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PRACTITIONERS' NOTES

LEFT IN THE DARK: HOW NEW YORK'S TAYLOR LAW IMPAIRS COLLECTIVE BARGAINING

Jason A. Zwara*

INTRODUCTION

Shortcomings in Public Sector Collective Bargaining

In New York, as in many states across the country, public sector collective bargaining rights were introduced as the keystone to combating public sector labor strife.¹ In giving public employees a valid avenue to make their demands heard, the frustration that led to strikes and work stoppages could, in theory, be diffused. While that theory, adopted in New York through the Taylor Law of 1967, has been a contributing factor in the extended period of labor tranquility over the last thirty years, the relentless focus on preventing labor strikes has led to an unstable and unsustainable economic model in public sector labor.²

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1. Only three-quarters of the states permit collective bargaining over wages and conditions of employment by some or all public employees. In recent years, several states (including Wisconsin, Indiana and Michigan) have enacted laws limiting or outright repealing collective bargaining rights. See Steven Greenhouse, *A Watershed Moment for Public-Sector Unions*, N.Y. TIMES, Feb. 18, 2011, <http://www.nytimes.com/2011/02/19/us/19union.html>.

2. See E.J. McMAHON & TERRY O'NEIL, MANHATTAN INST. FOR POLICY RESEARCH, HOW AN OBSCURE STATE LAW GUARANTEES PAY HIKES FOR GOVERNMENT EMPLOYEES – AND RAISES THE TAX TOLL ON NEW YORKERS 2 (2012) <http://www.empirecenter.org/Special->

As initially imagined, the Taylor Law was meant to promote flexibility and collaboration in labor relations.³ Over its history, however, the goal of preventing labor strife has dominated, resulting in a system that preserves the rights and benefits employees enjoy first and foremost at the expense of other interests of the public. This is especially perpetuated by one particular clause of the Taylor Law, known as the Triborough Amendment.⁴ As a result, public employers must make major concessions to public employees to introduce any new policies or practices.⁵ More often than not, employers have accomplished this goal by negotiating contracts that kick costs and tough decisions down the road. In difficult fiscal times, such as the financial crisis of the early 2010s, these deferred costs start to burden public employers.⁶ As such, it is vital that we explore and understand how the collective bargaining structure established by the Taylor Law contributes to the budget dilemmas facing school boards across the state.

This article proceeds by exploring the history and purpose of the Taylor Law in Part I and the development of the Triborough Amendment in Part II. Part III discusses how the Taylor Law works to ensure labor harmony first and foremost, and how this has created a dramatic imbalance in bargaining leverage between public unions and school boards. Part IV discusses the budget woes facing the Buffalo public schools as an example of how prior contract negotiations have backed the current board into a financial corner. Finally, Part V explores how the Taylor Law interferes with collective bargaining and makes legislative recommendations that can begin to level the playing field in collective bargaining going forward.

I. HISTORY AND DEVELOPMENT OF THE TAYLOR LAW

A. *Public Employee Relations in New York Before the Taylor Law*

In 1947, New York enacted the Condon-Wadlin Act, its first law regulating the relationship between public employers and employees.⁷

Reports/2012/01/triboroughtrouble011112.cfm (comparison evidence shows that both the public and private sectors have experienced lengthy periods of labor tranquility, suggesting broader factors).

3. See RONALD DONOVAN, ADMINISTERING THE TAYLOR LAW: PUBLIC EMPLOYEE RELATIONS IN NEW YORK 40 (1990).

4. See MCMAHON & O'NEIL, *supra* note 2, at 1.

5. See *id.*

6. See *id.* at 10.

7. Kristin Guild, *New York State Taylor Law: Negotiating to Avoid Strikes in the Public*

Also during 1947, Congress passed the Taft-Hartley Act, which amended the nation's first major labor relations law.⁸ Both the Condon-Wadlin and Taft-Hartley Acts were products of a common political and economic climate. Following World War II, labor unrest became a serious concern across many industries, including the public sector.⁹ In New York, "the proximate event that led to the enactment of [the] Condon-Wadlin law in March 1947 was a week-long strike by twenty-four hundred school teachers in Buffalo."¹⁰ Condon-Wadlin was a direct reaction to this example of labor strife, formally ratifying the common law prohibition of strikes by public sector employees and enforcing this prohibition with severe penalties.¹¹ In reality, then, Condon-Wadlin was less about regulating public sector employee relations than formally preserving the existing relationship. The law "was simple and straightforward in its purpose: to prevent strikes of public employees by making the cost of striking prohibitive."¹² Under the law, employees that went on strike were to be immediately terminated; those later reinstated would not be eligible for pay increases for three years and would be placed on probation for a period of three to five years.¹³

Despite the harsh penalties imposed on striking employees under Condon-Wadlin, labor strife continued and actually worsened: from 1947 to 1964, there were twenty-one significant public labor strikes across New York State.¹⁴ Labor strife continued because the harsh penalties in Condon-Wadlin were practically unenforceable. After a public strike ended, neither side in the dispute wanted to resume labor relations with the cloud of the harsh penalties overhead, so public employers regularly waived the penalties. In 1963, the legislature tried to address this issue by amending the law's penalties.¹⁵ The amendment made little difference as 1965 saw a significant strike by Department of

Sector, CORNELL UNIV., RESTRUCTURING LOCAL GOV'T, (May 1998), <http://www.mildredwarner.org/gov-restructuring/special-projects/nys-civil-service>.

8. See Labor Management Relations (Taft-Hartley) Act, ch. 120, 61 Stat. 136 (1947) (codified as amended at 29 U.S.C. §§ 151-166 (2006)).

9. See Guild, *supra* note 7.

10. DONOVAN, *supra* note 3, at 3.

11. John M. Crotty, *An Introduction to the Taylor Law*, N.Y. STATE DEPUTIES ASSOC., INC. (Sept. 2001), <http://www.nysdeputy.org/Archives,%20Wage%20Comparisons/Taylor%20Law%20Overview.pdf>.

12. DONOVAN, *supra* note 3, at 5.

13. Crotty, *supra* note 11.

14. See Guild, *supra* note 7.

15. The 1963 amendments reduced the periods of probation and ineligibility for pay increases on reinstated employees, however, they also added a penalty that all striking employees be fined two days' pay for each day on strike. See Crotty, *supra* note 11.

Welfare workers; the 1963 amendment expired shortly thereafter.¹⁶

After the expiration of the Condon-Wadlin amendment, Democrats in the legislature argued that a complete revision of the law was necessary.¹⁷ In 1965, the Democrat-led legislature passed the Lentol-Rossetti bill which would dramatically alter the government's approach to public employee relations.¹⁸ Instead of attempting to prevent public labor strikes through harsh penalties, Lentol-Rossetti would diffuse labor unrest through collective bargaining.¹⁹ Governor Rockefeller, a Republican, vetoed the bill, leaving Condon-Wadlin in place.²⁰

It did not take long for a major event to change Rockefeller's mind. Just as the Buffalo teachers' strike of 1947 spurred Condon-Wadlin, an even larger strike in New York City forced the Governor to reconsider the law.²¹ On New Year's Day, 1966, a New York City transit workers' strike essentially shut down the city for twelve days, costing the city's economy \$100 million a day.²² When the strike was finally settled, the inherent weakness of Condon-Wadlin was on display: as part of the deal struck to end the strike, the state legislature passed an amnesty bill foregoing all penalties that would otherwise have been imposed.²³ Three days after the strike ended, Governor Rockefeller announced that he would appoint a Public Employee Relations Committee 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."²⁴

B. *The Taylor Commission*

The committee Rockefeller put together was chaired by George W. Taylor, professor of industry at the University of Pennsylvania, and staffed with private sector labor experts from across the country; the committee quickly took on the name of its chair, becoming known as the Taylor Commission.²⁵ From the start, the committee knew that Condon-Wadlin needed to be repealed and completely replaced with a

16. DONOVAN, *supra* note 3, at 12.

17. *See* Crotty, *supra* note 11.

18. *See* DONOVAN, *supra* note 3, at 12.

19. *See id.*

20. *See id.* at 13.

21. *See* Guild, *supra* note 7.

22. *See id.*

23. *See id.*

24. *Id.*; *see* DONOVAN, *supra* note 3, at 23.

25. Guild, *supra* note 7.

comprehensive public sector collective bargaining system.²⁶ The experience under Condon-Wadlin made it clear that simply outlawing public employee strikes was not an effective practice. Rather, the best approach to ensuring labor tranquility was to give public employees a voice in setting the terms and conditions of employment.²⁷ Though the committee was well versed in private sector labor practices, it was keenly aware that the unique characteristics of public sector labor required unique solutions.²⁸

In constructing a collective bargaining system, the committee focused on five primary issues. Ronald Donovan, in his comprehensive history of the Taylor Law, paraphrased the five questions the committee posed to itself:

1. What forms of representation best serve the public interest and the interest of employees?
2. What arrangements should be followed to resolve problems that may arise concerning questions of employee representation?
3. What procedures should be developed for facilitating the process of agreement?
4. In the event of deadlock, what additional procedures should be available?
5. What should be the penalties for striking, and how should they be administered?²⁹

Notably absent among these questions was whether the prohibition on public employee strikes should continue; the committee almost took it for granted that the prohibition would remain, though a minor question over what penalties were appropriate would later be discussed.³⁰

While the Taylor Commission looked at private sector collective bargaining schemes as models, it also recognized that a public sector scheme needed to account for the unique characteristics of public sector

26.. See DONOVAN, *supra* note 3, at 30.

27. See *id.* at 35 (“[T]he best way to protect the public from strikes was to fashion methods whereby public employees could participate in affecting their terms and conditions of employment. . .”).

28. See *id.* at 35-36.

29. *Id.* at 28-29.

30. See *id.* at 29.

labor relations.³¹ In particular, the Commission needed to address three realities. First, that “terms and conditions of [public] employment are decided through a process responsive to majority will.”³² Second, that “legal and practical restrictions [exist] on the authority of government agencies to negotiate with their employees.”³³ Finally, that public employees are prohibited from striking.³⁴ Simply transposing a private sector collective bargaining model onto the public sector would be ineffective.³⁵

In the end, the Taylor Commission report, issued March 31, 1966, recommended completely repealing Condon-Wadlin and replacing it with a statute which would:

(a) grant to public employees the right of organization and representation, (b) empower the state, local governments and other political subdivisions to recognize, negotiate with and enter into written agreements with employee organizations representing public employees, (c) create a Public Employment Relations Board to assist in resolving disputes between public employees and public employers, and (d) continue the prohibition against strikes by public employees and provide remedies for violations of such prohibition.³⁶

Two recommendations would specifically address the issues unique to public sector labor relations: the creation of a largely independent Public Employee Relations Board (PERB) and final legislative oversight of impasse resolutions.³⁷ The latter, a mechanism for reaching a firm, binding resolution when disputes arose during contract negotiations, was particularly important to the Commission.³⁸ The report convincingly argued that because labor contracts are so fundamental to the budgeting process, and contract negotiations involve the allocation of public resources, the respective legislative body must have final say.³⁹

31. See Vincent Martin Bonventre, *The Duty of Fair Representation Under the Taylor Law: Supreme Court Development, New York State Adoption, and a Call for Independence*, 20 FORDHAM URB. L.J. 1, 6-7 (1992).

32. *Id.* at 6 (quoting Clyde W. Summers, *Public Employee Bargaining: A Political Perspective*, 83 YALE L.J. 1156, 1160 (1974)).

33. Bonventre, *supra* note 31, at 6.

34. *Id.* at 7.

35. *Id.*

36. *Id.* at 5-6 (quoting DONOVAN, *supra* note 3, at 23).

37. See DONOVAN, *supra* note 3, at 38-39.

38. See *id.* (“The committee’s fundamental philosophical commitment to the principle of legislative supremacy is manifest in its recommendations on impasse resolution. It is a constant theme throughout the report.”).

39. See *id.*

C. *Enacting and Implementing the Taylor Law*

Governor Rockefeller utilized much of the Taylor Commission report in drafting the law to propose to the legislature.⁴⁰ The Governor's proposed law, in fact, only deviated from the report in one major respect: Governor Rockefeller was predictably unconvinced of the necessity for legislative finality, instead retaining final authority to settle negotiation disputes in the executive branch.⁴¹ With a divided legislature, the two houses went different ways on the proposed law. The Republican-controlled Senate took up and quickly passed the Governor's bill, while the Democrat-led Assembly revived the Lentol-Rossetti bill, which the Governor had vetoed the previous year.⁴² The two bills, though sharing many common elements, had two major differences: first, Lentol-Rossetti included more lenient penalties on striking unions and workers, and second, Lentol-Rossetti would decentralize the administration of the law, giving local governments and other political subdivisions significant discretion in coordinating collective bargaining rules.⁴³

Though the Democrat-backed Lentol-Rossetti bill seemed more union friendly with its more lenient penalties, public employee support was actually split between the two bills. While the well-established public unions in New York City supported Lentol-Rossetti, both because of its more lenient penalties as well as its decentralized approach which favored strong local unions, upstate public labor was far less organized and supported either bill as a vast improvement over Condon-Wadlin.⁴⁴ The Governor's bill, however, received overwhelming support from the state's largest union, the Civil Service Employees Association (CSEA), which saw the centralized administration of the Governor's bill as an opportunity to strengthen and grow its labor presence outside of Albany.⁴⁵ With the strong support of CSEA, and after a small compromise with the Lentol-Rossetti backers to satisfy the New York City public unions,⁴⁶ Governor Rockefeller's bill was enacted in 1967.⁴⁷

40. *See id.* at 42.

41. *See id.* at 43 ("[T]he executive department believed that it had the constitutional responsibility for employee relations and ought not to delegate it to the legislature.").

42. *See id.*

43. *See id.*

44. *See id.* at 45-46.

45. *See id.* at 46.

46. Localities would be permitted to operate their own employee relations boards so long as their procedures were "substantially equivalent" to, and approved by, the state's PERB. *See* N.Y. CIV. SERV. LAW § 212(1) (McKinney 2011).

47. Public Employees' Fair Employment Act, ch. 392, 1967 N.Y. Sess. Laws 393

The first task in implementing the bill, which came to be known as the Taylor Law, was establishing the State's Public Employee Relations Board.⁴⁸ Through its first few years, PERB would be primarily occupied by the first objective of the Taylor Law: organizing local unions and holding representation elections.⁴⁹ At the time of enactment, 340,000 of the estimated 900,000 state and local government employees covered by the Taylor Law were already represented by unions, mostly in New York City and Albany.⁵⁰ Within one year of the law's enactment, an additional 360,000 public employees would be represented by unions.⁵¹ With most localities eager to work with employees to organize labor unions, PERB's early work was fairly straightforward.

Even in the early organization efforts, PERB quickly became aware that different labor issues would arise based on geography and industrial sector. First, some regions, such as Albany, and labor sectors, especially education, already had well-developed public sector unions.⁵² Second, PERB realized that New York City labor relations, as with so many other issues, were completely different from those of the rest of the state.⁵³ Facing a teacher strike in New York City just months after the Taylor Law was enacted, PERB "learned . . . that labor relations as practiced in the Big Apple were different. The parties had developed their own methods for settling differences."⁵⁴

D. Reconvening the Taylor Commission and the 1969 Amendments

In 1968, only one year after the enactment of the Taylor Law, Governor Rockefeller reconvened the Taylor Commission to review the law's progress and recommend any needed amendments.⁵⁵ The Commission's revised report, published in 1969, emphasized four areas of the law that could be strengthened. Tellingly, these four areas were largely restatements of the initial report in areas where the Governor had compromised in the initial law.⁵⁶ First, recognizing the unique character of collective bargaining in New York City, the Commission

(McKinney) (codified as amended at N.Y. CIV. SERV. LAW §§ 200-214 (McKinney 2011)).

48. *See id.* § 205.

49. *See id.* § 206.

50. DONOVAN, *supra* note 3, at 67.

51. *Id.* at 67-68.

52. *See id.* at 68.

53. *See id.*

54. *Id.* at 69.

55. *See id.* at 109-10.

56. *See id.* at 112-13.

recommended that PERB work with the City's Office of Collective Bargaining to develop custom bargaining and impasse procedures.⁵⁷ Second, the Commission recommended the establishment of a permanent advisory council, essentially to replace the Taylor Commission in the long term.⁵⁸

The other two recommendations reaffirmed the two keys of the Commission's first report, both of which were compromised and watered down in the actual legislation. First, the Commission recommended minor adjustments to the law's strike deterrents.⁵⁹ Second, and more significantly, the Commission stressed the importance of binding resolution in impasse procedures.⁶⁰ "The committee maintained that to have an effective substitute for the strike there needed to be finality in the impasse procedure and that any final judgment *must necessarily* reside with the legislative body."⁶¹ By and large, the Commission's follow-up report simply reinforced the recommendations that had been ignored in the initial report.⁶²

The 1969 amendments embraced these recommendations faithfully, altering the strike penalty provisions, adding a legislative "show-cause" hearing to impasse procedures, and giving PERB authority to define and regulate "improper practices" in collective bargaining.⁶³ For the next five years, the Taylor Law would largely resemble what the Taylor Commission envisioned: a comprehensive collective bargaining alternative to strikes that guaranteed meaningful input in negotiations for employees and finality for employers and the public.⁶⁴ Yet by the mid-1970s, with representation issues largely settled, applying the collective bargaining and impasse provisions of the Taylor Law would become the focal point. With a strengthening union presence, particularly in the education sector, the application of these provisions would begin to tip the balance of power in the unions' favor.

57. See *id.* at 113-14.

58. See *id.* at 114.

59. See *id.*

60. See *id.* at 113.

61. *Id.* at 113 (emphasis added).

62. See *id.* at 114-15 ("On the essential points of the inapplicability of the strike, on the supremacy of the legislative body, on impasse procedures, and on strike penalties . . . [the Commission] remained steadfast. Its recommendations called into question the compromises made by the legislature to get the law passed originally . . .").

63. See Crotty, *supra* note 11.

64. See DONOVAN, *supra* note 3, at 113.

II. HISTORY AND DEVELOPMENT OF THE TRIBOROUGH AMENDMENT

A. *The Triborough Doctrine and Triborough Amendment*

Of the early PERB decisions applying the collective bargaining and impasse provisions of the Taylor Law, the most important was *Triborough Bridge and Tunnel Auth. v. Dist. Council 37 and Local 1396, American Federation of State, County, and Municipal Employees (Triborough)*.⁶⁵ The case's holding and the subsequent case law over the next decade would culminate in the 1982 amendment to the Taylor Law adding section 209-a(1)(e), now better known as the Triborough Amendment.⁶⁶ In order to understand the importance of the Amendment, however, its history must be explored.

Triborough was one of the earliest PERB decisions moving beyond representation issues and on to regulating the collective bargaining process. The collective bargaining agreement (CBA) between the Triborough Bridge Authority and the transit workers' union included a provision for "seniority based pay increments" for all employees.⁶⁷ The CBA expired in 1971, at which point the Authority announced that it would no longer pay the seniority increments.⁶⁸ The Union charged that the Authority was violating section 209-a(1) of the Taylor Law,⁶⁹ arguing that the refusal to pay the seniority increments was an improper employer practice because it would interfere with, restrain, or coerce public employees to agree to a new contract and amounted to "a refusal to negotiate in good faith."⁷⁰

Under ordinary contract law, all the terms and conditions of the expired contract would terminate with the expiration and the Union would not have an argument.⁷¹ In interpreting its authority under the Taylor Law, however, PERB framed the issue as one of fairness in collective bargaining, not one of contract law.⁷² In order to ensure fair

65. 5 P.E.R.B. ¶ 3037, 3064, 3064-65 (1972).

66. *Id.*

67. *See id.*; N.Y. CIV. SERV. LAW § 209-a(1)(a), (d) (McKinney 2011 & Supp. 2013).

68. *Triborough*, 5 P.E.R.B. at 3064.

69. CIV. SERV. § 209-a(1)(a), (d) (The law provides that "[i]t shall be an improper practice for public employer or its agents deliberately (a) to interfere with, restrain or coerce public employees in the exercise of their rights guaranteed in section two hundred two of this article for the purpose of depriving them of such rights . . . (d) to refuse to negotiate in good faith with the duly recognized or certified representatives of its public employees. . . .").

70. *See id.*; *Triborough*, 5 P.E.R.B. at 3064-65.

71. *See Triborough*, 5 P.E.R.B. at 3064-65.

72. *See id.* at 3064. In rejecting "respondent's argument that the case was one involving contract interpretation," the hearing officer reasoned "that the statutory prohibition against an

bargaining, the current working conditions needed to be maintained; otherwise, PERB reasoned, an employer could alter working conditions to pressure employees to accept a new contract.⁷³ Thus, it would be an “improper employer practice” if the employer “unilaterally alter[s] existing mandatory subjects of negotiations while a successor agreement is being negotiated.”⁷⁴

While *Triborough* was a monumental case in applying the Taylor Law to negotiations, the decision presented a complex legal question that would require defining through additional cases: which terms of an expired contract were “mandatory,” meaning that altering them would place unjust pressure on the employees to agree to a new contract? The *Triborough* Board knew this was not an easy question and would best be answered on a case-by-case basis, slowly drawing the contours of what “mandatory” meant when applied to public sector collective bargaining agreements.⁷⁵ Several cases over the next decade would address the question from various angles as the term became gradually defined.

In *Board of Education of the City of Poughkeepsie v. Poughkeepsie Public School Teachers Ass’n* (“*Poughkeepsie PSTA*”),⁷⁶ a state court addressed a similar question. In *Poughkeepsie PSTA*, the CBA expired in 1972; shortly thereafter, the Union sought to grieve several issues under the grievance procedure included in the expired agreement.⁷⁷ The District objected to the use of these procedures since the CBA had expired.⁷⁸

The court found for the District, holding that the grievance procedures did not survive the expiration of the CBA.⁷⁹ While acknowledging that “the Legislature has not specifically stated whether an agreement . . . shall remain in effect after its terminal date,” the specific provisions of the Taylor Law made “it clear that [the Legislature] did not intend such extended duration.”⁸⁰ In the case at hand, with the parties disputing the proper procedures for settling a grievance, Taylor Law section 209 explicitly established an alternative

employee organization resorting to self-help by striking imposes a correlative duty upon a public employer to refrain from altering terms and conditions of employment unilaterally during the course of negotiations.” The Board agreed. *Id.*

73. *See id.* at 3065.

74. *Id.*

75. *See id.* at 3064-65.

76. 349 N.Y.S.2d 47, 47-48 (N.Y. Sup. Ct. 1973).

77. *See id.* at 48.

78. *See id.*

79. *See id.* at 50.

80. *Id.* at 48.

procedure.⁸¹ Without directly addressing *Triborough*, the court's holding in *Poughkeepsie PSTA* nonetheless helps to clarify that the *Triborough* doctrine is only concerned with maintaining the status quo to ensure fairness in collective bargaining, not with preserving the terms and conditions of an expired contract.

Later in the same year and the same court, the *Triborough* doctrine was addressed head on. In *Cardinale v. Anderson*,⁸² the CBA between the Baldwin School District and the Baldwin faculty union expired in 1973, with a provision that the contract would remain in effect unless either party chose to terminate it. The District exercised this option on the expiration date.⁸³ The expired contract included procedures for teachers to apply for, and the District to grant, yearly sabbaticals.⁸⁴ After announcing the termination of the contract, the District took no action on five pending applications, stating that since the CBA had expired, the provisions had no binding effect on the coming school year.⁸⁵ The Union filed a charge with PERB, claiming this action violated section 209-a(1) of the Taylor Law, citing the *Triborough* decision.⁸⁶

In *Cardinale*, unlike in *Poughkeepsie PSTA*, the court needed to directly address the *Triborough* ruling. The court found the doctrine inapplicable because the issue of the case could hardly be considered a "mandatory" subject of bargaining, as was the case in *Triborough*.⁸⁷ Differentiating the case from *Triborough*, the court reasoned, "[f]or whatever the term 'mandatory subject of negotiation' means, there must be a difference between basic salary for all the teachers in a large school district and possible Board approval of . . . sabbaticals for only twelve of them."⁸⁸ The court went on to warn against a broad application of *Triborough*, stating "even [employer alteration of basic employee benefits] may be legitimately occasioned by factors other than intent to pressure teachers, as by budget or by facility cutbacks. Accordingly, where such major interim changes occur, the issue still requires close examination of employment circumstances."⁸⁹

The unease over the potential breadth of the *Triborough* doctrine

81. See *id.* at 49.

82. 347 N.Y.S.2d 284 (N.Y. Sup. Ct. 1973).

83. *Id.* at 285.

84. See *id.* at 286.

85. See *id.*

86. See *id.* at 290.

87. See *id.* at 292.

88. *Id.*

89. *Id.*

displayed in *Cardinale* was shared by other courts. In *Dobbs Ferry Union Free School District v. Dobbs Ferry United Teachers*,⁹⁰ the court gave a more direct voice to these concerns. There, the CBA between the District and the Union was set to expire in 1976.⁹¹ However, the CBA included a “survivorship” clause stating that the CBA would remain in effect beyond the expiration date unless the contract had been “amended or superseded.”⁹² Such a clause presented the exact concern previous courts had about the potential reach of the *Triborough* doctrine: if the terms and conditions of a contract were maintained beyond its expiration, “the [school] board would be in a handicapped position, and at a serious disadvantage, because it either negotiates on the [Union’s] terms “or continue indefinitely” all the terms of the expired contract.”⁹³ After examining numerous cases that had addressed similar issues, including *Poughkeepsie PSTA* and *Cardinale*, as well as a Syracuse Law Review article⁹⁴ on the topic, the court struck down the provision as counter to public policy.⁹⁵ Again, without explicitly weighing in on the *Triborough* doctrine, the decision demonstrated the necessary balancing act in defining what terms were “mandatory.”⁹⁶ *Dobbs Ferry* cautions against a broad definition, raising concerns over the doctrine’s potential to subvert the public interest in favor of guaranteeing harmonious labor relations.

Dobbs Ferry also touched on a recent amendment to the Taylor Law that further aroused concerns over the *Triborough* doctrine. In 1974, the Legislature inserted section 209(3)(f), which dealt specifically with school boards, Board of Cooperative Educational Services (BOCES), and other educational government agencies.⁹⁷ Under section 209(3)(e), included in the original legislation, the final step of impasse resolution for all public labor disputes was that the public employer and the employee organization were both afforded the opportunity to submit their recommendations to the legislative body, which then was required to hold a public hearing and “thereafter . . . take such action as it deems

90. 395 N.Y.S.2d 988 (N.Y. Sup. Ct. 1977).

91. *See id.* at 989.

92. *See id.*

93. *Id.* at 994 (citing *Niagara Wheatfield Adm’rs Ass’n v. Niagara Wheatfield Cent. Sch. Dist.*, 54 A.D.2d 498, 502 (N.Y. App. Div. 1976) *vacated*, 44 N.Y.2d 68 (N.Y. 1978)).

94. *See generally* Robert F. Koretz & Robert J. Rabin, *Labor Relations Law*, 26 SYRACUSE L. REV. 125 (1975).

95. *Dobbs Ferry*, 395 N.Y.S.2d at 991-95.

96. *See id.*

97. 1967 N.Y. Sess. Laws 593-94 (codified as amended at N.Y. CIV. SERV. LAW § 209(3)(f) (McKinney 2011 & Supp. 2013)).

to be in the public interest” to resolve the impasse.⁹⁸ This was the statutory language employing the “legislative oversight” and finality in impasse resolution that the Taylor Commission saw as so important to an effective collective bargaining system.⁹⁹ Section 209(3)(f), however, eliminated the legislative oversight function for school boards and other educational government agencies, leaving the impasse resolution procedure open-ended.¹⁰⁰ “In this manner, by eliminating the final hearing with the School Board acting as a legislative body, a new collective bargaining agreement will only be entered into if both parties accept its terms.”¹⁰¹

The 1974 Amendment only furthered the courts’ concern over the potential of the *Triborough* doctrine. The courts were already concerned that a broad application of the *Triborough* doctrine would require carrying forward most, if not all, terms and conditions of employment under the expired contract.¹⁰² This would mean that “[t]he employees then would always start where they previously left off. They would be locked into a guaranteed gain position, and the employers into an assured losing stance . . . the union would have *no place to go but up*.”¹⁰³ The 1974 Amendment only exacerbated the seriousness of this concern: without finality and legislative oversight in impasse resolution, the union would essentially have a veto over any changes to the terms and conditions of employment. The court in *Dobbs Ferry* worried about this exact point, arguing that the result would be contrary to the public interest:

Such a contractual provision which would permit . . . [a] public body . . . to vest in a union of its employees the power unilaterally to

98. N.Y. CIV. SERV. LAW § 209(3)(e) (McKinney 2011).

99. See DONOVAN, *supra* note 3, at 113 (“The committee maintained that to have an effective substitute for the strike there needed to be finality in the impasse procedure and that any final judgment must necessarily reside with the legislative body.”).

100. See N.Y. CIV. SERV. LAW § 209(3)(f) (McKinney 2011 & Supp. 2013) (“[W]here the public employer is a school district, a board of cooperative educational services, a community college, the state university of New York, or the city university of New York, the provisions of subparagraphs (iii) and (iv) of paragraph (e) of this subdivision shall not apply, and (i) the board may afford the parties an opportunity to explain their positions with respect to the report of the fact-finding board at a meeting at which the legislative body, or a duly authorized committee thereof, may be present; (ii) thereafter, the legislative body may take such action as is necessary and appropriate to reach an agreement. The board may provide such assistance as may be appropriate.”).

101. *Dobbs Ferry*, 395 N.Y.S.2d at 992 (citations omitted).

102. See *Cardinale v. Anderson*, 347 N.Y.S.2d 284, 292 (N.Y. Sup. Ct. 1973).

103. *Id.* (emphasis added).

perpetuate for an indefinite or indeterminate period of time, determinable only at the sufferance of such Union, wages and other terms and conditions of employment, regardless of the economic conditions of the school district or municipality, would be violative of the public interest and public policy.¹⁰⁴

In 1977 the Court of Appeals weighed in on the matter in *BOCES Rockland County v. N.Y. State PERB*.¹⁰⁵ There, the CBA between BOCES and the Union included a provision for “[a] progression of automatic step increments for employees in the unit.”¹⁰⁶ When the CBA expired in 1974, but before negotiations began, BOCES announced it would honor all the terms and conditions of the expired contract, except that wages and benefits would remain at the levels in effect at the expiration date.¹⁰⁷ The Union challenged the refusal to extend the step increment provision as a violation of section 209 of the Taylor Law, citing *Triborough*.¹⁰⁸ PERB applied *Triborough* and found for the Union, ordering BOCES to cease and desist its refusal to pay the step increments.¹⁰⁹ On appeal, the appellate court reversed PERB’s ruling in part, holding that PERB only had the authority to enter an order for the employer to negotiate in good faith, and not an order of specific performance for BOCES to pay the salary increments.¹¹⁰

BOCES appealed to the New York State Court of Appeals, which accepted in order to give due consideration to the *Triborough* doctrine.¹¹¹ As in previous lower court cases addressing *Triborough*, the court closely criticized the doctrine without outright overturning the decision. The court critiqued the doctrine, when broadly applied, as counter to the public interest by ignoring and interfering with fiscal and political responsibilities of the public employer.¹¹² Specifically addressing the continued enforcement of salary step increases, the Court of Appeals fervently warned of the potential troubles:

As a reward and by encouraging the retention of experienced personnel in public positions, the concept of increments based on continuance in service, properly exercised, is creditable for the public entity and the

104. *Dobbs Ferry*, 395 N.Y.S.2d at 994.

105. 363 N.E.2d 1174 (N.Y. 1977).

106. *Id.* at 1175.

107. *See id.*

108. *See id.*

109. *See id.* at 1176.

110. *See id.* at 1174.

111. *See id.* at 1176.

112. *See id.* at 1177.

citizenry are better served . . . The concept of continual successive annual increments, however, is tied into either constantly burgeoning growth and prosperity on the part of the public employer . . . or a continuing general inflationary spiral, without admeasurement either of the growth or inflation and without consideration of several other relevant good faith factors such as comparative compensation, the condition of the public fisc and a myriad of localized strengths and difficulties.¹¹³

The court went on to further criticize the application of *Triborough* to pay increment provisions:

To say that the *status quo* must be maintained during negotiations is one thing; to say that the *status quo* includes a change and means automatic salary increases is another . . . The inherent fallacy of PERB's reasoning is that it seeks to make automatic increments a *matter of right*, without regard to the particular facts and circumstances. . . .¹¹⁴

Thus, while not completely upending the *Triborough* decision, the Court of Appeals ruling in *BOCES Rockland County* was a robust warning of the hazardous potential of the doctrine if stretched too far.

B. Enacting the Triborough Amendment

While the Court in *Rockland County BOCES* stopped short of overturning *Triborough*, and PERB continued to apply the doctrine in a variety of cases, the long-term fate of the doctrine was uncertain with a critical decision from the State's highest court in the background. Strong pro-union advocates, including Assemblyman Joseph R. Lentol, one of the primary sponsors of the Lentol-Rossetti Bill, pushed for legislative change to the Taylor Law that would protect the *Triborough* doctrine and roll back *Rockland County BOCES*.¹¹⁵ In 1978, the Legislature passed a union-sponsored bill that would amend the Taylor Law by making it an improper practice to "refuse to continue *all* the terms of an expired agreement until a new agreement is negotiated."¹¹⁶ This bill fell to Governor Carey's veto, as did an identical bill passed the

113. *Id.*

114. *Id.*

115. See Mary Helen Moses, *Scope of Bargaining and the Triborough Law: New York's Collective Bargaining Dilemma*, 56 ALB. L. REV. 53, 82 (1992).

116. *Id.* at 83 (citing A. 12710, Leg., 201st Sess. (N.Y. 1978); A. 4165, Leg., 202d Sess. (N.Y. 1979)) (emphasis added).

following year.¹¹⁷ Three years later, however, the Governor finally conceded to the union's pressure and signed section 209-a(1)(e), better known as the Triborough Amendment, into law.¹¹⁸

As Part III will explore, the Amendment's abandonment of the reasoning and purpose of its namesake decision and legal doctrine dramatically changes the doctrine's purpose, serving instead to protect public employees at the expense of the public interest.

III. THE FUNCTION AND IMPACT OF THE TRIBOROUGH AMENDMENT

A. *How the Amendment Strays from the Doctrine*

The *Triborough* doctrine, as developed through decisions such as *Troy City School District v. Troy Teachers Ass'n*¹¹⁹ and *County of Suffolk v. Suffolk County Patrolmen's Benevolent Ass'n*,¹²⁰ was grounded in the notion that the purpose of extending the terms and conditions of a contract beyond its expiration date was the preservation of the status quo to ensure a level bargaining field.¹²¹ Defining the term "status quo" is at the very heart of the *Triborough* line of cases. While the *Triborough* decision held "an employee organization which does not strike is entitled to the maintenance of the *status quo* during negotiations," it only went so far as defining the "status quo" as prohibiting the employer from "unilaterally altering existing mandatory subjects of negotiations while a successor agreement is being negotiated."¹²² Defining "status quo," by delineating "mandatory" from "permissive" or "illegal" subjects of bargaining, would require careful case-by-case consideration. The *Triborough* line of cases worked to draw the contours of the term "status quo."

In the first several cases, PERB defined the term "status quo" broadly, giving a wide application to the *Triborough* doctrine.¹²³ Rather than delineating "mandatory" subjects of bargaining from other subjects, PERB recognized three exceptions to a general application of *Triborough*.¹²⁴ First, an employer was not required to maintain the

117. Moses, *supra* note 115, at 83.

118. See N.Y. CIV. SERV. LAW § 209-a(1)(e) (McKinney 2011 & Supp. 2013).

119. 8 P.E.R.B. ¶ 4561, 4679 (1975), *rev'd on other grounds*, 9 P.E.R.B. ¶ 3039, 3068 (1976).

120. 9 P.E.R.B. ¶ 4537 *aff'd* 9 P.E.R.B. ¶ 3080 (1976).

121. See *id.* at 4606; *Troy City Sch. Dist.*, 8 P.E.R.B. at 4680.

122. See *Triborough Bridge and Tunnel Auth. v. AFL-CIO*, 5 P.E.R.B. ¶ 3037, 3065 (1972).

123. See *supra* Part II.A.

124. See *Triborough*, 5 P.E.R.B. at 3065.

“status quo” if the employee union engaged in an illegal strike.¹²⁵ Second, any dispute resolution procedures included in an expired contract did not survive because the Taylor Law specifically created and imposed an alternative procedure when no contractual method existed.¹²⁶ Third, an employer was permitted to make minimal unilateral changes under certain “compelling reasons” circumstances.¹²⁷

When the courts began reviewing *Triborough* decisions they limited the scope of the doctrine’s application and restricted PERB’s broad definition of the term “status quo.”¹²⁸ Part of this was a struggle over PERB’s claim of exclusive authority in the realm of public sector collective bargaining.¹²⁹ But the courts also raised concerns over the conflict between a broad interpretation of *Triborough* and the public interest in an efficient and effective government.¹³⁰ The *Rockland County BOCES* decision by the New York Court of Appeals (while not outright rejecting the *Triborough* doctrine) seriously questioned whether the doctrine’s application had strayed too far from the decision’s reasoning and justification.¹³¹ In rejecting the applicability of *Triborough* to the case at hand, the court argued “[t]he reasons . . . should be apparent. Involving a delicate balance between fiscal and other responsibilities, [the doctrine’s] perpetuation is fraught with problems, equitable and economic in nature.”¹³² The court went on to address the particular issue at hand, mandating perpetual automatic salary increases beyond the contract’s expiration, arguing that such a

125. See *Vill. of Valley Stream v. Local 342, Long Island Pub. Serv. Emps. Union*, 6 P.E.R.B. ¶ 4536, 4631 (1973), *aff’d*, 6 P.E.R.B. ¶ 3076, 3125 (1973); *Somers Cent. Sch. Dist. v. Somers Faculty Ass’n*, 9 P.E.R.B. ¶ 4521, 4573-74 (1976).

126. See *Bd. of Ed. of Poughkeepsie v. Poughkeepsie PSTA*, 349 N.Y.S.2d 47, 49 (N.Y. Sup. Ct. 1973) (holding that dispute resolution provision of expired contract did not survive because New York Civil Service Law § 209 created an explicit alternative). See also *Port Chester-Rye Union Free Sch. Dist. v. Port Chester Teachers Ass’n*, 10 P.E.R.B. ¶ 3079, 3133 (1977) (holding that the provision to arbitrate is no longer in effect because the contract has expired).

127. See *Cent. Sch. Dist. No. 1 of Wappinger v. Wappinger Cent. Sch., Faculty Ass’n, Inc.*, 5 P.E.R.B. ¶ 3074 (1972), *rev’d on other grounds*, 5 P.E.R.B. ¶ 5412 (1972). In *Wappinger*, PERB permitted the school district to unilaterally alter class loads for math and science teachers after the contract expired, reasoning that class loads were non-economic issues and there were “compelling reasons” (i.e. the scheduling of the school program) for the timing of the employer’s action.

128. See, e.g., *Rockland Cnty. BOCES v. N.Y. State Pub. Emp. Relations Bd.*, 363 N.E.2d 1174, 1176 (N.Y. 1977) (limiting PERB’s enforcement authority to the entry of an order directing the public employer to negotiate in good faith).

129. See *Triborough*, 5 P.E.R.B. at 3065 (holding that there was “no question of contract interpretation” and the board should not “defer to arbitration”).

130. See *supra* notes 111-114 and accompanying text.

131. See *Rockland Cnty. BOCES*, 363 N.E.2d at 1178.

132. *Id.* at 1177.

policy disregards the economic realities of public sector labor bargaining.¹³³ In sum, the court recognized the initial reasoning supporting the *Triborough* doctrine, while raising concerns that the doctrine was being overstretched by noting the inherent conflict with the public benefit.¹³⁴

The Triborough Amendment, however, is not grounded in this same reasoning. The legislators who supported and approved the Triborough Amendment likely believed that the Amendment would simply codify the *Triborough* doctrine and roll back the restrictions *BOCES of Rockland County* placed on the doctrine.¹³⁵ One of the bill's sponsors suggested a different incentive, however, arguing that "public employees need protection from irresponsible public employers who abuse the Taylor Law."¹³⁶ The idea of an amendment affording public employees protection in negotiations differs from the intended purpose of the *Triborough* doctrine—to ensure fairness in negotiations. The Governor's approval memorandum voiced similar concerns with the Amendment that had led him to twice veto the bill, particularly that the language of the Amendment went far beyond the scope of the *Triborough* decision as interpreted by the courts.¹³⁷

Two specific portions of the Amendment provide evidence supporting the Governor's concern that the Amendment did far more than codify the *Triborough* decision. First, the phrase "terms of an expired agreement" is used, instead of "mandatory terms of bargaining."¹³⁸ The court in *Cardinale* cautioned that an overly broad interpretation of the doctrine would extend application beyond the reasoning of PERB in that case, which sought only to preserve the status quo of employment to ensure fair bargaining.¹³⁹ The wording used in

133. See *id.* (holding that continual successive annual increments is problematic because it did not take into account other factors such as inflation or employer's good faith efforts in meeting its obligations).

134. See *id.* (noting that there are reasons for status quo to be maintained, but the status quo shall not be interpreted so broadly as to include automatic increases in salary). In *Triborough*, PERB recognized this concern but rejected it. See *Triborough*, 5 P.E.R.B. at 3065 ("[R]espondent expresses concern that the hearing officer's decision would prevent an employer from ever changing the terms and conditions of employment. . . . Respondent's concerns are not borne out by the statute . . . which under some circumstances include mandatory mediation and fact finding.").

135. See *Rockland Cnty. BOCES*, 363 N.E.2d.1173.

136. Melissa M. McGuire, Note, *The Effect of New York's Triborough Law on Public Sector Labor Negotiations*, 48 ALB. L. REV. 459, 482 (1983).

137. See DONOVAN, *supra* note 3, at 188-89. One commentator noted "the memorandum itself is interesting because until the very end it reads as though it were a preamble to a veto." *Id.*

138. N.Y. CIV. SERV. LAW § 209-a(1)(e) (McKinney 2011 & Supp. 2013).

139. See *Cardinale v. Anderson*, 347 N.Y.S.2d 284, 292 (N.Y. Sup. Ct. 1973).

the Triborough Amendment, however, is concerned with the contract only, not the actual bargaining atmosphere.¹⁴⁰ Second, the provision covers “all” terms of an expired contract, effectively eliminating the “mandatory/non-mandatory” subject of bargaining question, which was so vital to the reasoning in the discussion of *Triborough*.¹⁴¹ As the *Triborough* line of case law demonstrated, the courts and PERB were continuously struggling with the proper breadth of the doctrine’s application. Far from furthering the doctrine and contributing to this important legal discussion, the enactment of the Triborough Amendment fundamentally altered the very question the *Triborough* cases sought to answer.

C. An Imperfect Fit for Public Sector Collective Bargaining

At first, the difference between the *Triborough* doctrine and the Triborough Amendment may seem subtle, but the Amendment amounts to a shift in the very foundation underlying the doctrine. Not only did the Amendment roll back *Rockland County BOCES*, but it fundamentally changed the very question PERB set out to answer in *Triborough*. In that seminal case, PERB recognized the difficult balancing act the issue presented and saw the challenge as one of ensuring fair bargaining while also preserving the employer’s authority to operate.¹⁴²

In a way, the *Triborough* doctrine is a product of the Taylor Commission’s imperfect attempt to adapt a private sector collective bargaining model to the public sector. While the Taylor Commission attempted to address this imperfect fit through some of its recommendations,¹⁴³ notably the importance of finality in impasse resolution and reducing the penalties for illegal strikes, *Triborough* arose out of PERB’s efforts to calibrate bargaining leverage in actual practice, imposing a duty on the employer as a counterpoint to “the statutory prohibition against an employee organization resorting to self-help by striking.”¹⁴⁴ The shortcoming of *Triborough*, however, partially

140. See CIV. SERV. § 209-a(1)(c).

141. See *id.* (mandating that employer must “continue *all* the terms of an expired agreement until a new agreement is negotiated”) (emphasis added); cf. *Triborough Bridge and Tunnel Auth. v. AFL-CIO*, 5 P.E.R.B. ¶ 3037, 3064-65 (1972). (“[A]n employer cannot unilaterally alter existing *mandatory subjects* of negotiations while a successor agreement is being negotiated.”) (emphasis added).

142. See *Triborough*, 5 P.E.R.B. ¶ 3037, 3064.

143. See *supra* notes 55-64 and accompanying text.

144. See *Triborough*, 5 P.E.R.B. at 3064.

recognized by the “compelling reason[.]” exception¹⁴⁵ and by the Court of Appeals in *Rockland County BOCES*,¹⁴⁶ is that the doctrine overstates the impact of the prohibition on striking. In attempting to counterweigh the effect of the statutory strike ban on negotiations, the Taylor Law fails to recognize that there are numerous other factors in public sector collective bargaining that diminish the *employer’s* bargaining leverage.

There are at least three noteworthy characteristics of public sector collective bargaining that set it apart from the private sector by diminishing the public employer’s bargaining leverage. First, public employers, unlike their private sector counterpart, are sovereign entities.¹⁴⁷ While this permits public employers to impose a strike ban on employees, it also strips the employer of their biggest source of leverage—the ability to “pick up shop.”¹⁴⁸ Public employers are, by their very nature, charged with providing specific services to a specific territory, and therefore they cannot move away and, more importantly, they cannot go out of business.¹⁴⁹

Second, because of the sovereignty of the employer, public employees hold a piece of leverage that their private sector counterparts do not: the ability to pressure the employer across the bargaining table through the ballot box and other public channels.¹⁵⁰ All public employers are, directly or indirectly, representatives of the public and subject to election.¹⁵¹ Strong public unions, particularly in elections with low voter turnout, such as school board elections, can have a disproportionate impact on the vote: “At the heart of local politics is the astounding fact that teachers unions are in a position to determine who sits on local school board, and thus who they will be bargaining with . . . Needless to say [unions] have strong incentives to [engage in local politics].”¹⁵² Between the high incentive for unions to engage in local elections, the low turnout in many of these elections, the non-

145. See Cent. Sch. Dist. No. 1 of Wappinger v. Wappinger Cent. Sch., Faculty Ass’n, Inc., 5 P.E.R.B. ¶ 3074 (1972).

146. See *Rockland Cnty. BOCES*, 363 N.E.2d at 1177.

147. See Leo Troy, *Are Municipal Collective Bargaining and Municipal Governance Compatible?*, 5 U. PA. J. LAB. & EMP. L. 453, 453 (2003).

148. See *id.* at 461 (“Approval or disapproval of the results in the public sector can only be addressed through an election, a procedure which comes at discrete intervals and can be manipulated during the political process. As a result, public employers are virtually immune to markets.”).

149. See *Moses*, *supra* note 115, at 63.

150. See Troy, *supra* note 147, at 454-455.

151. See Bonventre, *supra* note 31, at 6.

152. Terry M. Moe, *Teachers Unions and the Public Schools*, in A PRIMER ON AMERICA’S SCHOOLS 151, 167 (Terry M. Moe ed., 2001).

partisan nature of school board elections, and the large impact of even small donations in races,¹⁵³ unions can very easily have a greatly disproportionate impact on local elections.¹⁵⁴ As one commentator argues

[T]he most important difference in collective bargaining between [the public and private] sectors is, again, the *political* dimension . . . particularly so at the local level. At the local level of government . . . the public employer, as an elected official is *largely dependent* on the union's wealth and membership (the voters).¹⁵⁵

Third, the political dimension of public sector collective bargaining also contributes to how bargains are made.¹⁵⁶ Since public employers are elected officials, greater attention is paid to the short-term costs of an agreement, which public officials feel the greatest public pressure over. The result is a strong incentive to win short-term concessions, which the public official will gain praise for, in exchange for long-term and non-monetary benefits. The Triborough Amendment further facilitates this approach to bargaining by eliminating the line between "mandatory" and "permissive" subjects of collective bargaining.¹⁵⁷ The Amendment puts

153. See *id.* at 167-68.

154. See *id.* at 169. Moe frequently notes in *Teacher Unions and the Public Schools*, as well as elsewhere, how very little is actually known or studied about the impact of public unions on elections, though the existing evidence all indicates that they have remarkable influence. *Id.*; see also Troy, *supra* note 147, at 474 (noting that both the NEA and AFT "must be regarded as significant obstacles to any competitive challenges because of their monopoly grip on public education."); FREDERICK M. HESS & MARTIN WEST, HARVARD UNIV. PROGRAM ON EDUC. POLICY AND GOVERNANCE, A BETTER BARGAIN: OVERHAULING TEACHER COLLECTIVE BARGAINING FOR THE 21ST CENTURY 33 (2005) ("[A]lmost 60 percent of [school] board members nationwide say teachers unions are "very active" or "somewhat active" in their local elections.").

155. Troy, *supra* note 147, at 457 (emphasis added); see also Terry M. Moe, *The Union Label on the Ballot Box*, 6 ED. NEXT no. 3, Summer 2006, 59, 59. ("Special interests, well organized and largely unchecked by the public, often have ample opportunity to engineer outcomes in their own favor.").

156. See Clyde Summers, *Public Sector Bargaining: A Different Animal*, 5 U. PA. J. LAB. & EMP. L. 441, 446-47 (2003).

157. See *In re. Greenburgh No. 11 Fed'n of Teachers and Greenburgh No. 11 Union Free School Dist.*, 32 P.E.R.B. ¶ 3024, 3046-48 (1999) (holding that permissive subjects that have been placed within the parties' collectively negotiated agreement are treated as mandatory subjects for all purposes). While several PERB decisions have delineated certain terms or conditions of employment as "permissive," once a "permissive" term is negotiated into a contract, it is treated as a "mandatory" term for all purposes, including requiring bargaining over the matter in subsequent negotiations. See, e.g., *West Irondequoit Teachers Ass'n v. Helsby*, 35 N.E.2d 775, 776-78 (N.Y. 1974) (holding class sizes are a non-mandatory bargaining subject); *In re. Greece Teachers Assoc. v. Greece Central School District*, 22 P.E.R.B. ¶ 3005, 3016, 3018 (1989) (holding number of teacher assignments per class day is a non-mandatory bargaining subject).

everything on the table for negotiations, allowing public officials to bargain away managerial decisions for short-term cost savings.¹⁵⁸ Public officials, concerned first and foremost with the budget's bottom line, are willing to negotiate away discretion on work rules in exchange for avoiding large pay raises.¹⁵⁹

Rather than address and correct these issues with the *Triborough* doctrine, the Triborough Amendment reinforces and "doubles down" on these errors.¹⁶⁰ The Triborough Amendment drifts beyond the initial *Triborough* doctrine, which itself was faulty for overlooking the many unique pressures and limits already placed on the public employer at the bargaining table.¹⁶¹ Over the past thirty years, what began as an attempt by PERB to adapt a private sector collective bargaining scheme to the public sector has become a law concerned only with protecting public employees and preventing labor unrest at any and all cost. This not only disposes of the initial intent of the *Triborough* ruling, but also ignores the public's interest in an efficient, effective and sustainable government. As Part IV will show through a case study of the Buffalo City School District, the Triborough Amendment has placed school districts and municipalities across the state in an unstable and unsustainable fiscal position.

IV. A CASE STUDY OF THE BUFFALO CITY SCHOOL DISTRICT

Buffalo is the second largest city in New York and the largest school district in the state outside of New York City, serving around 34,000 students in nearly sixty school facilities, not including a robust charter sector.¹⁶² Like many urban districts, particularly those with

158. See Summers, *supra* note 156, at 447-48 (discussing the implications of bargaining over managerial prerogatives, such as student discipline, behind closed doors); Terry M. Moe, *A Union by any Other Name*, 1 EDUC. NEXT no. 3, Fall 2001, 40, 41-42 (discussing common work rules unions negotiate to protect and expand their membership base, including limiting pay, transfers, promotions and assignments based on performance, increasing union input on teaching schedules, curriculum, materials and equipment, and union involvement in discipline and grievance procedures).

159. HESS & WEST, *supra* note 154, at 25 ("More important than the average dollar amounts [of fringe benefits], however, is the way that these benefits are structured. They reward longevity alone, thereby crippling a district's ability to compete for highly qualified new or mid-career candidates in an increasingly national labor market.").

160. See discussion *supra* Part III.A.

161. See discussion *supra* Part III.A.

162. Esther Scott & Martin Linsky, *A Time of Reckoning: Crisis in the Buffalo Public School System*, 2 J. CASES EDUC. LEADERSHIP 22, 23 (1999); *District Directory Information*, NAT'L CTR. FOR EDUC. STATISTICS, http://nces.ed.gov/ccd/districtsearch/district_detail.asp?ID2=3605850 (last visited Dec. 27, 2013); *Annual Estimates of the Resident Population: April 1, 2010 to July 1, 2012*,

declining enrollment, Buffalo has continuously faced financial pressure. This section takes a look at Buffalo's history of negotiating contracts with the Buffalo Teachers Federation, the District's largest bargaining unit, as a case study of the real world implications of the restraints imposed by the Taylor Law on school districts.

A. *A Brief History of Buffalo's Teacher Union Contract Negotiations*¹⁶³

Throughout the 1960s, Buffalo's economic prosperity permitted school budgets to be constructed without significant concern over revenues.¹⁶⁴ Budgets and labor contracts were established without significant conflict, infamously being hashed out in Mayor Frank Sedita's basement.¹⁶⁵ Along with a shift from a mayoral appointed to an elected school board, the City's growing financial hardship in the 1970s brought about significant changes for the District.¹⁶⁶ Over the decade, Buffalo would lose over 40,000 jobs and see its population decline by 23%.¹⁶⁷ When the first elected school board members took office in 1974, the city was in the nadir of its decline.¹⁶⁸ The newly elected school board was determined to ensure the District would remain financially sound.¹⁶⁹

When contract negotiations opened up in 1976 the Board took a hard line, proposing significant program cuts and refusing to increase teacher salaries.¹⁷⁰ Likely expecting a counter offer, the District was shocked when the union rejected the offer and went on strike, thereby violating the Taylor Law.¹⁷¹ The 20-day strike, coupled with the demands of the Buffalo Teachers Federation (BTF) for salary raises, improved medical coverage, restoration of previously cut programming, and additional benefits signaled a mammoth gap between the Board and the Union's positions.¹⁷² While many in the public were sympathetic to

U.S. CENSUS BUREAU,
<http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk> (last visited Sept. 16, 2013).

163. Much of the research on the history of contract negotiations in the Buffalo Public Schools comes from archive research from Rebecca Bass, on file with the author.

164. See Dave Ernst, *Has Electing Altered School Board?*, BUFFALO NEWS, Apr. 10, 1982.

165. See *id.*

166. See *id.*

167. See Scott & Linsky, *supra* note 162, at 24.

168. See *id.* at 24-25.

169. See *id.* at 25.

170. See Ernst, *supra* note 164.

171. See *id.*

172. See *id.*

the teachers, many also believed that the BTF's demands were simply not realistic for a city on the verge of bankruptcy.¹⁷³

A PERB arbitration panel largely sided with the BTF's demands.¹⁷⁴ While the District saw the panel's proposal as more costly than it likely could handle, the District was desperate to end the strike. While making significant gains in the contract, the BTF membership was nonetheless appalled by the fines imposed for the strike that would be used to fund the contracted raises.¹⁷⁵ The negotiations, strike, and final contract of 1976 left both sides greatly disappointed and created significant tension between them.

Through the 1980s the City ran up significant deficits covering the terms of the contract while also implementing court-ordered desegregation efforts.¹⁷⁶ This era created significant tension between the City and the District, especially during Mayor Jimmy Griffin's tenure, who regularly protested the financial drain caused by the District.¹⁷⁷ Over the same period, State funding to the District supporting Buffalo's lauded magnet system exploded. Between the two funding sources, the District's budget increased by 182% between 1981 and 1997, with the District's workforce vastly outpacing enrollment growth.¹⁷⁸

In 1989 a slate of candidates supported by Mayor Griffin narrowly edged a group of BTF-backed candidates.¹⁷⁹ The election coincided with an end to the free-flowing state funding, with the State in poor financial shape.¹⁸⁰ With funding tightening, contract negotiations in 1989 quickly became contentious, again requiring PERB intervention.¹⁸¹ The panel recommended significant salary increases aimed at closing the salary gap between the City and surrounding suburban districts.¹⁸² Newly appointed Superintendent Albert Thompson was unconvinced, however, believing that the panel's approach overlooked the generous health care and retirement benefits that City teachers enjoyed.¹⁸³ Eventually Thompson and BTF President Phil Rumore reached a

173. *Time for BTF to Cut Its Losses*, BUFFALO NEWS, Sept. 18, 1976, at C-2.

174. *See* Ernst, *supra* note 164.

175. *See* Darryl Campagna & Peter Simon, *Opening-Day Relief; Teachers Relent on Threat of Job Action*, BUFFALO NEWS, Sept. 6, 2000.

176. *See* Scott & Linsky, *supra* note 162, at 25-26.

177. *See, e.g. City vs. Schools: A Numbers Game*, BUFFALO NEWS, May 6, 1984, at A1-A2; *see also* Ernst, *supra* note 164.

178. *See* Scott & Linsky, *supra* note 162, at 26 & Ex. 4.

179. *See id.* at 27.

180. *See id.* at 28.

181. *See id.* at 30.

182. *See id.*

183. *See id.*

compromise in a series of one-on-one, closed-door negotiations, providing teachers a significant salary raise in exchange for increased contributions to health and retirement benefits.¹⁸⁴ To both parties' surprise, however, the Board rejected the contract by one vote.¹⁸⁵

With many accusing the Board of rejecting the contract out of spite over the concealed nature of the negotiations, Board members argued that the contract was simply not fiscally feasible.¹⁸⁶ In particular, members were concerned that the proposal relied too heavily on state aid increases that were far from certain.¹⁸⁷ After the rejection, the BTF refused to renew negotiations. Instead, the Union filed an improper practice charge with PERB, accusing the Board of improper communications with their chief negotiator and arguing that the District had waived its right to approve the contract.¹⁸⁸ PERB ruled for the BTF in 1991, ordering the implementation of the contract.¹⁸⁹

The 1991 PERB decision set off a dispute that would not be fully resolved until 2000. The District quickly appealed the decision, arguing that PERB did not have authority to mandate implementation of the contract; the matter became tied up in legal proceedings. In 1994, the year the contract was set to expire, a State Supreme Court judge reversed the PERB ruling.¹⁹⁰ While both sides initially hoped the ruling could be a chance for a fresh start, the relationship quickly soured and the BTF appealed the Court's ruling, putting an end to any negotiations.¹⁹¹

The mid-1990s saw political change in Buffalo, with a new Mayor and a new majority on the School Board bringing hope for reconciliation.¹⁹² When negotiations reopened in August 1994, with the BTF's appeal of the Court ruling still pending, the District hoped to peacefully reach an agreement and proposed a contract retroactively applying from 1990, therefore ending the back-pay litigation, through

184. *See id.*

185. *See id.* at 32-33.

186. John C. Doyle, Op-Ed., *Just for the Record, Buffalo, Good Sense Wasn't Missing from the Whole School Board*, BUFFALO NEWS, Jan. 15, 1997.

187. *See* Scott & Linsky, *supra* note 162, at 32.

188. *See Buffalo's Crisis Shouts a Warning to Albany: Fix the Legal Structure that Let this Happen*, BUFFALO NEWS, Dec. 12, 1996.

189. This ruling would go on to spark criticism of PERB, with opponents protesting the authority of an appointed panel to override an elected body. *Id.*

190. James Heaney, *Talks Held on Teachers Contract; School Superintendent, Union Leader Hope to Settle 4-Year Dispute Out of Court*, BUFFALO NEWS, Aug. 18, 1994.

191. *See* Scott & Linsky, *supra* note 162, at 35.

192. James Heaney, *Summit Planned on Improving City Public Schools*, BUFFALO NEWS, Dec. 7, 1995.

1996, with a total 19% salary increase over the period.¹⁹³ Any hope of reconciling was quickly lost when the BTF rejected the contract and threatened to strike.¹⁹⁴

With the District well aware of the effects of the 1976 strike, it sought to carefully avoid another strike.¹⁹⁵ The District and the Union appealed to the City, jointly and separately, for an increase in funding, a request promptly rejected by City Hall.¹⁹⁶ This left the Superintendent facing either a strike or a huge budget gap. Ultimately, the Superintendent agreed to a risky proposal from BTF President Phillip Rumore. The District would agree to a three-year contract, with a total 27.2% raise, and the District and the Union would make a joint commitment to find \$90 million to settle back payments for retirees.¹⁹⁷ If this effort failed, however, the Union would have the right to sue the District to recover to the full extent allowed by law.¹⁹⁸ With this agreement, the back-pay issue, originating in 1990, would extend through at least 1997. The looming threat of a strike was enough to persuade the Board to sign off on the settlement.¹⁹⁹

Over the next two years it became obvious that the District would be unable to secure the necessary funding to settle the outstanding back-pay issue.²⁰⁰ To make matters worse, the state not only imposed a freeze on school aid, it actually revoked \$4 million previously allocated for the District.²⁰¹ Through the early 1990s the District had maintained the appearance of fiscal stability by ignoring long-term costs and assuming unprecedented aid.²⁰² The 1990 state funding cut, coupled with possible liability for the 1990 back payments, revealed the depth of the District's fiscal problems.²⁰³

The District's obvious financial problems helped temper tensions during negotiations in 1996; the Union was well aware that the District

193. See Scott & Linsky, *supra* note 162, at 37.

194. See *id.*

195. See *id.* at 40.

196. See *id.* at 38.

197. See *id.*

198. See *id.* at 40.

199. James Heaney, *Mediator Proves Key to Teachers Contract; Both Sides Credit Kaufman with Keeping Strained Negotiations at the Table*, BUFFALO NEWS, Nov. 26, 1994. Several Board members had convinced themselves that if the back pay issue continued to be litigated it would ultimately end in the District's favor. See Scott & Linsky, *supra* note 162, at 42.

200. See Memorandum from Jim Shannon, Consulting Analyst on Strategic Analysis of the Buffalo Sch. Dist. Financial and Structural Crisis to James Harris, Superintendent (Feb. 1, 1997).

201. See Scott & Linsky, *supra* note 162, at 36.

202. See *id.* at 26.

203. See *id.* at 36-37.

did not have the financial capability to meet any major salary or benefit increases.²⁰⁴ While this helped assure peaceful negotiations, it hardly harmed the Union's position. As a newspaper headline described the negotiations, the "Board sacrificed savings to win peace with teachers."²⁰⁵ Despite an analysis from the Buffalo Fiscal Plan Commission recommending that the District could save \$20 million through negotiations, the final contract only saved \$3.5 million.²⁰⁶ Further, as in previous negotiations, the contract unrealistically relied on anticipated state and city aid that would not be forthcoming.²⁰⁷

In 2000, the District's fiscal gambles to ensure labor tranquility once again became a factor. In 1996 a New York State Appellate Court overruled the lower court's decision for the District on the 1990 contract dispute;²⁰⁸ four years later the District finally settled the litigation with the Union.²⁰⁹ Under the settlement, the District would pay \$73 million to cover a significant portion of the 1990 contracted raises.²¹⁰ Unable to cover the amount, the District relied on the lobbying efforts of local politicians, who secured a \$45 million interest-free loan from the State.²¹¹ The loan, however, came with numerous conditions requiring the District to submit to greater fiscal oversight by the city and the state.²¹²

The ten-year delay and six years of litigation ensured that tensions with teachers over the back payments would be high. Due to poor record keeping, which made it difficult to calculate the payments, the delay would be even longer.²¹³ In the meantime, negotiations on the contract that had expired in 1999 remained on hold. The tension over the back payments had boiled over into the contract negotiations. Frustrated by the stagnant negotiations, the BTF Executive Committee took a vote of no confidence in the District leadership. The District became frustrated, and worried, when the BTF began preparing to call a

204. See *id.* at 41.

205. James Heaney, *Board Sacrificed Savings; To Win Peace with Teachers*, BUFFALO NEWS, Nov. 17, 1996.

206. See *id.*

207. See *id.*

208. James Heaney, *Pay Ruling Stuns City; Staggering Debt to Teachers Leaves Future Unclear*, BUFFALO NEWS, Dec. 20, 1996.

209. Murray B. Light, Op-Ed., *Astute Legislature Can Be Thanked For Teacher Money*, BUFFALO NEWS, June 18, 2000.

210. See *id.*

211. See *id.*

212. Robert J. McCarthy, *Oversight of Schools to Increase*, BUFFALO NEWS, June 10, 2000.

213. Darryl Campagna, *Teachers Might Have to Wait Awhile for Back Pay*, BUFFALO NEWS, July 21, 2000.

strike.²¹⁴

On the first day of classes in September 2000, the BTF called a strike at seven o'clock in the morning, just one hour before classes would begin.²¹⁵ Despite a court order to end the strike, the BTF called a second strike the following Monday at 7:05 AM. The timing of the strikes, with hundreds of children already en route to school and thousands of families struggling to find child care at the last second, infuriated parents and the public.²¹⁶ As in 1976, the strike finally ended when the parties accepted a PERB panel proposal. The new contract would retroactively cover 1999 through 2004 and include a 13.5% salary increase, with retired teachers increasing contribution to their health insurance.²¹⁷ As with the 1976 strike, the fines and penalties imposed on the BTF²¹⁸ created tension and resentment between the parties that would last for years.

Since the 2000 contract expired in 2004, negotiations have essentially been non-existent. In 2004, a state-appointed fiscal control board imposed a salary freeze for all District employees, including teachers.²¹⁹ When the freeze lifted in 2007 the District moved all teachers up one "step" on the salary schedule.²²⁰ The Union was outraged, contending that all teachers should be moved up three "steps" to account for the entire three-year freeze period, and filed suit.²²¹ What followed was another four years of litigation; the Union won the first

214. Darryl Campagna, *Strike Fund Buys Agitated Teachers*, BUFFALO NEWS, Aug. 30, 2000.

215. Darryl Campagna & Gene Warner, *Strike Closes Schools; Teachers to be Told by Union to Report*, BUFFALO NEWS, Sept. 8, 2000.

216. Darryl Campagna, *Striking – A Tactic Past Its Time?; Few Parents Are Home All Day to Tend Strike-Idled Pupils, And Some; Observers Say The Job Action May Breed Ill Will*, BUFFALO NEWS, Sept. 10, 2000. Additionally, with the BTF made up largely of white teachers living beyond the city limits and the families most impacted by the strike being largely low-income minorities, the strikes became painfully tinged with racial undertones. *See id.*

217. Editorial, *Time to Concentrate on the Kids*, BUFFALO NEWS, Sept. 22, 2000.

218. BTF President Phillip Rumore was sentenced to 15 days in jail for contempt of court, of which he served 8 days, despite pleas from prominent politicians across the region and state and School Board members themselves. *See* Peter Simon, *Rumore Off to Jail as Pleas Fail to Sway Court*, BUFFALO NEWS, Sept. 30, 2000. The District pressed for \$400,000 in fines and the Union was ultimately fined \$250,000. Peter Simon, *Teachers Union Fined \$250,000 for Strike*, BUFFALO NEWS, Dec. 5, 2000. Beyond these penalties, the District and Union cross-filed improper practice charges with PERB, with the District seeking to revoke the Union's automatic dues check-off privileges. Peter Simon, *Educators on Edge: School District, Teachers Union Fighting A Cold War*, BUFFALO NEWS, Dec. 6, 2000.

219. MGT OF AMERICA, INC., ORGANIZATIONAL STUDY OF BUFFALO PUBLIC SCHOOLS, FINAL REPORT 3-38 (2010) [hereinafter MGT REPORT].

220. *See id.*

221. *See id.*

two rounds, but the New York Court of Appeals reversed and found for the District.²²² Again, the four years of litigation not only added significant tension to the relationship between the District and the BTF, but also prevented any negotiations for a new contract in the interim.²²³

In 2012, national attention fell on the District's contract with the BTF as major news outlets picked up a local story covering the explosive growth of a "cosmetic surgery" rider in the contract's health coverage.²²⁴ The rider, which provides zero co-pay cosmetic surgery coverage as part of the teachers' health care coverage, was initially inserted into the Union contract sometime in the 1970s, long before elective cosmetic surgery became widespread and remained largely out of sight for the next several decades.²²⁵ In the 2000s, however, the District suddenly saw its payments under the rider more than triple in just six years. News report after news report asked not why the rider was included in the first place, but why the District was powerless to do anything to control the exploding costs.²²⁶ The reason why the District had no control, as well as the reason why the Buffalo Teachers Federation has gone nine years without a new contract in place, and why the Union and the District have spent fifteen of the last twenty-three years litigating salary issues, lies in the impact of the Taylor Law and the Triborough Amendment on negotiations.

B. *Buffalo's Budget Woes: Spiraling Costs with No Relief Forthcoming*

Budget data over the past five years shows how Triborough has locked in unsustainable labor costs and prohibited the Buffalo City School District from addressing fiscal realities, especially when most needed.²²⁷ The District's revenue grew from 2006 through 2009, supported both by growth in state aid and by increased grant funding,

222. See *id.*; *In re Meegan v. Brown*, 16 N.Y.3d 395, 395 (N.Y. 2011).

223. See *Meegan*, 16 N.Y.3d at 402.

224. See, e.g., Jordan Weissmann, *Why Does Buffalo Pay for Its Teachers to Have Plastic Surgery?*, THE ATLANTIC ONLINE (Jan. 18, 2012, 9:15 AM), <http://www.theatlantic.com/business/archive/2012/01/why-does-buffalo-pay-for-its-teachers-to-have-plastic-surgery/251533/>.

225. See *id.*

226. See *id.*

227. All budget data is derived from official Buffalo City School District annual budgets and four-year budget projections. *Finance*, BUFFALO PUBL. SCHS., <http://buffaloschools.org/Finance.cfm?subpage=237> (last visited Dec. 28, 2013); See also, Jason A. Zwara, *Buffalo's Budget Woes: District Revenues and Expenses, 2006-2012*, BUFFALO REFORMED, (Apr. 2013), http://www.buffaloreformed.com/files/6713/7882/6326/Buffalos_Budget_Woes.pdf.

primarily though federal Race to the Top funding in 2008 and 2009.²²⁸ From 2009 through 2012, the budget stabilized, briefly dropping in 2010 before returning to the same level in 2011 and 2012.²²⁹ In 2006, total revenue for the District was \$634.3 million; this spiked to \$658.83 million in 2009, briefly dipped in 2010, then returned to \$659.4 million for 2012.²³⁰

While revenues peaked in 2009 before stabilizing through 2012, the District's expenses have exploded over the same period.²³¹ Total operating expenses in 2006-2007 were \$587.3 million; expenditures have steadily climbed each year, with 2012 projected expenditures amounting to \$676 million, a 15% increase over just five years. Over that same period, revenue grew only 4%. Observed in a vacuum, it would be unclear what was driving the budget gap—exploding costs, or stagnant revenues. One major factor points out the true culprit. Over the same period, enrollment in the District *dropped* by 4.2%.²³² Yet even with a significant decrease in student enrollment, both revenues *and* expenses increased over the same period.²³³

The biggest expense for the District is labor expenses, which are a direct result of collective bargaining agreements. From 2006 to 2012, while student enrollment dropped around 5%, labor compensation in the District dropped only .24%.²³⁴ While it is troubling enough that the District's direct labor expenses have not kept pace with falling enrollment, far worse are the exploding costs of providing benefits, especially health insurance, to employees and retirees. Since 2006,

228. Grant funding typically is allocated and earmarked for specific programs, therefore could best be thought of as outside the District's discretionary operations budget. This means that even if the District sees a significant increase in grant funding, funds may not be available to cover "operational" expenses, such as covering health insurance and retirement benefit expenses. See Zwara, *supra* note 227.

229. *See id.*

230. Budget data is on file with the author. The 2011 and 2012 budgets do, however, rely on using \$34.5 million and \$19.5 million, respectively, in appropriation funds, e.g. "rainy day" funds.

231. All budget data used here excludes building-related revenue and expenses because the District is in the midst of a major overhaul of nearly all of its facilities. Including building revenue and expenses would dramatically skew the budget figures.

232. This is a conservative figure. The District projected increased enrollment in 2012-13, anticipating the closure of a charter school, pushing many students back into the District. This charter closure was delayed and now looks to not be forthcoming. Excluding this projected increase, the true enrollment decline is 5.4%.

233. As a result, per student spending in the district has grown from \$17,421 to \$21,200, a 21.7% increase, in just five years.

234. District staffing has declined by 6.2%, driven primarily by decreases in teacher aides (down 15.9%) and blue-collar workers, including bus aides, cafeteria staff, maintenance staff, etc. (down 21%). Teaching staff has declined 3.1% while administrators have actually increased 2.8%.

expenditures for employee and retiree benefits have increased 37.9%, amounting to \$172.2 million, or 25.3% of the District's total budget.²³⁵ Health insurance has been the primary driver of this rising expense, especially for retirees.²³⁶

While these rising expenses are the result of many different variables, *Triborough* denies the District the flexibility needed to address them and prevents a collaborative approach between the District and its employees to tackle these tough issues, instead establishing an adversarial relationship that allows and encourages the employee unions to dig in and protect themselves when the District faces tough times.

V. HOW THE TAYLOR LAW INTERFERES WITH COLLECTIVE BARGAINING - AND HOW IT CAN BE FIXED

The Taylor Law, specifically the Triborough Amendment and section 209(3)(f), significantly interferes with collective bargaining, particularly between school districts and their bargaining units. The impact of the Taylor Law may be seen in the conflicts, delays, and tensions arising out of contract negotiations in Buffalo over the past thirty years.

First, by guaranteeing that all terms and conditions of a contract remain in effect after its expiration, the Triborough Amendment removes any meaning from the contract's expiration date and, with it, any consequences resulting from allowing the contract to expire without a new agreement in place. The Amendment creates two issues that interfere with collective negotiations. First, without any consequences resulting from the expiration of a contract, there is no urgency to negotiate. Second, without a meaningful deadline pushing the parties towards negotiations, outside, tangential issues between the parties can easily push them apart. These issues may be seen in Buffalo's contract negotiations with the BTF in 1990, 1994, and the ongoing nine-year period without a contract.²³⁷ In 1990 and 1994 the ongoing back-pay lawsuit interfered with negotiations for a new contract.²³⁸ Since 2004, a

235. For comparison, all other non-labor expenses for the District, including everything from transportation and food services to text books and supplies, amounted to only \$147.6 million in 2012, or 21.7% of the total budget.

236. Health insurance expenses for current employees rose from \$34.1 million in 2006 to \$41.2 million from 2012, or 20.8%. Providing health insurance to retired employees has been vastly more costly, rising from \$40.3 million in 2006 to \$63.8 million in 2012, a shocking 58.1% increase.

237. See Light, *supra* note 209.

238. See Scott & Linsky, *supra* note 162, at 30, 37.

host of continuing conflicts separate and apart from the contract negotiations have all allowed one party or the other to refuse to come to the bargaining table, including the wage freeze of the mid-2000s, the publicity surrounding the “cosmetic surgery rider” and, most recently, the dispute over a new, state-mandated teacher evaluation system.²³⁹ Because the Taylor Law fails to impose any consequences for allowing the contract to expire, there is no incentive to rise above ongoing separate disputes and no disincentive to ignore them.

Second, the Triborough Amendment’s preservation of the terms and conditions of the expired contract “shifts the goalposts” right from the start for bargaining. Rather than the expiring contract serving as a starting point for negotiations from which the parties can negotiate based on the factors that have changed since the last negotiations (most notably the public employer’s fiscal situation), the Triborough Amendment effectively makes the expiring contract the “floor” for negotiations. The terms and conditions of any new contract cannot be less favorable to the employees than the current contract, with Buffalo’s negotiations in 1996 a perfect example. Even with the District’s fiscal crisis well publicized and a major factor in negotiations, the contract the Union agreed to saved the District only \$3.5 million of a recommended \$20 million.²⁴⁰ The contract also ambitiously relied on an increase of state aid that never came. Instead, state aid was reduced over the next few years.²⁴¹

Third, the issues discussed above are compounded in school districts and other education sector employers by Taylor Law section 209(3)(f), a clause that only applies where “the public employer is a school district, a board of cooperative educational services, a community college, the state university of New York, or the city university of New

239. Bryan Meyer, *City Unions Say Surplus Should End Wage Freeze; Control Board Says Such Talk is Premature*, BUFFALO NEWS, December 10, 2005; see Weissmann, *supra* note 224; Jeff Preval, *Buffalo Teachers Union Plans to Reject Teacher Evaluations*, WGRZ (Apr. 29, 2013, 10:47 AM), <http://www.wgrz.com/news/article/212299/37/Buffalo-Teachers-Union-Plans-to-Reject-Teacher-Evaluations>.

240. Heaney, *supra* note 208.

241. A secondary issue nested within this issue is the complexity salary schedules bring to negotiations. In a typical contract, especially in public education, employees’ base compensation is calculated according to a “salary schedule,” under which all, or nearly all, employees receive guaranteed salary increases each year, based on years of service. These annual step increases are considered to be separate from contractual “raises,” and the bargaining unit regularly exploits the blurred definitions when appealing for public pressure on the employer. This disparity helps explain why the 2004 wage freeze imposed by a State-appointed control board was so dramatic. It was a true freeze on all wages, preventing even step increases from being paid. Deidre Williams, *BTf Says Mediator’s Proposal On Contract Favors Buffalo School District*, BUFFALO NEWS, Aug. 22, 2013, <http://www.buffalonews.com/city-region/btf-says-mediators-proposal-on-contract-favors-buffalo-school-district-20130822>.

York.”²⁴² For these education sector employers, no binding arbitration mechanism exists, unlike with other public sector employers.²⁴³ The result is that the expiration date of a contract is truly meaningless. Without consequences coming from the expiration and without a firm arbitration resolution, public education contracts are essentially perpetual, replaceable only by the joint agreement of both parties. Both parties recognize this, and it is a major reason why contract negotiations can drag on, as Buffalo’s have for the past nine years. In a 2010 consultant report, representatives of the BTF “expressed the belief that there is no purpose in [declaring impasse] since the dispute would go to a Fact Finder. The Fact Finder’s Report would then be submitted to the School Board and to Union leadership. No purpose would be served since the process lacks binding arbitration. . . .”²⁴⁴ Without any finality in arbitration, the entire process is meaningless, not to mention costly and time consuming.

These issues stem from the Triborough Amendment’s reinforcement of a flawed presumption that, as unions and their supporters regularly argue, the Triborough Amendment was enacted as a compromise to account for the Taylor Law’s ban on public employee strikes.²⁴⁵ While the ban on strikes, in theory, tilts the balance of negotiations in the employer’s favor, this does not work quite the same in practice, especially in the public sector. Many parts of the public sector, such as education, medical services and public safety, are especially concerned about strikes because of the level of unrest they can cause.²⁴⁶

The history of teacher strikes in Buffalo points to both how limited the effectiveness of the strike prohibition is and how profound the impact of even a mere threat to strike is on negotiations. The BTF has gone on strike twice in the past forty years. The 1976 strike had a decades-long impact on the District, while the effects of the 2000 strike

242. See N.Y. CIV. SERV. LAW § 209(3)(f) (McKinney 2011 & Supp. 2013).

243. See *id.* For most public employers, the impasse and arbitration process ends with binding legislative intervention. CIV. SERV. § 209(3)(e). For police, firefighters and related employees, the arbitration process ends in binding interest arbitration. CIV. SERV. § 209(4).

244. MGT REPORT, *supra* note 219, at 3-38.

245. See, e.g., Richard E. Casagrande & Deborah A. Milham, *Why We Defend Triborough*, NYSUT UNITED (Mar. 2011), <http://www.nysut.org/news/nysut-united/issues/2011/march-2011/why-we-defend-triborough>.

246. Consider the Buffalo Teachers Federation 2000 strike, which quickly escalated to a community-wide fight over the racial and socio-economic implications of the strike. See Campagna, *supra* note 216.

are still reverberating.²⁴⁷ In 1994, the BTF merely threatened to strike when preparing a strike fund.²⁴⁸ This threat alone was enough to quickly push the District to agree to an unfavorable contract. The Triborough Amendment suffers from the fatal logical flaws that prohibiting strikes is actually effective and that this imbalance in bargaining leverage needs to be corrected.

A. “Preserving the Status Quo”

Ultimately, the various collective bargaining issues created by the Taylor Law are products of one fatal flaw in the reasoning supporting the Amendment, namely, the distortion of what the status quo in negotiations actually entails. The Amendment errs in seeking to preserve the status quo before that term is adequately defined. As one commentator stated, “[i]f the [Amendment] was intended to preserve the status quo, the difficult question of defining the status quo remains unanswered.”²⁴⁹

In the *Triborough* decision, PERB held “an employer cannot unilaterally alter *mandatory* subjects of negotiations while a successor agreement is being negotiated.”²⁵⁰ Far from being a conclusive statement, however, the decision asked an important legal question: what terms and conditions of a contract are “mandatory” and therefore must be preserved after a contract’s expiration to ensure a level playing field in negotiating a successor agreement? Like many complex legal questions, the definition of “mandatory” would require a gradual process, shaping the edges through case-by-case determinations as specific questions and circumstances came before PERB and the courts. Over the next decade, PERB and the courts engaged in exactly this process of shaping the contours of this complex question.²⁵¹

The Triborough Amendment, enacted in 1982, preempted this budding case law by declaring it an improper practice “to refuse to continue *all* the terms of an expired agreement until a new agreement is

247. See Simon, *supra* note 218; see *In re Meegan v. Brown*, 16 N.Y.3d 395 (N.Y. 2011).

248. See Scott & Linsky, *supra* note 162, at 37.

249. McGuire, *supra* note 136, at 483-84.

250. *Triborough Bridge and Tunnel Auth.* 5 P.E.R.B. ¶ 3037, 3065 (1972) (emphasis added).

251. See, e.g., *Bd. of Educ. of Poughkeepsie v. Poughkeepsie Pub. Sch. Teachers Ass’n.*, 349 N.Y.S.2d 47, 48-50 (N.Y. Sup. Ct. 1973); *Cardinale v. Anderson*, 347 N.Y.S.2d 284, 289 (N.Y. Sup. Ct. 1973); *Dobbs Ferry Union Free School Dist. v. Dobbs Ferry United Teachers*, 395 N.Y.S.2d 988, 995 (N.Y. Sup. Ct. 1977); *Bd. of Educ. Servs. of Rockland County v. N.Y. Pub. Emp’t Relations Bd.*, 41 N.Y.2d 753, 759 (N.Y. 1977).

negotiated. . . .”²⁵² The Triborough Amendment, therefore, overrides the on-going legal discussion defining “mandatory” terms by declaring *all* terms and conditions “mandatory,” and thus protected, regardless of how the preservation of such terms impacted the collective bargaining table.

While supporters of the Triborough Amendment frequently argue that it merely codifies the *Triborough* doctrine,²⁵³ in reality the amendment goes much further. “Whether it was inadvertent or not, the reach of [Triborough] has extended far beyond the continuation of the status quo—in exchange for the strike proscription—during negotiations for a successor agreement.”²⁵⁴ Rather, the Amendment took what was a difficult question of subtle, case-by-case determinations of what terms and conditions were “mandatory,” needing to be preserved in order to ensure fair negotiating, and which terms were “permissive,” allowing the employer flexibility to deal with pressing economic realities while a new successor agreement was negotiated, and pushed it aside in favor of a broad, protectionist definition of the status quo. In reality, it is impossible for the Triborough Amendment to accomplish what its union supporters claim, codifying the *Triborough* doctrine, simply because the doctrine was still evolving and developing when the Triborough Amendment was enacted.

By superseding the *Triborough* doctrine, the Amendment largely ignores the doctrine’s initial purpose.

By removing the distinction between mandatory and nonmandatory subjects for contract continuation purposes, but continuing it for negotiation and impasse resolution purposes, the artificial balance undermines the collective bargaining process. Further, it creates a material disincentive for the employer to include nonmandatory terms in collective bargaining agreements because of the practical and legal inability to treat them as non-mandatory once the contract expires.²⁵⁵

Considering that the Taylor Law initially intended to promote harmonious cooperation and flexibility in solving unique issues in public employment, the Triborough Amendment essentially prohibits any sort of experimentation or flexibility, lest an employer become perpetually burdened with a failed experimental approach to employee relations.

In school districts, where the need for cooperation, flexibility, and

252. N.Y. CIV. SERV. LAW § 209-a(1)(e) (McKinney 2013 & Supp. 2013) (emphasis added).

253. See, e.g., Casagrande & Milham, *supra* note 245.

254. See Moses, *supra* note 115, at 95.

255. *Id.* at 108.

experimentation is especially high, the problems caused by the Triborough Amendment are further compounded by the absence of binding arbitration.²⁵⁶ In non-education public sectors, the impact of the Triborough Amendment is somewhat tempered by the finality of binding arbitration, provided in sections 209(3)(e) and 209(4).²⁵⁷ With binding arbitration, the arbitration panel weighs both the employer and employee proposals. The uncertainty of the outcome of arbitration, therefore, provides some pressure on the parties to reach an agreement on their own, lest the arbitration outcome be less favorable to their position.²⁵⁸ “The implications of the Triborough Doctrine are, therefore, extensive since they alter the negotiating mechanism. Less incentive to reach agreement may prolong the negotiating process, thus increasing pressure on the employer to make concessions”²⁵⁹ In the education sector, however, even this small amount of pressure to reach an agreement voluntarily is absent.

At its heart, the Triborough Amendment is unconcerned with codifying the *Triborough* doctrine. Rather, the Amendment’s only concern is guaranteeing protection of the union at the expense of the employer and, ultimately, the public. Triborough “gives employees unprecedented security during the interim between contracts . . . By enacting [the Amendment], the Legislature has won this security for the unions without negotiation, and thus artificially altered the negotiating process.”²⁶⁰ In this way, the Triborough Amendment fundamentally alters the collective bargaining process, tilting the balance in the employee union’s favor, and placing all the pressure in negotiations on the employer to make concessions to strike a deal. As the history of collective bargaining between the Buffalo City School District and the BTF shows, the Amendment has had disastrous consequences, both on the District’s finances and its policies. The Taylor Law is in dire need of reform.

B. *Fixing the Taylor Law*

The Taylor Law was initially enacted as a reaction to continued labor strife that persisted despite the Condon-Wadlin ban on public

256. See N.Y. CIV. SERV. LAW § 209(3)(f) (McKinney 2011 & Supp. 2013).

257. See CIV. SERV. § 209(3)(e); § 209(4).

258. See McGuire, *supra* note 136, at 466.

259. *Id.*

260. *Id.* at 492.

employee strikes.²⁶¹ Built on the idea that giving employees a voice in establishing the terms and conditions of employment could prevent labor strife, the Taylor Law adapted private sector collective bargaining models to the public sector. In doing so, the Taylor Commission recognized that the private sector models needed to be modified to account for the factors and circumstances unique to the public sector, notably that public sector employees were prohibited from striking.²⁶² Yet, whether from overestimating the impact of the strike prohibition or underestimating the impact of other factors unique to the public sector, or simply because the political process of enactment and subsequent amendments watered down the final act, the Taylor Law has become a law protecting public employees at the expense of all other interests involved in public sector labor relations, particularly the public's interest in an efficient and financially sustainable government.

The impact of the Law is most evident in school districts, which are subject to an additional and unique clause making fair bargaining even more difficult.²⁶³ As the example of the Buffalo Public Schools shows, the Taylor Law creates an adversarial relationship between the public employer and its bargaining units that no longer meets the needs of today's public sector labor relations. Worse, however, are the amendments to the Taylor Law, the Triborough Amendment and section 209(3)(f) particularly, which tip the scale of leverage dramatically in the public employees' favor.²⁶⁴ Rather than responding and adjusting to the public sector's current needs and crafting a flexible, collaborative labor relationship, the Amendment digs in and protects unions and public employees from modern realities.

In sum, the Taylor Law's initial framework, and the adversarial relationship it creates, is outdated and ill-suited for public sector collective bargaining that demands flexibility and collaboration between employer and employee.²⁶⁵ Combined with the amendments enacted over the years, the Law has promoted one goal, the protection of the rights and benefits of public employees, at the expense of all other interests and goals of public sector labor relations. The Taylor Law needs to be reconsidered and amended to set it back on its intended course, promoting labor harmony while also allowing for the efficient and sustainable operation of the government. Three legislative

261. See Crotty, *supra* note 11.

262. DONOVAN, *supra* note 3, at 29-30.

263. N.Y. CIV. SERV. LAW § 209(3)(f) (McKinney 2011 & Supp. 2013).

264. See MCMAHON & TERRY, *supra* note 2, at 6-7.

265. DONOVAN, *supra* note 3, at 40.

recommendations can begin this process.

1. Repeal the Triborough Amendment

The most important legislative action that can be taken is to repeal section 209-a(1)(e), the Triborough Amendment, and restore the *Triborough* line of cases, restoring the legal question first raised in the *Triborough* case, and allowing the definition of “status quo” be progressively developed on a case-by-case basis.

Repealing Triborough has received growing support from a diverse range of interest groups, including municipal leaders,²⁶⁶ school boards,²⁶⁷ school superintendents,²⁶⁸ and taxpayer reform groups.²⁶⁹ These groups tend to argue against one specific result of Triborough, the locking-in of automatic salary-step increases, which means “a public employer’s salary costs continue to rise even when labor negotiations have reached an impasse.”²⁷⁰ These groups were joined by a broader coalition in 2012 when news outlets across the country picked up stories covering the saga of the BTF contract’s “cosmetic surgery” rider.²⁷¹ The “cosmetic surgery” rider stories detailed how the Triborough Amendment obstructed the District’s ability to respond to out of control costs, especially the costs of providing generous employee health insurance packages.²⁷²

While these groups protest against specific outcomes from the Triborough Amendment, these problems and others stem from a common fault in the law. As the *Atlantic Online* article describes it, “[c]ollective bargaining only works if both sides have an incentive to deal.”²⁷³ The problem is that Triborough gives the employee representative only one incentive to negotiate—if it can get a better deal than the current contract. Thus, when a contract favorable to the union

266. See e.g., *The Triborough Amendment*, STOP THE TAX SHIFT, <http://www.stopthetaxshift.org/employee-relations/25-triborough-amendment?format=pdf> (last visited Sept. 28, 2013).

267. See e.g., *Triborough Reform*, N.Y.S. SCH. BDS. ASS’N, http://www.nyssba.org/index.php?src=gendocs&ref=Triborough%20Reform&category=advocacy_1 legislation (last visited Sept. 28, 2013).

268. See e.g., *Statewide Survey: NYS School Superintendents Foresee Financial/Educational Insolvency*, N.Y. COUNCIL OF SCH. SUPERINTENDENTS 4 (Nov. 20, 2012), http://www.nyscoss.org/img/news/news_geivlf8xci.pdf.

269. See e.g., MCMAHON & TERRY, *supra* note 2, at 1, 13.

270. *The Triborough Amendment*, *supra* note 266.

271. See Weissmann, *supra* note 224.

272. See *id.*

273. *Id.*

is agreed to in strong economic times, there is no incentive for the union to negotiate a successor agreement when the initial contract expires and the public employer's fortunes have worsened. Rather, the union is content to maintain the terms of the expired contract until the employer is able to offer more favorable terms. In sum, under *Triborough*, the expiration of a contract means nothing.

Repealing the Triborough Amendment and restoring the *Triborough* case law will restore the important legal question first posed in *Triborough* that remains unresolved: what terms and conditions of employment must be preserved after the expiration of a contract to ensure fair bargaining over a successor agreement for both parties? The courts and PERB began the long and difficult task of defining the contours of the "status quo" that must be preserved during negotiations. The Triborough Amendment preempted the development of this vital legal doctrine in favor of a simplistic and protectionist answer, that everything in the expired contract, including lock-step salary increases, must be preserved in order to protect the employee.²⁷⁴ Repealing the Triborough Amendment will allow the development of the *Triborough* doctrine to return to its proper course, deciding the contours of the doctrine on a case-by-case basis.

Beyond these issues, repealing the Triborough Amendment will begin to restore managerial discretion back to public employers, especially school districts, who have seen their autonomy stripped through collective bargaining agreements that have gradually consumed and defined operational decisions, from class sizes to curriculum and teacher assignments. As the authority to delineate "mandatory" and "permissive" subjects of bargaining is restored to PERB and the courts, public employers will gradually regain greater autonomy and flexibility to adjust "permissive" subjects without requiring negotiations with the bargaining unit.

Repealing the Triborough Amendment is thus vital both in assisting public employers to address their dire financial situations and in restoring the autonomy public employers require to operate effectively and efficiently. Repealing the Triborough Amendment should be a top priority.

2. Adjust Strike Penalties

The prohibition on strikes by public employees has been at the core

274. See discussion *supra* Part V.A.

of public sector labor relations since long before the Condon-Wadlin Act, which codified the common law ban on public employee strikes.²⁷⁵ The Taylor Commission took the continuation of the strike ban as a given,²⁷⁶ while the Commission's report expounded the arguments supporting the ban.²⁷⁷ The question that has persisted, however, is what penalties are appropriate and effective to enforce the ban on strikes. The Condon-Wadlin Act failed, in part, because the penalties it imposed to enforce the ban on strikes were unenforceable in practice.²⁷⁸

When the Taylor Commission first convened, one of its five priorities was to determine what penalties worked best to enforce the ban.²⁷⁹ The penalties proposed by the Taylor Commission were less harsh than those under Condon-Wadlin, yet still significant. Throughout the political process of compromising to enact the bill, however, these penalties were watered down. A year later, when the Taylor Commission was reconvened, restoration of the penalties initially proposed was one of the Commission's four recommendations for amending the Act.²⁸⁰ The 1969 amendments to the Taylor Law enacted these recommendations by removing the ceiling on fines that could be imposed on the union and permitting the revocation of the union's automatic dues check-off rights. However, the amendments also went much further by adding additional penalties directed at individual striking employees.²⁸¹

275. See DONOVAN, *supra* note 3, at 3; Crotty, *supra* note 11.

276. "For the committee . . . the issue quickly became a nonissue as there was almost instant agreement among its members that strikes in public employment were clearly inappropriate." DONOVAN, *supra* note 3, at 29.

277. The Commission laid out two reasons for the prohibition:

The first was the familiar argument that the marketplace constraints that customarily play a disciplining role in private industry bargaining are either wholly absent or severely attenuated in the government setting. A second and equally fundamental reason . . . related to ideas about governance in a democratic society. The claim is made that a strike in the public sector is essentially a contest of relative political power and as such is in conflict with the orderly functioning of democratic political processes, whereby elected officials exercise executive and legislative authority *on behalf of* the electorate.

Id. at 31 (emphasis added).

278. The New York City transit strike of 1965 which ostensibly led to the Taylor Commission was a perfect example. As a condition of ending the strike, State legislature passed an "amnesty" bill forgoing all penalties Condon-Wadlin would impose. *See id.* at 19-20, 23.

279. *See id.* at 29.

280. *Id.* at 114-15.

281. *Id.* at 121-22. The Amendment added a "two for one" penalty, fining striking employees two days' pay for each day on strike. The Amendment also made it more difficult to forego these penalties at the end of the strike by requiring automatic deduction of the fines from employees' paychecks. The "two for one" fines drew particular ire from employees, especially because they

While the 1969 amendments to the Taylor Law adopted the Commission's recommendations, they also needlessly added additional penalties not recommended by the Commission. Overly harsh penalties are just as obstructive to effective enforcement as overly lenient penalties. The Taylor Law's strike prohibition penalties need to be amended and realigned with the Taylor Commission's recommendations. This includes repealing the "two for one" fine on striking employees while also strengthening the penalties imposed directly on the union, including mandatory revocation of the union's automatic dues check-off right. While the "two for one" penalty directed at individual striking employees was ostensibly intended to address "wildcat" strikes,²⁸² the penalties have also been imposed on employees of union-sanctioned strikes while the union goes relatively unpunished. Moreover, the "two for one" penalty outside of the "wildcat" strike context serves only to foster resentment and to reinforce the adversarial nature of the employer-employee relationship.

The Taylor Commission's recommendations were properly aligned to walk the delicate line. The enacted law and subsequent amendments, however, have drifted too far and have thrown off the perfect balance of the Commission's recommendations.

3. Repeal Section 209(3)(f)

Lastly, section 209(3)(f), an oft overlooked clause of the Taylor Law, has an outsized impact on public sector labor relations in the education sector, particularly in school districts, which compounds the problems caused by the Triborough Amendment. Added to the Taylor Law in 1974, two years after the Triborough Amendment, section 209(3)(f) applies only "where the public employer is a school district, a board of cooperative educational services, a community college," or a state or city university.²⁸³ The section eliminates finality in collective bargaining impasses by excusing education sector negotiations from binding arbitration or legislative finality. As a result, even if education sector negotiations reach impasse,²⁸⁴ intervention by PERB will not

amounted to a source of revenue for the employer, which, as in the case of Buffalo following the 1990 teachers' strike, used the fine revenue to fund negotiated salary increases. *See id.*

282. "Wildcat" strikes are strikes by small groups of employees not authorized by the employees' union. *See* Thomas Kevin Sheehy, Note, *Wildcat Strikes: The Affirmative Duty of the Parent Union to Intervene*, 9 FORDHAM URB. L.J. 1059, 1059-60 (1980).

283. *See* N.Y. CIV. SERV. LAW § 209(3)(f) (McKinney 2011 & Supp. 2013).

284. The declaration of an "impasse" is a formal procedure which permits PERB to intervene

produce any results. As a BTF representative explained in a 2010 consultant report, “there is no purpose in [declaring impasse] since the dispute would go to a Fact Finder. The Fact Finder’s Report would then be submitted to the School Board and to Union leadership. No purpose would be served since the process lacks binding arbitration. . . .”²⁸⁵

In all other public sectors, contract negotiations are subject to one of two forms of finality. In “emergency service” sectors, including police and firefighters, section 209(4) subjects the parties to binding interest arbitration after negotiations reach impasse.²⁸⁶ In all other public sectors, section 209(3) establishes impasse procedures, culminating in a legislatively imposed agreement, as required by section 209(3)(e).²⁸⁷ In education sectors, however, impasse and arbitration provide no guarantee of final resolution. Only under such a system could the Buffalo Teachers Federation, the Buffalo Public School District’s largest bargaining unit, go without a current contract for more than nine years.²⁸⁸

Section 209(3)(f) has the effect of compounding the problems caused by the Triborough Amendment. While Triborough gives public employees a reason not to *want* to come to the bargaining table, section 209(3)(f) ensures the union does not *have* to come to the table either. Thus, collective bargaining in the education sector is subject to the union’s veto. If the union is content with, or believes the public employer cannot improve upon, the current agreement, the union has no incentive, and cannot be compelled, to bargain a successor agreement. This is the case that has plagued Buffalo for nearly a decade. The BTF is well aware that the District does not have the financial capability to improve upon the expired contract. Therefore the union has no incentive to negotiate a replacement agreement.

The impact of section 209(3)(f) is particularly troublesome in light of the two Taylor Commission reports, both of which stressed the importance of finality in bargaining impasse to the public sector collective bargaining scheme.²⁸⁹ In the second report, the Commission stated, “to have an effective substitute for the strike there needed to be finality in the impasse procedure and that any final judgment *must*

in the dispute. One of the parties involved in negotiations must declare the impasse and show why negotiations cannot move forward. *See* CIV. SERV. § 209(2).

285. MGT REPORT, *supra* note 219, at 3-38.

286. *See* CIV. SERV. § 209(2).

287. *See id.* § 209(2).

288. *See* MGT REPORT, *supra* note 219, at 3-38.

289. *See* DONOVAN, *supra* note 3, at 38-9, 113.

necessarily reside with the legislative body.”²⁹⁰ Because the collective bargaining process is so vital to the budgetary process, which is exclusively the domain of the legislative body, the legislature needed to retain the ultimate say in the public employer’s greatest expense, its labor contracts.

Section 209(3)(f) must be repealed and legislative oversight returned to collective bargaining in the education sector. More practically, the repeal of section 209(3)(f) will restore some meaning to the expiration date of education sector contracts. It will compel both sides to enter into negotiations, regardless of the impact of Triborough, over concern that a legislatively approved agreement will be less favorable than one normal negotiations would produce. The repeal of section 209(3)(f) is vital to restoring fairness to collective bargaining in the education sector.

290. *Id.* at 113 (emphasis added).