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LABOR & EMPLOYMENT ISSUES AND OPPORTUNITIES

- by -

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This presentation will address issues and opportunities for public sector leadership.

Topics will include:

- Overview of Collective Bargaining
- Best Practices – Collective Bargaining
- Select Bargaining Issues
- Grievance Arbitration
- Update on New Legislation and Cases

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OVERVIEW OF COLLECTIVE BARGAINING

Understanding the Taylor Law:

- Collective bargaining – mandatory, non-mandatory and prohibited subjects
- Duty to bargain in "good faith" – Rule of 3 x's
- CBA's tend to be "additive"
- *Triborough* Doctrine – most expired CBA terms continue
- No Strikes – strikes are illegal

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OVERVIEW OF COLELCTIVE BARGAINING

PERB Impasse Proceedings:

- Declaration of impasse (joint or unilateral)
- Mediation (non-binding)
- Fact Finding (non-binding)
- Conciliation (non-binding, normally for teachers only)
- Legislative Imposition – Muni can impose employment terms for a one (1) year period (i.e., a pay freeze)
- Interest Arbitration – 3 person Interest Arb panel imposes a two (2) year “award” for paid police and fire

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OVERVIEW OF COLLECTIVE BARGAINING

Effective bargaining requires understanding the differences between:

- Mandatory subjects
- Non-mandatory subjects
- Prohibited subjects

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OVERVIEW OF COLLECTIVE BARGAINING

Mandatory subjects:

- Wages and salary (including OT, longevity, special pays, differentials, premium pays, stipends, etc.)
- Hours of work
- Agency “shop fee” deductions
- “Other terms and conditions of employment” - PERB will determine, on a case-by-case basis, what this means by balancing the interests of public employees against those of the public employer.

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OVERVIEW OF COLLECTIVE BARGAINING

Mandatory subjects - "Other terms and conditions of employment" include:

- Paid Time Off (Vacation, Sick and Personal)
- Health Insurance and other insurances (dental, life, etc.)
- Discipline/termination (but see recent PD cases)
- Safety concerns
- "*Cohoes* Conversion" of a non-mandatory subject
- "Established past practice" on a mandatory subject

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OVERVIEW OF COLLECTIVE BARGAINING

Non-mandatory subjects include:

- Employer mission and methods of work
- Equipment procurement and deployment
- Determinations on size of the force
- Creation of a new department
- Employer's "statutory rights" under CSL, GML, etc.

Note: PERB is forever "chipping away" at these subjects by finding that some aspect is negotiable

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OVERVIEW OF COLLECTIVE BARGAINING

Prohibited subjects include:

- "[A]ny benefits provided by a public retirement system, or payments to a fund or insurer to provide income for retirees, or payment to retirees or their beneficiaries." Civ. Serv. Law § 201(4)
- Any subject that would violate U.S. or NYS Constitution or Local Law

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OVERVIEW OF COLLECTIVE BARGAINING

GML 207 Procedures - example of a mixed subject:

- The following subjects are <u>not</u> mandatory
    1. Muni right to make initial determination
    2. Muni right to select IME
    3. Muni right to make light duty assignment
    4. Employee right to demand “de Novo” review

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OVERVIEW OF COLLECTIVE BARGAINING

GML 207 Procedures - example of a mixed subject:

- The balance of the subjects are mandatory:
    1. GML 207 application process – notices, forms and time frames, etc.
    2. Appeal process
    3. Use of arbitrator vs. hearing officer
    4. Use of a “third doctor” exam
    5. Burdens of proof and “moving forward”
    6. Judicial review

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BEST PRACTICES - COLLECTIVE BARGAINING

Understand the history…so, before the first session:

- Review prior CBA's and MOA's – do not be afraid to ask questions on "why" a certain provision was put into the CBA and ask "how" it has worked out
- Review prior union demands and notes of prior bargaining sessions
- Review what wages and benefits the "Comps" (other local Muni's) are paying and providing
- Review any "Ground Rules"

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BEST PRACTICES - COLLECTIVE BARGAINING

Picking the Muni bargaining team:

- Understand the duty of a bargaining team to vote for a Tentative Agreement – allow no more than 2/5 or 3/7 of board/council to serve on team
- Do the team members have the “right temperament”? Will the members treat the other side with “mutual respect” as you will have to work with the LRS and Union president again?
- Do you need a lawyer on the team? Pro’s/Con’s

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BEST PRACTICES - COLLECTIVE BARGAINING

Crafting the bargaining proposals:

- What are the Muni's priorities – 2% tax cap, containing health insurance and OT costs, etc.
- Written proposals are always better
- Normally no need for a Muni to propose wage increase at the first session – see what the Union proposes first
- Ask for more, settle for less
- Be able to explain why the Muni proposal is needed

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BEST PRACTICES - COLLECTIVE BARGAINING

Understand the Union “mindset”

- Unions have political/economic reasons “to deliver”
- Unions do not care about private industry trends (or the impact on Muni residents – 2% tax cap, SALT, etc.)
- Unions do not like to go “backwards” or give up benefits
- However, Unions may be willing create new “tiers” of benefits for “new hires” for starting salary, longevity, health insurance, vacation/PTO, etc.

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BEST PRACTICES - COLLECTIVE BARGAINING

Strategies

- Costing Union proposals:
    1. Show Union how ridiculous the cost is;
    2. Ask Union what their priorities are;
    3. Understand the “hidden” costs of benefits;
    4. CBA benefits are often “additive”- once it gets into the CBA, it is difficult to ever get it out and continue after the CBA expires (unless subject to a “sunset” provision)

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BEST PRACTICES - COLLECTIVE BARGAINING

Strategies (Cont'd)

- Keep cool when discussing Union proposals
- Do not agree to some proposals - every proposal is contingent on a global or "package" deal
- Understand the effect of "sunset" clauses – a sunset clause (because it may expire unless renewed) will be an important "bargaining chip" later
- Leave some "room to maneuver" before reaching impasse – this buffer will be needed in mediation later

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SELECT BARGAINING ISSUES

Technology and Surveillance Concerns

- Global Positioning Systems (“GPS”)
- Closed Circuit Television (“CCTV”)
- Body Worn Cameras (“BWC”)
- Employee identification via finger/palm prints, retina/face scans, etc.
- “Wearable” sensor devices such as watches, braces, hats/headbands, gloves, etc.
- Text Messaging Intervention (“TMI”)

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SELECT BARGAINING ISSUES

Technology and Surveillance Concerns (cont'd)

- CSEA, Local 1000 and County of Nassau, 41 PERB ¶ 4553 (2008): Employer-mandated use of GPS enabled cell phones (i.e., equipment furnished by employer) would have no more effect on an employee's privacy than that of a supervisor accompanying the employee during workday; the fact that the GPS usage "may implicate" discipline (a mandatory subject) is irrelevant.

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SELECT BARGAINING ISSUES

Technology and Surveillance Concerns (cont'd)

- CSEA Local 1000, AFSCME, AFL-CIO and Nanuet UFSD, 45 PERB ¶ 3007 (2012): Due to "job security, privacy and personal reputation" interests, videotape surveillance of a workplace for monitoring and investigating employees is mandatorily negotiable, but a particular employer decision to use surveillance is subject to a fact-specific analysis.

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SELECT BARGAINING ISSUES

Technology and Surveillance Concerns (cont'd)

- Body Worn Cameras – PBA opposition:
    1. NYPD (now has a consensual pilot program)
    2. Nassau County
    3. City of Yonkers

Note: Similar to GPS, PERB seems wiling to bifurcate the employer's right to deploy equipment (non-mandatory) from concerns of possible use of equipment for discipline purposes (mandatory)

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SELECT BARGAINING ISSUES

Technology and Surveillance Concerns (cont'd)

- What rules will govern employee recognition technology (finger/palm prints, retina/face scans) or the use of wearables and TMI?
    1. Use of equipment vs. invasion of privacy?
    2. NYLL 201-a (anti-fingerprinting law)
    3. Collection and storage of "biometric" info
    4. ADA and NYSHRD disability issues
    5. Employee consent and access issues

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SELECT BARGAINING ISSUES

Retiree Health Insurance

- Understand rights and interests of current employees who are "retirement eligible" vs retirees
- *Kolbe v. Tibbetts, 22* N.Y.3d 344 (2013): Union cannot negotiate lesser benefits for retired members than specified in the contract under which they retired.
- *Chenango Forks CSD v PERB*, 21 N.Y.3d (2013): a school district's voluntary reimbursement of Medicare Part B premiums for over-65 retirees created a binding and reasonable "expectation" that it would continue.

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SELECT BARGAINING ISSUES

Job Security.

- *Matter of Arbitration between Johnson City Prof'l Firefighters Local 921 v. Village of Johnson City*, 18 N.Y.3d 32 (2011): holding that job security clauses have to be "express, unambiguous and comprehensive" and that the JCFD CBA's "no layoff" clause was too ambiguous to be enforced; to be enforced, the Muni must expressly waive its right to affect job loss even for reasons of budgetary or economic necessity.

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SELECT BARGAINING ISSUES

Job Security.

- *See also Yonkers Sch. Crossing Guard Union of Westchester Chapter, CSEA, Inc. v. City of Yonkers*, 39 N.Y.2d 964 (1976); *Board of Education v. Yonkers Federation of Teachers*, 40 N.Y.2d 268 (1976); and *Burke v. Bowen*, 40 N.Y.2d 264 (1976)
- Also understand that, per this case law, courts will only enforce the job security provision for a "reasonable" duration (2-3 years). Thus, *Triborough* should not apply. If so, why ever agree to renew the clause?

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SELECT BARGAINING ISSUES

Job Security -

Union will argue that minimum manning or staffing is really about "safety" or some other mandatory subject.

- *Vill. of Garden City v. Local 1588, Prof'l Firefighters Ass'n*, 132 A.D.3d 887 (2d Dept. 2015)
- *In re City of Lockport (Lockport Professional Firefighters Ass'n, Inc.)*, 141 A.D.3d 1085 (4th Dept. 2016)
- *Matter of City of Watertown*, 152 A.D.3d 1231 (4th Dept. 2017)

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SELECT BARGAINING ISSUES

Civil Service Law § 71 *Terminations*

- *Enlarged City Sch. Dist. of Middletown. v. CSEA*, 148 A.D.3d 1146 (2nd Dept. 2017): restrictions on employer's statutory CSL § 71 right to terminate employees violated public policy and not enforceable.
- But see *Long Beach Prof. Firefighters Assoc.*, 50 PERB ¶3036 (2017) and *Town of Cortlandt v PERB*, 30 PERB ¶ 7012 (1997): PERB held that Muni could be required to bargain over employer's discretion to terminate under CSL § 71.

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GRIEVANCE ARBITRATION

- Grievance arbitration is a creature of negotiation – no two grievance arbitration procedures are the same
    1. Scope - what issues/subjects are grievable?
    2. Who can grieve? Can Muni grieve? Can retiree?
    3. Step process – what are the time limitations and conditions precedent; is there a forfeiture?
    4. Selection of arbitrator –panel, PERB, AAA, etc.
    5. Arbitration process - who pays?

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GRIEVANCE ARBITRATION

- Why challenge arbitration? To prevent needless arbitration of a non-mandatory/prohibited subject or when grievant has not complied with grievance arbitration procedure
- When to challenge arbitration? PROMPTLY – normally Muni has only 20 days to challenge arbitration
- How to challenge arbitration? Normally by a petition (i.e., a motion) to stay arbitration – consider TRO/OTSC

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GRIEVANCE ARBITRATION

- Two Part *Liverpool – Watertown* Test*:* "[W]e first ask whether the parties may arbitrate the dispute by inquiring if 'there is any statutory, constitutional or public policy prohibition against arbitration of the grievance'…If no prohibition exists, we then ask whether the parties in fact agreed to arbitrate the particular dispute by examining their collective bargaining agreement. If there is a prohibition, our inquiry ends and an arbitrator cannot act." *Cty. of Chautauqua v. Civil Serv. Employees Ass'n*, 8 N.Y.3d 513, 519 (2007).

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GRIEVANCE ARBITRATION

- "First prong" (may-they-arbitrate?) challenges include those subjects prohibited by public policy or statute:
    1. Maintenance of personnel files
    2. Conduct of internal investigations
    3. Discipline of certain police officers
    4. Probationary/provisional employee tenure
    5. Seniority (other than per CSL § 80) during layoff
    6. Job Security (which takes many forms)
    7. Teacher tenure & student discipline

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GRIEVANCE ARBITRATION

- "Second prong" (did-they-agree-to-arbitrate?) challenges are legion and include:
    1. Is subject matter of dispute "fairly embraced"?
    2. Proper grievant? Probationary? Retiree?
    3. Time bars and conditions precedent (i.e., steps)
    4. Statute of Limitations
    5. Waiver of right to arbitrate by litigation/actions
    6. Waiver by agreement (Last Chance Agreement)

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UPDATE ON NEW LEGISLATION AND CASES

- GML § 92-d (Unlimited Sick Leave for WTC)
- Effective 9/11/17, grants a “line of duty sick leave” to those officers/employees outside NYC who (1) filed a “notice of participation” in WTC rescue, recovery or cleanup operations and (2) subsequently develop “a qualifying WTC condition”, as defined in RSSL § 2. Compensation shall be at the officer/employee’s regular rate of pay for those regular work hours missed and the leave shall be provided without a loss of accrued sick leave.

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UPDATE ON NEW LEGISLATION AND CASES

- GML § 92-d (Unlimited Sick Leave for WTC)
    1. Increased notice of WTC Sick Leave eligibility
    2. NYSRS controls the determination process
    3. Request that employee provide the NYSRS determination – don't accept other proof
    4. If this only amends the GML, is this a barrier to CSL § 71 or 73 terminations?
    5. Statute provides for reimbursement from NYS

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UPDATE ON NEW LEGISLATION AND CASES

- NYS Anti-sexual Harassment Laws
- Sexual harassment of non-employees – The New York Human Rights Law, which does not explicitly protect non-employees from sexual harassment in the workplace, will be amended to make the sexual harassment of certain non-employees (e.g., independent contractors, sub-contractors, vendors, consultants and other persons providing services) an unlawful discriminatory practice. This provision took effect immediately on April 12, 2018.

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UPDATE ON NEW LEGISLATION AND CASES

- NYS Anti-sexual Harassment Laws
- Prohibition on mandatory arbitration clauses – The Civil Practice Laws and Rules ("CPLR") which governs the conduct of New York civil lawsuits will be amended to prohibit employers from requiring employees to sign contracts that mandate arbitration of sexual harassment claims. This provision takes effect on July 11, 2018.

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UPDATE ON NEW LEGISLATION AND CASES

- NYS Anti-sexual Harassment Laws
- Prohibition on mandatory nondisclosure agreements - The GOL and the CPLR are amended to prohibit employers, their officers, and other employees from including a non-disclosure/confidentiality provision in a settlement agreement which resolves a sexual harassment claim, unless the provision is the preference of the complainant, who gets 21 days to consider and 7 additional days to revoke consent. This provision will take effect on July 11, 2018.

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UPDATE ON NEW LEGISLATION AND CASES

- NYS Anti-sexual Harassment Laws
- Requirement that employers prevent sexual harassment
  Requires that employers adopt anti-sexual harassment policies and implement training that meets or exceeds a "model" policy and training requirements to be promulgated by the New York State Department of Labor and the Division of Human Rights. This provision will take effect on October 9, 2018.

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UPDATE ON NEW LEGISLATION AND CASES

- NYS Anti-sexual Harassment Laws
- Reimbursement of public funds - Public employees (including former and unpaid employees) who are found personally liable for intentional wrongdoing *in a final judgment* related to a claim of sexual harassment must reimburse the public for his or her proportionate share of the total award paid by any state or public entity to a plaintiff within 90 days of payment. This provision took effect immediately on April 12, 2018.

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UPDATE ON NEW LEGISLATION AND CASES

- NYS Anti-sexual Harassment Laws
- State contracts - State contracts requiring competitive bidding for services performed or for goods sold must contain a statement affirming that the contractor/ has implemented a written policy addressing sexual harassment prevention in the workplace and that it provides annual training for all employees. State entities also may use the statement in contracts that do not require a competitive bid. This provision will take effect on January 1, 2019.

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UPDATE ON NEW LEGISLATION AND CASES

- *Janus vs. AFSCME, Council 31* (US Sup Ct)
- Background:
    1. Based on 1st Amendment claim by Janus that he was forced to participate in his union's political "speech" by paying dues to union
    2. Union argued that this is a "fair share" issue and is supported by 40 years precedent
    3. In past, Sup Ct split 4-4…now expect 5-4 result.
    3. Huge impact on public sector unions

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UPDATE ON NEW LEGISLATION AND CASES

- *Janus vs. AFSCME, Council 31* (US Supreme Court)
- Questions:
    1. How will this impact interpretation of the CBA which may mandate the collection of dues or agency/shop fees from all employees performing bargaining unit work?
    2. How do employers verify union membership?
    3. How will this impact negotiations, grievances and PERB practice if numbers of Union opt out?

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UPDATE ON NEW LEGISLATION AND CASES

- *Janus vs. AFSCME, Council 31* (US Supreme Court)
- Governor Cuomo's fix in the 2018 Budget:
    1. Requires public employers to provide "new hire" and "re-hire" names, locations and contact numbers to Union within 30 days of employment.
    2. Requires public employers to provide release time during work hours within 30 days of the above notification for Union to meet with all new hires, without loss of PTO – *How much release time?*

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UPDATE ON NEW LEGISLATION AND CASES

- *Janus vs. AFSCME, Council 31* (US Supreme Court)
- Governor Cuomo's fix in the 2018 Budget (cont'd):
    3. Codifies that individuals may sign dues authorization cards via means allowed by state technology law (including email).
    4. Requires employers to begin dues deduction within 30 days of receipt of dues authorization card and requires remittance of the dues to the union within 30 days of making the deduction.

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UPDATE ON NEW LEGISLATION AND CASES

- *Janus vs. AFSCME, Council 31* (US Supreme Court)
- Governor Cuomo's fix in the 2018-19 Budget (cont'd):
    5. Codifies that Union membership is automatically reinstated for (a) former members returning within a 1 year absence period and (b) current members retuning to payroll from a voluntary or *involuntary* leave.
    6. Codifies that the withdrawal process from the Union may be determined by the dues authorization card – *See sample*

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UPDATE ON NEW LEGISLATION AND CASES

- *Janus vs. AFSCME, Council 31* (US Supreme Court)
- From a new NYSUT dues card:

> "I understand that this authorization and assignment is not a condition of my employment and shall remain in effect, regardless of whether I am or remain a member of the union, for a period of one year from the date of this authorization and shall automatically renew from year to year unless I revoke this authorization by sending a signed notice of revocation via U.S. Mail to the union between the window period of Aug 1-31 or another window period specified in a collective bargaining agreement."

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UPDATE ON NEW LEGISLATION AND CASES

- *Janus vs. AFSCME, Council 31* (US Supreme Court)
- Governor Cuomo's fix in the 2018-19 Budget (cont'd):
    7. Codifies that (a) the Union can offer benefits and services that are above and beyond a negotiated agreement to its members only; (b) Union's obligation to non-members is limited to the negotiation and enforcement of the contract; and (c) Union is not required to represent non-members in discipline cases when the non-member is authorized to get their own rep.

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UPDATE ON NEW LEGISLATION AND CASES

- Notice of Claim
- *Matter of Fotopoulos v Board of Fire Commr. of the Hicksville Fire Dist.*, 2018 NY Slip Op 03128, __AD3d__ (2nd Dept. 2018): ”Here, since the petitioner [who was dismissed by Fire District] seeks both equitable relief *and the recovery of damages in the form of back pay*, the filing of a notice of claim *within 90 days after his claim arose* was a condition precedent to the maintenance of this proceeding.”
- **Note:** Claim ”may arise” well before the Art 78 is filed.

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QUESTIONS???