

## **NYSBA Labor and Employment Law Section Annual Meeting**

### **Government Mergers and Consolidations**

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**Presenter:**

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## I. Statutory Framework

### A. The New N.Y. Government Reorganization and Citizen Empowerment Act (General Municipal Law §§ 750-793)

1. Statute took effect on March 21, 2010
2. Application

The Act applies to towns, villages, fire districts, fire protection districts, fire alarm districts, special improvement districts or other improvement districts, library districts, and other districts created by law.

The Act does not apply to school districts, city districts or special purpose districts created under county law.

3. Purpose

The Act establishes uniform procedures for the consolidation and / or dissolution of local governments. Specifically, the Act provides for four types of actions:

- a) Board initiated consolidation;
- b) Voter petition initiated consolidation;
- c) Board initiated dissolution; and
- d) Voter petition initiated dissolution.

4. Unlike its predecessors, the Act:

- a) Establishes uniform, streamlined and simplified consolidation and dissolution procedures;
- b) Empowers governing bodies to initiate consolidation and consolidation processes for all types of local government entities;
- c) Empowers citizens to place consolidation / dissolution on a popular ballot by collecting petition signatures from voters;
- d) Clarifies and defines the petition process and the petition forms so that citizens may more easily initiate consolidations / dissolutions;

- e) Establishes a uniform signature requirement of 10%, or 5,000 residents, whichever is less, to initiate the consolidation / dissolution process. If an entity has fewer than 500 voters, the petition must contain signatures of at least 20% of the voters;
- f) Strikes from the law all pecuniary or property qualifications for signing petitions and / or voting on propositions to consolidate / dissolve a governmental entity; and
- g) Authorizes counties to abolish entire units of local government, subject to certain conditions such as county-wide referendums with special majority requirements.

## **B. New York's Education Law**

Section 1950(4)(d) of the Education Law allows school districts to contract with BOCES for the provision of certain services.

## **C. New York's Civil Service Law**

Section 70 of the Civil Service Law governs the transfer of public employees from one public employer to another.

## **D. The Public Employees' Fair Employment Act (the "Taylor Law") – N.Y. Civ. Serv. Law §§ 200 – 214**

1. Statute took effect in September 1967

This statute was the legislative result of a committee chaired by Professor George W. Taylor of the University of Pennsylvania. The committee was appointed to "make legislative proposals for protecting the public against the disruption of vital public services by illegal strikes, while at the same time protecting the rights of public employees." State of New York, Governor's Committee on Public Employee Relations, Final Report, March 31, 1966.

2. Major components of original Taylor Law:

- a. Granted public employees the right to organize for collective bargaining purposes to negotiate with their employers over the "terms and conditions of employment";
- b. Empowered state/local governments and other political subdivisions to recognize, negotiate with, and enter into written agreements with organizations representing public employees;

- c. Created the Public Employment Relations Board (“PERB”), consisting of three (3) “public members” to assist in the resolution of disputes between unions, public employers and their employees.
- d. Taylor Law modifications/amendments:
  - i. 1969 – Four-step impasse resolution procedure was added:
    - 1. Mediation;
    - 2. Fact finding;
    - 3. Superconciliation (post-fact finding mediation / voluntary arbitration); and, if all else fails,
    - 4. Legislative determination (final settlement voted on by local board, council, or other elected body with power over the budget).
  - ii. 1973 – Retirement benefits become nonmandatory subject of bargaining:
    - 1. Taylor Law amended to specifically exclude retirement benefits from definition of “terms and conditions of employment.”
      - a. Thus, they were no longer a mandatory subject of bargaining.
      - b. Amendment was driven by the growing concern over the cost of public employee pensions and the burden they placed on taxpayers due to their open-ended costs.
    - 2. Amendment later “watered down” to some extent by PERB case law and the inclusion of guarantees of retiree health insurance in collective bargaining agreements.
  - iii. 1974 – Interest arbitration becomes the final step for police and fire impasse procedures:
    - 1. Interest arbitration is compulsory and binding on both the employer and the employee organization;
    - 2. Initially enacted as an experiment, but has been extended every two (2) years since 1974.

- iv. 1974 – Legislative determination step eliminated from school district impasse procedures was seldom used prior to its elimination.
- v. 1982 – The Triborough Doctrine becomes the Triborough Amendment
  - 1. 1972 – In its Triborough decision, 5 PERB ¶ 3037 (1972), PERB established the Triborough Doctrine by holding that following the expiration of a contract, public employers could not unilaterally alter any of its employees' "terms and conditions of employment" while negotiating a successor agreement with the employee organization. The employer was however permitted to unilaterally alter nonmandatory subjects of bargaining during this time period.
  - 2. 1977 – BOCES v. PERB, 41 N.Y.2d 7753 (1977) – a (short-lived) victory for public employers. The Court of Appeals rejected the application of the Triborough Doctrine to increments. It held that after the expiration of a contract, although public employers should continue to pay the salaries in effect at the expiration of the contract, they should not have to continue to pay increments while in negotiations for a successor agreement.
  - 3. 1982 – Triborough Amendment – Restores Triborough Doctrine... and then some.
    - a. Under the Triborough Amendment, a public employer commits an "improper practice" if it refuses to continue all of the terms of an expired contract until a successor contract is negotiated. PERB soon interpreted this to mean that employers must continue to pay for both step and lane movements after the expiration of the earlier agreement and without a successor agreement in place.

## E. Proposed Legislation

In 2012, New York's State Senate Education Committee Chairman, John Flanagan (R-Smithtown), proposed Senate Bill 7486, which would allow three or more school districts to contract together or with a BOCES to create a regional secondary school. This would:

1. Improve instructional quality and students' educational opportunities by helping districts pool educational resources to allow them to provide the educational programming necessary to ensure that students are prepared to succeed in college and careers;
2. Allow districts to leverage resources to provide greater operational flexibility and cost savings;
3. Require boards of education to approve a resolution proposing establishment of a regional secondary school, to be followed by a referendum by voters in each school district;
4. Require SED approval of proposed regional secondary school plans to ensure that the plan provides for increased educational opportunities for students;
5. Provide state aid to incentivize districts that create a regional secondary school and to provide them with resources that may be required through the first five years of a transition; and
6. Preserve rights of teachers during a transition to a regional high school in a manner similar to when a BOCES assumes operation of a school district program.

## **II. Benefits**

### **A. School Districts**

The manner in which school districts are organized in New York is a matter of local determination. According to the New York State Education Reform Commission, more than half of New York's nearly 700 school districts educate fewer than 2,000 students, and yet many have their own administration. This often leads to unnecessary and expensive duplication. The Commission recommended streamlining school district consolidations. According to the Commission, it is imperative that shrinking districts restructure in order to maximize educational opportunities for their students.

Despite the numerous incentives provided by the State to encourage consolidation, very few school districts have consolidated in the past decade. The most recent merger is scheduled to take effect on July 1, 2013. This merger involved the Oppenheim-Ephratah Central School District and the St. Johnsville Central School District. Voters approved the proposed merger in December 2012. Some of the benefits of school district mergers include the following:

## **1. Save Money**

### a) Reorganization Incentive Operating Aid

When two school districts merge, the new district receives additional operating aid starting at the sum of 40% of the operating aid for each of the previous districts for the first five years, then decreasing by 4% per year for another nine years.

### b) Reorganization Incentive Building Aid

Equal to not more than an additional 30% of the highest of the former school districts' building aid ratio approved within ten years of the official date of reorganization.

Remaining debt of former districts becomes aided at the highest RWADA Aid Ratio of the former districts, but is not eligible for the additional 30%.

### c) The 2% Property Tax Cap Limited Districts' Ability to Raise Money

## **2. Increase Enrollment**

Studies show that student enrollment has declined in recent years. School districts with low enrollment typically have fewer educational opportunities and greater challenges in generating revenue, especially in rural, low-wealth areas.

Reorganization of school districts may allow the new district to:

- a) extend subject offerings to include, for example, multiple languages, advanced placement programs, development of programs for special needs or gifted students;
- b) provide a broader choice of electives and co-curricular opportunities; and
- c) increase the probability that teachers will serve only in their field of specialization.

## **3. (Re)Build Facilities**

## **4. Desegregate**

Research shows that poverty and racial segregation are more concentrated in small districts. Indeed, New York is the most segregated state in the United States.<sup>1</sup> Long Island, in particular, is the third most segregated suburb in the country.<sup>2</sup>

### **III. Obstacles / Questions to Consider**

#### **A. Self-Preservation**

Due to the nature of a consolidation or dissolution, those charged with pursuing and/or planning mergers or consolidations are often the ones who may end up having their positions eliminated as a result of the merger / consolidation (e.g., mayors, managers, supervisors, Board members, superintendents). Thus, as a means of “self-preservation,” municipal authorities often do not have much, if any, incentive to push for a consolidation. Cf. PRIVATE SECTOR GOLDEN PARACHUTE.

#### **B. Fear of Losing Local Identity**

Many municipalities fear that they will lose their identity if they merge with another, which they deem incompatible.

When two school districts merge, they do not need two mascots, but, more often than not, neither school district wants to assume a new mascot.

#### **C. Longer Commute**

In the case of school districts, some may need to allow more time for transportation to and from school.

#### **D. Overlapping Services**

A small town with a small geographic footprint does not necessarily need to have three fire districts -- with three chiefs -- within it.

#### **E. Is Service Sharing an Option?**

Examine what services can be shared amongst existing municipalities (e.g., police and fire; water and sewer districts; Code Inspection, Building Inspection and Fire Inspection; purchasing; human resources, etc.). Service sharing can be accomplished by intermunicipal agreement or by an intergovernmental relations council.

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<sup>1</sup> Harvard Civil Rights Project (2005, 2009).

<sup>2</sup> Vickie Moller, *Long Island Schools: Integration or Segregation?*, LONGISLAND.com (Mar. 26, 2012), <http://www.longisland.com/articles/03-26-12/long-island-schools-integration-or-segregation.html>.

## **F. What Level of Consolidation Works Best for Your Municipality?**

A local government can decide to combine two existing departments (e.g., Building Department and Code Enforcement Department). Two or more governments can merge departments in a particular area (e.g., merge a town and village's Department of Public Works); or entire governmental entities (towns, villages, etc.) can merge with each other, resulting in the consolidation or dissolution of one or more entities.

## **G. Dealing with Unions**

To the extent they are able to, unions may fight to protect the jobs / rights of their workers. At a minimum, this likely involves impact bargaining. However, in the worst case scenario, a consolidation process can get bogged down in (potentially) years of litigation at PERB and / or the courts. It would be best to communicate with the impacted unions early and often and attempt to negotiate resolutions to all potential labor issues prior to acting unilaterally and inviting improper practice charges.

## **IV. Taylor Law Implications**

### **A. Mandatory Subjects of Bargaining Under the Taylor Law – “terms and conditions of employment.” Civ. Serv. Law § 204(2).**

- i. “The term ‘terms and conditions of employment’ means salaries, wages, hours, agency shop fee deductions, and other terms and conditions of employment.” Civ. Serv. Law § 201(4). PERB, on a case-by-case basis, has determined what are “terms and conditions of employment” by balancing the interests of public employees against those of the public employer.
- ii. Public employers have a statutory duty to negotiate in good faith with any duly recognized/certified employee organization concerning any addition, deletion and/or modification of a mandatory subject of bargaining.
- iii. List of mandatory subjects of negotiation that are relevant during the discussion of municipal consolidations:
  - 1. Virtually all aspects of wages/salaries –
    - a. e.g., annual salary, hourly rates, overtime, differentials, premiums rates, longevity, all types of paid time off, retiree benefits, insurance, safety, GML §§ 207-a and 207-c procedures (for police and fire, respectively);

2. Hours of work.
  - iv. What are “other terms and conditions of employment” relevant during the discussion of municipal consolidations?
    1. Subcontracting; and
    2. Transfers of bargaining unit work.
  - v. How are mandatory subjects of bargaining resolved if the parties cannot reach an agreement?
    1. Different mechanisms for the resolution of impasses – three (3) different groups of public employees = three (3) different types of resolutions.
      - a. Police and Fire – tri-partite, binding interest arbitration on the issue(s) in dispute.
      - b. Municipalities (non police and fire) – legislative determination.
      - c. School Districts – Boards/Superintendents may be able to take unilateral action after exhausting first three (3) steps of impasse procedure.
  - vi. In consolidation context, employer’s decision to curtail or cease to provide a service does not require bargaining provided that the employer is completely and genuinely “out of the business.” Town of Brookhaven, 28 PERB ¶ 3010 (1995). Thus, it is within the employer’s management prerogative to abolish a service. “The decision to curtail services and eliminate jobs is not a mandatory subject of negotiations, although the employer is obligated to negotiate on the impact of such a decision on the terms and conditions of the employees affected. In considering whether a service has been abolished or merely transferred for performance by an agent, we look to the level of control exercised by the public employer.” PERB Opinion of Counsel, 29 PERB ¶ 5005 (2002).
- b. Nonmandatory Subjects of Bargaining Under the Taylor Law –
- i. Public employers and employee organizations are not required to negotiate regarding nonmandatory subjects of bargaining, but they may if they choose to. Bargaining over such subjects is, according to the PERB, usually beneficial and desirable for positive labor relations.

- ii. Once nonmandatory subjects are negotiated and placed into collective bargaining agreements, they become mandatory subjects of negotiation. See, e.g., City of Cohoes, 31 PERB ¶ 3020 (1998); Greenburgh No. 11 Union Free Sch. Dist., 32 PERB ¶ 3024 (1999).
  - iii. List of nonmandatory subjects of negotiation that may be relevant during discussion of municipal consolidations:
    1. Public employer's mission / function;
    2. Retirement benefits;
    3. Manpower considerations, hierarchy and assignments;
    4. Creation of new departments and/or services; and
    5. Parity provisions (unless public employer agrees to them).
- c. Prohibited Subjects of Negotiation Under the Taylor Law –
- i. What is prohibited?
    1. Statutory language – “[A]ny benefits provided by a public retirement system, or payments to a fund or insurer to provide income for retirees, or payment to retirees or their beneficiaries.” Civ. Serv. Law § 201(4).
    2. Clauses/proposals that contravene the Constitution or other federal and/or state law.

## V. **What Role Does the Taylor Law Play in Municipal Consolidations?**

- a. Subcontracting and Transfers of Bargaining Unit Work. Because the concepts overlap, they are often analyzed together.
- b. Subcontracting
  - i. Subcontracting occurs when a public employer contracts with an entity to perform work that was previously exclusively performed by unit members.
  - ii. Subcontracting of such bargaining unit work is a mandatory subject of negotiation.

- iii. An employer's failure to bargain a decision to subcontract out such work constitutes a refusal to bargain in good faith.
- c. Transfer / Reassignment of Bargaining Unit Work – Similar to subcontracting.
- i. Occurs when a public employer elects to transfer the work to another of its bargaining units and/or to its non-bargaining unit personnel in its employ.
  - ii. Need to know what "bargaining unit work" is protected because if the work in question is protected bargaining unit work, then the decision to subcontract and/or transfer it is a mandatory subject of negotiation. However, if the work is not protected "bargaining unit work," then the employer may be able to unilaterally subcontract and/or transfer the work without having to negotiate with the union.
  - iii. To determine what "bargaining unit work" is protected, PERB looks to two (2) factors:
    1. Whether the work has historically been performed exclusively by the unit's employees; and
    2. Whether the work itself remains essentially the same as it was prior to the transfer. See, e.g., Niagara Frontier Trans. Auth., 18 PERB ¶ 3083 (1985); Manhasset Union Free Sch. Dist., 41 PERB ¶ 3005 (2008), aff'd, Manhasset Union Free Sch. Dist. v. PERB, 61 A.D.3d 1231 (3d Dep't 2009).
    3. If the answer to both questions is answered in the affirmative, then the work in question is protected bargaining unit work and the employer must negotiate any transfer with the union.
  - 4. Part 1 – Exclusivity Analysis –
    - a. First, PERB has consistently held that there is no exclusivity over work when it is performed by both unit and non-unit employees.
      - i. See, e.g., East Hampton Police Benev. Ass'n v. Town of East Hampton, 29 PERB ¶ 3043 (1996) (PBA's improper practice charge dismissed because police officers did not have exclusivity over the work that was transferred away from them; harbor masters and bay

- constables also patrolled beaches and issued tickets and parking summonses).
- b. However, PERB has held that exclusivity can be demonstrated if the unit can “establish a discernable boundary to the claimed unit work which would approximately set it apart from work done by non-unit personnel.” County of Nassau, 21 PERB ¶ 3038 (1998) (emphasis added).
- i. Discernable boundary – Must determine the job duties actually performed by the unit members being examined.
    - 1. Involves an examination of the work intrinsic to the position – the “core components” of the job. If core components have exclusively been performed by unit members, then exclusivity will likely be found. See, e.g., City of Rome, 32 PERB ¶ 3058 (1999).
    - 2. Nonunit employees performing tasks incidental or peripheral to the core components will not destroy the exclusivity of the work.
  - ii. However, note that in Manhasset Union Free School District, although it was only in dicta and the case was not a “core components” case, the PERB recently moved away from the “core component” method of determining a discernable boundary and reverted to its previously used “reasonable relationship” / “past practice” discernable boundary analysis. 41 PERB ¶ 3005 (2008), aff’d, Manhasset Union Free Sch. Dist. v. PERB, 61 A.D.3d 1231 (3d Dep’t 2009) (stating that when determining the scope of unit work and whether it was exclusively performed by a bargaining unit, PERB will ask whether “the practice was unequivocal and was continued uninterrupted for a period of time under the circumstances to create a reasonable expectation among the affected unit employees that the [practice] would continue.”) (external citation omitted); see also City of Canandaigua, 45 PERB ¶ \_\_\_, Case No. U-29660, September 10, 2010 (on appeal to PERB, it was deferred to arbitration, which is still

pending)) (ALJ adopted dicta from Manhasset Union Free School District and rejected the “core component” analysis that a firefighter’s job is being ready to respond to fire and fire-related emergencies. Rather, following Manhasset, the ALJ held that the Union had established exclusivity over activities such as driving and operating city-owned fire department vehicles, testing fire hydrants and routine maintenance of fire houses, grounds and equipment. Thus, the City committed an improper practice when it transferred such work to the City’s civilian volunteer firefighters).

##### 5. Part 2 – “Substantially the Same” Analysis –

- a. If the nature of work and/or the qualifications necessary to perform the work:
  - i. Are substantially the same both before and after the transfer, it likely will be found to be bargaining unit work.
  - ii. If they are not substantially the same before and after the transfer, a balancing test is used, weighing the interests of the public employer against the interests of the unit’s employees. Niagara, 18 PERB at 3182.
- b. Thus, if the transfer of bargaining unit work includes a significant modification of the way the new resulting entity “does business,” such a decision will likely be held to be a managerial decision that does not have to be bargained.
  - i. Where the responsibilities of the new position are significantly greater, as evidenced by a higher level of authority and/or independence, the PERB has long held that such duties will not be held substantially similar. See, e.g., West Irondequoit Cent. Sch. Dist., 41 PERB ¶ 4581 (2008) (because evidence showed that qualifications for the position had changed substantially in terms of education and experience, the employer’s interest outweighed the unit’s loss of duties which had been performed by unit members); North Shore Union Free Sch. Dist., 11 PERB ¶ 3011 (1978) (substantial change in

- nature of job assignment permitted district to replace abolished position with non-unit position); Hewlett-Woodmere Union Free Sch. Dist., 29 PERB ¶ 4617 (1996) (changed nature of program and its targeted participants allowed district to act unilaterally in assigning supervision of program to persons outside of the bargaining unit).
- c. Finally, if a significant modification is found, the PERB then conducts the balancing test laid out in Niagara, 18 PERB ¶ 3083.
- i. The balancing test weighs the interests of the impacted employee(s) and the legitimate managerial concerns of the employer.
    1. Under the balancing test, the extent of the changes in qualifications and services weighs heavily in making the necessary determination.
    2. The greater the change in qualifications and services, the more the balance shifts towards the decision being a nonmandatory subject of bargaining. See, e.g., Fairview Fire Dist., 28 PERB ¶ 4608 (1995) (holding that although transfer of dispatching duties from firefighters to civilian dispatchers was a transfer of exclusive unit work, it was permissible because it constituted a per se change in job qualifications and, thus, change in level of service).
  - ii. Note – whether the transfer causes a significant detriment (*i.e.*, loss of employment) to the employees having work transferred away from them, such a factor would be significant in the balancing test. Where the transfer of bargaining unit work (typically from police officers or firefighters to civilians does not result in a loss of employment by the police officers or firefighters (known as “civilianization” cases), the balancing test will likely favor the employer over the union and the transfer will not likely be held to be an improper practice.
    1. See, e.g., Fairview Fire Dist., supra, (holding that transfer of dispatching

duties from firefighters to civilian dispatchers was within management's prerogative because the transfer resulted in a change in the level of service and, balancing the interests of the parties, any impact on firefighters was *de minimis* because the transfer did not result in the loss of employment by the firefighters).

6. In certain instances, statutes play a role in determining whether subcontracting and/or a transfer of bargaining unit work must be negotiated.

- a. Educ. Law § 1950(4)(bb) –

- i. Permits a Board of Cooperative Educational Services ("BOCES") to offer academic summer school programs. See Webster Cent. Sch. v. PERB, 75 N.Y.2d 619, 624 (1990) (holding that in § 1950(4)(bb), "the Legislature clearly manifested its intention that school districts' decisions to participate in such . . . programs not be subject to mandatory collective bargaining with teachers' unions").

- b. The impact of other statutes on consolidations/mergers is discussed in greater depth below.

- d. Impact Bargaining Under the Taylor Law –

- i. Public employers have the right to take unilateral action with regard to nonmandatory subjects of bargaining. However, if that action has an impact on the terms and conditions of employment of its employees, the employer may be obligated to negotiate the impact of its unilateral action with the union. See, e.g., City Sch. Dist. of New Rochelle, 4 PERB ¶ 3060 (1970) (holding that district had to negotiate the impact of its decision to eliminate positions and curtail services). A union's demand to bargain the impact of an employer's unilateral decision is a mandatory subject of bargaining. Burke v. Bowen, 49 A.D.2d 904, 373 N.Y.S.2d 387 (2d Dep't 1975), aff'd, 40 N.Y.2d 264, 386 N.Y.S.2d 654 (1996).

- ii. For example, if some of a public employer's employees were to be laid off as part of a consolidation, although the employer may not have to negotiate the layoffs, the union for those employees would be able to bargain the impact on those employees, e.g., severance benefits, pay, accrued time payouts, etc.

1. Village of Seneca Falls, Seneca County – Through its voters, the Village made a unilateral, managerial decision to go out of business by dissolving the Village effective December 31, 2011. All of the Village's employees were to be laid off upon the dissolution of the Village.
    - a. Our firm conducted impact bargaining with the Village's PBA and DPW units over the impact of the layoffs.
      - i. The agreements established how, upon their layoffs, the Village's employees would be compensated for their accrued compensatory time. The agreements also implemented a new sick leave policy and accrued sick leave payout procedure designed to avoid the potential for excessive absenteeism during the last year of the Village's existence.
  - iii. Police and Fire – Impact Bargaining. During impact bargaining, if public employers are not able to reach an agreement with police or fire units, the Taylor Law calls for the issue to be resolved through binding interest arbitration.
  - iv. A public employer can avoid impact bargaining under two circumstances:
    1. The impacted union waives its rights to impact bargaining; or
    2. Under the “duty satisfaction” concept, during past negotiations the employer and union have previously negotiated the impact of the employer’s unilateral action. See, e.g., Baldwinsville Cent. Sch. Dist., 15 PERB ¶ 3032 (1982).
- e. Consolidation-related Successorship Under the Taylor Law –
- i. The issue – does the successor public employer have a duty to bargain with the union that represented the employer’s “inherited” employees when they were employed by the other, now defunct public employer?
  - ii. PERB has turned to private sector successorship law for guidance, particularly the Supreme Court decision in NLRB v. Burns International Detective Agency, Inc., 406 U.S. 272 (1972).

1. Burns and its progeny hold that when a successor employer announces that it plans to retain all or nearly all of the predecessor's employees and a majority of those employees had been similarly employed by the predecessor, although the successor is not necessarily bound by the predecessor's CBA, the successor is obligated to recognize and bargain in good faith with the predecessor's union. It must also consult with the predecessor's union prior to making any changes in the initial terms and conditions of employment of the inherited employees.
2. In Burns and its progeny, the NLRB engaged in a totality of the circumstances examination when considering whether there is substantial continuity between the previous employer and the "new" employer which would require the "new" employer to bargain with the predecessor's union.
  - a. Although a number of factors are considered when making a "substantial continuity" decision, by far the most significant factor to examine is the continuity of the workforce determination.
    - i. If the "new" employer has hired and/or retained a substantial number of the predecessor's employees, the predecessor's unionized employees are a majority of the total workforce, and the predecessor's union demands to bargain with the new employer, NLRB precedent dictates that the new employer will have to bargain with the predecessor union. See, e.g., Burns, supra; Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27 (1987).
  - iii. However, due to the public policies often found in the public sector and supported by PERB, when discussing a possible school district consolidation, in an advisory opinion PERB distanced itself from a wholesale adoption of the private sector successorship law and stated that:
    1. "[w]hile it is likely that . . . the work force will remain largely the same, there is certainly a possibility that the individual negotiating units will no longer be appropriate, particularly in light of the fact that this Board deems most appropriate the largest unit which is consistent with the standards set out in CSL § 207.1. Thus, were the Board to adopt the private

sector case law in this area, it may well be that, if the consolidated entity did not wish to bargain on the basis of the former uniting arrangement, it could, at the outset of its existence, require its employees and their employee organizations to seek new recognition or certification.” 18 PERB ¶ 5002, 5004 (1984).

iv. PERB’s Successorship Cases –

1. What is a “successor employer” – A new employer that takes over the business of another operation that was unionized. A successor employer is established when the new employer elects to retain a representative and substantial complement of the other operation’s (former) bargaining unit members, a majority of which were similarly employed by the prior operation.
2. City of Amsterdam, 17 PERB ¶3045 (1984), aff’d, 17 PERB ¶ 7015 (Sup. Ct. Albany Co. 1984).
  - a. By referendum, city voters decided to: (1) eliminate the city’s Water Board and return its operations to the city; and (2) create new Water and Sanitary Sewer Department for the city that combined water and sewage operations. City argued that the creation of this new department required the city to place all of the employees performing these separate functions into one (1) bargaining unit.
  - b. The two (2) impacted units, the AFSCME (representing the nineteen (19) water workers) and the CSEA (representing the thirteen (13) sewer workers) objected to the city’s plan and filed an improper practice charge against the city.
  - c. PERB upheld the Director’s decision which held that both the AFSCME and CSEA units should be continued because of the respective units’ “undisputed history of effective representation of the employees in both units over an extended period of time.” Id.
  - d. Thus, despite the administrative inconvenience, as a successor employer, the city had to recognize and bargain with two (2) small, similarly situated units.
3. State of New York Olympic Regional Devel. Auth. (“ORDA”), 20 PERB ¶ 3046 (1987).

- a. Public ski facility (Gore Mountain) formerly operated by the state was transferred to ORDA, an independent, public-benefit corporation (which, like the state, was also considered a public employer). During the transfer, some former Gore ski instructors wanted ORDA to recognize their previous union (PEF) and adhere to their existing CBA. ORDA sought to merge the former Gore ski instructors into the newly organized, distinct unit that represented ORDA employees. That union included ski instructor titles.
- b. PEF filed an improper practice charge against ORDA. PERB upheld the ALJ's decision and stated that although ORDA was a "successor employer" and, under the law of the private sector would likely have to recognize and bargain with PEF, in the public sector:
  - i. "the legal obligations of 'successor' public employers must be consistent with [PERB's] longstanding interpretation of the Act that the criteria set out in CSL § 207.1 requires [PERB] to certify only the 'most appropriate' units and that these are ordinarily the largest units consistent with the Act's standards."
- c. PERB held that because ORDA had recognized a unit of all of its employees at its various facilities – including the seasonal ski instructors at issue – there was no basis for finding that the PEF unit at Gore was a "most appropriate" unit. Thus, ORDA was not required to recognize, bargain with, or adhere to the existing CBA involving PEF.
- d. PERB distinguished its holding in Amsterdam, supra, by pointing out that in Amsterdam, the transfer of complete, discrete units taken over in whole by the city was the most appropriate unit. It distinguished the issue in ORDA by stating that PEF merely sought to follow its forty (40) ski instructors and was asking PERB to ignore CSL § 207.1's requirements as they apply to ORDA.

4. City of Schenectady, 25 PERB ¶ 3043 (1992).

- a. The City of Schenectady employed twelve (12) nurses in its Health Department. The nurses were represented by the New York State Nurses Association (the "Association"). Effective January 1,

- 1991, the city's Health Department functions were transferred to the county and the twelve (12) nurses became county employees. The Association asked the county to recognize and bargain with it on behalf of the former city nurses and the county refused, stating that the CSEA represented all nurses employed by the county in a "wall-to-wall" unit.
- b. The Association filed an improper practice charge against the county. PERB reversed the decision of the Assistant Director, holding that the county had no legal obligation to recognize or negotiate with the Association concerning the twelve (12) transferred nurses.
  - c. Adhering to PERB's interpretation of CSL § 207.1 requiring it to certify only the "most appropriate" unit, the Board reasoned that although the county was a "successor employer," because the county already had a "wall-to-wall" unit in place and that such unit shared a substantial community of interest with the transferred nurses, the county-wide unit was the "most appropriate" fit for the transferred nurses.
  - d. Again, the Board distinguished its holding in Amsterdam, supra, by stating that although Amsterdam's facts were similar in the sense that an entire discrete unit was transferred, unlike the present case, in Amsterdam, under CSL § 207.1, maintaining the discrete separate units was most appropriate.

## **VI. Additional Consolidation Case law – PERB and the Courts –**

- a. School Districts
  - i. Monroe-Woodbury Cent. Sch. Dist., 10 PERB ¶ 3029 (1977)
    - 1. During contract negotiations, a teachers' union submitted a demand to fact finding that would require that "[a]s a condition of any merger or consolidation, all teachers presently employed by the district shall retain their position in any merged or consolidated district if they so desire," and also required that the clause be binding on the district as well as any district into which the district may be merged or consolidated.

2. The district filed a scope charge against the union, arguing that it was an improper practice to submit the above nonmandatory subject of bargaining, to fact finding.
  3. The Board agreed with the district and held that both segments of the demand were nonmandatory subjects of bargaining. In so holding, the Board stated that both PERB and the Court of Appeals had previously held that public employers need not negotiate its decision to lay off employees. Thus, the district did not have to negotiate about a guarantee of employment for a possible successor employer.
  4. Second, the Board stated that under the Education Law, if the district were consolidated into another district, it would dissolve and the successor employer would be a separate entity. Thus, the union was not permitted to compel the district to negotiate over a demand which would bind an entity that was not a party to the instant negotiations.
- ii. Cuba-Rushford Cent. Sch. Dist., 24 PERB ¶ 7538 (1991), aff'd, 25 PERB ¶ 7531, 182 A.D.2d 127 (4th Dep't 1992).
1. In July of 1990, the superintendents of the Cuba Central School District and the Rushford Central School District requested funding from the state for a study regarding the feasibility of one district annexing the other. After the study, the Commissioner of Education recommended the reorganization of the two (2) districts and the voters of each district approved the annexation in referendums. The annexation became effective July 1, 1991 and the reorganized district became the Cuba-Rushford Central School District.
  2. Prior to the annexation, the teachers in each district were each represented by their respective teachers' unions and had entered into CBAs with their respective Boards of Education. After the annexation was complete, the Rushford Faculty Association (the "Association") filed a grievance and demand for arbitration against the reorganized district. The grievance sought to have the district continue all of the contractual benefits due to them under the CBA between the Association and the (now defunct) Rushford Central School District. In Supreme Court, the district moved for a stay of the arbitration.

3. The Association argued that the CBA in question, like an individual employment contract, was a “property right” which the district was obligated to assume by operation of Education Law § 1804(5)(b) which stated that “the central school district, of which any such district shall have become a part, shall succeed to all the property rights of such. . . ”
4. The Supreme Court held, and the Fourth Department affirmed, that in the context of the reorganization of a central school district, the annexing district is not obligated to honor the CBA of those teachers previously employed by the dissolved school district who are now employed by the annexing district. In addition, the Association failed to demonstrate that, by any measure, it could be fairly characterized as the present “most appropriate” bargaining unit for the teachers now employed by the consolidated district.
5. Thus, because no agreement to arbitrate the grievance in question existed, the courts permanently stayed the arbitration.
6. Note – when discussing consolidations/annexations involving school districts, Districts must adhere to the statutory seniority requirements set forth in the Education Law. Those provisions are discussed in greater depth below.

## VII. Role and Importance of CBAs in the Consolidation Process

- a. Does the CBA in question contain a previously negotiated (and thus agreed upon) “Management Rights” clause that may constitute a waiver of the union’s right to negotiate decisions to subcontract and/or transfer bargaining unit work?
  - i. PERB has held that the duty to bargain may be satisfied through the negotiation of a management rights clause granting the employer the right to determine “when and to what extent” work is to be performed by unit members. County of Allegany, 33 PERB ¶ 3019 (2000); see also Mattituck-Cutchogue Union Free Sch. Dist., 40 PERB ¶ 4577 (2007) (“While the transfer of exclusively performed bargaining unit work constitutes a mandatory subject of bargaining and a union has the right to bargain concerning such a subject . . . the management rights clause in this matter constitutes a clear and unmistakable waiver of that right.”); Garden City Union Free Sch. Dist., 27 PERB ¶ 3029 (1993) (dismissing a charge

protesting the transfer of cafeteria services to a private corporation because the relevant management rights clause constituted a waiver of the right to bargain the transfer of unit work); City of Batavia, 28 PERB ¶ 4599, (1995) (finding that union waived right to negotiate over subcontracting of work through agreement to a clause which granted employer the sole right to determine whether and to what extent the work shall be performed by employees).

- ii. However, the current PERB Board very narrowly interprets management rights clauses. Thus, if the right at issue is not specifically addressed in a management rights clause, PERB will likely rule that a union has not waived its right to negotiate the issue.
  - 1. See County of Nassau, 24 PERB ¶ 4523, aff'd, 26 PERB ¶ 3029 (1991) (holding that provision of management rights clause allowing employer to regulate work schedules did not encompass employer's reduction in the length of its employees' meal periods); County of Nassau, 26 PERB ¶ 4574, aff'd, 26 PERB ¶ 3083 (1993) (holding that management rights clause providing employer authority to regulate work schedules – but not specifically work hours – did not permit employer to unilaterally increase its employees' weekly work hours); City of Canandaigua, 44 PERB ¶ \_\_\_, Case No. U-29660, September 10, 2010 (appeal pending) (ALJ held that management rights clause stating that the City had the right to "manage the Fire Department and to direct the working force, including the methods to be used in . . . fire prevention, fire fighting, and the operation and maintenance of equipment. . . ." could not be said to establish a clear and unmistakable waiver of the right to negotiate a unilateral transfer of bargaining unit work from professional firefighters to volunteer firefighters).
- b. Does the CBA in question contain previously negotiated (and agreed upon) provisions that constitute a waiver of the union's right to negotiate decisions to subcontract and/or transfer bargaining unit work?
  - i. See, e.g., Poughkeepsie v. Newman, 95 A.D.2d 101 (3d Dep't 1983), app dsmd, 60 N.Y.2d 859 (1983) (holding that a CBA provision allowing a public employer to "unilaterally subcontract must be explicit, unmistakable and unambiguous, and should constitute a waiver by the union of its right to negotiation with respect to such matters.") (external citation omitted).

- ii. Today, unions are extremely unlikely to, during negotiations, agree to a subcontracting clause that provides the employer with the ability to subcontract and/or transfer bargaining unit work without having to first negotiate with the union.
- iii. However, be sure to thoroughly review all of your existing CBAs for subcontracting language.
  - 1. Years ago subcontracting clauses were frequently found in CBAs and, if they remain in CBAs today, may constitute a waiver of the union's right to negotiate the employer's decision to subcontract and/or transfer bargaining unit work.

## **VIII. Other Statutory Issues Related to Municipal Consolidation**

- a. Civil Service Law Section 70 – Governs transfers of public employees from one (1) public employer to another. The goal of Section 70 (and its predecessors) was to serve as a protection for civil service employees and their individual security by allowing them to be transferred without further examination or qualification and would retain their classification and status. See Friedman v. Kern, 171 Misc. 332, 13 N.Y.S.2d 163 (Sup. Ct. New York Co. 1939); Ganley v. Giuliani, 171 Misc.2d 654, 655 N.Y.S.2d 264, aff'd, 253 A.D.2d 579, 677 N.Y.S.2d 135, rev'd on other grounds, 94 N.Y.2d 207, 701 N.Y.S.2d 324 (1999).
- b. Under this statute, the transfer of the job "function" is what necessitates the transfer of the personnel. The method and procedures for utilizing this provision of law is set forth in the statute itself and include provisions for the transfer of seniority for those individuals involved. In short, CSL § 70(2) requires that:
  - i. As soon as practicable after the transfer of the function, but not less than 20 days prior to the effective date of the transfer, the head of the department or agency from which the function is to be transferred shall certify to the head of the department or agency to which the function is going to be transferred a list of names and titles of those employees who are substantially engaged in the performance of the function to be transferred, and shall post this certified list, along with a copy of CSL § 70(2) in the office of the impacted personnel.
  - ii. The impacted employee may then, prior to the effective date of the transfer, protest his/her inclusion or exclusion on the list by giving a written notice of protest (with reasons) to the employer.

- iii. The transferring employer shall then review the protest, consult with the receiving employer, and notify the protestor within ten (10) days of a final administrative determination.
  - iv. Officers and employees transferred shall be transferred without the need for further civil service examinations or qualifications and shall retain their civil service classifications and status.
  - v. Permanent officers and employees in the competitive class are selected for transfer within each grade of each class of positions in the order of seniority (original appointment).
  - vi. An employee who fails to respond or accept a written offer of transfer from the transferring employer within ten (10) days, shall be deemed to have waived entitlement to such transfer.
  - vii. Permanent officers and employees in the competitive class who are not transferred shall have their names placed on a preferred list for reinstatement to the same or similar positions with either employer.
  - viii. Officers and employees transferred under CSL § 70(2) shall be entitled to full seniority credit for all purposes for service rendered in the transferring employer. Additional rules apply to unused vacation or annual leave and sick leave.
- c. The Education Law outlines the employment rights of employees in certain consolidation scenarios.
- i. Educ. Law § 2218(5)(f) – Applies in cases of the partitioning, dissolution or formation (reorganization) of one school district and annexation to a union free school district.
    - 1. In the event of a partitioning or formation of a district, members of teaching and supervisory staff of the pre-existing district at time of reorganization have the right to select the district in which he/she shall be considered an employee.
    - 2. Members of teaching and supervisory staff shall receive the same tenure status as he/she had in the pre-existing district.
    - 3. The selection is based on each teacher's seniority in the pre-existing school district, with the right of selection passing from teachers with the most seniority to those with the least seniority.

4. If an individual cannot obtain a position because the number of positions needed is less than the number of teachers/supervisory staff available, the individual is placed, in order of seniority, on a preferred eligible list in the new district and, if applicable, the remaining district.
- ii. Educ. Law § 1705(4) – Applies when a common, union free, or central school district is annexed in its entirety to a union free school district.
  1. All employees of the former district(s) at time of dissolution immediately become employees of the reorganized union free district.
  2. They also retain their tenure and/or employment status and seniority gained in annexed district, and seniority list of employees in the annexed district is merged with that of the annexing district.
  3. If number of teaching positions needed in the reorganized district is less than the number of combined employees of the district, the Board of Education shall abolish the unneeded positions and place teachers on preferred eligible lists in accordance with § 3013 of the Educ. Law.
  4. For salary, sick leave and other purposes, the employee's length of services in the annexed school is credited as employment time with the reorganized district.
- iii. Educ. Law § 1505-a(1 – 3) – Applies generally to district dissolutions and reorganizations.
  1. When a district is dissolved and partitioned up to more than one (1) district, teachers from the dissolved district can, based on their preferences and their seniority, select the district in which they desire to be employed.
  2. Districts receiving teachers from dissolved districts are required to accept the service/seniority credit the teacher acquired in the dissolved district and is to be used for determining salary, sick leave, and other provisions that may be tied to seniority.
  3. If there are less teaching positions available than teachers, teachers of the dissolved district are placed on a preferred

eligible list of the annexing district in order of seniority acquired in their dissolved district.

d. The New N.Y. Government Reorganization and Citizen Empowerment Act – GML §§ 750 – 793.

i. Law was drafted by then-Attorney General Andrew Cuomo and signed into law by Gov. David Paterson. Became effective on March 21, 2010.

1. The statute was enacted because it “empowers citizens, local officials and counties to reorganize outdated and inefficient local governments. The Act establishes uniform and user-friendly procedures for local government entities to consolidate or dissolve. Through the use of these procedures, in appropriate cases, local governments can enhance the delivery of services, achieve savings and reduce local real property taxes and other taxes and fees.” N.Y. Ass., Memo to Bill No. A08501 (1999).

ii. Amends and/or adds new sections to:

1. The General Municipal Law, the Municipal Home Rule Law, the Town Law, the Village Law, and the Local Finance Law.

iii. Statute establishes uniform procedures for the consolidation and/or dissolution of local government.

1. Applies to towns, villages, fire districts, fire protection districts, fire alarm districts, special improvement districts or other improvement districts, library districts, and other districts created by law.

2. Does not apply to school districts, city districts or special purpose districts created under county law.

iv. How does the statute differ from its predecessors?

1. Establishes uniform, streamlined and simplified consolidation and dissolution procedures;

2. Empowers governing bodies to initiate consolidation and consolidation processes;

3. Empowers citizens to place consolidation/dissolution on a popular ballot by collecting petition signatures from voters;

4. Clarifies and defines petition process and petitions form so that citizens may more easily initiate consolidations/dissolutions;
  5. Establishes uniform signature requirement of 10% or 5,000 residents, whichever is less, to initiate consolidation/dissolution process. If entity has less than 500 voters, petition must contain signatures of at least 20% of the voters;
  6. Strikes from the law all pecuniary or property qualifications for signing petitions and/or voting on propositions to consolidate/dissolve a governmental entity; and
  7. Authorizes counties to abolish entire units of local government, subject to certain conditions such as county-wide referendums with special majority requirements.<sup>3</sup>
- e. Recent Update – A push-back against municipal consolidation and New N.Y. Government Reorganization and Citizen Empowerment Act?
- i. During first week of May 2011, Senator Jack Martins (R) proposed a bill that would make it harder for municipalities to consolidate/dissolve. The bill was passed in the Senate.
    1. Highlights of the bill:
      - a. Places time limits on citizen-initiated consolidation efforts (force petitions to be completed in sixty (60) days). Presently, there is no time limit on how long citizens may take to compile signatures for a consolidation petition;
      - b. In the event a consolidation vote fails, it imposes a four (4) year moratorium on citizens again trying to initiate a consolidation process; and
      - c. Requires a second referendum to take place after the results of the dissolution study are released so that voters can vote on the dissolution plan.
    - ii. Gov. Cuomo spoke out against the bill and the Democratic-led Assembly elected not to take up the issue. The legislative session ended without any further action being taken on the bill. The

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<sup>3</sup> Summary adapted from: <http://www.reformnygov.com/proposal.html> (last visited May 31, 2011).

Senate passed the bill in June 2012 at which time it was delivered to the Assembly, but no further action has been taken on it to date.

## **IX. Questions/Issues/Problems That Arise When Considering – Mergers/Consolidations**

- a. “Tell me how I can eliminate YOUR job.”
  - i. Those charged with pursuing and/or planning mergers/consolidations are often the ones who may end up having their positions eliminated as a result of the merger/consolidation.
    - 1. E.g., Mayors, Managers, Supervisors, Superintendents, Board members, etc.
    - 2. Self-preservation – they do not have much incentive to merge/consolidate. For instance, Senator Martins’ bill (above) was drafted and proposed at the request of the New York Conference of Mayors, the Association of Towns, the Fireman’s Association of the State of New York and the Association of Fire Districts of the State of New York – all entities that have a vested interest in making mergers/consolidations more difficult.
- b. Look for overlapping services – ripe targets for mergers/consolidation.
  - i. For instance – Town of Greenburgh – population of approximately 85,000 people.
    - 1. Has 3 Fire Districts within it – Greenville, Hartsdale and Fairview.
    - 2. Necessary?
- c. Is “civilianization” of positions or transferring work to volunteers an option?
  - i. Police/Fire
    - 1. Can police/fire “desk jobs” be staffed by civilians, resulting in police officers and firefighters being reassigned to actual police/firefighting duties?
    - 2. Can some police/firefighting work be transferred to volunteers such as auxiliary police officers or volunteer firefighters?

- ii. School Districts – can Department Heads/Administrators go back into the classroom on a part-time basis?
  - d. Is service sharing an option?
    - i. What services should be shared?
      - 1. Police, Fire, DPW, Water Districts, Human Resources, Purchasing, Code Inspection/Building Inspection, Assessment?
    - ii. Which entity will take over? What will the new configuration be? Will the level of services be impacted?
    - iii. How can the sharing of services be accomplished?
      - 1. Intermunicipal Agreement – GML Article 5-G “municipal corporations and districts shall have power to enter into, amend, cancel and terminate agreements for the performance among themselves or one for the other of their respective functions, powers and duties on a cooperative or contract basis or for the provision of a joint service or a joint water, sewage or drainage project.”
      - 2. Intergovernmental Relations Council – GML Article 12-C, § 239-n – consist of any combination of counties, towns, villages, school districts, BOCES or fire districts. Intended to “unite governmental entities,” provide a forum for discussion of municipal problems/solutions and foster pooling of services.
  - e. Levels of Consolidation – Which works best for your municipality/school district?
    - i. A local government can decide to combine two existing departments. Example – Building Department and Code Enforcement Department.
    - ii. Two or more governments can merge departments in a particular area. Example – Merge the Town’s and Village’s Department of Public Works.
    - iii. Merge entire governmental entities with each other. Results in the consolidation or dissolution of one or more entities.

- f. Financial Analysis – What type of actual cost savings will a merger/consolidation bring?
  - i. Where will they come from?
  - ii. Labor costs (salaries, benefits, and pension) are typically the largest expense a public employer has – how will labor costs be impacted by the merger/consolidation?
- g. Unions – To the extent they are able to, unions will fight to protect the jobs/rights of their workers.
  - i. At a minimum – involves impact bargaining.
  - ii. Worst case scenario – consolidation process gets bogged down in (potentially) years of litigation in PERB and/or the courts.
  - iii. Recommendation – Communicate with the impacted unions early and often and attempt to negotiate resolutions to all potential labor issues prior to acting unilaterally and inviting improper practice charges.