



THE ADVOCATE

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VOLUME XXXI
SEPTEMBER 2012

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school districts for over
39 years.*

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RECOGNITION AND CERTIFICATION OF AN EMPLOYEE NEGOTIATING ORGANIZATION

As most of our readers are well aware, the Public Employees' Fair Employment Act (Article 14 of the New York Civil Service Law), more commonly known as the Taylor Law, at Section 202, Right of Organization, gives most public employees the "right to form, join and participate in, or to refrain from forming, joining or participating in any employee organization of their own choosing." Typically, public employee organizations attempt to organize public employees into "negotiating units" so that the organizations can represent the negotiating unit members "in the determination of their terms and conditions of their employment, and the administration of grievances arising thereunder." Section 203 Right of Representation.

The process normally begins when a worker, or group of workers, who for whatever reason, believe it would be in their best interest to be represented by an employee organization for purposes of determining their terms and conditions of employment through collective negotiations. As a result, the workers may formulate their own local employee association that is not associated with a larger preexisting labor union such as the Civil Service Employees Association, Inc., or the New York State United Teachers, or they may seek to be represented by a larger preexisting labor union. In either instance, the employee organization must demonstrate that a majority of the employees in the proposed negotiating unit desire to be

represented by the employee organization, and that the organization will not strike or assist in a strike against the public employer.

Before the employee organization can actually represent the employees in a proposed negotiating unit, the actual negotiating unit must be established and the employee organization must be recognized by the public employer or certified by the Public Employment Relations Board (PERB).

RECOGNITION

The recognition process typically begins when an employee organization informs the legislative body that it is requesting recognition in order to represent the workers in certain job categories for purposes of collective negotiations. The legislative body can grant, deny or even ignore the request. If the legislative body is willing to grant the request, it must be satisfied that the job titles are appropriate for inclusion in the negotiating unit and that a majority of the employees in the unit want to be represented by the employee organization seeking to represent them. Once the foregoing has been established, the legislative body may recognize the employee organization by:

1. Passing a resolution specifying the composition of the negotiating unit.
2. Posting the recognition resolution in a conspicuous place at suitable offices of the employer for not less than five working days.
3. Placing a public advertisement of the recognition resolution in a newspaper of general circulation in the area for not less than one day.
4. Notifying any employee organization that has, in a written communication within a year preceding the recognition, claimed to represent any employees in the negotiating units.

The published information must include the following:

1. The name of the employee organiza-

tion which has been recognized.

2. The job titles included in the unit for which it has been recognized.
3. The job titles that have been excluded from the unit.
4. The date of recognition.

An example of a typical Recognition Clause follows:

SAMPLE
Anytown Instructional Agreement
RECOGNITION CLAUSE

Section 1 - The Board of Education of the Anytown Central School District, pursuant to Article 14 of the New York Civil Service Law, by virtue of satisfactory evidence submitted by the Anytown Education Association that it represents a majority of the professional employees in the following defined bargaining unit, does hereby recognize the Anytown Education Association as the negotiating agent for all full-time regularly scheduled classroom teachers requiring certification by the New York State Education Department and employed by the District as follows:

Included: All regularly employed full time classroom teachers requiring certification by the New York State Education Department, inclusive of kindergarten teacher(s), elementary teacher(s), secondary teacher(s), school nurse(s), guidance counselor(s), reading coordinator(s), school psychologist(s), speech therapist(s), physical education teacher(s), home economics teacher(s), industrial arts teacher(s) and any other regularly employed special area classroom teachers.

Excluded: Superintendent, Administrative Assistant for Business, Building Principal(s), Assistant Principal(s), Director(s), Department Coordinator(s), Supervisor(s) and any other employee(s) requiring demonstrative or supervisory certification by the New York State Education Department. All casual, temporary and substitute persons are excluded, as are summer school teacher(s), adult education teacher(s), teacher aide(s), teaching

assistant(s) and the paraprofessionals. Also excluded are all other employees.

Section 2 - The Anytown Education Association does not assert the right to strike against any government, to assist or participate in any such strike, or to impose an obligation to conduct, assist or participate in such a strike.

Section 3 - This recognition shall remain in effect for the period as provided by law. Either party may act to modify this recognition in accordance with the law.

CERTIFICATION

In the event the public employer does not voluntarily grant recognition to the employee organization, or the parties are unable to agree upon composition of the negotiating unit, the employee organization may file a petition for certification with PERB. The employee organization must file the petition within thirty days after the public employer denies recognition. If the public employer did not respond to the request for recognition, the organization must file the petition between thirty and one hundred twenty days after it made the request for recognition.

When PERB receives a petition for certification, it will determine, either through mutual agreement between the public employer and employee organization, or through litigation, what job titles should be included or excluded in the negotiating unit. To that end, PERB will put those job titles that share a "community of interest" (so meaning those employees within the titles who share similar professional or nonprofessional duties and similar terms and conditions of employment) into one negotiating unit. After PERB has established the appropriate bargaining unit, it will determine if the majority of the employees within the appropriate negotiating unit want to be represented by the employee organization which is seeking to represent them.

In the private sector, the National Labor Relations Board always conducts a secret ballot election to determine if the majority of the workers in a negotiating unit want to be rep

resented by the employee organization which seeks to represent them. Not so under the Taylor Law. If the employee organization can demonstrate that it has a “showing of interest” (at least thirty percent of the employees in the negotiating unit but less than fifty-one percent want to be represented by the employee organization), then PERB will conduct a secret ballot election. If the majority of the employees in the negotiating unit vote in favor of being represented by the employee organization, PERB will certify the organization as the exclusive negotiating agent for the employees. If, however, the employee organization can demonstrate that fifty-one percent or more of the employees in the negotiating unit want to be represented by the employee organization, then PERB will not conduct a secret ballot election. Instead, the PERB will certify the employee organization as the exclusive negotiating agent for the negotiating unit without an election.

ALTERATION OF AN EXISTING NEGOTIATING UNIT

Prior to 1981, a board of education could unilaterally alter the composition of an existing recognized negotiating unit by passing a board resolution during the challenge period. The challenge period is the one month before seven months prior to the expiration of the contract. Thus, the period for a contract expiring on June 30 is the preceding November. Unfortunately, a board of education no longer has that prerogative and, upon objection, will be found in violation of the Taylor Law if it unilaterally changes the scope of an existing bargaining unit. In *Matter of County of Orange*, 14 PERB ¶3060 (1981), the PERB reasoned and wrote:

We confront, moreover, a question of policy in the administration of this statute. Considerations of fairness and reasonableness should preclude a public employer which has agreed to the burden of petitioning this Board for a definition of the appropriate unit should be borne by the party seeking to change an existing unit and not by the party that is content to abide by the status quo. While the employer might be slightly inconvenienced by having to file the petition,

it would not be prejudiced thereby.

Consequently, if a school district desires a change in the existing bargaining unit, it will be required to file a petition with PERB if the parties are unable to mutually agree upon the change.

UNIT CLARIFICATION AND UNIT PLACEMENT PETITIONS

Most school district employees are already in a negotiating unit represented by an employee organization that has been recognized or certified. There are occasions when a school district may want to change the composition of the negotiation unit by adding or removing certain job titles. If the district and the employee organization agree to the modification, then there is no need to petition PERB. Absent a mutual agreement, however, the district must file a petition with PERB. A unit clarification petition may be filed with PERB at any time. The purpose of a clarification petition is to determine if, under the parties’ contractual recognition clause, a disputed job title is already in or out of the existing negotiation unit.

A unit placement petition may also be filed with PERB at any time. The purpose of a placement petition is to determine if a job title, which is out of the existing negotiation unit, should be included in an existing negotiation unit. In that regard, PERB will decide if the job title enjoys a community of interest with the job titles already in the negotiation unit and if it would be compatible with the employer’s public service responsibility to put the job title into the negotiation unit.

Supervisory Personnel

Issues relating to the inclusion or exclusion of administrative or supervisory personnel into negotiating units composed of rank and file employees is also important. Supervisory personnel should not be confused with managerial or confidential persons. The Taylor Law (New York Civil Service Law, Article 14) carefully distinguishes supervisors from managers. A supervisor is an employee, who by virtue of his or her duties in employing, training, evaluating

and perhaps, disciplining or discharging subordinate employees should be excluded from being in the same negotiating unit because of a conflict of interest. In other words, while supervisors are entitled to bargain collectively, they should not be in a negotiating unit comprised of the employees they regularly supervise. Managerial and confidential employees do not have bargaining rights and they will be discussed later in this article.

Building principals, assistant principals and in some situations department coordinators are required to evaluate and supervise the work performance of subordinate employees. A decision to recognize administrators or supervisory personnel also entails a determination as to the appropriate composition of the negotiating unit. The PERB has held that department chairpersons, directors and principals should be excluded from an overall unit of instructional personnel because of the inherent conflict created when these administrators hire, evaluate, and assign teachers. See: *Matter of Board of Education of the Enlarged City School District of Troy*, 4 PERB ¶4014 (1971).

Moreover, in cases such as *Manchester-Shorts-ville Central School District*, 16 PERB ¶3055 (1983), PERB concluded that under certain circumstances the duties of a school principal go beyond the duties of a supervisor and thus he or she becomes a managerial employee.

In any event, if the school district wants to take a supervisor out of a rank and file bargaining unit, the District must file a decertification petition during the challenge period.

Managerial/Confidential Employees

The Taylor Law provides for a procedure to designate an individual as a managerial or confidential employee. According to §201 (7) (a) of the New York Civil Service Law:

Employees may be designated as managerial only if they are persons (i) who formulate policy or (ii) who may reasonably be required on behalf of the 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 such role is not of a routine or clerical nature and requires the exercise of independent judgment. Employees may be designated as confidential only if they are persons who assist and act in a confidential capacity to managerial employees described in clause (ii).

Once designated as a managerial or confidential employee, the individual is not eligible to exercise any Taylor Law rights. Section 214 of the Civil Service Law provides:

No managerial or confidential employee, as determined pursuant to subdivision seven of section two tentative of the public employees employed by the public employer of such managerial or confidential employee.

The criteria for determining managerial status is, by law, very narrow. The PERB, until recently, has strictly adhered to that narrowness in deciding what individuals should be declared managerial/confidential.

In the *Matter of Carle Place Union Free School District v. Carle Place Administrators Association*, 12 PERB ¶4056 (1979), the Director of Public Employment Practices and Representation decided that a school district's Director of Pupil Personnel/Attendance Officer, who exercised district wide responsibilities that included advising the superintendent on policy matters relating to his area of responsibility, was not includable in a principals' unit. In *Carle Place*, the Director referred to the *Matter of City School District of the City of Binghamton*, 8 PERB ¶3084 (1975) wherein the Board first, albeit perhaps without sufficient clarity, spoke to the issue of formulating policy. In Binghamton, the Board concluded that statutory references in Section 201 (7)(a)(i) to persons "who formulate policy" is not limited to the formulation of labor relations policy. Rather, in the case of a school district, it includes the methods, means and extent of achieving its educational objectives.

In *Board of Education, Beacon Enlarged Central School District*, 4 PERB ¶4344 (1971) the Direc-

tor of Public Employment Practices and Representation decided that building principals were not managerial employees. He reasoned in part, that the principals played a very limited nonessential role in bargaining with teachers, and had limited influence on district wide policy decisions. Since that decision, building principals have, therefore, been accorded Taylor Law protection which enabled them to organize and bargain collectively in separate units where they did not exercise supervisory responsibility over other unit members.

On March 3, 1982, however, in *South Colonie Central School District*, 15 PERB ¶4026 (1982) the Director, while not reversing the prior decision, confronted a somewhat different fact pattern and concluded that building principals were not covered under the Taylor Law because they were managerial employees. Unlike Beacon, the principals at South Colonie not only served as District representatives in bargaining with teachers but also analyzed and prioritized administrative recommendations on noneconomic negotiation proposals and were privy to all of the District's financial information. Thus, not being merely observers or resource personnel but decision makers, their petition for certification as a bargaining unit was dismissed. That case has not been appealed and it is, therefore, the law of the land in New York State labor relations. Consequently, it now appears that PERB has clarified and adopted a broader interpretation of a managerial employee.

Employees may also be designated as confidential if they work for a managerial employee as defined in §201.7(a)(ii) of the Law. A managerial employee is a person who, "may reasonably be required on behalf of the 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..." In *Town of Dewitt*, 32 PERB ¶3001 (1999), the PERB discussed the nature of a confidential employee when it wrote:

The definition of a confidential employee incorporates a two-part test for designation. The person to be designated must assist a

§201.7(a)(ii) manager in the delivery of the duties described in that subdivision. Assistance alone, however, is not enough to support a designation. In addition, the person assisting the §201.7(a)(ii) manager must be one acting in a confidential capacity to that manager. The first part of the test is duty oriented, while the second is relationship oriented. As the two parts of the test are distinct, satisfaction of one might not satisfy the other. A person assisting a manager through the performance of duties confidential in nature is not necessarily one performing those duties in a position which has a confidential relationship to the §201.7 (a)(ii) manager. A person in a confidential relationship to a managerial employee might never perform or be expected to perform any of the duties warranting a confidential designation. To read the statute in a manner that would have assistance with §201.7(a)(ii) functions by itself establish confidential capacity would make the words "and act in a confidential capacity to" appearing in §201.7(a) entirely superfluous. We do not believe that this is correct as a matter of statutory construction or a correct reflection of legislative intent.

Should the facts enunciated in these cases be of value to you in classifying any of your employees as managerial or confidential, the time to act is now.

Under the Taylor Law, an application to designate persons as managerial or confidential may be filed at anytime. If, however, the person sought to be designated as managerial/confidential is currently in a recognized or certified negotiating unit, only one application which has been processed to completion may be filed during a period of unchallenged representation. (Unchallenged representation is any time other than one month prior to seven months before the end of the contract.)

Should your district wish to proceed with an application for the designation of persons as managerial or confidential, please contact this office as soon as possible for further assistance.

AREA UNEMPLOYMENT RATES

New York State Rate

Year	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Ann. Avg.
2012	9.1%	9.2%	8.7%	8.1%	8.6%	9.1%	9.1%						
2011	8.9%	8.6%	8.2%	7.7%	7.8%	8.1%	8.3%	8.1%	8.2%	8.0%	7.9%	8.0%	8.2%

Syracuse, NY Metropolitan Statistical Area

Year	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Ann. Avg.
2012	9.4%	9.4%	8.7%	8.1%	8.5%	9.0%	9.0%						
2011	9.3%	9.0%	8.5%	7.8%	7.8%	8.2%	8.2%	7.8%	8.1%	7.7%	7.8%	8.2%	8.2%

Auburn, NY Micropolitan Statistical Area

Year	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Ann. Avg.
2012	9.2%	9.3%	8.6%	7.9%	8.1%	8.4%	8.3%						
2011	9.1%	9.0%	8.5%	7.5%	7.3%	7.5%	7.5%	7.1%	7.2%	7.1%	7.3%	7.8%	7.7%

Cayuga County Statistical Area

Year	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Ann. Avg.
2012	9.2%	9.3%	8.6%	7.9%	8.1%	8.4%	8.3%						
2011	9.1%	9.0%	8.5%	7.5%	7.3%	7.5%	7.5%	7.1%	7.2%	7.1%	7.3%	7.8%	7.7%

Broome County Statistical Area

Year	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Ann. Avg.
2012	9.7%	9.4%	8.7%	8.2%	8.6%	9.2%	9.2%						
2011	9.7%	9.2%	8.8%	8.3%	8.0%	8.5%	8.5%	8.0%	8.2%	7.9%	8.0%	8.4%	8.5%

Ithaca, NY Metropolitan Statistical Area

Year	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Ann. Avg.
2012	6.9%	6.5%	5.9%	5.7%	6.3%	7.2%	7.0%						
2011	6.4%	5.8%	5.3%	5.3%	5.4%	6.5%	6.7%	6.2%	5.9%	5.6%	5.5%	5.6%	5.8%

Ontario/Seneca/Wayne/Yates Statistical Area

Year	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Ann. Avg.
2012	9.1%	9.1%	8.5%	7.5%	7.9%	8.1%	7.7%						
2011	9.2%	9.0%	8.5%	7.6%	7.3%	7.4%	7.1%	6.8%	6.9%	6.6%	6.8%	7.6%	7.6%

Rochester, NY Metropolitan Statistical Area

Year	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Ann. Avg.
2012	8.5%	8.6%	8.0%	7.7%	8.0%	8.4%	8.5%						
2011	8.6%	8.4%	7.9%	7.3%	7.3%	7.7%	7.8%	7.5%	7.6%	7.2%	7.2%	7.5%	7.7%

*Source: New York State Department of Labor
Labor Statistics
www.labor.state.ny.us*

CONSUMER PRICE INDEX

August 2012

	INDEX 1982-84 BASE YEAR=100	% INCREASE FROM 2011	% INCREASE FROM PRIOR MONTH
NY-Northeastern New Jersey Area			
1. All Urban Consumers	253.472	1.4	0.6
2. Urban Wage Earners & Clerical Workers	249.734	1.5	0.6
U.S. City Average			
1. All Urban Consumers	230.379	1.7	0.6
2. Urban Wage Earners & Clerical Workers	227.056	1.7	0.7

COST OF LIVING UPDATE

ALL CITIES

NY - NORTHEASTERN NEW JERSEY

Month	Revised Wage Earner Index	%	All Urban Consumers Index	%	Revised Wage Earner Index	%	All Urban Consumers Index	%
Jan-10	212.6	3.3	216.7	2.6	234.1	2.9	239.0	2.4
Feb-10	212.5	2.8	216.7	2.1	234.2	2.4	238.9	1.8
Mar-10	213.5	3.0	217.6	2.3	235.2	2.7	240.1	2.1
Apr-10	214.0	2.9	218.0	2.2	235.8	2.7	240.5	2.1
May-10	214.1	2.6	218.2	2.0	236.1	2.5	241.1	2.2
Jun-10	213.8	1.4	218.0	1.1	235.9	1.7	240.8	1.5
Jul-10	213.9	1.6	218.0	1.2	236.3	1.8	241.1	1.5
Aug-10	214.2	1.4	218.3	1.1	236.8	1.7	241.6	1.4
Sep-10	214.3	1.4	218.4	1.1	236.7	1.4	241.5	1.2
Oct-10	214.6	1.5	218.7	1.2	237.5	1.9	242.0	1.5
Nov-10	214.8	1.3	218.8	1.1	237.6	1.6	242.0	1.3
Dec-10	215.3	1.7	219.2	1.5	237.6	1.8	241.9	1.4
Jan-11	216.4	1.8	220.2	1.6	238.4	1.8	242.6	1.5
Feb-11	217.5	2.3	221.3	2.1	239.8	2.4	243.8	2.1
Mar-11	220.0	3.0	223.5	2.7	241.7	2.7	245.6	2.3
Apr-11	221.7	3.6	224.9	3.2	242.7	2.9	246.5	2.5
May-11	223.0	4.1	226.0	3.6	244.3	3.5	248.1	2.9
Jun-11	222.5	4.1	225.7	3.6	244.6	3.7	248.5	3.2
Jul-11	222.7	4.1	225.9	3.6	245.3	3.8	249.2	3.3
Aug-11	223.3	4.3	226.5	3.8	246.0	3.9	250.1	3.5
Sep-11	223.7	4.4	226.9	3.9	246.9	4.3	250.6	3.8
Oct-11	223.0	3.9	226.4	3.5	246.3	3.7	250.1	3.3
Nov-11	222.8	3.8	226.2	3.4	245.5	3.3	249.3	3.0
Dec-11	222.2	3.2	225.7	3.0	244.6	3.0	248.3	2.7
Jan-12	223.2	3.1	226.7	2.9	245.5	3.0	249.3	2.8
Feb-12	224.3	3.1	227.7	2.9	246.5	2.8	250.3	2.6
Mar-12	226.3	2.9	229.4	2.7	248.2	2.7	245.1	2.5
Apr-12	227.0	2.4	230.1	2.3	248.7	2.5	245.9	2.3
May-12	226.6	1.6	229.8	1.7	249.0	1.9	252.7	1.8
Jun-12	226.0	1.6	229.5	1.7	248.5	1.6	252.4	1.6
Jul-12	225.6	1.3	229.1	1.4	248.2	1.2	252.0	1.1
Aug-12	227.1	1.7	230.4	1.7	249.7	1.5	253.5	1.4
Sep-12								
Oct-12								
Nov-12								
Dec-12								

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