New York State Correctional Officers & Police Benevolent Association, Inc.

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Rights and Obligations Under the Taylor Law That You Need to Know as a Corrections and Law Enforcement Officer

A Strike is- Any unauthorized change that you make in your normal daily job routine that stops, slows down or postpones the normal job accomplishment of your assignment – even if you follow exactly what your job description, department policy or directive indicates (work to rule).

Possible Penalties for Individual Members

"Two-for-one" Payroll deduction" – For every day you are determined to be performing a strike related action, you will be docked 2 days of pay.

Disciplinary Sanctions - Above and beyond payroll deduction, an employee can receive additional discipline, including fine, suspension or termination.

Possible Penalties for NYSCOPBA

The Taylor Law prohibits any representing employee organization, including NYSCOPBA, from "engaging in, causing, instigating, encouraging or condoning a strike."

Loss of Triborough Rights - Under the Taylor Law, Triborough rights allow the provisions of the Collective Bargaining Agreement (contract) to remain in effect until a successor agreement is negotiated, even after the expiration of an agreement. If it is determined that NYSCOPBA, as the representing employee organization, is responsible for a "strike action", the Triborough rights are forfeited. Members would lose the right to benefits that continue after the contract expires.

Loss of "Dues Check-off" - "Dues check-off" allows NYSCOPBA members to use payroll deductions for NYSCOPBA insurances and other benefit programs. If it is determined that NYSCOPBA is responsible for a "strike action", the "Dues-check-off" rights would be forfeited. In addition, because NYSCOPBA receives members' dues directly through payroll deduction, the loss of dues check-off could impair proper membership tracking and may result in representation and benefit interruptions.

NYSCOPBA Statement:

Let it be clearly stated that NYSCOPBA does not and will not: engage in, cause, instigate, encourage or condone any action that could in any way be considered a "strike" action.

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MEMORANDUM

TO: NYSCOPBA Executive Board

FROM: Lippes Mathias Wexler & Friedman LLP

DATE: April 21, 2017

SUBJECT: The Taylor Law Prohibition Against Strikes

This memorandum discusses the current law in New York regarding strikes and work stoppages in the public sector. We first address the definition of a "strike" and then describe the procedures that come into play when employees or employee organizations are alleged to have participated in a strike.

What is a strike?

Civil Service Law § 210 states: "[n]o public employee or employee organization shall engage in a strike, and no public employee or employee organization shall cause, instigate, encourage, or condone a strike." The question that naturally stems from this prohibition against striking is what exactly constitutes a strike?

A strike includes "any strike or other concerted stoppage of work or slowdown." *Civil Service Law* § 201(9). Furthermore, *Civil Service Law* § 210(2)(b) establishes that employees are presumed to have engaged in a strike (on the date or dates when the strike occurs) if they 1) are absent from work without permission, or 2) abstain wholly or in part from the full performance of their duties in the normal manner without permission. Simply put, the prohibition of strikes extends to partial work stoppages or to any diminution in the services normally rendered.

The question that remains is this: can an employee simply perform only the duties that are required pursuant to his or her job description? This is often called "work-to-rule," whereby employees choose to perform only the duties that are expressly established, and nothing more. Furthermore, a slowdown, may be one where employees perform the duties as outlined, but they are being performed in a manner different to the normal manner. *Civil Service Law* dictates a strike as one where employees stop working, or when there is a concerted stoppage of work or slowdown.

As examples, teachers who refuse to participate in faculty meetings, field trips, parent teacher conferences, or any activity not expressly provided for by a labor agreement, have been found to have engaged in unlawful strikes. *See, Webutuck Teachers Ass'n*, 13 PERB ¶ 3041 (1980) (refusal to attend faculty meetings held to be unlawful strike); *Bellmore-Merrick Central High Sch. Dist. v. Bellmore-Merrick United Secondary Teachers, Inc.*, 85 Misc.2d 282 (Sup. Ct. Nassau Co. 1975) (refusal to attend "back to school night" held to be unlawful strike), *Churchville-Chili Educ. Ass'n*, 18 PERB 4529 (1985). Furthermore, failure to engage in even voluntary services has been held to be an unlawful strike if a practice of performing these services has been established. *West Genesee Central Sch. Dist.*, 38 PERB ¶ 4506 (2005), *citing Pearl River Union Free Sch. Dist.*, 11 PERB 4530, *aff'd*, 11 PERB 3085; *see also, Local 826, Council 66, AFSCME, AFL-CIO*, 12 PERB 3003 (1979) (employees who worked for city sanitation were held to be in violation of strike provisions when they refused temporary job assignments and voluntary overtime). A work stoppage initiated to protest or react to an employer's improper practice is also unlawful. *Farmingdale Union Free School District*, 11 PERB 3055 (1978).

Most notable with respect to allegations of a slowdown based on a change in how employees normally perform their duties, even when there is a law or policy at issue, is the case in *Local 252, Transport Workers Union of America, AFL-CIO v. NYS Public Employment Relations Board*, 58 N.Y.2d 354 (1983), where the Court of Appeals upheld PERB's determination that bus drivers had engaged in a strike based on a change in how they performed their duties. The bus drivers in this case inspected their busses before the run instead of after, as had been their usual practice, which resulted in finding equipment violations and led to bus runs not being operated. *Id.* The employees were relying on the *Vehicle and Traffic Law* in making this change – specifically to ensure they were driving busses that were not in violation of the *Vehicle and Traffic Law*. The Board, in its initial decision held, "public employees' abnormal and overly meticulous adherence to the law and rules which has the effect of interfering with the performance of the employer's mission and which is designed to extract bargaining concessions" can be a strike under the *Taylor Law*. In affirming PERB's determination, the Court of Appeals held that, notwithstanding the fact that performing their jobs in the normal manner (i.e. inspecting the busses after their runs) would have entailed the operation of busses in violation of the *Vehicle and Traffic Law*, the concerted refusal to perform normally was an illegal strike. *Id.* In *Matter of Acosta v. Wollett*, 55 N.Y.2d 761, the Court of Appeals upheld a determination that a strike had occurred when employees refused to work in a temporary location which had no certificate of occupancy and had hazardous conditions (unheated, deficient electricity).

The Court even went on to discuss the legal question of the impact of the State Law (*VTL*) and the changes made by the employees. The employees and the union had raised, how can they be found to be engaged in a strike when what they were doing (which was a change in normal practice) was done in order to be in compliance with the *Vehicle and Traffic Law?* The Court reviewed the definition of a strike, ("any strike or other concerted stoppage of work or slowdown by public employees") and determined that the language, literally read, did not contain any exceptions for which

the union could claim the change is justified – even if justified by law or other legitimate motivating reason. *Id.* In conclusion, the Court held:

> We do not hold that concerted refusal to engage in conduct which would entail violation of law, if taken for the purpose of enforcing job-related demands, may always be determined to constitute a strike within the contemplation of the Taylor Law. We do hold that where, as here, the reliance on a sudden concern for overly meticulous and abnormal observance of statutory commands is purely a subterfuge, the incidental circumstance that continued performance of duties in the normal manner might entail violations of statute does not legally preclude a finding that there has been a strike. *Id.*

Based on the current case law, if an officer were to engage in "work-to-rule" or a "slowdown" by performing their duties in a manner which is different than how they are normally performed, he or she could be found to be engaged in an unlawful strike.[1] Under current case law, this is even true if the employees are performing their duties in a manner which may be established by a law or a policy. It is clear that the existing case law focuses heavily on the "concerted" nature and the change from the normal manner of performing duties, than any justification given by the employees, such as following a policy or law.

Individual Employees—possible penalties and procedural protections

"Two-for-one" payroll deduction penalty

In the event that it appears that a violation of the subsection prohibiting strikes has occurred, the chief executive officer of the government involved shall investigate and make a determination. *Civil Service Law* § 210(2)(d). Following such a determination, the chief executive officer shall notify the chief financial officer of his determination, as well as send notice to each employee determined to be involved by personal service or certified mail. The chief financial officer is to make a payroll deduction against each employee determined by the chief executive officer to be in violation of the prohibition against strikes. Such a payroll deduction is often called the "two for one" penalty (i.e., an amount equal to twice an employees daily rate of pay for each day or part thereof that it was determined that the employee violated the prohibition against strikes).

"Two-for-one" payroll deduction penalty procedures

Employees who have been determined to be in violation of the prohibition of strikes have the opportunity to object (within 20 days of receipt of the notice discussed above) by filing a sworn affidavit with supplemental documentary evidence with the chief

[1] It should also be noted that correctional officers may have an additional concern should they choose to engage in "work-to-rule" activity or "slowdown activity." As a paramilitary organization, the Department of Correctional Services functions with a chain of command. Therefore, an officer could be performing only the duties required under his or her job description, but then be ordered to perform another duty by a supervisor. Not only could such activity subject the officer to violations for concerted strike activity, but disobeying the order of the supervisor could also be considered insubordination and subject the officer to discipline.

executive officer. *Civil Service Law* § 210(2)(g). If the chief executive officer determines that the evidence establishes that the employee did not violate the subdivision, he shall sustain the objection. If the chief executive officer determines that the evidence fails to establish that the employee did not violate the subdivision, he shall dismiss the objection. If the chief executive officer determines that the evidence presented raises a question of fact, a hearing officer is appointed and the employee is provided a hearing and a determination is made by the hearing officer. The employee bears the burden of proof at the hearing. If it is ultimately determined (by the chief executive officer or a hearing officer) that the employee did not violate the subsection, payroll deductions shall cease and the employee is refunded any deductions previously made. All determinations are reviewable through an Article 78 proceeding.

Civil Service Law § 210(2)(g) provides employees with an opportunity to object to the chief executive officer's determination that he or she engaged in a strike in violation of the subsection and the imposition of the "two for one" payroll deduction penalty. It appears from the language of the statute, that *each* individual employee determined to be involved in the strike, has his or her own right to file an objection (with appropriate sworn affidavit and documentary evidence) and his or her own hearing (if a hearing is determined to be necessary because of a factual dispute). There are no cases directly discussing this issue, but the language of the relevant subsection suggests that each individual has such protections. Specifically, the statute speaks of "any employee's" right to object, and provides for the employee to submit his or her own sworn affidavit. Furthermore, the statue continues to state "the employee" throughout, indicating, that the determinations (by both the chief executive officer and a hearing officer) should be made individually regarding "the employee," meaning one, singular employee at a time.

Discipline

Besides the penalty of a "two for one" payroll deduction for any employee determined to have violated the prohibition of strikes, individual employees can also be disciplined for a strike violation. Specifically, Section 210(2)(a) states, "any employee who violates subdivision one of this section may be subject to removal or other disciplinary action provided by law for misconduct." Disciplinary charges against an employee must be brought within existing statutory or contractual provisions for employee discipline.[2] Therefore, in the case of a NYSCOPBA member, the provisions of Article 8 must be followed in order for the agency to discipline an employee for violation of the prohibition of strikes.

[2] As discussed in further detail in this section, a penalty against an employee organization for condoning, instigating, causing, or encouraging a strike can also be the loss of *Triborough* rights. *Triborough* rights provide that the terms of an expired contract continue until a successive contract is reached. If an employee organization loses *Triborough* rights due to involvement in a strike, and the current contract is expired, then negotiated disciplinary procedures in a contract are no longer valid, and the only protections will be those provided by statute. For instance, if NYSCOPBA were to lose *Triborough* rights because of involvement in a strike, then the negotiated disciplinary provisions of Article 8, which substitute the statutory provisions of *Civil Service Law* §75, would no longer apply if there is no current contract, and only the protections of *Civil Service Law* § 75 would exist if an agency wished to discipline an employee.

Employee Organizations—possible penalties and procedural protections

As discussed above, individual employees can be penalized in two ways (payroll deduction and discipline) for violating the prohibition of strikes. Furthermore, employee organizations can also be penalized for it's involvement in a strike.

A chief executive officer who determines that a strike has occurred is obligated to report that strike to PERB.[3] The employer or PERB's counsel can file a charge that the employee organization engaged in a strike. If it is found that the organization engaged in, caused, instigated, encouraged, or condoned the strike, the employee organization may be penalized by suspension of the organization's dues deductions and loss of the employee organization's *Triborough* rights.

Possible Penalties

a. Loss of *Triborough* rights

The doctrine provided by *Triborough* rights, originally established by PERB case law, and now codified in the *Taylor Law*, mandates that the terms of an expired contract continue until a successive agreement is reached. This doctrine is viewed as a way to compensate unions for the loss of the right to strike. The statutory language states it is an improper practice for a public employers "to refuse to continue all the terms of an expired agreement until a new agreement is negotiated, unless the employee organization which is a party to such agreement has, during such negotiations or prior to such resolution of such negotiations, engaged in conduct violative of subdivision one of section two hundred ten of this article." *Civil Service Law* 209-a(1)(e).

Generally, when there is an expired collective bargaining agreement, the employer must continue with the terms of the prior agreement and failure to do so is an Improper Practice. If an employer chose not to continue the terms of an expired contract, he employer, in an Improper Practice charge, would have a defense that they did not have to continue the terms based upon an employee organization strike. This penalty of losing *Triborough* rights is imposed by the public employer, not by PERB or a Court.

Since NYSCOPBA's contract is currently expired, the loss of *Triborough* rights could be catastrophic. It would mean that the current, expired contract, would not have to be followed by the employer. This would cause a loss of many significant rights and benefits outlined in the collective bargaining agreement.

b. Forfeiture of dues checkoff

[3] Pursuant to *Civil Service Law* § 210(4), the chief executive officer is also required to make a public report regarding the strike. This report includes, 1) the circumstances surrounding the strike, 2) the efforts used to terminate the strike, 3) the names of the public employees deemed to be responsible and the varying degrees of responsibility, and 4) the sanctions imposed and proceedings pending regarding those responsible.

The Board can institute a forfeiture of dues checkoff and agency fees for violations of the strike provisions. In fact, if PERB finds that the employee organization has violated the strike provisions, PERB must institute due forfeiture. The only question that remains is the duration of the dues forfeiture.

The determining the duration of the dues forfeiture, PERB shall consider the following facts in making its determination: 1) the extent of willful defiance of subdivision one (prohibition of strikes), 2) the impact of the strike on public health, safety, and welfare of the community, and 3) the financial resources of the employee organization. The Board may also consider 1) the refusal of the organization or employer to submit to fact finding or mediation, and 2) whether, if so raised by the employee organization, the employer engaged in such acts of extreme provocation as to detract from the responsibility of the employee organization for the strike.

The factor of extreme provocation is an affirmative defense. If the Board finds extreme provocation, it often states that it would have ordered a particular penalty, but because of the extreme provocation by the employer, a lesser penalty is imposed.

Each case is judged on a case-by-case basis; therefore it is difficult to make generalizations about the penalty PERB will impose in any particular case. It is important to note that unions representing employees in prisons, psychiatric facilities, and detention facilities have been punished severely because of the imminent and substantial danger that the absence posed. As an example, a 17-day statewide strike by correctional officers where the union did not instigate or cause the strike, but did condone and encourage the strike, led to the imposition of dues forfeiture for eighteen (18) months. *N.Y. State Inspection, Sec.& Law Enforcement Employees, Dist. Council 82, AFSCME, AFL-CIO,* 14 PERB 3069 (1981).

The union representing Transit Authority employees lost its dues checkoff privilege based on its role in a three-day transit strike in New York City in December of 2005. *New York City Transit Authority v. Transportation Workers Union of America,* 2006 N.Y. Misc. LEXIS 4046, affirmed in part, 37 A.D.3d 679, motion denied 18 Misc. 2d 414, modified 2008 N.Y. App. Div LEXIS 7698.

Procedures to implement forfeiture of dues checkoff

Either the public employer or PERB's counsel can file a charge against an employee organization by serving written notice with a copy of the charges. The employee organization has eight (8) days to serve a written answer. A hearing is to be held before the PERB Board "promptly." In determining whether the employee organization violated the subdivision, the board shall consider 1) whether the employee organization called the strike or tried to prevent it, and 2) whether the employee organization made or was making good faith efforts to terminate the strike. *Civil Service Law* § 210(2)(e).

These decisions are reviewable through the courts, but the courts review is limited. The court will not disturb PERB's finding so long as there is "substantial evidence" in the record to support it.

Civil Service Law § 211 procedures for injunctions and findings of criminal contempt

Civil Service Law § 211 states that the chief executive officer must notify the chief legal officer when it appears that employees or an employee organization has threatened to strike or is committing a strike and the chief legal officer must apply to the supreme court for an injunction against such violation. The chief legal officer applies for the injunction by order to show cause, naming the parties involved and providing the facts evidencing the threat of the strike or the current strike. Once the papers are served, counsel for the parties named (employees, employee organization, etc) must appear and show cause why the preliminary injunction restraining the conduct should or should not be issued by the court. The parties named may raise questions of fact that require a trial and the court will make a determination as to whether the temporary restraining order should continue pending the trial.

Courts have resolved many procedural problems regarding petitions for injunctions. Specifically, in *Orchard Park Central School District v. Orchard Park Teachers Association,* 50 A.D.2d 462, *appeal dismissed*, 38 N.Y.2d 911, the court held that the names of each and every striking employee need not be named in the petition if the names are unknown or the number of employees is to numerous to enjoin them all. The court also held that the temporary restraining order is effective against anyone with actual knowledge of it and that personal service of the restraining order was not necessary to bind anyone to the directive of the restraining order.

Employees or employee organizations may be punished for criminal contempt for willfully disobeying an injunction restraining a violation of the strike prohibition. If it is found by a court "beyond a reasonable doubt"[4] that an employee or employee organization violated the court order and disobeyed the injunction (criminal contempt), the court can impose a fine or jail time.

In assessing penalties to be imposed for contempt, the courts look at the same factors as PERB does in assessing dues forfeiture penalties. In contempt proceedings, the affirmative defense of extreme provocation by the employer does mitigate penalty, but it is not a defense to granting the injunction or a determination of guilt in a contempt proceeding itself. Employees and employee organizations can be penalized for strike activity through both the procedures in Section 210 ("two-for-one" penalty for individuals and dues deductions for employee organizations) and Section 211 (criminal contempt).

Under what circumstances is an employee organization held to be involved in the strike?

The question that remains is when is an employee organization held liable for a strike and not simply the employees who participated? The law prohibits an employee

[4] Contempt determinations are usually made through a proceeding before the court, however, summary punishment can occur if contempt is committed in the presence of the court, such as an employee refusing to obey a directive of the court to return to work.

organization from "engaging in, causing, instigating, encouraging, or condoning a strike." The law in this area is a function of case law and therefore is not black and white.

In determining whether an employee organization has violated subdivision one of this section, the board shall consider (i) whether the employee organization called the strike or tried to prevent it, and (ii) whether the employee organization made or was making good faith efforts to terminate the strike. *Civil Service Law* § 210(g)(3)(e). Circumstantial evidence (such as timing) can provide a rational basis for a determination that an employee organization condoned a strike. *Eagan v. Newman*, 92 A.D.2d 1007 (3d Dept. 1983).

What is clear is that PERB will not penalize an employee organization if its members stage a "wild-cat" strike. *Buffalo Teachers Federation, Inc. v. Helsby*, 515 F.Supp. 215 (1981), *aff'd* 676 F.2d 28. Furthermore, a union cannot be presumed complicit in a strike based *only* on a showing that a significant number of members engaged in the strike. *Matter of Police Benevolent Ass'n of the City of Yonkers, Inc. v. NYS PERB*, 51 N.Y.2d 779 (1980).

a. Case Law Examples

In *Eagan v. Newman*, the Appellate Division, Third Department held that PERB's determination finding that the employee organization condoned the strike, in violation of Section 210, was substantially supported by the evidence. 92 A.D.2d 1007 (1983)(hereinafter "*Egan*"). In *Egan*, PERB found that the union had not called for or instigated the strike, but once it started, the union did encourage and condone the strike. *Id.* The court held that although there was no direct evidence that the union condoned or encouraged the strike, there was circumstantial evidence which was enough to find a violation against the union. The circumstantial evidence included the fact that every officer, agent, and representative of the union did individually participate in the strike and was found to have engaged in strike activity and none of these individuals sought administrative review of this determination. *Id.* at 1007. The court was not persuaded by the fact that the union president requested that the strikers return to work. The court stated that such a request was "pro forma" and intended to simply obscure the union involvement. *Id.* The court held "given the facts that the president remained silent when he first learned of the strike plans, that his request came well after the strike had begun, that he himself did not order the strikers back to work, that he neither threatened nor took any internal disciplinary action against the striking employees, and that he was found to have engaged in the strike, there was ample support in the record for PERB's findings." *Id.*

In *CSEA v. Helsby*, the court determined that there was not enough evidence against CSEA to support a finding that it violated the provision against striking where there was no evidence that the CSEA initiated or condoned the absenteeism, and disciplinary proceedings against the employees for allegedly striking were all found in the employees' favor. *CSEA v. Helsby*, 33 A.D.2d 339 (3d Dept. 1970).

In *Amalgamated Transit Union, Division 1342* v. *Newman*, the Appellate Division, Fourth Department, held that PERB's determination that the union condoned a strike and therefore was in violation of subsection 210 was not substantially supported by the record. 78 A.D.2d 105 (4th Dept. 1980). The record revealed that the union had not instigated or caused the strike, and in fact, the record showed that the union officials tried to prevent the strike, and later tried to end the strike and did not themselves participate in the strike. *Id.* In PERB's decision, the Board held that the union condoned the strike because in PERB's judgment the union could have done more to prevent the strike. The court held that PERB's decision was not supported by the evidence and furthermore noted, "[t]he danger inherent in its [PERB's] decision on these facts is that a union, despite best efforts of its leadership, may be held guilty of a violation of section 210 of the Civil Service Law whenever a wildcat strike occurs." *Id. at* 111.

As always, please feel free to contact our office with any questions.