PERB Applications and Related Ethical Issues

Matthew P. Ryan, Esq.

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Applications before the New York State Public Employment Relations Board ("Board") and Related Ethical Issues

By: Matthew P. Ryan, Partner
Roemer Wallens Gold & Mineaux LLP

1. **Introduction** –
    a. The "Public Employees Fair Employment Act" or more commonly known as "Taylor Law"; in short "the Act"
    b. New York State Civil Service Law §§ 200 et seq.
    c. Public and Private employees (SERA)
    d. PERB Rules and Regulations 4 NYCRR §§ 200 et seq.
    e. PERB Website – www.perb.ny.gov

2. **General Matters – Who is covered?**
    a. For our purposes today, Public Employees as defined by § 201 (7) – person holding a position by appointment in the service of a public employer; i.e., a County are covered by the Act.
    b. Excluded: judges and justices of the unified court system, people holding positions or employment in the organized militia of the state and persons who have been designated from time to time as managerial or confidential upon the application of the public employer
    c. Public Employer defined by § 201 (6) – County
        i. If you have an elected Sheriff, County and Sheriff are considered joint public employers under the Act
    d. You do not have to be a licensed attorney to practice before the Board. This will be discussed later as it relates to ethical considerations

3. **The "Board"**
    a. There are four main branches of the Board
    b. The Board – Three members appointed by the governor. Board chair, and two other members.
        i. Final arbiter of matters that come before the other three branches.
    c. Office of Public Employment Practices and Representation (private too)

i. Think improper practices
ii. Creation of Bargaining Units
iii. Think elections

d. Office of Conciliation

i. Contract impasses and grievance arbitration
ii. Interest arbitration for interest arbitration eligible

e. Office of Counsel

i. Think litigation – Generally deal with enforcement of Board orders and strikes
ii. Legal Opinions

4. Main "Applications" before the Board (35 minutes)

a. Office of Counsel

i. Application for Injunctive Relief

1. Applies traditional concept of immediate irreparable harm
2. Civil Service Law § 211 – Prohibition of Strikes
3. Must apply to the Board
4. If demonstrate that public employees or employee organization is threatening or about to do, or doing an act in violation of section two hundred and ten of Civil Service Law (Strikes) chief executive officer (County Executive, Administrator, Board) must notify the chief legal officer (County Attorney); provide CA facilities, assistance and data to carry out duties under
5. If CE fails to do so CA can apply for injunction against CEO.
6. If CEO fails to comply, may seek order of contempt (Judiciary Law § 750)

ii. Civil Service Law § 210 – Prohibition of Strikes

a. Presumption of strike – If strike occurs, presumed that any employee absent without permission or abstains from work, even partially, on dates strike occurs engaged in strike. (Civil Service Law § 210 (b))
b. CEO has to make "determination" after investigation and affidavits whether strike has occurred with dates and times of violations and

names of employees – Walk out, work to rule, sick out, etc. Non-final until remainder of § 210 satisfied. (Civil Service Law § 210 (d))

c. CEO must notify the CFO of the names of the employees engaging in strike – number of days or partial days strike has occurred. Id.

d. CEO must notify of violation by personal service or by certified mail at last known address. (Civil Service Law § 210 (e)).

e. No earlier than 30 days nor later than 90 days CFO deducts from each employee 2 days' pay for each day of strike. (Civil Service Law § 210 (f)).

f. Employee may object (Civil Service Law § 210 (g)). Employee has 20 days to object. Must provide affidavit – documentary proof, short plain statement of acts demonstrating determination was incorrect.

g. CEO determines no strike – reverse.

h. Question of fact – Must appoint a hearing officer to investigate question of fact; employee carries burden of proof.

i. Violation – Notify the employee.

j. No violation – CEO must notify CFO cease deductions and refund other deductions.

k. Subject to Article 78

l. Board may act on its own motion if it appears strike occurred against employee organization

iii. Proceedings against employee organization (Civil Service Law § 3 (a-h)).

1. CEO or Board on own motion. CEO "institutes" proceedings before the Board.

2. Written notice of charges along with charges

3. If Board, must serve governmental agency

4. EO has 8 days to answer

5. Board promptly hold hearing – entitled to counsel and summons witnesses – Rules of evidence do not apply.

6. Board must determine:

a. Whether the EO calls the strike or tried to prevent it; and

b. Whether the EP made or was making good faith effort to end the strike.

7. EO forfeiture:

a. Lose dues deduction rights for as long as Board determines or infinite period subject to restoration (see Civil Service Law § 210 (f)).

8. Civil Service Law § 210 (4) – Within 60 days of termination of strike – CEO must prepare report containing:

a. Circumstances surrounding the start of the strike

b. Efforts used to terminate strike

c. Names of employees causing, instigating, or encouraging the strike

d. Sanctions related to the varying degrees of individual responsibility.

iv. PERB Rules and Regulations § 206

1. File a charge

a. Party filing charge

b. EO charge is against

c. Clear and concise statement of facts constituting the violation.

d. ALJ conducts hearing and submits to Board; Parties can except to the determination.

e. Strike charge on PERB Website: www.perb.ny.gov – under office of counsel and board-related

b. Review and Enforcement of Board Orders

i. PERB Rules and Regulations § 213.11

ii. Must show enforcement is necessary – affidavits showing public employer did not comply.

iii. Office of Counsel will have conference attempt to mediate and settle. If no settlement is reached, Office of Counsel will make an application for a judgement to enforce the order. Contempt sanctions available.

1. Office of Employment Practices and Representation

a. "Representation" applications

i. Certification/Decertification – Proceeding to determine exclusive representation status for purposes of collective bargaining for three reasons:

- When filed by the employee organization, may be used when a substantial number or employees wish to be represented in collective negotiations by an employee organization and the petitioner desires to be certified; can be filed 30 days after refusal or no action by employer. Employer's major role will be to provide name and address for employees' subject of petition for mail-in ballot vote.
- Employer essentially "along for the ride"
- When one or more employee organizations have presented a claim to the employer as the negotiating representative of the employees of the employer;
- Petition for decertification may be filed when the petitioner asserted that the currently recognized or certified employee organization should be deprived of representation status – typically 2 competing unions. If filed to by employer must demonstrate union is defunct.
- Cert/Decert - Tricky filing periods for unions – 7 months be for expiration of agreement – May for June – Applies to County; After CBA expires window reopens. Employer can object if untimely. Employer must provide a response – have to include all other unions in jurisdiction
- Decertification only – no incumbent union – Employer must show union is defunct – not just losing majority status – Must show EO is no longer representing employees negotiating and administering CBAs.
- Certification and decertification can be filed at same time.

Practice quirk – Whether employees in certain titles should be in same bargaining unit requires a determination of "community of interest" – Employer must present job descriptions and establish duties for each title.

b. Management or Confidential Applications

i. "or" is important
ii. Managerial – Formulate policy or may reasonably required on behalf of public employer to assist directly in the preparation for and conduct of collective negotiations or to have a major role in the administration of agreements or in personnel administration provided that role is not of a routine or clerical nature and requires the exercise of independent judgment.
iii. Confidential – only if they are persons who assign t and act in a confidential capacity to managerial employees.
    1. Think prepare bargaining proposals or budget employees who determine how much money is available for negotiations.
iv. Test is not based on title but actual job duties
v. Employer must demonstrate and bears burden of proof.
vi. Form on PERB's website
vii. Can be filed any time.

c. Declaratory Rulings

i. Applicability of the act – Are employees public employees.
ii. Scope of negotiations Determination whether a particular subject matter is a mandatory, non-mandatory, or prohibited subject of bargaining.

d. **Improper Practice Charges** Civil Service Law §§ 209-a (1) and (2)

i. Charge
ii. Answer
iii. Affirmative defenses – PERB uses CPLR 3018 and holds that failure to plead may result in waiver if motion to amend answer is not made prior to close of hearing.
    1. Duty satisfaction/waiver – must plead any defense that may take a party by surprise – best practice is to plead it and with specificity.
iv. Extension of time to answer – Ask for it and you will get it.
v. Injunctive relief available.
vi. "1" – **Employer improper practices**

209-a (1)(a) – interfere, coerce, or retrain public employees in exercise of rights under section 202 – Right to organize – Public employees have the right to form, join, and participate in, or refrain from forming, joining, or participating in, any employee organization.

209-a (1)(b) – to dominate or interfere with the formation or administration of an employee organization for the purpose of depriving them of such rights.

209-a (1)(c) – to discriminate against an employee for the purpose of encouraging or discouraging membership in, or participation in the activities of any employee organization

209-a (1)(d) – Refusal to negotiate over mandatory terms and conditions of employment.

Practice quirk – Also applies when a party submits a non-mandatory or prohibited subject of bargaining to interest arbitration or fact finding.

209-a (1)(e) – Fail to continue terms of expired CBA – Commonly known as the Triboro Amendment. Prior to the amendment when terms of CBA expired terms ceased to operate unless the parties agreed to continue. Think advancement on the salary schedule

209-a (1)(f) – Use of state funds to train managers or to discourage membership in a union.

209-a (1)(g) – Right to representation during interrogation

209-a (1)(h) – To disclose home addresses, personal telephone numbers, personal cellphone numbers, personal e-mail addresses of a public employee except when required by the Act, lawful service of process, subpoena, court order or in accordance with Section 208 of the Act (quarterly report of name, home address, job title, etc.), or otherwise as required by law (FOIL).

"2" – **Employee Organization improper practices**

209-a (2)(a) – interfere with, retrain, or coerce public employees in the exercise of the rights granted under section two hundred two, or to cause, or attempt to cause, a public employer to do so provided, however, that an employee organization does not interfere with, restrain or coerce public employees when it limits its service to and representation of non-member in accordance with this subdivision

209-a (2)(b) – to reuse to negotiate collectively in good faith with a public employer provided it is the duly recognized or certified representative of such employer.

209-a (2)(c) – Duty of fair representation – Employer cannot file but if filed employer is statutorily implead so that complete relief can be granted. Employer can be forced to accept a grievance even if untimely.

2. Office of Conciliation
    a. Impasse Resolution Procedures
    b. Declaration of impasse – PERB Form on website - Must include dates of negotiations and unresolved bargaining proposals at a minimum. Practice Tip: Include any last offers by the parties to give the mediator an opportunity to review where the parties stood when impasse occurred.
    c. Mediation – Traditional and Focused Intense Negotiations
    d. Fact Finding – No PERB form
        i. Fact Finder makes non-binding recommendation
        ii. If either party rejects any of the recommendation matter proceeds to legislative imposition
        iii. CEO has 10 days to make report to legislative body
        iv. Legislative body has to hear matter and make determination
        v. Cannot change terms and conditions of employment covered by terms of CBA.
    e. Interest arbitration – No PERB Form.
        i. Petition and Response; Cross-Response required if you file an IPC re scope of bargaining
        ii. 10 working days to file improper practice charged re nonmandatory or prohibited subjects of bargaining or titles seeking arbitration are not IA eligible – be careful with mixed bargaining units.
        iii. Deputy Sheriffs re interest arbitration eligible if more than 50% of service is criminal law enforcement as certified by the sheriff and are police officers.
        iv. Only matters directly relating to compensation may be submitted to interest arbitration, and CBA must be expired for 1 year before window to arbitrate opens up.
        v. Refusal to proceed to arbitration – Maintain status quo for 2 years.

vi. Voluntary Grievance Panel – Not an application per se. PERB website does have a demand for arbitration.
    1. Parties have to agree to use PERB

Ethical Considerations When Practicing Before the Board (10 minutes)

1. **Confidential Communications in PERB Matters**
    a. Internal union communications deemed confidential. Treated same as confidential communications with a lawyer
    b. Under PERB Rule of Practice §216.2, Communications with a party to negotiations and its negotiator considered confidential – This means bargaining team's communications are confidential and so are communications with mediator; same as lawyer (see, Town of Cicero, 50 PERB ¶ 4592)(ALJ refused to allow testimony regarding communications with mediator during private caucus). Happens to be the only reported case on the matter.

2. **Conduct before a tribunal**
    a. New York Rules of Professional Conduct Rule 3.3
        i. Tribunal denotes an arbitrator in an arbitration proceeding and administrative agency. PERB falls within this meaning
        ii. Section F (1), (2), and (3) a lawyer before a tribunal shall not fail to comply with known local customs of courtesy or practice of the bar or particular tribunal without given to opposing counsel timely notice of the intent not to comply; Engage in undignified or discourteous conduct; Intentionally or habitually violate any established rule of procedure; or Engage in conduct intended to disrupt the tribunal.

    b. PERB misconduct rules – PERB Rules § 214
        i. PERB Rule of Practice §214.1 Misconduct by Any Person
        ii. §214.2 Suspension and other sanctions – Newly minted in 2017; No cases reported under new rule.
        iii. Examples of misconduct – Only two reported cases.
            1. Matter of valley – 30 PERB ¶3023 (1997) – Pattern of and practice of baseless delaying tactics in several forms. Failure to recognize that a title was employed by Town despite factual record of such and continuing to claim not part of bargaining unit. Submitted documents designed to

mislead the Board to benefit his client. Resulted in censure.

2. Matter of Munafo – 31 PERB ¶ 3012 (1998) – Repeated outbursts and gestures that threatened and intimidated ALJ during pre-hearing conference – 6 month suspension from practice.

iv. Union "Representation" Proceedings: Board must "investigate" proper bargaining unit. Requires the public employer to present "facts" relevant to community of interest even though employer may be adverse to unionization. '

c. Not application related – Client in an arbitration proceeding

i. Not that we are representing the union, but client it a grievance matter is the union and in a misconduct matter

ii. NYS Bar Opinion 743 – Duty of confidentiality to union or employee – may be relevant in who makes decision in a particular matter.

d. Organization as the client – Rule of Professional Conduct 1.13

i. Organization is client and not for an of the constituents.

ii. May have to protect confidences gained by interviewing employees of organization

e. Many PERB filings, including answers to improper practice charges must be verified.

Questions…

Matthew P. Ryan Esq.
Partner

mryan@rwgmlaw.com
Telephone Number: 518-464-8290

Biography
Matthew P. Ryan joined the firm after serving as associate general counsel for a labor union for almost 13 years. Prior to his labor union experience he was an attorney in the private sector focusing on personal injury litigation. Matt now concentrates his practice in all aspects of labor and employment law focusing on public sector labor relations. In this regard, he has conducted numerous arbitrations, collective negotiations, mediations, fact findings, and interest arbitrations. His experience also includes representing parties before the New York State Public Employment Relations Board in all aspects of matters conducted before the Board. He also has significant experience in practice before the courts of the State of New York and New York's Federal Courts.

Education / Admissions
J.D., Albany Law School of Union University (2001)
B.A., Political Science, Siena College in (1997)
Admitted to practice in New York
United States District Court for the Northern District of New York
United States Court of Appeals for the Second Circuit
United States Supreme Court

Other
Matt enjoys spending time with his wife, Colleen, and two children, Patrick and Brendan. He also enjoys cooking, playing golf and skiing with his family.

Practice Group
Labor and Employment