Protecting Pensions And Contract Rights For Public Sector Employees

A look at how, in the current economic climate, some cities and states have attempted to impair contracts and pensions and how the public sector labor force has and can protect against those efforts

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Introduction

Recently, in an important decision for public employees, the Illinois Supreme Court rejected an attempt by Illinois lawmakers to impair the State’s public pension system. The proposed legislative changes would have, among other items, curtailed future cost-of-living adjustments for workers, raised the age of retirement for some, and imposed a cap on pensions for those with the highest salaries. Though no one could reasonably dispute the gravity of Illinois’ budgetary difficulties, the court recognized that “economic conditions are cyclical and expected,” and “fiscal difficulties have confronted the State before.” The Legislature could not attempt to cure budgetary shortfalls on the backs of public employees, even in dire circumstances, because the Illinois constitution provides that benefits promised as part of a pension system for public workers “shall not be diminished or impaired.” To the court, “crisis [was] not an excuse to abandon the Rule of law….it [was] a summons to defend it.” Thus, the Legislature could not unilaterally diminish the fundamentally and constitutionally preserved retirement benefits of public workers.

The Illinois Supreme Court’s decision is one of several recent decisions nation-wide dealing with the constitutionality of a state’s seeking to impair contractually bargained-for pension rights of public employees. Yet, the decisions have not all been decided the same way and have had mixed results for public employees.

Even more recently, in a lawsuit filed by a number of New Jersey public employee unions, New Jersey Superior Court Judge Mary Jacobson initially ruled that Governor Chris Christie’s attempt unilaterally to withhold $1.6 billion of contributions from the public pension system to cure New Jersey’s budgetary shortfall was unlawful.

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Co-Editors: Alan M. Klinger, Co-Managing Partner, and Dina Kolker, Special Counsel in Stroock’s Litigation and Government Relations Practice Groups. The Co-Editors wish to thank Beth A. Norton, Special Counsel, and David J. Kahne, Julie L. Goldman, and Samantha M Rubin, associates, in Stroock’s Litigation and Government Relations Practice Groups. We also acknowledge the contributions of Scott A. Budow who was a summer associate in the Stroock program.
The court held that reneging on the State’s financial obligations to public sector workers violated the contract rights of the employees under the New Jersey and Federal Constitutions.

The court concluded that because the State “failed to present any real evidence of an emergency situation or of its having considered any alternatives to cutting out the [pension payments] entirely to balance the budget,” the action was unconstitutional. Governor Christie was ordered to make the $1.6 billion payment to the public pension system because the State had “substantially impaired plaintiff’s contractual rights without justification.”

However, the New Jersey Supreme Court reversed the lower court ruling. In a lengthy opinion, the court held that the New Jersey legislation that created the annual obligation to fund the severely underfunded pension system ran afoul of the State Constitution’s Debt Limitation Clause, a unique New Jersey constitutional mandate prohibiting the Legislature from incurring debts, either by contract or by statute (i.e., without voter approval), exceeding one percent of the annual budget. The court, in its first full paragraph, made absolutely clear that whether New Jersey’s “men and women must be paid their pension benefits when due [was] not in question.” Instead, the issue was whether the funding legislation in question, Chapter 78, could create a valid and legally enforceable contractual right to an annual contribution from the State into the pension funds in the absence of voter approval. Because of the New Jersey-specific constitutional debt limitation provision, under state law it could not. There was no enforceable contract.

Importantly, on this strictly legal question pertaining to a statutory financing scheme, the court had no occasion to consider whether the State’s commitment to pay retirement benefits when due is a valid and binding contract and whether its failure to pay would constitute a violation of the federal or State Contracts Clause. The language of the decision, and the court’s repeated emphasis on the narrow question before it, suggests that it remains, at the very least, an open question. Indeed, the court recognized the importance of New Jersey fulfilling its obligations and noted that the State “must get its financial house in order” to “honor its compensation commitment to retired employees.” It further emphasized that “the State repeatedly asserted at oral argument that it is not walking away from its obligations to the pensions and to pay benefits due to retirees.” Thus, while the decision ostensibly appears to be a victory for the Christie administration, no overly broad conclusions about its substance or applicability of the decision to other jurisdictions should be drawn.

For over a decade, New Jersey has, on average, made less than half of its required annual contributions to its state pension fund and, as in many states like Illinois, with politicians loathe to propose tax increases or to make the budgetary cuts needed to fund shortfalls, attention has now turned to the once believed to be inviolable public sector pensions.

The recent Illinois decision and the New Jersey lawsuit, captioned Burgos v. New Jersey, despite their ultimate differing outcomes, provide a path for how public sector unions can utilize state and federal constitutional provisions to protect the safety net that their members have for so long counted on for their retirements. New Jersey’s and Illinois’ budgetary imbalance and consequent fiscal difficulties are not uncommon. Although the U.S. economy is improving, as evidenced by lower unemployment rates, drastically reduced gas prices,
and surging stock markets, fiscal concerns remain for some of the nation’s largest cities and states. Recovering from the recession has been harder for certain U.S. municipalities, in part because despite the improved housing and labor markets, tax revenues – the largest source of government funds – have not universally rebounded as quickly. Many American cities are still struggling to adjust to the shrunken revenue streams that resulted from the recession, the decline in federal and state aid, and the decline in property tax revenue. In some recent, well-known severe cases – Detroit, Michigan, San Bernadino, California, and Stockton, California – the impact of the recession, combined with the unwillingness of governments to make hard choices, has pressed municipalities into bankruptcy. Aside from cities and smaller localities, some state governments, are also facing difficult choices in today’s challenging economic climate.

Under the guise of these budgetary constraints, policymakers have taken aim at public sector pensions and contracts in an attempt to stabilize finances. Such unilateral attempts to reduce or eliminate altogether contractually bargained-for rights, have been met with challenges across the country, based on both state and federal constitutional grounds. Under numerous state constitutions, including Illinois’, New Jersey’s, and New York’s, public sector employee pensions are accorded the status of contracts, “the benefits of which shall not be diminished or impaired,” under a provision colloquially referred to as the “Non-Impairment Clause.” Similarly, under Article I, Section X of the Federal Constitution, states are prohibited from impairing contractual obligations, under a provision known as the “Contracts Clause.” The federal Contracts Clause and state non-impairment clauses safeguard the legitimate expectations of employees who devote their lives to public service and ensure that the promises made to municipal workers when they began their careers are ultimately fulfilled. As they have historically, many public sector workers take lower paying jobs precisely for the security and predictability of seniority and a pension. Yet, these protections are not absolute. In truly dire economic circumstances, governments exercising their constitutionally recognized police power may trump these protections and modify or breach labor contracts. Importantly, however, they may only legally so act as a last and necessary resort.

The first part of this article outlines the contours of state non-impairment clauses and the federal Contracts Clause (and state analogs), focusing on how courts analyze challenges made on those constitutional bases. The second part of this article discusses recent legislative and judicial impairments of public sector pensions in both Detroit and Illinois. Last, we examine the state of the law in New York, using recent national developments to inform the analysis.

Methods for Protecting Pensions and Contract Rights

The Non-Impairment Clause – Protecting Pensions

Public sector employees in certain states can use the non-impairment clause to protect their pension rights from unilateral reductions imposed by a state or local government. Under many state constitutions, including New York’s, pensions are granted contractual status. Article V § 7 of the New York State Constitution declares that, “membership in any pension or retirement system of the state or of a civil division thereof shall be a contractual relationship, the benefits of which shall not be diminished or impaired.” Notably, there is no qualification. Thus, any judicial or legislative
action that seeks to impair pension rights is arguably a violation of New York’s Non-Impairment Clause.\textsuperscript{15}

Case law and the legislative history confirms that the purpose of New York’s Non-Impairment Clause was “to fix the rights of the employees at the time of commencement of membership in the [pension] system, rather than as previously at retirement.”\textsuperscript{16} The clause prohibits unilateral action by either the Legislature or the employer that would diminish or impair the rights employees have gained through their membership in the system.\textsuperscript{17}

The Contracts Clause – Protecting Contract Rights

In addition to non-impairment clauses, the federal Contracts Clause and its more well-developed caselaw protects all citizens nationwide from having their contract rights modified or impaired by government officials. It applies commonly to labor contracts between government employers and public employee unions. Wage freezes or furloughs, for example, which typically abrogate the collectively bargained-for wage increases of municipal workers, fit neatly within the constitutionally contemplated paradigm of a state impairing a citizens’ contractual rights. To challenge the imposition of a wage freeze or furlough, employees have argued that by imposing the freeze, the state is violating its obligations under the federal Contracts Clause, which provides that “[n]o state shall . . . pass any . . . law impairing the obligation of contracts.” (Most states have a contracts clause analog that mirrors the federal provision.) In addition to challenging wage freezes or other diminution of contract rights, the Contracts Clause may also be used to challenge a unilateral impairment of public sector pensions in states that recognize pensions as contractual obligations. In New York and other states, through the Non-Impairment Clause, the constitution not only prohibits the impairment of pensions but expressly recognizes pensions as contracts. Other states have afforded pensions contractual constitutional protection via court rulings.\textsuperscript{18}

To establish a viable Contracts Clause claim, employees must show there has been a “substantial impairment of a contractual relationship.”\textsuperscript{19} Courts will assess, whether a contractual impairment is constitutional: “(1) whether the contractual impairment is in fact substantial; if so, (2) whether the law serves a significant public purpose, such as remedying a general social or economic problem; and, if such a public purpose is demonstrated, (3) whether the means chosen to accomplish this purpose are reasonable and appropriate.”\textsuperscript{20} When a state is impairing its own contracts, as is often the case with municipal and state workers, the impairment is scrutinized more closely than if a state is impairing private contracts.\textsuperscript{21} “Courts are less deferential to a state’s judgment of reasonableness and necessity when a state’s legislation is self-serving and impairs the obligations of its own contracts.”\textsuperscript{22} Further, the level of review is heightened if the impairment is severe. The United States Supreme Court has recognized “[t]he severity of the impairment is said to increase the level of scrutiny to which the legislation will be subjected.”\textsuperscript{23}

The most significant hurdle in prevailing on a Contracts Clause claim from a labor perspective is demonstrating that the impairment did not “serve a significant public purpose” or that the impairment was not “reasonable and appropriate” to accomplish that purpose. In \textit{Buffalo Teachers Fed’n v. Tobe} (“Buffalo Teachers”), the Second Circuit analyzed whether legislation establishing a wage
freeze to deal with Buffalo’s fiscal crisis was a violation of the Contracts Clause. 24 There, the court found that the wage freeze did not violate the contracts clause because the freeze was “reasonable and necessary” 25 during an extreme economic crisis in the city of Buffalo during 2003. 26 Buffalo’s population was declining, its poverty rate was above 20% and its credit rating was near junk status. Importantly, the court emphasized that the wage freeze was utilized as a “last resort measure,” imposed “only after other alternatives had been considered and tried,” including, among other things, a tax increase and a city-wide hiring freeze. 27 Other factors the court considered in determining the reasonableness of the wage freeze was that the freeze was temporary, and applied prospectively to future wages, not to past wages already earned. 28 The Buffalo Teachers precedent clarifies that though a government’s interest in addressing a dire fiscal emergency may constitute a legitimate public interest, the existence of revenue shortfalls or other budgetary problems alone does not satisfy the significant public purpose inquiry. 29 Relief from the obligation to pay its workers is useful from a budgetary perspective to any government. But a wage freeze or other unilateral contract impairment is not just another tool for balancing municipal budgets; it is a tool that must only be used as a last resort. 30

In the case of the New Jersey appellate court, Judge Jacobson began her analysis by stating that New Jersey’s Non-Impairment Clause created a contractual right for pensions between public employees and their employers. 31 While recognizing that the constitutional prohibition is not absolute, the court held that the State’s decision to eliminate $1.57 billion of its $2.25 billion obligation to the pension system reflected a substantial impairment “by any measure.” 32 Moreover, because “a State is not completely free to consider impairing the obligations on par with other policy alternatives,” New Jersey’s Governor could not unilaterally cut pensions, more than a year before the end of the fiscal year, before even considering other budgetary alternatives. 33 The court afforded less deference to the State in its analysis of whether the Governor’s actions were reasonable and necessary because the State’s own economic self-interest was at stake. Quoting the Supreme Court’s seminal decision in U.S. Trust, the court stated that “[i]f a State could reduce its financial obligations whenever it wanted to spend the money for what it regarded as an important public purpose, the Contracts Clause would provide no protection at all.” 34

Though the New Jersey Supreme Court reversed the decision on other grounds, the lower court’s decision (and Justice Albin’s dissent in the Supreme Court decision) is critical as it used the Contracts Clause analytical framework of U.S. Trust and Buffalo Teachers and applied it to the impairment of state employee pensions. A future challenge in New Jersey to the actual reduction of pension payments should pick up on Judge Jacobson’s reasoning in this regard. As the Supreme Court found, New Jersey must get its “financial house in order,” but to withstand scrutiny, impairing pensions must be a last, not a first resort.

Comparing the Non-Impairments Clause and the Contracts Clause

Since its adoption, the Non-Impairment Clause in New York has most often been used to prohibit the Legislature from altering the formula by which the amount of retirement benefits is determined. 35 In both Kleinfeldt v. New York City Employees’ Retirement System and Birnbaum v. New York State Teachers Retirement System, the New York Court of Appeals explained that even if their decisions
invalidating the Legislature’s attempt to alter the retirement benefits formula would “plunge[]” the retirement system “into bankruptcy,” the court was “not at liberty to hold otherwise” as the constitutional amendment prohibits – without qualification – official action which “adversely affects the amount of retirement benefits payable to the members under [the] laws and conditions existing at the time of his entrance into retirement system membership.” 36 In Kleinfeldt, the court further emphasized that “[a]lthough fiscal relief is a current imperative, an unconstitutional method may not be blinked.” 37

This reasoning suggests that the Non-Impairment Clause may actually be stronger than the Contracts Clause and a first and threshold line of defense, as the Non-Impairment Clause – unlike the Contracts Clause – may protect pensions even in the event of a fiscal crisis. These New York cases, along with the Illinois decision discussed below, support the position that the Non-Impairment Clause may provide an absolute protection against pension reductions. However, the inviolability of New York’s and other state’s non-impairment clauses may come into question. Some judges in states with similar non-impairment clauses have found that the pension protection provision is not ironclad. These judges hew more closely to the Contracts Clause “last resort” analysis in determining whether pensions may be impaired.

**Legislative and Judicial Impairments in Today’s Economic Climate**

The contours of non-impairment clause jurisprudence can be seen in the recent examples of both Detroit and Illinois. Both illustrate what circumstances may allow for a successful constitutional challenge.

**Detroit’s Bankruptcy and Public Sector Pensions**

Detroit’s bankruptcy filing in 2013 underscores the vulnerability of pensions amidst tough financial times. Detroit’s bankruptcy filing was not surprising, as the city had reached rock bottom following “decades of decline” and the “flight of residents and businesses to the suburbs.”38 It stands as the biggest municipal bankruptcy filing in the country’s history, a true low for the “hollowed-out relic that once was hub for the U.S. automotive industry.”39 Detroit, like Buffalo in 2003, was in dire economic straits, experiencing significant decreases in population, employment, and revenue. These decreases caused the city’s infrastructure to decay, its crime rates to rise, and its borrowing to become excessive.40 Detroit’s debt, upon filing, was estimated to be $18 billion.41

In the face of Detroit’s challenging financial circumstances, its public sector employees sought to protect the pensions they were promised. Michigan, like New York, has a constitutional non-impairment clause protecting them. Article IX, § 24 of the Michigan Constitution reads, “[t]he accrued financial benefits of each pension plan and retirement system of the state and its political subdivisions shall be a contractual obligation thereof which shall not be diminished or impaired.” Several public sector employee unions challenged Detroit’s eligibility to file for bankruptcy and its attempt to diminish their pensions. The unions argued that “the city filed for bankruptcy with the sole intention of diminishing pension benefits, and that the filing violates state and federal constitutions.”42 However, the court explained that although the “the State of Michigan cannot legally provide for the adjustment of the pension debts of the City of Detroit” due to the “prohibition against the State of Michigan impairing contracts in both the...
United States Constitution and Michigan Constitution . . . [t]he federal bankruptcy court, however, is not so constrained.” The court reasoned that because the Bankruptcy Clause of the U.S. Constitution, and the corresponding Bankruptcy Code, empower the Bankruptcy Court to impair contract rights, pensions – though armed with constitutional contractual status, could be impaired in bankruptcy. The court stated, “[t]heir has long been understood that bankruptcy law entails impairment of contracts.” Thus, despite the seemingly absolute language of the Michigan Non-Impairment Clause, Bankruptcy Judge Steven Rhodes found that Detroit pensions could be impaired in order to settle the bankruptcy.

Importantly, the linchpin of Judge Rhode’s ruling was that (1) the situation in Detroit was so dire that municipal bankruptcy was necessary and (2) within that municipal bankruptcy context, impairment of bargained-for rights was permissible.

As a result of the court’s decision, a settlement with the unions, which reduced the pensions of retirees by 4.5% and eliminated their cost-of-living adjustments, was reached by the parties and confirmed by the court on November 7, 2014. Clearly, Detroit’s bankruptcy significantly impacted the lives of the hard working people of Detroit, altering their expectations of retirement.

Illinois Workers Fight Back

Like Detroit and New Jersey, the State of Illinois is enduring persistent economic and budgetary difficulties. Despite the national economic recovery and a recent increase in state income taxes, Illinois is “in a deeper financial hole than ever,” according to a recent state financial report. Illinois has “both atypically large debts and structural budgetary imbalances” that threaten to rapidly expand the State’s already growing debts and deficits. It has the lowest credit rating of any state, and it now faces future credit downgrades, which will further increase the state’s high cost of borrowing. To combat its rising deficits, Illinois, like other governments, turned to legislation to overhaul its pension system. Unlike Judge Rhodes’ decision in Detroit however, the Illinois courts have been unwilling to allow the government to dishonor its pension commitments.

In December 2013, Illinois passed legislation in an effort to close the gap of $100 billion of unfunded liabilities in the State’s retirement system. This legislation attempted to restore fiscal balance “by raising the retirement age for government employees and cutting cost-of-living adjustments.” Plaintiff public sector unions brought suit to enjoin enforcement of the law on the grounds that it unconstitutionally impaired public employee pension rights under the Illinois Non-Impairment Clause. The State argued that the act was justified as an exercise of its police powers. By order dated November 21, 2014, Illinois Judge John Belz struck down the legislation ruling that “because the Act diminishes and impairs pension benefits and there is no legally cognizable affirmative defense, the Court must conclude that the Act violates the Pension Protection Clause of the Illinois Constitution.”

Judge Belz “rejected Illinois’ argument that pensions could be cut to protect the public welfare in an emergency, including the state’s precarious financial situation.” He explained that the Illinois “Pension Protection Clause contains no exception, restriction, or limitation for an exercise of the State’s police powers or reserved sovereign powers.”

The Attorney General of Illinois filed a motion to appeal Judge Belz’s ruling. The Illinois Supreme Court heard oral arguments on March
11, 2015 and on May 8, 2015 the Court unanimously affirmed, finding that state politicians had attempted to correct Illinois’ fiscal problems on the backs of public sector retirees without a meaningful effort to distribute the burden among all Illinoisans. Other means, such as increasing state income taxes, had not been considered and even a budgetary crisis was not an excuse to override the clearly stated absolute protection of pensions.  

Following Judge Belz’s ruling in the lower court, public sector employees of Illinois took the offensive, seeking to challenge additional pension-impairing legislation passed by the State directed towards municipal employees in Chicago. Public Act 98-0641, which came into law in June 2014, “demands increased pension contributions from [Chicago] employees and limits their cost-of-living adjustments” in an effort to “cover a funding shortfall of as much as $9.4 billion in two city pension funds supporting more than 60,000 workers and retirees.”61 In December 2014, a coalition of unions and city employees filed suit to strike down the legislation. In their complaint, the coalition stated “[u]nless this court strikes down and enjoins implementation of the act, plaintiffs and thousands of other current and retired city of Chicago and Chicago Board of Education employees will be harmed, and the trust that all Illinois citizens place in the inviolability of their constitution will be breached.”62 The outcome of this new litigation should shed further light on the viability of challenges to unilateral pension-impairing legislation in states with non-impairment clauses.

Lessons To Be Drawn From Detroit, Illinois and New Jersey  

New York public sector employees can learn from the cases in Detroit, Illinois, and New Jersey despite the still unsettled state of the law. These experiences provide a sense of the circumstances under which a court may permit the abridgement of public worker pensions and when it might resist unilateral legislative or executive action. They also provide useful information on the effectiveness of the two primary legal challenges available to public sector unions to thwart pension and benefit reductions: one based on state non-impairment clauses, as was the case in Illinois, and one, as in New Jersey and Buffalo, based on state and federal contracts clause claims.

In Detroit, the court permitted the impairment of pensions because of the city’s bankruptcy and the federal court’s perceived ability to invalidate public contracts without violating the Contracts Clause. Detroit’s decision rested on the city’s dire financial crisis and the federal court’s analysis that federal bankruptcy law trumps both the State Non-Impairment Clause as well as the federal Contracts Clause.

In Illinois, despite the State’s precarious financial situation, the court did not permit pensions to be impaired. There, the public sector unions pointed to the Non-Impairment Clause, and the court interpreted the clause as an absolute protection against any reduction the state legislature wished to impose upon the public employee pension system. By contrast, in New Jersey, the Supreme Court,
assured by counsel that the State “is not walking away from its obligations to the pensions systems and to pay benefits due to retirees” found that a unique New Jersey constitutional provision, prevented the formation of a contract requiring certain pension funding levels. No such constitutional provision exists in New York.

The takeaway is that at the very least in New York – because of the Buffalo decision and the fact that pensions are constitutionally protected contracts – pensions may only be impaired when a municipality is suffering a severe fiscal crisis as in Detroit or Buffalo, and, even then, absent bankruptcy only once all other reasonable alternatives have been tried. However, an unprecedented situation akin to Detroit’s bankruptcy is unlikely to occur in the foreseeable future in New York. So long as New York State and its municipalities are not on the verge of dire fiscal crisis, public employees here should find comfort in the state and federal constitutional arguments, which succeeded in Illinois and, at least initially, New Jersey, to bar any attempted pension reduction. A challenge to pension or contract infringing governmental acts should focus first on the unambiguous constitutional language of the Non-Impairment Clause (“benefits… shall not be diminished or impaired”) and second on whether the government action to abrogate contractual rights or pensions is truly a measure of last resort.

By David J. Kahne, an associate in the Litigation and Government Relations Practice Groups of Stroock & Stroock & Lavan LLP.

For More Information

Alan M. Klinger  Dina Kolker
212.806.5818  212.806.5606
aklinger@stroock.com  dkolker@stroock.com

1 In re Pension Reform Litigation, No. 118585, 2015 IL 118585, 2015 Ill. LEXIS 499 (Ill. May 8, 2015)
2 Id. at *68.
4 Id.
8 Id.
10 N.Y. CONST. art. V, § 7; see also Ill. CONST. art. XIII, § 5; Mich. CONST. art IX, § 24.
11 U.S. CONST. art. I § 10, cl. 1.
12 These arguments do not apply to bilateral negotiations between government officials and public sector employees in efforts to curb contract or pension rights; rather, these arguments apply when government officials unilaterally attempt to alter pension rights. Further, these arguments do not apply to employees who enter the pension
system after pension rights have been impaired. There is no claim of pension impairment if it occurred prior to an employee’s entrance into the pension system.


14 Barnes et al. v. Arizona State Retirement System et. al., No. CV. 2011-011638 (Sup. Ct. AZ, Maricopa Cnty., 2012) (invalidating act that sought to increase employee contributions to Arizona’s retirement system under the Arizona and federal Contracts Clause and under Arizona’s Non-Impairment Clause).


16 Ballentine v. Koch, 89 N.Y.2d at 56.


19 Sanitation & Recycling Indus., Inc. v. City of New York, 107 F.3d 985, 993 (2d Cir. 1997).

20 Condell v. Bress, 983 F.2d 415, 418 (2d Cir. 1993).


23 Kleinfeldt, 36 N.Y. 2d at 101.

24 Condell, 36 N.Y. 2d at 101.


27 Id. at 193.

28 Id. at 194.

29 Id. at 244.

30 Id.

31 Kleinfeldt, 36 N.Y. 2d at 101.


33 464 F.3d 362 (2d Cir. 2006).

34 Id. at 371. (“Ultimately, for impairment to be reasonable and necessary under less deference scrutiny, it must be shown that the state did not (1) ‘consider impairing the ... contracts on par with other policy alternatives’ or (2) ‘impose a drastic impairment when an evident and more moderate course would serve its purpose equally well,’ nor (3) act unreasonably ‘in light of the surrounding circumstances’”) (quoting U.S. Trust Co., 431 U.S. at 30-31).

35 Id. at 371-72.


37 As discussed in further detail supra at 6-7, a Contracts Clause argument faces additional challenges if the impairment has been imposed in the context of municipal bankruptcy. Certain courts have found that the Contracts Clause does not constrain the federal government and that bankruptcy law “explicitly empower[s] bankruptcy court[s] to impair contracts.” See In re City of Detroit, Mich., 504 B.R. 191, 244 (Bankr. E.D. Mich. 2013). Moreover, if a municipality is in a fiscal situation as dire as bankruptcy, the necessity of impairment may be more pronounced.

38 Id. at 102; Bimbaum, 5 N.Y.2d 1, 11 (1958).

39 Id. at 102; Bimbaum, 5 N.Y.2d 1, 11 (1958).


43 Id. at 244.

44 Id.

45 Id. (internal citations omitted). In examining the legislative intent behind the Non-Impairment Clause in the Michigan Constitution, the court explained that the Non-Impairment Clause in Michigan is no stronger than the Contracts Clause, and thus pensions could be impaired in bankruptcy just like contracts are impaired in bankruptcy. The court stated, the “constitution could have given pensions protection from impairment in bankruptcy
in several ways.” Id. at 247. The court then explained that the drafters of the Michigan Constitution could have protected pensions further by prohibiting Michigan municipalities from filing bankruptcy, or by creating a property interest in pensions that bankruptcy courts would be required to respect under state law, or by establishing a secured interest in a municipality’s property, or finally, the drafters could have “explicitly required the State to guaranty pension benefits.” Id. (emphasis added). The court concluded that since the drafters took none of these precautions, pensions, because they enjoy merely a contractual status, are vulnerable to impairment in bankruptcy. Id. at 243–248.


49 Illinois Public Employee Benefits Act, Public Act 098-0599 § 1 (June 1, 2014).

50 See also In re Pension Litigation, supra note 46. (“Pension Protection Clause contains no exception, restriction, or limitation for an exercise of the State’s police powers or reserved sovereign powers. Illinois courts, therefore, have rejected the argument that the State retains an implied or reserved power to diminish or impair pension benefits.”).


53 Id.

54 Id. (emphasis added).


56 See also In re Pension Litigation, supra note 46. (Judge Belz’s ruling tends to support the argument that the Non-Impairment Clause is stronger than the Contracts Clause. Belz explained that the Illinois Non-Impairment Clause is absolute, and will still be violated even if the state is in severe financial distress. In contrast, the Contracts Clause, will not be violated if there is a significant public purpose for the impairment.)


Sometimes It’s The Thought That Counts

Implications of the First Department’s Decision on Rescission of Release Time Certificates

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Introduction

The constant struggle for balance between management's authority to act unilaterally, and a union’s ability to resist such action, permeates labor relations. This is particularly true in the public sector, where achieving stability involves weighing issues of workers' rights and the public interest. Although the question of whether an employer has the discretion or authority to take certain actions necessarily informs how both management and unions approach a particular situation, it is worth remembering that the question of bare authority is not, and should not, always be the end of the analysis. Even when an employer may, under certain circumstances, have the authority to take a particular action, the same action may be improper when taken for improper reasons such as retaliation, anti-union animus or bad faith.

This principle is critical to placing the decision in Patrolmen’s Benevolent Assoc. of City of New York v. City of New York (which addresses the issue of release time authorization) in its proper context. There, based upon the indictment of the officers involved, the City rescinded the release time certificates for the union’s chosen representatives. Ignoring arguments that such discretion raised the issue of so-called “company unions” in the public sector, the Appellate Division, First Department held that the City’s Office of Labor Relations (“OLR”) could unilaterally rescind the release time certificates of union representatives who had been indicted in a criminal scheme and direct the Patrolmen’s Benevolent Association to select three different representatives to replace them, which some have contended permits the City broad power to interfere with the internal operations of a union. In reaching its conclusion, the First Department also made facially broad declarations as to the City’s authority over release time. Yet, despite that broad language, OLR’s authority here is not boundless but, as discussed below, continues to be limited by the mandates of the Taylor Law and the New York State Labor Law.

This article (i) discusses the enactment of Executive Order 75, which provides for release time certificates; (ii) reviews the Court’s ruling in Patrolmen’s Benevolent Association v. City of New York; and (iii) discusses the ways in which the decision’s impact may be tempered.

Background

In 1973, New York City Mayor John Lindsay signed Executive Order 75 (“EO 75”), establishing the practice of “time released” union employees – employees who facilitate the proper operation of public sector labor relations by representing their union and interacting with management by, among other tasks, investigating grievances, participating...
in labor/management committee meetings, serving as members of the Municipal Labor Committee, and participating in fact-finding or other collective bargaining proceedings, without loss of their job, pay or other employee benefits. Although EO 75 has been criticized by some for allowing City employees to conduct union business while being paid by the City, one of the principal – and important – reasons for its enactment was the recognition by Mayor Lindsay that “time spent on union activities is time devoted to the public interest [as much as] time spent in the performance of regularly assigned duties.” (EO 75, Whereas clause).

Although EO 75 granted union representatives certain accommodations, it also imposed certain requirements on “time released” union employees, including a prohibition on organizing, directing or participating in strikes or job actions of any kind while on release time, the advance approval for time spent on permissible activities and, most pertinent here, the requirement that “employees assigned on a full-time or part-time basis granted leave without pay pursuant to this Order shall at all times conduct themselves in a responsible manner” (EO 75, §4(10)). Although the requirement that union representatives act in a responsible manner may seem innocuous on its face, experienced union and management representatives know that agreement between labor and management sometimes comes after contentious and heated negotiation. Thus, what is “responsible” for a zealous union representative – whose job it is sometimes to press issues that may be upsetting to management – may not always align with management’s view of whether the conduct is responsible. That said, the near absence of any litigation regarding the revocation of release time suggests that union representatives generally behave appropriately and both labor and management typically work through the rougher patches in their relationship.2

### Patrolmen’s Benevolent Assoc. of City of New York v. City of New York

Although the First Department decision in PBA expressed a broad view of the City’s authority under EO 75, the genesis of the case was specific and external to labor-management relations. In PBA, the First Department was faced with determining the boundaries of the City’s leeway in intervening in union independence in a case in which three PBA delegates were among 16 police officers implicated in a ticket-fixing investigation. The three delegates, among others, were indicted by a grand jury on charges of official misconduct, grand larceny, and tampering with public records and, pursuant to Civil Service Law §75(3-a), were suspended without pay for 30 days and then placed on modified duty pending resolution of the charges.3 The City, however, went a step beyond any statutory mandates by revoking the EO 75-granted release time certificates of the three union delegates, on the unilaterally-determined grounds that they had violated §4(10) of EO 75 and had not acted “in a responsible manner at all times.”4

Without either providing a hearing for the union delegates or consulting with the PBA, the City proposed a remedy of issuing three new release time certificates – for three representatives of the union’s choice to replace the elected representatives.5 The union declined, instead filing a contract grievance with OLR asserting that the original three delegates were denied a hearing prior to the revocation of their release time certificates and that the City and OLR engaged in conduct that “dominated” or “interfered” with the right of the union to represent itself.6 After OLR denied the grievance, the PBA filed a demand for arbitration with the New York City Office of
Collective Bargaining, seeking to have the release time certificates reinstated on the ground that the rescission violated both the parties’ collective bargaining agreement and EO 75.7 Simultaneously, the PBA sought a preliminary injunction in aid of arbitration to enjoin OLR from denying or revoking the release time certificates. The Supreme Court (New York Cty., Joan B. Lobis, J.) granted the injunction and OLR appealed to the First Department.8

The First Department determined that “the indictments of the individual petitioners on charges related to a ticket-fixing scheme that include allegations of grand larceny, official misconduct, tampering with public records, and criminal solicitation constitute a sufficient basis for the City to determine that the individual petitioners did not ‘at all times conduct themselves in a responsible manner.’”9 Although the direct issue of OLR’s authority was not before the Court in reviewing the grant of the injunction, the First Department did not limit its holding to whether criminal indictments were sufficient, absent convictions or pleas, to invoke §4(10) of EO 75. The Court went beyond the facts and held that EO 75 “generally vests the City with broad oversight of employee representatives” and that because enforcement is committed to the Commissioner, who may issue implementing rules and regulations, OLR has broad authority to determine what constitutes conduct in a “responsible manner” and to unilaterally rescind release time certificates it has granted.10

**Implications**

At first blush, the broad language utilized in the First Department’s decision appears to authorize significant employer control over internal union matters (e.g., influencing which union members can serve as representatives on release time). Such fears, upon closer examination however, should prove unfounded. Even assuming that the First Department was correct in its approval of the unilateral revocation of the release time certificates on the basis of the indictment alone (a position the PBA understandably contested in the absence of any adjudication of wrong-doing and the continued employment of the officers pending resolution of the charges), government employers remain tempered in the actions they can take.

Both the Taylor Law and the New York State Labor Law prohibit interference with union administration as well as discrimination on the basis of anti-union animus or for the purpose of chilling union activity. The representatives chosen by the union members are not fungible and requiring the substitution of different members for these roles begins to infringe upon a basic union right.

Taylor Law Section 209-a.1 prohibits an employer from, among other things, “deliberately … dominat[ing] or interfer[ing] with the formation or administration of any employee organization for the purpose of depriving them of [their rights of organization and representation].”11 Notably, although the PBA raised issues of domination, the procedural posture of the case sought an injunction in aid of arbitration under the PBA’s collective bargaining agreement. There is no indication that the delegates’ union activity played a role or that a separate improper practice charge was filed making such claim.

The Taylor Law also prohibits an employer from “discriminat[ing] against any employee for the purpose of encouraging or discouraging membership in, or participation in the activities of, any employee organization.”12 Thus, even if OLR may have general authority to revoke a time-release certificate if the union representative is not acting in a “responsible manner,” OLR may not
use this authority as a pretext for interfering in union administration or discriminating against employees for engaging in protected activities. For example, an employer has the right to transfer employees (in accordance with the provisions of the applicable collective bargaining agreement), but cannot transfer an employee because the employee has engaged in activities protected by the Taylor Law. Similarly, New York Labor Law §201-d makes it unlawful for an employer to discriminate against an individual because of that person’s “membership in a union or any exercise of rights granted under...[the Taylor Law].”

In PBA, although the Union had argued that allowing OLR to revoke release time solely based on the indictment had the effect of interfering with the Union’s internal operations and independence, there was no argument that the revocation was motivated by the officers’ union activity. Accordingly, while the First Department’s decision in PBA serves to undermine the breadth of union discretion, its impact on active union representatives and their ability to zealously represent their members is substantially tempered.

**Conclusion**

Whether correctly determined or not, PBA begins to set forth the parameters of what it means to “at all times conduct oneself in a responsible manner.” Public sector unions, however, should find comfort in the fact that the broad wording used by the Court in discussing release time should not translate to OLR being able to operate unchecked, as other protections operate to prevent employers from interfering with or dominating a union.

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By Beth A. Norton, Special Counsel in the Litigation and Government Relations Practice Groups of Stroock & Stroock & Lavan LLP.

For More Information

Alan M. Klinger
212.806.5818
aklinger@stroock.com

Dina Kolker
212.806.5606
dkolker@stroock.com

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2. Both PERB and the courts have engaged in limited review of EO 75 and have not addressed the requirement set forth in EO 75 §4(10) regarding conduct in a “responsible manner.” In deciding other issues related to the negotiation of release time, PERB has indicated that it may be appropriate for the City to revoke release time certificates if the employees are not comporting with the requirements set forth in EO 75, but it did not decide that issue.
3. Id., at 310.
4. Id.
5. Id., at 309.
6. Id.
7. Id.
8. Id.
9. Id., at 310.
10. Id.
13. In the Matter of Freeport UFSD, 12 PERB ¶3038 (1979) (holding that where teacher’s union activities were known to school principal, who was disturbed by them, subsequent transfer of teacher was discriminatorily motivated in violation of the Taylor Law).
Smile, You Are On The Employer’s Camera

**Introduction**

In a recent setback for public sector workers’ rights, the New Jersey Public Employment Relations Commission (“PERC”) held that New Jersey Transit Bus Operations (“NJTBO”) could unilaterally install security cameras on buses, and use footage for disciplinary purposes. Beyond the facts of the case, the decision based its conclusion upon a broad view of the employer’s interest in providing safe and efficient public transportation. At first glance, the decision seems to elevate universally applicable and vague articulations of an agency’s mission—safety and efficiency—above fundamental precepts of labor law, setting a dangerous example for other jurisdictions.

Nonetheless, for reasons explained in this article, a similar challenge to such blanket surveillance in New York, and potentially in New Jersey outside the NJTBO context, would likely be decided differently. Despite the seemingly broad justification underpinning New Jersey’s decision, public sector unions in New York should not expect the New York Public Employment Relations Board (“PERB”) to be persuaded by New Jersey’s reasoning. Rather, PERB has held that blanket surveillance is typically a mandatory subject of bargaining. Moreover, even where the surveillance is sufficiently targeted and investigatory in nature as to be non-mandatory, PERB has held that the impact of such surveillance remains mandatorily negotiable.

**Amalgamated Transit Union, Local 820 v. NJTBO**

NJTBO is a public transportation corporation that serves as the nation’s third largest provider of bus, rail and light transit. The Amalgamated Transit Union, Local 820 (“ATU”) represents bus operators who work for NJTBO. In 2007, NJTBO unilaterally installed a surveillance system called DriveCam on their buses without negotiating with ATU. DriveCam is a camera and microphone system located on the front windshield that records video and audio footage of the bus driver and the passenger area, in addition to footage of the road in front of the bus. NJTBO’s justification for installing DriveCam was to “provide passengers and operators protection and deterrence of crime through videotaping of incidents on buses.” When NJTBO installed the program over ATU’s objections, ATU filed a grievance against NJTBO, alleging that the use of DriveCam was a mandatorily negotiable subject of bargaining.

In 2013, after ATU had filed for arbitration of its grievance, NJTBO applied to the Superior Court, Chancery Division for an order restraining arbitration. The Superior Court issued a preliminary injunction restraining arbitration and referred the matter to PERC. Because PERC has exclusive jurisdiction regarding the ATU’s claim, the court permanently enjoined the arbitration.
ATU then filed a scope of negotiations petition before PERC.

In addressing the issue, PERC was asked to reconcile two competing concepts: (i) enforcement of traditional notions of collective bargaining between NJTBO and ATU, and (ii) NJTBO’s explicit statutory mission of providing efficient, effective and safe public transportation. Although the concept of balancing these sometimes-competing interests is familiar in scope of bargaining matters, PERC applies a specific and explicitly employer-friendly analysis when the matter pertains to NJTBO.

When issues arise that simultaneously impact the employment relationship and NJTBO’s statutory mission in particular, PERC employs an approach initially adopted by the New Jersey Supreme Court:

[A]n issue that settles an aspect of the employment relationship is mandatorily negotiable unless negotiations over that issue would prevent NJT[BO] from fulfilling its statutory mission.

Therefore, NJTBO’s statutory mission seemingly takes precedence over traditional precepts of collective bargaining when the two conflict. This rule does not apply to other government employers in New Jersey, although it is not entirely clear if the general rule would reach a different result in similar facts.

This employer-friendly approach largely governed PERC’s determination that DriveCam was not a mandatorily negotiable subject of bargaining, and that DriveCam recordings could be used for disciplinary purposes. Ultimately, PERC decided that “negotiations over whether NJTBO can use DriveCam video recordings as evidence for the imposition of disciplinary sanctions against ATU members would substantially impair NJTBO’s ability to fulfill its statutory mission of efficiently and effectively operating a safe, responsive public transportation system.”

Although pointing out that the NJTBO rule is different than the rule applicable to other public employees in New Jersey, PERC also relied on a non-NJTBO case that reached the same result. In City of Paterson v. PBA, P.E.R.C. No. 2007-62, the board articulated the broadly applicable rules that scope of bargaining determinations require “balancing the impact on employees’ work and welfare against interference with the determination of government policy.” While stated slightly differently, the rule is substantially similar to the NJTBO rule and yielded, in that case, the same result: the city’s unilateral installation of overt video surveillance cameras in a public safety building was not mandatorily negotiable.

Implications for New York

On its face, PERC’s reasoning in the NJTBO case could have far-reaching implications, as all agencies are created by statute, and statutes typically have expansive language defining the agency’s mission. A precedent allowing unilaterally implemented changes to the workplace justified by reference to ubiquitous mission components like “safety” and “efficiency” would substantially erode bargaining rights.

By contrast, in New York, PERB has taken a more nuanced approach to issues of video surveillance in the public sector. As a threshold
matter, PERB has held that broad-scope video surveillance (as compared to targeted investigatory surveillance) is generally a mandatory subject of bargaining. The most recent and comprehensive articulation of the analysis applicable to video surveillance is found in *Town of Clarkstown*, an un-appealed decision of an administrative law judge. There, the union claimed that the town employer improperly and unilaterally installed motion-sensitive video cameras in and around the town’s Highway Department buildings. The union was advised as to the location of the cameras, which did not include restrooms, locker rooms, or break rooms. The union was also advised that if any employee was viewed on camera involved in improper activity, the video footage could be used as evidence in a disciplinary proceeding.

Relying on prior PERB cases, the town argued that use of cameras was not a mandatory subject of bargaining. The ALJ disagreed, determining that the installation of video cameras was analogous to workplace parcel inspections (previously found to be a mandatory subject of bargaining), and therefore was a new work rule that required a balancing of interests. In *Clarkstown*, the balance favored the employees’ rights.

In reaching that conclusion, the ALJ addressed the employees’ privacy interests. Rather than viewing being recorded as something superficial and passive, as had a prior PERB decision, *City of Syracuse*, the ALJ viewed it as something invasive that necessarily involved the employee’s participation. The ALJ rejected the contention that surveillance cameras simply enhance what supervisors were already doing and determined that “[t]o be comparable [one] would have to assume constant supervisory observation of employees in the work areas at several angles and contemporaneous[ly] record[] details of the observations.” Finally, while there was no new basis for discipline in that case, the cameras provided an enhanced method for determining when employees engage in misconduct.

PERB has, however, given employers a somewhat wider berth – more akin to New Jersey’s approach – when video surveillance is implemented as part of a more targeted investigation. Historically, targeted investigatory procedures in disciplinary matters have been found nonmandatory. For example, in *Custodian Association of Elmont*, an ALJ declined to find that the employer committed an improper practice when it hired a private investigator to confirm whether a bus driver was driving unsafely (e.g., driving through stop signs, riding curbs, and driving while students were not seated). The private investigator videotaped the employee’s bus on two separate occasions and generated a list of driving infractions. The district acknowledged that it did not videotape its drivers as a matter of course – it had only done so in this instance as an investigative device to follow-up on multiple complaints from parents about the particular employee. Finding for the district, the ALJ determined that

the District’s action was investigatory and preliminary to the disciplinary action eventually pursued against [the employee] as a result of the District’s findings. Investigatory procedures in disciplinary matters are not mandatorily negotiable…. [T]o find otherwise would interfere with an employer’s ability to inquire into employee conduct and would frustrate investigatory activity, which is an essential aspect of
management prerogative and which overrides the duty to negotiate.\(^{14}\)

Despite the apparently sweeping language of *Elmont*, PERB more recently concluded that the investigatory exception to bargainability is limited, finding that the length and scope of surveillance can impact terms and conditions of employment, and therefore negotiability, even in targeted investigation cases. In *CSEA v. Nanuet UFSD*, 43 PERB 4591 rev’d in part 45 PERB 3007 (2012), PERB concluded that a district’s unilateral surveillance of a custodial employee via hidden camera was an improper practice. The district began investigating the employee in connection with complaints that he was “spending too much time in the school’s custodial office located in the basement, instead of performing his job duties.” As in *Elmont*, the district hired a private investigator, who placed a hidden, motion-activated camera outside the room in the school where the employee worked, to determine how much time the employee spent in the custodial room during his shift. The district later used images captured from this camera in disciplinary proceedings brought against the employee.

The ALJ initially concluded that *Elmont* was dispositive, finding for the employer. On exceptions, PERB rejected the ALJ’s reasoning. Although ultimately holding that the improper practice charge was untimely, PERB addressed the negotiability of installing the cameras. PERB declared that “in general, the decision by an employer to engage in videotape surveillance of a workplace for monitoring and investigating employees is mandatorily negotiable under the Act because it ‘bears a direct and significant relationship to working conditions.’”\(^{15}\) Thus, typically, an employer may not unilaterally install a video camera system in the workplace, even if the system is being used for “monitoring and investigating.”

However, PERB further explained that there are instances when utilizing surveillance is not mandatorily negotiable. In certain cases, PERB posited, such as a correctional facility, “videotaping may be integral to the employer’s core mission, and therefore the subject might be nonmandatory if the videotaping is necessary and proportional for meeting that mission.”\(^{16}\) It is unclear if PERB’s expressed view as to the unique circumstances of a correctional facility would extend to the general interest in providing safe and efficient public transportation as in *NJTBO*, but even then PERB’s comment suggests only that a correctional facility “may” require a different balancing, not that all use of video surveillance could be free from the duty to bargain.

Finally, even where the decision to utilize video surveillance is not itself mandatorily negotiable, PERB has held that the employer violates its bargaining obligation when it refuses a demand to bargain the impact of using video cameras for disciplinary purposes on buses.\(^{17}\) In *Amalgamated Transit Union and Niagara Frontier Transit Metro System Inc.*,\(^{18}\) the employer acquired new buses that were equipped with a video system that continuously recorded. Previously, the employer had never used video cameras on buses. After the buses were delivered, the union learned that they were equipped with video cameras, and asserted a right to bargain the impact of such video surveillance.

PERB explained that the union’s impact demand was “limited to disciplinary procedures,” which are, by definition, mandatorily negotiable, so the employer was required to negotiate the impact of its decision.\(^{19}\) If the union’s demand had
included investigatory procedures in disciplinary matters, as opposed to the disciplinary procedures themselves, PERB hinted that the matter may then have been nonnegotiable. PERB explained that “investigatory procedures in disciplinary matters have been held to be nonnegotiable,” referencing a case decided almost 30 years earlier, but not expressing an opinion about whether that case was correctly decided. Strikingly, in deciding the NJTBO case, PERC considered the PERB Amalgamated case, among others from outside New Jersey, and did not find it persuasive.

It merits briefly noting that negotiability is just one legal consideration for unions and employees facing the use of video (or other) surveillance by a public employer. Depending on the nature of the surveillance, individual employees may claim violations of federal and state constitutional, as well as common law, rights to privacy. Although an employee’s reasonable expectation of privacy may be diminished in the public sphere, privacy rights do exist.

A public employee’s likelihood of success in a claim for invasion of privacy depends, generally speaking, on weighing his or her employer’s legitimate interest in surveillance with the nature and severity of the privacy intrusion and the employee’s reasonable expectation of privacy. The surveillance should be reasonably tailored to further the public interest. Thus, surveillance policies that are legitimately and narrowly designed to protect public safety and are applicable to employees who frequently engage with the public are more likely to withstand scrutiny than, for example, policies applicable to administrative employees who have limited public interaction.

Conclusion

Overall, public sector unions in New York should continue to expect a more balanced and nuanced approach to the negotiability of video surveillance under PERB law than evidenced by the New Jersey NJTBO decision. In New Jersey, a finding that video surveillance effectuates the statutory mission of NJTBO essentially granted the employer unfettered discretion to use the cameras.

But, that facially broad holding is limited to that agency even within New Jersey, and should have little weight, if any, in New York. New York’s approach does not require an all-or-nothing finding. New York views blanket video surveillance as typically a mandatory subject of bargaining, with a variety of factors to be considered and weighed in instances of investigatory use. As a result, New York’s approach is more tailored to reflect a balance between statutory objectives and the important role that public sector bargaining representatives play in a unionized workplace.

By Dina Kolker, Special Counsel in the Litigation and Government Relations Practice Groups of Stroock & Stroock & Lavan LLP.

For More Information

Alan M. Klinger  
212.806.5818  
aklinger@stroock.com

Dina Kolker  
212.806.5606  
dkolker@stroock.com

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1 See Amalgamated Transit Union, Local 820, P.E.R.C. No. 2015-53.
New Jersey authorized the conversion of its mass transit system from private ownership to public ownership in the late 1970’s. *Amalgamated Transit Union, Local 820, P.E.R.C. No. 2015-53.* At the time of conversion, New Jersey enacted legislation establishing that the purpose of the newly created public transit system would be to provide “coordinated, safe and responsive public transportation” “in the most efficient and effective manner” possible. See N.J.S.A. 27: 25-2a, N.J.S.A 27: 25-2b.

In *Matter of New Jersey Transit Bus Operations, Inc.*, 125 N.J. 60, 592 A.2d 547, 550 - 56 (1991), the seminal NJTBO case relied upon by PERC in its recent decision, the New Jersey Supreme Court recognizes that “the prior standard applicable to other public employees does not apply [to NJTBO].”


*Town of Clarkstown, 44 PERB 4625 (2011).*

*Custodian Association of Elmont, 28 PERB 4693 (1995).*

*Id.*

*Id.*

*Id.*

*Amalgamated Transit Union and Niagara Frontier Transit Metro System Inc., 36 PERB ¶ 3036 (2003).*

*Id.*

*Id.*

*Id.*
Decisions Of Interest

Summer 2015

Friedrichs v. California Teachers Association

During its upcoming October 2015 term, the United States Supreme Court will reconsider the seminal case of Abood v. Detroit Board of Education in what could become a significant change in the law governing agency fees and public-sector labor unions. Agency fees are monies paid to unions by nonmembers, who do not wish to join the union, but who nonetheless benefit from a union’s collective bargaining efforts on behalf of all employees in a given field. These fees seek to overcome the “free rider” problem; without agency fees, nonmembers would reap the rewards of a union’s hard work without providing it any financial support. On June 30, 2015, the Supreme Court agreed to hear the case of Friedrichs v. California Teachers Association, in which the Plaintiffs have asked the Court explicitly to overturn Abood, which had authorized the imposition of agency fees in the public sector. The apparent hostility of a portion of the Supreme Court towards Abood, expressed in Harris v. Quinn, albeit in dicta, makes the granting of certiorari in Friedrichs worrisome.

In Harris v. Quinn, the Court held that only “fully-fledged” public employees fell within the ambit of Abood and could be required by law to pay agency fees, and that the Plaintiffs, home-care personal assistants, whose employment was controlled in large part by the individual customer rather than the State, were not “fully-fledged” public employees.1 Perhaps more notable than the holding of Harris, which found that Abood was inapplicable rather than invalid, was Justice Alito’s scathing criticism of Abood and the concept of agency fees. Justice Alito accused the Abood court of inadequately addressing the First Amendment issues implicated by agency fee payments, misunderstanding prior Supreme Court jurisprudence, and failing to foresee practical problems that its holding created.2 As explained in our full discussion of Harris in the Fall 2014 issue of Stroock Reports: Public Employee Law, the Harris dicta all but invited an opportunity to overrule Abood.

Friedrichs unfortunately provides that opportunity, threatening to transform American labor law by invalidating nearly 40 years of Supreme Court jurisprudence surrounding agency fees. The Friedrichs Plaintiffs, ten California teachers, are challenging the validity of the California Educational Employment Relations Act, which permits California unions to utilize agency-shop arrangements.3 Plaintiffs brought their case in the United States District Court for the Central District of California and, for purposes of creating an appeal, sought a judgment on the pleadings in favor of the Defendants, which the District Court granted on the grounds that Abood “foreclose[s] Plaintiffs’ claims.”4 The Ninth Circuit summarily affirmed on November 18, 2014.

Co-Editors: Alan M. Klinger, Co-Managing Partner, and Dina Kolker, Special Counsel in Stroock’s Litigation and Government Relations Practice Groups. The Co-Editors wish to thank Beth A. Norton, Special Counsel, and David J. Kahne, Julie L. Goldman, and Samantha M Rubin, associates, in Stroock’s Litigation and Government Relations Practice Groups. We also acknowledge the contributions of Scott A. Budow who was a summer associate in the Stroock program.
A public-sector union’s right to collect agency fees from nonmembers is now at substantial risk. In their Petition for a Writ of Certiorari (i.e., permission for the Supreme Court to hear the case), Plaintiffs presented two questions to the Court: “[w]hether Abood…should be overruled and public-sector ‘agency shop’ arrangements invalidated under the First Amendment” and “[w]hether it violates the First Amendment to require that public employees affirmatively object to subsidizing nonchargeable speech by public-sector unions, rather than requiring that employees affirmatively consent to subsidizing such speech.”

Notably, Plaintiffs argued, as did Justice Alito in the Harris dicta, “the interests in ‘avoiding free-riding’ and promoting ‘labor peace’ cannot justify compelled subsidization of union speech on matters of public concern.” Briefs amicus curiae were filed in support of the Petitioners by the Pacific Legal Foundation, National Right to Work Legal Defense Foundation, Inc., Mackinac Center for Public Policy, the Attorneys General of Michigan, Alabama, Arizona, Colorado, Georgia, Kansas, Texas, Utah and West Virginia, and former California Governor Pete Wilson and Former California Senate Majority Leader Gloria Romero, among others. Of the nine states whose Attorneys General joined the aforementioned brief amicus curiae, all but Colorado and West Virginia are right to work states. No amicus briefs in opposition appear on the docket.

After the Supreme Court granted Plaintiffs’ Petition, leaders of the National Education Association, American Federation of Teachers, California Teachers Association, American Federation of State, County and Municipal Employees and Service Employees International Union released a joint statement condemning the Court’s decision and emphasizing unions’ dependence upon the fees they collect. The American Federation of Teachers, in an article written by its President Randi Weingarten, pledged to start “a national campaign to mobilize members and communities across the country to fight for an America where everyone’s voice matters.” The potential disruption to labor peace has also brought the Federal Government to the side of labor. Labor Secretary Thomas Perez stated in response to the Court’s determination to hear the case:

I think public-sector workers…are some of our most important employees, and I think the ability to have collective bargaining for them is critical. They’re not getting rich, they’re doing some of the most important work, and I think collective bargaining has been key to their success, and the people who don’t want to sign up for those…to pay dues, they actually benefit from those, the work that these unions are doing to get higher wages and fair treatment in the workplace, and so they want to be able to be free-riders, you know, pay nothing but get all the benefits, and states have appropriately said you can require people to pay their fair share. And I think that’s the right thing to do and I think the collective bargaining process for public-sector workers is critically important.

Despite the push-back, proponents of the abolition of agency fees are celebrating the Supreme Court’s decision. Deborah La Fetra, Principal Attorney of the Pacific Legal Foundation, declared “[t]he court’s decision to take this case is welcome news for everyone who values First Amendment freedom of speech – which includes your freedom not to underwrite a politically active organization that you don’t agree with.”
Although in Friedrichs, agency fees arise in the context of a teachers’ union, the issue is not limited to that field. The issue transcends all types of civil service across all states and should be of concern to all public sector unions and their members.

The Parties’ briefs on the merits are due in September and October 2015, and oral argument is expected to take place during the Court’s next term, which commences in October 2015. Unions should consider how best to marshal support for their position, possibly banding together, as well as seeking the assistance of good government entities, to submit to the Court on an issue that may severely alter American labor law.

**Morton v. Mulgrew**

A union’s flexibility in negotiating collectively bargained agreements that balance, in good faith, the sometimes divergent interests of its membership received a boost in a recent decision from Justice Donna Mills of the Supreme Court, New York County. In *Morton v. Mulgrew*, plaintiffs brought a class action suit alleging that the United Federation of Teachers (“UFT”), in its most recently negotiated collective bargaining agreement, breached its duty of fair representation by agreeing to provide retroactive increases only to those who remained active or retired from service. Plaintiffs, a group of former UFT members who had voluntarily quit their jobs with the NYC Board of Education (“DOE”), alleged that their exclusion from these contractual provisions constituted an improper failure to represent their interest.

The UFT moved to dismiss the claims on various grounds, including that the plaintiffs could not satisfy the pleading requirement most recently articulated by the Court of Appeals in *Palladino v. CNY Centro Inc.* and that the mere exclusion of former members who quit their jobs could not state a claim for breach of the duty of fair representation.

In *Palladino*, the Court of Appeals reaffirmed its prior interpretation that complaints against an unincorporated association – such as the UFT – must allege that all of the individual members of the association authorized or ratified the conduct at issue. Although a significant majority of UFT members ratified the most recent agreement, not all members either voted or approved. Following *Palladino*, the Court declined to create an exception to the pleading requirement for duty of fair representation claims and concluded that Plaintiffs could not satisfy this requirement.

Moreover, the UFT argued that merely treating differently former members who left their position prior to the UFT reaching agreement with the employer, was not a violation of its duty to fairly represent its members. The UFT pointed out that negotiations are a give and take between the Union and the employer and it is not always possible to have every conceivable demand met. The long and difficult negotiation that spanned two mayoral administrations ultimately had to bridge the distance between the UFT’s demand that all current, retired and former members receive retroactive increases and the employer’s initial offer that only active employees receive an increase. The parties ultimately agreed to provide the most benefits to the largest group that was mutually acceptable – all actives and retirees. This reflected the normal ebb and flow of bargaining and was consistent with the Union’s duty to fairly represent all of its bargaining unit members.

The Court agreed, relying, inter alia, on *Matter of Civil Serv. Bar Assn, Local 237 Intl. Bhd. Of
**Teamsters v. City of New York,** for the proposition that

[w]here the union undertakes a good-faith balancing of the divergent interest of its membership and chooses to forgo benefits which may be gained for one class of employees in exchange for benefits to other employees, such accommodation does not, of necessity, violate the union’s duty of fair representation.13

The Court found that the cursory allegation that the UFT did not bargain on plaintiffs’ behalf, was insufficient, particularly in light of the explicit contractual provisions addressing the issue of increases stemming from the 2009-2011 round of bargaining. Plainly, the Union had considered the matter and negotiated regarding it. Next, the Court rejected Plaintiffs’ conclusory contention that the UFT acted in a bad faith or discriminatory manner. The Court held that “plaintiffs fail to give any indication that facts indicating the UFT’s purported decision could be discovered.”14

Accordingly, the Court dismissed all claims against the UFT. But the UFT is not the only union that has been the subject of such challenge to its bargaining authority. A case making virtually the same claims, brought against the New York State Nurses Association, is currently pending before Justice Shlomo Hagler, also in Supreme Court, New York County. There, too, the defendant union has moved to dismiss. The outcome of that motion merits watching.

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**Additional Public Pension Cases of Note**

In addition to the cases discussed in this issue’s lead story “Protecting Pensions and Contract Rights for Public Sector Employees,” there are at least two other cases contributing to the legal landscape worth noting as public employees fight to protect against the impairment of their pensions:

**In re: City of Stockton**

Stockton, California, like Detroit, experienced a catastrophic economic downturn when the housing bubble burst in 2007. For fiscal year 2012, Stockton, a city of approximately 300,000 people, had been able to decrease its deficit to $26 million from a height of over $96 million, but it had over $900 million in unfunded pension liabilities to, among other creditors, the California pension system (“CalPERS”). Unemployment was around 22%, the city’s bond rating obtained “junk” status, property values had declined 50% and the crime rate was among the worst in the nation. The city was unable to perform its basic obligation of public safety and had already declared a fiscal emergency on multiple occasions, slashed employment by 25%, implemented furloughs and drastically reduced library and other recreational funds.15

Like the bankruptcy court in Detroit in In re: City of Detroit (a discussion of that case is set out in our lead story, and with similar reasoning), Judge Christopher Klein ruled that Stockton’s contractual obligations to its pension system could be altered in Stockton’s municipal bankruptcy because “the essence of bankruptcy is impairing the obligation of contract.”16 In fact, Judge Klein arguably went further than the Detroit bankruptcy court because the California legislature previously had singled out CalPERS for a special added layer of protection in Chapter 9 bankruptcy cases by (i) forbidding the rejection of any contract between CalPERS and a municipality and (ii) imposing a termination charge backed by a statutory lien, in the event of a termination (from the CalPERS system).

The termination lien in the case of Stockton, for walking away from its liabilities, would have been
$1.6 billion, a sum the Court called a “gold handcuff” or “poison pill.”\textsuperscript{17} Ultimately, Judge Klein found that the lien could be avoided under bankruptcy law. Because the Supremacy Clause of the Federal Constitution resolves conflicts between Congress and a contrary state law in favor of Congress, the lien could be avoided and, more generally, municipal contracts and pensions could be impaired under the Federal Bankruptcy Code.\textsuperscript{18}

Judge Klein later confirmed a bankruptcy settlement that did not impair the City’s pension obligations.\textsuperscript{19} As a political solution, the City of Stockton refused to reduce pension benefits “saying that cutting pensions would devastate its ability to retain cops, firefighters, and other public officials.”\textsuperscript{20} A City official stated that retaining the present pension system “was a business decision that we made and it was the right thing for Stockton.”\textsuperscript{21} Though the pensions of workers already in the retirement system were not impaired, pensions and health care benefits for future hires were reduced.\textsuperscript{22}

\textit{Carver v. NIFA}\textsuperscript{23}

Unlike Detroit and Stockton, California, Nassau County, Long Island is one of the wealthiest counties in the country. Yet, in 2011, through its interim finance authority, the Nassau County Finance Authority ("NIFA"), Nassau County imposed a wage freeze to cure a budgetary deficit occasioned, at least in part, by a change in accounting practices in the County. The County’s Police Officer unions brought suit, arguing in NY federal court that a wage freeze unconstitutionally impaired their contractual rights, because despite Nassau County’s fiscal difficulties, the wage freeze was used as an initial measure to generate savings, rather than a last resort. In Nassau County, prior to imposing a wage freeze the county had repealed taxes (eliminating more than $70 million in recurring revenue) and had explored budgetary alternatives to closing the budget gap only \textit{after} the wage freeze was imposed. The Police Officers contended they were the main losers in a budgetary and political stalemate between the County and NIFA, with the breach of their contract having been used as a first, easy step to achieving temporary savings in lieu of conserving other revenue sources or implementing the real, long-term recurring savings necessary to close the County’s fiscal gap.

The Police Officers brought two claims, one under the federal Contracts Clause and the other based on a plain reading of the text of the state law that granted the power to freeze wages only for the defined “interim finance period.” The NIFA Act, the legislation creating NIFA, had extended that period to 2008. The Police Officers argued that the ability to freeze wages thus ended at that time.

The District Court found that the wage freeze indeed violated state law and, following the time-held maxim of constitutional avoidance, accordingly declined to reach the constitutional issue.\textsuperscript{24} Unfortunately, the Second Circuit reversed the district court’s decision, explaining that the district court improperly reached this state law issue and a lower state court judge subsequently decided the statutory interpretation issue differently than did the federal judge.\textsuperscript{25} The case is currently on appeal to the Appellate Division, Second Department. The underlying Contracts Clause issue remains before the District Court.

\underline{For More Information}

\begin{tabular}{ll}
Alan M. Klinger & Dina Kolker \\
212.866.5818 & 212.866.5606 \\
aklinger@stroock.com & dkolker@stroock.com
\end{tabular}

Id. at 2632-2633.


Randi Weingarten, They want to break our union, AMERICAN FEDERATION OF TEACHERS (July 1, 2015), http://www.aft.org/node/10440.

Labor Secretary Perez: government unions have the right to require members to pay their ‘fair share,’ PBS NEWSHOUR (June 30, 2015 at 6:32PM), http://www.pbs.org/newshour/rundown/labor-secretary-obamas-overtime-proposal/.


Id.

Morton, at 8.


In re: City of Stockton, 526 B.R. 35 (Bankr. E.D. Cal. 2015).

Id. at 48.

Id. at 66.


Id.

Id.

Stroock & Stroock & Lavan LLP was co-counsel to the Nassau County police officer unions in this matter.


Carver v. NIFA, 730 F.3d 150 (2d Cir. 2013).