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IMPROPER PRACTICES

1. The Taylor Law

1.1 The *Public Employees Fair Employment Act,* Article 14 of the *Civil Service Law,* usually referred to as the *Taylor Law*, is the law which governs public sector labor relations in New York State. This law designates the state agency that is charged with the responsibility of enforcing the *Taylor Law.* Further, this law describes the actions that public employers, public employees and unions can and cannot take in the realm of labor relations.

1.2 Under the *Taylor Law*, public employees have the right to organize and join unions; the right to negotiate collectively with a public employer; and the right to administer grievances that arise out of the employment relationship.

1.3 The *Taylor Law* also prohibits strikes by public employees. A strike is defined as a strike, slowdown or other concerted stoppage of work. It is important to note that the Public Employment Relations Board ("PERB") has found that an organized discontinuance of services that were formerly performed voluntarily can constitute a strike (i.e. "working to rule"). Members who engage in a strike are liable for "two for one" penalties.

1.4 The *Taylor Law* prohibits unions from taking any action to "cause, instigate, encourage, or condone a strike." Accordingly, the law requires a union to take affirmative action to prevent and/or to terminate a strike. A union found to have caused, instigated, encouraged or condoned a strike can be subjected to monetary fines and loss of dues check-off privileges.

2. The Public Employment Relations Board

2.1 PERB is the State agency primarily responsible for enforcing the *Taylor Law* and regulating public employment labor relations in New York State.

2.2 All representation issues are decided by PERB -- establishing appropriate bargaining units, monitoring representation elections, deciding on requests to fragment existing bargaining units.

2.3 PERB is responsible for administering mediation and fact-finding when the parties have declared impasse in contract negotiations.

2.4 PERB also decides improper practice charges.

3. **Improper Practice Charges**

3.1 Under the *Taylor Law*, both public employers and public employee unions can commit what are defined as improper practices. The statute lists the acts of a public employer which are improper practices.

3.2 It is an improper practice for a public employer to refuse to continue all the terms of an expired collective bargaining agreement until a new agreement has been negotiated. This is a charge that can only be filed by the union. This duty to continue the contract is sometimes referred to as the "Triborough Law".

3.3 It is an improper practice for a public employer to deliberately dominate or interfere with a public employee union, meaning that a public employer can't provide support for a union, or control the union's officers. This is also a charge that can only be filed by a union.

3.4 It is an improper practice for a public employer to interfere with, coerce or restrain public employees in the exercise of their rights to form, join or participate in unions. It is also an improper practice for a public employer to discriminate or retaliate against a public employee for exercising these rights. These are charges that can be filed by the union or by the affected employee directly. In order to win one of these charges, the union or the employee must prove that the only reason the employer took action against the employee was because of the employee's exercise of protected rights.

For example, a union steward made a statement during a labor/management meeting that stewards acting on union business did not have to follow the chain of command, directly contradicting the Superintendent. The Superintendent then immediately stood up, announced that the meeting was over, and walked out. The next day the steward was formally counseled by his immediate supervisor for his insubordinate comments during the meeting. This would be a good retaliation charge. Comments made (without threats of physical violence and without shouting or swearing) in the context of a labor/management meeting are protected activity, and management was clearly aware that the steward was acting in his capacity as a steward at that meeting. The Superintendent was clearly displeased at being contradicted, and the counseling was related only to the statements made by the steward.

3.5 It is also an improper practice for a public employer to refuse to negotiate in good faith with the union. This is a charge that can only be filed by the union.

(a) A public employer must negotiate with the union concerning terms and conditions of employment which are "mandatory subjects". If it is not a term or condition which is a mandatory subject, the employer has no duty to negotiate.

(b) The *Taylor Law* defines terms and conditions of employment as "salaries, wages, hours and other terms and conditions of employment." PERB has, through its decisions over the last 30 years, established lists of mandatory and non-mandatory subjects. For example:

(i) Salary is clearly a term and condition of employment that the employer must negotiate upon the union's demand. Generally speaking, economic benefits to employees (such as payment of moving expenses or longevity pay) are mandatory subjects.

(ii) Staffing levels are non-mandatory subjects which the employer has no obligation to negotiate and the union has no right to insist on negotiating.

(iii) Health Insurance is a term and condition of employment and must be negotiated.

(iv) The determination of what equipment employees will use (such as two-way radios in buses, shotguns in police cars, the use of particular textbooks or bullet-proof vests) is non-mandatory, and the employer has no duty to negotiate.

(c) The most common type of improper practice charge concerning the duty to negotiate is filed during the term of the contract, when the employer makes a unilateral change in a term and condition of employment that is a mandatory subject, without first negotiating with the union.

3.6 When an employer's action is both a contract violation and an improper practice, PERB will "defer" to the contract grievance procedure and will conditionally dismiss the IP. Therefore, as a general rule, if there is a provision in the contract covering the subject, PERB will refuse to process the charge. PERB's policy is to encourage the parties to resolve disputes through their negotiated grievance process.

3.7 However, where an improper practice charge alleges employer domination, interference or retaliation, PERB will generally not defer the charge, even where the contract prohibits such conduct and the union files a grievance. It is PERB's policy not to defer these types of charges and exercise its exclusive jurisdiction over these issues regardless of contractual remedies the parties may have.

3.8 Similarly, when the employer acts without negotiating concerning a mandatory term and condition of employment that is not covered in the contract, there is no basis for deferral, and PERB will process the charge. This generally occurs when there is a well-established past practice that the employer changes.

(a) A "past practice" as PERB defines it:

(i) has to have been in place for a significant period of time;

(ii) has to be widely known;

(iii) must have been continuously followed without exception;

(iv) must reasonably be expected to continue.

(b) For example, if the employer has for many years provided employees with free parking in a lot for their exclusive use, the employer cannot unilaterally start charging employees to park in that lot. This is because free parking is an economic benefit and a mandatory subject of negotiation. The practice of not charging for parking was long-standing, known by all employees, and available to all employees. The employer may not change its past practice of providing free parking without first negotiating with the union. Furthermore,

employee parking is not covered by the parties' collective bargaining agreement. Therefore, PERB would have jurisdiction over the matter (it would not be "deferred"). Other examples of mandatory subjects not covered by the contract include State owned housing and swapping.

3.9 The employer frequently raises affirmative defenses such as deferral, waiver, and duty satisfaction. At times, the State also argues that the subject is prohibited from bargaining due to a specific statutory authorization. These are all legal arguments to be addressed by the law firm if raised.

4. **The Right to Representation During a Disciplinary Interrogation**

4.1 The *Taylor Law* was amended to provide representational rights for all public sector employees when they are questioned under circumstances creating the reasonable appearance that they may be the subject of discipline. This legislation, Chapter 244 of the Laws of 2007, was proposed and adopted after the New York State Court of Appeals found that no such right existed under the language of the *Taylor Law* as it existed at that time.

4.2 These rights are sometimes referred to as Weingarten rights, based on a United States Supreme Court decision in the case of *NLRB v. Weingarten*, 420 U.S. 251 (1975), which held that a private sector employee covered under the National Labor Relations Act had a statutory right to refuse to submit, without union representation, to an interview which he reasonably feared would result in discipline.

4.3 NYSCOPBA representatives should be taking the position that all of NYSCOPBA's members, including probationary members, have the right to representation during questioning when it reasonably appears that the employee may be subject to potential disciplinary action (*i.e.* termination of their probationary employment, etc.).

4.4 Members being questioned under these circumstances, whether it be in the facilities, at Central Office or otherwise, should be requesting union representation. If possible, they should attempt to get such a request on the record. This could be in a transcript, in the investigator's notes or a memorandum submitted before or during the questioning. If a member is denied representation, the member and/or representative should write up a detailed memorandum describing exactly what happened. The memorandum should include information about the incident (such as: the names of the people involved; dates of events; places; the subject matter of the questioning; and whether or not there is some type of record of the member's request for representation).

4.5 The union representatives should follow up to ensure we are made aware if any discipline is taken against the member. All of the relevant information and documents should be forwarded to the regional representatives, so that the information can be forwarded to the law firm for review. We will evaluate each denial as we receive them to determine if an improper practice charge should be filed.

4.6 The most recent collective bargaining agreement incorporates the *Taylor Law* definition for union representation into the Bill of Rights.

IS IT POSSIBLY AN IMPROPER PRACTICE?

Did the employer make a unilateral (not negotiated) change to an existing past practice?

- The prior practice must have been long term, widely known, followed without exception, and reasonably expected to continue.
- If "yes" it may be an Improper Practice depending on the subject matter of the change.

Was the change related to a term or condition of employment that is a mandatory subject, such as money, time off from work, disciplinary procedures, comfort and convenience (i.e., availability of food), or other financial benefit (i.e., free parking)?

- If "yes" – it may be an Improper Practice.

Does the change relate to something specifically addressed in the Collective Bargaining Agreement?

- If "yes" then PERB will defer jurisdiction and the matter will likely need to be addressed through a contract grievance and not an Improper Practice.

If you believe your employer may have committed an improper practice, please gather all information and documents related to the prior practice and the change, and provide immediately to your Vice President or Business Agent for review.

Improper Practice charges are filed by the union (drafted and submitted by the law firm). There is a <u>strict</u> four month timeframe to file the charge, so it is imperative you collect all information for review immediately.