

Consolidation and Collective Bargaining

Collective bargaining agreements (CBA) and other employee and union issues often arise during any local government consolidation. Under New York's Public Employees Fair Employment Act (Taylor Law), public employers have a statutory duty to negotiate in good faith with the unions representing their employees regarding the terms and conditions of employment. Both the Public Employment Relations Board (PERB)¹ and the courts have held that the decision to transfer work that has historically been performed exclusively by employees of one bargaining unit (unit work) to persons outside of the bargaining unit is a mandatory subject of negotiation in many circumstances.² This is true whether the transfer would be to a private contractor or to employees of another public employer.

Consolidating Services

Various types of consolidation or shared services between local governments raise the issue of whether such arrangements, and the decision to enter into them, must be negotiated. Subcontracting and the reassignment of unit work is generally recognized as a mandatory subject of bargaining, although there are exceptions. While it is by and large a management prerogative of a local government to decide what level of service to provide to its citizens, practically speaking, this means that in order to lower costs through unilateral action, the level of a service must be reduced or eliminated. For example, in one case, an employer's decision to abolish a position was lawful, but when it assigned that unit work at about the same time to non-unit employees the employer was held to have violated the Taylor Law.³ Thus, reassignment of unit work generally must be negotiated; the practical effect being that consolidation of services or subcontracting in an effort to save tax dollars normally must be agreed to by the appropriate employee bargaining unit, especially where levels of service remain about the same, before being implemented.⁴

A current example of an effort at consolidation is in the Town of Clay in Central New York. There, the Town is proposing to merge its police department into the Onondaga

¹ PERB is the NYS agency established pursuant to the Taylor Law to administer that law.

² The Taylor Law gives little guidance as to what issues must be collectively bargained. The statute imposes a duty to negotiate "terms and conditions of employment," which is loosely defined as "salaries, wages, hours, and other terms and conditions of employment." Thus, one must look to case law for any further detail on what subjects are "mandatory" (i.e., a term or condition of employment such that either party must negotiate upon demand); "non-mandatory" or "permissive" (i.e., a party may request to include such a subject in a CBA, however, neither party is under any duty to negotiate these subjects or to include them in a CBA); or "prohibited" (i.e., a subject that cannot be negotiated since enforcement would be either illegal or against public policy. NYS pension benefits are one example).

³ City of Poughkeepsie, 15 PERB ¶ 3045

⁴ *Public Sector Labor and Employment Law, 3rd Ed.*, Edited by Jerome Lefkowitz, Esq., Jean Doerr, Esq., and Sharon Berlin, Esq., § 7.13.



County Sheriff's Department, which would in turn patrol the town. This initiative would save the taxpayers an estimated 20% on their town tax bill. As noted, significant impediments exist under the current system. The affected union has alleged a violation of the Taylor Law for failure to negotiate the decision to consolidate. Of course, every group will naturally seek to protect their own interests; however, if this initiative is blocked through litigation the enthusiasm for future consolidation efforts may be jeopardized. The Commission's recommendations herein are meant to alleviate these impediments.

In addition to the municipal employer's bargaining obligation that may attach to the decision to transfer unit work, there is also a duty to bargain, upon demand, the "impact" or effects of that decision upon the terms and conditions of employment. So, even where the local government is able to unilaterally implement a decision regarding unit work, the "impact" on the terms and conditions of employment must still be negotiated upon demand. For example, where a municipality decides unilaterally to eliminate certain positions and not replace them, this curtailment of services for economic reasons is a management prerogative. However, the municipality would still be obligated to negotiate the effect of the decision to layoff employees on the terms and conditions of employment (wages, hours, workload, and other mandatory subjects) of the affected employees. In cases of layoffs, the employer's obligation to negotiate impact extends to laid off employees as well as those retained in employment.⁵

Consolidating Local Governments

Full municipal or governmental consolidation (such as two towns consolidating) will involve a change in the employing unit. The legal obligations of these municipalities to their present, new, and former employees, and the unions that represent them, are issues that must be resolved during a consolidation. There is a large body of successorship law in the private sector since there are frequent changes in corporate ownership; however, there is little precedent under New York's Taylor Law because of an absence of similar changes with respect to local governments. Depending on the circumstances, a successor employer may or may not be bound by substantive provisions of a CBA. Generally, PERB has held that a successor employer is not bound by the substantive provisions of a CBA negotiated by its predecessor which has not been agreed to or assumed by the successor.⁶ Nevertheless, the successor employer may have a duty to continue to recognize and bargain with the union that represented its predecessor's employees. Whether or not this duty exists has been determined simply by which is more appropriate, bringing the employees into the successor employer's union or continuing to recognize the union from the previous employer. Where various obligations of the successor public employer are not controlled by a

⁵ Baldwinsville Cent. School Dist., 15 PERB ¶ 3032 (1982).

⁶ Matter of Cuba-Rushford Cent. School Dist., 182 AD2d 127 (4th Dept 1992) -- Where a school district dissolved and was annexed by a neighboring district, the CBA of the dissolved district does not travel with any employees that are subsequently hired by the annexing district. The CBA is not a "property right" such that the annexing public entity would have to accept it as it would other outstanding debts and liabilities.



CBA, many are determined by the Civil Service Law, which provides for the orderly appointment of employees during a consolidation or dissolution and annexation.

Municipal officials are understandably hesitant in these areas because of the scarcity of legal authority to offer guidance regarding employee bargaining rights with respect to municipal consolidation. When a simple service sharing arrangement can bring grievances and improper practice charges, which come with expensive and time consuming arbitrations and litigation, it could be expected that the unions will wage an even more vigorous battle where a municipal consolidation would bring a reduction in wages and benefits or even layoffs.

Removing the Impediments

The US Constitution Article 1, §10 provides that “No state...shall pass any law that...impairs the obligation of contracts...” While the New York State Constitution has no similar Contract Clause, the due process clause (Article 1, § 6) of the State Constitution has been construed to impose a similar limit on legislative action. However, the prohibition is not absolute, and a central question is whether the State law has operated as a “substantial impairment of a contractual relationship.”⁷ If the State law constitutes a “substantial impairment,” the State, in justification, must have a significant and legitimate public purpose behind the statute, such as the remedying of a broad and general social or economic problem, and the means chosen must be reasonable and appropriate.⁸

There are statutory schemes that have successfully superseded areas of collective bargaining rights. For example, the basic authority within the Education Law for districts to subcontract programs to BOCES for various services, subject to the approval of the Commissioner of Education, has been held to be within the discretion of the district and outside the scope of mandatory collective bargaining. Another example is the Judiciary Law, amended in 1977, to include an entire plan of annexing local government employees into State employee status are part of the new State Unified Court System:

Notwithstanding any other provision of law...commencing April first, nineteen hundred seventy-seven all justices, judges, and non-judicial officers and employees of the courts and court-related agencies of the unified court system set forth in subdivision one of this section shall be employees of the state of New York and the salaries, wages, hours and other terms and conditions of their employment shall be determined in accordance with the provisions of this section. (see Judiciary Law § 39)

⁷ See Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 244 (1978).

⁸ The Buffalo wage freeze cases are an excellent illustration of this rationale. See Buffalo Teachers Federation v. Tobe, et al., 464 F.3d 362 (2nd Cir. 2006).



However, there are limits to State action. It should be noted that the Judiciary Law amendments did grandfather in all the existing unions of the local employees. Also, as a result of those amendments, it was held by the Court of Appeals that certain provisions did unconstitutionally infringe upon employees' vested contract rights. As a result, the statutory provisions had to be interpreted as being optional rather than mandatory and former county employees had the option of accelerated payments from their former employers for certain accumulated leave cash-outs.

To facilitate municipal consolidation, dissolution, and sharing of services, the Commission recommends amending the Taylor Law and other applicable statutes to **provide that when municipalities consolidate operations collective bargaining agreements shall be subject to renegotiation with the newly created entity taking over the consolidated function.**

Moreover, in order to smooth the progress of both sharing of services and consolidation of departments between local governments, as well as the consolidation of local governments themselves, these statutory amendments should provide that when municipalities consolidate operations or services (or consolidate local governments entirely) the decision to transfer, consolidate, or reassign exclusive bargaining unit work and the impact of the decision, would be non-mandatory subjects of negotiation, i.e., management prerogative.

Amendments made to the Taylor Law or other statutes in order to accomplish the goals of this proposal would likely be upheld by the courts as constitutional, even where collective bargaining agreements are in place. However, there are certain vested contractual rights that have been preserved by the Court of Appeals; these rights should be addressed in any statutory amendments. In addition, other areas of uncertainty should be clarified such as a mechanism to decide what union will represent and bargain for employees of a successor entity upon a municipal consolidation or dissolution.

