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STATUS DISPUTES UNDER THE
TAYLOR LAW

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IN 1967 the legislature of New York State, in enacting the Public Employees' Fair Employment Law (Taylor Law), reaffirmed a long standing statutory prohibition against strikes by public employees. The legislature in this enactment, however, did not limit itself to this negative approach but rather recognized a need "to assure public employees, who are estopped from using the strike, that they have the right to negotiate collectively." The implementation of this assurance took the form of not only granting to public employees the right of organization and representation but also requiring all public employers in the state to negotiate with and enter into agreements with employee organizations representing public employees.

The declaration of the right to negotiate collectively will be meaningful only if means and procedures to effectuate this legislative policy are provided. The initial step in this effectuation is to establish procedures for selecting negotiating representatives of public employees and for resolving disputes involving representation status. In the law, the legislature did establish certain standards for the resolution of representation disputes, created the Public Employment Relations Board (PERB) and directed this Board to establish procedures for the resolution of such disputes.

The two primary issues in representation disputes are: first, the appropriate unit, that is, what employees shall be grouped together for the purpose of collective negotiations, and second, the selection of the employee organization to represent the employees so grouped together.

In order for the procedures created by the Taylor Law to encourage labor-management harmony, the decisions and policies of the PERB must be understood by all those concerned with public employee labor problems. Thus, there is a need for a review of the experience of the

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1. N.Y. Civ. Serv. Law art. 14 (Supp. 1968). This legislation is commonly known as the Taylor Law.
PERB in resolving various problems that arise with these representation status disputes. This article will undertake that review. It will deal first with ascertainment of the appropriate representation unit. Various factors are involved in determining the unit: What do we mean by "the appropriate unit"? Can a unit be appropriate where there is a conflict of interest among the employees and to what degree must there be a community of interests? What role should the employer have in determining the proper unit? Next, the selection of the employee organization will be discussed. Relevant to this determination are the following questions: What is an employee organization? How must the showing of interest be made? How is the determination of majority status made? Finally, must the union agree in advance not to strike in order to be granted certification?

I. THE SELECTION OF THE APPROPRIATE UNIT

A. Definition of the Appropriate Unit

The PERB, in entering upon its role as an adjudicator of representation status disputes, was mindful of the caveat that established "arrangements developed for private industry cannot be literally transferred to the public sector . . . ." Nevertheless private sector experience does provide a repository of knowledge in the field of labor relations which should not be ignored, but rather should be considered with the qualification that any conclusion derived therefrom be modified to reflect the problems and considerations unique to the public sector.

On the question of the "appropriate unit," the policy of the National Labor Relations Board (NLRB) appears to be well settled. In a representation proceeding there is no requirement that the unit in issue be found to be the most appropriate unit. Rather the question simply is whether it is an appropriate unit. Thus the fact that other groupings of employees would be as appropriate as the unit in issue, does not warrant a denial of the unit sought unless the unit itself is inappropriate.

The policy of the NLRB in the private sector has been carried over to the public sector in representation disputes involving employees in the federal service. In representation questions involving such employees it has been concluded almost without exception that the issue was not the most appropriate unit but whether the unit sought by an employee organization was an appropriate unit.

The decisions of the PERB represent a substantial departure from the NLRB's policy. The Board and its Director of Representation have

required that the unit determined be the *most* appropriate unit.\textsuperscript{10} This departure from private sector policy and public sector experience in the federal service is predicated upon the difference in the standards for determining the appropriateness of a unit as established by Congress through the National Labor Relations Act and Executive Order 10988 on the one hand, and the New York State legislature on the other hand.

The Congress provided that: "The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof. . . ."\textsuperscript{11} In the main, the implementation of this legislative mandate has involved the question of whether the employees in the proposed unit had such a community of interest that they should be included in the same unit for the purposes of collective bargaining. Similarly, section 6(a) of Executive Order 10988 provides in part that: "Units may be established on any plant or installation, craft, functional or other basis which will ensure a clear and identifiable community of interest among the employees concerned . . . ."\textsuperscript{12} Thus both under the National Labor Relations Act and Executive Order 10988 the factors considered in determining the appropriateness of a unit primarily deal with the concept of community of interest.

However, the New York State legislature established three standards to be utilized in defining the appropriate unit.\textsuperscript{13} The first of these provides: "the definition of the unit shall correspond to a community of interest among the employees to be included in the unit . . . ."\textsuperscript{14} This criterion is by its terms not dissimilar to the criterion utilized by the NLRB or in unit determinations under Executive Order 10988. Accordingly, the PERB in implementing this standard stated that "whether the employees sought to be grouped together are subject to common working rules, personnel practices, environment or salary and benefit structure,"\textsuperscript{15} would be relevant factors. If this statutory criterion were the only one to be applied in unit determination, the concept of a "most appropriate unit" could not be sustained.

There are two further criteria to be considered. One provides that the

\begin{itemize}
  \item \textbf{10.} County of Rockland, 1 PERB \textsuperscript{f} 1-430 (1968); Malone Cent. School Dist., 1 PERB \textsuperscript{f} 1-399.28 (1968); Central School Dist. No. 1, 1 PERB \textsuperscript{f} 1-399.89 (1968).
  \item \textbf{11.} 29 U.S.C. § 159(b) (1964). The specific provisions of this subsection dealing with professional employees and crafts are not considered here.
  \item \textbf{12.} 3 C.F.R. 521, at 524 (Comp. 1959-63). Other stated considerations such as whether the group is homogenous, interchange of employees, and extent of common supervision all have a definite bearing on whether there is in fact a substantial community of interest.
  \item \textbf{13.} N.Y. Civ. Serv. Law § 207(1) (Supp. 1968).
  \item \textbf{14.} N.Y. Civ. Serv. Law § 207(1)(a) (Supp. 1968).
  \item \textbf{15.} PERB, Rules of Procedure 9 (1967).
\end{itemize}
public employer at the level of the unit have the authority to agree to, or to make effective recommendations with respect to the terms and conditions to be negotiated. The other criterion requires that "the unit shall be compatible with the joint responsibilities of the public employer and public employees to serve the public." This criterion primarily concerns the degree of administrative inconvenience to be experienced by unwarranted fragmentation in the uniting of public employees. The PERB has construed this statutory criterion to require the designation of as few units as possible, consistent with the overriding requirement that the employees be permitted to form or join employee organizations of their own choosing to represent them in a meaningful and effective manner. In brief, the PERB's policy is that fragmentation of a public employer's employees into small units is to be avoided unless there is present such a conflict of interest as to preclude effective and meaningful collective negotiations. To avoid such fragmentation, the Board has adopted the "most appropriate unit" policy.

This "most appropriate unit" policy of the PERB has given rise to unit determinations that at times do not coincide with any of the units sought by the parties to the proceeding. Thus, the question arises whether the PERB may define a unit which it deems to be most appropriate although such a unit was not sought by any of the parties. The PERB determined that it had such power. The Board reasoned that the statutory grant of authority to resolve disputes concerning representation status did not limit the exercise of this authority to the approval or disapproval of a unit sought by a party or parties. Further, if the Board's authority were so restricted, a representation dispute might be interminable in that it would continue until a party petitioned for a unit which the Board could find to be appropriate.

The "most appropriate unit" concept has been challenged by the following arguments: (1) it impedes organization of public employees, (2) it deprives public employees of the right of selecting an employee organization of their own choosing, and (3) it may totally deprive public employees of representation. However, to date the application of this concept has not resulted in the deprivation of representation since there always has been an employee organization present to represent the employees in the unit as defined. Furthermore, the right of public employees

to an employee organization of their own choosing\textsuperscript{23} simply means that when a unit is defined the employees therein may select the organization to represent them and the policy of "a most appropriate unit" does not deprive employees of the exercise of this right. Moreover, if experience establishes that the denial of a separate unit in a given situation results in ineffective representation this can be considered in a proceeding after the expiration of the period of unchallenged representation status provided for in section 208(c) of the Act.

B. Community and Conflict of Interest

It is well settled Board policy that the mere fact that occupational dissimilarities exist among employees in a proposed unit does not merit the conclusion that the requisite community of interest is wanting.\textsuperscript{24} Conversely, occupational similarities alone do not warrant grouping employees in one unit.\textsuperscript{25} A majority of the representation cases which have come before the Board presented situations where one employee organization sought to represent a unit of part of the government's employees and another employee organization sought to represent or was representing all of the employees of such government. In these cases the government usually has a salary plan common to all employees. In addition, all employees are eligible for the same fringe benefits and personnel policies are applicable to all employees.\textsuperscript{26} On such facts it has been concluded that there is a substantial community of interest shared by all employees so as to warrant an overall unit consisting of all the employees, unless there is evidence in the record which establishes sufficient conflict of interest between some employees to sustain a separate unit.\textsuperscript{27}

The issue of a conflict of interest has most often arisen in proceedings involving nonprofessional employees.\textsuperscript{28} In the \textit{City of Ogdensburg} case,\textsuperscript{29} the petitioner sought a unit of hourly paid employees in the highway and water department. The Director of Representation found that the employees included in the petition were classified as either noncompetitive or labor, whereas most other employees of the city were either competitive or exempt. The Director concluded that the noncompetitive and labor class employees did not have the statutory protection provided by the procedures applicable to discharge or the imposition of other discipline\textsuperscript{30}

\textsuperscript{23} N.Y. Civ. Serv. Law § 202 (Supp. 1968).
\textsuperscript{24} Sanitation Dep't, 1 PERB ¶ 1-399.99 (1968).
\textsuperscript{25} Board of Higher Educ., 1 PERB ¶ 1-407 (1968).
\textsuperscript{26} Massena Cent. School Dist. No. 1, 1 PERB ¶ 1-436 (1968).
\textsuperscript{27} Village of Great Neck, 1 PERB ¶ 1-411 (1968); Malone Cent. School Dist., 1 PERB ¶ 1-399.29 (1968).
\textsuperscript{28} The issue of conflict of interest in grouping professional with nonprofessional employees will be considered infra. See page 524-26.
\textsuperscript{29} 1 PERB ¶ 1-414 (1968).
\textsuperscript{30} N.Y. Civ. Serv. Law § 75 (Supp. 1968).
or the statutory protection relating to layoffs. Thus it was concluded
that the conflict of interest between noncompetitive employees and com-
petitive employees with respect to job security was such as to preclude
their inclusion in the same negotiating unit.

In a subsequent proceeding, a rather similar case was presented with
the variant that the employer voluntarily accorded to noncompetitive
employees the same protection accorded to competitive employees with
respect to discharge and layoffs. However, the Board concluded that
this voluntary grant of protection was not such as to warrant a different
conclusion than that reached in Ogdensburg, reasoning that the noncom-
petitive employees were not guaranteed the same protection enjoyed by
the competitive employees.

In another case where the blue collar employees had such unique terms
and conditions of employment that the other employees of the employer
would have little interest in the contract demands of the blue collar em-
ployees, it was concluded by the Director of Representation that there
was present a conflict of interest sufficient to justify a separate unit of
blue collar employees. The Board has, however, consistently declined
to separate a small group of blue collar employees from an overall unit.
This policy has been dispositive of a series of cases wherein bus drivers
employed by school districts sought a negotiating unit separate from other
nonprofessional employees.

Therefore, conflict of interest has been found where the Board has
concluded that there is present such diverse interests in subjects of nego-
tiation among groups of employees that effective and meaningful negotia-
tions would be precluded if all the employees were grouped into an overall
unit.

1. Supervisory Employees

The Taylor Law does not by its terms preclude supervisory employees
from participation in the rights granted to public employees. The term
“public employee” as defined in the Law is broad enough to be all inclu-
sive. Thus, while it would seem clear that supervisors are entitled to

32. Middle Country Cent. School Dist. No. 11, 1 PERB ¶ 1-399.67 (1968).
33. County of Rockland, 1 PERB ¶ 1-430 (1968).
34. New York State Bridge Authority, 1 PERB ¶ 1-399.65 (1968); Saranac Lake
Cent. School Dist. No. 1, 1 PERB ¶ 1-399.24 (1968); County of Warren, Case No.
C-0170 (1968).
35. Saranac Lake Cent. School Dist. No. 1, 1 PERB ¶ 1-399.24 (1968); Central School
Dist. No. 1, 1 PERB ¶ 1-399.89 (1968). However, it is to be noted that in a recent decision
the Director of Representation found a separate unit of bus drivers because of their
unique terms and conditions of employment. Board of Educ., 1 PERB ¶ 1-440 (1969). This
case is presently being appealed to the Board.
any person holding a position by appointment or employment in the service of a public
representation and participation in collective negotiations, it is unclear whether they may be properly included in the same unit with the “rank and file” employees.

If one were to look to the private sector for guidance, the answer would clearly be in the negative. However, the National Labor Relations Act as amended specifically excludes supervisors from being employees within the meaning of that Act, and other jurisdictions have provided some form of statutory exclusion of supervisors. Since the New York statute is silent, to attempt to divine legislative intent requires a review of the legislative history of the Taylor Law. In this regard, the report the Taylor Committee is most significant because it is regarded as the document which guided the legislature in enacting the Taylor Act, and it is the only document available which could be characterized as a legislative history of the law.

The Taylor Committee advised caution in adopting the arbitrary rule of excluding supervisors from employee units, stating: “The effectiveness of the employees’ collective influence on the terms of their employment in some areas of public employment may be related more to the community than to the conflict of, interests between employees and their supervisors.” It would seem, therefore, that if a community of interest is shown to exist among employees and their supervisors, they may be included in the same unit unless the supervisory responsibilities give rise to a conflict of interest outweighing the facts or circumstances which established the community of interest. The presence of supervisory responsibilities does not per se compel a finding of a conflict of interest. Rather it is the type and nature of the supervision that is to be considered. Where the supervisor may impose discipline, can effectively initiate disciplinary procedures, or is required to evaluate a subordinate’s performance, the conflict may outweigh the community.

This was the approach utilized by the Board in the State Police case. The ranks of major, captain, lieutenant and sergeant all bear supervisory

employer, except that such term shall not include persons holding positions by appointment or employment in the organized militia of the state for purposes of any provision of this article other than sections two hundred ten and two hundred eleven of this article.”


40. Id. at 25.

41. New York State Div. of State Police, 1 PERB ¶ 1-399.32 (1968).

42. Id.


responsibilities; nevertheless, the Board concluded that sergeants should be included in the basic unit with the troopers. The Board noted that only the commissioned ranks prepare performance ratings and only they take corrective action in the case of misconduct. These factors, plus others, compelled the Board to find such a conflict of interest as to preclude the inclusion of these ranks in a unit with troopers.

In finding a basis for a supervisory exclusion one cannot rely upon job titles alone for, in another case, the Board included lieutenants in a basic unit with patrolmen. In that case, the chief of police and not the lieutenants assigned the patrolmen. Moreover, the chief determined whether or not a patrolman would be retained and whether disciplinary action would be initiated. The record did indicate that the lieutenants occasionally did make recommendations concerning the above matters, but it did not indicate the weight given to such recommendations. If it were established that such recommendations were substantially followed, the result might have been to exclude lieutenants from the basic unit.

The same approach has been applied to other occupations in the public sector. In many school district cases, for example, school administrators were excluded because their supervisory responsibilities, including the hiring of new teachers, the evaluation of performances, and the making of recommendations involving tenure, gave rise to such conflicts of interest between the principals and teachers that separate representation was warranted. Nevertheless, principals have been included in the same unit with the teachers when the PERB Director of Representation found that, even though the principals “theoretically” had the power to make recommendations about discipline or tenure, such power was rarely exercised and, thus, there appeared to be no likely conflicts of interests sufficient to warrant exclusion from the basic unit. This conclusion was strengthened by the fact that the record established a history of negotiations wherein the teachers and principals were represented by the one organization.

It would seem, therefore, that the Board to date would not exclude from the basic unit those supervisors who are mere assignors of work or who are working supervisors in the nature of lead men, and who do not have the responsibility for imposing discipline or effectively recommending it.

2. Professional Employees

The Taylor Law does not specifically mention professional employees or their right to separate units. In the private sector the National Labor Rights Act...
Relations Act provides that professional employees may not be included in a unit with other employees unless they vote for such inclusion. Though the Act does not so provide, the Taylor Committee report, in discussing the concept of community of interest, appeared to favor the position that separate units for professional employees be given due consideration.

One of the first cases to deal with this question involved registered nurses employed by Chemung County. The employer contended that the appropriate unit should consist of all employees of the county including the nurses. The Director of Representation, while noting that nurses participated in the employer's overall salary plan and enjoyed the same fringe benefits as all other employees, nevertheless concluded that the nurses were entitled to a separate unit. He found that the registered nurses formed "a cohesive group having a substantially different community of interest from that of all other employees." This finding was predicated on the history of labor relations within the profession, their common interests in maintaining the status of their profession and their personal status within it, and the general maintenance of professional standards. Thus, it was felt that at the negotiating table the nurses would be interested in subjects which would be of little concern to other employees, such as the raising of professional standards, in-service education, and tuition refunds.

Similar reasoning was applied in the Thruway case where all professional employees were placed in a professional unit. The Director found that the professional employees had a substantially different community of interest from that of rank and file employees and, therefore, they could negotiate effectively only in a separate unit. This finding was based substantially on the fact that the professional employees' interests at the negotiating table would necessarily be quite diverse from employees in the basic unit.

A problem of greater delicacy was presented in the State case which involved professional employees from such various disciplines as medicine, law, accountancy and economics. The decision of the Board was to place all such employees in one professional unit. Admittedly with such diverse disciplines there must be a divergency of interests. However, the reasoning of the Chemung and Thruway cases had a viable application.

51. Chemung County, 1 PERB ¶ 1-415 (1968).
52. Id. at 4043.
53. Id. ¶ 1-415; Sullivan County, 1 PERB ¶ 1-399.53 (1968).
54. New York State Thruway, 1 PERB ¶ 1-423 (1968).
55. New York State, 1 PERB ¶ 1-424 (1968).
here. Though the disciplines differed, the interest in the maintenance of professional standards and status would provide a common bond. Further experience is necessary to determine whether this grouping of professions may preclude effective and meaningful negotiations. The desire to avoid unwarranted fragmentation appears to dictate this approach. Fragmentation should be granted only where the evidence to support it is clear and convincing. It is interesting to note that the professionals who comprise the instructional staff of schools, colleges and state universities have generally been accorded the right to separate units with little or no dissent.

C. Role of the Employer in Unit Determination

The Taylor Law does contemplate and encourage voluntary recognition by the employer. Employer recognition involves the same two steps traditionally recognized in the private sector: first, acceptance of the unit as appropriate, and second, recognition of the organization as the choice of the employees in the unit. Two questions have arisen concerning voluntary recognitions by public employers. Does the Board have the power to review the employer's unit determination and set it aside if the Board determines it is not the appropriate unit? Assuming the answer to the first to be in the affirmative, the second question is the weight to be given to the employer's preference in unit determination.

The power of the Board to review and set aside would appear to be clearly provided in the statute. In the case of the state government, section 205(5)(b) empowers the Board "[t]o resolve . . . disputes concerning the representation status. . . ." The power of the Board to so act in a representation dispute involving the state government has been upheld by the court of appeals. The court stated: "An organization which disputes the representation status of an employer-recognized organization may invoke the procedures of the Board under sections 205 and 207 to obtain Board certification. In that event it may displace the previously employer-recognized organization . . . ." The power to so act in the case of governmental employers within the state other than the state is equally clear, but its exercise is conditioned upon the absence of procedures established pursuant to section 206(1). This section empowers any government other than the state or a state authority to establish procedures to resolve representation disputes. The procedures established, however, are required to be consistent with statutory criteria set forth in section 207 which are the same criteria to be
used by the Board in resolving representation disputes. Thus, it would appear to follow that if a local government establishes procedures to resolve representation disputes then the Board would lack jurisdiction to review unit determinations made thereunder save for the limited question of determining whether the procedures established and their implementation are consistent with the provisions of section 207.

The Board, however, was concerned that the implementation of the organizational rights granted to public employees would be inhibited if the local government were to adopt the dual role of employer and adjudicator of representation disputes. Accordingly, the Board in drafting its Rules of Procedure provided that the limited review as to inconsistency would be applicable only when the procedures established by a local government provided for an impartial agency to administer such procedures. In the absence of such an impartial agency the scope of review will extend to the merits of the dispute.

Thus, the statutory scheme as interpreted by the Board and the courts to date would not only permit but would also encourage an employer, confronted with conflicting demands for recognition from two competing employee organizations, to make an initial unit determination which determination may be challenged and may be subject to review by the Board. It should be pointed out, however, that this construction of the statutory scheme is not free from doubt. The basic question involved here is when does a representation dispute arise within the meaning of sections 205(5)(a), (b) and (c) and 207 of the Act. Specifically, is there such a dispute when one or more employee organizations request recognition from the employer as to a negotiating unit which the employer does not deem to be appropriate, or does a dispute not arise until the employer has made an initial unit determination or has been accorded an opportunity to do so and has refused to act? Private sector experience would compel acceptance of the former alternative whereas, as noted above, the Board and the courts have accepted the latter alternative as the intent of the legislature. In the private sector, the employer is not permitted to resolve a substantial representation question even initially by according recognition to an employee organization. The NLRB requires an employer in such a situation to maintain strict neutrality. The underlying basis for this policy is that in granting recognition under such circumstances the employer is interfering with the free exercise of the rights of employees to choose their bargaining representative.

60. Regulations of the Public Employment Relations Board § 206.1 (1967).
61. Id.; cf. City of Niagara Falls, 1 PERB ¶ 1-417 (1968); City of Ogdensburg, 1 PERB ¶ 1-414 (1968); Central School Dist. No. 1, 1 PERB ¶ 1-442 (1969).
There is of course a basis for this departure from policy in the private sector in that there is a substantial difference between private employers and public employers. Public employers “owe a very special obligation to the public not owed by private employers. . . .”\(^6\) They are motivated not by profit but by a desire to provide the necessary service to the public they serve. Therefore, it should be assumed that their unit determination is made on the basis of what is deemed to be in the interest of orderly and efficient administration of government. However, this has to be balanced with the full implementation of the rights granted to public employees in section 203 of the Act. For example, under existing procedure a public employer could favor one employee organization over another by making a unit determination that would reflect the organizational strength of the preferred organization. Further, it has been argued in one case that the grant of recognition to one of the competing employee organizations and resultant negotiations with it did result in some interference with the unfettered exercise of employees’ organizational rights. Thus, further experience is necessary to determine whether this initial unit determination by public employers does result in a substantial impairment of section 202 rights.\(^6\)

Another question is the weight to be given to the employer’s preference in unit determination. The determination by a public employer of an appropriate unit is entitled to some weight,\(^6\) unless it is not based on some logical and persuasive considerations. An example of this may be found in the City of Auburn School District case.\(^8\) There the employee organization petitioned for certification as the negotiating representative for all certified employees of the employer. The employer contended that the principals of its schools should be excluded from the bargaining unit of teachers. However, there was some evidence in the case that the principals desired to be included in the unit with the teachers and that the teachers wished to be joined with the principals. The contention of the employer, however, was that it was necessary for it to have access to the principals in the course of negotiations with the teachers and that a single unit of principals and teachers would deprive the employer of such advice and counsel. The evidence of record established this contention as a meritorious one. The employer had asked the principals for their suggestions on various matters proposed by the teachers in the course of negotiations. The principals declined to give such advice to the employer because they

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68. Enlarged City School Dist., 1 PERB ¶ 1-399.69 (1968).
considered themselves part of the one unit with the teachers and stated that all discussions should be limited to the negotiating table.

The Board concluded that the employer's argument, that the exclusion of principals was required for the discharge of its responsibility to its constituency, was substantial and that this, with other factors present in the case, was sufficient to outweigh the desire of the employees for a single unit.\textsuperscript{69}

The most significant case to the contrary involved state employees.\textsuperscript{70} In that case the state as the public employer created three units of state employees: members of the New York State Police, the professional staff of the State University of New York, and a residual unit of all other state employees. The determination of this residual unit was challenged by a number of employee organizations. The Board, while recognizing that some weight was to be given to the employer's determination, nevertheless concluded that the great number of job titles and the occupational diversities present were of such a nature to preclude effective and meaningful collective negotiation if all were included in a single unit and, therefore, determined that this residual unit be divided into five units based primarily on occupation.\textsuperscript{71}

II. THE SELECTION OF THE EMPLOYEE ORGANIZATION

A. Employee Organizations

The term "employee organization" is defined in section 201(6) of the Taylor Law as "an organization of any kind having as its primary purpose the improvement of terms and conditions of employment of public employees . . . ." The inclusion of the phrase beginning "having as its primary purpose" has raised questions with respect to organizations whose membership includes employees in both the private and public sector. If the definition were interpreted to limit an employee organization solely to one which admits to membership only public employees, this would unquestionably limit the number of organizations which could be qualified under the Law. However, the Board has not adopted such a strict interpretation.

In those situations where the employee organization does admit to membership both public and private employees, it has been held that if

\textsuperscript{69} Id.; see Board of Educ., 1 PERB \$ 1-426 (1968), where the Director of Representation determined that the evidence submitted by the employer in support of its preference was insufficient to overcome other evidence. See also Chemung County, 1 PERB \$ 1-415 (1968), where the Director of Representation found that the desire of the employees (nurses) for separate representation prevailed over the employer's contrary unit determination.

\textsuperscript{70} New York State, 1 PERB \$ 1-424 (1968).

\textsuperscript{71} This determination of the Public Employment Relations Board is now under judicial review.
the public employee members of the organization select their own negotiating committee and, without participation by private sector members, ratify negotiation agreements, the organization is an employee organization within the meaning of section 201(6). The reasoning of the Board is that the public employees who are responsible for the conduct of the negotiations would, therefore, not be submerged in an organizational structure dominated by private sector employees. Hence, where the independence of action of public employee members involved is protected, such organizations have been found to be within the purview of section 201(6) of the Law.

Another question concerning the qualification of an employee organization was raised in the Thruway case where an employee organization's qualification was challenged on the ground that it was employer dominated. The basis of this contention was that managerial personnel were members of that organization. It was held that so long as no management member of the organization was permitted any role in the formulation of the demands of rank and file employees or in the ratification of any collective agreement concerning non-supervisory employees the organization would qualify.

The Board has also held that no organization may qualify as an employee organization under section 201(6) if it fails to file financial reports required by section 726 of the Labor Law of the State. The reasoning of the Board is that it will not grant status to an organization that does not comply with the Labor Law.

One employer challenged an employee organization's participation in a representation proceeding on the ground that its membership was not limited to employees of the employer. The employer contended that only employee organizations "limited to employees of the employer are entitled to recognition or certification." The contention was rejected by the Director of Representation on the ground that there is no specific statutory language which supports this contention. Rather, as long as the employee organization has as its primary purpose the improvement of the terms and conditions of employment of public employees, it satisfies the requirements of section 201(6).

B. Showing of Interest

It has long been established in the private sector that a petition for certification or decertification submitted by an organization seeking to represent or act on behalf of employees must be supported by a substan-
tial number of employees in the unit which is the subject of the petition.\(^7\)
This concept has been carried over into the public sector.\(^8\)

The Taylor Law does not provide any statutory requirement on this
point. The Board, however, does require a showing of interest.\(^7\) Where
the petition is filed following the employer's refusal to recognize, the
petitioner must make a showing of interest of thirty percent of the em-
ployees in the unit which the petitioning employee organization alleges
to be appropriate.\(^8\) Where the petition is filed by an employee organi-
zation in objection to an employer's voluntary recognition of another orga-
nization, it must be supported by a showing of interest of ten percent of
the employees either in the unit found appropriate by the employer or in
the unit the petitioner claims to be appropriate.\(^8\) Although not provided
in the Rules of Procedure of the PERB, the Board does require a show-
ing of interest by an employee organization seeking to intervene in a
representation proceeding. Here the showing of interest required is ten
percent of the employees in a unit proposed by any one of the parties
including the intervenor.

The Board has followed the practice of the NLRB\(^8\) in providing that
the determination as to the sufficiency of showing of interest is an admin-
istrative one and not subject to collateral attack by the parties.\(^8\)

C. Determination of Majority Status

The legislature has directed that the ascertainment of the public em-
ployees' choice of employee organization shall be made "on the basis of
dues deduction authorization and other evidences, or, if necessary, by
conducting an election."\(^8\) Consequently, the initial question before the
Board was under what circumstances would an election be deemed neces-
sary. Rather than approach this question on an ad hoc basis the Board
decided to provide an answer to this question in its Rules of Procedure.\(^8\)

\(^7\) 29 U.S.C. § 159(c) (1964).
\(^8\) Municipal Employee's Relations Act, Mass. Gen. Law Ann., ch. 149, § 178H(4)
(Supp. 1968); Arbitration of School Teacher Disputes, R.I. Gen. Laws Ann. § 28-9.3-5
(1968); Oregon Civil Service Rule on Collective Bargaining, §§ 98-200(5), 98-300(3), in
H. Roberts, supra note 38, at 483.

\(^9\) Regulations of the Public Employment Relations Board § 201.3(a), (b) (1967).
\(^10\) Regulations of the Public Employment Relations Board § 201.3(a) (1967).
\(^11\) Regulations of the Public Employment Relations Board § 201.3(b) (1967).
\(^12\) Standard Cigar Co., 117 N.L.R.B. 852, 853 (1957).
\(^13\) Regulations of the Public Employment Relations Board § 201.6(a)(1) (1967);
see Bethpage Schools, 1 PERB § 1-399.19 (1968); City of Niagara Falls, 1 PERB § 1-399.57
(1968).
\(^14\) N.Y.Civ. Serv. Law § 207(2) (Supp. 1968).
\(^15\) Regulations of the Public Employment Relations Board § 201.6(h)(2) (1967):
"Direction of an election. If the director of representation determines that an election or
elections shall be held, he shall provide that such election or elections be conducted by an
The Board defined the phrase "dues deduction authorization and other evidences" to mean membership in an employee organization plus proof that such membership is for the purpose of representation in collective negotiations. Thus, an employee organization may be certified without an election if it can establish that a sufficient proportion of the employees have designated it as their negotiating agent and a substantial number of employees have not designated a competing employee organization. Fifty-five percent of the employees in the unit is a sufficient proportion for certification without an election unless a competing organization shows a "membership plus" of ten or more percent of the employees.86

The types of proof which have been accepted include a notarized membership list plus cards designating the organization as the employees’ negotiating agent,87 a card authorizing dues deductions and also authorizing the organization to represent the employee,88 a card constituting an application for membership in the organization and also designating the organization as the bargaining agent,89 and individual affidavits of membership plus individual cards designating the organization as the employees’ bargaining agent.90 In situations where competing organizations submit "membership plus" proof covering the same individual employees, such evidence will not be counted for either organization.91 The Board has adopted a policy that in order for "membership plus" proof to be

agent of the board at such time and place and upon such terms and conditions as the board, the director of representation, or the agent may specify." (Emphasis deleted.)

86. Regulations of the Public Employment Relations Board § 201.6(h)(1) (1967).

The chart below sets forth the varying percentages:

<table>
<thead>
<tr>
<th>Column I (Percentage necessary to be certified without an election)</th>
<th>Column II (Percentage necessary to certification without an election)</th>
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<tbody>
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<td>55</td>
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<td>69</td>
<td>24</td>
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<td>70</td>
<td>25</td>
</tr>
</tbody>
</table>

87. Central School Dist. No. 4, 1 PERB ¶ 1-399.50 (1968).
88. Village of Greenport, 1 PERB ¶ 1-399.56 (1968).
89. Town of Brasher, 1 PERB ¶ 1-399.60 (1968).
90. Chemung County, 1 PERB ¶ 1-415 (1968).
91. City of Utica, 1 PERB ¶ 1-399.49 (1968).
acceptable the documents must have been executed no more than one year prior to the filing of the petition for certification.

D. The Necessity of a No-Strike Affirmation

Section 207(3)(b) of the Taylor Law permits the Board to certify an employee organization as the legal representative of its members only if the organization has submitted an affirmation that it does not assert the right to strike or to assist or participate in any strike against any governmental employer. This affirmation is usually made at the time an employee organization files a petition initiating a representation proceeding. There have been instances where an employee organization, which has made such affirmation, has been charged with violating the prohibition against strikes during the pendency of the proceeding.\(^\text{92}\)

In the first instance where this occurred, the Director of Representation for the Board ordered the representation proceeding stayed until the charge of a violation of section 210(1) had been resolved.\(^\text{93}\) The Director reasoned that if the charge of violation were sustained it might cause the Board to "look behind the . . . no-strike affirmation and conclude that it was a sham."\(^\text{94}\) In that event, the Director concluded that the employee organization "would not be permitted to participate in any further proceedings leading to possible certification."\(^\text{95}\)

The power or right of the Board to deny an employee organization participation in a representation proceeding on this ground or even to inquire into the good faith of an employee organization in making a no-strike affirmation was challenged.\(^\text{96}\) It is clear that the Act does not grant this power explicitly. However, the legislature did expressly provide that the Board certify an employee organization only when such affirmation had been submitted.

The purport of such an affirmation is a formal renunciation of the intent to strike against a public employer. Thus it would seem obvious that the legislature did not intend that such affirmation be "a meaningless recitation or an affirmation without substance or obligation."\(^\text{97}\) Accordingly, the Board reasoned that where an employee organization engages in a strike after making a no-strike affirmation and before certification, it would be remiss if it failed to inquire into the good faith of the affirmation.

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94. Id. at 4056.
95. Id.
96. Town of Huntington, 1 PERB ¶ 1-399.96 (1968).
97. Id.
The Board, however, modified the order of the Director of Representation to stay the proceeding, directed that he proceed with the certification proceeding but that certification of the employee organization be withheld until the employee organization demonstrated to the Board that the affirmation was made in good faith and that the organization had intended to act in accord with the affirmation.\textsuperscript{98}

The procedure adopted by the Director of Representation to deal with this problem has a distinct advantage in that the guilt or innocence of the employee organization will have been established prior to any representation election so that the public employees involved can make an informed judgment. However, the obvious disadvantage is that it would result in a substantial delay in the certification process, thus delaying implementation of the rights of public employees to collective negotiations.

\textbf{III. Conclusion}

The Act of the legislature and the concurrence therein by the Governor in granting to public employees the right of participation in the determination of terms and conditions of their employment is a most positive one. It is to be recognized that the grant of such rights may be productive of some degree of unrest in the field of public employment throughout the state. On the one hand, one might find a degree of exuberance, if not militance, on the part of public employees in the exercise of these newly found rights. On the other hand, one might expect a degree of resentment on the part of public employers in having to relinquish their heretofore unfettered exercise of a unilateral determination of terms and conditions of their employees' employment. However, public employers and employee organizations are to be commended in view of the fact that unrest or unlawful activities arising out of disputes concerning representation status have been relatively few.

The policies of the PERB obviously do not constitute an inflexible or unchanging approach to the question. Experience will be a teacher; undoubtedly there will be changes as a result of the lessons taught by experience.

\textsuperscript{98} Id.