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L&E Newsletter

A publication of the Labor and Employment Law Section
of the New York State Bar Association

A Message from the Chair

As I write this, the World Trade Center no longer exists, colleagues, friends and family have died, offices are lost, travel has slowed, the economy has dipped, anthrax seems to be more and more of a threat, and everywhere people carry on with a "we can do it" attitude. And we are doing it. Thank you to all our colleagues, members and officers of our Section and the New York State Bar Association for offering space, assistance and encouragement. There is not sufficient room here to enumerate the specifics but many of us know of the generosity of our colleagues. I believe my first "Message from the Chair" addressed the kindness and support our Section members so freely gave. This, my third message, again calls attention to the presence of that spirit on an even grander scale. Membership in our Section, and in the NYSBA overall, provides a greater benefit than any of its parts. Indeed, the greatest benefit of being in our Section is being a part of it.

On a more concrete note, our Executive Committee and our CLE Committee are identifying programs that can be of assistance to our members and to NYSBA overall. Future programs, and the one at our Annual Meeting in January 2002, will devote a portion of its program to the newly emerging issues which have resulted from the attacks. Laws that were on the back burner are now coming forward, offering relief to employees and responsibilities to employers. For example, some questions we will endeavor to discuss are: (1) Whether, under the Americans with Disabilities Act, an employer must accommodate employees' needs resulting from emotional damages suffered by that employee as a result of these attacks? (2) Will the attacks qualify as an event under the Family Medical Leave Act which entitles an employee to 12 weeks of leave (with reinstatement) for difficulties suffered as a result of the attacks? (3) What are the rights of contract and other employees when a business relocates as a result of the attack? (4) Do absence policies have to be modified to address absences of employees when the absences are related to the attacks? (5) What issues need to be negotiated with the union(s) in an organized workplace? (6) Is an employer obligated to take specific action to protect discrimination and harassment of employees of Middle Eastern origin both in the workplace and in meeting customer demands? (7) Are there any special obligations to employees who are called up to serve in a military capacity? These, of course, are just a few questions our presenters will address at our Annual Meeting and at other programs being planned.

Most of our practices have been and will be affected by the terrorist attacks. We are all involved in addressing

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major issues and, in effect, defining and creating new law. How will we meet this challenge? Can we, as we must, use our unique positions to assure that the law which will develop meets our ethical and professional responsibilities as both advocates and officers of the courts? Will legislation that may develop under our influence provide adequate guidelines which respect the integrity of employees, labor and management? This is our obligation and there is no greater body of lawyers than ours to proceed ethically, in good conscience and in the pursuit of justice for all.

Over the years, we have traditionally participated in Labor vs. Management softball games and have teased each other with ease. Many of us have become friends. Yet, we all recognize that we are bound to represent our clients to the fullest in a context that will assure profits, a decent wage and a workplace free from unnecessary stress and distress. Unlike other areas of legal practice, we recognize that relationships among labor, management and employees continue long after the dispute is resolved. The resolution must "work" as it has long term effect. When our Section has submitted *amicus* briefs or commented on legislation, it has looked for appropriate solutions which are workable. We are negotiators and recognize the needs of all parties involved in the negotiations. We must use these unique and extraordinary skills to achieve a relative peace between us as we fight this war against terror. We can and must be the best that we can be.

Linda Bartlett

2002 New York State Bar Association

ANNUAL MEETING

January 22-26, 2002

Labor and Employment Law Section Meeting
Friday, January 25, 2002
New Yorker Hotel

From the Editor

There is nothing original to write about the disasters that have occurred since the last edition of this *Newsletter* came out. Everyone has lost someone or something and we are all bearing the unbearable.

Doing it together makes it easier. The New York State Bar Association has published information and resources at www.nysba.org as a service to attorneys and the public. There is a listing of new offices and contact information for attorneys and clients, opportunities for attorneys who wish to volunteer to help victims in New York and New Jersey, and numerous links to sources of financial and professional assistance. The listings are updated frequently and include legal updates for New York practitioners.

I was at the University of Leicester in October, to complete some of the requirements for an LL.M. degree in European Union Law (with a "specialism" in employment law—one of my favorite "over there" expressions). It was heartening to hear the most sincere expressions of grief and sympathy from our international class of students, as well as from people I met throughout Britain.

I happened to visit both Blenheim Palace and the War Cabinet Rooms Museum. Listening to the recordings of Winston Churchill's wartime speeches had a special resonance and significance now. At an exhibit showing the people of London going about their daily routines amid the ruination of the Blitz, I saw that continuing to live our lives is the answer to the terrorists.

In that spirit, I thank those who were able to contribute articles to this edition: Gary Johnson, Judith La Manna, Arthur Riegel, James Steinberg and Richard Zuckerman. Because this edition of the *Newsletter* is later than usual, there will be a shorter lead time before the next. I hope that other members of the Section will be able to take some time to write articles of interest to our colleagues for the coming issue, so we can go forward.

Janet McEneaney

Request for Articles

If you have written an article, or have an idea for one, please contact

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Articles should be submitted on a 3-1/2" floppy disk, preferably in Microsoft Word or WordPerfect, along with a printed original and biographical information.

General Municipal Law § 207-c Eligibility: What's Changed Since *Balcerak*

By Richard K. Zuckerman

Section 207-c of the General Municipal Law, enacted in 1961, expressly provides that a police officer shall be entitled to specific benefits provided he or she is "injured in the performance of duties" or "taken sick as a result of the performance of duties."[1] Until the 1999 Court of Appeals' decision in *Balcerak v. County of Nassau*,[2] the courts of this state were divided on the issue of whether a determination by the Workers' Compensation Board that an injury or illness arose out of and in the course of employment was dispositive of an employee's entitlement to section 207-c benefits for that same injury or illness.[3]

In *Balcerak*, however, the Court of Appeals held that the issues to be determined in a workers' compensation proceeding were sufficiently dissimilar from those to be determined under General Municipal Law § 207-c to preclude giving so called "collateral estoppel" effect to the workers' compensation determination.[4] Accordingly, the Court held that a finding in favor of workers' compensation benefits has no bearing on whether or not section 207-c benefits should be granted.[5]

In reaching this conclusion, the Court of Appeals contrasted the intent of the Workers' Compensation Law with that of General Municipal Law § 207-c. The Court explained that the Workers' Compensation Law, "is the State's most general and comprehensive social program, enacted to provide all injured employees with some scheduled compensation and medical expenses, regardless of fault for ordinary and unqualified employment duties."[6]

The Court of Appeals characterized General Municipal Law § 207-c, by contrast, as evincing a legislative intent to provide the benefits set forth therein only in cases where covered employees sustained injuries incurred in the performance of "special work related to the nature of heightened risks and duties."[7] According to the Court of Appeals:

> General Municipal Law § 207-c benefits were meant to fulfill a narrow and important purpose. The goal is to compensate . . . employees for injuries incurred in the performance of special work related to the nature of heightened risks and duties. These functions are keyed to "the criminal justice process, including investigations, presentencing, criminal supervision, treatment and other preventative corrective services.[8]

Post-*Balcerak* Decisions

Following *Balcerak*, a covered employee may be eligible for section 207-c benefits if his or her injury or illness satisfies the "heightened risk and duties" standard. If it does, then section 207-c benefits are available. If not, then the covered employee may receive workers' compensation benefits, but not section 207-c benefits. The practical effect of the *Balcerak* decision has been to eliminate the Workers' Compensation Board as a forum to determine whether an injury or illness is within the purview of section 207-c and to replace it with a system where those determinations are rendered solely by covered employers, invoking their own procedures.

A. Cases Denying Benefits

As the decisions that follow demonstrate, section 207-c benefits have been routinely denied where the work-related injury was not sustained due to the "heightened risks and duties" involved in the job. In *Balcerak*, on remand from the Court of Appeals, the Appellate Division, Second Department, determined that the county had a rational basis for determining that a correction officer's injuries were not sustained in the performance of his duties when he was involved in an automobile accident, in his private car, while on his way home from his post guarding an inmate at a hospital.[9] Relying on the fact that the officer was injured *after* he was relieved of his post, the Court agreed with the supreme court's determination that the officer was not entitled to section 207-c benefits because he was not injured in the performance of his duties.[10]

In *Ertner v. County of Chenango*,[11] the Third Department concluded that section 207-c benefits were properly denied where a corrections officer sustained injuries when she fell while going downstairs to inspect the first-floor cells of the jail, because the injury did not occur as a result of a "heightened risk peculiar to the performance of the duties of such an officer." The court explained:

> [I]t would be virtually impossible to enumerate each and every instance in which an employee would be entitled to General Municipal Law § 207-c benefits as opposed to workers' compensation benefits (and such determinations must, of necessity, be made on an ad hoc basis), two rather classic examples come to mind: a police officer injured while pursuing a fleeing felon and a correction offi-

> cer injured while trying to quell a prison riot. At the opposite end of that spectrum is a case such as this. It can hardly be said that an injury incurred while a correction officer is going up or down stairs at his or her place of employment is one incurred as a result of a heightened risk peculiar to the performance of the duties of such an officer.

In *Wynne v. Town of Ramapo*,[12] the court affirmed the denial of a police officer's application for section 207-c benefits where the officer, while off-duty and on vacation outside of his department's jurisdiction, injured his hand while breaking a window to free a child from a car. Because the officer was off-duty when he sustained his injury, the court determined that section 207-c benefits were unavailable.

In *Moshier v. City of Little Falls*,[13] the Fourth Department determined that section 207-c benefits were unavailable because the officer did not sustain a duty-related injury or illness. Unfortunately, the decision does not describe the type of injury or any details as to how it was sustained.

In *Clements v. Panzarella*,[14] section 207-c benefits were denied where, although the police officers were injured in the performance of their duties,[15] the kind of injuries they sustained "were not 'heightened' by the fact that they were police officers involved in 'the criminal justice process.'"[16]

In *Stalter v. Scarpato*,[17] three police officers sought review of their employer's denial of section 207-c benefits. One officer alleged that he injured his foot when he slipped off the curb while investigating an automobile accident, while another officer alleged that he injured his knee when he stepped off the rear of a truck while conducting a commercial vehicle inspection. The third officer alleged that he was injured on six separate occasions: (1) a back injury from slipping and falling while evacuating a burning building; (2) a back injury from two separate motor vehicle accidents while driving his patrol car; (3) a foot injury from falling out of a police barricade truck; (4) a re-injury to his foot from tripping over a hose on the garage floor; and (5) a back injury from being kicked while investigating a domestic disturbance. The court affirmed the denial of section 207-c benefits for the first two officers because, even though the officers were injured in the line of duty, their injuries were not caused by the "special work related to the nature of heightened risks and duties involved in the criminal justice process." With respect to the third officer, the court determined that his back injuries that were sustained while evacuating a burning building and being kicked during the investigation of a domestic dispute were "conceivably" covered by section 207-c.[18]

In *Pratti v. County of Sullivan*,[19] section 207-c benefits were denied where a police officer tripped on a rug while proceeding to answer the patrol phone, injuring his knee, because his on-the-job injury was not sustained "while performing the inherently dangerous duties of a deputy sheriff, as intended to be included within the ambit of GML Section 207-c."[20]

In *Dobbertin v. Town of Chester*,[21] section 207-c benefits were denied where a police officer was injured when she slipped on a snow-covered driveway while returning to her patrol car following an investigation.

B. Cases Granting Benefits

As the following cases demonstrate, several courts have continued to grant section 207-c benefits notwithstanding the *Balcerak* decision. These courts generally explain that the relevant language in *Balcerak* was *dicta*, contrary to the broad statutory language of section 207-c.

In *Theroux v. Reilly*,[22] the court ruled that four of the five corrections officers who had challenged the denial of section 207-c benefits were entitled to those benefits. The injuries at issue were: (1) a shoulder injury when a door was opened while the officer was supervising inmates cleaning a hallway at the jail; (2) an eye injury from accidentally walking into the corner of a suspended television set hanging from the ceiling while conducting an inmate count; (3) shoulder and neck injury caused when, while in the process of making a log entry, the chair in which the officer was sitting broke and collapsed beneath him; (4) lower back injury caused by opening a kitchen door to enable inmates to enter the kitchen; and (5) ankle injury caused when the officer slipped off the edge of a sidewalk in front of the jail while entering the jail to commence a work shift. The court explained that the first four injuries were compensable under section 207-c because they occurred in the performance of the officers' duties. In contrast, the injury that occurred as the officer was entering the jail to *begin* his work shift was not sustained in the performance of his duties, as his shift had not yet begun.

In *Schafer v. Reilly*,[23] two correction officers challenged the denial of section 207-c benefits where one officer sustained a back injury when an operator-controller corridor gate at the jail closed as he was walking through and pinned him against the door jamb, and the other officer suffered a head injury from walking into a suspended television set after being distracted by an inmate and while on his assigned cell block security patrol. The court reasoned that section 207-c benefits were available because these injuries were sustained during the performance of the officers' duties, rejecting the *dicta* in *Balcerak*.

Finally, in *Brasca v. Panzarella*,[24] a police officer tripped over a "PVC" sewer line while on duty when he was walking from his patrol vehicle to a temporary headquarters trailer and sought disability benefits pursuant to section 207-c. The court ruled that section 207-c benefits were available if the officer was injured while in the furtherance of his police duties, explaining that section 207-c is a reme-

dial statute that "must be liberally construed in favor of those [it is] intended to benefit."[25]

Pending Legislation

In June, 2001, the New York State Legislature passed a bill that would effectively overrule the *Balcerak* decision by eliminating the intentional statutory distinction between entitlement to workers' compensation benefits and General Municipal Law § 207-c benefits.[26] The legislation would also empower the Workers' Compensation Board to make controlling determinations for benefits pursuant to section 207-c.[27]

The legislation further would amend General Municipal Law § 207-c to replace "is injured in the performance of his duties or who is taken sick as a result of the performance of his duties or who is taken sick as a result of the performance of his duties" with "suffers an injury or illness arising out of and in the course of his employment, within the meaning of the workers' compensation law," and to change the language that such injury or sickness "was incurred during, or resulted from such performance of duty" to "arose out of and in the course of such employment."[28] It would also add that, "[a]ny award or decision of a workers' compensation board referee which determines whether or not an injury or illness arose out of and in the course of employment, within the meaning of the workers' compensation law, unless reversed or modified on appeal, shall be a final and conclusive determination between the parties to the workers' compensation proceeding, as to whether or not the same injury or illness arose out of and in the course of employment within the meaning of this section."[29] In other words, a workers' compensation determination that an injury or illness arose out of employment will be conclusive for requests for benefits pursuant to General Municipal Law § 207-c. The legislation would become effective immediately and retroactively to December 16, 1999. As of this date, the Governor has not acted upon this bill, which has been vigorously opposed by many municipalities and their advocates.

Conclusion

It may be expected that the majority of the courts addressing the issue will continue to apply the *Balcerak* decision as written, at least until it is overruled by pending legislation. Until then, municipalities should be certain to make use of their current window of opportunity to review pending and prior General Municipal § 207-c (and section 207-a determinations) in light of the standards set forth in *Balcerak* and its progeny.

Endnotes

1. Gen. Mun. Law § 207-c.
2. 94 N.Y.2d 253, 701 N.Y.S.2d 700 (1999).
3. *Compare O'Hara v. Bigger*, 228 A.D.2d 507, 644 N.Y.S.2d 298 (2d Dep't 1996) (decision of the Workers' Compensation Board did not preclude a hearing on the issue of whether the police officer's injuries occurred in the performance of his duties for General Municipal Law § 207-c purposes) *with De John v. Town of Frankfort*, 209 A.D.2d 938, 619 N.Y.S.2d 229 (4th Dep't 1994) (Town was bound by the unappealed Workers' Compensation Board determination that the police officer's injuries occurred during the performance of his official duties and, accordingly, the police officer was entitled to disability benefits pursuant to § 207-c).
4. 94 N.Y.2d at 261, 701 N.Y.S.2d at 704.
5. *Id*.
6. *Id*. at 259, 701 N.Y.S.2d at 703.
7. *Id*.
8. *Id*. (citation omitted).
9. 711 N.Y.S.2d 501, 502 (2d Dep't 2000).
10. *Id*.
11. 280 A.D.2d 851, 720 N.Y.S.2d 410 (3d Dep't 2001).
12. 728 N.Y.S.2d 785 (2d Dep't 2001).
13. 281 A.D.2d 913, 721 N.Y.S.2d 848 (4th Dep't 2001).
14. No. 7771/00 (Sup. Ct., Nassau Co., Sept. 22, 2000) (Winick, J.).
15. One officer injured his back when he slipped and fell while clearing away police lines; the other injured his elbow when he fell while descending a flight of stairs.
16. *Id*.
17. No. 11203/00, N.Y.L.J., Dec. 1, 2000, p. 32 (Sup. Ct, Nassau Co.) (Winick, J.) (appeal pending).
18. *Id*.
19. No. 1067/99 (Sup. Ct., Sullivan Co., July 9, 1999) (Kane, J.).
20. *Id*.
21. No. 5735/00 (Sup. Ct., Orange Co., Dec. 22, 2000) (Slobod, J.) (appeal pending).
22. No. 014251/00, 2001 WL 459132 (Sup. Ct., Nassau Co., Feb. 7, 2001) (DeMaro, J.) (appeal pending).
23. No. 20497/00 (Sup. Ct., Nassau Co., Apr. 19, 2001) (Davis, J.).
24. No. 13265/00 (Sup. Ct., Nassau Co., Sept. 25, 2000) (De Maro, J.) (appeal pending).
25. *Id*.
26. *See* New York State Senate Bill No. S. 5279-A, 2001-02 Regular Senate Session (N.Y. May 9, 2001); New York State Assembly Bill No. A. 8587-A, 2001-02 Regular Assembly Session (N.Y. April 26, 2001). It should be noted that this legislation would not affect General Municipal Law § 207-a, which applies to firefighters.
27. *Id*.
28. *Id*.
29. *Id*.

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Participant-Directed Investment Programs— What Role Shall Investment Advisers Play in the Future?

By James M. Steinberg

In 1974, the Employee Retirement Income Security Act[1] (ERISA) was passed by Congress to provide working Americans with statutory protection of their retirement assets. In connection with jointly managed Taft-Hartley plans, ERISA established the standards for the administration of defined benefit and contribution pension plans. These plans are usually administered by joint boards of trustees representing union and management. Over the years, the investment philosophy concerning these plans has matured from solely relying on GICs, to the retention of investment managers who specialize in fixed income or equities, to the current trend of establishing participant-directed investment programs under section 404(c) of ERISA.

From a trustee's point of view, the establishment of a section 404(c) plan relieves him from some of his fiduciary duty. So long as a plan participant is allowed to independently allocate his investments, trustees cannot be held liable for the participant's investment decisions. The conditions for relief from liability for investment losses is based upon three key factors. First, participants must have: (1) a broad range of investment alternatives to choose from; (2) the opportunity to give investment instructions with a "frequency that is appropriate in light of the market volatility" of the investment alternatives; and (3) the opportunity to obtain "sufficient information to make informed decisions with regard to investment alternatives available under the plan."[2] Generally speaking, if these conditions are met, section 404(c) relieves the trustees of certain fiduciary liability.

However, trustees are still responsible for monitoring the investment fund options available to participants and for the investments made into the default fund option for those participants who do not actively manage their accounts. Despite these responsibilities, section 404(c) does not impose any obligation upon trustees to provide participants with investment education, although nearly all such plans provide participants with materials and investment education seminars. Most likely in response to plans providing this education, in June of 1996, the U.S. Department of Labor issued Interpretive Bulletin 96-1, entitled "Participant Investment Education." Interpretive Bulletin 96-1 attempted to clarify the level of participant education which could be provided without imposing fiduciary liability upon plan trustees.

Particularly, Interpretive Bulletin 96-1 stated that investment education could include: (1) plan information; (2) general financial and investment information; (3) asset allocation models; and (4) interactive investment materials.[3] With regard to *plan information*, the DOL stated that fiduciary liability is not imposed upon the trustees if it includes the terms of the plan, the benefits available to plan participants and the impact of pre-retirement withdrawals on future retirement income. The DOL further explained that *general financial and investment information* may be provided so long as it does not bear any direct relationship to the investment alternatives offered to participants under the plan. This type of information would include educating participants about financial concepts, asset classes, the effects of inflation on one's account and how to assess risk tolerances. Plan participants may also be furnished with

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asset allocation models such as pie charts, graphs and case studies that show the asset allocation portfolios for hypothetical individuals with differing time horizons and risk tolerances. Lastly, education programs will not impose fiduciary duty upon trustees if *interactive investment materials* focus only on the future retirement income needs of participants and do not suggest specific investment portfolios. The difficulty placed upon plans that provide investment education is that if the education provided crosses the "line" imposed by the DOL and becomes "advice," the trustees will lose the relief from liability articulated in Interpretive Bulletin 96-1.[4]

Although Interpretive Bulletin 96-1 articulates the appropriate standard for investment education, some boards of trustees are contemplating the retention of investment advisers for their participants. This is because some participants are requesting "enhanced" education while some boards are concerned that participants are not taking full advantage of the participant-directed program. Obviously, providing such an advice

component to a participant-directed plan will impose upon trustees additional fiduciary responsibilities which the implementation of a 404(c) plan is supposed to limit. Before one can consider implementing an advice component to a plan, the difference between education and advice must be recognized. Particularly, "education" is the process of providing participants with general investment and financial information, along with asset allocation models incorporating various risk tolerances. Meanwhile, "advice" is personalized, one-on-one investment recommendations provided by a financial adviser that are relied upon by a participant to establish the allocation of his retirement assets.

"[T]rustees must rely on various factors in hiring an adviser, such as his experience, his willingness to acknowledge his fiduciary status, his ability to work one-on-one with participants, and his knowledge of the participants' background and its relevance to how he approaches and discusses issues with them."

In the event that a board decides to institute an advice component to its participant-directed plan, it is of the utmost importance that the adviser retained is a plan fiduciary. For an adviser to be fiduciary, the advice he provides must be: (1) individualized and pertain to the value of property or the advisability of a particular investment; (2) rendered periodically for a fee; and (3) rendered pursuant to a mutual understanding or agreement that the advice will be the primary ground for the participant's investment decisions. Further, in retaining an adviser, the trustees must utilize the prudent man rule. Particularly, the standard imposed upon trustees is to perform their duties with "the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims."[5] What this means is that trustees must rely on various factors in hiring an adviser, such as his experience, his willingness to acknowledge his fiduciary status, his ability to work one-on-one with participants, and his knowledge of the participants' background and its relevance to how he approaches and discusses issues with them.

While trustees are deciding whether or not to retain an investment adviser under ERISA's current parameters, the U.S. House Education & the Workforce Committee unveiled H.R. 2269, entitled the "Retirement Security Advice Act"[6] (RSAA). According to Education & the Workforce Chairman, John Boehner (R-Ohio), the RSAA addresses the need for allowing employers to provide their workers with access to professional investment advice so long as the advisers fully disclose their fees and any potential conflicts of interest.[7] Under this legislation, the Committee's position is that the RSAA will clarify that employers are not responsible for the individual advice given by professional advisers to individual participants, but shall remain responsible under ERISA's fiduciary standard for the prudent selection and periodic review of any investment adviser.

Some of the legislation's highlights according to the Committee appear in the Bill Summary and include:[8]

1. Protection of workers from potential abuses.
2. H.R. 2269 permits investment service firms to provide investment advice about all investment products, including their own, as long as they disclose any relevant information about the advisers' fees and potential conflicts.
3. Investment advice may only be offered by "fiduciary advisers"—qualified entities that are already regulated under other federal and state laws.
4. Investment advisers will be subject to fiduciary liability under ERISA, including civil and criminal enforcement by the U.S. Department of Labor.
5. As fiduciaries, advisers will be personally liable for any failure to act solely in the participant's interest.
6. The use of disclosure as a means of dealing with potential conflicts is well accepted in the securities laws and has been used in a number of ERISA exemptions granted by the U.S. Department of Labor.
7. Existing securities and state insurance law protections will continue to apply as well.

Although participants must be provided with the best possible advice on how to invest their retirement money, the role that investment advice should play must be thoroughly reviewed. In principle, the theory behind the RSAA is sound: provide participants with reliable investment advice through qualified professionals while relieving trustees of the responsibility regarding the actual advice provided (with the exception of the trustees' responsibility to prudently retain and monitor the investment adviser). However, this legislation would create an exemption to ERISA's prohibited transaction rule,[9] by allowing plans to contract with just one firm to manage participants' investment assets and provide its participants with investment advice. Under the RSAA, such an arrangement would be appropriate so

long as the investment firm/adviser disclosed this conflict to the participants. This exception seems to fly in the face of the strict and delineated lines drawn by ERISA with regard to fiduciary duties, disclosure obligations and prohibited transactions.

"By allowing an investment firm to not only manage assets, but also provide participants with advice regarding how their portfolios should be diversified, the chances for abuse are inherent."

Under any investment advice component, the key is that participants must be provided with objective, unbiased information concerning the investment options available under their plan. By allowing an investment firm to not only manage assets, but also provide participants with advice regarding how their portfolios should be diversified, the chances for abuse are inherent. This has already been recognized by several providers of participant-directed investment programs. These investment firms refuse to provide investment advice and instead recommend third-party investment adviser firms such as mPower and Morningstar. Such an investment adviser firm is then independently and contractually retained by the trustees to provide objective investment advice. Unfortunately, without any expressed provisions under ERISA addressing the potential liability imposed on trustees who retain investment advisers for their plan's participants, boards will be exposing themselves to liability which they should not otherwise take on under ERISA's current requirements.

As the RSAA proceeds through congressional hearings and debates, revisions thereto should be considered to establish protections for employers and trustees in the retention of third-party investment advisers. Particularly, the RSAA should not be a tool that allows investment firms the right to manage assets and advise participants. Instead, this legislation should focus on establishing for trustees a standard of responsibility in the retention of an investment adviser that mirrors the standard established under section 404(c) of ERISA. As trustees are responsible for the retention and monitoring of investment providers while being relieved of the responsibility of the investment decisions made by a participant who is actively managing his retirement account, so to should trustees be relieved from the results of investment advice provided to participants by a financial adviser who has been prudently retained and monitored. If such definitive legislation is enacted, many boards may seek to retain investment advisers since they will have the statutory protection from liability necessary to assist plan participants in the twenty-first century.

Endnotes

1. 29 U.S.C. §§ 1001 *et seq*.
2. 29 C.F.R. § 2550.404 c-1.
3. 29 C.F.R. § 2510.3-21(c)(1).
4. Howard W. Hans & Lauren A. Bradbury, "Improving Participant Investment Choices through Education and New Fund Models," Journal of Taxation of Employee Benefits, Vol. 4, No. 1 (May/June 1996).
5. ERISA § 404(a)(1)(B).
6. A summary of the bill, along with its text and testimony from the hearings held on July 17, 2001, before the Subcommittee on Employer-Employee Relations, may be found at the Committee's Web site at edworkforce.house.gov.
7. Bill Summary, H.R. 2269—Retirement Security Advice Act, at edworkforce.house.gov/issues /107th/workforce/erisa/summary.
8. *Id*.
9. ERISA § 406.

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Recent Taylor Law Developments

By Gary Johnson

This article reviews the substantive decisions issued by the New York State Public Employment Relations Board (PERB) between April and September 2001, and relevant legislation enacted and approved during that period. Readers should always refer to the full text of the decisions and legislation noted.

Pleadings: Affirmative Defenses

Does a respondent to a discrimination charge have to affirmatively plead the "legitimate business reasons" defense? Does not pleading that defense bar the respondent from proving that it had a legitimate business reason for taking the action that allegedly violated the Taylor Law?[1]

The charge in *State of New York* alleged that the state unlawfully retaliated against Hoefer, a union steward, because he got a local newspaper to relocate a newspaper box on a state university campus for worker-safety reasons. The state counseled Hoefer for getting the box moved.

The state's answer denied that the counseling session was improperly motivated, but did not affirmatively allege a legitimate business reason for counseling Hoefer. For that reason, at the hearing, the Assistant Director declined to consider any evidence of a legitimate business reason. He found a violation.

The Board reversed on the pleading issue, but affirmed the finding of a violation. The rule in interference and discrimination cases has long been that if the charging party proves a *prima facie* case of improper motivation, the burden of going forward shifts to the respondent to show that it acted for legitimate business reasons. The Board has never required a respondent to plead that defense before it could introduce evidence to meet its burden of going forward in an interference or discrimination case.

In fact, as the Board's decision pointed out, it has always rejected proposals from its clientele to amend the Rules of Procedure to require respondents to affirmatively plead any non-discriminatory reasons for their allegedly unlawful actions. As it had in response to those proposals, in *State of New York* the Board again declined to impose that burden on respondents. Doing so, the Board felt, might compromise settlement efforts, or distort the parties' respective burdens of proof. In addition, the Board said, the availability of a motion for particularization affords charging parties adequate protection against surprise.[2]

The Assistant Director, however, had made an alternative finding based on the state's evidence of a legitimate business reason, and still found a violation. The Board did not disturb that determination.

Improper Practices: Deferral

A charge complains of conduct which, if proven, violates the Taylor Law as well as the parties' contract. Should an Administrative Law Judge (ALJ) always defer decision on the merits of such a charge to binding arbitration if it's available?

The ALJ found in *Schuyler-Chemung-Tioga BOCES* that PERB had jurisdiction over a union's charge that a Board of Cooperative Educational Services (BOCES) violated Civil Service Law § 209-a.1 (a) and (d), when it refused to provide information that the union requested in its investigation of a potential grievance. The ALJ recognized that a failure to provide information necessary to administer a collective bargaining agreement (CBA) would violate subparagraphs (a) and (d), but he deferred the charge to the parties' binding arbitration procedures. The CBA required BOCES to make documents relevant to a grievance available to the union, unless the documents were confidential.

Echoing its 1992 *City of Albany* decision,[3] the Board looked at the "a" and "d" allegations separately. First of all, *City of Cohoes*,[4] did not apply, because the relevant language in the CBA did not mirror section 209-a.1 (a). At best, the contract gave the union rights that were similar to those that flow from subparagraph (a). Moreover, as relevant here, *Cohoes* held only that proposals to duplicate statutory language in a CBA are mandatory because bargaining might result in adding rights to those enjoyed under a statute. *Cohoes* was not an indication that the Board was prepared to abandon its long-held policy not to defer alleged violations of subparagraph (a) unless they are purely derivative of a corresponding allegation of a violation of subparagraph (d).

Perhaps most important, deference to arbitration to determine whether the Taylor Law has been violated in such circumstances is ill-advised for a number of reasons unrelated to *Cohoes*. For example, the standards of proof in improper practice and arbitration proceedings differ, and the remedies available to an arbitrator may not adequately effectuate the Taylor Law's policies. Parties who prefer arbitration can include in their contracts an unambiguous election to arbitrate contract disputes that might also involve an improper practice. But even if

they do, they don't divest the Board of its improper practice jurisdiction. They simply waive their rights to proceed before the Board.

Turning to the alleged violation of subparagraph (d), the Board held that that allegation was not subject to the Board's jurisdictional deferral policy, because it was inextricably intertwined with the alleged "a" violation. Having said that, the question was whether PERB had jurisdiction over the alleged "d" violation. The Board found that it did. Section 205.5 (d) specifically reserves PERB's jurisdiction where an alleged violation of an agreement would "otherwise constitute an improper practice." So the Board had jurisdiction even if the respondent's conduct arguably violated the parties' contract.

That left a final question. *Should* the Board exercise its jurisdiction over the alleged "d" violation? The union had a pending grievance, complaining of the same conduct, which was subject to binding arbitration. Where there are other alleged violations that PERB has exclusive jurisdiction over, like the alleged violation of subparagraph (a) at-issue here, the Board does not bifurcate the proceedings. It retains jurisdiction over all the allegations in the charge. Therefore, the Board remanded the charge to the ALJ for a decision on the merits.[5]

Fragmentation of Existing Bargaining Units

Fragmentation was the issue in *County of Steuben*.[6] The petition in *Steuben* sought to fragment 53 supervisors from a unit of approximately 762 county employees that had existed over 30 years. While the supervisors had input into hiring, the retention or termination of employees on probation and promotion decisions, there were several layers of decision-making supervision above these supervisors, and the local administrative code and the parties' collective bargaining agreement significantly limited the supervisory authority that they exercised. The nature of their responsibilities was insufficient to justify their fragmentation from a long-standing bargaining unit. While there had been conflicts between these supervisors and employees they supervised, natural to any supervisor-supervisee relationship, they did not justify fragmentation either.

An employer's application to have an employee designated managerial or confidential can affect the scope of a bargaining unit. The Board denied a "confidential" designation to the county's assistant director of nursing in *County of Otsego*[7] because the position she allegedly worked in a confidential capacity to, the director of nursing, did not meet the statutory criteria for a managerial designation. The director of nursing had no independent role in collective negotiations or personnel administration.

Duty of Fair Representation

Finding a violation of a union's duty to fairly represent employees turns on the charging party pleading and proving that the union acted in an arbitrary, discriminatory or bad faith manner. The Board affirmed the dismissal of three cases where the charging party's proof failed to meet that standard.

A union did not breach its duty of fair representation by refusing to file a grievance, where the union disagreed with the charging party's interpretation of a contract provision, and told the charging party what its reasons were and that it would try to address his concerns in the next round of negotiations. The charging party's interpretation was not the only possible interpretation, and even if the union's interpretation was incorrect, there was no evidence of discrimination or bad faith.[8] The Board reached a similar result in *United Federation of Teachers, Local 2, AFT, NYSUT, AFL-CIO (Zito)*.[9] Zito was out on unpaid medical leave when he got a notice of suspension, with pay, pending a disciplinary proceeding. The notice related to alleged excessive absences before he went out on medical leave. He grieved the suspension and notice of discipline through steps 1 and 2. But the union told Zito that in its opinion, his grievance had no basis under the contract with the school district and refused his request to move the grievance to step 3.

The Board held that the record showed the union investigated the grievance and found that it had no merit. Zito failed to demonstrate that the union's conduct was deliberately invidious, arbitrary or based on bad faith.

In still another duty-of-fair-representation case dismissed for lack of proof, Ruse, a probationary employee of the New York City Transit Authority, charged that his employer terminated him because of his union activities, and that his union then unfairly refused to represent him. His proof failed to sustain either charge. The record showed the union's extensive communications with him, and, in any event, the parties' agreement barred from arbitration disputes about terminations of probationary employees. As to Ruse's allegations against the employer, there was no proof that he was engaged in a protected activity.[10]

Similarly, the Board upheld the Director's dismissal of a charge based on a stipulated record, where the allegation and proof showed only that the charging party's union had tabled discussion on his grievance until he was present to join in, and that he indicated he wouldn't attend. There was no basis for finding that the union's decision to table the grievance was arbitrary, discriminatory or taken in bad faith.[11]

Jurisdiction and Procedure

A number of cases turned on jurisdictional or procedural issues:

In *Board of Education of the City School District of the City of New York and United Federation of Teachers*,[12] Kresz, the charging party, filed a charge in December 2000, more than four months after the school district allegedly violated the Taylor Law by requiring her to sign in and out. Even though Kresz responded within the time limit that the Assistant Director gave her to address certain deficiencies in the charge, she did not originally timely file the charge. The allegations in the charge against her union were also untimely. She filed the charge more than four months after her union informed her that it would no longer represent her in a disciplinary arbitration hearing.

In *New Rochelle Federation of School Employees, Local 280, AFT/NYSUT, AFL-CIO (Sobie)*,[13] Sobie's amended charge alleged that in October and November 1999, her union declined to assist her in getting a contractual longevity increment that she believed she was entitled to. The union's position was that she was just shy of the required number of years of service. The amended charge also alleged that in December 1999, the union refused Sobie's request to file a grievance.

The charge, originally filed on April 6, 2000, claimed that the union's refusal to help Sobie breached its duty of fair representation to her. Neither her union nor the school district she worked for raised the defense of timeliness in its answer. But at the hearing on the charge, Sobie testified that in November 1999 she asked for the union's help in filing a grievance and it refused her request.

If the violation occurred in December 1999, as alleged in the amended charge, the charge was timely; if the violation occurred in November 1999, as Sobie testified at the hearing, it was not. Under the Board's Rules, if the untimeliness of the charge is first revealed at the hearing, then the ALJ can dismiss. Relying on Sobie's testimony, that's just what the ALJ did.

The Board reversed. It noted that the amended charge was timely on its face, neither respondent had raised timeliness as a defense and the union had in fact made an offer of proof that Sobie hadn't requested it to process any grievance before January 2000. Given all that, plus Sobie's "somewhat confused" testimony, the Board found that there was insufficient conflict between the facts pleaded and Sobie's testimony to dismiss the charge on the basis of untimeliness first revealed at the hearing.

And in *Board of Education of the City School District of the City of New York and United Federation of Teachers (Fearon)*,[14] Fearon's charge was timely, but deficient, as originally filed. Rather than supplement the charge as permitted by the Director's notice of the deficiencies, she filed an amended charge. The Board held that the amended charge superseded the original charge, and that it now pleaded the facts so as to make her filing untimely. It dismissed the charge.

Legislation

Finally, practitioners should note the following legislation affecting public sector labor relations that was enacted and approved this year:

- **Laws 2001, chapter 36.** Extends the agency shop fee provisions of Civil Service Law § 208 to June 30, 2003.
- **Laws 2001, chapter 46.** Extends the injunctive relief provisions of Civil Service Law § 209-a to June 30, 2003.
- **Laws 2001, chapter 58.** Extends the contract dispute resolution procedures in Civil Service Law § 209 (4) that apply to units of firefighters and police officers to July 1, 2003.

Endnotes

1. Civil Service Law §§ 200-214.
2. *State of New York (State University of New York—Oswego)*, 34 PERB ¶ 3017 (May 1, 2001).
3. 25 PERB ¶ 3006.
4. 31 PERB ¶ 3020 (1998) (later history omitted).
5. *Schuyler-Chemung-Tioga Board of Cooperative Educational Services*, 34 PERB ¶ 3019 (May 1, 2001).
6. 34 PERB ¶ 3023 (Jun. 27, 2001).
7. 34 PERB ¶ 3024 (Jun. 27, 2001).
8. *William Floyd United Teachers Local 158 (Flynn)*, 33 PERB ¶ 3053 (Nov. 16, 2000).
9. 34 PERB ¶ 3029 (Aug. 16, 2001).
10. *Transport Workers Union, Local 100 (Ruse), and New York City Transit Authority*, 34 PERB ¶ 3018 (May 1, 2001).
11. *Westchester County Correction Officers Benevolent Association, Inc. (Cioce)*, 34 PERB ¶ 3030 (Aug. 16, 2000).
12. 34 PERB ¶ 3026 (Jun. 27, 2001).
13. 34 PERB ¶ 3028 (Aug. 16, 2001).
14. 34 PERB ¶ 3031 (Aug. 16, 2001).

Gary Johnson is PERB's Associate Counsel and Director of Litigation. Any views expressed in this article are his own, and do not necessarily reflect the views of the Board or any of its officers, employees or agents.

Credit Where Credit Is Due

By Judith A. La Manna

Those of us who write, create and/or practice law are highly sensitive to giving credit where it is due for a great idea, image or argument. For that reason, I give full credit here and now to my friend, Liz Berry, for a descriptive phrase she offered to me recently, under circumstances that make it valuable as a life lesson as well. It may be old and may have been used by others before, but Liz gets the credit from me.

The descriptive phrase is "Personal Pronoun Person." I learned it from Liz on September 14, when my husband and I waited at the Berry home, with other friends and some family. We still had a glimmer of hope to learn of the rescue of Liz's brother, William Burke, Jr., a New York City Fire Department Captain. Bill was, we knew, in the rubble of the South Tower of the WTC, where he had returned to make one more rescue after ushering out his men, just before the tower collapsed. This was a time to be there for our friends.

During the evening, Liz and I found ourselves talking alone on the patio. I complimented the newly finished patio and Liz directed my attention to how the chairs remained arranged from the previous evening, definitely not "around" the round patio table. Five chairs were at one side, and on the opposite side was a single chair.

"That's where the Personal Pronoun Person was sitting," Liz explained, gesturing to the empty chair. Pointing to the grouping, she added, "and that's where the rest of us ended up."

"The what?" I asked.

"The Personal Pronoun Person," Liz repeated. "That's someone whose whole vocabulary consists of 'I, me, my.'"

When the PPP visited the Berry home the previous night, after learning about Liz's brother, she joined the family and others then sitting all around the patio table. Within minutes the PPP managed to define all events in terms of her own problems and woes.

"So what does that have to do with the chairs?" I asked, still confused.

"Well," said Liz. "None of us were aware of it at the time, but little by little as the PPP talked, we started inching around the table to the far side, away from the PPP, and grouping together. Talk about body language."

The Berrys are, each of them, strong people. Liz, a Ph.D. Psychologist, is an anchor for family, close and extended. She is the oldest of six siblings of the Burke family. Billie was the next oldest. Her husband Paul and I worked together in the District Attorney's office. Their two teenage children—Alyson and Michael—are bright, resolute and mature beyond their years.

On the evening of September 14, we were all at the Berry house to do something, whatever we could, for the Berrys. The people there, in an unspoken conspiracy, came together to try to give the Berrys some moments when they were not thinking, hoping, waiting, jumping at each phone call. It is nicer to think that on the previous evening the PPP believed she was also offering comfort, in her own self-centered way, or that her PPP performance was at least a distraction.

In truth, doing for others is a bit of a personal pronoun act. In this time when so much has been destroyed there have been untold acts of kindness, all directed outward, none of them seeming like enough. Some of us would lift concrete with our bare hands or shovel rubble, if allowed. Some give blood, donations, food, time. We have all prayed. We still do. The need to do something to help is selfish, probably, and frustrating when it cannot be fulfilled.

My contributions seem small, my selfish need to do something, for the Berrys, for anyone, impossible to fulfill. Therefore, I am grateful to Alyson Berry for giving me something I could do. It was at her request that I made the Berrys a raspberry-apple pie, which I brought to them on September 14. Trust me, there was never a pie so willingly made. It appears, giving credit to Alyson where the credit is due, she is responsible for a new descriptive phrase: a Personal Pie Person. It's something.

For Your Information

Arbitrator Mentorship Program Update

The Arbitrator Mentorship Program continues to serve the Section. Its two most recent "graduates" are Jerrold Mehlman and Nancy Faircloth Murphy.

Mr. Mehlman launched his career as an arbitrator in 1998 and was mentored in this program by Steven Goldsmith, Rose Jacobs, Randall Kelly and Marilyn Levine. He has almost 40 years of "hands-on" labor experience. He began his career as a field attorney for the NLRB and also served as Deputy Executive Director of Labor Relations and Collective Bargaining for the New York City Board of Education. In the private sector, he was labor counsel at J.P. Stevens and Dow Jones. Mr. Mehlman is listed on the arbitration panels of AAA, FMCS, NYSERB and the New Jersey Board of Mediation.

Ms. Murphy is an alumna of Wells College and was awarded a Master's Degree in Industrial and Labor Relations by the Cornell School of Industrial and Labor Relations. She has been an arbitrator, mediator and fact finder since 1993. Ms. Murphy is listed on the arbitration and mediation panels of AAA, FMCS, NMB, NYSERB and NYS PERB.

The mentors of Ms. Murphy and Mr. Mehlman have unanimously agreed that they possess the skills and abilities to successfully acquit themselves as arbitrators. We wish them well in all their future endeavors.

As for the leadership of the Arbitrator Mentorship Program, it is with great pleasure that I announce that the new Chair of the Program is Steve Goldsmith. Steve is a well-known and highly-regarded arbitrator who is a member of long standing of the Labor and Employment Law Section of the Association, and of the National Academy of Arbitrators.

Arthur Riegel

* * *

In Brief

Irving Perlman has become of counsel to the firm of **O'Donnell, Schwartz & Glanstein**.

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Thank you for your cooperation.

Janet McEneaney
Editor

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