

Concurrent Two

Taylor Law at 50

May 10, 2018 | 3:00 p.m. – 3:50 p.m. | Fort Orange Ballroom 5
1.0 areas of professional practice CLE credit

The *Triborough* Doctrine and Statute: A Catalyst or Hindrance to Harmonious Labor Relations?

This session will discuss the history and impact of the *Triborough* doctrine and statute, their impact on labor relations and negotiations from both the labor and employer perspective, and current and future issues, including the meaning and impact of *City of Ithaca*, 49 PERB ¶ 3030 (2016).

Panelists:

Angela M. Blassman, Administrative Law Judge, NYS Public Employment Relations Board

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Michael Krauthamer, Esq., Labor Relations Specialist, NYSUT

Including:

The Impact of *Triborough*: A Catalyst or Hindrance
to Harmonious Labor Relations?

Addendum: Collective Bargaining in a Tax Cap Environment
Has Strategy in Regard to *Triborough* Changed

The Impact of Triborough: A Catalyst or Hindrance to Harmonious Labor Relations?

By Angela M. Blassman

I

Introduction: The Taylor Law's Triborough Amendment

The New York State Public Employees' Fair Employment Act, known as the Taylor Law, was amended in 1982 to address what occurs when the term of a collective bargaining agreement between a public employer and a public employee organization expires.¹ Section 209-a.1(e) of the Taylor Law, known as the "Triborough Amendment," makes it an improper practice for a public employer, or its agents, deliberately to "*refuse to continue all the terms of an expired agreement until a new agreement is negotiated,*" [emphasis added].²

The statute includes a "strike exception;" an employee organization is not entitled to the continuation of the terms of an expired agreement if, during negotiations for a new agreement or before those negotiations are resolved, it engages in, causes, instigates, encourages, or condones a strike during or prior to such resolution of such negotiations, engaged in conduct violative of subdivision one of section two hundred ten of this article."³ If that occurs, the employer's refusal to continue to the terms of the expired agreement will not violate the Act.⁴

¹ The New York State Public Employees' Fair Employment Act, New York State Civil Service Law Article 14, is alternatively referred to in this paper as the "Taylor Law" and the "Act."

² The Triborough Amendment has been referred to as the "continuation-of-benefits clause." *Assn of Surrogates and Supreme Court Reporters within the City of New York v. State of New York*, 25 PERB ¶ 7502, at 7507.

³ Taylor Law, § 210.1.

⁴ Taylor Law § 209-a.1 states:

It shall be an improper practice for a public employer or its agents deliberately...(e) to refuse to continue all the terms of an expired agreement until a new agreement is negotiated, unless the employee organization which is a party to such agreement has, during such negotiations or prior to such resolution of such negotiations, engaged in conduct violative of subdivision one of section two hundred ten of this article.

II

Historical Background to Enactment of the Taylor Law and the Triborough Amendment

1935 National Labor Relations Act - The US Congress passed the NLRA, also known as the Wagner Act, obligating *private sector employers* to bargain collectively with unions selected by a majority of employees. Public employees were *not* included in that legislation.

Public Sector Strikes. Public employees engaged in strikes before and after World War II. The end of World War II saw an increase in public sector labor activism, including strikes.⁵

1947 – Taft-Hartley Act of 1947. The U.S. Congress enacted the Taft-Hartley Act in reaction to a rash of strikes. That Act prohibited public sector strikes and established strict penalties (immediate dismissal and a 3-year bar to reemployment) for striking public sector employees.⁶

1947 – NYS Condon-Wadlin Act. The Condon-Wadlin Act was passed in reaction to strikes in Rochester, Yonkers, and Buffalo, and a threatened strike by the New York City Transport Workers Union.⁷ To deter strikes by government employees, the Condon-Wadlin Act also mandated severe penalties, including dismissal of striking workers. The Condon-Wadlin Act, however, quickly came to be viewed as unenforceable and an impediment to the settlement of labor disputes, so that its penalties were often not imposed.⁸

1960s Strikes – In 1960, 5,500 teachers in New York City walked out for one day when the City refused to recognize their union. In 1961, evening high school teachers staged a three and one-half week strike. In 1962, 22,000 teachers walked out for one day over a contract deadlock. In April 1962, approximately 20,000 New York City teachers engaged in a one-day strike, which closed most of the city’s schools.⁹

1963. Temporary Amendment. The Condon-Wadlin Act was amended to ease the mandatory penalties.¹⁰ The amendment expired in 1965, causing a return to the heavy mandatory penalties.

1965 NYC Strikes. In January 1965, New York City Department of Welfare employees began a work stoppage that lasted 28 days, the longest public employee strike in New York City’s

⁵ *Lefkowitz on Public Sector Labor & Employment Law*, 4th Ed. (hereafter, “*Lefkowitz*”) § 1.9.

⁶ *Id.* at § 1.17, p. 23.

⁷ *Lefkowitz*, §§ 1.15 and 1.18.

⁸ *Lefkowitz*, § 1.20.

⁹ See Steven Greenhouse, *Charles Cogen Dies at 94; Led Teachers in New York*, *New York Times*, February 20, 1998 (available at <http://www.nytimes.com/1998/02/20/nyregion/charles-cogen-dies-at-94-led-teachers-in-new-york.html>) (accessed March 21, 2018). *Lefkowitz*, § 1.20, p. 26.

¹⁰ *Id.*

history. Over 5,000 workers were dismissed and union officials were jailed. Part of the negotiated settlement was a suspension of strike penalties.¹¹

1966 Transit Strike. On January 1, 1966, the TWU led New York City transit workers in a 12-day strike that resulted in economic losses estimated to be as much as \$ 100 million each day. The transit strike was the impetus for Nelson Rockefeller to appoint, on January 15, 1966, a five-member Committee on Public Employee Relations, chaired by Professor George W. Taylor from the Wharton School at the University of Pennsylvania, and composed of labor relations experts.¹²

April 21, 1967. Nelson A. Rockefeller signed the Taylor Law, giving New York State public employees the statutory right to organize and negotiate collective agreements. It continued to prohibit strikes, but with lesser penalties, and created the Public Employment Relations Board.¹³

September 1967. The Taylor Law became effective and replaced the Condon-Wadlin Act.

July 28, 1972 – Triborough Doctrine. PERB issued *DC 37 and Local 1396, AFSME, AFL-CIO v. Triborough Bridge and Tunnel Authority*,¹⁴ enunciating its “Triborough” doctrine.

1975 – New York City Financial Crisis. In 1975, New York City was on the brink of filing bankruptcy. Although it did not file bankruptcy, its finances were subject to the Emergency Financial Control Board until 1986.¹⁵

May 12, 1977 – The New York State Court of Appeals limited the *Triborough* doctrine in *BOCES of Rockland County v. NYS PERB* (hereafter, *BOCES of Rockland County*), 41 NY2d 753 (May 12, 1977).¹⁶

1982 – The Triborough Amendment. The Taylor Law was amended to include the § 209-a.1(e).

¹¹ Lefkowitz, §1.24, p. 28.

¹² Lefkowitz, § 1.17, p. 23. See also *New York State Taylor Law: History*, Cornell University, College of Architecture, Art, and Planning, Restructuring Local Government, <http://www.mildredwarner.org/gov-restructuring/special-projects/taylor-law> (accessed March , 2018). William A. Herbert, *Jerome Lefkowitz: A Pragmatic Intellect and Major Figure in Taylor Law History*, fn 6 (available at <http://perb.ny.gov/pdf/lefkowitz.pdf>) (accessed March 12, 2018). Lefkowitz, § 1.27.

¹³ New York City preceded the State in passing legislation granting representational rights to public sector employees. In 1958, Mayor Robert F. Wagner’s Executive Order No. 49 granted collective bargaining rights to New York City’s municipal workers for the first time. In 1967, the New York City Collective Bargaining Law was, enacted, succeeding the Wagner Executive Order. Lefkowitz, §§ 1.30 -1.31.

¹⁴ 5 PERB ¶3037 (July 28, 1972), *affirming*, 5 PERB ¶ 4505 (1972).

¹⁵ *Financial Control Board Loses Most of its Control*, New York Times, June 30, 1986, p. B3.

¹⁶ 8 PERB ¶ 3018 (1975), *remedy modified*, 50 AD2d 832, 8 PERB ¶ 7017 (2nd Dept 1975), *judgment of the Appellate Div modified by annulling and vacating PERB’s determination*, 41 NY2d 753, 10 PERB ¶ 7010 (1977).

Strikes Before & After Passage of the Triborough Amendment:

The number of strikes per annum declined after the enactment of the Triborough Amendment.¹⁷ As stated by one researcher:

In the first 15 years after the Taylor Law was enacted in 1967, the state Public Employment Relations Board was asked to intervene in 299 walkouts, the vast majority involving teachers' unions. Strikes averaged 20 a year in the 1970s, despite PERB's willingness to impose the Taylor law's full sanctions on striking workers and their unions in roughly two-thirds of those cases.

The trend abruptly changed in the early 1980s. Since 1983, PERB has recorded only 41 strikes of government workers in New York—an average of fewer than two per year. Compared to the tumultuous 1960s and 70s—with some significant exceptions—the last quarter-century has been an era of labor tranquility in the state and local government throughout New York.¹⁸

The question becomes whether that change was a result of the Triborough amendment. Different commentators have answered that question differently. E.J. McMahon, a conservative commentator, gives the Triborough amendment at least “some,” but not all the credit for the reduction in strikes. He notes other possible factors, such as the general decrease in strikes nationwide in the 1980s in both the public and private sectors; the increase in global competition; the 1981 tough federal response to the air traffic controller strike; and the general post-WW II increase in pay and benefits of public employees, as other explanations.¹⁹

¹⁷ *Lefkowitz* § 1.15.

¹⁸ E.J. McMahon, *Taylor Made: The Cost and Consequences of New York's Public-Sector Labor Laws*, Empire Center reports (October 17, 2007), available at <https://www.empirecenter.org/publications/taylor-made-the-cost-and-consequences-of-new-yorks-public-sector-labor-laws/> (accessed March 20, 2018).

¹⁹ *Id.*

III

1972 - Triborough Decision

The Triborough Amendment took its name from the Board case that dealt with the issue before the New York State Legislature enacted § 209-a.1(e) of the Act: *District Council 37 and Local 1396, AFSME, AFL-CIO v Triborough Bridge and Tunnel Authority* (hereafter, the “*Triborough decision*”).²⁰

The issue in that case was the employer’s failure to pay a contractual increment due under the expired contract for years of service. The employer maintained employee salary and fringe benefit levels, but refused to pay increments to employees whose anniversaries occurred after June 30, 1971, the expiration of the contract’s term. Further, the contract itself was silent regarding whether the increment provision was intended to survive the contract’s term.

The Board’s decision was based on alleged violation of § 209-a.1(d) of the Act, the duty to negotiate in good faith. Of course, § 209-a.1(e) of the Act, requiring the continuation of the terms of an expired agreement had not yet been enacted.

Analysis of the Board’s Triborough Decision

Most of the issues currently raised with respect to the Triborough amendment were raised during the litigation of *Triborough* case, including whether the failure to pay an increment constitutes a unilateral change and the financial burden imposed on the employer during times of financial contraction. Those issues were subsequently revisited in *Board of Cooperative Educational Services of Rockland County v. New York State Public Employment Relations Board* (hereafter, “*Rockland County BOCES*”).²¹ As discussed more fully below, in that case the New York State Court of Appeals viewed the issues differently from the Board, and limited the doctrine’s application.

²⁰ 5 PERB ¶ 3037 (July 28, 1972), *affirming*, 5 PERB ¶ 4505 (1972).

²¹ 8 PERB ¶ 3018 (1975), *remedy modified*, 50 AD2d 832, 8 PERB ¶ 7017 (2nd Dept 1975), *judgment of the Appellate Div modified by annulling and vacating PERB’s determination*, 41 NY2d 753, 10 PERB ¶ 7010 (1977).

a. *Triborough Decision: Maintaining the Status Quo & Prohibition on Self Help*

The *Triborough* decision emphasizes the principal that the status quo must be maintained during the hiatus period between contracts as a *quid pro quo* for the Act's prohibition on strikes, a remedy that private sector employees can exercise and that changes the power balance during negotiations. Both a strike by labor and an employer's undertaking a unilateral change in terms and conditions are viewed by the Board as prohibited "self-help." The Board stated:

the statutory prohibition against an employee organization resorting to self-help by striking imposes a correlative duty upon a public employer to refrain from altering terms and condition of employment unilaterally during the course of negotiations. This duty of an employer in the public sector to refrain from self-help is greater than is the similar duty of private sector employers. Accordingly, the hearing officer found "that an employee organization which does not strike is entitled to the maintenance of the *status quo* during negotiations" and ruled that "an employer cannot unilaterally alter existing mandatory subjects of negotiations while a successor agreement is being negotiated."

When the Board issued its *Triborough* decision, not that many years had passed since the Taylor Law was proposed and enacted. When the bill was proposed, there were strong objections by labor organizations because it included a strike prohibition, which they viewed to as improperly restricting employees' right to "withhold their labor." The terms "Slave Labor Act" and "Rat Bill" were used in opposition to the bill. A union rally was held on May 23, 1967 in Madison Square Garden and the statute was condemned as an "evil law."²²

²² See *Jerome Lefkowitz: A Pragmatic Intellect and Major Figure in Taylor Law History*, by William A. Herbert. As recently as November 2011, an international labor organization issued a report concluding that the Taylor Law's strike prohibition violated international freedom of association principles and argued that New York State should conform to internationally recognized principles and prohibit strikes only workers of essential services in the strict sense of the term. *Lefkowitz*, at § 1.16, p. 22.

b. *Triborough Decision*: Was there a Unilateral Change?

In *Triborough*, the employer argued that it had not changed any term or condition of employment, because it maintained the salaries and fringe benefits provided under the expired agreement and only withheld increments, a matter that it viewed as “a cost item to be taken into account by the parties as part of negotiations for the successor contract.”²³ The employer further argued that the Board should consider the parties’ practice, as evidenced by their past dealings. The employer noted that, during the prior two periods between contracts, it had not paid the increment, although it later paid it retroactively.²⁴

However, both the ALJ and the Board decisively viewed the matter as involving a unilateral change in the status quo. The Board further stated that the obligation to maintain the status quo was not dependent upon the existence of a right in an expired contract, but existed since it was a benefit enjoyed by the employees.²⁵

c. *Triborough Decision*: Cost of Maintaining the Status Quo During Periods of Financial Contraction

The Board discussed in *Triborough* the employer’s concern that imposing a freeze on terms and conditions of employment would impose a hardship during periods of economic downturn. The Board held that that employer’s argument lacked merit, since the Act includes a statutory scheme to resolve impasses. The Board stated:

In its brief, respondent expresses concern that the hearing officer's decision would prevent an employer from ever changing the terms and conditions of employment contained in an expired agreement absent the concurrence of the employee organization and argued “the irrevocable nature of benefits might prove tolerable during periods of sustained economic growth or continued inflation. At a time of economic contraction, however, or because of austerity mandated by some other cause, the precedent would operate effectively to prevent the managers of public agencies from conforming to changed circumstances and operating those agencies in a business-like manner.” Respondent's concerns are not

²³ 5 PERB ¶ 4505 at p. 4521.

²⁴ *Id.* at pp. 4521-4522.

²⁵ 5 PERB ¶ 3037, at p. 3065. The ALJ noted that, if a benefit that existed when the contract expired was not in the contract, the duty was to maintain “the law of the shop.” 5 PERB ¶ 4522, at footnote 7.

borne out by the statute. Civil Service Law Section 209 prescribes negotiation procedures which under some circumstances include mandatory mediation and fact-finding. Section 209-a.1(d) clearly imposes upon an employer a duty to negotiate in good faith during the pendency of these procedures.

Paragraph (e) of subdivision 3 of Section 209 prescribes procedures for determining terms and conditions of employment in the event that negotiations, including conciliation procedures, do not produce an agreement. In the instant case, respondent acted unilaterally during negotiations and not after their completion when it could have done so in accordance with the statutory scheme.

IV

Cases Post-Triborough Decision & Before Triborough Law

a. Third Dept – Arbitration Clause Expires with Contract’s Term

In **1974**, the Third Department held, in *Board of Education of the City School District for the City of Poughkeepsie*,²⁶ that an expired contract’s provision for arbitration did not continue in effect beyond the contract’s agreed upon term. No mention is made in *Poughkeepsie* of the *Triborough* case.

The Third Department affirmed the lower court’s decision, which granted the employer’s petition to stay the arbitration of a grievance that had been filed after the contract’s expiration. The lower court stated that the Legislature intended the impasse procedures in § 209 of the Act to resolve bargaining disputes, and that

[t]o declare that an agreement continues beyond its stated expiration date would run counter to the [Legislature’s] plan and upset the balance between public employers and employees which has been established by statute.²⁷

²⁶ *Board of Educ of the City Sch Dist for the City of Poughkeepsie*, 75 Misc2d 931, 6 PERB ¶ 7518 (Supreme Court, Dutchess County June 26, 1973); *affd*, 44 AD 2d 598, 7 PERB ¶ 7504 (2d Dept 1974).

²⁷ *Id.* As set forth below, the public policy grounds expressed in *Poughkeepsie* were superseded by the Legislature’s passage of § 209-a.1(e) of the Act. See *City of Long Beach*, 51 PERB ¶ 3005 (Feb 2018) (U-33449).

b. *Malone* - Parties Can Agree to Continue Terms & Extend Arbitration Clause

PERB held, in *Board of Education of **Malone** Central School District*, 8 PERB ¶ 3043 (July 1, 1975) that the grievance-arbitration procedure in the parties' expired contract continued in effect during the hiatus between contracts because the parties had agreed to continue all contract terms that were not challenged during negotiations by either party. PERB distinguished the Third Department's *Poughkeepsie* case, *supra*, based on the existence of the parties' agreement to continue the terms of the expired contract. In reaching that conclusion, the Board reiterated that the obligation imposed by *Triborough* was not predicated on "the existence of a prior contract but applies to all terms and conditions of employment however established including the grievance/arbitration procedure between the parties."²⁸ The Board also noted the following policy concern:

To hold otherwise (particularly in the absence of the employee organization's right to strike) would be potentially disruptive of the promotion of harmonious employee/employer relations as contemplated by the Act.

V

**Judicial Limitation of the *Triborough* Case
*BOCES Rockland County***

PERB's *Triborough* doctrine was limited by the New York State Court of Appeals in *Rockland County BOCES*,²⁹ a case factually similar to *Triborough*. In that case, as in *Triborough*, the employer continued to pay unit employees their salary pursuant to the expired agreement, but did not pay the increment that would have become due during the hiatus period.

The facts in in *Rockland County BOCES* case, arguably, more strongly supported a finding that the status quo between the parties included the payment of the increment during the hiatus period, because that, after the expiration of the first three

²⁸ 8 PERB ¶3048, at pp. 3074-3075.

²⁹ 8 PERB ¶ 3018 (1975), *remedy modified*, 50 AD2d 832, 8 PERB ¶ 7017 (2nd Dept 1975), *judgment of the Appellate Div modified by annulling and vacating PERB's determination*, 41 NY2d 753, 10 PERB ¶ 7010 (May 12, 1977).

contracts between the parties, the employer paid the automatic step increments, even if a successor agreement had yet to be reached; but that it did not do so after the fourth agreement expired, which led the union to file the improper practice charge.

In deciding *Rockland County BOCES*, the Board reiterated its *Triborough* doctrine, stating:

The *sine qua non* of negotiating in good faith is refraining from imposing unilateral changes in terms and conditions of employment during negotiations. This proposition is the essence of our *Triborough* doctrine. In the *Triborough* case, we held that the expectation of an annual increment based upon a long standing and continual practice of its having been paid is a term and condition of employment that cannot be altered unilaterally during negotiations. For this purpose, it makes no difference whether or not such practice was ever embodied in an agreement.³⁰

The Board ordered BOCES to negotiate in good faith and to pay the increment to the employees who were entitled to it under the expired agreement.

a. *Rockland County BOCES and the Status Quo*

The Court of Appeals annulled and vacated PERB's determination, stating:

We hold that, after the expiration of an employment agreement, it is not a violation of a public employer's duty to negotiate in good faith to discontinue during the negotiations for a new agreement the payment of automatic annual salary increments, however long standing the practice of paying such increments may have been.³¹

The Court of Appeals reasoned that such increments did not maintain the status quo, but change the relationship between the parties. It stated that the *Triborough* doctrine was based on the erroneous assumption that the parties' existing relationship was being preserved, but that, "in reality, such payments extend or change the relationship established by the parties."

³⁰ 8 PERB ¶ 3018 (1975).

³¹ *BOCES, Rockland County*, 41 NY2d 753, at 754,

b. *Rockland County BOCES and the Financial Distress Argument*

The Court of Appeals also saw the employer's financial distress argument differently from PERB. The Court's decision was influenced by the municipal financial difficulties that were then evident.³² The Court specifically notes that it was, at that time, presented with various cases arising from the municipal financial pressures of the 1970s:

The reasons for not giving effect in these circumstances to the so-called "Triborough Doctrine" should be apparent. Involving a delicate balance between fiscal and other responsibilities, its perpetuation is fraught with problems, equitable and economic in nature. As a reward and by encouraging the retention of experienced personnel in public positions, the concept of increments based on continuance in service, properly exercised, is creditable for the public entity and the citizenry are better served, and time losses suffered because of training periods and inefficiency in performance are likely to be reduced. The concept of continual successive annual increments, however, is tied into either constantly burgeoning growth and prosperity on the part of the public employer, or the territory served by it, or a continuing general inflationary spiral, without admeasurement either of the growth or inflation and without consideration of several other relevant good faith factors such as comparative compensation, the condition of the public fisc and a myriad of localized strengths and difficulties. In thriving periods the increment of the past may not squeeze the public purse, nor may it on the other hand be even fair to employees, but in times of escalating costs and diminishing tax bases, many public employers simply may not be able in good faith to continue to pay automatic increments to their employees.

To say that the *status quo* must be maintained during negotiations is one thing; to say that the *status quo* includes a change and means automatic increases in salary is another. The matter of increments can be negotiated and, if it is agreed that such increments can and should be paid, provision can be made for payment retroactively. The inherent fallacy of PERB's reasoning is that it seeks to make automatic increments a matter of right, without regard to the particular facts and circumstances, by establishing a rule that failure by a public employer to continue such increments during negotiations is a violation of the duty to negotiate in

³² Two years earlier, in 1975, New York City had been on the brink of filing bankruptcy and its finances were subject to control by a control board until 1986.

good faith. No such principle appears in the statute, nor should one exist by administrative fiat. Therefore, without expressing complete disapproval of the “Triborough Doctrine,” we hold that it was error for PERB to determine that BOCES had violated its duty to negotiate in good faith solely because of its failure to pay increments after the expiration of an employment agreement.³³

According to certain commentators, during the ten years between the enactment of the Taylor Law and *Rockland County BOCES*, teacher unions often treated increases due to service steps and educational attainment as “old money,” and insisted that only raises applied to base salary was “new money” that reflected the increase being given in a new agreement.³⁴ *Rockland County BOCES* was viewed as providing relief to employers because the elimination of step raises during the interim period “meant that all pay increases were truly negotiable.”³⁵

VI

Triborough After Rockland County BOCES

a. *Port Chester-Rye* - PERB Held that the Employer has No Duty to Proceed to Arbitration Upon a Contract’s Expiration

Section 208.1(a) of the Act provides that an employer must extend to an employee organization, upon certification or recognition, the right to represent unit employees, both in “negotiations,” and in “*the settlement of grievances*” [emphasis added]. Based on that statutory right, the Board held in *Port Chester-Rye Union Free School District*, 10 PERB ¶ 3079 (September 15, 1977), that the employer has a

³³ *Rockland County BOCES*, *supra*, at 748-759.

³⁴ Citing to 2010-2011 data, commentators have stated that teacher salary schedules in New York State often include 20 to 30 annual pay “steps” and additional increments based on educational credits. E.J. McMahon and Terry O’Neil, “*Triborough Trouble, How an obscure state law guarantees pay hikes for government employees – and raises the tax toll on New Yorkers*,” Empire Center for New York State Policy, Modern Press Albany, NY, <https://www.empirecenter.org/wp-content/uploads/2013/09/Triborough-Final2.pdf> (accessed April 5, 2018).

³⁵ *Id.*

statutory duty to adjust grievances. That right exists irrespective of the existence of a grievance procedure in the parties' contract.

Relying on *Poughkeepsie, supra*, the Board in *Port Chester* further held that the Act does not include any obligation to take a grievance to arbitration. The grievance procedure, including the arbitration provision, was held to have expired with the contract's term, and the employer was found to have no obligation to proceed to arbitration once the contract was expired. The Board distinguished *Malone, supra*, noting that in that case the parties had specifically agreed that the contract terms, unless either party proposed an amendment or modification, would continue during the hiatus period.

The finding in *Port Chester*, that a contract's arbitration provision does not survive the expiration of an agreement, was based on public policy grounds that were superseded by the Legislature's passage of § 209-a.1(e) of the Act. The Board explicitly overruled *Port Chester* in that regard in a recent decision, *City of Long Beach*, 51 PERB ¶ 3005 (Feb 2018) (U-33449).

a. *Niagara Wheatfield* – Court of Appeals – Neither a Raise Provision Nor the Continuation of Benefits Clause Violated Public Policy

In *Niagara Wheatfield Administrators Association v. Niagara Wheatfield Central School District*, 44 N.Y.2d 68, 11 PERB ¶ 7512 (March 28, 1978), the Court of Appeals held that public policy did not prevent a school board from agreeing to continue the terms of an agreement after its expiration, including a "tie-in" clause that provided that administrators' would receive an increase if the teachers received one. The contract's continuation clause provided:

The current negotiated agreement and established fringe benefits between the Board of Education and the NWA (association) shall remain in effect until modified or changed by mutual agreement in subsequent negotiations.

In that case, the administrators filed a grievance seeking an increase in pay based on the contract's tie-in clause, which it argued was continued by the contract's continuation clause. The arbitrator held that the administrators were entitled to the raise. On appeal from a decision confirming the award, the school district argued that

the award violated public policy. The Court of Appeals found no violation of public policy.

VII

The 1982 “Triborough Amendment” -- Civil Service Law § 209-a.1(e)

When the Triborough amendment was first enacted, it did not include the strike exception. However, the Governor’s Memorandum upon signing the bill indicated that both houses of the legislature had assured him that they would pass an amendment to the bill clarifying that it was not intended to mandate any new or additional benefits, that the protection was revoked in the case of a strike, and that a resolution by impasse procedures would supersede the terms of the prior agreement (McKinney’s Session Laws of NY, 1982, pp. 2631-2632). In *partial* fulfillment of that promise, Chapter 921 of the Laws of 1982 (effective December 20, 1982) was enacted amending § 209-a.1(e) of the Act to clarify that an employee organization that engages in conduct violative of the “no strike” provision of the Act (§ 210.1) is not afforded the “freeze” protection of § 209-a.1(e) of the Act.³⁶ That bill, which was proposed by the Governor, initially provided that the status quo imposed by § 209-a.1(e) of the Act would also cease to apply when negotiations are resolved pursuant to the procedures in § 209 or § 212 of the Act. The bill as initially proposed was rejected by the Legislature in order to satisfy union opposition to the proposed amendment.³⁷

a. Scope of the Triborough Amendment

Section 209-a.1(e) of the Act requires the employer to continue *all* the terms of an expired agreement until new terms and conditions of employment are either

³⁶ Section 210.1 of the Act provides:

No public employee or employee organization shall engage in a strike, and no public employee or employee organization shall cause, instigate, encourage, or condone a strike.

³⁷ The Board’s set forth in detail the legislative history with respect to the amendment of § 209-a.1(e) of the Act in *Niagara County Legislature and County of Niagara*, 16 PERB ¶ 3071 (1983), *annulled sub nom. County of Niagara v New York State Public Employment Relations Board*, 122 Misc2d 749, 17 PERB ¶ 1703 (Sup Ct, Niagara County 1984); *judgment of Supreme Court reversed and petition to stay enforcement of PERB’s decision dismissed*, 104 AD2d 1, 17 PERB ¶ 7021 (4th Dept 1984).

negotiated or achieved through impasse procedures contained in § 209 and § 212 of the Act. The Board's *Triborough* doctrine, however, only maintained the status quo of mandatorily negotiable subjects of negotiations.³⁸ Therefore, contractual terms that addressed non-mandatory or "permissive" subjects of bargaining, were not frozen by the *Triborough* decision and an employer could unilaterally change those terms upon a contract's termination without violating the Act. The statute, therefore, is more expansive regarding the preservation of contractual terms. However, § 209-a.1(e) of the Act only preserves the terms of an expired agreement and does not address the status quo of non-contractual terms and conditions of employment.

b. The Strike Exception in the Triborough Amendment

The strike exception, codified in § 209-a.1(e) of the Act, was previously enunciated by PERB in *Triborough*. PERB specifically stated that an employee organization lost the right to the continuation of the status quo if it engaged in a strike.³⁹ PERB applied that exception in subsequent cases, such as the *Village of Valley*

³⁸ "Mandatorily negotiable" matters are defined by § 201.4 of the Act as "terms and conditions of employment," which include

salaries, wages, hours and other terms and conditions of employment provided, however, that such term shall not include any benefits provided by or to be provided by a public retirement system, or payments to a fund or insurer to provide an income for retirees, or payment to retirees or their beneficiaries. No such retirement benefits shall be negotiated pursuant to this article, and any benefits so negotiated shall be void.

Sections 203, 204, and 209-a.1(d) and .2(b) of the Taylor Law authorize and require public employers and employee organizations to negotiate in good faith over mandatorily negotiable terms and conditions of employment. An employer may not act unilaterally with respect to a mandatory subject. In *Lynbrook v New York State Public Employment Relations Board*, 48 NY2d 398 (1979), the Court of Appeals stated:

In public employment law, "prohibited" subjects are those forbidden, by statute or otherwise, from being embodied in a collective bargaining agreement. "Mandatory" subjects are those over which employer and employees have an obligation to bargain in good faith to the point of impasse. "Permissive" subjects are those as to which either side may, but is not obligated to bargain; though neither party must continue to bargain on a permissive issue to the point of impasse, once it becomes the subject of an agreement, it is fully binding.

³⁹ 5 PERB ¶ 3037, at p. 3064.

Stream.⁴⁰ In that case, the employer unilaterally changed the hours of work of sanitation collectors after they engaged in a work slow-down. The Board sustained the ALJ's finding that the union could not rely on the employer's duty to maintain the status quo during negotiations because it supported the slow down which, the Board noted, had already altered that status quo.

A union's allegation that the employer engaged in "extreme provocation," leading to the employees' strike, is not an exception to the statute's strike prohibition and does not protect a union from a strike charge. It is merely a mitigating factor to be considered when imposing a strike penalty.⁴¹

c. Compelling Need Exception is Not Applicable Under § 209-a.1(e)

The same year that *Triborough* was issued, the Board held that an employer does not violate the Act if it unilaterally changes a term and condition of employment under the following circumstances: (i) the employer negotiated with the union on the issue to a point of impasse before it undertook unilateral action, (ii) compelling reasons existed for the timing of the employer's action, and (iii) after its unilateral action the employer recognized a continuing obligation to negotiate on the issue until agreement.⁴² However, the compelling need doctrine, is not a defense to an allegation that an employer failed to continue the terms of an expired agreement.⁴³ The Board reasoned that the compelling need defense cannot be used to defend an alleged breach of § 209-a.1(e) of the Act, since that statutory provision constitutes an affirmative grant of jurisdiction to PERB to remedy an employer's breach of a term of an expired collectively negotiated agreement.⁴⁴

⁴⁰ 6 PERB ¶ 3076 (1973).

⁴¹ See Act, §201.3(f).

⁴² *Wappingers Cent Sch Dist*, 5 PERB ¶ 3074 (1972).

⁴³ See *County of Erie and Erie County Medical Center Corp*, 43 PERB ¶ 3008 (2010).

⁴⁴ *Id.* at p. 3026.

VIII

Development of the Law After the Enactment of §209-a.1(e)

Nov. 1982 – “*Maplewood-Colonie*” - Court of Appeals

a. Grievance Procedures Continue after Contract Expiration Public Policy Under §209-a.1(e) Does Not Bar Payment of Increment

Soon after § 209-a.1(e) was enacted, the Court of Appeals applied it in *Maplewood-Colonie Teachers' Association v. Board of Trustees of Maplewood-Colonie Common School District*, 15 PERB ¶ 7516 (3d Dept 1981). In that case, the Appellate Division, Third Department, stayed arbitration of a grievance seeking to enforce the contractual increment provision in an agreement. On public policy grounds, the Third Department held that the employer acted properly when it refused to pay the increment, even though the contract included a continuation of benefits clause that provided that the contract's terms would be valid until beyond its expiration.

The Court of Appeals reversed the Third Department and denied the stay of arbitration. The Court clearly held in *Maplewood-Colonie* that the § 209-a.1(e) has the effect of *continuing an expired contract's grievance procedure*.

It appears, however, that the Court of Appeals also addressed the substantive public policy issue. Although the Court's decision was terse, it specifically states that it was addressing the public policy issue addressed by the lower court--that is--whether it is contrary to public policy for an employer to pay a contractual increment during the hiatus period. In *Maplewood-Colonie*, therefore, the Court held that the Legislature's enactment of § 209-a.1(e) of the Act overturned the public policy argument against payment of an increment due during the interim period, at least when, as in that case, the expired agreement includes a continuation of benefits clause.

June 1983 – “Cobleskill”

b. PERB finds § 209-a.1(e) Requires Payment of Steps During Interim

In *Cobleskill Central School District* (hereafter “Cobleskill”),⁴⁵ the Board stated that the public policy expressed in *Rockland County, supra*, had been reversed by the legislature’s enactment of §209-a.1(e) of the Act, which expresses the “statutory policy governing a public employer’s conduct during the interim, or hiatus period, between collective bargaining agreements,” and extends a public employer’s obligation to continue all terms of an expired agreement during the contractual hiatus period to the payment of salary increments. In *Cobleskill*, the Board found that the employer violated §209-a.1(e) of the Act when it failed to pay unit employees salary increments based upon years of service as required by the salary schedule included in the expired agreement.

1992 – *Surrogates and Supreme Court Reporters*

c. Constitutional Protection Afforded to Extended Contracts Terms

The New York Court of Appeals held, in *Association of Surrogates and Supreme Court Reporters Within City of N.Y. v. State of New York* (hereafter, *Surrogates*),⁴⁶ that the terms of an expired labor agreement that are extended by § 209-a.1(e) are protected by the Contract Clause of the United States Constitution.⁴⁷ The Court found that, in passing § 209-a.(1)(e), the Legislature created private rights of a contractual nature enforceable against the State. The contract continues after its stated term is complete and those extended terms are afforded protection under the contract clause of the Federal Constitution.

In *Surrogates*, the State attempted to offset anticipated budget shortfalls by enacting an amendment to the State Finance Law implementing a five-day lag payroll where nonjudicial employees of the Unified Court System were paid for nine days,

⁴⁵ 16 PERB ¶3057, *affd sub nom. Cobleskill Cent Sch Dist v Newman*, 16 PERB ¶7023 (Sup Court Albany County 1983), *affd*, 105 AD2d 564, 17 PERB ¶7019 (3d Dept 1984), *motion for leave to appeal denied*, 64 NY2d 610, 18 PERB ¶7006 (1985).

⁴⁶ 79 N.Y.2d 39, 25 PERB ¶ 7502 (1992).

⁴⁷ US Const, Art I, § 10, cl 1. “The Contract Clause of the United States Constitution prohibits a state from passing any law impairing the obligation of contracts.”

rather than 10, in each biweekly salary check over five payroll periods. The wages were deferred and to be paid in lump sums when employees' service was terminated by either retirement or death. The Court held that §209-a.(1)(e) created a "valid and subsisting contract" beyond the agreement's stated term.

1992 – Clarkstown

d. Board distinguished Wage Increases vs Wage System

In *Clarkstown Central School District*, 25 PERB ¶3082 (1992), the Board found that the lump sum increases provided for in each year of an expired, three-year agreement were not subject to continuation pursuant to §209-a.1(e) of the Act upon that agreement's expiration because the lump sum increases were granted instead of, and were the same as, annual percentage wage increases.

The Board's decisions make it clear that there is a difference between a negotiated wage increase, whether that increase is created pursuant to a formula or is a flat increase, and the component parts of a salary schedule, referred to as a wage system. It is the wage system that continues in effect after the expiration of an agreement pursuant to §209-a.1(e) of the Act, unless the parties' agreement includes language indicating that they intended the wage system to end, or "sunset,"⁴⁸ after the agreement's expiration.

In determining whether an agreement's term sunsets, the same rules of contractual interpretation apply as when interpreting any other term:

It is...the nature of the parties' specific agreement as to a given term of their contract which determines the employer's post-expiration obligations with respect to that term under §209-a.1(e) of the Act. In ascertaining the nature of the parties' agreement, the character of the evidence necessary to establish an agreement to a term of a contract for purposes of §209-a.1(e) is no different than the character of the evidence necessary to establish an agreement to any other term of an agreement for any other purpose under the Act... As with any agreement, a sunset agreement can exist in any circumstance in which it can be concluded reasonably that the

⁴⁸ In *Waterford-Halfmoon*, *supra*, at 3162, note 1, the Board explained that a sunset provision "is an agreement between the parties to a bargaining relationship under which one or more terms of a collective agreement are terminated at a specified time, typically upon expiration of the contract, or upon a specified condition."

parties intended to restrict or condition a given term of their collective bargaining agreement.⁴⁹

e. 1994 - Waterford-Halfmoon - Wage System & Sunset

In *Waterford-Halfmoon Union Free School District* (hereafter “*Waterford-Halfmoon*”), 27 PERB ¶3070 (1994), the involved two issues, a salary increment based on years of service and increases based on a formula that took into account salary data from surrounding school districts and led to the creation of a schedule. In *Waterford-Halfmoon* PERB held that the employer was obligated pursuant to § 209-a.1(e) of the Act to advance unit employees on the steps under the last salary schedule created pursuant to the expired agreement, the Board explained:

A salary schedule reflects simultaneously both an individual’s rate of pay for a given year and a wage system. The individual’s rate of pay is represented by the dollar amounts assigned for a given year to each step of the schedule. The wage system exists in the calculation of wage rates based upon component factors. In *Cobleskill*, the component factors of that salary system were education and years of service; here, the component factor of the wage system is years of service only. The particular factors in a wage system may vary by employer, but it is the wage system in whatever its form which is the term of the agreement subject to continuation.”⁵⁰

However, the Board found that the employer was *not* required to create a new schedule with increased salaries using a formula that took into consideration salary data from surrounding school districts because that portion of the agreement was clearly meant to reflect the means of calculating yearly wage increases that the parties did not intend to continue beyond the agreement’s expiration.

f. Waterford-Halfmoon - Contract References to Years Do Not Necessarily Sunset an Increment Provision

In *Waterford-Halfmoon*, *supra*, the Board rejected the argument that “a reference to the years the salary schedules covered sunsetted the wage system represented by the two component parts of those salary schedules.” Further, in *Waterford-Halfmoon*,

⁴⁹ *Id.* at 3160.

⁵⁰ *Id.* at 3161.

the Board also specifically reversed its prior holding in *Suffolk County*⁵¹ where it had held that the reference in an agreement to specific years when increment steps were to be paid sunsetted that term:

We cannot conclude that a simple reference to the years covered by salary schedules reflects an intent to terminate the wage system embodied therein without similarly concluding that a contract's general duration clause serves to sunset all of the terms of the contract upon expiration. The former is merely a more particularized version of the latter and to have a contract's duration clause sunset all terms of that contract obviously defeats the very purpose of §209-a.1(e) of the Act.

g. 2011 – Deer Park - No Violation by Failure to Pay Increment

In *Deer Park Union Free School District*, 44 PERB ¶ 3032 (2011), the charge alleged that the school district violated § 209-a.1(e) of the Act when it failed to pay a vertical step increment on September 5, 2008. The expired contract showed that vertical step advancements were due on July 1, 2005, 2006, and 2007. The Board narrowly construed the pleading and found no violation on the ground that the expired agreement did not impose an obligation to advance unit members a vertical step on the specific date pled, September 5, 2008. The Board also noted that the union had failed to plead or prove alternative theories establishing a past practice or a statutory obligation under § 209-a.1(d) or (e) to continue the timing of those payments.

VII

Triborough, Interest Arbitration, and Legislative Determination “Standing” on Triborough Rights

November 1984 – “County of Niagara” (a/k/a “promises, promises”)

a. The Appellate Division held that an Employer Cannot Unilaterally Impose New Contract Terms pursuant to § 209 of the Act

County of Niagara v New York State Public Employment Relations Board, 104 AD2d 1, 17 PERB ¶ 7021 (1984), is important to understanding how § 209-a.1(e) of the Act came to limit employers' authority under § 209 of the Act to engage in legislative imposition and achieve finality of the bargaining process.

⁵¹ 18 PERB ¶4528, *affd*, 18 PERB ¶3030 (1985), *appeal dismissed sub nom. Faculty Assn of Suffolk Community College v New York State Pub Empl Rel Bd*, 18 PERB ¶7016 (Sup Ct Suffolk County 1985), *affd*, 125 AD2d 307, 20 PERB ¶7002 (2d Dept 1986).

Section 209 of the Taylor Law provides elaborate procedures for resolving negotiation impasses. Section 209.3(e)(iv) of the Act allows an employer's legislative branch, in certain circumstances, to unilaterally impose terms and conditions of employment as the final step in the negotiation procedure (referred to as legislative imposition).⁵² In *County of Niagara*, the Fourth Department reinstated PERB's determination in that case, finding that an employer's legislative body is precluded by § 209-a.1(e) of the Act from exercising its right to change terms and conditions of employment through legislative imposition.

In *County of Niagara*, the Fourth Department based its interpretation of § 209-a.1(e) of the Act on the plain language of that statute, and specifically on the language providing that the duty to maintain terms and conditions applies "until a new agreement is negotiate." Citing to § 201.12 of the Act, which defines the term "agreement," the Fourth Department held that "[r]esolving an impasse by legislative action is not the same as negotiating an agreement." *Id.* at p. 3.

The Fourth Department also based its decision on the legislative history of the Triborough Amendment. As set forth above, when signing the initial version of the Triborough Amendment, the Governor's Memorandum indicated that he had received assurances from both legislative houses that the bill would be amended to clarify that terms of an expired collective bargaining agreement would continue only until a new agreement is negotiated—or—"negotiations are resolved pursuant to the procedures established in section two hundred and nine" [emphasis added]. Although such a bill was introduced into legislative session, it failed passage (McKinney's Session Laws of NY, 1982, pp. 2631-2632). The Fourth Department, therefore, concluded that the "Legislature is precluded from imposing a settlement which diminishes employee rights

⁵² Section 209.3(e) of the Taylor Law permits the imposition of terms and conditions of employment by a legislative determination where the public employer is a government other than an educational institution (see also § 209.3(f) of the Taylor Law, which applies to educational institutions). Section 209.4 of the Taylor Law permits the imposition of terms and conditions of employment by an arbitration panel where the public employees are police officers, firefighters and certain other employees who work for certain departments of local government.

under an expired collective bargaining agreement.” *County of Niagara, supra*, 104 AD2d 1, at p. 3. As to public policy, the Fourth Department stated:

To hold otherwise would ignore the public policy and purpose of the Taylor Law to “promote harmonious and cooperative relationships between government and its employees and to protect the public by assuring *** the orderly and uninterrupted operations and functions of government” (Civil Service Law, § 200). The power of the Legislature to resolve negotiations unilaterally gives the public employer a decided edge in negotiations. Nevertheless, this power is deemed necessary in the interests of concluding negotiations, particularly since public employees do not enjoy the right to strike as do employees in the private sector. Some means of resolving an impasse is, therefore, necessary. As a limitation on the legislative body, however, section 209-a grants some measure of protection to employees, who will at least be assured of maintenance of the status quo until a new agreement is negotiated.⁵³

**b. PERB’s Decision in *County of Niagara & City of Batavia*
Limitations of § 209 and Legislative Imposition**

In a footnote in its decision in *County of Niagara*,⁵⁴ the Board explained its reading of § 209.1(e) of the Act and stated that its ruling did not effectively repeal § 209 of the Act, since

a legislative body is still free to impose terms and conditions of employment not dealt with in the expired agreement. It may also impose the terms and conditions of employment contained in the prior agreement for an additional year, thereby foreclosing further negotiations for that period. (See *Bethlehem CSD #6*, 5 PERB ¶ 3010 [1972].) Further, an employee organization may consent to the issuance of a legislative determination by a legislative body or to a determination by a public arbitration panel, in which event it would waive its right to require the

⁵³ *Id.*

⁵⁴ *Niagara County Legislature and County of Niagara*, 16 PERB ¶ 3071 (1983), *annulled sub nom. County of Niagara v New York State Public Employment Relations Board*, 122 Misc2d 749, 17 PERB ¶ 1703 (Sup Ct, Niagara County 1984); *judgment of Supreme Court reversed and petition to stay enforcement of PERB’s decision dismissed*, 104 AD2d 1, 17 PERB ¶ 7021 (4th Dept 1984).

public employer to abide by the terms of the expired agreement. Finally, if an employee organization strikes, a public employer is need not abide by an expired agreement thereafter.

The Board referenced the foregoing analysis from *County of Niagara*, in *City of Batavia*, 17 PERB ¶ 3007 (1984). In that case, the employer filed a charge alleging that the union violated § 209.1(d) of the Taylor Law when it submitted a petition for interest arbitration pursuant to 209.4 of the Taylor Law covering nonmandatory subjects of negotiation. The employer also argued in that case that the union violated the Act because the subject matter of the petition covered matters in the parties' expired agreement, and the enactment of § 209.1(e) of the Taylor Law prevented it from implementing an eventual arbitration award.

The Board again held that “an employee organization waives its right to complain under § 209.1(e) when it consents to a determination by a public arbitration panel or by a legislative body,” and that the authority of an arbitration panel appointed pursuant to § 209.4, and pursuant to the union’s petition, “would not be diminished by the provisions of § 209-a.1(e).” The Board in *Batavia*, therefore, made it clear that, when an employee organization files a petition for interest arbitration, it consents to the issuance of a determination by a public arbitration panel, and waives its right under § 209-a.1(e) to require the public employer to abide by the terms of the expired agreement.

c. *City of Kingston* - Employer Cannot Unilaterally Proceed to Interest Arbitration

In *City of Kingston*, 18 PERB ¶ 3036 (1985), the Board addressed the issue of whether § 209-a.1(e) of the Act precludes a public employer from changing terms and condition of employment pursuant to an arbitration award. In that case, the City had filed a petition for interest arbitration, seeking to resolve an impasse in negotiations with the union representing its firefighters. The union objected to the petition, and filed an improper practice charge alleging that the City’s mere filing of the petition for interest arbitration, without its consent, violated § 209-a.1(e) of the Act.

The Board recognized at the outset of its decision, that the union appeared to be more interested in the retaining the benefits in its expired agreement, which included

benefits that were not mandatorily negotiable, than in the potential new benefits it might win at arbitration. *Id.* at p. 3074. Nonetheless, the Board extended its ruling in *Batavia* (which addressed legislative imposition), to arbitration awards issued in police and fire impasse resolutions. The Board stated:

It is clear that the legislative history which persuaded us that legislative determinations may not be imposed upon unconsenting unions also applies to interest arbitration awards.

As in *Batavia*, the Board in *City of Kingston*, also based its decision on the plain language of § 209-a.1(e), which makes it an improper practice for an employer deliberately “to refuse to continue all the terms of an expired agreement until a new agreement is negotiated.”

The Board reiterated in *City of Kingston* that, by petitioning for arbitration, a union consents to the process and thereby waives its right to “*stand on the expired agreement.*” The Board also reiterated that “a union that consents to the interest arbitration process is bound by whatever resolution emerges from that process.” *Id.* at p. 3074. The Board noted in *City of Kingston* that, in the absence of a valid consent, the employer could only be held to have violated § 209-a.1(e) of the Act “if it actually altered the terms of an expired agreement pursuant to such an arbitration award.” The Board therefore held that the City did not violate the Act by merely filing a petition for interest arbitration. However, the interest arbitration panel was found to lack power to resolve the deadlock with respect to the subjects contained in the expired contract, unless the union agreed to the submission of those issues to the panel.

d. What about *City of Ithaca* and Interest Arbitration, and a Union’s Right to Stand on Its § 209-a.1(e) Rights?

In *City of Ithaca*, 49 PERB ¶ 3030 (2016) (appeal pending), the City filed an improper practice charge alleging that the PBA violated its duty to negotiate in good faith, in violation of § 209-a.2(b) of the Act when, after the PBA opposed the City’s petition seeking interest arbitration for the period January 2011 to December 2013, the PBA declined to negotiate with the City for an agreement for the period beginning 2014.

In that case, the City and the PBA had engaged in collective negotiations for an agreement for the period beginning January 2012. When the matter was not resolved

after the parties' participation in mediation pursuant to the Act's impasse procedures, the City filed a petition seeking binding interest arbitration. In its response to the petition, the PBA opposed interest arbitration, stating that it would not participate in the arbitration phase of the Act's impasse procedure and was electing, instead, to "stand on the continuation of the expired agreement for the two year period over which an Interest Arbitration Panel would have had jurisdiction, namely 2012 and 2013." *Id.* Based on the PBA's position, PERB declined to process the City's petition for interest arbitration.

Thereafter, the City sent a letter to the PBA advising that it was the city's position that the terms and conditions for 2012 and 2013 had been resolved "by virtue of the PBA electing to stand on the expired agreement by refusing to participate in binding interest arbitration process," and sought to begin negotiations with the PBA for an agreement that would begin January 1, 2014. The PBA responded to the City with a letter stating that it disagreed that it had, by its refusal to participate in the arbitration process, forfeited its right to negotiate contract terms for the period covering 2012 and 2013 and it demanded negotiations for the period beginning January 1, 2012, and not January 1, 2014, as sought by the City. Thereafter the City filed the charge alleging that the PBA had violated § 209-a.2(b) of the Act when it refused its request to negotiate for the terms of an agreement beginning January 1, 2014.

More than once in its decision, the Board emphasizes the Act's interest in finality and that finality was not achieved despite the fact that the parties negotiated in good faith and exhausted PERB's impasse procedures. The Board also notes that the employer's efforts to achieve finality were "thwarted" by the PBA's electing to stand on its rights under § 209-a.1(e) of the Act:

although the parties here are entitled to a final determination of their contractual rights through mandatory interest arbitration, one party can, by standing on its *status quo* rights, prevent such a final determination from taking place.

The Board further states that "the process designed to achieve finality was effectively thwarted, despite the City's best efforts to achieve that finality." *Id.* The Board again repeats that the City negotiated in good faith and that "only the PBA's

exercise of its right to decline to participate in interest arbitration prevented such a final resolution.” *Id.*

The Board then finds as follows:

As a result, the corollary question arises of whether the other party, which has exhausted all statutory negotiation and conciliation processes in good faith, can be compelled to negotiate over the *status quo* period even though agreement was prevented by external circumstances wholly outside that party’s control. We find, as explained more fully below, that the duty to negotiate in good faith over the *status quo* period, here 2012 and 2013, has been satisfied. *Id.*

The Board repeats that finding, stating that the City satisfied its duty to negotiate “for the applicable duration of an interest arbitration award,” that is, for calendar years 2012 and 2013. The Board’s analysis in *Ithaca* makes no mention of the legislative history that drove the analysis in both *County of Niagara*⁵⁵ and *City of Kingston*.⁵⁶

However, the Board’s decision in *Ithaca* may be seen as consistent with *County of Niagara* to the extent that, in that case, the Board stated that its reading of § 209.1(e) of the Act did not effectively nullify the impasse procedures of § 209 of the Act. Since *Niagara* dealt with legislative imposition, the Board in that case held that a *legislative* body

is still free to impose terms and conditions of employment not dealt with in the expired agreement. *It may also impose the terms and conditions of employment contained in the prior agreement for an additional year, thereby foreclosing further negotiations for that period* [emphasis added].

The Board’s decision in *Ithaca*, therefore, might be seen as an extension of the analysis of *County of Niagara* to cases involving binding interest arbitration. That is, the interest arbitration panel, as the legislative body, may impose the terms and conditions of employment contained in the prior agreement. The variation in the period of

⁵⁵ *Niagara County Legislature and County of Niagara*, 16 PERB ¶ 3071 (1983), *annulled sub nom. County of Niagara v New York State Public Employment Relations Board*, 122 Misc2d 749, 17 PERB ¶ 1703 (Sup Ct, Niagara County 1984); *judgment of Supreme Court reversed and petition to stay enforcement of PERB’s decision dismissed*, 104 AD2d 1, 17 PERB ¶ 7021 (4th Dept 1984).

⁵⁶ 18 PERB ¶ 3036 (1985), *and petition to stay enforcement of PERB’s decision dismissed*, 104 AD2d 1, 17 PERB ¶ 7021 (4th Dept 1984).

imposition, two years instead of the one year, can be accounted for by the differences in those procedures.

Additionally, in *Ithaca*, the Board takes the added step of discussing what occurs when a union includes in its demands for negotiations proposals that pertain to terms and conditions of for the period of imposition of the terms of the prior contract. The Board, finds that a union does not violate the Act by doing so, as long as it does not impose the negotiations of those terms as a condition on bargaining, and as long as it does not insist on those terms “to impasse.” In other words, the Board treats the demand for negotiations of the period of imposition as a nonmandatory, but permissive subject of negotiation.

COLLECTIVE BARGAINING IN A TAX CAP ENVIRONMENT

HAS STRATEGY IN REGARD TO TRIBOROUGH CHANGED

- The Tax Cap was signed into law in June 2011 and became effective with fiscal years commencing in 2012.
 - The statewide tax cap figure for 2016-2017 was .12%. The statewide tax cap figure for 2018-2019 is 2%. In 2004-2005 school district average tax levy increases was 8.26%.
- Preparation for bargaining is critical. Even more of an emphasis on analyzing budgets, scattergrams, determining the applicable 1% number.
- While Labor and Management have always bargained in poor economic times, the Tax Cap has changed the landscape.
 - It has resulted in some legitimacy to Management's assertion that a dollar is a dollar in response to Labor's traditional position that there is new money and old money and we only negotiate over new money.
 - For instance, for those bargaining units with increment/step salary schedules, it is critical to determine the employer's cost of increment. This is the number one "old money" issue. Others include longevity increases, educational advancement (i.e., column movement in school districts) and any other built in salary/monetary increase that has been previously negotiated.
 - It has become a challenge for some unions to be able to protect the integrity of a step/increment schedule while also growing the salary schedule as a whole.
 - Unions should consider intense (real) bargaining during the time period leading up to the date that a step/increment is paid. Depending on the cost of increment, achieving a retroactive salary increase may be difficult.
 - Strategies include delaying the implementation of a step/increment (1/2 step if paid halfway through the year), dividing a step increase over two years (1/2 the value of a step increase in consecutive years) or even freezing steps.
 - Some settlements have utilized creative formulas which utilize the tax levy.
 - There has been an increase in the restructuring of salary schedules to decrease or slow down the cost of step/increment, particularly for those contracts that have a high cost of step. The trade-off typically

is an increase to top salary. It will just take an employee longer to reach this higher top salary.

- Unions should be careful in how these “step” provisions are drafted to ensure the integrity of the step schedule going forward. Use specific dates and avoid language with only an effective date and no ending date (e.g., effective January 1, 2013 all steps on the salary schedule shall be frozen).
- Unions may want to focus on non-monetary items or “quality of life” issues.
- Management should be cautious about becoming too comfortable on what may appear to be the impact of the tax cap. Unions are better educating their members on the financial impact of all terms and conditions of employment (pension, health insurance) and it may lead to new strategies.

WHAT ABOUT TRIBOROUGH?

- The granting of steps during an interim period continues to serve its intended purpose to maintain labor peace during what may be a difficult contract negotiation.
- Post-Tax Cap bargaining has emphasized the term “Triborough costs” and phrases like costs “exceeded Triborough” or “came in below Triborough” became more commonplace.
- Certainly, the granting of steps continues to serve as a safety net for unions as a way of providing salary increases during an interim period. This is particularly true during a contract negotiation in which the employer is seeking unreasonable concessions.
- However, due to the lack of retroactive salary increases, unions are less comfortable in sitting back for extended interim periods. Each time a step or “old” money is granted, the union is missing an opportunity to allocate money in areas that it may prefer. As a result, the prospect of an impending interim period has motivated unions to make a sincere effort to reach an agreement for a successor agreement before it expires as opposed to sitting back and waiting for Triborough to kick in which used to be more common.
- Even though steps are granted, an interim period will likely result in a salary schedule remaining status quo without any growth.
- Triborough remains an impediment to an employer that is seeking to reduce its personnel costs to a number that is below the “Triborough cost.”