

**NEW YORK STATE SCHOOL BOARDS ASSOCIATION
90th ANNUAL CONVENTION**

NEGOTIATIONS – BARGAINING FOR SURVIVAL

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INTRODUCTION

As New York State school districts approach the negotiations table during the 2009-2010 school year, they face the most destabilized economy since the inception of the Taylor Law forty years ago and a crisis on Wall Street. There is the ever-present statutory restrictions of the “budget cap” legislation of Sections 2023(3) & (4) of the Education Law and its limit upon budget to budget increases, regarding a contingency budget, based upon the annual CPI x 1.20 (CPI is currently at -1.1% through July of 2009). School district negotiators are well advised to proceed cautiously in reaching multi-year agreements at the bargaining table. Next year’s tax levies may be burdened by deficit reduction measures under consideration by the New York State Legislature that will reduce previously committed 2009-2010 State Aid. The prospect of increased TRS and ERS contributions to make up billions in pension plan losses in 2008 will yield significant payroll taxes starting as soon as the 2010-2011 school year budget. In addition, there remains the possibility that the Legislature will enact, for the first time, school tax caps, restricting the amount of the local tax levy in an absolute sense. To enhance future budget vote success, flexibility in determining benefits and the deployment of the work force within our schools will be critical and dependent, in large part, upon existing collectively negotiated agreements and modifications that may be made to them.

I. NEGOTIATIONS PROCESS

A. *Selecting the District’s Negotiating Team*

- Utilizing professional negotiators;
- Deciding if the Superintendent of Schools should be on the team;
- Deciding if Board Members should be on the team;
- Team composition if interest-based bargaining is utilized.

B. *Commencing Negotiations*

- Ground rules for negotiations constitute a non-mandatory subject of bargaining (*Town of Shelter Island*, 12 PERB ¶3112 [1979] and *Greenburgh No. 11 Federation of Teachers*, 32 PERB ¶3035 [1999]). Neither party may insist that bargaining take place only at meetings open to the public and the press (*Saratoga County*, 17 PERB ¶3033). However, ground rules may assist in the orderly progression of negotiations with tentative agreements being written when reached, but subject to overall agreement.
- Since ground rules are not required under the Taylor Law, insistence upon the presence of the press or public at negotiations sessions violates the law (see *County of Saratoga*, 17 PERB ¶3053 [1984]; and *Town of Shelter Island*, 12 PERB ¶3112 [1979]).
- At the mediation stage, insistence on the confidentiality of proposals over the other party’s objection violates the Taylor Law as an unlawful ground rule (*Greenburgh No. 11 Federation of Teachers*, 32 PERB ¶3035 [1999]).

C. *Status Quo and Unilateral Change under Legislative Triborough*

Part of the duty to negotiate in good faith involves changing the status quo with respect to mandatory subjects of negotiations and the Taylor Law now requires maintaining status quo regarding non-mandatory subjects of bargaining that are contained within an expired collectively negotiated agreement.

The statutory enactment of § 209-a (1)(e) of the Civil Service Law in 1981 was aimed at restoring a PERB agency doctrine known as the Triborough Doctrine (*Triborough Bridge and Tunnel Authority*, 5 PERB ¶3037 [1972]), in light of a then-recent Court of Appeals decision (*Rockland County BOCES v. PERB*, 41 NY2d 753 [1977]), which overruled the doctrine that provided the right to automatic step increment in the year following the expiration of a collectively negotiated agreement (the hiatus period), but before a new agreement was reached. This amendment to the Taylor Law now requires the implementation of all of the provisions in an expired agreement during the hiatus period and also provides for the right to arbitrate pursuant to a provision in the expired agreement, a right that did not exist prior to the enactment of § 209-a (1)(e).

The nature of the subjects of negotiations is broken down by PERB decisional law into three categories – mandatory, permissive and prohibited subjects. In the absence of a contractual provision, matters considered permissive subjects may be unilaterally changed, while matters considered to be mandatory subjects may not be changed, unless there is mutual agreement to make a change (subject to a limited exception when there is a compelling reason when the parties have submitted the matter to fact finding; *see Wappingers CSD*, 5 PERB ¶3074 [1972]).

- **Mandatory Subjects:** Wages, hours and other terms and conditions of employment which, on balance, are more central to employee work rights than the public service mission of the public employer (*New Rochelle*, 4 PERB ¶3060; *Yorktown*, 7 PERB ¶3030). [See List at Appendix “A”].
- **Permissive Subjects:** Inherently and fundamentally matters of (Non-Mandatory) policy making related to the primary mission of the public employer or because the legislature intended to commit these matters solely to the discretion of the public employer (*Bd. of Educ. [City of New York] v. PERB*, 75 NY2d 660 [1990] - citing *Webster CSD v. PERB*, 75 NY2d 619 [1990]). [See List at Appendix “B”].
 - **Job Security Clause (no layoff clause)** –A contractual guarantee not to abolish the positions of bargaining unit members in whole or in part is a non-mandatory subject of negotiation, unless such a clause has been placed within the collectively negotiated agreement without a sunset provision (*see Yonkers CSD*, 40 NY2d 268 [1979], *City of New Rochelle*, 4PERB ¶3060 [1973] & *Greenburgh No. 11 Federation of Teachers*, 32 PERB ¶3024 [1999]). For decisions involving sunset clauses, *see Waterford-Half Moon UFSD*, 27 PERB ¶3070 (1994) and *Schuylerville CSD*, 29 PERB ¶3029 (1996).

- **Converted Subjects:** Permissive subjects that have been placed within the parties' collectively negotiated agreement are treated as mandatory subjects for all purposes (*Greenburgh No. 11 Federation of Teachers, supra*).
- **Prohibited Subjects:** Where the statute leaves no room for negotiability (*[Cheektowaga] UFSD v. Nyquist*, 38 NY2d 137 and *Bd. of Educ. [City of New York]*, 75 NY2d 660 [1990]), or where strong public policy concerns, whether express or implicit in the law, would be violated (see *Susquehanna Val. Teachers Assn.*, 37 NY2d 614, 617, and *Cohoes CSD v. Teachers Assn.*, 40 NY2d 774).
- **Past Practice:** A past practice is an unequivocal, continued and uninterrupted implementation of a practice regarding a mandatory subject of bargaining for a period of time sufficient under the circumstances to create a reasonable expectation among the affected unit employees that the practice would continue. See *County of Nassau* 24 PERB ¶3029 (1991) & *Chenago Forks Teachers Association*, 40 PERB ¶3012 (2007).
- **Reserved Right to Revert:** Employer right to revert to express contract language notwithstanding past practice to the contrary (*State of New York - Unified Court System*, 26 PERB ¶3013 [1993]; *Florida UFSD*, 31 PERB ¶3056 [1998]; and *County of Nassau*, 31 PERB ¶3074 [1998]).
- **Waiver and Duty Satisfaction:** A contractual provision may expressly grant the right to the employer to unilaterally change terms and conditions of employment that are not covered under the parties' agreement or to allow the employer to change a subject addressed in the agreement at its option. Such a contractual provision is referred to as a strong management's rights clause (see *Garden City Union Free Sch. Dist.*, 27 PERB ¶3029 [1994] & *Yonkers Police Assn.*, 40 PERB ¶3001 [2007]).

D. Management Prerogatives Regarding the Employment of Teachers

Over the history of the Taylor Law, PERB has ruled extensively regarding a School Board's right as a public employer to unilaterally determine the following aspects regarding the employment of teachers and other unionized employees. These subjects are considered to be permissive or non-mandatory subjects of bargaining:

1. **Qualifications and Criteria for Promotion** - Non-mandatory subjects of bargaining (*West Irondequoit Teachers Association*, 4 PERB ¶3070, *Buffalo*, 29 PERB ¶3023 and *West Seneca*, 29 PERB ¶3024).
2. **Job Description Content** - A non-mandatory subject of negotiations (*Waverly*, 10 PERB ¶3103 and *Dobbs Ferry*, 22 PERB ¶3039).

3. ***Inherent Job Duties Subject to Unilateral Change*** - A non-mandatory subject of negotiations including: administrative duties of principals (*Oyster Bay-East Norwich*, 18 PERB ¶3075); Submission of Lesson Plans by Teachers (*Troy CSD*, 11 PERB ¶4538); Textbook Inventory by Teachers (*Plain Edge UFSD*, 15 PERB ¶4602); Hallway and Bus Duties of Teachers (*Wallkill CSD*, 21 PERB ¶4506); Nature of Teaching Duties That are an Inherent Part of the Teacher’s Job (*Seneca Falls CSD*, 23 PERB ¶3032); Faculty Attendance at Student Activities (*Orange*, 10 PERB ¶3080); Reduced Teaching Time of Department Chairs and Observation Time Increase (*Norwick CSD*, 14 PERB ¶3059), Instructional Time Increase With Duty Time Decreased (*Savona CSD*, 20 PERB ¶3055); Number of Students Assigned to Class (*Pearl River UFSD*, 11 PERB ¶3085 and *Seneca CSD*, 23 PERB ¶3032); and Caseload of School Psychologist, Social Workers and Guidance Counselors (*New York City SD*, 20 PERB ¶4550).

4. ***Class Size***: In *W. Irondequoit Teachers v. Helsby*, 35 NY 2d 46 (1974), our state’s highest court upheld a PERB determination that class size constitutes a non-mandatory subject of bargaining. In supporting its decision that class size is a management prerogative, the Court opined:

“That basic policy decisions as to the implementation of a mission of an agency or government are not mandatory subjects of negotiation.” *Id.*

At the same time, the Court noted that the impact of class size on teachers is negotiable (*see Yorktown Faculty Association*, 7 PERB ¶3030 [1974]).

Once the parties placed class size restrictions within a collectively negotiated agreement, the same, by operation of PERB’s “*conversion theory*” doctrine, changed the nature of the contractually included non-mandatory subject of bargaining to mandatory status. *Greenburgh No. 11 UFSD*, 32 PERB ¶3024 (1999).

5. ***Teaching Assignments during the Work Day***: In *Greece Central School District*, 22 PERB ¶3005 (1989), the Public Employment Relations Board determined that the number of teaching periods per day to assign to a teacher constituted a non-mandatory subject of negotiations and could be unilaterally changed by school district management, even when the subject was being negotiated by the parties. PERB noted that while it encourages parties to negotiate non-mandatory subjects, the mere fact that they are doing so does not preclude a unilateral change and does not *per se* constitute bad faith bargaining. Thus, where seventh and eighth grade teachers were required to teach five (5) classes per day rather than four (4), such change, so long as it was made within the limits of the work hours of the teacher work day was subject to unilateral determination by the Board of Education (*id.*).

E. Duty to Bargain in Good Faith

Relevant Cases

1. Both parties are required to approach the negotiations table with the sincere desire to reach an agreement, where argument, persuasion and the free exchange of views may take place (*East Meadow Teachers' Assn.*, 16 PERB ¶3086 [1983] and *Southampton PBA*, 2 PERB ¶3011 [1969]).
2. There is a mutual obligation to meet at reasonable times and confer in good faith with respect to wages, hours and other terms and conditions of employment. (*Id.*)
3. Reasonable efforts must be made to resolve differences (*Lynbrook P.B.A.*, 10 PERB ¶3067 [1977]).
4. There is no duty to agree to any particular proposal (*Lynbrook PBA*, 10 PERB ¶3067, at pg. 3119 [1977]). However, a failure to make any concession or reach any agreement is a factor to be considered in determining a party's good faith (*Deposit Teachers Assn.*, 27 PERB ¶3020 [1994]).
5. Good Faith bargaining must be demonstrated from the ground rules stage through the ratification process;
 - One side may not insist upon who will be present as the representative(s) of the other side (*County of Nassau*, 12 PERB ¶3090 [1979]) and may not condition negotiations upon the release of team members with pay (*Town of Riverhead*, 25 PERB ¶3057 [1992]).
 - Meetings must be reasonably scheduled with dates fixed in time (*Uniformed Firefighters Assn. [Mt. Vernon]*, 11 PERB ¶4539 aff'd 11 PERB ¶3095 [1978]).
 - A two month delay is violative of the law (*Harrison Assn. of Teachers*, 7 PERB ¶3041 [1974]) and *Town of Hempstead*, 27 PERB ¶3039 (1994). A teachers union's four month delay in filing a fact-finding brief also violates the duty to negotiate in good faith (*Poughkeepsie City School District*, 27 PERB ¶3079 [1994]).
 - Information meaningful to the negotiations must be made available by either party (*Village of Johnson City*, 12 PERB ¶3020 [1977]).
 - A zero increase proposal, indicative of "hard bargaining", is not a *per se* violation of good faith bargaining (*Columbia County CSEA*, 10 PERB ¶3047 [1977]). Adamancy or hard bargaining is not by itself evidence of a failure to negotiate in good faith. (*Town of Scriba*, 35 PERB ¶3011 [2002]).

- A demand to freeze or decrease current benefit levels is not *per se* a violation of good faith bargaining (*New Rochelle City Sch. Dist.*, 4 PERB ¶3060 [1971]).
- The withdrawal of previously reached tentative agreements may be considered in bad faith, absent extenuating circumstances (*Merrick UFSD*, 17 PERB ¶3006 [1984]; *Peekskill CSD*, 16 PERB ¶3075 [1983]).
- Awaiting state aid figures before promoting salary offer is permissible (*Yonkers CSD*, 17 PERB ¶3006 [1984]).
- Awaiting teachers contract settlement before negotiating to conclusion with another unit (nurses) violates the duty to negotiate (*East Ramapo School Nurses*, 31 PERB ¶3038 [1998]).
- Proceed to the negotiating table when union demands impact negotiations arising from management decision - may not decide unilaterally that there is no impact (*North Babylon U.F.S.D.*, 7 PERB ¶3027 [1974]).
- Subcontracting of services requires decision bargaining and not just impact bargaining (e.g., transportation services - *Odessa Montour CSD*, 28 PERB ¶3013 [1995]). Exceptions for BOCES CoSer agreements where only the impact of the decision is subject to negotiations (e.g., head custodian services - *Scio CSD*, 29 PERB ¶4525 [1996]; cosmetology and machine shop - *Lackawanna Tea. Assn.*, 28 PERB ¶3023 [1996]; and summer school - *Webster CSD v. PERB*, 75 NY2d 619 [1990]). The duty to bargain exists when the work at issue has been exclusively performed by members of the bargaining unit (*Manhasset Union Free Sch. Dist.*, 41 PERB ¶3005 [2008]). The same analysis for determining the past practice is applied to determining exclusivity of unit work, taking into consideration discernable boundaries, if any (*id.*).
- Negotiators must be empowered to make agreements necessary to conclude negotiations (*Sachem CSD*, 6 PERB ¶3014 [1973]; and *Somers CSD*, 3 PERB ¶3001 [1970]).
- It is not unlawful to insist upon renegotiating an adverse arbitration award while negotiating for a new contract (*South Orangetown CSD*, 13 PERB ¶3098 [1980]).
- Parties must execute the terms of a written agreement which embodies those provisions agreed upon (*Newburgh CSD*, 15 PERB ¶3002 [1982]; *Lynbrook PBA*, 10 PERB ¶3067 [1977] and *Odessa Montour Teachers Assn.*, 31 PERB ¶3054 [1998]).
- Preserving the legislative approval process by not having a quorum of the Board on the District's negotiations team (*Sylvan-Verona Beach CSD*, 15 PERB ¶3067 [1982]).

- Seven (7) month delay in presenting agreement for ratification by the public employer governing body constituted a waiver of the right to ratify and PERB required execution of an agreement by the chief executive officer (*SEIU and Utica City S.D.*, 27 PERB ¶3027 [1994]).
- Duty to recommend memorandum of agreement for ratification by respective constituencies, but funding provisions not effective until approved by the Board (*City of Dunkirk*, 25 PERB ¶3029 [1992]; *Buffalo City SD*, 24 PERB ¶3033 [1991]; app'd 191 AD2d 985 [4th Dept. 1993], 82 NY2d 656 [1993]) - C.E.O. responsible for ratification; discussion of ratification vs. legislative approval; see, also, *Nassau County BOCES*, 17 PERB ¶3011 [1984]; *City of Saratoga Springs*, 20 PERB ¶3031 [1987]; and *Ass'n of Surrogates v. State of New York*, 78 NY2d 143 [1991]).

F. *Subjects of Negotiations with Mandatory and Permissive Aspects*

- ***Teacher Evaluation***: The negotiations of teacher evaluation systems involve matters that are both mandatory and non-mandatory subjects of collective bargaining. The non-mandatory aspects include evaluation criteria and rating standards, while the mandatory aspects include procedures and the form for the evaluation (*e.g.*: narrative, check-list or a combination). The new **Regents Rules at Part 30-2.1 through 2.3**, the Commissioner's Regulations at Part 100.2(o) and Section **3012-b of the Education Law** refer to Taylor Law implications with respect to teacher evaluation. The Commissioner's Regulations (Section 100.2(o)) set forth eight (8) required evaluation criteria that should be deemed beyond the scope of negotiability and subject to inclusion in every teacher evaluation instrument due to the mandate for their use, as set forth in the regulation. [See *Somers C.S.D.*, 9 PERB ¶3014 (1976), *Elwood U.F.S.D.*, 10 PERB ¶3107 (1977), *Newburgh C.S.D.*, 21 PERB ¶3036 (1988) and *Genesee Educational Association*, 29 PERB ¶3072 (1996)]. The New statutory provisions for evaluating classroom teachers and the Regents Rules, *supra*, mandate consideration of how classroom teachers use the analysis of student data to inform instruction.
- ***Health Insurance***: The subjects of health insurance for current employees and prospective retirees are mandatorily negotiable under the Taylor Law (*City of Cohoes* 27 PERB ¶3058 [1994]), while there is no duty to negotiate benefits for the former members of the bargaining unit who retired at or before the time of the last expired agreement (*City of Johnstown*, 25 PERB ¶3085 [1992]).
 - Effective May 15, 2009, Chapter 729 of the laws of 1994 has been amended to make permanent those provisions which related to health insurance benefits and contributions of retired school district employees. This law removes the sunset date of May 15, 2009 as

set forth in Chapter 43 of the Laws of 2008, and provides that retiree health insurance premiums and benefits for retirees and their dependents shall *not* be reduced unless there is a corresponding reduction during the school year for the active members of the bargaining unit from which the retirees retired (*see Jones v. Bd. of Educ. Watertown CSD*, 30 AD3d 967 [4th Dept. 2006]).

- Where the Collectively Negotiated Agreement does not specify the benefits or designated carrier of the employer's health insurance plan, changes in plan providers and plan features may be made unilaterally by the employer (*Unatego CSD*, 20 PERB ¶3004 [1987]).
- When an HMO made available to employees changed the prescription drug co-pay from \$3.00/\$5.00 to \$4.00/\$7.00, a matter beyond the County's control, such change could not be attributable to the County as an unlawful change in the provision of health insurance (*County of Dutchess*, 32 PERB ¶3047 [1999]).
- ***Contracting-Out Programs***: Entering into vendor contracts or assigning bargaining unit work to non-unit members constitutes a mandatory subject of bargaining when the represented unit members had previously, exclusively performed the same work (*State of New York [SUNY Buffalo]*, 29 PERB ¶3067 [1996]). However, BOCES CoSer Agreements may be entered into unilaterally by school districts without there being a duty to negotiate over the work that had been exclusively performed by unit members (*Webster CSD v. PERB*, 75 N.Y.2d 619 [1990] - involving summer school; *Matter of Vestal Empls. Assn. v. Public Empl. Relations Bd.*, 94 N.Y.2d 409 [2000] - involving printing services and *Scio CSD*, 29 PERB ¶4525 [1996] - involving head custodial services).
- When a school district unilaterally transferred its Driver Education program to a private, non-profit organization, to provide the same services that the district had previously provided exclusively using bargaining unit employees, it violated the duty to negotiate in good faith (*Long Beach Central School District*, 26 PERB ¶3065 [1993]).

G. *Negotiations and Impasse*

Under the Taylor Law there is no finality mechanism to bring about an agreement other than a meeting of the minds between the union and the school district. If a negotiated agreement cannot be achieved and an impasse occurs, the dispute resolution process is:

1. Mediation in the event of impasse (120 day technical impasse or true impasse -- *see City of Mt. Vernon*, 11 PERB ¶3095 [1978] -- premature impasse determination by mediator);
2. Fact-finding;

3. Superconciliation;
4. Voluntary interest arbitration;
5. No change except for agreed upon change.

Strategies for Resolving Impasses

- The mediator/fact-finder model.
- Pre fact-finding mediation with the fact finder.
- Interest arbitration on a limited basis.¹

Negotiations Related Communications during Contentious Times

- PERB held that the school district did not violate the duty to negotiate in good faith by communicating to members of the bargaining unit the substance of negotiations and mediation sessions, where the content of the communications was merely informative and did not contain threats of reprisal, promise of benefits or otherwise attempt to circumvent the union negotiators (*Greenburgh No. 11 Federation of Teachers*, 32 PERB ¶3035 [May 24, 1999]). PERB found that the union had violated Section 209-a.2(b) by its unwillingness to make a proposal during mediation unless and until the district agreed not to reveal the union’s proposal to its rank and file. PERB held:

“As we have noted, insistence upon a demand which seeks to fix the manner in which the parties will negotiate violates the duty to negotiate in good faith because these matters are preliminary and subordinate to the substantive negotiations between the parties. Demands that negotiations be open to the public, that transcripts of negotiations be taken or, as here, that no statement be made to the public during negotiations setting forth the positions of either party, deal with the confidentiality of negotiations and, therefore, are preliminary matters and non-mandatory.” (at pg. 3081)

- A public employer’s representatives are entitled to express opinions regarding the merits of the position and potential economic consequences, so long as they do not do so in a coercive manner or subvert the authority of the Union negotiators. (*Albany Police Officers Union 17 PERB 3068* [1984]).

¹ When the Millbrook Central School District and the Millbrook Teachers Association could not reach agreement on the precise definition of end-of-day professional commitments, they left the matter subject to resolution by interest arbitration, using the following language:

“If there is a dispute regarding a professional commitment the work will be performed and there shall be a right to grieve. Should the matter proceed to arbitration, it shall be placed before Arbitrator Jeffrey M. Selchick.” [Article IV(B) of 2000-2004 Collectively Negotiated Agreement.]

II. COST SAVINGS MEASURES IN NEGOTIATING TAYLOR LAW AGREEMENTS

A. *Salary Based Bargaining Proposals to Reduce Total Salary Cost Increases*

- No increase or delayed increase to salary schedule (e.g. 0% September 1st, 2% February 1st).
- No increase or delayed increase to extracurricular, co-curricular, and interscholastic sports pay schedules.
- Split year increases (e.g. 1% September 1st, 1% February 1st).
- Freeze step movement.
- Create hold steps (e.g., two years to move from one step to the next).
- Use flat dollar salary schedule increases to reduce the percentage of spread between steps.
- No salary increase in return for job security (e.g. maintain same number of teaching or administrative positions for one year with a sunset provision lifting the job security right at the end of the no salary increase year).
- Reduce the number of salary columns.
- Consider *graduate credit* and *in-service credit* increases as discrete issues – not automatically increased by percentage applied to the salary schedule.
- Restrict video courses and on-line courses for graduate credit or limit the number of such credits that may be granted.
- Limit the number of credits that may be recognized for column movement in a given year (e.g. no more than 12 or 15).
- Reduce or limit reimbursement for professional development training or tuition (e.g. newly hired teachers to receive no compensation for PDP hours, such as the first 12 hours per school year).
- Restrict compensation for “free standing credits” to blocks of six or nine.
- Place a moratorium on new credit and column acquisitions.
- Delete or place a moratorium upon sabbatical leave provision.
- Reduce payout costs for sick leave and/or personal leave days that are annual or related to separation from employment.
- State Aid and/or TRS/ERS circuit breaker provision which would either call for a reopener or cut off the remaining years of a contract upon the contingency of State Aid loss or significant increase in pension contributions.

B. Health Insurance Based Bargaining Proposals to Reduce Total Cost Increases

- Increase employee health insurance premium contribution requirements.
- Grandfathering those with superior benefits, creating a two tiered structure.
- Increase prospective retiree health insurance premium contribution requirements.
- Offer less expensive HMOs.
- Increases in prescription drug co-pays.
- Change to less expensive health insurance plan (*see Unatego, supra*).
- Restrict dual spouse coverage.
- Reduce or eliminate health insurance buyouts (where employee premium contributions would deter dual coverage).
- Graduated health insurance buyout programs (assuring greater cost savings through greater participation in the buyout program).
- Increase vesting period for retiree health insurance entitlement.
- Scaled retiree health insurance contributions (differentiated employer contributions based upon number of years of service in the district).
- Limited employer Medicare Part B reimbursements to the floor amounts (in plans other than the State Health Insurance Plan).
- Limit Medicare reimbursements to the individual active employee or retiree (eliminating spouse and dependent reimbursements).

C. Retirement Incentive Programs to Reduce Total Cost Increases

Retirement incentive programs with multi-year payouts into the retiring employee's tax sheltered annuity account may provide immediate cash flow savings during the years of payout and more savings thereafter.

- ***Legal Aspects of Deferred Compensation Retirement Incentives:*** The Internal Revenue Code ("IRC") presently allows school districts to make non-elective direct contributions into employees' tax sheltered annuities, in lieu of cash payments.
 - The limitation on payments is governed by an annual cap amount determined under IRC § 415.
 - The cap amount applies to the combination of employee elective contributions and employer non-elective contributions.
 - Any payments that would exceed the cap may be paid-out in cash as additional compensation or rolled over into future calendar years for

payment into the employee's tax sheltered annuity for up to five (5) years.

[**Note:** For roll-over years, to be qualified for tax deferred treatment it is questionable whether or not payments may be made to the retiree's estate in the event of death before all payments have been made. An IRS Ruling on this matter should be forthcoming.]

- Types of contractual payments typically made into tax sheltered annuity accounts.
 - Retirement incentive payments.
 - Vacation and/or sick leave cash conversions.
- Advantages to parties:
 - School Districts:
 - Relief from FICA payment obligation (in whole or in large part).
 - Multi-year payout offers cash flow relief.
 - Employees:
 - Relief from FICA payments.
 - Deferred taxable event until time of withdrawal.
- **Note:** To receive such payments, the employee's tax sheltered annuity must be set up to receive employer non-elective payments.
 - **Caveat:** The employee may not have the option to receive the payment in cash in lieu of the non-elective employer contribution. A cash option would render the payment plan unqualified for tax deferred treatment. Likewise, during the time of employment an employee may not have buy-out monies for a benefit placed in his/her tax sheltered annuity at a time when there is a benefit option available (e.g., payment for annual sick leave accrual when sick leave days would otherwise be available for use).
 - Consultants are available to perform calculations for school districts to assure legal compliance with respect to funding.

➤ ***Sample Language on Early Retirement Incentive:***

The parties shall implement an early retirement incentive program for employees in the bargaining unit who are 55 years of age or older and

who are placed on Step 15 or above of the salary schedule as of July 1, 2009 who are eligible to and will retire from the District to receive pension benefits from the New York State Teachers' Retirement System effective either July 1, 2009 or July 1, 2010. The submission of a letter of resignation for the purpose of retirement on or before January 4, 2010 shall be an additional condition for entitlement to receive the early retirement incentive benefit. In the event that eight or more unit members present their irrevocable resignation letters for the purpose of retirement in writing to the Superintendent's office on or before January 4, 2010, the second year provisions of this memorandum of agreement (health insurance, salary schedule increase and stipend increases) shall become effective. The retirement incentive shall be comprised of two or three fifteen thousand dollar (\$15,000) payments to the retiree's Section 403(b) I.R.C. tax sheltered annuity account as non-elective direct employer contributions, without cash option. The first payment shall be made during the month of November immediately following date of retirement, the second payment shall be made the next following November and the third payment, for those who retire on June 30, 2009 shall be made in November 2011.

D. Layoffs and Furloughs to Reduce Total Cost Increases

While layoffs, whether temporary (furlough) or indefinite, are inconsistent with the economic theory of the Federal Government's stimulus plan, the same may be available options for cost reduction purposes.

- Statutory layoff and recall rights for pedagogical and non-pedagogical competitive class civil service employees must be complied with.
 - Contractual rights may supplement statutory rights (e.g. creating a notice requirement for employees to be laid-off where no such requirement exists in the law).
- Contractual layoff and recall rights, if any, must be complied with, with respect to non-pedagogical employees in the non-competitive and labor classes.
- ***Caveat:*** the ability to furlough (layoff for a few days or weeks during the work year) may be curtailed by contractual language that assures annual compensation for working ***up to*** a certain number of days. In such cases, the salary due to employees will remain the same whether or not they are furloughed.

E. Contractual Reopeners - Time to Consider Them?

1. There is no duty to reopen a contract for mid-term bargaining, absent a provision in the contract requiring such bargaining.
2. A party can still request that the contract be reopened but other party has the right to say "no"; Union's are often in a political dilemma addressing such requests to reopen because generally, some members will end up losing or suspending some income or benefits as a result. However, Unions must balance that issue with the prospect of significant losses of jobs otherwise. NYSUT generally leaves it up to each local to decide whether to allow re-opening.

APPENDIX "A"

MANDATORY SUBJECTS OF NEGOTIATIONS COMMON IN SCHOOL DISTRICT NEGOTIATIONS

A. Compensation

1. Pay increases or decreases (10 PERB ¶3104; 16 PERB ¶3094);
2. Incentive pay plans (6 PERB ¶7510);
3. Longevity pay (5 PERB ¶3037);
4. Merit Pay (14 PERB ¶3008);
5. Overtime rate (6 PERB ¶3030);
6. Call-in pay (10 PERB ¶3056);
7. Pay for increased workload (10 PERB ¶3080; 7 PERB ¶7014);
8. Graduate credit pay (12 PERB ¶3084);
9. Holiday pay rate (12 PERB ¶3010);
10. Severance pay (11 PERB ¶3072);
11. Tuition fees (20 PERB ¶3013);
12. Pay increase based upon increases in other districts (31 PERB ¶3015).

B. Insurances

1. Health (13 PERB ¶7006);
2. Limitation on insurance where spouse's plan covers (18 PERB ¶3050; 20 PERB ¶7005);
3. Employee premium contributions (18 PERB ¶3056);
4. Current employee retirement benefits and beneficiary benefits (18 PERB ¶7503; 10 PERB ¶3067 and 27 PERB ¶3058);
5. Welfare fund payments (4 PERB ¶8021);
6. Dental insurance (16 PERB ¶3056; 15 PERB ¶3096 - future retirees);
7. Optical insurance (4 PERB ¶8021);
8. Life insurance (13 PERB ¶7006);
9. Legal insurance (18 PERB ¶3065);
10. Self-insured personal property damage fund (30 N.Y.2d 122);
11. Liability insurance (16 PERB ¶3007).

C. Leaves

1. Sick leave (14 PERB ¶3010);
2. Family illness (11 PERB ¶3109);
3. On-the-job injury (16 PERB ¶3007);
4. Liquidating sick leave upon retirement (9 PERB ¶3014);
5. Union leave (10 PERB ¶3080);
6. Personal leave (9 PERB ¶3014);
7. Vacation leave (38 N.Y.2d 778);
8. Bereavement Leave (7 PERB ¶3078)
9. Educational Leave (17 PERB ¶3121);
10. Jury duty (7 PERB ¶3078);
11. Holiday (11 PERB ¶3055; 15 PERB ¶3069) [except for specifying days upon which no work may be performed -- 29 PERB ¶3037];
12. Compensatory Time [FLSA] (18 PERB ¶3065).

- D. Financial Benefits Assistance
1. Transportation - vehicles (17 PERB ¶3090);
 2. Parking (18 PERB ¶3038);
 3. Housing (15 PERB ¶3017);
 4. Secretarial service (11 PERB ¶3045);
 5. Physical exam (13 PERB ¶3015).
- E. Seniority Rights
1. Procedures for assignments and transfers (17 PERB ¶3120).
- F. Residency Requirements
1. For existing staff for continuing employment as opposed to new hires (12 PERB ¶3100; 13 PERB ¶3051).
- G. Training
1. Attendance at workshops on an involuntary as opposed to voluntary basis (6 PERB ¶3065).
- H. Subcontracting/Discernible Boundaries
1. Decision must be negotiated at the public employer's initiation before contracting out may occur and the union is not required to make a demand to negotiate (28 PERB ¶3013 [1995]).
 2. A union may waive its exclusivity rights through a management's rights provision in a collectively negotiated agreement (29 PERB ¶3046 [1996]).
- I. Miscellaneous
1. Retroactivity (20 PERB ¶3017);
 2. Zipper clause (18 PERB ¶3040);
 3. Grievance procedure (10 PERB ¶3079);
 4. Favored nations (reopener) clause (11 PERB ¶3087);
 5. Safety, but not manning (9 PERB ¶3007; 11 PERB ¶3087);
 6. Management rights clause addressing mandatory subjects (18 PERB ¶3065);
 7. Agency fee (11 PERB ¶3057);
 8. Sign-In/Out or time clocks [initial or increased req.] (20 PERB ¶3053);
 9. Return of snow days to calendar (25 PERB ¶3060);
 10. Provision of bottled water at work sites (32 PERB ¶3034 [1999]);
 11. Drug testing procedures once the decision to conduct testing according to the legal standards has been made (27 PERB ¶3054);
 12. Alternative disciplinary procedure to § 75 Civil Service Law (31 PERB ¶3045 [1998]).

APPENDIX “B”

NON-MANDATORY SUBJECTS OF NEGOTIATIONS

1. Program choice (9 PERB ¶3057);
2. Creating and filling of new positions (17 PERB ¶3055);
3. Availability of faculty for academic advice for students (9 PERB ¶3068);
4. Schedules for students (9 PERB ¶3014);
5. Number of personnel files maintained (18 PERB ¶3065);
6. Hours of service to the public or days of the week when service is performed (9 PERB ¶3068; 17 PERB ¶3109);
7. School calendar (11 PERB ¶3012; 9 PERB ¶3068);
8. Student instructional day (12 PERB ¶3113; 39 N.Y.2d 111);
9. Work sites (9 PERB ¶3068);
10. Change in make-up of bargaining unit (10 PERB ¶3092);
11. Negotiations ground rules (12 PERB ¶3112);
12. Equipment safety committee (9 PERB ¶3014);
13. Preamble language (11 PERB ¶3045);
14. Benefits for non-unit members (17 PERB ¶3064);
15. Benefits for retirees (15 PERB ¶3096);
16. Religious holidays - a violation of the Establishment Clause (29 PERB ¶3041);
17. Unitary demands [part mandatory/part non-mandatory] (11 PERB ¶3085; 18 PERB ¶3065);
18. Ambiguous demands subject to non-mandatory construction (12 PERB ¶3083);
19. Statutory requirements (12 PERB ¶3015; 19 PERB ¶3015);
20. Matters not within Board discretion (10 PERB ¶3043);
21. Matters which would contravene the law (18 PERB ¶3065);
22. Demand to waive constitutional rights (20 PERB ¶3048 [search and seizure rights]);
23. Job security (4 PERB ¶3060);
24. Class size (*W. Irondequoit Teachers v. Helsby*, 35 N.Y.2d 46 [1974]);
25. Anti-union discrimination clause (10 PERB ¶3043);
26. Promotional policy for non-unit jobs (12 PERB ¶3037);
27. Use of employer's facilities and equipment (9 PERB ¶3068);
28. Keys to building [security issue] (9 PERB ¶3068);
29. Residency as a promotional requirement (26 PERB ¶3025);
30. Job qualifications for hire or promotion (29 PERB ¶3023 [1996]);
31. Restriction on heat generating appliances at hospital employees' break room (32 PERB ¶3005 [1999]).