

9-1-2018

The Taylor Law at 50

John F. Wirenius

Follow this and additional works at: <https://scholarlycommons.law.hofstra.edu/hlej>



Part of the [Labor and Employment Law Commons](#)

Recommended Citation

Wirenius, John F. (2018) "The Taylor Law at 50," *Hofstra Labor & Employment Law Journal*: Vol. 36: Iss. 1, Article 2.

Available at: <https://scholarlycommons.law.hofstra.edu/hlej/vol36/iss1/2>

This document is brought to you for free and open access by Scholarship @ Hofstra Law. It has been accepted for inclusion in Hofstra Labor & Employment Law Journal by an authorized administrator of Scholarship @ Hofstra Law. For more information, please contact lawscholarlycommons@hofstra.edu.

THE TAYLOR LAW AT 50

*John F. Wirenius, Chair, NYS PERB**

I. “THE REST IS PROCEDURAL”

In 1969, Jerome Lefkowitz, then Deputy Chair of the Public Employment Relations Board (“PERB”), used the story of the pagan who asked the great Jewish sage Hillel to explain the substance of Judaism—while standing on one foot—to make a point.¹ As Lefkowitz retold the story, Hillel raised one foot, and quickly answered, “[t]he substance of Judaism is to love thy neighbor as thyself. All the rest is procedural. Now you must go and study the procedures so as to be able to accomplish the substance.”²

Lefkowitz then drew the parallel:

[t]he substance of the Taylor Law can also be stated briefly. It is that public employees have the right to join or not to join any employee organization of their own choosing, and that public employers are required to negotiate with the employee organizations which have been chosen by their employees to represent them. All the rest is procedural.³

This statement holds true today, a half-century after the enactment of the Taylor Law.⁴

The relegation of “all the rest” to “procedure” may seem jarring but

* John F. Wirenius is the Chairperson of the New York State Public Employment Relations Board. John is a graduate of Fordham University and the Columbia University School of Law.

1. Jerome Lefkowitz, *The Taylor Law, Discrimination and Nontenured Teachers*, 20 LAB. L.J. 575, 575 (1969).

2. *Id.*

3. *Id.*

4. Public Employees’ Fair Employment Act of 1967, ch. 392, 1967 N.Y. Sess. Laws 1527, 1527-28 (recognizing that the statute is generally known as the “Taylor Law” as it is based upon the recommendations in a report to the Governor of a committee headed by Professor George W. Taylor of the University of Pennsylvania).

bear in mind that “sometimes substantive values cannot be achieved except by reshaping the process for an area of law. Thus, in addition to substantive rules arising from procedural opportunities or shortcomings, procedural rules often serve substantive objectives.”⁵ Or, as Oliver Wendell Holmes put it as long ago as 1881, “whenever we trace a leading doctrine of substantive law far enough back, we are very likely to find some forgotten circumstance of procedure at its source.”⁶ From almost the dawn of the Anglo-American system, through the enactment of the Federal Rules of Civil Procedure in 1938 and beyond, substantive legal reform has been accomplished by crafting procedures that “nudge” or steer the parties in a particular direction, mandated by a policy decision.⁷

The Taylor Law is just such a statute; it creates what has been called a “choice architecture” system, one that in ways both overtly and subtly guides the parties to a desired outcome.⁸ In the Taylor Law, that preferred outcome is for the parties to collectively negotiate terms and conditions of employment and to resolve differences at the bargaining table, until it is clear that no such resolution is possible at that time.⁹ Only in the last resort, and only for employees in specific public safety positions, is interest arbitration available to settle a contract, and even that is for a sharply limited time.¹⁰

At the core of the Taylor Law, as Lefkowitz’s parable suggests, are

5. Scott M. Matheson, Jr., *Procedure in Public Person Defamation Cases: The Impact of the First Amendment*, 66 TEX. L. REV. 215, 224 (1987).

6. OLIVER WENDELL HOLMES, *Lecture VII*, in THE COMMON LAW 247, 253 (1881).

7. PAUL BRAND, *Henry II and the Creation of the English Common Law*, in HENRY II: NEW INTERPRETATIONS 215, 239-40, 241 (Christopher Harper-Bill & Nicholas Vincent eds., 2007); see also Joseph Biancalana, *For Want of Justice: Legal Reforms of Henry II*, 88 COLUM. L. REV. 433, 433-34 (1988); Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 910 (1987).

8. Richard H. Thaler, Cass R. Sunstein & John P. Balz, *Choice Architecture*, in THE BEHAVIORAL FOUNDATIONS OF PUBLIC POLICY, 428, 428, 429-30 (Eldar Shafir ed., 2013); see also RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WELFARE, AND HAPPINESS*, ch. 5 (2008).

9. N.Y. CIV. SERV. LAW § 209(2) (Consol. 1995).

10. For most other non-pedagogical employees, if no agreement results after fact-finding, the appropriate legislative body may, for one budget period, “take such action as it deems to be in the public interest, including the interest of the public employees involved.” N.Y. Civ. Serv. Law § 209(3) (e) (iv). However, under the so-called “Triborough Amendment,” § 209-a.1 (e) of the Taylor Law (added by 1982 Laws c. 921), an employer commits an improper practice if it “refuse[s] to continue all the terms of an expired agreement until a new agreement is negotiated.” Thus, the “legislative body is precluded . . . from imposing a settlement which diminishes employee rights under an expired collective bargaining agreement.” *In re County of Niagara v. Newman*, 104 A.D.2d 1, 4 (4th Dep’t 1984); *City of Ithaca*, 51 PERB ¶ 3010, 3083-3084 (2018). For pedagogues, the Taylor Law only allows negotiation, with statutory non-binding impartial assistance, until agreement is reached. N.Y. CIV. SERV. LAW § 209(3)(f). (Consol. 1995).

two correlative values—the recognition of the right of employees to be represented and to bargain collectively, and the duty of both the employer and the selected employee organization to negotiate over terms and conditions of employment.¹¹ As Governor Nelson A. Rockefeller phrased it in his memorandum approving the bill, the Taylor Law’s “primary impact will be to impose upon the public employer, the public employee and the employee organization a joint responsibility for solving employment relations without injury to the public interest.”¹² Professor George W. Taylor, who chaired the committee that proposed the law that is called by his name, agreed.¹³ For Taylor, the law’s reciprocal expansion of employee rights, which was concomitant with reaffirming employee organizations’ duty to the public, made it a landmark: “*Effective participation by employees in the determination of their conditions of employment,*” he emphasized (quite literally), “*is the basic idea behind the new law.*”¹⁴

That basic idea of employee input through collective bargaining has flourished in New York, as has the value of mutual reciprocal duties owed by both management and labor not only to each other, but, ultimately, to the people of the State.¹⁵ New York’s Taylor Law has respected those reciprocal duties, with the vast majority of public sector employees’ terms and conditions of employment being negotiated between management and labor, while collective negotiations have also ensured the delivery of services with almost no interruptions due to workplace disputes.¹⁶

The achievement of the Taylor Law is especially impressive in the light of the performance of its predecessor, the Condon-Wadlin Act, in effect from 1947 until its repeal and replacement by the Taylor Law in

11. Public Employees’ Fair Employment Act of 1967, ch. 392, 1967 N.Y. Sess. Laws 1527, 1527-28.

12. Public Employees’ Fair Employment Act of 1967, ch. 392, 1967 N.Y. Sess. Laws 1527, 1527-28 (acknowledging that those reciprocal duties are in the statute’s text; for example, § 207 (c), provides that in determining the appropriate composition of a bargaining unit, “the unit shall be compatible with the joint responsibilities of the public employer and public employees to serve the public.”).

13. See generally George W. Taylor, *Strikes in Public Employment*, 85 GOOD GOV’T, Spring 1968, at 9 (discussing the recognition resulting from the new law that employers have a responsibility to work with their employees to foster effective participation by employees in setting their conditions of employment).

14. See *id.*; see also GEORGE W. TAYLOR ET AL., GOVERNOR’S COMMITTEE ON PUB. EMP. REL. FINAL REP. 9, 19 (1966) <http://www.perb.ny.gov/wp-content/uploads/2018/04/1966-Taylor-Committee-Report.pdf>.

15. See Pauline R. Kinsella, Chairwoman, N.Y. State Pub. Emp’t Relations Bd., *The Challenges Faced by the Collective Bargaining Process*, Presentation at the Pub. Emp’t Relations Bd., Cornell, & Office of Collective Bargaining Conference 2-3 (Dec. 2, 1997).

16. See *id.* at 5-6.

1967.¹⁷ Condon-Wadlin simply barred strikes, and deemed strikers to have abandoned their jobs, allowing the employer to re-hire those employees if it chose to, but requiring the erstwhile strikers to serve a five-year probationary period, and barring any pay raises for three years after their re-hiring.¹⁸ While Condon-Wadlin was formidable on paper, “[t]he prevailing viewpoint, however, was that the act had been unenforceable.”¹⁹ The problem of enforcement was not restricted to New York and Condon-Wadlin; as the great legal scholar Glanville Williams summarized:

Attempts have been made to make strikes illegal by statute in Australia and New Zealand and also in England when the National Arbitration Order was in force. Such attempts remain virtually dead letters because of the practical difficulties of enforcement. It is not practical politics to imprison or fine hundreds of thousands of strikers; and even if legal action is directed against their leaders, the result generally is to turn them into martyrs and prolong the dissension.²⁰

In sharp contrast to the dim view of collective bargaining taken by the United States Supreme Court in its recent decision in *Janus v. AFSCME*,²¹ then PERB Chair Harold Newman in 1984 hearkened back to the seminal *Steelworkers Trilogy*, in which “Justice Douglas wrote some words that every labor relations professional should remember:”

The collective bargaining agreement . . . is more than a contract; it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate. . . . A collective bargaining agreement is an effort to erect a system of industrial self-government. When most parties enter into contractual relationship, they do so voluntarily,

17. See LEFKOWITZ ON PUBLIC SECTOR EMPLOYMENT LAW at 24, 30-31 (William A. Herbert et. al. eds., 4th ed. 2016).

18. See *id.* at 24.

19. *Id.* at 25.

20. THEODORE W. KHEEL, REPORT TO SPEAKER ANTHONY J. TRAVIA ON THE TAYLOR LAW 13 (1968).

21. *Janus v. AFSCME*, 138 S.Ct. 2448, 2483 (2018) (Claiming that “[the] ascendance of public-sector unions has been marked by a parallel increase in public spending,” and that while “[n]ot all that increase can be attributed to public-sector unions, of course, but the mounting costs of public-employee wages, benefits, and pensions undoubtedly played a substantial role.”).

in the sense that there is no real compulsion to deal with one another, as opposed to dealing with other parties. This is not true of the labor agreement. The choice is generally not between entering or refusing to enter into a relationship, for that in all probability preexists the negotiations. Rather, it is between having the relationship governed by an agreed-upon rule of law or leaving each and every matter subject to a temporary resolution dependent solely upon the relative strength, at any given moment, of the contending forces.²²

Under the Taylor Law, unilateral action—whether by management or by labor—is heavily disincentivized; the statute prohibits employers from “refus[ing] to continue all the terms of an expired agreement until a new agreement is negotiated”—unless the union has violated its own obligation not to strike.²³ Unilateral action (i.e., a strike) by a union results in fines and forfeiture of dues deduction privileges, as well as freeing management to act unilaterally, pursuant to the Triborough Amendment.²⁴ Again, the point of the statute is to draw the parties toward a negotiated resolution. This reflects former Board Chair Pauline Kinsella’s description of “the basic social contract which underlies the public policy in favor of collective bargaining: the employer gives up some of its power (and profit) to employees, and in return, work will be performed efficiently and without disruption.”²⁵

Controversial as it was at the time, the prohibition of strikes was seen by the framers of the Taylor Law as a necessary precondition of productive collective negotiation between public employers and employees.²⁶ However, it is fair to note that the authors of the Taylor Law, and its early implementers at PERB, had strongly held general philosophical objections to strikes against government employers.²⁷

22. Harold R. Newman, *Reactions of a Passionate Observer*, in *THE ELEMENTS OF GOOD PRACTICES IN DISPUTE RESOLUTION: 1984 PROCEEDINGS, TWELFTH ANNUAL CONFERENCE* 8, 12 (Soc’y of Prof’l in Disp. Resol., 1985) (quoting *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578-79 (1960) (alteration in original)).

23. N.Y. CIV. SERV. LAW §§ 209-a (1)(e) (Consol. 1995); N.Y. CIV. SERV. LAW § 210(2)(a) (Consol. 1995).

24. See N.Y. CIV. SERV. LAW §§ 210 (3) (a), 208(1)(b), 210.1 (Consol. 1995).

25. Pauline R. Kinsella, Chairwoman, N.Y. State Pub. Emp’t Relations Bd., *The Challenges Faced by the Collective Bargaining Process*, Presentation at the Pub. Emp’t Relations Bd., Cornell, & Office of Collective Bargaining Conference 4 (Dec. 2, 1997).

26. Taylor, *supra* note 13, at 9, 13.

27. TAYLOR ET AL., *supra* note 14, at 42.

Professor Taylor declared that the prohibition of strikes, “I believe, is designed not simply as protection against the interruption of vital services, but—even more importantly—to preserve the processes of representative, democratic government to which we are dedicated.”²⁸

Likewise, Robert Helsby, PERB’s first Chair, viewed “a strike against the government [a]s in the nature of insurrection, or at least civil disobedience.”²⁹ He also contended that the stakes were fundamentally different, explaining that “government, unlike private employers, . . . cannot liquidate its business and reinvest its funds elsewhere; it is obliged by law to provide specified services, some essential, others less essential.”³⁰ Finally, Helsby was concerned that “the injury which a strike by government employees inflicts upon innocent victims is greater than that which follows most strikes in the private sector.”³¹

Jerry Lefkowitz put the matter more bluntly, describing “collective bargaining, insofar as it relies upon the strike threat,” as a “throwback” to “Ordeal by Battle,” and adding that “in labor disputes, Ordeal by Battle is more likely to hurt innocent bystanders” than had been the case at common law.³² Lefkowitz pointed out that the “history of jurisprudence has been the gradual displacement of such tests of strength by rational judgments,” Lefkowitz maintained that, unlike a private sector strike, which he described as a “test of economic strength,” a public sector strike is “a political challenge,” an effort to “change the public climate” by inflicting discomfort on the citizenry.³³ Indeed, Lefkowitz wrote that an illegal strike should be viewed as an act of civil disobedience, but not a justified one absent “a situation where a government by its provocative conduct may precipitate a situation which suppresses the dignity of its employees.”³⁴ Apart from their rule of law and democratic-theory based

28. Taylor, *supra* note 13, at 10.

29. Robert D. Helsby, Chairman, Report to the Select Joint Legislative Committee on Public Employees’ Relations 3 (1970).

30. *Id.*

31. *Id.* at 3-4.

32. Jerome Lefkowitz, *Civil Servants and the Strike*, 85 GOOD GOV’T, Spring 1986, at 15. Although Lefkowitz was not a member of the Taylor Committee and did not have any role in drafting its report, he was “assigned the task of drafting legislation that would “embody the Taylor Committee’s specific proposals.” Lefkowitz also served as Deputy Chairperson from the agency’s formation until 1987. In that capacity, he was the architect of PERB’s Rules of Procedure. RONALD DONOVAN, *ADMINISTERING THE TAYLOR LAW: PUBLIC EMPLOYEE RELATIONS IN NEW YORK*. 64-65, 157 (Ithaca, NY: ILR Press, Issue 23) (1990).

33. *Id.* at 18.

34. *Id.* at 19-20. Lefkowitz did acknowledge that provocation arising to a denial of the fundamental dignity of labor could justify or excuse a strike. *Id.* at 20. Absent such provocation, Lefkowitz rather harshly opined that “for government employees to engage in civil disobedience in order to fatten their pay envelopes by a few dollars” was “an abuse of the technique.” *Id.*

dislike for strikes, Lefkowitz, Taylor, Helsby, and Rockefeller all viewed strikes as subverting the bargaining relationship by violating the reciprocal duties inherent in the right to negotiate.³⁵

In the past half-century, unilateral action by either labor or management has greatly diminished.³⁶ Public employers throughout the state have successfully acclimated to negotiating terms and conditions of employment, and unions have found their best recourse at the table, not in the streets.³⁷ While the advertising disclaimer that past performance is no guarantee of future results must be borne in mind, the overwhelming majority of public employers and employee organizations have healthy, well-functioning relationships, as established by the two metrics that matter: reaching agreements and resolving disputes.³⁸

II. A NEUTRAL, INDEPENDENT AGENCY

Writing about those early years after the enactment of the statute and the formation of PERB to administer the law, Lefkowitz noted that the future of both “did not appear very promising”:

Passed by a reluctant legislature under pressure from an aggressive governor, it was opposed by most local governments and practically all public sector unions. The local governments were disturbed that the statute’s policy of fostering collective bargaining would compromise the authority of elected government to manage municipal affairs. The unions, for their part, were unwilling to settle for a law that continued to deprive them of a legal right to strike, and they were convinced that a law administered by an agency, the heads of which were appointed by the governor, the boss of the largest contingent of public employees, could not be trusted.³⁹

Despite these bleak circumstances, “the Taylor Law and the Board became accepted fixtures within a few years after the statute took

35. *See id.* at 16, 19; Taylor, *supra* note 13, at 10.

36. *See infra* Part III.

37. *See infra* Part III.

38. *See infra* Part III.

39. Jerome Lefkowitz, *Joseph Crowley—A Dedicated Public Servant*, 54 *FORDHAM L. REV.* 468, 469 (1986).

effect.”⁴⁰ The late labor historian Ronald Donovan wrote that PERB’s handling of the hotly contested representation proceedings for state employees in 1967-1969 “was absolutely critical in determining the future of the agency.”⁴¹ Had the agency been overly deferential, “[t]he result would have confirmed the allegations of the law’s sharpest critics.”⁴² Instead, Donovan noted, “PERB came through a difficult period with its independence and integrity secured,” and that “[a] good deal of the credit for this success belongs to PERB’s chairman, Robert Helsby.”⁴³

After he left PERB, Helsby explained his vision of how PERB was meant to function:

At the heart of a responsible labor relations system is an independent and an impartial group of professional neutrals who decide the controversial issues with consistency and integrity on the basis of objectivity and merit. These professionals must, of course, be allowed to be insulated from political interference and lobbying.⁴⁴

Harold Newman, who succeeded Helsby as Chair, hewed to the same vision of his role.⁴⁵ As he put it, “[w]e see our role as implementors of the statute, not as policymakers in any sense that we shall try to influence major changes in the law,” adding that “[w]e try to maintain our neutrality and objectivity, and leave the public policy questions to the Governor and the Legislature.”⁴⁶ PERB’s Executive Director, Ralph Vatalaro agreed; emphasizing that “[t]he best we can do is to gain the respect of the two parties to a dispute, that we do our jobs in an objective and fair manner.”⁴⁷ Vatalaro pointed out the classic neutral’s dilemma by stating, “[w]e

40. *Id.*

41. *See* Donovan, *supra* note 32, at 100.

42. *Id.*

43. *Id.* In memorializing Board member Joseph Crowley, Lefkowitz described Helsby as “a man of rectitude, and a superb administrator,” who “organized a strong staff and motivated it to perform in accordance with the principles that he and Joe had set.” Lefkowitz, *supra* note 39, at 469.

44. Robert D. Helsby, *One Man’s View of the Taylor Law—Thirteen Years Later Governor’s Conference on Public Sector Bargaining 7* (Nov. 12, 1980).

45. *See Fifteen Years of the Taylor Law: Viable But Still Imperfect*, THE CHIEF-LEADER, Aug. 27, 1982, at 3.

46. *Id.*

47. *Id.* Ralph Vatalaro was appointed Director of Information and Education upon the founding of the agency and subsequently served as Executive Director from 1970 to 1990. *See id.*; *see also* DONOVAN, *supra* note 32, at 62-63; *Ralph Vatalaro: Obituary*, THE ONEIDA DAILY DISPATCH: THE LEGACY (June 7, 2015)

<https://www.legacy.com/obituaries/oneidadispatch/obituary.aspx?n=ralph-vatalaro&pid=175017505&fhid=13157>.

cannot expect to have both parties to a specific controversy like what we do—because in virtually all that we do there is a winner and a loser, and somebody, PERB, usually, has to make the pronouncement.”⁴⁸

At times, this has created heat for PERB and its personnel—Alton Marshall, an alumnus of the Rockefeller Administration, remembered that “Helsby was considered a god dam [sic] Benedict Arnold.”⁴⁹ At around the same time, the editor of *The Civil Service Leader* denigrated Jerry Lefkowitz and Director of Representation Paul Klein as would-be “Labor Messiahs” and demanded their firing.⁵⁰ Even George Taylor “often remarked, somewhat ruefully, that the resulting enactment was called the Taylor Law only because the politicians knew that Taylor would never run for office.”⁵¹

In the early years, denunciations by labor as well as friction with employers was common; Helsby noted that “[w]ithin a month after the Taylor Law was passed, some 15,000 unionists gathered in Madison Square Garden to denounce the Law and establish a fund for its repeal.”⁵²

Currently, and for the past four decades, no such ructions disfigure PERB’s relationships with the parties. That is not to say that specific decisions have not been controversial, or that both sides to a given dispute are always pleased with the outcome of any given case; I recall as deputy chair attending a public meeting at which PERB’s non-intervention in a matter in which no proceeding before the agency had been commenced was scathingly criticized.

Case-specific unhappiness with particular outcomes, though, does not remotely resemble the systemic objections, in some instances amounting to open hostility, to the Taylor Law and to PERB itself that marked the early days.⁵³ In large part, I believe, this reflects the agency’s success in preserving its integrity and its neutrality. While this reflects great credit on the staff and board members of PERB over the years, it also reflects on the architectonic structure of the agency. Put more simply, neutrality and freedom from political pressure are baked into the structure

48. *Id.*

49. Interview with Alton Marshall, Secretary, Governor Rockefeller (Apr. 30, 1985); DONOVAN, *supra* note 32, at 77.

50. DONOVAN, *supra* note 32, at 85.

51. Helsby, *supra* note 44, at 4.

52. Robert D. Helsby, Chairman, N.Y. State Pub. Emp’t Relations Bd., Labor Relations in the Public Sector—A Political Approach for a Democratic Society, Address at the IIRRA Annual Spring Meeting and IIRRA Pan American Regional Meeting (May 3, 1973) 10.

53. See generally Bernard T. King, *The Taylor Act Experiment in Public Employer-Employee Relations*, 20 SYRACUSE L. REV. 7, 9 (1968) (asserting instances of unfairness and unreasonableness resulting from PERB’s procedures).

of PERB.

As the former Executive Director Ralph Vatalaro said in an interview almost thirty years ago, “PERB is independent with built-in safeguards to keep politics out of the Board.”⁵⁴ Board members “are appointed for six-year terms, one each on odd-numbered years.”⁵⁵ In addition to the staggered terms, the Taylor Law provides that “[n]ot more than two members of the board shall be members of the same political party,” another check against political pressure.⁵⁶

Most importantly, however, as Vatalaro noted in 1978, the “governors have made it a practice to appoint only highly qualified and experienced people to the board.”⁵⁷ In fact, “all the board members (since 1967) have been experienced in labor relations, arbitration, mediation, and/or labor law prior to their appointments.”⁵⁸ Two years later, Helsby noted:

[W]e in New York have been fortunate to have had Governors who have understood the collective bargaining process and the need for a neutral agency of this type. There has been no attempt to politicize its organization, its procedures, operations, or the substance of its decisions Likewise, it [New York] has every right to be proud of the high caliber of the members it has appointed to the Board and the reputation the Board has earned for competence and integrity, not only in New York but across the Nation.⁵⁹

From my position as Chair in 2019, I firmly agree with Bob Helsby that the independence, integrity and quality of the Board and its members—and I would add its Directors, Administrative Law Judges, and Conciliation staff—are the hallmarks of PERB.⁶⁰ I also agree with Pauline Kinsella that they are the primary reasons for its success and the success of the Taylor Law for fifty years.

54. *The Civil Services Employees Association: PERB: Neutrality Important*, THE PUBLIC SECTOR, Dec. 13, 1978, at 7 (internal quotation marks omitted).

55. *Id.*

56. N.Y. CIV. SERV. LAW § 205(1) (Consol. 1995).

57. *The Civil Service Employees Association*, *supra* note 54, at 7.

58. *The Civil Service Employees Association*, *supra* note 54, at 7.

59. Helsby, *supra* note 44, at 8.

60. Helsby, *supra* note 44, at 7.

III. “ACCOMPLISHING THE SUBSTANCE”

According to PERB’s internal statistics, 85% of public employers reach agreements with the unions representing their employees.⁶¹ 15% of impasses involve public safety employees, and approximately 40-45% of these go to binding arbitration.⁶²

Additionally, the Taylor Law has virtually eliminated strikes—since 2012, only one declared strike has taken place, involving adjunct faculty at Nassau Community College in 2013.⁶³ While there have been several strike charges filed in the past decade, most have involved equivocal behavior such as suspected slowdowns or sick outs.⁶⁴ Such charges have averaged approximately two or fewer per year, and have been settled without adjudication.⁶⁵

The Empire Center’s Terry O’Neill and E.J. McMahon have suggested that the credit for the reduction of strikes to the Taylor Law is overstated, comparing the decline in strikes with that which has taken place nationwide:

In fact, federal labor statistics show that strikes of all sorts, in both the public and private sectors, decreased sharply across the country in the 1980s. Analysts have offered a variety of reasons for the trend, including corporate restructurings and increased global competition affecting the once heavily unionized manufacturing sector. A watershed event in the history of American labor relations came in 1981 with President Ronald Reagan’s tough response to a strike by federal air traffic controllers. Overwhelming public support for Reagan’s decision to

61. *PERB by the Numbers*, N.Y. ST. PUB. EMP. REL. BOARD (Apr. 28, 2018), <http://www.perb.ny.gov/perb-by-the-numbers/>.

62. *Id.* (finding that (1) Approximately 2100 contract are negotiable each year; (2) Approximately 15% of negotiations reach impasse (300-500) each year; (3) Approximately 70% of all impasses settle in mediation ; and (4) Approximately 15% of the cases involve police and firefighters where interest arbitration is the final step slightly fewer of these cases settle in mediation (55-60%)).

63. *See In Re Nassau Cmty. Coll.*, 47 N.Y. PERB 3006 (2014).

64. N.Y. CIV. SERV. LAW § 201 (Consol. 1995).

65. *See generally, Counting Strike Threats*, *Monthly Lab. Rev.*, U.S. BUREAU LAB. STATISTICS (May 2018), <https://www.bls.gov/opub/mlr/2018/letters-to-editor/strike-threats.htm> (discussing the decrease in strikes statistics in the United States).

fire and replace all the striking workers played an important role in changing the climate of labor relations across the country.⁶⁶

As O'Neill's and McMahon's own graph shows, the rate of public sector strikes in New York has fallen to much the same level, and occasionally lower than the combined nationwide public and private sector strikes, which they offer as comparators.⁶⁷ However, the national trend of diminishing strikes takes place against a backdrop of declining union membership since 1983.⁶⁸ By contrast, union membership in New York State's public sector has remained strong throughout that same period, and has remained roughly consistent from 2001 through 2017.⁶⁹ Nor do either of the specific factors adverted to—corporate restructuring and increased global competition—apply to New York State's public sector employees.⁷⁰ Rather, the decline in strikes under the Taylor Law demonstrates that the elimination of strikes can be achieved through collective bargaining, and does not require a withering labor movement or the enfeeblement of specific unions.⁷¹

Finally, 80% of improper practice claims are settled without a decision with the mediation efforts of PERB's Administrative Law Judges; the rest are resolved by binding decisions.⁷² Over the last decade, exceptions to the Board have been filed in about one-third of the cases in

66. TERRY O'NEILL & E.J. MCMAHON, *TAYLOR MADE: THE COST AND CONSEQUENCES OF NEW YORK'S PUBLIC SECTOR LABOR LAWS* 6, 22-23 (Empire Ctr. for Pub. Policy ed., 2018).

67. *Id.* at 22, Fig. 4.

68. *See id.*; see also Megan Dunn & James Walker, *Union Membership in the United States*, U.S. BUREAU LAB. STATISTICS 1-3 (Sept. 2016) <https://www.bls.gov/spotlight/2016/union-membership-in-the-united-states/pdf/union-membership-in-the-united-states.pdf> (noting a small uptick in union membership — 0.1% — in 2017).

69. *See, e.g.*, RUTH MILKMAN & STEPHANIE LUCE, *THE STATE OF THE UNIONS 2017: A PROFILE OF ORGANIZED LABOR IN NEW YORK CITY, NEW YORK STATE, AND THE UNITED STATES* 1, 3 fig.1c (The Joseph S. Murphy Inst. for Worker Educ. and Labor Studies ed. 2017).

70. O'NEILL & MCMAHON, *supra* note 66, at 22.

71. *See* Arvid Anderson & Loren A. Krause, *Interest Arbitration: The Alternative to the Strike*, 56 *FORD L. REV.* 153, 177-178 (1987) (noting success of Taylor Law in both averting strikes and leading to negotiated agreements or interest arbitration awards that "closely parallel one another"). Other commenters debate the effect of the anti-strike provisions on collective bargaining. Compare Kate Montgomery Swearingen, *Tailoring the Taylor Law: Restoring a Balance of Power to Bargaining*, 44 *COLUM. J. LAW & SOC. PROB.* 513, 522-523 (2011) (claiming that Taylor Law strike penalties are effective but at the expense of employees' ability to effectually negotiate) with *TAYLOR MADE*, *supra* n. 66 at 23 ("Increasingly shielded from management pressure by Taylor Law amendments, court precedents and PERB rulings, the state's public-sector unions by the 1980s no longer had much to strike over.").

72. *PERB by the Numbers*, *supra* note 61.

which ALJs have issued decisions.⁷³ By the time an appeal to the Board has been filed, settlement is much less likely; the Board has issued, on average, one-third the number of decisions the ALJs have.⁷⁴ From this admittedly rough handling of PERB's internal and published data, an imprecise but salient portrait—not a photograph, perhaps, but at least a water color—of labor relations in New York State can be glimpsed.⁷⁵ That picture is one of a system that is largely successful, with most disputes being settled, rather than going to a binding decision. In sum, the portrait depicts the Taylor Law functioning as intended.⁷⁶

A. Conciliation Practices as An Alternative to Compulsory Binding Arbitration

The fact that the vast majority of bargaining units (85%) and employers are able to reach collective bargaining agreements without PERB intervention alone reflects a fundamentally healthy system of collective bargaining throughout the State.⁷⁷ For those units and employers, Bob Helsby's maxim that "the best agreement is one which the parties reach themselves" has been brought to fruition.⁷⁸

Strangers to PERB's conciliation processes might find the path leading to reaching binding interest arbitration counter-intuitive.⁷⁹ In other contexts under New York state law, the Court of Appeals has stated that "arbitration is considered so preferable a means of settling labor disputes that it can be said that public policy impels its use."⁸⁰

Despite this general preference by the courts in other circumstances, the Taylor Law only makes compulsory binding arbitration available to create a final resolution when the parties cannot reach a collective bargaining agreement for a subset of public employees, whose work involves public safety.⁸¹ That is not for lack of an alternative model; the

73. *See id.*

74. *See id.*

75. *See id.*

76. Public Employees' Fair Employment Act of 1967, ch. 392, 1967 N.Y. Sess. Laws 1527, 1527-28.

77. *PERB by the Numbers*, *supra* note 61.

78. Helsby, *supra* note 29, at 8.

79. THOMAS KOCHAN ET AL., *The Long Haul Effects of Interest Arbitration: The Case of New York State's Taylor Law*, 63 INDUS. & LAB. REL. REV. 565, 566 (2010).

80. *Associated Teachers of Huntington, Inc. v. Bd. of Educ., Union Free Sch. Dist. No. 3, Town of Huntington*, 306 N.E.2d 791, 796 (N.Y. 1973); *see also In re City of Oswego (Oswego City Firefighters Assn., Local 2707)*, 988 N.E.2d 499, 501 (N.Y. 2013) (Lippman, J., dissenting) (quoting *Assoc. Teachers of Huntington v. Bd. of Educ.*, 988 N.E.2d 499, 501 (N.Y. 1973)).

81. N.Y. CIV. SERV. LAW §§ 209(2) & 209(3) (Consol. 1995).

New York City Collective Bargaining Law, enacted together with the Taylor Law, makes impasse arbitration (that law's equivalent process) available to all public employees and employers falling under its jurisdiction.⁸²

Both the limited availability of interest arbitration and the steps required to invoke that right are examples of the "choice architecture" embedded in the Taylor Law.⁸³ Even for the subset of public employees and employers who are eligible for binding interest arbitration, the Taylor Law and PERB's Rules of Procedure provide that "interest arbitration is only available under the [Taylor Law] when efforts of the parties themselves to reach agreement through true negotiations and conciliation procedures have actually been exhausted."⁸⁴ Those conciliation procedures must be pursued in good faith by both parties before empaneling an interest arbitration panel.⁸⁵

The goal of the process is to steer all but the most entrenched parties toward jointly resolving their differences through collective bargaining, rather than having a resolution imposed by an external arbitrator.⁸⁶ This preference in the Taylor Law is supported by several rationales, and has functioned effectively since 1974.⁸⁷

Asked in 1979 if he maintained his previously expressed belief that "final and binding arbitration should be used only as a last extreme, the last method," PERB Chair Harold Newman answered:

Yes, I don't like binding arbitration. First of all, I don't know any labor relations professional who would not argue that the best kind of agreement is an agreement made by the parties themselves, without the intervention at all of any third party neutral.

But if indeed a genuine impasse does occur, and the parties are unable to reach agreement by themselves, then certainly the favored way from my point of view for achieving a settlement is through the device of mediation, because they are the parties who are still making their own

82. See New York City Collective Bargaining Law, N.Y. CODE tit. 12, § 12-311(c) (2) (1998).

83. See City of Ithaca, 49 N.Y. PERB ¶ 3030, 3089 (2016).

84. *Id.* at 3097; N.Y. CIV. SERV. LAW §§ 209(3) (Consol. 1995).

85. *Id.* (2016).

86. See Harold Newman, *Interest Arbitration: Impressions of a PERB Chairman*, 37 ARB. J. 7, 8 (1982).

87. Helsby, *supra* note 44, at 8-9.

agreement as an extension of the collective bargaining process, and the mediator is simply serving as a kind of marriage counselor.

In fact-finding, I would like to think that again that since the fact-finding report can be accepted or rejected by the parties, there is a kind of mediation with recommendations, and that too is more acceptable to me than arbitration. Arbitration means the parties have turned their responsibility for their contract terms over to somebody else.⁸⁸

In another article, he explained that collective bargaining is inherently preferable to binding arbitration, on the ground that “[n]o labor neutral, no matter what his or her background, skills, education, or experience, can know as much about the parties’ needs as they do.”⁸⁹ More over, “the neutral doesn’t live with the contract—the parties do.”⁹⁰

As a result, Newman cautioned that:

[T]hose of us who head neutral agencies and are responsible for the appointment of mediators, arbitrators, and factfinders should always be on guard against intervening too early in negotiations. We should strive to be certain that exhaustive good faith effort by the parties to achieve agreement on their own has been made before providing the services of an impartial.⁹¹

The other “major attack on binding arbitration made by its critics is that it will have a ‘chilling’ effect upon the bargaining process.”⁹² Binding arbitration “will inevitably undermine collective bargaining, it is argued, whenever either party anticipates that they might gain more from arbitration than from negotiation;” this “‘narcotic’ effect supposedly leads

88. Harold Newman, Opinion, *Viewpoint: Harold R. Newman, PERB Chairman*, Feb. 1979, 3 N.Y. ST. PUB. EMP. COMMUNICATOR 4.

89. Newman, *supra* note 86, at 8.

90. *Id.* at 8.

91. *Id.* at 8.

92. Charles M. Rehmus, *Interest Arbitration*, in *THE EVOLVING PROCESS—COLLECTIVE NEGOTIATIONS IN PUBLIC EMPLOYMENT* 249, 257 (Robert D. Helsby, Jeffrey Tener & Jerome Lefkowitz eds., 1985); see also Charles M. Rehmus, *Interest Arbitration in LABOR-MANAGEMENT RELATIONS IN THE PUBLIC SECTOR: REDEFINING COLLECTIVE BARGAINING* 196 (John L. Bonner ed. 1999).

to ever-increasing reliance on arbitration.”⁹³ In the scholarly literature regarding interest arbitration, the data has been read to support conclusions that “chilling and narcotic effects” will result as to collective bargaining.⁹⁴ Even the limited interest arbitration provisions under the Taylor Law are not entirely immune; as then-Chair Pauline Kinsella pointed out in 1993, PERB’s impasse resolution proceedings “are not, however, intended, as they are sometimes being used, as a substitute for collective bargaining and as a means to shift elsewhere the responsibility for making decisions.”⁹⁵

In another example of “choice architecture,” PERB’s interest arbitration panels are tripartite in nature—each side appoints one member, who together jointly select the public member.⁹⁶ Under the Taylor Law, the parties’ appointed members effectively advocate for their respective clients.⁹⁷ This means that the process is only one of arbitration in the last resort, after the parties, first directly, and then through their panel members, have failed to agree. Up until that moment, interest arbitration is effectively mediation under another name.

Again, Newman:

Tripartite interest arbitration is certainly a misnomer. No neutral arbitrator can chair a panel with two partisan arbitrators and function as anything but a mediator. This is not necessarily bad, but we ought to recognize tripartite arbitration for what it is—more mediation than arbitration. Heaven forbid that any arbitrator without mediation experience and skill undertake chairing a tripartite panel.⁹⁸

93. Rehmus *supra* note 93, at 257-58; *see also*, Gary E. Bolton & Elena Katok, *Reinterpreting Arbitration’s Narcotic Effect: An Experimental Study in Repeated Bargaining*, 25 GAMES & ECON. BEHAV. 1, 2 (1998) (describing “substantial field evidence that bargaining with arbitration lessens the likelihood that bargainers will reach a settlement on their own.”); Hoyt N. Wheeler, *Compulsory Arbitration: A “Narcotic Effect”?*, 14 INDUS. REL. 117, 117-20 (1975).

94. Rehmus *supra* note 92, at 257-58.

95. PAULINE R. KINSELLA, PUBLIC SECTOR LABOR DEVELOPMENTS 2 (1993).

96. N.Y. CIV. SERV. LAW §209(4) (Consol. 1995). Again, this is not the only direction in which the Legislature could have gone—or indeed, did go. *See* New York City Collective Bargaining Law, N.Y. CODE tit. 12, § 12-311(c) (2) (1998). The New York City Collective Bargaining Law provides that the parties nominate members of the impasse panel, but the Chair of the Board of Collective Bargaining, in her capacity as Director of the Office of Collective Bargaining itself appoints the panel members unless the parties’ nominations coincide. *Id.*

97. *See* KINSELLA, *supra* note 95, at 4-5.

98. Newman, *supra* note 86, at 8.

Once again, the Taylor Law nudges the parties to craft their own solution.

By leaving so much responsibility in the hands of the parties, the Taylor Law allows for the risk of ongoing deadlock when a relationship breaks down, as when, in 2016, the Buffalo City School District and the Buffalo Teachers Federation completed negotiations, “resulting in the first collective bargaining agreement in over a decade” between the parties.⁹⁹ That this case was an outlier, as demonstrated by the statistics cited above, does not mean that the fundamental trust in the parties to reach agreement is without cost—though that cost is ameliorated by the *status quo* provision of the Taylor Law, designed to keep both parties at the table.¹⁰⁰

Moreover, the “choice architecture” and nudging of the Taylor Law and PERB’s rules can be effective even with parties who have evidenced the narcotic effect of interest arbitration.¹⁰¹ Such parties can break through and reach agreement, often as a result of the successful deployment of PERB’s mediators. The City of New York and the New York City Patrolmen’s Benevolent Association (“PBA”) had, in the last five rounds of bargaining prior to the 2016 negotiations, gone to interest arbitration four times.¹⁰² The result of that fourth interest arbitration was acrimonious, with the PBA-appointed member of the panel issuing a dissent objecting to the process and describing the ultimate award as an “odious decision and callous mistreatment of the City’s 23,000 Police Officers.”¹⁰³ Protests took place outside the home of the public member of the panel, an unprecedented event.¹⁰⁴

Despite this unpropitious setting, when the parties reached impasse for the next contract in 2016, intensive mediation by PERB’s Director of Conciliation and a long-standing member of PERB’s mediation panel, himself an eminent arbitrator, helped the parties to reach agreement.¹⁰⁵

99. Buffalo Teachers Fed’n, 49 N.Y. PERB ¶ 4560, 4560-61 (2016).

100. *PERB by the Numbers*, *supra* note 61.

101. Richard Steier, *Arbitration Looms Again in PBA Wage Dispute*, THE CHIEF LEADER (Aug. 28, 2014), http://thechiefleader.com/arbitration-looms-again-in-pba-wage-dispute/article_9cfa6776-127e-11e4-af63-001a4bcf6878.html.

102. *Id.*

103. Patrolmen’s Benevolent Ass’n of the City of New York v. The City of New York, N.Y. ST. PUB. EMP. REL. BOARD Case No. IA2014-009;M2014-027, at 2 (Dec. 12, 2015) (Waks, Arb., dissenting).

104. Lorena Mongelli, *NYC Police Union Protests Small Raises Outside Arbitrator’s House*, N.Y. POST (Nov. 5, 2015, 9:43 A.M.), <http://nypost.com/2015/11/05/nyc-police-union-protests-small-raises-outside-arbitrators-home/>.

105. Press Release, Bill DeBlasio, Mayor of N.Y.C., Mayor DeBlasio and Patrolmen’s Benevolent Association Announce Tentative Five-Year Agreement (Jan. 31, 2017),

Mayor Bill De Blasio, at the press conference announcing the agreement, thanked:

[The] mediators who performed a crucial role in this process. And perhaps our mediators don't get a lot of headlines, but they do extraordinarily important work and they help sides even when there is some disagreement come together and found common ground. I want to thank Kevin Flanigan from the Public Employ[ment] Relations Board for his exceptional work and Marty [Scheinman], who . . . played a crucial role as well.¹⁰⁶

A half a century after the passage of the Taylor Law, PERB's Office of Conciliation is effectively resolving the vast majority of contracts that do not settle without assistance. And it still does so with the mediator's philosophy that the "power of persuasion" and "unavoidable influence" in the long run, provides "greater structure and formality of the process [and] establishes a narrower range for settlement that positively affects negotiating dynamics."¹⁰⁷

B. "Rep" and the Business of the Board

Returning to Lefkowitz's summary of the Taylor Law, it had three prongs: (1) that public employees have the right to join or not to join any employee organization of their own choosing; (2) that public employers are required to negotiate with the employee organizations which have been chosen by their employees to represent them; and (3) the procedures by which these two rights are protected.¹⁰⁸

Matters involving mediation, fact-finding, and interest arbitration which the Office of Conciliation facilitates do not, as a general matter, come before the Board.¹⁰⁹ They are indicative of the second component of the summary—helping the parties to reach an agreement.¹¹⁰

By contrast, the matters decided in the first instance by the staff of

<http://www1.nyc.gov/office-of-the-mayor/news/062-17/transcript-mayor-de-blasio-patrolmen-s-benevolent-association-tentative-five-year>.

106. *Id.*

107. Joshua M. Javits, *Better Process, Better Results: Integrating Mediation and Arbitration to Resolve Collective Bargaining Disputes*, 32 A.B.A. J. LAB & EMP. L. 167, 182 (2017).

108. Lefkowitz, *supra* note 1, at 580.

109. *See infra* note 125.

110. Lefkowitz, *supra* note 1, at 575-76.

PERB's Office of Public Employment Practices and Representation (known as the "Rep Department" or just "Rep" internally) are the Board's daily fare.¹¹¹ In large part, this is because those cases that go to decision in the Rep Department are essentially legal in nature. That is, they are binding decisions involving questions of the Taylor Law, as it has been construed by the Board and the courts as applied to facts found by PERB's Administrative Law Judges ("ALJs"), or its Director or Assistant Director (each of whom hear cases in addition to their administrative roles).¹¹²

The questions of representation—unit definition and clarification, as well as determining what union will represent a group of employees—are handled in the first instance by the Rep Department, and then by the Board.¹¹³ So too are challenges to the threshold question of whether employees are entitled to representation.¹¹⁴

Under the Taylor Law, employees are presumed to be eligible for representation for collective bargaining.¹¹⁵ Unlike the broad exclusion for "supervisors" under the National Labor Relations Act, only employees determined by PERB to be "managerial" or "confidential" under § 201(7) of the Taylor Law are barred from representation and collective bargaining.¹¹⁶ Under the statute, employees are "managerial" if "they are persons (i) who formulate policy or (ii) who may reasonably be required on behalf of the public employer to assist directly in the preparation for and conduct of collective negotiations or to have a major role in the administration of agreements or in personnel administration provided that such role is not of a routine or clerical nature and requires the exercise of independent judgment."¹¹⁷ Under the same section, employees may be

111. *Overview*, N.Y. ST. PUB. EMP. REL. BOARD (May 7, 2018), <http://www.perb.ny.gov/perb-overview/>; see also *Office of the Chairperson*, N.Y. ST. PUB. EMP. REL. BOARD (Apr. 28, 2018), <http://www.perb.ny.gov/office-of-the-chairman/> (noting that it is one of the duties of the Public Employment Relations Board to review appealed decisions of all Offices, including the Office of Public Employment Relations Practices and Representation).

112. See N.Y. COMP. CODES R. & REGS. tit. 4 §201.10 (2019) (acting as the procedural rule of the Public Employment Relations Board to have Administrative Law Judges decide on cases); N.Y. COMP. CODES R. & REGS. tit. 4 § 201.11 (2019) (acting as a procedural rule that Public Employment Relations Board cases decided by Administrative Law Judges are appealable to the Board); N.Y. COMP. CODES R. & REGS. tit. 4 §213.10 (2019) (determining that when a case goes on appeal to the Board, decisions made by the Board are final); see also *Office of the Chairperson*, *supra* note 111.

113. *Office of Public Employment Practices & Representation*, N.Y. ST. PUB. EMP. REL. BOARD. (Apr. 28, 2018), <http://www.perb.ny.gov/office-of-public-employment-practicesrepresentation/>.

114. *Id.*

115. N.Y. CIV. SERV. LAW § 203 (Consol. 1995).

116. N.Y. CIV. SERV. LAW § 201(7) (McKinney 1967); *Frequently Asked Questions*, N.Y. ST. PUB. EMP. REL. BOARD (Apr. 25, 2018), <http://www.perb.ny.gov/frequently-asked-questions/>.

117. *Id.*

designated as confidential only if they are persons who assist and act in a confidential capacity to managerial employees engaged in labor relations on behalf of the employer as described in clause (ii).¹¹⁸

Improper practice charges are also handled by Rep.¹¹⁹ As is the case with Conciliation, Rep's ALJ's successfully resolve through settlement the vast majority of improper practice charges that come before them. To again use an imperfect measure, for the period from 2009-2010 through 2014-2015, an average settlement rate computed by averaging cases filed per year and cases pending at the beginning of each year with cases settled yields an approximate settlement rate of 80%.¹²⁰ For the same time period, ALJs have issued, on average, 126 decisions per year.¹²¹

From 2009 through 2015, the Board decided, on average, thirty improper practice cases per year.¹²² Additionally, it has issued in each year, on average, five representation decisions, twenty-one certification decisions, and two unit placement or unit clarification decisions. In the same time period, the Board issued one managerial/confidential decision.¹²³ In sum, about a quarter of improper practice decisions by ALJs are appealed to the Board, and most of these go to decision.¹²⁴

Because the Board functions as an appellate body, there are no statutory or regulatory mechanisms to promote settlement once a case goes before it.¹²⁵ Also, the parties often choose to appeal decisions to the

118. *See id.*

119. *See* N.Y. COMP. CODES R. & REGS. tit. 4 §204.1-18 (2019) (governing improper practice charges).

120. ROCKEFELLER INST. OF GOV., 2015 NEW YORK STATISTICAL YEARBOOK 314 (39th Ed. 2016). Calculating from reported figures from 2009-2010 through 2014-2015, averaging 812 cases filed per year, with 663 settled or withdrawn cases, yielding an average settlement rate of 82%. *Id.* An average of the year-by-year settlement rates measured against actual number of settled/withdrawn cases per year yields an approximate settlement rate of 78% for the same time period. *Id.* Averaging these two admittedly imperfect figures yields an average settlement rate for the period of 80%. *Id.* Although the statistics have not been published yet, the years 2015-2016, 2016-2017 and 2017-2018 yield similar figures. *Id.* In 2015-2016, 884 cases were filed, and 786 were settled or otherwise withdrawn, yielding a settlement percentage rate of 88.9%. *Id.* ALJs issued 143 decisions, and the Board decided 52. In 2016-2017, 835 cases were filed, and 666 settled or withdrawn, a settlement rate of 79.7%. *Id.* ALJs decided 117 cases, and the Board issued 50 decisions. *Id.* Likewise, in 2017-2018, 733 cases were filed, 630 settled or were otherwise withdrawn, yielding a settlement percentage of 85.9%. ALJs issued 111 decisions, and the Board issued 67. *Id.*

121. *Id.*

122. *Id.* (calculating the pure average from 2009-2010 through 2014-2015 gives a slightly higher average, that is, 34 cases per year; but in 2011-2012, the Board decided 51 improper practice cases, an aberrantly high number for that period that skews the average in a misleading way).

123. *Id.*

124. *Id.* at 314.

125. Raymond D. Horton, *Public Employee Labor Relations Under the Taylor Law*, 31 PROC. OF THE ACAD. OF POL. SCI. 161, 161-174 (1974).

Board to clarify the Taylor Law's application to difficult or unprecedented facts, or to obtain clarity as to how the Taylor Law's policies or prior cases should be followed when they are in conflict.¹²⁶ In such cases, unlike the mediator's ideal, the answer can be more valuable than the settlement.

When the Taylor Law was first enacted, PERB was not explicitly given jurisdiction over improper practices by either management or labor.¹²⁷ In 1967, Jerry Lefkowitz "took the lead in preparing PERB's rules of procedure," including drafting the first prohibition of improper practices, which was struck down by the courts in 1968.¹²⁸ The following year, the Legislature amended the Taylor Law statute to add § 209-a, which defines improper practices on the part of both labor and management.¹²⁹ The Taylor Law gives PERB "exclusive, non-delegable jurisdiction" over improper practice charges.¹³⁰

It is an improper practice for an employer to do any of the following: (1) interfere with, restrain or coerce public employees in the exercise of their rights under the Taylor Law for the purpose of depriving them of such rights; (2) dominate or interfere with the formation or administration of any employee organization for the purpose of depriving them of such rights; (3) discriminate against any employee for the purpose of encouraging or discouraging membership in, or participation in the activities of, any employee organization; (4) refuse to negotiate in good faith with the duly recognized or certified representatives of its public employees; (5) refuse to continue all the terms of an expired agreement until a new agreement is negotiated, unless the employee organization which is a party to such agreement has, during such negotiations or prior to such resolution of such negotiations, engaged in strike-related conduct as prohibited by 210(1) of the Taylor Law; (6) utilize any state funds appropriated for any purpose to train managers, supervisors or other administrative personnel regarding methods to discourage union organization or to discourage an employee from participating in a union organizing drive; (7) fail to permit or refuse to afford a public employee the right, upon the employee's demand, to representation by a representative of the employee organization when at the time of questioning by the employer of such employee it reasonably appears that he or she may be the subject of a potential disciplinary action; or (8) to

126. *Office of the Chairperson*, *supra* note 111.

127. *Id.*

128. *See Civil Serv. Employees Ass'n v. Helsby*, 21 N.Y.2d 541, 554 (N.Y. 1968); *see also* DONOVAN, *supra* note 41, at 64, 77.

129. N.Y. CIV. SERV. LAW § 209(a) (McKinney 1969).

130. N.Y. CIV. SERV. LAW § 205(5)(a) (Consol. 1995).

disclose home addresses, personal telephone numbers, personal cell phone numbers, or personal e-mail addresses of public employees except where mandated by the Taylor Law, court order, a subpoena or other legal process.¹³¹

It is an improper practice for a union to: (1) interfere with, restrain or coerce public employees in the exercise of the rights to form, join and participate in, or to refrain from forming, joining, or participating in, any employee organization of their own choosing;¹³² (2) to refuse to negotiate collectively in good faith with a public employer; or (3) to breach its duty of fair representation to public employees.

The board's decisions with respect to improper practice charges are subject to judicial review as to whether the decision "was affected by an error of law or was arbitrary and capricious or an abuse of discretion," or not "supported by substantial evidence."¹³³ The board "is accorded deference in matters falling within its area of expertise."¹³⁴

The board's primary purpose is, as it has been since the beginning, deciding those questions of law that *don't* get resolved by settlement or collectively bargained agreements.¹³⁵ In deciding cases, the board has the additional responsibility of providing guidance for the parties and their representatives.¹³⁶ The board must flesh out the necessarily broad language of the Taylor Law—whether a union's demand to bargain over a specific term and condition of employment is a mandatory subject of bargaining, or whether it falls within management's right to assign duties, select equipment, and organize how those assignments are performed.

PERB's experience, and the extent to which its decisions have been accepted by the parties and stood the test of time, have vindicated Pauline Kinsella's judgment that:

I believe that without strong governmental agencies which are respected by all parties, the process of collective bargaining is placed in extreme jeopardy. I don't believe the parties will police themselves, and I

131. N.Y. CIV. SERV. LAW § 209-(a)(1) (Consol. 1995). The prohibition of release of personal contact information is contained in a new § 209-(a)(1) (h), added by NYS Sess. Laws 2019, ch. 55, Part E (April 12, 2019).

132. N.Y. CIV. SERV. LAW §§202, 209-(a)(2) (Consol. 1995).

133. *See* N.Y. CIV. SERV. LAW § 209-a(4)(c) (Consol. 1995); *see also* N.Y. C.P.L.R. 7803 (Consol. 2011) (specifying the standard of review).

134. *In re Kent v. Lefkowitz*, 27 N.Y.3d 499, 505 (N.Y. 2016).

135. *See* N.Y. CIV. SERV. LAW § 209(2) (Consol. 1995); *see also* N.Y. CIV. SERV. LAW § 209(3) (Consol. 1995).

136. N.Y. CIV. SERV. LAW § 209(3)(d) (Consol. 1995).

don't believe *ad hoc* arbitrators will adequately focus on the public interest as they review cases brought by specific parties. I believe governmental agencies should provide law enforcement functions.¹³⁷

PERB has successfully provided those functions since it was granted improper practice jurisdiction in 1969.¹³⁸ Part of how it has done so is by fostering a jurisprudential consistency and consensus as to the guiding principles it sets out.

The Board has, sought to achieve consensus among its three members throughout its history.¹³⁹ Of course, dissents are welcome where a principled disagreement cannot be reconciled, and have sometimes been prophetic.¹⁴⁰ However, the members of the Board, present as well as past, prize the virtue of providing clear, non-partisan guidance. The virtue of clarity is best served when all of the members of the Board can agree on a final articulation of a result that serves the Taylor Law, and the Board's members work to consensus in the vast majority of cases. This culture of consensus inherently stabilizes the Board. While members come, and go, bringing with them their own experience and viewpoints, the Board is not noted for the partisan swings that some scholars see in decisions of the National Labor Relations Board.¹⁴¹ Indeed, that has long been the case; Ronald Donovan wrote in 1990 that:

[w]hereas observers of the National Labor Relations Board often speak of the Eisenhower, Kennedy, or Reagan Board as a shorthand way of indicating a particular labor policy orientation associated with the political views of the incumbent president, the policies of

137. Pauline R. Kinsella, Chairwoman, N.Y. State Pub. Emp't Relations Bd., *Privatizing the Public Interest: Who Needs the Impartial Agencies?*, Presentation at the Pub. Emp't Relations Bd., at 3-4 (July 27, 1997) (transcript available at New York State Public Employment Relations Board).

138. N.Y. CIV. SERV. LAW § 209(a) (McKinney 1969).

139. See DONOVAN, *supra* note 41, at 153-157.

140. *Id.* at 157-59.

141. See Joan Flynn, *A Quiet Revolution at the Labor Board: The Transformation of the NLRB, 1935-2000*, 61 OHIO ST. L. J. 1361, 1365-1366 (2000) ("In short, the once unimaginable has now become the norm, and the modern-day NLRB looks like nothing so much as the tripartite model for the agency that was explicitly considered and decisively rejected by the Wagner Act Congress"); see also Zev J. Eigen & Sandro Garofalo, *Less Is More: A Case for Structural Reform of the National Labor Relations Board*, 98 MINN. L. REV. 1879, 1884 (2014) ("The [National Labor Relations] Board's approach is—some might say 'notoriously'—marked by frequent shifts in precedent when the administration changes, combined with a policy of non-acquiescence with federal appellate court rulings until the Supreme Court ultimately decides an issue").

PERB have been remarkably constant over its history, irrespective of state administration, agency leadership, or board composition.¹⁴²

In deciding cases, the Board explains its results in written opinions, and relates them to prior Board decisions, old and new. Like any common law system, the Taylor Law, as supplemented by its Rules of Procedure, requires careful, fact-driven decisions explaining why the material facts at issue mandate the result the Board has arrived at. The Board's decisions serve the additional purpose of persuasion, of demonstrating that a given result is rooted in the Taylor Law and in the caselaw that has developed over the years, and not a result of favoring one party over another.

Our written opinions also make us, as former Chair Pauline Kinsella put it, "publicly accountable" because "our decisions are in the public eye and they are carefully scrutinized."¹⁴³ The public nature of what we do makes a difference."¹⁴⁴

Two other institutional constraints on the Board are the record compiled by the ALJs and the scope of appeal of their decisions to the Board.¹⁴⁵ The ALJs conduct the hearings, where necessary; they weigh the credibility of witnesses, and apply the Taylor Law and the Rules, as well as the Board's prior decisions.¹⁴⁶ The Board defers to the ALJ's factual findings, especially when they are based in whole or in part on the ALJ's weighing of the credibility of the witnesses' testimony on a disputed factual question.¹⁴⁷ The ALJ's written opinion also frames the issues before the Board; under PERB's Rules, parties must file specific exceptions to an ALJ decision, and questions of law or fact not raised before the ALJ and excepted to before the Board are waived.¹⁴⁸

Where no board decisions address the precise matter at issue, the ALJs may consult the published decisions of their predecessors and colleagues as ALJs. Sometimes, they must do their best in the absence of any guidance at all.¹⁴⁹

142. DONOVAN, *supra* note 32, at 154.

143. Kinsella, *supra* note 137, at 4.

144. *Id.*

145. See tit. 4 §§ 201.1, 213(1) (2019).

146. See tit. 4 § 212.4(a), (d).

147. Payson, 50 N.Y. PERB ¶ 3002, 3008 (2017) (citing, *inter alia*, Fashion Inst. of Tech. v. Helsby, 44 A.D.2d 550 (1st Dep't 1974)).

148. See tit. 4 § 213.2 (b)-(4); see also *Burke*, 49 N.Y. PERB ¶ 3021, 3072, n. 4 (2016).

149. See generally R. Terrance Harders, *Striking a Balance: Administrative Law Judge Independence and Accountability*, 19 J. NAT'L ASS'N ADMIN L. JUDGES 1, 4-5 (1999) ("To the extent that administrative law judges, in deciding cases concerning enforcement and disputes, pass on the

In such cases, the importance of the Board's review is clear. Only the Board can provide clarity—an ALJ decision, however well thought out and persuasive, only binds the parties to that decision, even if no appeal is filed.¹⁵⁰

These rules are not meant to make an appeal to the board a technicality-strewn minefield. Rather, they make sure that an appeal is a review of the facts and issues presented to the ALJ, and not a second bite at the apple.

Recent chairs have steadily sought to reduce the technical nature of pleading before PERB.¹⁵¹ Under Jerry Lefkowitz, who returned to PERB in 2007, (this time as chair, serving until January 2015), the directors and the deputy chair began a thorough review of PERB's rules.¹⁵² This rules revision was the first since 1999, and the proposed amended rules were thoroughly reviewed and revised again under Seth Agata, my immediate predecessor as chair.¹⁵³ When I was appointed chair in 2016, I inherited the work begun by Jerry and Bill Herbert (with the help of Kevin Flanigan, Monte Klein, David Quinn, and Anthony Zumbolo), and continued under Seth (with my input as deputy chair, and that of all the directors who had served under both Jerry and Seth).¹⁵⁴ With additional valuable contributions of Deputy Chair Sarah Coleman, the rules were formally adopted on August 2, 2017.¹⁵⁵

Under these new rules, pleading is less technical while electronic filing has been adopted and is being phased in. Likewise, practices (some of which were reflected in the board's decisions, others simply known to experienced practitioners before the agency, but not to newer practitioners or individuals without representation), are now incorporated into the rules.

validity of agency statutory interpretation and rules, administrative law judges take upon themselves the role of the courts and stand, potentially at least, in the way of agency policy-making").

150. *Police Benevolent Ass'n of New York State, Inc.*, 50 N.Y. PERB ¶ 3001, n. 42 (2017) (citing *Nassau Cty. Sheriff's Corr. Officer's Benevolent Ass'n*, 48 N.Y. PERB ¶ 3023, at 3089 n. 89 (2015)) (determining that a decision of an ALJ is not binding on the Board and has no precedential value).

151. *Nassau Cty. Sheriff's Corr. Officer's Benevolent Ass'n, Inc.*, 49 N.Y. PERB ¶ 3001 (2016).

152. William A. Herbert, *Jerome Lefkowitz: A Pragmatic Intellect and Major Figure in Taylor Law History*, in John F. Wirenius, ed., *The Taylor Law At 50: Public Sector Labor Relations In A Shifting Landscape*, 577, 582-583 (2019).

153. John F. Wirenius, *Profile of Seth H. Agata*, N.Y. ST. PUB. EMP. REL. BOARD. (Apr. 28, 2018), <http://www.perb.ny.gov/wp-content/uploads/2018/04/seth-agata.pdf>.

154. *See NYS Public Employment Relations Board Through the Years*, N.Y. ST. PUB. EMP. REL. BOARD (Apr. 28, 2018), <http://www.perb.ny.gov/perb-through-the-years/> (referring to when the author began as chairman of the board).

155. *Rules and Regulations of the Public Employment Relations Board When Acting Pursuant to Article 14 of the Civil Service Law*, N.Y. ST. PUB. EMP. REL. BOARD (Oct. 9, 2018) <https://www.perb.ny.gov/rules-of-procedure/>.

In the same time period, the Board has moved to eliminate technicalities that harmed both management and labor.¹⁵⁶ So, for example, the Board has overruled precedent penalizing both labor and management for failing to recite a precise formula of words in its pleadings when the essence of the claim or defense is clear from the pleadings.¹⁵⁷

Likewise, we continue to reduce our backlog of undecided cases, promoting more efficient resolution of disputes. As we have hired new staff to fill the places of those who have retired, we at PERB intend to resolve cases with full consideration, but to ensure that processing of cases can be done in a timely basis, so that our remedies actually make the parties whole, and promote the policies and values of the Taylor Law.

As PERB moves forward into its second half-century, the agency is cultivating a new generation of staff, as well as encountering a new generation of clientele and constituents. This anniversary year is not just a celebration but it is the beginning of a new era, as many experienced practitioners and parties retire or move on to other concerns. At the same time, changes at the national level, and the revitalization of communities throughout the State, present new challenges to State and local employers, and to the individuals comprising their workforces, as well as the unions representing them.¹⁵⁸ The post-World War II settlement, the latter years of which birthed PERB, has ended. The challenges of the nascent era in which we start this second half-century are starkly different from those of the first.

Among the most significant of these challenges are the expected tectonic shift in the labor relations landscape created by the United States Supreme Court's decision in *Janus*.¹⁵⁹ In that case, the Court found that state labor relations statutes or agreements violated the First Amendment by requiring public employees who are not union members to pay fees to unions whose representational efforts and collective bargaining agreements the nonmember employees benefit from.¹⁶⁰ In so ruling, the

156. Nassau Cty. Sherriff's Corr. Officers' Benevolent Ass'n, Inc., 49 N.Y. PERB ¶ 3001 (2016) (deeming management's mislabeling defense of "duty satisfaction" as one of "waiver" not fatal); Suffolk Cty. Deputy Sheriffs PBA, 49 N.Y. ¶ PERB 3005 (2016) (reversing an ALJ's finding that a union had failed to timely plead repudiation as an improper practice when it asserted a contractual claim, only to be met with a deferral claim).

157. Nassau Cty. Sherriff's Corr. Officers' Benevolent Ass'n, Inc., 49 N.Y. PERB ¶ 3001 (2016); Cty. Deputy Sheriffs PBA, 49 N.Y. PERB ¶ 3005 (2016).

158. See Kinsella *supra* note 25 (noting the beginning of some of these trends in the public sector in 1997).

159. See *Janus* 138 S.Ct. at 2463, 2464.

160. *Id.* at 2483, 2486.

Court overturned 40 years of its own precedent, with roots stretching back another 20 years.¹⁶¹ The decision may destabilize well-functioning collective bargaining relationships at the stroke of a pen.

Although legislation has been passed and signed into law by the Governor to ameliorate the potential impact of *Janus*, harmonizing these new amendments to the Taylor Law with the structure of the law, and the reciprocal obligations that form the heart of the Taylor Law, will present issues for PERB to resolve as the scope of the decision's impact becomes clear.¹⁶² Likewise, determining what, if anything, remains of the provisions that are cast into doubt by the *Janus* opinion will present more issues to the Board to decide, at least in the first instance. In all of these issues, we must be guided by the reciprocal obligations of public employers and employees to each other, and to the public they serve.

As we begin to address those challenges, our core mission remains unaltered—which is, at heart, nothing less than facilitating the efficient delivery of services to the people of the State of New York, while respecting the inherent dignity and value of all those whose work is a part of providing those services. In a newly unstable environment with significant change, we at PERB, like others in the field, must also raise our own standards. As new participants from both management and labor come to the bargaining table, they will need to learn to manage the intricate, relationship-driven, but ultimately productive, arts of labor relations. As an agency, we intend to use this anniversary commemoration as a catalyst to re-launch our long dormant educational mission, for the benefit of the parties, and the people, as provided for by the Taylor Law.¹⁶³ But teaching how things *were* done is not sufficient in itself. We intend to continue to advance and learn how to adapt the values of collective bargaining and of dispute resolution, to continue “to promote harmonious and cooperative relationships between government and its employees and to protect the public by assuring, at all times, the orderly and uninterrupted operations and functions of government.”¹⁶⁴

And then we continue to do just that—get out and promote harmonious and cooperative relationships between government and its employees—in the field, at the bargaining table, and, where necessary, in

161. *Id.* at 2479, 2483, 2486.

162. *Governor Cuomo Signs Legislation to Protect the Rights of New York's Working Men and Women*, N.Y. ST.: PRESSROOM (Apr. 12, 2018), <https://www.governor.ny.gov/news/governor-cuomo-signs-legislation-protect-rights-new-yorks-working-men-and-women>; NY Laws 2018, Ch. 59, Pt. RRR; NY Laws 2019, Ch. 56, Part. DD.

163. *See* N.Y. CIV. SERV. LAW § 205 (Consol. 1995).

164. N.Y. CIV. SERV. LAW § 200 (Consol. 1995).

our legal processes. At its best, the Board and the Agency strive to uphold both sides of the reciprocal duties owed by the parties to each other, but ultimately to the people of the State of New York.

All of these initiatives and resolutions, as well as our revised Rules, are intended to protect the two substantive rights provided by the Taylor Law—the right to representation and the right to negotiate terms and conditions of employment. The Taylor Law created PERB as a referee and facilitator to ensure that employees entitled to representation can exercise that right if they so choose. PERB ensures that the parties' negotiations are conducted in good faith, without coercion or the fear of reprisal; that all subjects that are mandatorily negotiable can be negotiated to fruition; and to assist the parties when their negotiations break down despite their good-faith efforts.

As a wise man once wrote, the rest is all procedural.