



Fall Training Session Agenda and Program Schedule

9:15AM – 9:55AM – Campus Arrival

9:30AM – 10:30AM - Continental Breakfast

10:00AM – 11:00AM – Robert Blaisdell, Risk Management Director and Mike Kenneally, Executive Director for NYSCMA member sponsor Comp Alliance, will present on Drug Testing and Employee Discipline within the regulatory framework of the newly enacted Marijuana Regulation and Taxation Act.

11:00AM – 12:30PM - Ed Eisenstein will present on the use of Artificial Intelligence (AI) in local government. Mr. Eisenstein is an IT professional having worked in the public sector, as CIO for Nassau County on Long Island. He currently consults in the public and private sectors.

<https://edeisenstein.com/>

12:30PM - Lunch

1:00PM – 2:00PM - Bryan Goldberger, an Albany based municipal attorney with labor law and collective bargaining experience, will discuss current collective bargaining negotiating strategies while providing updates on important recently enacted and/or pending PERB decisions.

2:15PM – 3:30PM - Campus Tours: Main Campus & Pine Lake Environmental Campus (Pine Lake Campus is a few miles from the main campus, requiring a short drive).

3:30PM – Training Seminar organized schedule complete.



DAZED AND CONFUSED

ABOUT
EMPLOYEE DRUG AND ALCOHOL TESTING?


2023 NYSCMA Fall Training Session
Oneonta, New York
October 19, 2023

Presented by:
NEW YORK STATE MUNICIPAL WORKERS' COMPENSATION ALLIANCE

Michael Kenneally
Executive Director
Comp Alliance

Robert Blaisdell
Director of Loss Control
Comp Alliance

Introduction




Dazed and Confused?

This presentation will provide a high-level overview of:

1. Known hazards of drugs and alcohol in the workplace;
2. Regulatory framework of drug and alcohol testing;
3. The five W's (who, what, when, where and (w)how of drug testing in the workplace; and
4. Basic rights and responsibilities of employees and employers.


Hazards



Drugs and Alcohol at Work are Unsafe

- According to the U.S. Department of Labor, drug and alcohol abuse in the work place causes 65% of on the job accidents.
- 40% of all industrial fatalities are caused by individuals with substance use disorders.


Hazards



Effects of Drugs and Alcohol in the Workplace

- Drug and Alcohol use, or being under their influence, contribute to an increase in workplace-related injuries.
- Can damage work relationships and effectiveness, as it affects speech and memory.
- Decreases productivity.
- Decreases morale.


Hazards



Effects of Drugs and Alcohol in the Workplace

- Safety concerns are often a company's primary reason for prohibiting marijuana in the workplace, and they are a valid basis for banning the drug.
- Marijuana use has been linked to an increase in job accidents and injuries, and the National Institute on Drug Abuse notes that the short-term effects of marijuana include impaired body movement, difficulty with thinking and problem-solving, memory problems, and an altered sense of time.

Hazards



Effects of Drugs and Alcohol in the Workplace

- Driving under the influence of cannabis is illegal. Driving while high slows motor coordination and other skills needed to drive safely.
- If you feel different, you drive different. And remember, if you've consumed food infused with cannabis – called an "edible" – it can take as long as four hours for it take effect. **If you're not sure if you're high or impaired, stay put, and don't take the chance of harming yourself or others.**
- Smoking cannabis, even as a passenger, in a vehicle is illegal.


Regulations



Regulatory Framework

- Constitutional issues.
- Alphabet soup: OTETA, MRTA, EAP, FMLA, ADA.
- Collective bargaining and employee handbooks.
- Workers' compensation laws.


Regulatory Framework



U.S. Constitution: Searches and Warrants

- Fourth Amendment – Searches and Seizures
 - Testing is a constitutional search.
 - To be constitutional, searches must typically be based on individualized suspicion.
 - In criminal contexts, warrants issued upon probable cause satisfy this need.
 - “Special Needs” exception

Regulatory Framework



U.S. Constitution: Exceptions to Warrants

- Absent individualized suspicion, a search may be reasonable if there a “special need, beyond the normal need for law enforcement.”
- Special need exceptions are context specific and require a balancing of the employees expectation of privacy and the legitimate government interest to be served.



Skinner v. Railway Labor Executives' Assn
489 U.S.602 (1989)

- Federal regulations mandated drug testing for rail employees involved in an accident, and authorized it for certain other safety violations.
- "...it is reasonable to conduct the tests in the absence of a warrant or reasonable suspicion" due to:
 - Limited discretion of employers
 - Surpassing safety interests served
 - Diminished expectation of privacy of the employees

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Treasury Employees v. Von Raab
489 U.S.656 (1989)

- US Customs Service required drug screening for three types of employees:
 - Those involved in drug interdiction
 - Those carrying firearms
 - ~~Those handling classified information~~
- "...the Government's **compelling interests** in preventing the promotion of drug users to positions where they may endanger the integrity of our Nation's borders or the lives of the citizenry outweigh the **privacy interests...**"

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Vernonia School Dist. 47J v. Acton
515 U.S. 646 (1995)

- School district required drug testing of all student athletes.
- The Court considered the decreased expectation of privacy of school children, relative unobtrusiveness of the search and the severity of the need met.
- "...the relevant question is whether that intrusion upon privacy is one that a reasonable employer might engage in."

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Regulatory Framework




Chandler v. Miller
520 U.S. 305 (1997)

What about the following offices:

- Governor
- Lt. Governor
- Secretary of State
- Attorney General
- Judges of the Court of Appeals
- Agency Commissioners

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Regulatory Framework




Alphabet Soup: OTETA

- OTETA: Federal law requires CDL license holders (among others) to be tested pre-employment, post-accident, return-to-duty, random, follow-up and upon reasonable suspicion.
- Sets standards, policies and procedures for testing.
- Preempts state local laws.

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Regulatory Framework



Alphabet Soup: MRTA

- MRTA: New York law legalizes cannabis for adults over the age of 21 and prohibits discrimination against employees for use outside of the workplace.
- Employees not permitted to use or be impaired by marijuana during work.
- Pre-empted by federal law where OTETA applies.
- What about where its prohibited by collective bargaining? See *Moran Ruiz v. Ontario County*, 218 A.D.3d 1341 (2023)

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Regulatory Framework

COMP ALLIANCE
Since 1992

Alphabet Soup: ADA & NYSHRL

NY Public Health Law 3369 – Medical Marijuana

- Being a certified patient shall be deemed to be having a “disability” under article fifteen of the executive law (human rights law).
- Does not bar the enforcement of a policy prohibiting an employee from performing his or her employment duties while impaired.
- Does not require any person or entity to do any act in violation of federal law.

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Regulatory Framework

COMP ALLIANCE
Since 1992

Alphabet Soup: EAP, FMLA & NYSHRL

- EAP: Employee Assistance Programs to help employees overcome alcohol or substance abuse and provide a plan of treatment and care.
- FMLA: Family Medical Leave may be used for time necessary to rehabilitate under the care of a health-care provider.
- ADA / NYSHRL: Does not cover active drug or alcohol abuse, but prohibits discrimination against those recovering.

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Regulatory Framework

COMP ALLIANCE
Since 1992

Collective Bargaining

- The procedures for testing and disciplinary actions are mandatory subjects.
- Testing Policies should balance employee rights and privacy against the special needs of the employer, and be clear and specific as to who is covered, prohibited conduct and the procedures for testing.
- OTETA preempts collective bargaining over testing, but leaves discipline to the employer.

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Five W's of Testing

COMP ALLIANCE
Since 1974

Drug and Alcohol Testing

- Who? (Roles of employees / supervisory personnel)
- What? (Alcohol or controlled substances)
- When? (Pre-employment, post-accident, etc.)
- Where?(On-site, at a facility)
- (W)how? (reliability, invasiveness)

Five W's of Testing

COMP ALLIANCE
Since 1974

Who?

- Who are the employees are subject to testing under your policy?
 - CDL / Drivers: Federal Law.
 - Other "safety-sensitive" employees?
- Who is responsible for supervising and monitoring employees ?
- Who are the key resources for testing? In-house? TPA?

Five W's of Testing

COMP ALLIANCE
Since 1974

What are you testing for?

- Alcohol Testing: On/Off Duty? Tolerable levels? Observable indications?
 - OTETA requires random testing of 10% of driver positions.
- Controlled Substances: On / Off Duty? Tolerable Levels? Observable indications?
 - OTETA requires random testing of 50% of driver positions.

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Five W's of Testing

COMP ALLIANCE
Since 1990

What? Controlled Substances

- Marijuana / Cannabis
- Cocaine
- Opiates (Codeine / Morphine and derivatives)
- Methamphetamine
- MDMA
- PCP



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Five W's of Testing

COMP ALLIANCE
Since 1990

What about Marijuana?

- Cannabis is legal in New York for adult use, but still prohibited by federal law.
- OTETA requires that drug testing screen for THC regardless of state law.
- New York State prohibits testing for off-duty use of cannabis, but does not permit its use on-duty.

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Five W's of Testing


COMP ALLIANCE
Since 1990

When is testing permitted...or required?

- Pre-employment, Promotion or Transfer
- Post-Accident
- Return-to-duty
- Follow-up
- Random
- Reasonable Suspicion

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Five W's of Testing




When? Pre-employment

- Drug tests for new employees should be performed post-hire but pre-employment through a conditional offer.
- Drug testing not required of applicants to a position.
- Applicants should be informed of drug-testing policy.

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Five W's of Testing




When? Post - Accident

- Tests for Alcohol should be administered shortly after the accident
- Tests for controlled substances may take longer
- Employee subject to post-accident testing should remain available for testing

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Five W's of Testing




When? Return to duty and follow up

- Return to duty testing should be administered after receiving any required counseling by a trained substance abuse professional and before an employee undertakes a safety-sensitive job duty.
- Follow-up testing should be administered unannounced, in the manner and frequency advised recommended by a substance abuse counselor.
 - OTETA Minimum: 6 tests in 12 month period.

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Five W's of Testing



When? Random

- Implemented pursuant to written plan.
- OTETA Minimum:
 - 50% driving positions for controlled substances
 - 10% driving positions for alcohol
- NOT % of employees but % of positions – the same employee may be selected more than once if they are drawn at random.


Five W's of Testing



When? Reasonable Suspicion

- The purpose of the alcohol and drug testing regulations in Part 382 of the Federal Motor Carrier Safety Regulations (FMCSR) is to prevent accidents and injuries that are the result of driver misuse of alcohol and/or drugs.
- Section 382.603 effects all persons designated to supervise drivers to determine whether reasonable suspicion exists to require a driver to undergo testing under Sec. 382.307.

Five W's of Testing



When? Reasonable Suspicion

- Articulate symptoms of impairment
 - Specific, contemporaneous, articulable observations concerning the appearance, behavior, speech or body odors"
- Observed by supervisor trained in making these observations.

Five W's of Testing

COMP ALLIANCE
Since 1974

When? Articulate symptoms

- What should supervisors look for from drivers:
 - Bloodshot eyes
 - Dry mouth
 - Increased appetite
 - Fatigue and lethargy
 - Excessive sleepiness
 - Impaired balance
 - Poor co-ordination
 - Lack of attention to grooming and hygiene

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Five W's of Testing

COMP ALLIANCE
Since 1974

Where does testing take place?

- Depending on the circumstances and the test performed, testing may occur:
 - On-site (alcohol screening, post accident).
 - At a collection facility.
- Ensure chain-of-custody of any collected samples to preserve integrity of tests.

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Five W's of Testing


COMP ALLIANCE
Since 1974

(W)how?

- Types of Tests:
 - Blood
 - Urine
 - Breath: Alcohol can be tested for with an evidential breath testing device. A screening test may be administered first, then confirmed by other testing.
 - Salvia / Hair?

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Five W's of Testing




(W)how? Reasonable Suspicion

- Respect privacy – relay “reasonable suspicion” to a supervisor as confidentially as reasonably possible.
- For urine tests, specimen testing should occur in private, unobserved if reasonably possible. (Direct observation required for follow-up and return-to-duty testing under OTETA)
- Preserve chain of custody / integrity of collected sample.

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Five W's of Testing




(W)how? Reasonable Suspicion

- Document all facts and observations. May need them if challenged or to support disciplinary action.
- Employee may have right to consult with counsel or union representative under CBA, so long as there is no unreasonable delay in testing.
- Confirmatory tests are more specific than screening tests.

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Questions???



Questions and requests for additional information

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NYSCMA FALL CONFERENCE

11:00AM – 12:30PM OCTOBER 19TH

Artificial Intelligence (AI) in local government FALL 2023

PRESENTER:

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Presentation location (follow along):

www.edeisenstein.com/blog/

Click on: [AI Presentation for Government Officials \(Oct 2023\)](#)

PRESENTATION GUIDE:

1. What is ChatGPT (how it all started)
The company is OpenAI
Elon Musk Investment into the company
Microsoft buys OpenAI and released ChatGPT

2. Defining ChatGPT (AI chatbot that uses natural language processing (NLP) to respond to users)
Human response chatbot by Microsoft
3. Defining DALL-E and Midjourney (AI model that generates images from text)
text to graphic art translator
How Useful can AI-Generated Images
Issues with gender biases,
Reinforced racial stereotypes & explicit images.
4. What is a Prompt, how to make AI prompts and how they are used today
Prompt discussion, what it does and how to use them
5. AI Hallucinations, are they a real threat
The AI begins to make up stories with detail
Code enhancements are reducing this effect
6. Development of AutoGPT (an autonomous GPT system)
A completely autonomous GPT engine
How some have used it for nefarious reasons
7. Why locally installed versions like GPT4ALL exist now
AI searches without exposure to the Internet
Is it safer to use AI on a local machine, what's the good vs. bad
8. Professor Max Tegmark (LIFE 3.0, research to keep AI beneficial to humanity)
Will the AI displace humanity
How does AI cause Technological unemployment
How the AI begins to replicate humans and animals (AGI)
9. Why GPT is a necessary part of our Future (achieving Web3.0!)
The AI is the necessary technology to allow IoT devices to save to a blockchain
The AI engine will give way to decentralized Internet access
10. What is Industry 5.0 (German Initiative)
German initiative to assure the betterment of Humanity through AI
11. What is Society 5.0 (Japanese Initiative)
The Japanese Initiative to build AI for the betterment of humanity
12. What are the 17 Sustainability Strategies by the United Nations

The UN Sustainability strategies build Smart Cities enabled by AI
Human sustainability is the key to the use of AI

13. How does AI benefit Humanity (10 benefits)

1. **Decision Making**
2. **Skill Development**
3. **Quality Control**
4. **Personalization**
5. **Human-Machine Interaction**
6. **Language Translation**
7. **Education**
8. **Healthcare**
9. **Crisis Management**
10. **Smart-Cities**

14. Government Operations enhancements using AI (top 15 strategies)

1. **Streamlining customer service inquiries**
2. **Automating repetitive tasks**
3. **Enhancing public safety**
4. **Improving accessibility**
5. **Assisting with language translation services**
6. **Improving fraud detection**
7. **Enhancing policy analysis**
8. **Providing language tutoring**
9. **Generating content for educational materials**
10. **Enhancing public engagement and participation**
11. **Improving document classification**
12. **Enhancing cybersecurity**
13. **Improving data privacy**
14. **Improving disaster response**
15. **Enhancing policy implementation**

15. Key takeaways for governments using AI and chatGPT

- ♦ **Generating responses to constituents**
 - ♦ *Faster with higher accuracy and detail.*
- ♦ **Automating repetitive tasks**
 - ♦ *Streamlining management reports and inquiries.*
- ♦ **Improve accessibility and public engagement**
 - ♦ *Government websites and social media platforms.*
- ♦ **Instant responses to questions**
 - ♦ *Engage in meaningful conversations with government*
- ♦ **Improve government operations**
 - ♦ *Fraud detection, disaster response, policy implementation*

NOTES/QUESTIONS



PUBLIC SECTOR COLLECTIVE BARGAINING AND RECENT INTEREST ARBITRATION DECISIONS

*Outline remarks by Bryan J. Goldberger, Esq., Goldberger and Kremer
At the New York State City/County Management Association, Fall Training Program.
October 19, 2023*

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Thank you for joining me today.

As a guide, I have provided an outline of today's discussion.
I encourage you to ask questions so the session can be
as interactive as possible.

Best Regards,
Bryan J. Goldberger, Esq
Partner, Goldberger & Kremer, Employment Law Attorneys

Representing Public and Private Sector Employers for Over 30 years

- Labor Relations
- Collective Bargaining
- Mediation & Arbitration
- Litigation before PERB, State & Federal Courts
- General Municipal Law 207-c & 207-a
- Harassment / Workplace
Violence Policies
- Wage & Hour Matters

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PUBLIC SECTOR COLLECTIVE BARGAINING AND RECENT INTEREST ARBITRATION DECISIONS

The Taylor Law: Civil Service Law §200 to §215

Public Employment Relations Board (PERB):

- Located in Albany, Buffalo, and Brooklyn
- www.perb.state.ny.us
- Created in 1967 with enactment of the Public Employees' Fair Employment Act (also known as the Taylor Law)
- PERB is an independent agency, statutorily separated from the New York State Civil Service Department, that has jurisdiction over disputes involving public employees and public employee organizations. See N.Y. Civ. Serv. Law §200.
- §212 of the Civil Service Law permits local governments to create mini-PERB's so long as PERB finds that their procedures are substantially equivalent to those used by PERB.
- PERB Board
 - Policy making body
 - 3 members appointed by the governor and confirmed by the Senate. Current members are: John Wirenius, Rosemary A. Townley, and Anthony Zumbolo.
 - Governor designates one member as the Chair; the Chair is a full-time employee. See Civ. Serv. Law §205(1).
 - Members have six-year terms.
 - Not more than two members of the board shall be members of the same political party; no member may hold public office or public employment elsewhere in the state. See Civ. Serv. Law §205(2).
- Executive Director
 - Administrative and budgetary responsibilities. See Civ. Serv. Law §205(4)(a); See also 4 NYCRR §208.2.
- Three Program Units
 - **Office of Conciliation:** administers collective negotiations and dispute resolution process. The Director, upon notification by the parties, determines if an impasse in negotiations exists and appoints a mediator and if necessary, a fact finder.
 - **Office of Employment Practices and Representation:** responsible for resolving representation and improper practice matters.
 - **Office of Counsel:** represents PERB in court actions. See Civ. Serv. Law §205(4)(a).
- Functions
 - Controversy involving union representation of employees
 - Adjudication of parties' rights under the Taylor Law
 - Includes jurisdiction over alleged improper practices



- Conciliation of negotiation impasses:

Non-Public Safety Units

- mediation
- fact finding
- legislative hearing

Public Safety Units

- mediation
- compulsory arbitration

Union duties:

1. Avoid interference with or discrimination against an employee for the exercise of his or her protected Taylor Law rights. See Civ. Serv. Law §209-a(2).
2. Good faith negotiations on terms and conditions of employment.
3. A duty to fairly represent (DFR) each employee in the bargaining unit that is a dues-paying member. See Janus v. AFSCME, 138 S. Ct. 2448 (2018)
 - a. The employer is automatically a party in a DFR case. See Civ. Serv. Law §209- a(3).

Employer duties:

1. No interference with employee Taylor Law rights. See Civ. Serv. Law §209-a(1)(a).
2. No actions motivated by an anti-union bias.
3. No interference with union formation or administration.
4. Must negotiate in good faith; judged by the totality of conduct.
5. Must continue all terms of an expired contract (The Triborough Amendment).
6. No use of State funds for union avoidance. See N.Y. Lab. Law §211-a(2);
See also Civ. Serv. Law §209-a(1)(l).
7. No use of State funds to either train personnel as to how to discourage union organization or to discourage participation in a union organizing drive. See N.Y. Lab. Law §211-a(1).
8. Must allow an unrepresented employee union representation if, during any questioning the employee concludes that he or she may become the target of disciplinary action; a reasonable time for the appearance of the representative must be allowed; failure to do either could result in a PERB order disallowing any information secured from the questioning. See Civil Service Law §209-a.1 (g).
 - a. Once employees are unionized, the union represents all employees in the bargaining unit for collective bargaining.
 - b. Employees are covered by the collective bargaining agreement whether or not they are dues-paying members. See Janus v. AFSCME, 138 S. Ct. 2448 (2018).
9. All matters which are terms and conditions of employment that are sought to be implemented, modified, or deleted must be negotiated before an alteration occurs.
10. The fact that a term and condition of employment is not addressed in a labor contract does not authorize unilateral employer conduct, absent contractual right to do so.
11. No separate negotiations on a term and condition of employment with an individual employee who is a member of a bargaining unit.



12. Once a question of representation is raised, usually conveyed in a letter to the CEO, no unilateral changes in employment conditions.
See Village of Suffern, 38 PERB ¶ 3020 (2005).
13. Except for those designated as managerial or confidential, terms and conditions of employment are mandatory subjects of negotiation and, if unionized, cannot be acted upon unilaterally.

What's Negotiable?

Mandatory Topics of Bargaining

- Definition: Terms and conditions of employment, as determined by PERB and the courts, which must be negotiated if raised by a party in negotiations.
- Salaries, wages and hours, and other terms and conditions of employment.
See Civ. Serv. Law §200 (b), (c).
 - Basic rates of pay, whether hourly wage, annual salary, or incentive merits are mandatory subjects. See NYSBA Labor Handbook, p. 647.
 - A mandatory vaccination policy may not be unilaterally imposed. Matter of the Improper Practice Proceeding between Suffolk County Court System, 56 PERB ¶ 4513 (2023).
- An employer and an employee organization must bargain about mandatory subjects in good faith-must make a sincere effort to reach an agreement.
- Traditional insurance benefits such as life insurance, health insurance, and dental insurance are mandatory topics. See NYSBA Labor Handbook, p. 654.
- Holidays, vacations, leaves, and related matters are mandatory topics.
See NYSBA Labor Handbook, p. 657.
- Subcontracting is generally mandatory. See NYSBA Labor Handbook, p. 663.
 - Exception: If work has not been exclusively performed by members of the bargaining unit or if the skills and qualifications necessary to perform the work have significantly changed.
- *Cameras in the workplace*: In Town of Clarkstown, 44 PERB ¶ 4625 (2011), the ALJ held that the Town's installation of video cameras in the work areas of its highway garage was "little more than an enhanced investigatory tool to ascertain employee misconduct," and after balancing the employers interest of protecting its assets with the "constant video monitoring of employee work performance and behavior with discipline as a stated consequence of such monitoring," the ALJ found that the Town had violated the Taylor Law for failing to negotiate the installation and use of the cameras.



Non-Mandatory/Permissive Topics of Bargaining

- Definition: subjects which are not terms and conditions of employment that may be bargained for.
- Non-mandatory issues contained in a labor contract become mandatory subjects if raised in negotiations for a successor agreement.
- See City of Cohoes, 31 PERB ¶ 3020 (1498), and Greenburgh No. 11 UFSD, 32 PERB ¶ 1 (1999).
- Impact of any initial agreement to negotiate a non-mandatory subject.
- Impact of a refusal to continue to negotiate such a subject.

Illegal Topics of Bargaining

- Definition: A subject where, even if it is included in a collective bargaining agreement, it is unenforceable.
- For example, pensions, provisions which would violate applicable law, etc. See Civ. Serv. Law §201 (4).

Who negotiates on behalf of a Municipality?

- The municipal CEO negotiates on behalf of the municipality. See Civil Service Law §201 (12).
- The CEO has the right to determine members of the bargaining team.
- Under Civil Service Law §201 (12), if a tentative agreement were to be reached, the legislative body must approve the funding necessary in order to allow for the implementation of the agreement. The legislative body may not mandate that the CEO pursue specific issues in negotiations.

Past Practices:

- Definition: unwritten conditions in the workplace in existence over an extended period of time.
- PERB has held that to prove the existence of a past practice, a union must show that the practice was:
 1. Unequivocal and mutually accepted;
 2. Has existed without substantial variation for a significant period of time; and
 3. The continuation of the practice could have been reasonably expected by bargaining unit members.
 - See Scotia Patrolmen's Benev. Assn (Village of Scotia), 56 PERB ¶ 3011 (2023). (Summary and Complete Copy Attached to Outline).
- Involve either a mandatory subject of negotiations or a non-mandatory one.
 - For a mandatory subject, changes must be bargained.



- Union remedy for a unilateral change—file an improper practice charge with PERB.
- For a non-mandatory subject, the practice could be unilaterally altered since there is no obligation to negotiate over non-mandatory issues.
 - In this situation, an employer may still have to bargain the impact of the change, as that is a mandatory subject of negotiations.
- Regardless of how long a municipality may have continued a past practice, where contractual language exists addressing the subject matter of the practice, there is an absolute right to unilaterally revert to explicit contractual language.
- See *Nassau County*, 31 PERB ¶ 3064 (1998); See also *NYS Workers Compensation Board*, 32 PERB ¶ 3076 (1999).
- Most recent PERB decision addressing its administrative standards for assessing the existence of a past practice: *Matter of Sullivan Cty. Patrolmen's Benevolent Ass'n, Inc. v. N.Y. State Pub. Emp't Relations Bd.*, 179 A.D.3d 1270 (App. Div. 3rd Dept. 2020).

Impasse Resolution

- "Impasse" is not defined in the Taylor Law.
- Under Civil Service Law §209.2, parties can devise their own mutually agreed upon impasse procedure. This is rarely done in practice.
- In the absence of a mutually agreed upon impasse procedure, Civil Service Law §209.3, et seq., provide the statutory default impasse procedures, depending on the type of bargaining unit involved. See "Functions" of PERB, *supra*.

Invoking the Impasse Procedures: PERB Rules of Procedure Part 205

- Declaration of Impasse filed with PERB's Director of Conciliation
 - May be filed by either party, or jointly by both parties.
 - Form available from PERB.
- Director reviews Declaration and appoints a mediator if the Declaration appears timely and sufficient.
 - Impasse may not be declared before sufficient time has expired to enable parties to fully consider proposals and attempt to reach agreement, *Matter of Johnson City Firefighters*, 12 PERB ¶ 3020 (1979).
 - Director does not conduct a formal hearing to determine whether or not impasse exists.

Mediation Process — First step under all Taylor Law Impasse Procedures

- PERB will not permit parties to waive mediation.
- Civil Service Law §205.4(b) grants confidentiality to the mediator by prohibiting mediator from testifying before any administrative or judicial tribunal, either voluntarily or via subpoena, regarding any information acquired in the course of his or her duties and



also prohibits documents and written communications so acquired from being disclosed. Only exception is where testimony is required pursuant to a criminal trial or proceeding.

Fact Finding Process — Second step under the Taylor Law for all employees other than police officers, firefighters, employees of the New York City and Metropolitan Transit Authorities and their subsidiaries, and a few others.

- Civil Service Law §209.3(b) and (c) provide that PERB shall appoint “a fact-finding board of not more than three members, each representative of the public.”
- PERB by practice will not process a fact-finding request until mediation has been exhausted.
- Fact-finding may be requested by either party or jointly.
- PERB ordinarily appoints a single individual as fact finder. Three person boards may be used in certain high-profile cases involving large bargaining units.
 - PERB staff mediators are not appointed as fact finders. All fact finding is done by members of PERB’s ad hoc fact-finding panel.
 - PERB encourages fact finders to attempt to mediate a settlement of the dispute if possible.
 - Generally, only mandatory subjects of bargaining may be brought to fact-finding. Board of Higher Education of the City of New York, 7 PERB ¶ 3028 (1974); Rockville Centre Principals Ass’n, 12 PERB ¶ 3021 (1979).
 - A fact finder may, however, consider and make recommendations on non-mandatory subjects in the absence of an improper practice charge filed with PERB by an objecting party. The fact finder does not make determinations regarding whether an item is mandatory or non-mandatory.
 - Exception to the general rule: the “conversion” theory adopted by PERB in City of Cohoes, 31 PERB ¶ 3020 (1998) and Greenburgh No. 11 Federation of Teachers, 32 PERB ¶ 3024 (1999); Non-mandatory items which are contained in a collective bargaining agreement become mandatory subjects which may be advanced to fact-finding or compulsory interest arbitration.

Fact-Finding Hearing

- Civil Service Law §205.5(j) and (k) — Fact-finder may administer oaths and affirmations, examine witnesses and documents, take testimony and receive evidence, and compel attendance of witnesses and production of documents by issuance of subpoenas.

Report and Recommendations

- Fact-finder has power to make public recommendations for the resolution of the dispute. Civil Service Law §209.3(b).
- The fact-finder’s recommendations are advisory only. Onenstein v. Gora, 4 PERB ¶ 7012



(Sup Ct. Suffolk County; 1971).

- After the report is transmitted to the parties, the fact-finder may "assist the parties to affect a voluntary resolution of the dispute." Civil Service Law §209.3(c)(ii).
- The findings and recommendations are made public within five days of the transmission of the report to the parties. Civil Service Law §209.3(c)(iii).
- If Fact-Finding Report is rejected in whole or part by either of the parties, the Chief Executive Officer forwards a copy of the report to the legislative body with the CEO's recommendation for settlement. The Union may also submit its recommendations to the legislative body. Civil Service Law §209.3(e)(i)(ii).
- The legislative body or a committee thereof conducts a public hearing at which both sides are required to explain their position regarding the fact-finding report. Civil Service Law §209.3(e)(iii).
- The legislative body is empowered to take such action as it deems to be in the public interest, including the interest of the public employees involved. Civil Service Law §209.3(e)(iv). The legislative body may impose term and conditions of employment. The imposition may not exceed one fiscal year, however City of Mount Vernon, 5 PERB ¶ 3057 (1972).

- The one-year term is measured from the expiration of the prior contract, if fiscal year and contract year are not coterminous, or, if no contract exists, from the imposition date. Triborough Bridge and Tunnel Authority, 10 PERB ¶ 3027 (1977);

Opinion of Counsel, 20 PERB ¶ 5007 (1987).

- **Caveat:** Because it is an improper practice under Civil Service Law § 209- a.1 (e) for an employer to change an expired agreements terms before a new agreement is negotiated, a union can elect to stand on the terms of the current agreement and refuse to participate in the legislative proceeding. The legislative body is precluded by the Triborough Amendment from imposing a settlement which diminishes employee rights under an expired collective bargaining agreement.

County of Niagara v. Newman, 104 A.D.2d 1, 17 PERB ¶ 7021 (4th Dept, 1984).

If the union participates in the legislative determination process, it waives its right to elect to stand on existing contract terms. A union cannot participate, and then wait to see the results of the determination, before making its election. City of Buffalo, 19 PERB ¶ 3023 (1986).

The legislative body can impose employment terms, notwithstanding a union's election to stand on existing contract terms, if the imposition deals with items not covered by the contract or if it simply reimposes the terms of the expired contract for one year. Suffolk County OTB, 28 PERB ¶ 4545 (1993) (*Emphasis added*).



For Police and Fire Bargaining units

- If mediation does not produce an agreement within 15 days after the mediator's appointment, either party may file a Petition with the Director of Conciliation to refer the dispute to a public arbitration panel, Civil Service Law §209.4(b). Despite the 15-day time frame, the Director will not process a petition unless it is clear that a reasonable mediation effort has been exhausted.

The Interest Arbitration Process

- The Petition must contain items listed in §205.4 of PERB's Rules of Procedure (4 NYCRR §205.4). Form is available from PERB.

Response to the Petition is due within 10 working days of its receipt and must contain the items listed in 4 NYCRR §205.4(b), including respondent's statement of agreed upon terms and its position on items which are still outstanding. The Response must also reference any improper practice charge objecting to arbitration. Under §205.6 of PERB's Rules, such objections include claims that a matter being submitted is not a mandatory subject of negotiations; was not negotiated prior to filing the petition; and/or was resolved by agreement during negotiations. See 4 NYCRR §205.5. Any such improper practice charge may not be filed with the Director of Public Employment Practices and Representation after the date a timely response was or should have been filed with the Director of Conciliation. 4 NYCRR §205.6.

 - If a non-mandatory item is contained in the expired agreement, it is treated as mandatory for purposes of submission to the arbitration panel.

The Interest Arbitration Panel

- Three (3) members. Parties each select a member of the panel and jointly agree on the third, neutral member, Civil Service Law §209.4(c)(ii); 4 NYCRR §205.7. If parties cannot agree on the neutral member, PERB submits a list of nine (9) arbitrators, and parties alternately strike names until one (1) member remains.
- After designation of the panel by PERB, the conduct of the proceeding is within the exclusive control of the panel but must conform to applicable law. Civil Service Law §205.8.

Interest Arbitration Proceedings and Award

- In formulating a "just and reasonable award," the panel must specify the basis for its findings and must consider stated statutory criteria, "in addition to any other relevant factors." The statutory criteria required to be considered by the panel include:
 1. Comparison of the wages, hours and conditions of employment of the employees involved in the arbitration proceeding with those of other employees performing similar services or requiring similar skills under similar working conditions with other



- employees generally in public and private employment in comparable communities;
2. The interests and welfare of the public and the financial ability of the public employer to pay.
 3. Comparison of peculiarities in regard to other trades or professions, including specifically, (1) hazards of employment; (2) physical qualifications; (3) educational qualifications; (4) mental qualifications; and (5) job training and skills.
 4. The terms of the parties' past collective bargaining agreement, "including but not limited to the provisions for salary, insurance and retirement benefits, medical and hospitalization benefits, paid time off and job security."
- The panel's award is final and binding and not subject to approval by the Employer's legislative body. Civil Service Law §209.4 (c)(vi).
 - The duration of the panel's award shall "in no event exceed two (2) years from the termination date of any previous collective bargaining agreement; if there is no previous agreement, then not more than two (2) years from the date of the panel's determination. Civil Service Law §209.4 (c)(vi).
 - The award is subject to judicial review under CPLR Article 75 not Article 78. Caso v. Coffey, 41 N.Y.2d 153, 9 PERB ¶ 7026 (1976).

Sample Collective Bargaining Agreement Language

1. Sample Grievance Definition: A grievance is a dispute or difference of opinion raised by an employee or by a group of employees (with respect to a single common issue) covered by the Agreement against the Department involving as to them the meaning, interpretation, or application of the express provisions of this Agreement.
2. Sample Work Rules Provision: The employer may adopt, change, or modify work rules. Whenever the Employer changes work rules or issues new ones, the Union will be given at least five (5) days' prior notice, absent emergency, before the effective date, in order that the Union may have the opportunity to discuss said rules with the Employer before they become effective if the Union so desires. Further, copies will be given to employees before such rules take effect and a copy will also be given to the Union.



SUMMARY OF RECENT INTEREST ARBITRATION DECISIONS

Matter of Evans Police Benevolent, Inc v. Town of Evans, New York PERB CASE NO.: IA2021-008; M2021-077

Award: Base Salaries

Base Salaries are to be increased 1.5% retroactive to January 1, 2021 and an additional 1.5% increase retroactive to July 1, 2021. Base Salaries are to be further, increased 1.5% retroactive to January 1, 2022 and an additional 1.5% increase retroactive to July 1, 2022.

Panel Determination

On the comparability factor, the Panel rejected the lists of comparable units offered by the parties. Instead, the Panel developed a "proper list of comparable officers based on facts such as size of the unit; size and location of the municipality and the demographics of the community such as household income."

Matter of Baldwinsville Police Benevolent Association, Inc. v. Village of Baldwinsville PERB CASE NO.: IA2021-003; M2020-008

Award on Base Wages

The Base Wage schedule shall be increased by 2.5% effective March 1, 2020, and an additional 2.5% effective March 1, 2021, to reflect the Base Wage Schedule found on pages 21 and 22 of the Opinion and Award.

Panel Determination

On the comparability factor, the Panel determined that the Villages and Towns proposed by the PBA are the most appropriate group of comparables, as they all provide similar services, and many of them share many other similar characteristics, including size of department and size of jurisdiction. The PBA argued that its police officers should be compared with police officers in villages in close proximity to Baldwinsville as "geographical area is the most relevant way to determine the market. After all, that is who the Village [of Baldwinsville] is competing with to attract police officers." (p. 4). Further, PBA contended that "the phrase 'in comparable communities' in the comparability criteria does not only mean governments of exactly the same type or size or with the same crime statistics." (p. 4-5). Essentially, the Panel held that towns and villages can be comparable jurisdictions so long as the relevant factors are not overlooked.

continued on the following page



Matter of The City of Fulton v. Fulton Firefighters Association
PERB CASE NO.: IA 2021-006; M2021-014

Award on Base Wages

2021: 3.0% (retroactive to 01/01/2021)
2022: 3.0% (retroactive to 01/01/2022)

Firefighter Wage Progression

Prior to the determination of this award, a Fulton Firefighter would only receive top-pay after 17 years of service. The Award of this Panel compressed the existing 17-year scale down to 14, removing steps 16, 15, and 14.

Panel Determination

The primary issue in this matter was whether a 17-year progression to receive top-pay was too long a wait. On the comparability factor, the Panel concluded that the “decades-long parity” between the Fulton Firefighters and Fulton Police Officers should be maintained. In rejecting the City’s submission of six (6) comparable municipalities, which did not include the Fulton Police Officers, the Panel determined that the Union’s comparables (Fulton Police Officers and Oswego Firefighters), along with the historical precedent of comparing the same, were the proper and appropriate comparables in the issuance of this Award as they share similar local economics, demographics, and a similar range of wages and benefits for firefighters.

The Matter of Buffalo Police Benevolent Association, Inc. v. City of Buffalo, New York PERB
CASE NO.: IA 2020-012; M2019-080

Award

1. Effective July 1, 2019 and retroactive to that date, the base salary schedule on all steps and titles will be increased by three percent (3.0%).
2. Effective July 1, 2020 and retroactive to that date, the base salary schedule on all steps and titles will be increased by three point two five percent (3.25%).

Panel Determination

On the comparability factor, the Panel determined that the selection of comparables presented by both the City and the PBA were reasonable. The City’s selection of comparables consisted of other large cities spread across the state, and the PBA’s selection focused primarily on wages paid to police in local communities. Despite the reasonableness of the City’s and PBA’s comparable selections, the issue of a wage increase for PBA members



ultimately rested on two factors: the interest and welfare of the public, and hazards of employment. The Panel issued an increase in pay to PBA members "because of the inherently hazardous nature of their employment." Specifically, in its decision, the Panel cited the mass shooting that occurred in the Buffalo grocery store that cost a police officer his life as an example of the inherently hazardous nature of police work.

Update to Past Practices:

- *Scotia Patrolmen's Benev. Assn (Village of Scotia)*, 56 PERB ¶ 3011 (5/23/23) The Board affirmed an ALJ's determination that the Village violated its bargaining obligation when it unilaterally changed its military leave policy by discontinuing a past practice of granting 22 working days or 30 calendar days of paid military leave and implementing a military policy that calculated leave in hours, not days. (see 56 PERB ¶ 4522 [2033]).
- The Board concluded record evidence of a ten-year practice of calculating military leave in days was sufficient to establish a binding past practice and to give unit members a reasonable expectation that the practice would continue. The Board concluded that the AU in the instant matter applied the appropriate standard in finding the employer's actions violated §209-a.1(d) of the Act.
- PERB explained that the earlier *Scotia* decision was not dispositive of the instant dispute because of the factual uniqueness of each case. Accordingly, the Village was ordered to rescind its current military leave policy which granted 180 hours of paid military leave per calendar, and to restore its prior practice of granting unit members 22 working days or 30 calendar days of paid military leave.
- The Board also directed the Village to make the affected unit employees whole for lost wages and benefits and to post a notice.



APPENDIX

Matter of Sullivan County Patrolmen's Benevolent Assn., Inc. v New York State Pub. Empl. Relations Board - VIEW HERE - bit.ly/3Qc7Tty or scan QR Code



56 PERB P4513 - VIEW HERE - bit.ly/46HR4Fq or scan QR Code



56 PERB P3011 VIEW HERE - bit.ly/3ZOXfVF or scan QR Code

