Attachment C

# NECSLRA CONFERENCE
## JUNE 21, 2019

# OPTIMIZING MEDIATION: LESSONS FROM NEW YORK'S THREE IMPASSE PROCEDURES

# IMPASSE PROCEDURES UNDER THE TAYLOR LAW

**William Conley, Acting Director of Conciliation**
**NYS Public Employment Relations Board wconley@perb.ny.gov**

# COLLECTIVE BARGAINING AND IMPASSE PROCEDURES

I. The Duty to Negotiate

A. The employer's chief executive officer and the union have a mutual duty to negotiate. This duty obligates the parties to:

1. Meet at reasonable times;

2. Confer in good faith with regard to wages, hours and other terms and conditions of employment; and

3. Sign a written agreement on demand that incorporates any agreement reached in negotiations.

B. The duty to negotiate in good faith does not require either party to agree to a proposal or make any concession.

II. Negotiation Subjects

A. Mandatory Subjects;

B. Permissive or Non-Mandatory Subjects; and

C. Prohibited Subjects.

III. Arriving at Impasse

A. "Impasse" is not defined in the Taylor Law. As developed by case law, impasse exists when:

1. Reasonable efforts at voluntary negotiations have stalled and third-party assistance is therefore appropriate.

2. May be "deemed" to exist if no agreement reached 120 days prior to end of public employer's fiscal year, usually end of contract.

3. Civil Service Law § 209(2) authorizes the parties to devise their own mutually agreed upon impasse procedure. In the absence of such a procedure, § 209 sets forth the statutory default impasse procedures which vary depending upon the type of bargaining unit involved.

B. Invoking the impasse procedures pursuant to PERB's Rules of Procedure, Part 205.

1. Declaration of Impasse is filed with PERB's Director of Conciliation; impasse may be filed individually by either party, or jointly by both.

2. A Declaration of Impasse form is available on PERB's website (www.perb.state.ny.us). It is not necessary to use the form; for example, a letter that provides the necessary information outlined on the form and in § 205(1)(a) of PERB's Rules including names, addresses, phone numbers of parties and their representatives, number of employees in bargaining unit, the employer's fiscal year, the expiration date of present or expired agreement, a "clear and concise history of negotiations leading to the impasse, including the number and dates of the negotiating sessions", a list of all unresolved issues, and a statement that service of the Declaration of Impasse was made on the other party, is sufficient.

3. Director of Conciliation reviews impasse declaration and appoints a mediator if timely and appropriate. The declaration may be found premature, depending on the bargaining history.

4. Appointment of mediator.

a. Either full-time staff member of PERB, or from ad hoc mediation panel.

b. Joint requests for a particular mediator are honored subject to staff caseload and availability and budget considerations. Unilateral requests for a particular mediator are rejected absent unique circumstances.

IV. Mediation Process

A. Mediation is the first step under all Taylor Law impasse procedures regardless of type of bargaining unit.

1. Mediation may not be waived. PERB facilitation of interest-based bargaining or participation in PERB's Facilitated Intensive Negotiations process may be deemed "mediation".

2. Mediator's goal is to help the parties to reach an agreement through facilitation, persuasion, education, and/or other techniques. Mediation is ordinarily limited to 3 sessions.

B. Civil Service Law § 205(4)(b) renders mediation "confidential" by prohibiting the mediator from testifying before any administrative or judicial tribunal, whether voluntarily or by subpoena, regarding the mediation process and information/documents acquired during same. An exception may be made where the testimony is required for a criminal trial or proceeding. Statements by the parties to the mediator are also deemed confidential where the parties are not present in the same room.

C. Using mediation effectively.

1. "What ifs".

2. "Off-the-record" proposals.

3. Mediator's proposal.

4. Do not ignore "political realities".

V. Fact-Finding Process

A. Applies if mediation is not successful, except for impasses involving police, firefighters, certain transit employees, and the State Police.

B. Neutral fact-finder is appointed by PERB to hear the parties' evidence regarding their positions and render a written report to the parties containing non-binding recommendations for settling the outstanding issues.

C. If the parties do not reach an agreement on the recommended terms within 5 days of the issuance of the fact-finder's report, it becomes public.

D. Fact-finding is what the parties and the fact-finder make it. Fact Finders ordinarily attempt to mediate an agreement during the first day of fact finding and sometimes find the parties willing to make movement they were unwilling to make during mediation.

VI. Legislative Hearing

A. If fact-finding is not successful, except for impasses involving police, deputy sheriffs primarily engaged in criminal law enforcement, firefighters, certain transit employees, the State Police, school districts, and community colleges, a legislative hearing is next.

B. The public employer's legislative body will be provided a copy of the fact-finding report and the recommendation of the employer's chief executive officer for settling the contract dispute. Good opportunity for creativity.

C. Legislature then holds a public hearing for the parties to explain their positions.

D. Legislature may then take action it deems appropriate to resolve the dispute with some limits, i.e., ordering parties back to the bargaining table, or imposing a settlement good for only one fiscal year.

E. However, the Legislature cannot change the terms of an expired agreement unless the union has waived the right to have those terms continued.

VII. School Districts and Community Colleges

A. Although a legislative hearing is possible after fact-finding, the legislative body has no authority to impose a settlement.

B. PERB may appoint a "conciliator" or "superconciliator" to further mediate the dispute.

VIII. Compulsory Interest Arbitration

A. Applies to terms and conditions of employment of officers or members of:

1. Any "organized fire department…police force or police department";

2. Any "other unit of the public employer which previously was a part of an organized fire department whose primary mission includes the prevention and control of aircraft fires";

3. Detective-investigators, criminal investigators and rackets investigators in district attorneys' offices outside New York City;

4. State Police troopers, officers and investigators, senior investigators and investigator specialists;

5. Employees in the State security services or security supervisors' units who are defined as police officers or who are employed by the State

Department of Correctional Services and defined as peace officers under Criminal Procedure Law § 2.10 (e.g., State corrections officers, but no lifeguards, ski patrol).

6. Employees in the State agency law enforcement services unit who are defined as police officers under Criminal Procedure Law § 1.20 (e.g., conservation officers, SUNY police, park patrol, forest rangers)

7. Deputy sheriffs "who are engaged directly in criminal law enforcement activities that aggregate more than fifty per centum of their service...and are police officers..." pursuant to the Criminal Procedure Law § 1.20 "as certified by the municipal police training council" (e.g., road patrol deputies, but not local corrections officers).

8. Suffolk county corrections officers or Suffolk county park police.

B. If mediation does not produce an agreement within 15 days after the mediator's appointment, either party may file a petition with the Director of Conciliation to refer the dispute "to a public arbitration panel". Civ. Serv. Law § 209.4(b).

1. The statutory 15-day time line notwithstanding, the Director will not process a petition unless it is clear that a reasonable mediation effort has been exhausted.

2. Response to petition must be filed within 10 working days of its receipt and must contain the items listed in § 205.4(b) of PERB's Rules, including respondent's statement of agreed-upon terms and its position on those still outstanding. The response must also reference any improper practice charge objecting to arbitrability. Such objections, under § 205.6 of

PERB's Rules, include claims that a matter(s) being submitted: is not a mandatory subject of negotiations; was not negotiated prior to filing the petition; and/or was resolved by agreement during negotiations. Any such improper practice charge may not be filed with the Director of Public Employment Practices and Representation after the date a timely response was, or should have been, filed with the Director of Conciliation. 4 NYCRR § 205.6. There is no prescribed form on which the response must be filed.

3. Conversion theory of negotiability is the major exception to objection to arbitrability based on nonmandatory subject being submitted to arbitration in petition or response. If nonmandatory item is contained in an expired agreement, a demand that relates to this item may be treated as mandatory for purposes of submission to the arbitration panel.

C. The Interest Arbitration Panel

1. Three-member, tripartite panel. Parties each select a member of the panel, and jointly agree on the third, a neutral or "public" member. Civ. Serv. Law § 209.4(c)(ii); 4 NYCRR § 205.7.

2. If parties cannot agree on the neutral member, PERB submits a list of nine arbitrators, and parties alternately strike names until one survives. It is preferable to "go second".

3. After designation of the panel by PERB, the conduct of the proceeding is within the exclusive control of the panel, but must conform to applicable law. Civ. Serv. Law § 205.8.

D. Interest Arbitration Proceedings and Award

1. Given the tripartite nature of the panel, it was contemplated that the neutral member would engage in active settlement efforts to obviate the need for an award. This is commonly accomplished through "executive sessions".

2. The panel is authorized to hold hearings and take oral and written evidence and argument. Prior to voting on any issue, issues may be referred back to the parties for further negotiations, but only on the joint request of the employer and organization panel members.

    a. Any party making more than one adjournment request bears the entire cost of the adjournment fee, if any. Civ. Serv. Law § 209.4(c)(iii).

    b. Either party may request a transcript, in which case the cost is to be shared by the parties.

3. In formulating a "just and reasonable award", the panel must "specify the basis for its findings" and consider stated statutory criteria, "in addition to any other relevant factors":

    a. "[C]omparison of the wages, hours and conditions of employment of the employees involved in the arbitration proceeding with [those of] other employees performing similar services or requiring similar skills under similar working conditions and with other employees generally in public and private employment in comparable communities";

b. "[T[he interests and welfare of the public and the financial ability of the employer to pay";

c. "[C]omparison of peculiarities in regard to other trades or professions, including specifically, (1) hazards of employment; (2) physical qualifications; (3) educational qualifications; (4) mental qualifications; (5) job training and skills"; and

d. The terms of the parties' past collective bargaining agreements, including but not limited to, "salary, insurance, retirement benefits, medical and hospitalization benefits, paid time off and job security."

4. The weight to be given each statutory criterion is within the discretion of the interest arbitration panel, except in cases involving fiscally eligible municipalities. When an Interest arbitration panel determines the municipality before it is a fiscally eligible municipality the public arbitration panel must consider the ability to pay by assigning a weight of seventy percent (70%) to the public employer's ability to pay. Civil Service Law § 209.6(e). The remaining criteria contained in Civil Service Law section 209(4), C, 5 (comparison of wages, hours..., Interests and welfare of the public, comparison of peculiarities in regard to other trades and professions..., the terms of collective bargaining agreements negotiated between the parties in the past providing for compensation and fringe benefits, including, but not limited to...) shall constitute an aggregate weight of thirty percent. The public interest arbitration panel must find a public employer a fiscally eligible municipality if:

a. the average full value property tax rate of such public employer is greater than the average full value property tax rate of seventy-five percent of counties, cities, towns, and villages, with local fiscal years ending in the same calendar year as of the most recently available information, or

b. the average fund balance percentage of such public employer is less than five percent and the state comptroller has certified that any additional fund balances in funds other than the general fund available for payment of arbitration awards in each year, if added to the fund balance of the general fund, would not cause the average fund balance percentage of such public employer to exceed five percent. Civil Service Law §209.6 (c-d)

5. The interest arbitration panel's award is final and binding and not subject to approval by the employer's legislative body. Civil Service Law § 209.4(c)(vi).

6. The duration of the panel's award shall "in no event" exceed 2 years from the termination date of any previous collective bargaining agreement; if no previous agreement, then not more than 2 years from the date of the panel's determination. Civil Service Law § 209.4(c)(vi).

7. The award is subject to judicial review under Civil Practice Law and Rules Article 75, not Article 78. Caso v. Coffey, 41 N.Y.2d 153, 9 PERB ¶ 7026 (1976).

8. The statutory provisions for binding arbitration under Civil Service Law § 209.4 have been subject to renewal every 2 or 3 years since it was first enacted for 3 years' duration in 1974.

E. Variation for State Police

1. Process and procedure are generally the same as for municipal police and fire, but the types of items that may be brought to arbitration are limited to those that do not concern "issues relating to disciplinary procedures and investigations or eligibility and assignment to details and positions, which shall be governed by other provisions prescribed by law". Civil Service Law § 209.4(e).

2. To the extent the items not eligible for interest arbitration still constitute mandatory subjects of negotiation, they are subject to the default impasse resolution process otherwise in effect for non-police/fire, non-education sector employees, i.e., mediation/fact-finding/legislative hearing.

3. The parties may agree to confer authority on the arbitration panel to issue a final and binding award for a period up to four (4) years. Civil Service Law § 209.4(c)(vi).

F. Variation for State Security Services and Security Supervisors Units and State Agency Law Enforcement Unit

1. Eligible employees in these units are only those described in VIII.A.5 and 6, above.

2. Process and procedure is generally the same as for municipal police and fire, but the types of items that may be brought to arbitration are only

those "directly relating to compensation, including, but not limited to, salary, stipends, location pay, insurance, medical and hospitalization benefits; and shall not apply to non-compensatory issues including, but not limited to, job security, disciplinary procedures and actions, deployment or scheduling, or issues relating to eligibility for overtime compensation which shall be governed by other provisions proscribed by law". Civil Service Law § 209.4(f).

3. The parties may agree to confer authority on the arbitration panel to issue a final and binding award for a period up to four (4) years. Civil Service Law § 209.4(c)(vi).

G. Variation for Certain Deputy Sheriffs

1. Eligible employees are only those described in VII.A.7, above.
2. Eligible "road patrol" deputy sheriffs are eligible for compulsory interest arbitration provided that the parties' contract has been expired for "a period not less than twelve months" and all other available statutory impasse procedures have been "fully utilized".
3. Process and procedure is generally the same as for municipal police and fire, but the types of items that may be brought to arbitration are only those "directly relating to compensation, including, but not limited to, salary, stipends, location pay, insurance, medical and hospitalization benefits; and shall not apply to non-compensatory issues including, but not limited to, job security, disciplinary procedures and actions, deployment or scheduling, disciplinary procedures and actions, deployment or scheduling, or issues relating to eligibility for overtime compensation

which shall be governed by other provisions proscribed by law". Civil Service Law § 209.4(g).

H. Variation for Suffolk County Corrections Officers and Suffolk County Park Police Officers

1. Compulsory interest arbitration with regard to Suffolk county correction officers and park police officers shall not apply to issues relating to disciplinary procedures and investigations or eligibility and assignment to details and positions, which shall be governed by other provisions prescribed by law.

I. Taylor Law Amendment and Recent PERB Decision

1. When a public employer is found to be a fiscally-eligible municipality, there are two options the parties may utilize.

   a. The parties may submit the matter to the public arbitration panel and utilize the process and statutory criteria discussed herein in section VIII, or

   b. By mutual agreement, the parties may jointly, stipulate and agree that an impasse exists and jointly request that the financial restructuring board for local governments established in section 160.05 of the local finance law resolve such impasse. These joint requests are irrevocable. (It appears this option has not yet been utilized in lieu of Taylor Law interest)

i. Under the Amendments, the financial restructuring board for local governments shall render a just and reasonable determination of the matters in dispute by an affirmative vote of a majority of the total number of its members. The restructuring board shall specify the basis for its findings, taking into consideration, in addition to any other relevant factors, the traditional factors that the arbitration panels consider. The panel must render a determination within six months of being formally requested by the parties to convene.

ii. The Amendments allow each party to be heard either in person, by counsel, or by other representatives, either orally or in writing, or both. The advocates are permitted to provide the panel statements of fact, supporting witnesses and other evidence, and argument of their respective positions with respect to each case. The board shall also have authority to require the production of additional evidence, either oral or written, as it may desire from the parties. All proceedings, meetings and hearings conducted by the board shall be held in the city of Albany. The board's determination shall be final and binding upon the parties for the period prescribed by such board, but in no event shall such period exceed four years from the

termination date of any previous collective bargaining agreement or if there is no previous collective bargaining agreement then for a period not to exceed four years from the date of determination by the board. Such determination shall not be subject to the approval of any local legislative body or other municipal authority, and shall only be subject to review by a court of competent jurisdiction in the manner prescribed by law.

2. On September 5, 2018 the Public Employment Relations Board decided "Ithaca III", *City of Ithaca and Ithaca Police Benevolent Association, Inc.*, 51 PERB 3020. Practitioners should be aware of the following practical impacts of the decision.

   a. While a union may still invoke its *Triborough* rights under Section 209-a.1(e) of the act, PERB overruled *Kingston* and *Yonkers* to the limited extent those decisions supported the position that an employer's interest arbitration petition would not be processed once a union invokes its *Triborough* rights to maintain the status quo under of the Act; and

   b. Assertion of a union's *Triborough* rights under Section 209-a.1(e) of the Taylor Law limits the scope and enforceability of an award (protects status quo) issued by the interest arbitration panel but does not eliminate the statutory right of an employer to petition for interest arbitration. The processing of the petition brings finality to

the negotiation process for the duration of the award as determined by the interest arbitration panel within the statutory time frame (up to 2 or 4 years as discussed above herein section VIII), based upon the parties' bargaining history and other appropriate factors.

3. On October 23rd, 2018 the Public Employment Relations Board decided *Town of Blooming Grove and Blooming Grove Police Benevolent Association, Inc.*, 51 PERB 3028, 51.

Over the past decade PERB Administrative Law Judges issued conflicting rulings as to whether a party could bring proposals exceeding the statutory limit on the duration of arbitration awards (up to 2 or 4 years as discussed above herein section VIII), to interest arbitration. In *Blooming* Grove the Board definitively answered the question by stating:

> *"In the interest of providing future guidance to these and other parties, however, we note that the Town's asserted reason for submitting two-year demands initially—because the interest arbitration panel lacked authority under the Act to issue an award that exceeded two years, absent the parties' consent—lacked merit. Although an arbitration panel may not issue a determination under the Act that exceeds two years, that restriction is expressly a limit on the panel's ability to frame an award, and does not restrict the duration of the parties' proposals to the panel. Simply put, we find that it is not unlawful for a party to submit demands to interest arbitration that exceed two years where, as here, the parties had*

*been consistently negotiating for a contract that exceeded two years."*

Section 205.4 (b)(3)(ii) of the PERB Rules of Procedure states petitions for Compulsory Interest Arbitration petitions shall contain "petitioner's position regarding terms and conditions of employment not agreed upon. **Proposed contract language presented during the negotiations must be attached**." (emphasis added). The Board's *Blooming Grove* decision coupled with the requirements of section 205.4 (b)(3)(ii) of the PERB Rules of Procedure strongly support Compulsory Interest Arbitration is an extension of the negotiation process, and as such, the parties should submit their actual bargaining proposals to the arbitration panel. It is the arbitration panel's duty to issue an award which complies with the statutory limit on the duration of awards.

References:

Public Sector Labor & Employment Law in New York State: Impasse Procedures, Paul J. Sweeney, Esq., Nathaniel G. Lambright, Esq., Kevin Flanigan, Former Director of Conciliation, PERB, William Conley, PERB Acting Director of Conciliation. (2016)

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