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May 21, 2007

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Re: Case No. IA2006-024; City of New York and PBA of the City of New York, Inc.

Dear Representatives:

The following constitutes my decision regarding the objections raised by the PBA to the processing of the referenced interest arbitration petition, and regarding the City's contention that I should designate a specific panel to determine this impasse.

Background

The relevant background is not in serious dispute. The City filed a Declaration of Impasse in July of 2006, after which I appointed Chief Regional Mediator Philip Maier as mediator. After mediation did not bring about an agreement, the City, on October 25, 2006, filed the at-issue petition to refer the impasse to interest arbitration in accordance with CSL §209.4. I granted the PBA an extension of time to file its response, and received that response on November 22, 2006. By letter of November 30, 2006, the PBA notified me that it was designating Jay W. Waks, Esq. as its party-appointed member of the tripartite arbitration panel, and by letter of December 4, the City advised me that it was appointing Carol O'Blenes, Esq. as its member. On December 12, 2006, I sent the parties' representatives an identical list consisting of nine individuals, all of whom were members of PERB's panel of interest arbitrators, for purposes of selecting the public panel member pursuant to CSL §209.4(c)(ii) and §205.7 of PERB's Rules of Procedure (4 NYCRR §205.7; hereinafter "Rules"). The parties received the list by the close of business on December 15.

On December 22, 2006, one of the two individuals then serving as PERB Board members resigned, leaving the three-member Board without a quorum. On December 27, the remaining member – PERB's Chairman – also resigned, leaving the Board with no members. On the latter date, at the request of the parties, I participated in a conference call with a variety of their representatives. During the call, the City contended that the parties had agreed to meet on that date to engage in alternate striking of the list I had sent them, but that the PBA had voiced objections, and was not participating in the statutory procedure. The PBA contended that it found the list problematic, alleging that two of the names it contained had served in an interest

arbitration proceeding conducted under the auspices of a different agency some years back, and had issued a decision not to its liking. It also questioned my authority to issue a list at all, given that the literal language of the statute and the Rules confers such authority on "the Board," and further questioned my power to designate a panel or further process the petition in the absence of any Board members. I declined to provide the parties a formal opinion at the conclusion of the conference call, and invited them to submit written argument concerning the issues being raised, should they so desire. The parties subsequently submitted written correspondence that generally outlined and supported the respective positions they had taken in the conference call; the City's letter of December 28 asked that I confirm that all names on the panel list would be deemed acceptable to the PBA in accordance with §205.7 of the Rules, given its alleged failure to participate in the selection process.

I thereafter made a number of attempts by telephone to have the parties consider agreeing upon various alternatives for the selection of the public panel member, in order to obviate what appeared to be inevitable litigation. I also engaged in preliminary legal research concerning the jurisdictional questions raised by the PBA pertaining to the continuing authority of Board agents to act in the absence of a sitting Board, later turning such work product and the parties' correspondence over to PERB's Acting Associate Counsel for her consideration and legal advice. On January 22, 2007, the City sent me a letter by which it purported to unilaterally designate Arnold Zack – one of the nine arbitrators listed on the December 12, 2006 selection list – as the public member and chair of the interest arbitration panel "by operation of law." The PBA responded by letter dated January 25, objecting to the City's purported designation and contending that it had not failed to participate in the selection process. On January 26, after I had forwarded both letters to PERB's Acting Associate Counsel, she wrote counsel for both parties, asking for their positions and supporting legal arguments regarding five specific issues "[b]ecause the Director's authority to act in the absence of Board has never before been questioned." On February 14, both parties complied with this request.

Two other matters of significance need be noted. First, on February 2, 2007, the City commenced a CPLR Article 78 proceeding in the nature of mandamus, naming me as a respondent, and seeking to compel me to designate the public arbitration panel with the panel chair it had unilaterally selected. In an opinion by Justice Devine dated March 17, 2007, Supreme Court, Albany County dismissed the City's petition, holding that it could not compel PERB to act, since PERB was not a named party. Second, on February 28, Governor Spitzer nominated Jerome Lefkowitz, Esq., as PERB's Chairman, and Robert Hite, Esq. and Eric Schmertz, Esq., as Members of the Board. Chairman Lefkowitz and Member Hite were confirmed by the State Senate on April 18.

Discussion

At the outset, it must be noted that the issue posing, at least in my opinion, the most difficult, vexing and arcane legal issue – whether I had authority, in the absence of at least a Board quorum, to designate an interest arbitration panel in this matter – is now moot. With the confirmation of Chairman Lefkowitz and Member Hite on April 18, a functioning Board is in place. While the issue raised by the PBA concerning my authority to issue a list or designate a panel "without the express approval or direction of the Board" remains, such question can now be addressed without the added dimension and complexity that the issue of continuing

delegation during a Board hiatus presents. Moreover, the presence of a Board means the availability of an administrative appeal, should either party wish to contest my judgments in this matter; questions regarding the binding nature of such judgments in the absence of appellate control by the agency are no longer relevant to this case.

This leaves three live issues for disposition: 1) the PBA's contention that I lacked authority to issue the December 12, 2006 panel selection list, and presently lack authority to designate a panel, without the express approval or direction of the Board; 2) the PBA's contention that the December 12 list contains the names of arbitrators who are not "disinterested" within the meaning of CSL §209.4(c)(ii), and who therefore should be excluded; and 3) the City's contention that the PBA has not "participated" in the selection process as that term is used in Section 205.7(b) of the Rules. I will address these *seriatim.*

First, I reject the PBA's contention that, even though the former Board was still in place at the time, I lacked authority to issue the December 12, 2006 list, and presently lack authority to designate a panel. The PBA's argument is founded upon the fact that both the Taylor Law and the Rules state that "the board" shall issue such lists and refer such disputes to a public arbitration panel [CSL §209.4(b) and (c); 4 NYCRR §205.7]. Indeed, both the statute and the Rules literally charge "the board" with virtually every aspect of administration of the Taylor Law's impasse resolution processes, be it the receipt of notices of impasse (Rules, §205.1), the determination as to whether an impasse exists (CSL §209.3), the appointment of mediators and fact finders [CSL §§209.3 and 209.4(a)], and the receipt of petitions for interest arbitration [CSL §209.4(b) and Rules, §205.4], let alone the issuance of interest arbitration lists and designations of public arbitration panels. The Board, however, historically has performed none of these functions directly, but rather has delegated such tasks to the Director of Conciliation both *de jure* and *de facto*.

The Taylor Law plainly charges the Board with resolving collective bargaining disputes [CSL §§209 and 205.5(i)], and permits the Board to appoint such persons as it may "deem necessary for the performance of its functions" [CSL §205.4(a)]. It has appointed the Director of Conciliation as "the agent of the board" for purposes of administering the processes used for resolving collective bargaining impasses, including mediation, fact-finding and interest arbitration [Rules, §200.3; *NYC Transit Authority*, 39 PERB ¶3006 at 3024 (2006)]. The Board has repeatedly acknowledged, both explicitly, and implicitly through affirmance on review, this delegation of authority in its case law. *NYC Board of Education*, 34 PERB ¶3016 (2001); *Town of New Windsor*, 31 PERB ¶3061 (1998); *Niagara Frontier Transportation Authority*, 30 PERB ¶3009 (1997); *County of Oneida*, 20 PERB ¶3044 (1987); *Village of Southampton*, 16 PERB ¶3049 (1983); *County of Yates*, 16 PERB ¶8001 (1983). In *Town of New Windsor*, *supra*, the Board stated:

> "We have for many years reviewed Director determinations involving the compulsory interest arbitration provisions of the Act and Rules....Our right and power to review staff determinations is inherent in our delegation to those persons of the power to make them. Moreover, our review is necessary for there to be a final order which can be appealed judicially" (at 3133; emphasis supplied; citations omitted).

The Board has even held that it will not address issues upon exceptions that were not first raised

with the Director of Conciliation. *NYC Transit Authority*, supra at 3026.

Having served in this capacity since 1990, I, like my predecessors, have made countless determinations in the course of processing thousands of collective bargaining impasses, obviously with the knowledge and consent of the Board. PBA is itself well aware of this, given that, during the last two rounds of bargaining with the City, it was the moving party, filing declarations of impasse and interest arbitration petitions with me, as Director, and seeking mediator appointments, panel selection lists and arbitration panel designations from me, rather than directly from the Board [see, *e.g. City of New York*, 34 PERB ¶3033 (2001)]. In fact, during the 2004 negotiations, the PBA, responding to exceptions filed by the City with the Board, supported my ruling that appointment of a mediator was warranted. *City of New York*, 37 PERB ¶3018 (2004).

In essence, the PBA's argument stands for the proposition that all the work assumed by PERB's Directors of Conciliation over the past forty years has been *ultra vires*.[1] While I welcome the extended holiday that adoption of the PBA's position would now afford me, sadly, I do not find it supported by law, fact or reason.

Next, I also reject the PBA's contention that the December 12, 2006 arbitrator selection list was tainted by the inclusion of two individuals who had served in an earlier interest arbitration proceeding involving these same parties. CSL §209.4(c)(ii) specifies that the alternate striking process "shall be completed within five days of receipt of this list." The record established that the parties received the list on December 15. As such, the process should have been completed not later than December 20, which in turn, means that any objections a party wishes to lodge with the Director of Conciliation in regard to any aspect of that list must also be made by that date, lest they be waived, unless the basis for the objection could not have been known within that time frame. The rationale for this is evident from the short time frames set out by the Legislature in CSL §209.4(c)(ii) itself. As the Board stated in *Town of New Windsor, supra*:

> "The terms of the Act reflect the Legislature's desire for the prompt resolution of disputes pending at arbitration. This public policy is expressed by the provision of specific time frames for the accomplishment of the various steps to be taken during the arbitration process. The Legislature's expression of a need for speed in interest arbitration is reflected in our own Rules, under which an objection to arbitrability postpones only the issuance of an award of the contested issues, not the arbitration proceedings themselves" (at 3133).

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[1] Given the successful administration of the impasse procedures over this time frame, including over thirty years of administering the interest arbitration procedures, the delegation to the Director has plainly effectuated the Legislature's intent. As such, I reject the PBA's contention, based on language utilized in Section 207 of the Rules, that the maxim *expressio unius est exclusio alterius* compels a conclusion that only the Board is empowered to act. To the extent that principle of statutory construction may apply to agency rules, it is well settled that it must be applied to effectuate the intent of the legislation being implemented and not applied to defeat that intent. *Mtr. of Auburn Police Local 195 v Helsby,* 62 AD2d 12, 16 (3d Dept 1978), affd on op below 46 NY2d 1034 (1979). Moreover, Section 207 applies to voluntary grievance arbitration, which unlike interest arbitration, is neither mandated by the Taylor Law nor has any direct statutory predicate. As such, the Section would not be fleshed out through PERB case law, and was necessarily written with the type of detail necessary to inform the parties of their rights and obligations should they voluntarily choose to come under that process.

Here, the PBA did not inform me that it had any issue with regard to the December 12 list until the conference call on December 27. The basis for its objection, namely that two of the listed arbitrators served on a panel in 1997 that issued an award not to its liking, was plainly known to the PBA on the date it received the list. As such, I find that it was procedurally barred from raising the issue a week after the statutory period for striking the list had expired.

Were I to reach the merits of the PBA's claim, I would still dismiss it. All names contained on the December 12 list are members of PERB's interest arbitration panel, and therefore received Board approval of their respective applications upon initial review and evaluation by the Director of Conciliation. The two individuals of concern to the PBA are nationally-reputed arbitrators who have served on PERB's neutral panels for over thirty years; both are members of the National Academy of Arbitrators and one, Mr. Zack, is a former President of that highly respected professional association. There can be no question as to their qualifications or expertise as arbitrators. As to the PBA's specific complaint that they served a decade ago on an interest panel involving these same parties, I must first note that the panel was not under PERB's auspices, but rather that of the New York City Office of Collective Bargaining, which, at the time, had jurisdiction over impasses involving the City's police officers. While PERB officials can be charged with knowledge of who served on the agency's own cases, it cannot be charged with such knowledge or recall as to matters outside its interest and control. Even if it could, in this case, the two individuals of whom the PBA complains were among the nine names contained on the selection lists that I issued to these parties during the 2001 (Mr. Zack) and 2004 (Mr. Aiges) rounds of interest arbitration; in neither case was any "disqualification" argument or other complaint raised by the PBA to their inclusion on those lists.

In any event, at bottom, the PBA's argument runs not to disqualification[2] of these arbitrators but rather to dissatisfaction with them – and the latter is the reason both parties have the procedural right to alternately strike four names each. The PBA did not like an award rendered by these arbitrators on a set of facts that existed ten years ago. It is entirely possible that the City has received awards in the past from these or others on the nine-person list that it too, at the time, found disagreeable. It is commonly known that arbitrators often come into and go out of favor with a given party – and then back again – with the frequency that George Steinbrenner once hired, fired and rehired managers. Their shelf life is sometimes determined by their latest decision. A decision a party deemed unfavorable in 1997 is certainly not a basis for disqualification of an arbitrator in 2007; should the arbitrator's performance continue to trouble that party today, it may well, however, provide a reason for that party to exercise its statutory right to strike his or her name and thereby guarantee a public member more to its liking.

Finally, my dismissal of the PBA's contentions does not mandate a finding that it failed to participate in the selection process, as the City urges. The City contends that by operation of §205.7 of the Rules, the PBA's failure to strike the list means that "all names on the list shall be

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[2] A disqualification argument concerning an alleged "contentious" financial relationship involving Mr. Zack and the Cornell ILR School some years back was contained in a footnote to the PBA's February 14, 2007 response to Acting Associate Counsel's January 26 letter. This objection was never raised with me either within the statutory five day period from its receipt of the list, nor during the December 27, 2006 conference call. To the extent it may be nonetheless be found to be before me, I reject it as a mere assertion unsupported by any record evidence or affirmation, and either irrelevant, or, to the extent it is based upon the PBA's possible desire during the arbitration proceeding to call witnesses having a relationship with Cornell , self-serving.

deemed acceptable to it" and that, therefore, the City's first choice, in this case Mr. Zack, automatically becomes the public member and chair of the panel. While this would be the case if the PBA's conduct and objections were utterly frivolous, I find that the totality of circumstances surrounding this case are such as to preclude such a ruling.

The City relies upon *Matter of City of Albany v PERB*, 86 Misc2d 476 (Sup Ct, Albany Co 1976), a case in which PERB did invoke §205.7 of its Rules, and appointed the union's choice from the list it had tendered the parties, after the City had refused to participate in the panel selection process. There are important differences, however, between the facts in *City of Albany* and those presented in this case. In *City of Albany*, there was never a question regarding the City's refusal to participate in the process; the City, in fact, was championing its refusal. As was noted by the court that later confirmed the interest arbitration award issued in that case, the City had refused to file a response to the petition filed by the police union, had refused to designate its own member to the arbitration panel, and had twice rebuffed PERB's attempts to designate someone associated in interest with the City as that panel member, as required in such event by the Rules (the City's then-Mayor Corning famously refused to serve, stating "I thought the Thirteenth Amendment prohibited involuntary servitude"). *Albany Police Officers Union v City of Albany*, 9 PERB ¶7017 (Sup Ct, Albany Co 1976); see also Donovan, *Administering the Taylor Law* (ILR Press, 1990), at 145-147 for a full description of the City's defiant attitude towards interest arbitration at the time.

In this case, by contrast, a factual question does exist regarding whether or not the PBA's conduct amounts to a failure to participate. Here, the PBA filed responding papers, designated its member of the panel, complied with invitations from me and from PERB's Acting Associate Counsel to brief the legal issues, and continually objected to the City's characterizations that it was refusing to participate in the process. Of greatest significance is the fact that the PBA timely registered the one objection I do not consider wholly specious, namely the now-mooted contention that, absent a sitting Board, I lacked authority to further proceed in the matter. Unlike the PBA's other objections, which could have been made upon receipt of the list, this objection was timely, given that the PBA could not have made it until December 22, 2006, when a Board quorum no longer existed. The objection was made on December 27, which, in keeping with the spirit of CSL §209.4(c)(ii), is within five days of the time PBA could have, let alone should have been aware of the circumstances giving rise to the claim; moreover, being jurisdictional rather than merely procedural in nature, it is likely not subject to a time bar in any event.

There is little question that, by raising this objection, the PBA, as a practical matter, has frustrated the relatively speedy processing contemplated by the Legislature and by PERB. While this is to be lamented, and in ordinary circumstances, would not be condoned, the circumstances presented in this case were extraordinary. PERB had never before experienced a complete absence of sitting Board members. It was at least arguable, if not convincing, that absent a rule or policy statement continuing the delegation of function in the Director when a Board power vacuum exists,[3] my designation of a panel and the panel's subsequent acts, including any award, would lack legal foundation, and be subject to challenge by a party or a taxpayer. While

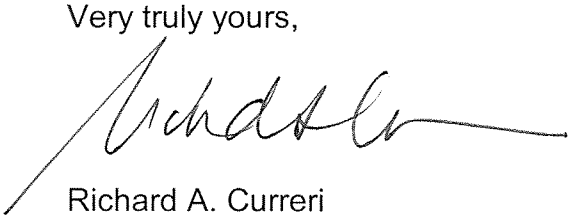
[3] Since the matter is now moot, and will not be answered through this litigation, the new Board may wish to consider clarification of its intent in these circumstances, via rule-making or a written policy statement.

a few cases from other jurisdictions were unearthed that might imply a contrary result,[4] exhaustive legal research failed to produce any cases on point in New York or elsewhere. Moreover, both the *City of Albany* case relied upon by the City and referenced above (86 Misc2d at 479), and the Board's decision in *City of Kingston,* 18 PERB ¶ 3036 (1985, at 3076), establish that the PBA's failure to raise this objection before the Director and/or its further participation in the interest arbitration process, might well be deemed a waiver.

Order

Given these circumstances, while mindful that the PBA's objections have considerably slowed the statutory process, I cannot find its conduct amounted to a failure to participate. Having dismissed its other objections, I am therefore ordering both parties to strike the December 12, 2006 list in accordance with time frame set forth in CSL §209.4(c)(ii) and §205.7(b) of the Rules, namely, not later than five days from the date of receipt of this letter, which is being sent to the parties via overnight mail. A copy of the December 12, 2006 list is again enclosed. A party wishing to file exceptions with the Board must do so in accordance with §213 of the Rules. A party wishing to file exceptions, while also preserving its ability to participate in the alternate striking procedure set out in the aforementioned statute and rules, must, however, either file such exceptions within five (5) days of the date of receipt of this letter, or, within that five (5) day period, provide the Board with a notice of intention to file such exceptions.

Very truly yours,



Richard A. Curreri

[4] See, *e.g. Railroad Yardmasters of America v Harris,* 721 F2d 1332 at 1343 (US App DC, 1983); *Donovan v National Bank of Alaska,* 696 F2d 678 at 682 (9th Cir, 1983); *United States v Wyder,* 674 F2d 224 at 227 (4th Cir, 1982), *cert. denied* 457 US 1125 (1982); *David B. Lilly Co. v United States,* 571 F2d 546 at 550 (Ct.Cl, 1978); *see also,* discussion of *de facto* officer doctrine in 18A NY Jur2d §§32, 34, 42 and *Mtr of Smithtown v Moore,* 11 NY2d 238 (1962).