two primary parties to the hearing officer, OCB's written brief as it applies to jurisdictional issues only, and OCB's position on substantive matters as stated in OCB decisions, most notably, Decision B-24-75.

¹ On January 30, 1976, we issued an Interim Decision indicating that we did not deem the continuation of impasse panel proceedings to be inconsistent with the determination of the hearing officer.

FACTS

The facts are set out in detail in the hearing officer's report. As we confirm his findings of fact, it is unnecessary to restate them all. We do, however, state those facts that are essential to our resolution of that issue which is most critical to the parties -- whether the refusal of the City to negotiate over certain demands on the ground that those demands did not involve mandatory subjects of negotiation was a violation of its duty to negotiate in good faith under the Taylor Law. The unresolved negotiation demands involve duty charts. Duty charts reduce to diagram form the working schedules of police officers for the calendar year. Most police officers work on a rotating, three-platoon (shift) basis providing around-the-clock coverage. The charts show the number, frequency and sequence of various platoon assignments; the number of tours of duty in a set (number of consecutive days worked in a given platoon); the duration, frequency and sequence of swing periods (off-duty periods between sets); and the scheduled days on and off, including weekends, but excluding individual variables such as vacations and personal leave. In 1972, the City promulgated a new squad system (and new duty charts) which provided for increased police protection on the third platoon consistent with crime fighting needs. Under that system, the number of annual work days was reduced to 243, and the work day was increased to 8-1/2 hours. That procedure was incorporated in the 1972-73 agreement.

In May 1974, the City proposed to delete from the successor agreement the provisions relating to the new squad system on the ground that the subject was not mandatory. Thereupon, the Board of Collective Bargaining (BCB) of OCB decided (Decision B-5-75) that the City must bargain over,

"...those aspects of duty charts and the 24 squad system which affect hours of work, including days of work and days off, and which are not fixed by law and which do not impinge on the City's right to determine the level of manning required to provide police protection to the public."

The ensuing negotiations are described in the hearing officer's report and are the basis of his determination that the City refused to furnish appropriate information and engaged in surface bargaining².

On June 6 the City advised PBA that it was asking BCB to appoint an impasse panel. Over PBA's objections, the impasse panel was appointed. On July 29, 1975, the City informed PBA that it was filing a scope of bargaining petition with BCB and it did so on August 8, 1975, one week after the filing of the instant charge by PBA. The petition to BCB alleged that the following issues were non-mandatory: ~~starting and finishing times, the number of different charts, the number of platoons, the percentage of appearances on each platoon, the number of tours in a set and the length and number of swings that a policeman receives in a chart cycle.~~ In its ensuing decision (B-24-75), BCB determined that the length of the work week was mandatory; all other subjects except swing periods it classified as non-mandatory. Swing periods it found to be a hybrid subject determined by factoring in the number of days and hours worked with managerial decisions on starting times, platoons and levels of manning³.

2 Confirming his findings of fact, we will return to his conclusions of law infra.

3 Dealing with an argument made by the City that the 1972 squad system violated Section 971 of the Unconsolidated Laws by providing for an 8-1/2 hour work day, BCB concluded that Section 971 did not prohibit a work day of more than 8 hours, provided that the tour of actual police field work did not exceed 8 hours per day and an average of 40 hours per week. The hearing officer agreed. So do we.

Unconsolidated Laws, Section 971 may, however, have important ramifications concerning the matters before us. It establishes unique provisions and procedures relating to the tours of duty of New York City policemen that might distinguish the situation herein from the situation in City of White Plains, as reflected in our decision at 5 PERB 3013 (1972). New York City's BCB appears to have reached such a conclusion in its Decision B-24-75. It held that Unconsolidated Laws, Section 971, along with the management rights clause of the New York City Collective Bargaining Law, constitute an implicit prohibition within the meaning of Board of Education v. Huntington, 30 NY 2d 122 (1972) as would render a term and condition of employment a non-mandatory subject of negotiation.

Although not raised by any of the parties, facts relating to the nature of the New York City Collective Bargaining Law and the background of its enactment are of concern to us and we take administrative notice of those facts. The essential provisions of the New York City Collective Bargaining Law were proposed by a tri-partite panel of the Labor-Management Institute of the American Arbitration Association on March 31, 1966. Included among the recommendation of that tri-partite panel were the substantive provisions regarding scope of collective bargaining and the procedures for resolving scope of bargaining questions by OCB that are now contained in the New York City Collective Bargaining Law. The tri-partite panel recommended that OCB should administer it by a board consisting of 7 members, two of whom were to be appointed by the Mayor, two by a Municipal Labor Committee (MLC) and three impartial members to be selected by the Mayor's and MLC's appointees.⁴ This recommendation, too, has been incorporated into the New York City Collective Bargaining Law. PBA was among the participants in the labor committee of the tri-partite panel. To this date, it continues as a member of MLC.

DISCUSSION - SCOPE OF NEGOTIATIONS

The City's exceptions posed two challenges to the hearing officer's determination that the City erred in asserting that certain matters are not mandatory subjects of negotiation. Its major position is that BCB Decision B-24-75 is dispositive of the issue and PERB is without jurisdiction to reach a contrary conclusion regarding employment that is subject to the New York City Collective Bargaining Law. In this, it is supported by OCB. The secondary, or fall-back position, is that, in any event, the BCB decision is a correct one and should be endorsed by PERB. OCB's arguments in support of this proposition -- to which PBA properly objects on the ground that intervention was limited to

⁴ The proposal called for the creation of MLC to consist of representatives of qualified organizations of City employees which would be a successor to the labor committee of the tri-partite panel.

the jurisdictional issue -- have not been considered by us.

The position of the City and OCB on the jurisdictional issue is that scope of negotiation questions involving employment that is subject to the New York City Collective Bargaining Law must be resolved under that law. In support of that proposition, the City and OCB argue that CSL Section 212 authorized the City of New York to enact the New York City Collective Bargaining Law and provided that it and the procedures taken thereunder "shall be of full force and effect unless and until such provisions and procedures, or the continuing implementation thereof, are found by a court of competent jurisdiction, in an action brought by the board in the county of New York for a declaratory judgment, not to be substantially equivalent to the provisions and procedures set forth in this article [the Taylor Law]." The City and OCB correctly note that no action has ever been brought to declare the New York City Collective Bargaining Law not substantially equivalent to the Taylor Law. A fortiori, there has been no jurisdictional determination to that effect. Moreover, the City and OCB point out that the BCB decision B-24-75 was appealed by PBA and confirmed by Mr. Justice Hellman of the Supreme Court (Matter of PBA v. BCB, NYLJ, January 2, 1976, p. 6).

These are strong arguments, but we are not entirely persuaded by them. Scope of negotiations issues are normally resolved in the context of improper practice charges alleging refusals to negotiate in good faith. This is true in the private sector⁵ as it is under the Taylor Law. PERB's role in resolving scope of negotiation questions in the course of administering CSL Section 209-a.1(d) and Section 209-a.2(b) has been confirmed by the New York State Court of Appeals (West Irondequoit Teachers v. Helsby, 35 NY 2d 46 [1974]).

⁵ e.g. NLRB v. Borg-Warner, 356 U.S. 342 (1958).

By the terms of CSL Section 205.5(d), inserted in the Taylor Law in 1969, two years after the enactment of CSL Section 212, PERB's responsibilities under CSL Section 209-a are exclusive. The legislature recognized that the language of CSL Section 205.5(d) would restrict OCB's jurisdiction over scope of negotiation disputes. Each year from 1969 through 1972 it enacted an exception to PERB's exclusive jurisdiction to extend for one year only. The last of those exceptions lapsed on March 1, 1973⁶.

6 The first of those exceptions was introduced at the request of the Select Joint Legislative Committee on Public Employee Relations. That Committee's memorandum in support of S 5670 (1969) is set forth in full herewith:

SENATE 5670

"AN ACT to amend the civil service law in relation to procedures, including those in the city of New York, to assist in resolving disputes between public employees and public employers.

Purpose of the Bill:

To exempt the City of New York temporarily from the requirement that the Public Employment Relations Board have exclusive and non-delegable jurisdiction over improper employer and employee organization practices.

Summary of the Bill:

The bill would provide that the exclusive non-delegable jurisdiction of the Public Employment Relations Board with regard to improper public employee organization practices, as provided by Chapter 24 of the Laws of 1969, shall not apply to the City of New York until March 1, 1970.

Statement in Support of Bill:

New York City's Office of Collective Bargaining has exercised jurisdiction in disputes over the scope of bargaining and over the meaning of the City's management rights clause to determine questions of what is bargainable, and thus what subjects may go to an impasse panel for its recommendations.

The recent amendment to the Public Employees' Fair Employment Act (Taylor Law) would preempt OCB's jurisdiction over these matters by giving PERB exclusive and non-delegable jurisdiction over improper practices by public employers and public employee organizations.

The recent amendment to the Taylor Law also requires the City to report prior to the next Session with regard to certain problems affecting OCB believed by some experts to have contributed to strife between the City and its employees. Consistent with this approach, the bill would defer changes in the scope of OCB's operations by exempting it from PERB's exclusive jurisdiction over improper practices until March 1, 1970.

By exempting New York City, the bill would ease the burden on PERB with regard to the complex problems of implementing the new code of improper practices and, thereby, make such implementation more manageable and orderly.

It is to the Legislature that the City and OCB must turn to insure its right to resolve scope of negotiation questions involving employment subject to the New York City Collective Bargaining Law. We join with the City and OCB in urging the enactment of such legislation. Indeed, we first advocated giving such jurisdiction to OCB in a Report to the State Legislature on December 1, 1969 pursuant to the mandate of June 1969, Chapter 24, to consider this and several other issues. Negotiations under the New York City Collective Bargaining Law are complicated by unique provisions restricting various mandatory subjects of negotiation to different levels of bargaining. In the instant case, the situation is further complicated by the provisions of Unconsolidated Law, Section 971 that are uniquely applicable to New York City. The resolution of scope of negotiations in New York City is best left to OCB, the agency which administers those provisions relating to level of bargaining as well as the procedures by which impasses are resolved.

Notwithstanding our reading of the Act as giving us the primary jurisdiction over scope of negotiation questions even in New York City, we nevertheless find that the hearing officer should have accepted BCB's determination as to the scope of bargaining herein.⁷ In reaching this conclusion, we rely first upon the singular status granted OCB by the State Legislature in Section 212 of the Act, namely, that its establishment does not require a prior approval by this Board -- a requisite with respect to all other local boards throughout the State -- rather, the cited section provides, in substance, that the New York City Collective Bargaining Law, as enacted by New York City, is in full force and effect until there is a determination by the Supreme Court,

⁷ In view of this conclusion, we do not reach the issues posed by the City's fall-back position, that the BCB decision is a correct one and should be endorsed by us.

New York County, that such law is not in substantial equivalency with the State law practice and procedures.⁸ Secondly, we have noted the unique negotiating problems confronting New York City and the expertise of OCB in dealing with such problems.⁹ Thirdly, we note the role of PBA in the formulation of the New York City Collective Bargaining Law and its membership in MLC, through which it shares in the administration of OCB. Finally, we recognize the need of OCB to accommodate to the provisions of Section 971 of the Unconsolidated Laws which are uniquely applicable to New York City. Under these circumstances, there are restrictions upon the opportunities for PBA to seek relief from this Board in a matter covered by the New York City Collective Bargaining Law and already decided by BCB. Therefore, while we recognize that the test used by the hearing officer to decide whether or not to accept BCB's determination on scope of negotiations is an appropriate one where this Board defers to an arbitrator, we do not apply that test in the instant case. Greater weight must be given to a decision of BCB in a case such as this than would be accorded to an arbitrator's award.¹⁰ All of the reasons aforesaid oblige us to accept the BCB decision on the scope issue in this decision.

We reverse the decision below insofar as the hearing officer determined that the City failed to negotiate in good faith by reason of its refusal to negotiate over matters determined by BCB not to be mandatory subjects of negotiation.

⁸ Thus, Section 1173-4.3b, "Management Rights" upon which BCB relies in its decision B-24-75, is in full force and effect, there being no determination to the contrary.

⁹ Matter of Queens Borough Public Library, 8 PERB 3060 (1975).

¹⁰ This is so a fortiori in the instant case where the BCB decision was appealed to and confirmed by the Supreme Court.

DISCUSSION - SURFACE BARGAINING AND THE FAILURE TO
PROVIDE INFORMATION

Confirming the hearing officer's findings of fact, we also confirm his determination that the City violated Section 209-a.1(d) by failing to provide information and by engaging in surface bargaining. The hearing officer's determination of surface bargaining and failure to provide information was not limited to those issues which we now find the City not obliged to negotiate about. We accept the hearing officer's reasoning as set forth in his opinion.

DISCUSSION - PREMATURE DECLARATION OF IMPASSE

We also confirm the hearing officer's findings of fact and conclusions of law in connection with his determination that the City did not violate CSL Section 209-a.1(d) by declaring an impasse prematurely. In reaching this determination we again accept the reasoning contained in the hearing officer's opinion.

CONCLUSION

Based upon the foregoing, we conclude that the City did not violate CSL Section 209-a.1(d) by declaring an impasse prematurely or by refusing to negotiate about certain demands relating to duty charts, but that it did violate that section by engaging in surface bargaining regarding aspects of duty charts and work schedules about which it was obliged to negotiate and by failing to provide sufficient relevant information to PBA during negotiations.

In accordance with our findings of fact and conclusions of law and in view of the specific violations of the Act as found,

IT IS ORDERED that the City negotiate in good faith.¹¹

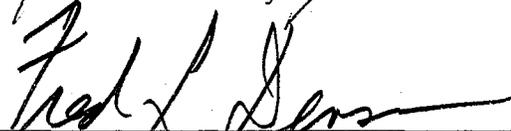
Dated: New York, New York
March 25, 1976



Robert D. Heisby, Chairman



Joseph R. Crowley



Fred L. Denson

¹¹ Consistent with our Interim Decision, this Order does not contemplate cessation of proceedings before the impasse panel.