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Case Note: Labor Law - Collective Bargaining - Job Security is a Proper Subject of Negotiations Between a Public Employer and Public Employee Organization Under the Taylor Law

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CASE NOTES

LABOR LAW — Collective Bargaining — Job Security is a Proper Subject of Negotiations Between a Public Employer and Public Employee Organization Under the Taylor Law. *Board of Education v. Yonkers Federation of Teachers,* 40 N.Y.2d 268, 353 N.E.2d 569, 386 N.Y.S.2d 657 (1976).

In 1975 the city of Yonkers was plagued by a severe financial emergency.[1] As part of an effort to balance its budget, plaintiff Yonkers City Board of Education unilaterally terminated the services of a number of teachers.[2] Defendant Yonkers Federation of Teachers demanded arbitration on this issue under the terms of a job security clause contained in the collective bargaining agreement between the Board and the Federation.[3] Plaintiff then brought a proceeding for a stay of arbitration.[4]

Plaintiff Board of Education contended that job security is an improper subject for a collective bargaining agreement.[5] It also argued that, even if job security were a proper subject, considerations of public policy, generated by the deplorable financial conditions of the city, would have permitted the abolition of jobs in this instance and the denial of the arbitration agreement.[6] The Board pointed to the New York State Financial Emergency Act[7] for the

1. Section 2-a of the New York State Financial Emergency Act for the City of Yonkers states that, "The legislature hereby finds and declares that a state of financial emergency exists within the city of Yonkers." 1975 N.Y. Laws ch. 871, § 2-a.

2. Board of Educ. v. Yonkers Fed'n of Teachers, 40 N.Y.2d 268, 271, 353 N.E.2d 569, 570, 386 N.Y.S.2d 657, 658 (1976).

3. *Id.* The collective bargaining agreement between the teachers union and the board of education provided that, "During the life of this contract no person in this bargaining unit shall be terminated due to budgetary reasons or abolition of programs but only for unsatisfactory job performance . . . ." The agreement also contained broad grievance and arbitration clauses. *Id.* at 272, 353 N.E.2d at 571, 386 N.Y.S.2d at 658.

4. *Id.* at 271, 353 N.E.2d at 570, 386 N.Y.S.2d at 658. Plaintiff Board of Education brought this proceeding for a stay of arbitration under section 7503 of the New York Civil Practice Law and Rules which states in part: "[A] party who has not participated in the arbitration and who has not made or been served with an application to compel arbitration, may apply to stay arbitration on the ground that a valid agreement was not made or has not been complied with . . . ." N.Y.C.P.L.R. § 7503(b) (McKinney 1963), *as amended,* (McKinney Supp. 1976).

5. 40 N.Y.2d at 272, 353 N.E.2d at 573, 386 N.Y.S.2d at 658.

6. *Id.* at 275, 353 N.E.2d at 573, 386 N.Y.S.2d at 660.

7. 1975 N.Y. Laws ch. 871.

City of Yonkers as evincing a legislative determination which favored the abolition of jobs.[8]

Conversely, defendant teachers' union declared that "neither statute nor controlling decisional law, nor public policy, prohibited the board from voluntarily negotiating, before the onset of the legislatively declared emergency, about job security."[9] Thus, the union maintained that the agreement with respect to job security was valid when made, and should be honored even though the city was encountering fiscal difficulties.

The supreme court, Westchester County, held the job security clause void as violative of public policy and granted a stay of arbitration.[10] The appellate division affirmed.[11] The court of appeals reversed the lower court rulings and enforced the collective bargaining agreement by directing the parties to proceed to arbitration under its terms.[12] It held that job security is a proper subject for bargaining between public employers and public employees because no statute, controlling decisional law, nor restrictive public policy prohibits negotiating about the subject.[13] The court stated that this particular job security clause merited enforcement since it was of relatively brief duration (three years), was not negotiated in a time of financial emergency, and was explicit in excluding budgetary reasons as a valid excuse for firing teachers.[14] Chief Judge Breitel also declared that the financial crisis facing Yonkers was not a sufficiently crucial public policy consideration to warrant the condoning of a breach of the job security clause.[15]

Almost a decade has elapsed since Governor Rockefeller signed the Public Employees' Fair Employment Act[16] in 1967,[17] lauding it as a "milestone in employer-employee relationships in the state"[18]

8. 40 N.Y.2d at 275, 353 N.E.2d at 573, 386 N.Y.S.2d at 660.
9. *Id.* at 272-73, 353 N.E.2d at 571, 386 N.Y.S.2d at 658-59.
10. *Id.* at 271, 353 N.E.2d at 570, 386 N.Y.S.2d at 658.
11. 51 App. Div. 2d 568, 379 N.Y.S.2d 109 (2d Dep't), *rev'd*, 40 N.Y.2d 268, 353 N.E.2d 569, 386 N.Y.S.2d 657 (1976).
12. 40 N.Y.2d at 276, 353 N.E.2d at 574, 386 N.Y.S.2d at 661.
13. *Id.* at 271-72, 353 N.E.2d at 570, 386 N.Y.S.2d at 658.
14. *Id.* at 275-76, 353 N.E.2d at 573, 386 N.Y.S.2d at 660-61.
15. *Id.* at 276, 353 N.E.2d at 573, 386 N.Y.S.2d at 661.
16. N.Y. CIV. SERV. LAW art. 14 (McKinney 1973), *as amended*, (McKinney Supp. 1976).
17. This law was passed by the Legislature and signed by the Governor on April 21, 1967. Public Employees Fair Employment Act, 1967 N.Y. Laws ch. 392.
18. N.Y. Times, April 22, 1967, at 19, col. 3.

for its novel provision of "basic rights for public employees that have been previously unrecognized in the law."[19] The aim of the framers of the statute, popularly known as the Taylor Law, was to replace the unworkable harsh strike penalties of the Condon-Wadlin Act[20] with legislation that not only would protect the public against the impairment of vital public services by illegal strikes, but would also grant the public employee rights of representation and collective bargaining.[21] However, questions continue to arise over the scope of these rights.[22]

The Taylor Law imposes an obligation to negotiate only as to subjects deemed "terms and conditions of employment."[23] These are the mandatory subjects of negotiations between a public employer and employee.[24] Although the statute defines "terms and conditions of employment" as "salaries, wages, hours and other terms and conditions of employment,"[25] the definition is a general one which does not sufficiently specify the mandatory subjects of negotiations.[26]

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19. Letter from Governor Rockefeller on the Enactment of the Public Employees Fair Employment Act of 1967 (April 21, 1967) published in 1967 N.Y. Sess. Laws 1527 (McKinney 1967).

20. 1958 N.Y. Laws ch. 790, § 108 (repealed 1967).

21. Governor's Committee on Public Employment Relations' Final Report, State of New York 9 (March 31, 1966); section 203 of the Taylor Law provides that: "Public employees shall have the right to be represented by employee organizations to negotiate collectively with their public employers in the determination of their terms and conditions of employment, and the administration of grievances arising thereunder." N.Y. CIV. SERV. LAW § 203 (McKinney 1973).

22. Although the Governor's Committee on Public Employee Relations' Final Report suggests that "[t]here be clarification by statute as to which subjects are open to negotiation in whole or in part, which require legislative approval of modifications agreed upon by the parties, and which are for determination solely by the legislative body," the Legislature did not opt to include any extensive listing of negotiable and nonnegotiable subjects in the terms of the Taylor Law. GOVERNOR'S COMM. ON PUBLIC EMPLOYEE RELATIONS' FINAL REP., STATE OF NEW YORK 45-46 (March 31, 1966).

23. Under the terms of the statute the "terms and conditions of employment" are the only subjects about which an employer is required to negotiate. N.Y. CIV. SERV. LAW §§ 203, 204(2) (McKinney 1973).

24. An employer's failure to negotiate with respect to the "terms and conditions of employment" is deemed as "improper employer practice" which is subject to the sanction of the Public Employment Relations Board [hereinafter cited as PERB] issuing an order to negotiate in good faith. *Id.* §§ 209-a(1)(d), 205(5)(d).

25. *Id.* § 201(4) (McKinney 1973), *as amended,* (McKinney Supp. 1976).

26. The Nevada Local Government Employee-Management Relations Act is an example of a public employment statute that, unlike New York's Taylor Law, is fairly definite as to

The task of determining the extent of these collective bargaining rights under the Taylor Law passed to the Public Employment Relations Board (PERB)[27] and the courts.[28] Following the rationale that exists in the private sector,[29] they have characterized collective bargaining subjects as: (1) issues warranting mandatory negotia-

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what matters shall be deemed mandatory or non-mandatory subjects of negotiations. The law states that:

> The scope of mandatory bargaining is limited to:
> (a) Salary or wage rates or other forms of direct monetary compensation. (b) Sick leave. (c) Vacation leave. (d) Holidays. (e) Other paid or nonpaid leaves of absence. (f) Insurance benefits. (g) Total hours of work required of an employee on each work day or work week. (h) Total number of days' work required of an employee in a work year. (i) Discharge and disciplinary procedures. (j) Recognition clause. (k) The method used to classify employees in the bargaining unit. (l) Deduction of dues for the recognized employee organization. (m) Protection of employees in the bargaining unit from discrimination because of participation in recognized employee organizations consistent with the provisions of this chapter. (n) No-strike provisions consistent with the provisions of this chapter. (o) Grievance and arbitration procedures for resolution of disputes relating to interpretation or application of collective bargaining agreements. (p) General savings clauses. (q) Duration of collective bargaining agreements. (r) Safety. (s) Teacher preparation time. (t) Procedures for reduction in work force.
>
> Those subject matters which are not within the scope of mandatory bargaining and which are reserved to the local government employer without negotiation include:
> (a) The right to hire, direct, assign or transfer an employee, but excluding the right to assign or transfer an employee as a form of discipline. (b) The right to reduce in force or lay off any employee because of lack of work or lack of funds, subject to paragraph (t) of subsection 2. (c) The right to determine: (1) Appropriate staffing levels and work performance standards, except for safety considerations; (2) The content of the workday, including without limitation workload factors, except for safety considerations; (3) The quality and quantity of services to be offered to the public; and (4) The means and methods of offering those services.

NEV. REV. STAT. §§ 288.150(2)-(3) (1973).

27. N.Y. CIV. SERV. LAW § 205(1) (McKinney 1973). Section 205(1) of the Taylor Law created the Public Employment Relations Board to "assist in resolving disputes between public employees and public employers." *Id.* § 200(d). Section 205 also authorizes PERB to conduct studies of those subjects which are negotiable in whole or in part or nonnegotiable under the Taylor Law. *Id.* §§ 205(5)(g)(iii), 205(5)(g)(v). PERB's decisions in resolving disputes over the negotiability of certain subjects should be conclusive if reasonable, since the New York Court of Appeals held that PERB's decisions should be accepted unless they are clearly unreasonable. West Irondequoit Teachers Ass'n v. Helsby, 35 N.Y.2d 46, 50-51, 315 N.E.2d 775, 777, 358 N.Y.S.2d 720, 722-23 (1974). *See* City of Schenectady v. Helsby, 57 Misc. 2d 91, 292 N.Y.S.2d 141 (Sup. Ct. 1968).

28. Section 213 of the Taylor Law provides that a party may seek judicial review by the courts of an order by PERB. Parties may also ask the courts to enforce PERB's decisions. N.Y. CIV. SERV. LAW § 213 (McKinney 1973).

29. NLRB v. Borg-Warner Corp., 356 U.S. 342 (1958).

tions;[30] (2) problems that may be properly bargained about on a voluntary basis;[31] or (3) matters which may not be negotiated, even on a permissive basis.[32]

In *City School District v. New Rochelle Federation of Teachers*,[33] PERB characterized curtailment of services and job eliminations as non-mandatory subjects of negotiations under the Taylor Law.[34] It rejected the New Rochelle Federation of Teachers' contention that a public employer must negotiate with the recognized employee organization concerning a decision to reduce its work force.[35] While PERB conceded that the decision to reduce the work force would affect conditions of employment, the Board stated: "[I]t does not follow that every decision of a public employer which may affect job security is a mandatory subject of negotiations."[36] PERB pointed out the distinction between the responsibility of the public and private employer, noting that public employers "owe a very special obligation to the public not owed by private employers."[37] It reasoned that a "public employer exists to provide certain services to its constituents, be it police protection, sanitation or . . . education [and that] [o]f necessity, the public employer, acting through its executive or legislative body, must determine the manner and means by which such services are to be rendered and the extent

30. *E.g.*, Albany PPFA, 7 P.E.R.B. 3142 (1974) (death benefits, exclusively of representation, establishment of labor-management and joint safety committees, parity, retirement and seniority rights are mandatory subjects of negotiation between the government and its firefighters).

31. *E.g.*, New York City School Bds. Ass'n v. Board of Educ., 39 N.Y.2d 111, 347 N.E.2d 568, 383 N.Y.S.2d 208 (1976) (demand that each student have a specific number of contact periods is a non-mandatory subject of negotiation, but hours of instruction for students may be negotiated on a permissive basis); Board of Educ. v. Areman, 52 App. Div. 2d 573, 382 N.Y.S.2d 515 (2d Dep't 1976) (mem.) (inspection of employee personnel files by an employer is a non-mandatory subject of negotiations, but an employer *may* limit his right to inspect personnel files).

32. *E.g.*, Farrigan v. Helsby, 68 Misc. 2d 952 (Sup. Ct. 1971), *aff'g* 3 P.E.R.B. 3632 (1970) (agency shop).

33. 4 P.E.R.B. 3704 (1971).

34. *Id.* at 3706. The case arose after the superintendent of schools, for reasons of economic and administrative efficiency, recommended and approved budget cuts that would result in the elimination of departments in the school system and the termination of about 140 positions. *Id.* at 3705.

35. *Id.* at 3705.

36. *Id.* at 3706.

37. *Id.* at 3706-07.

thereof . . . ."[38] The Board maintained that a budget cut with concomitant job eliminations is primarily a managerial decision which the public employer should have the power to make.[39]

PERB's precise ruling in *New Rochelle* was that this curtailment of services was not a subject about which an employer could be *compelled* to negotiate.[40] Concomitantly, PERB added that its decision would not prevent an employee organization from "seeking negotiations concerning such decisions on a *permissive* basis."[41] This ruling gave the public employer the option of voluntarily negotiating with an employee union on job elimination. Nevertheless, a number of subsequent decisions stripped the resultant collective bargaining agreements of their validity and enforceability.

Two years after PERB decided *New Rochelle,* the supreme court, Putnam County, declared that an agreement prohibiting job abolition would not be legally enforceable.[42] In *Carmel Central School District v. Carmel Teachers Association*[43] the court concluded that the creation and abolition of positions in a school district were board of education functions which could not be delegated.[44] It also rea-

38. *Id.* at 3706.

39. *Id.* The framers of the New York City Collective Bargaining Law incorporated this rationale into the language of their law. While subdivision (a) of section 1173-4.3 (dealing with the scope of collective bargaining) maintains that it is the public employer's duty to bargain about wages, hours and working conditions, subdivision (b) states that:

> It is the right of the city, or any other public employer . . . to determine the standards of services to be offered by its agencies; . . . relieve its employees from duty because of lack of work or for other legitimate reasons; . . . determine the methods, means and personnel by which government operations are to be conducted; . . . take all necessary actions to carry out its mission in emergencies; and exercise complete control and discretion over its organization and the technology of performing its work. Decisions of the city or any other public employer on those matters are not within the scope of collective bargaining . . . .

Collective Bargaining Law, N.Y. ADMIN. CODE ch. 54, § 1173-4.3(b) (1975).

40. 4 P.E.R.B. at 3706 (1971).

41. *Id.* at 3707. The Board also held that, although the employer cannot be compelled to negotiate about a decision to terminate positions, the "impact" of such a decision on the "terms and conditions of employment" *would* be a mandatory subject of negotiations. *Id.* Some examples of such mandatory subjects would be severance pay, continued medical and other fringe benefits, order of layoff and workload of remaining employees. Somers Faculty Ass'n, 9 P.E.R.B. 3022, 3024-25 (1976); City of White Plains, 5 P.E.R.B. 3013, 3014 (1972).

42. Carmel Cent. School Dist. v. Carmel Teachers Ass'n, 76 Misc. 2d 63, 67, 348 N.Y.S.2d 665, 669-70 (Sup. Ct. 1973).

43. 76 Misc. 2d 63, 348 N.Y.S.2d 665 (Sup. Ct. 1973).

44. *Id.* at 66-67, 348 N.Y.S.2d at 669.

soned that the creation and abolition of positions were not terms and conditions of employment, and that boards of education could not negotiate and contract with respect to them, even on a voluntary basis.[45] No mention was made of PERB's *New Rochelle* opinion.[46]

Subsequently, in *Lippman v. Delaney*,[47] the appellate division also failed to follow the rationale of the *New Rochelle* opinion. Instead, Justice Samuel Rabin refused to enforce a job security clause which was voluntarily negotiated by the county of Westchester with the Westchester County Civil Service Employees Association.[48] The court correctly perceived that PERB classified a reduction in work force for budgetary reasons as a non-mandatory subject of negotiations under the Taylor Law,[49] but then erroneously stated that two PERB decisions[50] also declared that this was not a *proper* subject for a collective bargaining agreement between a public employer

45. *Id.*, 348 N.Y.S.2d at 669-70.

46. In an attempt to buttress his affirmation, Justice John P. Donohoe cited only one authority and mistakenly claimed that the court of appeals in Board of Education v. Associated Teachers of Huntington, 30 N.Y.2d 122, 282 N.E.2d 109, 331 N.Y.S.2d 17 (1972), held that a board of education had no authority to negotiate a matter that was not considered a "term and condition of employment." Carmel Cent. School Dist. v. Carmel Teachers Ass'n, 76 Misc. 2d at 66, 348 N.Y.S.2d at 669. However, rather than restricting the ability of an employer to negotiate with an employee organization about declared non-mandatory subjects, the *Huntington* court directed its attention to the broad range of subjects that could be classified as *mandatory* subjects of negotiation. Board of Educ. v. Associated Teachers of Huntington, 30 N.Y.2d at 129, 282 N.E.2d. at 113, 331 N.Y.S.2d at 23. In the opinion, Chief Judge Fuld emphasized that the Taylor Law's purpose of encouraging harmonious relations in public employment could best be effectuated through increased negotiation between public employers and their employee organizations. He stated that their ability to negotiate was only limited by direct statutory prohibitions. *Id.* at 127-29, 282 N.E.2d at 111-13, 331 N.Y.S.2d at 21-23.

47. 48 App. Div. 2d 913, 370 N.Y.S.2d 128 (2d Dep't 1975) (mem.).

48. *Id.* at 914, 370 N.Y.S.2d at 130-31. The action was brought by the Civil Service Employees Association and Walter Lippmann, whose position as a Deputy Sheriff was terminated by the Westchester County Board of Legislators because of a reorganization of departments for budgetary reasons. *Id.* at 913-14, 370 N.Y.S.2d at 129-30. The relief Lippmann sought was either reinstatement or reclassification. He relied on a clause in his contract with the County of Westchester which stated that, "In any reorganization of the Sheriff's Department, the County administration has no intention of depriving any permanent employee who is now on the payroll of a job." *Id.* at 915, 370 N.Y.S.2d at 131. The contract provided that, in the event of reorganization, either the whole unit would be transferred to the jurisdiction of another agency, or if an employee was not transferred with his unit, he would be offered another equivalent position in city service. *Id.*

49. *Id.* at 914, 370 N.Y.S.2d at 131.

50. Yorktown Faculty Ass'n, 7 P.E.R.B. 4509 (1974); City of White Plains, 5 P.E.R.B. 3013 (1972).

and employee organization.[51]

Shortly after the appellate division rendered its decision in *Lippmann,* the court of appeals adopted the reasoning of the *New Rochelle* opinion in *Susquehanna Valley Central School District v. Susquehanna Valley Teachers' Association.*[52] The case arose when budget limitations of the Susquehanna school district necessitated staff reductions.[53] The Susquehanna Valley Teachers' Association demanded reinstatement of the abolished positions.[54] It cited a collective bargaining agreement which guaranteed the permanency of these positions by stabilizing staff size.[55] The court of appeals upheld the ability of the board of education to negotiate voluntarily about the stability of staff size.[56] It concluded that a public employer has authority to negotiate voluntarily with his public employees about non-mandatory subjects under the Taylor Law if no statute, controlling decisional law, or considerations of public policy prohibited such action.[57] The court noted that none of these factors

51. 48 App. Div. 2d at 914, 370 N.Y.S.2d at 130-31. Although both cases to which Justice Samuel Rabin refers did state that an employer could not be "compelled" to negotiate about job reductions or job security, they were silent on the point of the permissibility of negotiating about these issues. However, since the employee associations in both cases were demanding negotiation about job security rather than seeking judgment on the validity of job security clauses after they were already voluntarily negotiated, it is evident that the facts of these cases did not warrant a discussion of permissive negotiations of non-mandatory subjects. Thus, it seems certain that PERB's silence on this subject in these cases was in no way indicating a rejection of the very principle it espoused in *New Rochelle.* Rather, the Board merely chose not to discuss a point that was unnecessary for resolution of the facts presented. Yorktown Faculty Ass'n, 7 P.E.R.B. 4509 (1974); City of White Plains, 5 P.E.R.B. 3013 (1972).

In his dissenting opinion in *Lippmann,* Justice James D. Hopkins reiterated the notion promulgated in *New Rochelle.* He concluded that it is not "an impermissable surrender of municipal power" to include job permanency within the negotiated terms of a collective bargaining agreement. The judge stressed the holding of the court of appeals in Syacuse Teachers Association v. Board of Education, 35 N.Y.2d 743, 320 N.E.2d 646, 361 N.Y.S.2d 912 (1974), that the collective bargaining rights afforded under the Taylor Law are broad in scope and limited only by prohibitions in statute or decisional law. 48 App. Div. 2d at 915-16, 370 N.Y.S.2d at 131-32.

52. 37 N.Y.2d 614, 339 N.E.2d 132, 376 N.Y.S.2d 427 (1975).

53. *Id.* at 616, 339 N.E.2d at 133, 376 N.Y.S.2d at 428.

54. *Id.*

55. *Id.*

56. 37 N.Y.2d at 617-18, 339 N.E.2d at 133-34, 376 N.Y.S.2d at 429-30.

57. *Id.* The court extended the rule advanced in *Syracuse* by adding restrictive public policy considerations as another limitation on the public employer's freedom to contract with the public employee about non-mandatory subjects. *See* note 51 *supra.*

were present in this case.[58] It therefore held that the collective bargaining agreement should be enforced and the parties should proceed to arbitration under its terms.[59]

The instant case[60] reached the second department just five months after the court of appeals decision in *Susquehanna*. Nevertheless, the appellate division, in three decisions on the same day,[61] flatly rejected *Susquehanna*.

In *Schwab v. Bowen*,[62] the second department refused to enforce a collective bargaining agreement that guaranteed public employees job security for a period of three years.[63] The court reverted to the narrow view propounded by the supreme court in *Carmel* and the appellate division in *Lippmann* that the public employer possesses the power to create and abolish positions in good faith, that such good faith creation and abolition are non-mandatory subjects of negotiation between an employer and an employee, and that any collective bargaining agreement that attempts to deal with this non-mandatory subject and to restrict the employer's ability to terminate positions would not be upheld.[64]

Schwab is an extreme holding. In rejecting the *non-mandatory — but — permissive* stance of *New Rochelle* and *Susquehanna*, Presiding Justice Frank A. Gulotta contended that the subject of job elimination cannot be negotiated, even on a voluntary basis, because it is not a term or condition of employment.[65]

However, Justice Gulotta did qualify his rejection of *Susquehanna*. He stated that "even were we to accept the concept that a public employer may voluntarily choose to bargain collectively as to a non-mandatory subject of negotiation [the concept advanced by PERB in *New Rochelle* and adopted by the court of appeals in *Susquehanna*], the public interest or welfare in this case

58. 37 N.Y.2d at 617-18, 339 N.E.2d at 134, 376 N.Y.S.2d at 429.

59. *Id.*

60. Board of Educ. v. Yonkers Fed'n of Teachers, 51 App. Div. 2d 568, 379 N.Y.S.2d 109 (2d Dep't), *rev'd*, 40 N.Y.2d 268, 353 N.E.2d 569, 386 N.Y.S.2d 657 (1976).

61. *Id.*; Schwab v. Bowen, 51 App. Div. 2d 574, 379 N.Y.S.2d 111 (2d Dep't 1976); Yonkers School Crossing Guard Union v. City of Yonkers, 51 App. Div. 2d 594, 379 N.Y.S.2d 113 (2d Dep't), *aff'd*, 39 N.Y.2d 964, 354 N.E.2d 846, 387 N.Y.S.2d 105 (1976).

62. 51 App. Div. 2d 574, 379 N.Y.S.2d 111 (2d Dep't 1976).

63. *Id.* at 574-75, 379 N.Y.S.2d at 112.

64. *Id.* at 575, 379 N.Y.S.2d at 112. *See* notes 43-51 *supra* and accompanying text.

65. *Id.* at 575, 379 N.Y.S.2d at 112.

demands that the public employers' job abolition power remain unfettered."[66] The judge maintained that the fiscal crisis facing the city of Long Beach was a public policy consideration which would supercede that city's duty to honor the contractual rights afforded to its public employees by the job security clause.[67]

Justice Gulotta used this same rationale in deciding the instant case. In *Yonkers*,[68] he reiterated that "good faith abolition of job positions is not a term or condition of employment [and] any collective bargaining agreement purporting to bind the public employer thereon cannot be upheld."[69] He again presented an alternative holding. He stated that even if the court held that this nonmandatory subject could be voluntarily negotiated upon, the financial emergency of the city and the pressing public concerns it breeds could render an otherwise valid job security clause invalid and unenforceable.[70] Justice Gulotta used similar reasoning to decide *Yonkers School Crossing Guard Union v. City of Yonkers*.[71]

This procession of clashing cases left the position of the courts in a state of confusion.[72] The appellate division continued to contend that reduction in work force was an improper subject for negotiations even after the court of appeals in *Susquehanna* was adamant in insisting on the propriety of a public employer voluntarily negotiating about job security. Justice Gulotta also argued that even if he accepted the *non-mandatory—but—permissive* stance of *New Rochelle* and *Susquehanna*, the peculiar public policy considerations involved in the cases that he was deciding would demand that he refuse to enforce the job security clauses. While he had to consider the acute financial difficulties of the cities involved in *Schwab*, *Yonkers*, and *Yonkers School Crossing*, this problem did not face the court of appeals in *Susquehanna*.

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66. *Id.*

67. *Id.*

68. 51 App. Div. 2d 568, 379 N.Y.S.2d 109 (2d Dep't), *rev'd*, 40 N.Y.2d 268, 353 N.E.2d 569, 386 N.Y.S.2d 657 (1976).

69. 51 App. Div. 2d at 568, 379 N.Y.S.2d at 111.

70. *Id.* at 568-69, 379 N.Y.S.2d at 111.

71. 51 App. Div. 2d 594, 379 N.Y.S.2d 113, *aff'd*, 39 N.Y.2d 964, 354 N.E.2d 846, 387 N.Y.S.2d 105 (1976). This latter case was distinctive from the others Justice Gulotta was considering since the collective bargaining agreement involved did not explicity exclude budgetary reasons as an acceptable excuse for laying off employees. As a result, the court of appeals affirmed the appellate division's holding in *Yonkers School Crossing Guard Union*.

72. *See generally* Note, 4 FORDHAM URBAN L.J. 545, 557-58 (1976).

Resolution of these conflicting opinions came when the court of appeals reversed the appellate division's decision in *Yonkers*.[73] The court's task was to decide whether a stay of arbitration should be affirmed, or whether the parties should be directed to proceed to arbitration under the terms of the collective bargaining agreement.[74] The court was not required to provide remedies for breach of the job security clause, or even to decide whether a breach did, in fact, occur.[75] However, in order to make the decision of whether the stay

73. 40 N.Y.2d 268, 276, 353 N.E.2d 569, 574, 386 N.Y.S.2d 657, 661 (1976).

74. *Id.* at 271, 353 N.E.2d at 570, 386 N.Y.S.2d at 658.

75. *Id.* at 276, 353 N.E.2d at 573, 386 N.Y.S.2d at 661. A comparison should be drawn at this point to another case Chief Judge Breitel decided on the same day. In Burke v. Bowen, 40 N.Y.2d 264, 353 N.E.2d 567, 386 N.Y.S.2d 654 (1976), twenty-two active members of the paid fire department of Long Beach brought an action to seek review of the dismissal of thirteen other paid firefighters, and the reinstatement of their former co-workers. *Id.* at 266, 353 N.E.2d at 568, 386 N.Y.S.2d at 655. Plaintiffs urged that the laying off of the thirteen firefighters constituted a breach of the job security provision in the collective bargaining agreement negotiated between the City of Long Beach and the firefighters union. *Id.* The job security provision guaranteed that thirty-four would be the minimum number of active firefighters in Long Beach for the duration of the agreement (three years and seven months), and emphasized that "in no event shall the presently agreed upon minimum be readjusted downward." *Id.* at 266, 353 N.E.2d at 568, 386 N.Y.S.2d at 656. The stated intent of the provision was to assure both "public safety standards as well as minimum job protection for the firefighters." *Id.* Accordingly, the plaintiffs contended that their safety was endangered by having to work with the reduced number of firefighters. *Id.* at 266, 353 N.E.2d at 568, 386 N.Y.S.2d at 655.

The court of appeals affirmed the appellate division's and the supreme court's holdings of dismissal of the petition. *Id.* at 268, 353 N.E.2d at 569, 386 N.Y.S.2d at 656. Chief Judge Breitel held that, although job security is a permissive subject for negotiations under the Taylor Law, and although the job security provision involved was valid (since it was, like the clause in *Yonkers*, of relatively brief duration, not negotiated in a time of financial emergency, and explicit in forbidding layoffs for budgetary reasons), the remedy that the plaintiffs sought and the fact that their was no arbitration clause in their agreement dictated that he dismiss the petition. *Id.* at 267, 353 N.E.2d at 568-69, 386 N.Y.S.2d at 656.

The judge explained that since there was no arbitration clause in their collective bargaining agreement, the plaintiffs were asking that the court decide the merits of the dispute—whether a breach occurred, and, if so, what remedy should be meted out. Chief Judge Breitel stated that the equitable remedy of specific performance was the only remedy available to the plaintiffs since they were not the ones fired, and thus would not have standing to ask for damages at law for breach. *Id.* at 267-68, 353 N.E.2d at 569, 386 N.Y.S.2d at 656. The judge declared that "in the throes of a grave financial crisis, the city should not, as a matter of equity, be compelled to reinstate the dismissed firefighters." *Id.* at 267, 353 N.E.2d at 569, 386 N.Y.S.2d at 656. Therefore, since Chief Judge Breitel considered the remedy of specific performance to be inappropriate under the circumstances, and since it was the only remedy available to the plaintiffs, he dismissed the petition. *Id.* at 268, 353 N.E.2d at 569, 386 N.Y.S.2d at 656.

It is evident that the absence of an arbitration provision in the collective bargaining agree-

of arbitration should be affirmed, the court first had to determine whether the job security clause was a valid and enforceable one.[76]

In *Yonkers,* Chief Judge Breitel seems to be opting for a three-pronged test in determining the validity and enforceability of the job security clause. He first announced a broad general rule: that job security is a proper subject for negotiations between a public employer and employee organization on a voluntary basis.[77] This general rule is an affirmation of the court of appeals holding in *Susquehanna.*[78] Chief Judge Breitel maintained that a public employer can voluntarily negotiate about a non-mandatory subject of negotiations if no prohibitive statute, controlling decisional law, or public policy exists.[79] He concluded that these factors were not present so as to prevent the board of education from voluntarily negotiating about job security.[80] This decision is reasonable and appears consistent with the Legislature's intent in framing the Taylor Law, especially since the public policy of that law would seem to encourage, rather than restrict, voluntary negotiation by a public employer.

Although the Taylor Law requires only that the public employer negotiate with a certified employee association concerning the "terms and conditions of employment,"[81] and does not address itself to permissive negotiations about other subjects, nothing in the law negates this possibility. The stated aim of the Taylor Law is to "promote harmonious and cooperative relationships between gov-

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ment in *Burke* was unfortunate for the public employees involved. Chief Judge Breitel's decision suggests that if there had been an arbitration provision in the collective bargaining agreement, he would have directed the parties to proceed to arbitration as he did in *Yonkers.* Thus, it is interesting to compare the two decisions and to note that, subsequent to the court of appeals' decision in *Yonkers* that directed the parties to proceed to arbitration, the arbitrator *did* direct the Board of Education to reinstate the dismissed teachers. Yonkers Fed'n of Teachers v. Board of Educ., No. 1339-0424-76 (1976) (House, Arb.).

76. Plaintiff Board of Education brought the proceeding for a stay of arbitration under section 7503 of New York's Civil Practice Law and Rules, which authorizes the court to grant a stay of arbitration when a valid agreement has not been made or complied with. N.Y. C.P.L.R. 7503 (McKinney 1963), *as amended,* (McKinney Supp. 1976). *See* note 4 *supra* and accompanying text.

77. 40 N.Y.2d at 271-72, 353 N.E.2d at 570, 386 N.Y.S.2d at 658.

78. *Id.* at 273-74, 353 N.E.2d at 572, 386 N.Y.S.2d at 659. *See* note 57 *supra* and accompanying text.

79. *Id.*

80. 40 N.Y.2d at 274, 353 N.E.2d at 572, 386 N.Y.S.2d at 659.

81. N.Y. CIV. SERV. LAW §§ 203, 204(2) (McKinney 1973).

ernment and its employees."[82] The statute maintains that this purpose can best be achieved by endowing the public employee with the rights of organization and representation,[83] and requiring the employer to negotiate with certified employee organizations.[84] Therefore, it would appear that voluntary negotiation by the employer on a non-mandatory subject would be welcomed as a positive step toward realizing the Legislature's goal of improved relations in public employment.[85]

Further indication of the rectitude of this general rule is PERB's pronouncement of this *non-mandatory—but—permissive* rule in *New Rochelle.*[86] In *West Irondequoit Teachers Association v. Helsby,*[87] the court of appeals stated that "[t]he legislature, in article 14 of the Civil Service Law . . . created PERB, and lodged with PERB the power to resolve disputes arising out of negotiations. Inherent in this delegation is the power to interpret and construe the statutory scheme. Such construction given by the agency charged with administering the statute is to be accepted if not unreasonable."[88] This decision suggests that the court should accept the *non-mandatory—but—permissive* stance of *New Rochelle* if it is not unreasonable.[89]

The rationale in *New Rochelle* was reasonable. PERB's decision that a public employer could not be *compelled* to negotiate about the basic policy decision of job elimination[90] is certainly not unreasonable. In *West Irondequoit Board of Education v. West Ironde-*

82. *Id.* § 200.

83. *Id.* § 200(a).

84. *Id.* § 200(b).

85. This assumption is further supported by the Governor's Committee on Public Employee Relations' Final Report. In it, Professor Taylor and his associates advised that such "harmonious relations" between public employees and their employers could not be achieved without affording public employees rights of representation and negotiation, and that "these rights of association and negotiation must be accorded as a necessary counterpart to the prohibition of strikes by public employees." GOVERNOR'S COMM. ON PUBLIC EMPLOYEE RELATIONS' FINAL REP., STATE OF NEW YORK 14 (March 31, 1966). *See also* Comment, 2 FORDHAM URBAN L.J. 506, 521 n.78 (1974).

86. 4 P.E.R.B. 3704, 3707 (1971).

87. 35 N.Y.2d 46, 315 N.E.2d 775, 358 N.Y.S.2d 720 (1974).

88. 35 N.Y.2d 46, 50-51, 315 N.E.2d 775, 777, 358 N.Y.S.2d 720, 722-23 (1974) (citations omitted).

89. *See* note 27 *supra.*

90. 4 P.E.R.B. at 3706.

quoit Teachers Association,[91] PERB expressed its justification for this decision by stating that "basic decisions as to public policy should not be made in the isolation of a negotiation table, but rather [they] should be made by those having the direct and sole responsibility therefor, and whose actions in this regard are subject to review in the electoral process."[92]

Furthermore, PERB's decision in *New Rochelle* to grant the public employer the discretion to agree to negotiate about job eliminations[93] also seems justifiable. The public employer's responsibility to the public is to use its best judgement in making managerial decisions.[94] A governmental agency does not neglect this responsibility by voluntarily negotiating about job reductions. Whether the employer makes this managerial decision unilaterally, or makes the managerial decision to decide the issue by negotiating with an employee organization, is immaterial. The employer remains answerable to its constituency in both cases.

Thus, this general *non-mandatory—but—permissive* rules appears to be a valid and accurate one. The aforementioned public policy considerations and the recognition by the court of appeals of the conclusiveness of a reasonable decision by PERB support this finding. However, Chief Judge Breitel also stated: "This is not to say . . . that all job security clauses are valid and enforceable or that they are valid and enforceable under all circumstances."[95] He therefore placed two qualifications on this general rule.

First, he said that *not all* job security clauses are valid and enforceable.[96] This statement suggests that a particular job security clause must first meet some kind of minimal requirements in order to be considered valid and merit enforcement by the courts. The court concluded that the job security clause in the instant case was valid when made since it was brief in duration (three years), was not negotiated at a time of financial emergency, and was explicit in excluding budgetary considerations as a permissible excuse for fir-

91. 4 P.E.R.B. 3725 (1971).
92. *Id.* at 3727. See notes 36-39 *supra* and accompanying text.
93. 4 P.E.R.B. at 3707. *See* note 41 *supra* and accompanying text.
94. 4 P.E.R.B. at 3706.
95. 40 N.Y.2d at 275, 353 N.E.2d at 573, 386 N.Y.S.2d at 660.
96. *Id.*

ing employees.[97] Chief Judge Breitel did not specify whether the presence of all three elements is a necessary condition for the validity of a job security clause. He merely stated that not "all job security clauses are valid and enforceable,"[98] and that the clause in the instant case was valid because these three factors were present.

Chief Judge Breitel also posited that a job security clause might not be "valid and enforceable *under all circumstances*"[99]—a second qualification. This pronouncement suggests that external circumstances can intervene to render an otherwise valid job security clause invalid and unenforceable. In dicta, Chief Judge Breitel maintained that, at times, public policy considerations *would* be pressing enough to justify the breach of a job security clause by a public employer.[100] He noted that if the city were on the verge of bankruptcy, all its obligations, including job security clauses, would suffer impairment and dissolution in an effort to save the city from such a fate.[101]

However, the court held that the job security clause involved in the instant case was "not yet vulnerable to attack as in violation of public policy."[102] It did not accept the board of education's insistence that the "Financial Emergency Act evince[d] a legislative determination of public policy that job abolition must be permitted in this case."[103] Rather, Chief Judge Breitel pointed out that the New York State Financial Emergency Act for the City of Yonkers posited that attrition, not job abolition, should be the employer's primary means of stabilizing its work force in an effort to balance its budget.[104]

This decision appears to be sound, for it seems that public policy would warrant enforcement, and not breach of the job security clause. As Chief Judge Breitel logically and persuasively argued:[105]

> the overriding purpose of the act [New York State Financial Emergency Act for the City of Yonkers] was to protect those who had entered into agree-

97. *Id.* at 275-76, 353 N.E.2d at 573, 386 N.Y.S.2d at 660-61.
98. *Id.* at 275, 353 N.E.2d at 573, 386 N.Y.S.2d at 660.
99. *Id.* (emphasis added).
100. *Id.* at 276, 353 N.E.2d at 573, 386 N.Y.S.2d at 661.
101. *Id.*
102. *Id.*
103. *Id.* at 275, 353 N.E.2d at 573, 386 N.Y.S.2d at 660.
104. *Id.*
105. *Id.* at 275, 353 N.E.2d at 573, 386 N.Y.S.2d at 660 (emphasis added).

> ments with the city and to insure that these agreements would be kept, not only bondholders and noteholders, but all others who had engaged in contractual agreements with the city . . . . A job security provision insures that, at least for the duration of the agreement, the employee need not fear being put out of a job. Such absence of fear may be critical to the maintenance and efficiency of public employment, just as the fear of inability to meet its debts may destroy the credit of the municipality. *A job security clause is useless if the public employer is free to discard it when it is first needed.*

The three-pronged test that emerges from Chief Judge Breitel's opinion appears to be a valid and effective way of determining the validity of a job security clause and the enforceability of its provisions. The public policy of New York seems to support his general rule and encourage, rather than restrict, the voluntary negotiation of the non-mandatory subject of job security by the public employer. The Taylor Law's policy of encouraging harmonious relations in public employment[106] would be thwarted if an employer were allowed to mislead his employees by negotiating a completely impotent agreement. Moreover, the judge's two qualifications provide proper and necessary safeguards against any misuse of this broad power to negotiate about job security.

In its application of this three-pronged test, the court of appeals correctly discredited and disproved the contentions of the appellate division. It rejected the appellate division's assertion that job security is an improper subject of negotiations.[107] It also negated the appellate division's alternate holding that a financial crisis similar to the one that the city of Yonkers was experiencing provides enough justification for a public employer to dishonor and ignore a negotiated job security clause.[108]

The *Yonkers* decision should be of great encouragement to public employees in New York. It was delivered at a time when the government of that state laid off an unprecedented number of its public employees. It does not endow civil servants with the right to demand negotiations on job security. However, it does affirm the public employer's ability to negotiate voluntarily about job security, and holds that the terms of such an agreement should be enforced. As a

106. N.Y. CIV. SERV. LAW § 200 (McKinney 1973). *See* note 83 *supra* and accompanying text.

107. *See* notes 51, 63-65, 70 *supra* and accompanying text.

108. *See* notes 67-68, 71 *supra* and accompanying text.

result, the decision provides public employees with the assurance that the government will have to attach as much importance and significance to its agreements with them, as it affords to its obligations to bankers, bondholders, noteholders, financial investors and other creditors.

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