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## Good Faith: Balancing the Right to Manage with the Right to Represent

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# GOOD FAITH: BALANCING THE RIGHT TO MANAGE WITH THE RIGHT TO REPRESENT

**By**  
**SUZANNE DARROW-KLEINHAUS**

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For any employee on the receiving end of a workplace decision by management, whether it be termination, reassignment, a change in work schedule, or even the choice of vending machines in the cafeteria, there is no question but that the employer holds the upper hand. This is the lot of the “at-will” employee, who works at the will of the employer and can be fired at any time—for no reason or any reason, as long as it is not an illegal reason.<sup>1</sup> In contrast, the union employee, through collective bargaining, has managed to gain some substantive job protections. Nevertheless, through reservation of rights clauses, management control has remained broad and far-reaching, with few if any effective limits.

Under the common law, business owners enjoy certain freedoms of action which are referred to as management rights or prerogatives. These prerogatives generally reflect the inherent right of management to manage. They afford management the ability to control the enterprise by directing its workforce, determining the means and methods of operation, and, in short, exercising all the rights necessary to effectively and efficiently run the business. Recent decades, however, have witnessed significant inroads into these once unchallenged areas of management’s domain. Collective bargaining agreements, state and federal legislation, and arbitration have imposed restrictions on management’s previously unfettered right to manage.<sup>2</sup> Still, it was the labor relations acts with their stimulation of col-

lective bargaining and the concomitant adoption of collective bargaining agreements between management and labor that resulted in the most significant restrictions on management rights.<sup>3</sup> The adoption of bargained-for written agreements irrevocably altered the nature of the employment relationship between management and labor and effectively removed it from the indefinite realm of at-will employment.

By reducing the work relationship to a writing, a negotiated labor agreement places management and labor on equal footing under the law. The status of contract replaces the nether world of at-will for employees. And with the recognition of a contractual relationship comes the contractual obligation of good faith.

Management spokespersons generally take the position that despite the collective bargaining agreement, management retains the authority it must have to successfully carry out its function of managing the enterprise, referring to these rights as “residual” or “reserved” powers.<sup>4</sup> Management maintains that “it need not look to the collective bargaining agreement to determine what rights it has reserved to itself, but should look to the agreement only to determine what rights it has ceded away or agreed to share with employees.”<sup>5</sup> Still, to insure that no mistakes are made as to the extent or nature of management’s rights, protective clauses are a widely used method of preventing arbitrators from “interpreting away” such rights.<sup>6</sup> Typically, such management rights clauses reserve to management all discretion to direct the workforce, manage the company business, control production, frame company rules, and a multitude of other supervisory functions. Often a “savings clause” is included to assert that management retains all rights not specifically modified or restricted by the contract and that the rights listed in the agreement are not necessarily all inclusive.<sup>7</sup>

Labor, on the other hand, denies that management’s rights are so broad as to encompass everything not specifically allocated in the collective bargaining agreement or otherwise limited only by constitutional or statutory enactment. For example, while serving as Gen-

eral Counsel of the United Steelworkers of America, Arthur Goldberg asserted:

[The right to direct] is a recognition of the fact that somebody must be boss; somebody has to run the plant. People can’t be wandering around at loose ends, each deciding what to do next. Management decides what the employee is to do. However, this right to direct or to initiate action does not imply a second-class role for the union. The union has the right to pursue its role of representing the interest of the employee with the same stature accorded it as is accorded management. To assure order, there is a clear procedural line drawn; the company directs and the union grieves when it objects. To make this desirable division of function workable, it is essential that arbitrators not give greater weight to the directing force than the objecting force.<sup>8</sup>

For Justice Goldberg, management’s right to direct its workforce did not imply some right over and above labor’s right. Instead, he argued for the inherent equality of the parties and urged arbitrators not to put their thumbs on the scale in favor of management when evaluating its actions with respect to labor. But he neglected to identify for arbitrators the specific article within the agreement that they should rely upon to preserve the balance between management and labor. The obligation of good faith provides this vital balance. It operates to limit management’s otherwise unfettered freedom to act and makes workable what Justice Goldberg so perceptibly recognized as “the desirable division of function” between management and labor.

The notion that management should act in good faith when it exercises discretion is not new. Arbitrators routinely question the reasonableness of a specific management action and many arbitrators are reluctant to uphold arbitrary or capricious managerial actions that

adversely affect union members.<sup>9</sup> What is absent, however, is the consistent application of good faith as a valid contractual limitation on management's reserved rights. For it is only through the imposition of this obligation on management in its exercise of discretion that labor's concessions are duly recognized and the collective bargaining agreement is truly a bargained-for exchange.

The obligation of good faith is well-recognized in general contract law as an implied term in every contract. This obligation is not altered simply because the contract in dispute is a collective bargaining agreement.<sup>10</sup> The precept of good faith thus binds the public employer in the performance of its contractual obligations as it does every party to a contract. Consequently, arbitrators should not shirk from applying the obligation of good faith in the enforcement and performance of the provisions of collective bargaining agreements. They should act affirmatively and apply the principles of good faith whenever called upon to evaluate management behavior.

This paper will demonstrate that the obligation of good faith is a valid contractual limitation on management discretion. First, it will show that this obligation is analogous to the common law's imposition of good faith conduct in exclusive dealings and requirements contracts where discretion is reserved to one party; second, that it is consistent with the expressed intent of the New York legislature in its promulgation of the Taylor Law to "promote harmonious and cooperative relationships between government and its employees..."; third, that it is consonant with the Taylor Law's statutory requirement of good faith bargaining; fourth, that it is commensurate with the union's duty of fair representation; fifth, that it is implicit in the basic contract principles arbitrators generally apply in interpreting and enforcing collective bargaining agreements; and finally, that the history of decisions indicates that it is already well-recognized by hearing officers, arbitrators, and judges although not clearly articulated as a breach of the obligation of good faith. By ex-

plicitly and conclusively recognizing bad faith behavior as a breach of a contractual obligation, however, the delicate balance between control and liberty in the collective bargaining agreement will be assured.

## DISCRETION RESERVED TO ONE PARTY

### *Fundamental Fairness*

Courts often supply a term requiring both parties to a contract to exercise what is called "good faith" or "good faith and fair dealing."<sup>11</sup> This duty is based on fundamental notions of fairness and its scope varies according to the nature of the agreement. Some conduct, such as subterfuge and evasion, clearly violates the duty, even if the actor believes his conduct to be justified.<sup>12</sup> But the obligation goes even further. Bad faith may be overt or may consist of inaction. Hence, the duty may not only proscribe undesirable conduct, but may require affirmative action as well. Thus, a party may be under a duty "not only to refrain from hindering or preventing the occurrence of conditions of the party's own duty or the performance of the other party's duty, but also to take some affirmative steps to cooperate in achieving these goals."<sup>13</sup>

The phrase "good faith" is used in a variety of contexts and its meaning can vary with the context. In general, "good faith performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party; it excludes a variety of types of conduct characterized as "bad faith" because they violate community standards of decency, fairness or reasonableness."<sup>14</sup> While a complete listing of types of bad faith is impossible, Comment d to the Restatement Second of Contracts § 205 identifies the following types of behavior as illustrative of bad faith behavior: evasion of the spirit of the bargain, lack of diligence and slacking off, willful rendering of imperfect performance, abuse of a power to specify terms, and interference or failure to cooperate in the other party's performance.<sup>15</sup>

The Restatement Second encourages courts to apply reasoning from the Uniform Commercial Code by analogy to other areas of contract law. It does so in specific circumstances by formulating general principles of contract law based on or derived in part from rules found in the Code. For example, the common law's adoption of good faith is based in good part on the duty of good faith imposed by the Uniform Commercial Code in § 1-203.<sup>16</sup> Similarly, the common law principle of unconscionability borrows from UCC § 2-302.<sup>17</sup>

Good faith is deemed so important to the essence of the bargaining relationship under the Uniform Commercial Code that parties are specifically prohibited from disclaiming "the obligations of good faith, diligence, reasonableness and care prescribed by this Act...."<sup>18</sup> This is in marked contrast to the Code's general permissiveness which typically permits parties to vary the effect of its provisions by agreement.<sup>19</sup> It is also in contrast to what has been referred to as "an expanded concept of contract" whereby Article 2 has made contracts easier to form by reducing the formalities required for contract formation.<sup>20</sup> But despite the reduced formalities required for contract formation,<sup>21</sup> the addition of "gap fillers" to supply terms in an agreement that might otherwise fail of indefiniteness,<sup>22</sup> and the expansive nature of contract to mean the "total legal obligation which results from the parties' agreement,"<sup>23</sup> the Code nonetheless departs from its general principle that parties are free to make their own contracts to impose the non-dischargeable obligation of good faith.

The Seventh Circuit, however, has taken a somewhat less expansive view of the UCC's requirement of good faith. For example, it reads

the UCC's definition of good faith requiring "honesty in fact in the conduct or transaction concerned"<sup>24</sup> as imposing "no duty to be kind, or considerate, or make concessions in bargaining" for purposes of contract between merchants under Illinois law.<sup>25</sup> Thus, in *Digital Equipment Corporation v. Uniq Digital Technologies*, Judge Easterbrook found that a manufacturer did not breach its

duty of good faith to a computer distributor when it refused to continue to recognize the distributor's addition of the operating system to computers as added value<sup>26</sup> because while good faith "is a ringing term,...there is no abstract 'duty of good faith' even in the law of fiduciary obligations."<sup>27</sup> Still, Judge Easterbrook conceded that "some parts of the law create

discrete duties to do things in good faith; labor law...creates a duty of good faith bargaining, but even that branch of law does not require either side to make concessions."<sup>28</sup>

Nevertheless, the Seventh Circuit recognized that were it not for the doctrine of good faith, one party to an agreement would be "at the mercy" of the other, where the other party might have "an incentive to exploit its leverage by refusing to come to terms."<sup>29</sup> In *First National Bank of Chicago*, Judge Posner examined the conduct of two parties to a loan agreement based on two letter offers. The court reasoned that without the implied condition of good faith bargaining over the terms of the loan, the "commitment letter, by making the loan conditional on the working out of mutually satisfactory terms, would have placed ATM at the mercy of the bank and might have given the bank an incentive to exploit its leverage by refusing to come to terms so that it could pocket the fees set forth in the fee letter without doing anything to earn them."<sup>30</sup> While the court also pointed out the

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importance of such other factors as the enterprise's concern with its reputation and the hope to gain future contracts as limits on opportunistic behavior, it was nonetheless the contract doctrine of good faith performance that "standardly applie[s] to cases in which the contract requires that performance be to the satisfaction of the paying party."<sup>31</sup>

Generally not one to belabor a point, Judge Posner nevertheless continued to assess the role of good faith in contractual obligations well beyond the usual rule. After stating that "a party cannot withhold satisfaction in bad faith – that is, cannot take the position that he is not satisfied when in fact he is," the court advised that "there is more to the doctrine."<sup>32</sup> Good faith "would also forbid the bank to insist on an unreasonable condition, or a condition it would not have insisted on but for the siren song of the fee agreement."<sup>33</sup> At this point, the court distinguished between the good faith obligation during the negotiation phase and this obligation during the performance phase, concluding that while the duty of good faith is weak in the formation stage of a contract, "if indeed it can be said to exist at all there," once a contract is formed, "the duty of good faith performance enters the picture and requires bargaining in good faith over the terms left open by the original contract; for that bargaining is a component of the anticipated performance."<sup>34</sup>

Thus, even assuming there is some merit in the Seventh Circuit's contention that good faith does not require "kindness" in the bargaining relationship, the duty of good faith nonetheless remains an integral requirement of performance. There is no reason to depart from this general contract obligation simply because the contract in question is a collective bargaining agreement. Rather, there is a compelling reason to insist upon it. Where one party has been given reserved discretion, the obligation to exercise good faith is essential to ensure the parties' mutuality of obligation.

#### *Requirements Contracts and Exclusive Dealings*

**Requirements-output contracts.** In an appeal of a requirements contract case, Judge Posner

posed the following question: "Is such a contract essentially a buyer's option, entitling him to purchase all he needs of the good in question on the terms set forth in the contract, but leaving him free to purchase none if he wishes provided that he does not purchase the good from anyone else and is not acting out of ill will toward the seller?"<sup>35</sup> Judge Posner identified this as a fundamental question in the law of requirements contracts.

Courts are particularly willing to find that a party has an obligation to exercise good faith when that party has been given discretionary power over one of the terms of the contract.<sup>36</sup> Output and requirements contracts are leading examples of such contracts where the parties perform with reserved discretion. In these types of agreements, the parties have entered into a contract for the sale of goods without committing to purchase a specific quantity – hence an undefined term and the concomitant power of discretion.

Under an output contract, the seller's duty to deliver is determined by its output, as to which the seller has some discretion. Under a requirements contract, the buyer's duty to purchase is determined by its requirements, as to which the buyer has some discretion. Unless the parties have themselves agreed otherwise, the court defines the obligation to maintain output or requirements in terms of good faith. Any reduction in output or requirements, including a reduction to zero, must be made in good faith.<sup>37</sup> Thus Judge Posner writing for the Seventh Circuit in *Empire Gas Corporation v. American Bakeries, Co.*, held that where a company never ordered any of the equipment contemplated in a requirements contract with its supplier, the "Illinois courts would allow a buyer to reduce his requirements to zero if he was acting in good faith."<sup>38</sup> Hence a buyer could be found not to have breached its agreement to buy approximately 3000 fuel conversion units, even though it never purchased a single unit, if it did so in good faith.

The issue then was whether the buyer had acted in good or bad faith when it reduced its requirements to zero. In assessing the buyer's

“faith” and determining whether it be “bad” or “good,” Judge Posner offered clarification by example for a term which he recognized as having no “settled meaning in law” but rather is something of a “chameleon.”<sup>39</sup> He suggested that the buyer was

clearly... acting in bad faith if during the contract period it bought propane conversion units from anyone other than Empire Gas, or made its own units, or reduced its purchases because it wanted to hurt Empire Gas (for example because they were competitors in some other market). Equally clearly, it was not acting in bad faith if it had a business reason for deciding not to convert that was independent of the terms of the contract or any other aspect of its relationship with Empire Gas, such as a drop in the demand for its bakery products that led it to reduce or abandon its fleet of delivery trucks. A harder question is whether it was acting in bad faith if it changed its mind about conversion for no (disclosed) reason.<sup>40</sup>

The court’s reliance on an examination of conduct to determine good or bad faith is revealing. It acknowledges that such a determination must be made on a case-by-case basis, and even more important, it shows that there is no one set definition of good or bad faith but rather it is relative to the circumstances and the parties. Yet despite the difficulty in making the assessment, the role of good faith cannot be ignored. As Judge Posner finally answered his

initial question, a “buyer cannot arbitrarily declare his requirements to be zero” because the essential element of good faith prevents him, acting as a monitor on his behavior.<sup>41</sup>

**Exclusive Dealing Relationships.** Exclusive dealing agreements are another example of contracts that call for the exercise of one party’s discretion where courts have often supplied a term calling for “best” or “reasonable” efforts.<sup>42</sup> Although the scope of this duty is no better defined than that of the duty of good faith, Professor Farnsworth has noted that “it is clear that the duty of best efforts is more onerous than that of good faith.”<sup>43</sup>

In exclusive dealing agreements, courts have often implied a term calling for the parties’ best efforts. The leading common law case is *Wood v. Lucy, Lady Duff-Gordon* where Cardozo, writing for the New York Court of Appeals, supplied a term calling for Wood to use his best efforts to market her fashions.<sup>44</sup> Here, the rights granted Wood were an exclusive privilege, preventing

Lady Duff-Gordon from further activity and from granting rights to others. Because her sole compensation depended entirely on Wood’s efforts, the court supplied a term requiring that he use “reasonable efforts to bring profits and revenues into existence.”<sup>45</sup>

An exclusive dealing relationship, therefore, is a continuing, highly interdependent arrangement where one of the parties’ performance involves some degree of discretion. Such agreements can include contracts for the sale of goods and contracts of real estate brokers.<sup>46</sup> The common denominator in all such agreements is that they convey “exclusive” rights. Conversely, courts will not supply a requirement of best efforts where the rights given are not exclusive because in that case the grantor of those rights does not disqualify it-

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self from further activity or from granting rights to others.<sup>47</sup> Moreover, even if the rights given are exclusive, the courts will refrain from requiring best efforts if “the grantor’s remuneration is a fixed sum.”<sup>48</sup>

**Collective Bargaining Agreements.** Like requirements-output contracts, labor contracts in the form of collective bargaining agreements reserve discretion to one party to the bargain in the nature of management rights provisions. Generally, such clauses reserve to management the rights not specifically allocated to either management or labor within the four corners of the collective bargaining agreement.<sup>49</sup>

Management rights clauses vary widely in form and content. Some may provide simply that “all normal prerogatives of management shall be retained by the Company except as specifically limited or abridged by the provisions of this Agreement.”<sup>50</sup> In contrast, others provide exquisite detail, stating specific powers to be exercised by management while noting that “this enumeration [is] merely by way of illustration and not by way of limitation.”<sup>51</sup>

This “reserved rights” doctrine has been the topic of much debate. It has been challenged on the basis of the reasonableness of the specific management right and the equitable exercise of that inherent right.<sup>52</sup> It is not surprising, therefore, that the implied obligation of good faith features prominently in the debate. As Arbitrator Sidney Wolff has commented:

[W]hile management has the right to manage subject to the contractual limitations, is there not implied – if not expressed – the requirement that management will exercise that right in good faith...

Management may subcontract, for example, but is it not to do so in good faith depending on the needs of its business rather than from an intent merely to take work away from its unionized employees, to cause them to lose their jobs, to demoralize them – all to the end of destroying the union?

All will agree that it is an obligation of a party to a contract not to enter upon a course of conduct the effect of which is to avoid performance under that contract and to render it null and void. This is well settled in ordinary contract law. How much more applicable is it to a labor contract intended to maintain a proper stable working relationship between a company, its employees, and the union! <sup>53</sup>

Arbitrator Wolf would agree, therefore, with Justice Goldberg in recognizing the need for reciprocity between management and labor in order for the relationship to endure successfully. However, Arbitrator Wolf recognizes that it is the duty of good faith in the discharge of management’s discretion that maintains the balance. Management’s obligation of good faith can be inferred from Justice Goldberg’s words when he noted that labor’s ability to accept management’s right to manage “without question depends on equally clear acceptance by management of the view that the exercise of these rights cannot diminish the rights of the worker and the union.”<sup>54</sup> Only the exercise of good faith in the execution of its discretion would ensure that labor is not placed in a position inferior to management.

Not only do collective bargaining agreements contain a term reserving discretion to one party to the bargain in the form of management rights clauses, but they involve an element of exclusivity as well. Like the common law’s “exclusive dealing” relationship, management and labor in the public sector are involved in a continuing, highly interdependent arrangement where one of the parties’ performance involves some degree of discretion. Courts have required a party’s “best” or “reasonable” efforts in such a situation.<sup>55</sup> No less should be demanded when the contract is a labor contract. No less is demanded of labor when it exercises exclusivity. In *Vaca v. Sipes*, the United States Supreme Court recognized that a union’s exclusivity as a bargaining agent brought with it the concomitant duty “to exer-

cise its discretion with complete good faith and honesty, and to avoid arbitrary conduct.”<sup>56</sup>

Management’s exclusivity in the public sector comes as a result of its freedom from the obligation to negotiate its management prerogatives. Whereas the Taylor Law requires public employers to bargain with labor over a mandatory subject of negotiation in good faith, there is no such requirement for non-mandatory subjects.<sup>57</sup> A party may decline to negotiate about such a subject without violating a duty to negotiate in good faith.<sup>58</sup> Management prerogatives are considered such non-mandatory subjects of bargaining.<sup>59</sup> For example, the creation and filling of new positions is a management prerogative and not mandatorily negotiable.<sup>60</sup> Similarly, a demand restricting changes in managerial policies which may impact on terms and conditions of employment is nonmandatory, although the impact of such policy changes is a mandatory subject of negotiation.<sup>61</sup> Many if not most of management’s operating decisions, therefore, fall within the purview of its management prerogatives and would appear not to be subject to any limitation. Surely a management with absolute discretion was not the result the New York State legislature intended from its efforts to harmonize the employer-employee relationship by promulgation of the Taylor Law.

## THE TAYLOR LAW

### *Statutory Requirement of Good Faith Bargaining*

In enacting article 14 of the Civil Service Law and the Public Employees’ Fair Employment Act (“Taylor Law”),<sup>62</sup> the New York State legislature declared that “it is the public policy of the state.... to promote harmonious and cooperative relationships between government and its employees....”<sup>63</sup> This “harmonious and cooperative relationship” was based in large part on the granting to employees of the fundamental right to “form, join and participate in, any employee organization of their own choosing.”<sup>64</sup> Further, public employees were granted

the right “to be represented by employee organizations to negotiate collectively with their public employers in the determination of their terms and conditions of employment, and the administration of grievances arising thereunder.”<sup>65</sup> The sincere hope was that by giving government employees collective bargaining rights, the pressures that led to strikes would be averted.<sup>66</sup> The provision for employee representation and the imposition of mutual obligations on both parties to the collective bargaining relationship can be viewed as an expression of the legislature’s intent to equalize the bargaining relationship.

Similarly, the Taylor Law’s requirement that public employers negotiate with unions over “wages, hours and other terms and conditions of employment” in “good faith” is another indication of the legislature’s intent to balance the power between employees and employers. The Civil Service Law defines collective negotiations as “the performance of the mutual obligation of the public employer and a recognized or certified employee organization to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession.”<sup>67</sup> This imposition of good faith on both sides of the bargaining table recognizes the significance of such behavior in the bargaining process.

While good faith negotiations are defined largely as a matter of intent,<sup>68</sup> and therefore assessed principally by conduct, the Taylor Law nevertheless recognized the critical importance of such behavior and deemed it an improper practice for public employers or employee organizations to refuse to bargain in good faith.<sup>69</sup> Thus the Taylor Law imposes a statutory obligation on the parties to meet at reasonable times<sup>70</sup> and to make reasonable efforts to resolve differences.<sup>71</sup> A union’s insistence

on agreement for paid release time for its bargaining representatives as a condition to continuation of negotiations for a collective bargaining agreement was held to violate the duty to negotiate in good faith.<sup>72</sup> In finding a lack of good faith, the Administrative Law Judge looked at the overall conduct of the union at the negotiating table and noted that while the Act does not require concessions by either party, it does require that they express a willingness to meet at reasonable times and places to exchange proposals.<sup>73</sup> The ALJ did not find it difficult to conclude that the union violated its statutory obligation when it canceled one scheduled meeting after another because “obviously, the type of exchange and consideration of proposals required by the Act cannot take place if the parties fail to meet.”<sup>74</sup>

Similarly, in *Deposit Teachers Ass’n*, the PERB Board affirmed the Administrative Law Judge’s finding that the District’s conduct, taken as a whole during the parties’ four negotiating sessions, evidenced bad faith conduct.<sup>75</sup> In examining the nature of the reciprocal bargaining obligations of good faith imposed by § 204.3 of the Act, the Board noted that “a party’s failure to make any concessions or to reach any agreements are factors which may be properly considered in assessing a party’s good faith. A party negotiates in good faith only by actively participating in deliberations so as to indicate a present intent to find a basis for agreement.”<sup>76</sup> The Board further recognized that while the Act did not require parties to agree, “an employer was ‘obliged to make some reasonable effort in some direction to compose his differences with the union’ if the statutory bargaining obligation [was] to have any significance at all.”<sup>77</sup> The Board’s assessment that collective bargaining would be meaningless unless the employer came to the bargaining table with a sincere desire to reach agreement is clear recognition of the critical role of good faith in labor relations. Notably, the Board evaluated “good faith” intent by its objective, outward manifestations.

A failure of parties to negotiate in good faith would upset the delicate balance between labor

and management so essential to the basic mechanism of collective bargaining. As ALJ Barsamian stated in evaluating a refusal to bargain in good faith allegation, “it is central to the dogma of the requirement of good faith in public sector labor exchanges during negotiations that there be a sincere desire to conclude a bilaterally negotiated agreement with the other party. The measure of ‘a party’s sincerity is usually its willingness to exchange proposals, to discuss the issues, to explain the rationale of its negotiation position upon request, and to accommodate the idea of compromise.’”<sup>78</sup> In the *Matter of Greenburgh*, the ALJ found that the union’s refusal to present bargaining proposals unless the school district agreed to certain “confidentiality” ground rules to be an impermissible act of bad faith.<sup>79</sup> The ALJ found that because the union refused to set forth a single proposal during the entire mediation process unless the ground rule was first in place as a condition precedent to dialogue, the entire process was thwarted and produced “so chilling a climate as to result in fatal freezing of the mediation process.”<sup>80</sup> The obligation of both parties to negotiate in good faith, therefore, is essential to a meaningful dialogue and critical to ensuring the meaningful operation of the entire collective bargaining process.

### *Private, Public Sector Differences*

The rights of private sector employees to organize and bargain collectively are governed by the National Labor Relations Act (“NLRA”).<sup>81</sup> The stated policy of the NLRA, like that of the Taylor Law, is to foster a harmonious and cooperative relationship between employers and employees, albeit with added recognition of promoting and protecting the commercial interests of the nation as a whole.<sup>82</sup> Despite the similar underlying purposes between these two Acts, however, there are significant differences between them. These distinctions serve to distinguish the unique role assumed by the obligation of good faith in public sector labor relations.

The most fundamental difference between the rights granted to public employees pursu-

ant to the Taylor Law and those granted to private sector employees under the National Labor Relations Act (NLRA) involves the right to strike. The NLRA gives private sector employees the right to strike;<sup>83</sup> the Taylor Law expressly prohibits it.<sup>84</sup> In prohibiting the right to strike, the Taylor Law takes away what is generally recognized as the most powerful weapon in labor's bargaining arsenal. Admittedly, public employees are denied the right to strike because of the legitimate need of government to assure its orderly, continued existence and that of the general public's welfare. Still, if the Taylor Law intended to foster "harmonious and cooperative relationships between government and its employees" based on stabilizing the relationship between labor and management, would it remove the most powerful equalizer between them unless there was something equally effective to compensate for labor's loss?

If indeed there was to be no second class role for labor, but rather a "harmonious relationship" with management, then it would require a level playing field to make it succeed.<sup>85</sup> And it is the requirement that management exercise its rights in good faith that makes the otherwise inequitable division of power both equitable and workable. Significantly, Justice Goldberg called for recognition of the inherent equality of labor and management if the division of function between these entities were to function smoothly. He argued that the parties were equal, even if management appeared to be the more active player by directing operations while labor could only file grievances when it objected.<sup>86</sup> To make what Justice Goldberg referred to as the "desirable division of function" between labor and management

workable, certainly both parties would have to act in good faith while the obligation to do so would no doubt fall heavier on the party acting with discretion.

Another significant difference between the Taylor Law and the NLRA which further illustrates the import of the obligation of good faith in public sector labor relations, is the Taylor Law's specific requirement of deliberate

intent on the part of the employer to engage in improper practices.<sup>87</sup> In contrast, unfair labor practices under the NLRA do not require that a practice be "deliberate" to be improper.<sup>88</sup>

The Taylor Law's requirement of deliberate intent indicates the importance of evaluating motivation in making determinations of improper conduct. Certainly, the task of assessing motivation is

not an easy one because of its inherently intangible nature. Nonetheless, the legislature must have considered it vital to include it in the language of the statute when it could easily have left it out as did the NLRA. In comparing the two statutes, it is obvious that the language is practically identical with the exception of the Taylor Law's inclusion of deliberateness. Would the New York State legislature have required conscious intent before finding an improper practice if it did not intend to recognize the obligation to act in good faith when evaluating both management's and labor's behavior?

#### ***Duty of Fair Representation***

Commensurate with management's obligation to exercise good faith intent in the exercise of its rights and obligations towards labor is the union's duty of fair representation to its members. A judicially crafted doctrine, the duty of

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### **WOULD THE NEW YORK STATE LEGISLATURE HAVE REQUIRED CONSCIOUS INTENT BEFORE FINDING AN IMPROPER PRACTICE IF IT DID NOT INTEND TO RECOGNIZE THE OBLIGATION TO ACT IN GOOD FAITH WHEN EVALUATING BOTH MANAGEMENT'S AND LABOR'S BEHAVIOR?**

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fair representation is based on the fact that unions were certified as the exclusive bargaining agent under the Railway Labor Act ("RLA").<sup>89</sup> In *Steele v. Louisville & N.R. Co.*, the Supreme Court balanced a union's right as exclusive bargaining representative for a group of workers with a corresponding duty to them because of this right.<sup>90</sup> The Court found that this duty obligates the union to represent all workers in the bargaining unit over which it exercises exclusive bargaining rights "without hostile discrimination, fairly, impartially, and in good faith."<sup>91</sup>

The duty of fair representation was subsequently recognized and adopted under the NLRA<sup>92</sup> in *Ford Motor Co. v. Huffman*.<sup>93</sup> But it was not until *Vaca v. Sipes* that the Supreme Court fully delineated the contours of the union's "duty of fair representation" as

[t]he exclusive agent's statutory authority to represent all members of a designated unit includ[ing] a statutory obligation to serve the interest of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct.<sup>94</sup>

This decision and subsequent Supreme Court decisions on the union's duty of fair representation to its members have occurred in the private sector context. Although the New York Court of Appeals has adopted the rule from *Vaca* in the private sector,<sup>95</sup> it has yet to rule on its applicability in the public sector. Nevertheless, this doctrine has been applied to the public sector by the state supreme court and the appellate divisions of all four departments in addition to a number of lower courts.<sup>96</sup>

Just as a party's obligation to bargain in good faith is evaluated by its overall conduct in conducting negotiations, a union's duty of fair representation to its members is judged by the totality of its actions. Thus a breach of this duty occurs "only when a union's conduct toward a member of the collective bargaining unit is

arbitrary, discriminatory, or in bad faith."<sup>97</sup> A mere error in judgment on the part of the union will not constitute a breach of the duty of good faith.<sup>98</sup> Instead, the union is obligated to process the employee's grievance against the employer in a nondiscriminatory manner<sup>99</sup> which generally requires that the union assess each member's grievance "with a view to its individual merit and its consistency with prior and pending grievance proceedings."<sup>100</sup>

While it is true that a union may not arbitrarily ignore a meritorious grievance or process it perfunctorily, it is equally true that a union member does not have "an absolute right to have [her] grievance taken to arbitration."<sup>101</sup> The union is "vested with discretion – to be exercised in good faith – to determine when a grievance is worthy of further pursuit and when it should be settled and to weed out frivolous and meritless grievances."<sup>102</sup>

Once again, the exercise of discretion is limited by the obligation to do so in good faith. Without the restraint imposed by this obligation, the union's judgment would be absolute and the equality between union and member so essential to genuine representation would be effectively destroyed.

## **APPLYING CONTRACT PRINCIPLES TO COLLECTIVE BARGAINING AGREEMENTS**

General contract principles are routinely applied to interpret a collective bargaining agreement because it is first and foremost a contract between two parties. As discussed above, the obligation to act in good faith is well-recognized in general contract law as an implied term in every contract and assumes a particularly significant role in contracts where discretion is reserved to one party to the agreement. This obligation is not altered simply because the contract in dispute is a collective bargaining agreement.<sup>103</sup> Arbitrators generally apply basic contract principles in interpreting and enforcing collective bargaining agreements; the implied obligation of good faith should be no more than another

principle used by arbitrators when called upon to evaluate disputed behavior.

Apparently, courts recognize the basic nature of collective bargaining agreements as contracts because when called upon to interpret such agreements, they routinely apply accepted standards of interpretation of general application.<sup>104</sup> As a general rule, “all written instruments, constitutions, statutes, and contracts are interpreted by the same general principles, although the specific subject matter may call for strictness or liberality.”<sup>105</sup> Arbitrators similarly use these basic contract standards of construction.<sup>106</sup>

While the standards of contract construction as used by arbitrators are not inflexible and parties probably do not expect arbitrators to be as bound by the rigid rules of construction as are the courts, arbitrators nonetheless rely on basic contract standards in construing contract provisions. Without doubt, the labor-management arbitrator is most often called upon to interpret the collective bargaining agreement. Interpretation is the process by which the meaning given to the language used by the parties is ascertained to determine the legal effect of the contract.<sup>107</sup> Interpreting a contract provision is a process and arbitrators, like the courts, rely on the following basic principles: first, there is no need for interpretation unless the agreement is ambiguous;<sup>108</sup> second, an agreement is not ambiguous if its plain meaning can be determined without any other guide than a knowledge of the simple facts on which its meaning depends;<sup>109</sup> third, the primary goal is to determine and carry out the mutual “intent of the parties” which is determined by examining the express language of the agreement,<sup>110</sup> statements made at pre-contract negotiations, the bargaining history of the parties and past practice;<sup>111</sup> fourth, words are given their usual and ordinary meaning absent an indication they were intended to be used in a different or colloquial sense;<sup>112</sup> and finally, where contract language is ambiguous, a construction that is “reasonable and equitable to both parties rather than an

unfair and unreasonable advantage over the other is preferred.”<sup>113</sup>

In addition to these basic contract rules for interpreting contractual provisions, arbitrators also rely on such general standards of contract interpretation as the following: the rule that ambiguous language will be construed against the party who proposed or drafted the language;<sup>114</sup> the axiom that the law abhors a forfeiture;<sup>115</sup> the doctrine that a general principle should be restricted by more specific provisions; the canon of construction that to expressly include one or more of a class in a written instrument must be taken as the exclusion of all others;<sup>116</sup> the precept that where general words follow an enumeration of specific terms the general words will be interpreted to include or cover only things of the same general nature or class as those enumerated unless it is shown that a wider sense was intended;<sup>117</sup> and the maxim that an interpretation should be given to ambiguous language that avoids harsh, absurd, or nonsensical results.<sup>118</sup>

This list is surely not exhaustive, nor is it meant to be. Rather, the intent is simple: to show that arbitrators routinely apply basic contract principles in examining and interpreting collective bargaining agreements, at times even citing the general common law rule as authority.<sup>119</sup> And if arbitrators are so ready to invoke general contract principles in all these areas of contract interpretation, they should be just as ready to invoke the contractual obligation of good faith.

## **UNILATERAL MANAGEMENT ACTIONS**

While a unilateral management action might not be a breach of the statutory duty to bargain in good faith, it might well constitute a breach of the contractual obligation to act in good faith. A public employer or employee organization commits an improper practice when it refuses to bargain in good faith over a mandatory subject of negotiation.<sup>120</sup> But exactly what the parties are required to negotiate or are prohibited from bringing to the

bargaining table remains one of the most heavily litigated subjects in public sector labor relations. It is precisely resolution of this issue that determines, for example, whether an employer's unilateral change in a workplace procedure is an improper practice for which the Taylor Law provides the union with a remedy or whether the action falls within the scope of management's prerogative and need not be negotiated.<sup>121</sup>

Such a determination has major consequences. If it is found that management's unilateral act does not violate its bargaining obligation under § 209-a 1(d) because the action falls within the scope of management's prerogative and the improper practice charge is consequently dismissed, it is very possible that labor will be left without a remedy. For labor is hard pressed to overcome the presumption afforded management when it claims management prerogative as its source of right for a disputed action.

While labor did not bargain for an irrebuttable presumption of privilege for management to act unilaterally under the guise of a management rights clause, this is nonetheless a common result. In *Matter of City of New Rochelle*, the Administrative Law Judge found that the City had a managerial right to unilaterally determine the criterion by which it defined "excessive" use of sick leave and dismissed the improper practice charge brought by the union.<sup>122</sup> The union asserted that management failed to negotiate the impact of a change made in the parties' sick-leave procedure when it reduced from 12 to 10 the number of absences constituting excessive use. The ALJ noted that the City's definition of "excessive" had been reduced from 15 days to 12 days in the past but the union failed to object until a list was issued which placed certain employees with 10 absences in the excessive-use category.<sup>123</sup> The ALJ did not question the basis for this reduction and simply held that "an employer has the right to combat the misuse of sick leave and the City has the power unilaterally to determine the criterion by which it might define 'excessive' use of sick leave."<sup>124</sup> Interestingly,

there was no discussion of a problem with employees abusing sick leave which might have led the ALJ to this conclusion. Also interesting was the ALJ's assertion that "I [do not] regard as dispositive that unit employees are contractually entitled to 12 days of sick leave per annum...."<sup>125</sup> Somehow the ALJ felt confident in concluding that the City acted rightfully in defining excessive sick leave as 12 days even though employees were contractually entitled to this number of sick days. Essentially, employees were disciplined for utilizing a contractual right and the City's right to do so was upheld as within its prerogative.

Interestingly, in *Onondaga-Madison Board of Cooperative Educational Services*, the Board upheld the ALJ's decision to dismiss the union's improper practice charge but not based on the ALJ's reliance on management's prerogative.<sup>126</sup> In this case, the union alleged that BOCES unilaterally altered the work week of a custodial employee to include Saturday work, without increasing the weekly hours of work, but failed to compensate the employee at the negotiated overtime rate. The ALJ, however, declined to view this matter as one about compensation, a mandatory subject of negotiation, and found instead that it was management's prerogative to decide whether or not it required the weekend services of its employees. The union conceded management's right to decide whether or not it needed the weekend services of its employees but claimed that when an employee is required to work Saturday, that employee should be paid the negotiated overtime rate. The Board agreed with the ALJ's decision to dismiss the union's charge but on a different basis. Instead, the Board found that it would dismiss the charge even if it read it to be a complaint that the employee was not compensated sufficiently because whether an employee has a right to premium pay is a matter covered by the parties' collective bargaining agreement and PERB has no jurisdiction in this area.<sup>127</sup>

In this instance, the union might have improperly identified the nature of the employer's transgression by claiming a statu-

tory violation when it was more appropriately a contract violation. Thus, the ALJ was not far from the mark when he read the charge as an issue involving work scheduling. Typically, management has the right to determine staffing levels without negotiation because staffing is a nonmandatory subject.<sup>128</sup> In this case, however, it appears that an employee's schedule might have been manipulated to avoid the contractual obligation of overtime. If so, the Board was correct in dismissing the improper practice charge. But unless an arbitrator is willing to examine the employer's motivation and the possibility of bad faith in effecting a unilateral change, the union is left without the likelihood of a remedy.

Interestingly, a similar situation arose in the *Matter of Public Employees Federation, AFL-CIO*, where the union filed

an improper practice charge alleging that the State of New York sought to reallocate a unit position to a different salary grade to avoid the payment of contractual overtime.<sup>129</sup> As in *Onondaga*, the PERB Director found no improper practice under the Taylor Law and dismissed the union's charge, even if the act of reallocating a unit position was "to avoid the consequence of a contractual provision."<sup>130</sup> Thus it would appear that the union was once again in the wrong forum. It should have brought a grievance alleging a breach of the parties' collective bargaining agreement and not an improper practice for failure to negotiate pursuant to the Taylor Law.

It is very possible, therefore, that unions fail to properly identify the nature of a unilateral action of the employer, alleging a violation of the duty to negotiate, i.e., an improper practice in violation of section 209-a.1(d) of the Act, when it is more appropriately a breach of contract action. This occurs for two reasons.

First, the line between a unilateral action that is an improper practice and one that falls within management's prerogative is very fine and often not very clear; and second, labor fails to perceive a source of right in the collective bargaining agreement on which to assert its contract claim.

Discerning the difference between a unilateral action that is a violation of the Taylor Law and one that breaches the parties' collective

bargaining agreement is as hard for the courts to do as it is for labor. The Court of Appeals admitted that "no litmus test has yet been devised that automatically identifies a term or condition of employment, or a management prerogative, or establishes whether a particular subject should be placed into the first category or the second."<sup>131</sup> While recognizing this difficulty in determining whether

a matter was a term or condition of employment or a management prerogative, the court held firm in one respect—"in the exercise of managerial prerogatives,...the employer must act in good faith."<sup>132</sup> Furthermore, the court recognized the instinctive tendency of management to usurp power and control and noted that the regulatory scheme of the New York City Collective Bargaining Law protected against the "the public employer, who could by declaring conditions of employment to be 'qualifications' unilaterally put such matters beyond the statutory duty to bargain."<sup>133</sup>

Thus the Court of Appeals was keenly aware of these twin dangers for labor: first, the problem in determining whether a matter was mandatorily negotiable; and second, the likelihood that management would wield its discretion to unilaterally put such matters beyond the statutory duty to bargain. Unfortunately, the Court of Appeals was not successful in resolving the

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issue and these matters are routinely disputed between the parties, the judges, and the Board.

For example, in contrast to the Board's finding in *Onondaga* that there was no violation of section 209-a.1(d) when an employee's work schedule was manipulated, the Administrative Law Judge in *Lackawanna Municipal Housing Authority* specifically found that the employer violated its bargaining obligation by unilaterally instituting a rotating workweek in place of its former established Monday through Friday workweek.<sup>134</sup> The ALJ held that while management may unilaterally determine the number of maintenance mechanics it needs on duty at any given time or the days of the week on which services are to be performed, "it is nonetheless required to negotiate over the scheduling of time off during the workweek."<sup>135</sup> The employer violated section 209-a.1(d) by "unilaterally altering the workday/workweek of maintenance mechanics... and refusing to negotiate the decision," the ALJ found.<sup>136</sup> Despite no significant distinction between the facts in *Onondaga* and *Lackawanna* to warrant such different results, one employer is ordered to negotiate in good faith while the other is not. While it is difficult to determine whether the complained of actions in *Onondaga* and *Lackawanna* were more properly designated improper practices or contract breaches, one thing is certain: in each case, management acted unilaterally to manipulate the employee's workweek and avoid the payment of overtime. To this observer, such action smacks of bad faith. It fails to adhere to the parties' agreed common purpose,<sup>137</sup> is inconsistent with the justified expectations of labor, and is neither fair nor reasonable.<sup>138</sup>

Ironically, management often defends such a unilateral action by claiming that the union effectively "waived" its right to bargain the issue by virtue of the management rights clause in the parties' collective bargaining agreement.<sup>139</sup> It is well-settled PERB precedent that a waiver will not be lightly found and that the party's relinquishment of the right to negotiate must be clear, unmistakable and unambiguous.<sup>140</sup> Still, waivers are frequently found, even in broadly-worded

management clauses. In *County of Onondaga*, an effective waiver was found in a management rights clause allowing the transfer of duties from the police division to the custody division despite demonstrated exclusivity over the claimed work.<sup>141</sup> The Director found that while the scope of the clause was broad and did not address the responsibilities of the particular party at issue, it nevertheless made "clear that any aspect of the 'operation' [could] be transferred by the Sheriff to other 'personnel.'" <sup>142</sup>

By asserting a waiver defense, management claims that when labor agreed to the inclusion of a general management rights clause in the parties' collective bargaining agreement, it gave up its right to negotiate issues that had not yet even arisen. Further, such a defense maintains that labor gave a clear grant of right to the employer to act, virtually without limit. When management has used a defense of waiver to support unilateral actions including the transfer of unit work to non-union employees<sup>143</sup> and the implementation of random drug and alcohol testing,<sup>144</sup> it is difficult if not impossible to believe that labor would have so agreeably acquiesced. Rather, management's defense to its unilateral action that labor "waived" its bargaining rights by virtue of a broadly-worded management rights clause is itself an act of bad faith and repugnant to the very essence of collective bargaining.

Besides the difficulty in assessing the character of management's unilateral act, labor faces the more problematic issue of identifying a source of right within the parties' collective bargaining agreement on which to bring the grievance. Typically, management defends its unilateral act by claiming the broadly-worded management rights clause as its authority. Labor, on the other hand, is hard-pressed to find a reasonably arguable source of right on which to contest this apparently legitimate assertion of management's prerogative. A recognition of good faith as a valid contractual limitation on management's exercise of its reserved rights, however, would resolve this dilemma by affording labor a viable cause of action in a contract dispute.

Deferral to the parties' contractual grievance procedure is often the result when labor asserts an improper practice alleging a unilateral management act. Affording labor a source of right in the contract would eliminate the burden on PERB and save time and resources. In *Town of Walkill*, the Administrative Law Judge conditionally dismissed the union's improper practice charge, deferring the merits of the charge to the parties' contractual grievance procedure.<sup>145</sup> The union alleged that the Town had committed an improper practice when it unilaterally implemented a new policy regarding sick leave requiring house confinement. The Town defended on the basis of the management rights clause in the parties' agreement allowing it "to make, alter, delete and enforce reasonable rules, regulations, orders and policies..."<sup>146</sup> The ALJ found that this same clause provided a "reasonably arguable source of right" to the union in that it might be "reasonably read to restrict the Town's right to make, alter, delete and enforce rules, to actions of the Town which may be characterized as reasonable."<sup>147</sup> Thus the ALJ found deferral to the parties' grievance process more appropriate because disposition of the charges required an interpretation of the contractual language and was in keeping with the policies of the Act. Quoting a recent Board decision, the ALJ concluded:

When, as here, the disposition of a refusal to bargain charge necessitates the interpretation of an agreement which is arguably a source of right to the charging party, and an award rendered under a binding grievance procedure is potentially dispositive of the issues underlying the charge, we have been persuaded that the policies of the Act favoring an accommodation of the parties' dispute resolution procedures are again advanced by a conditional dismissal of the charge, even when the charging party union has elected not to invoke the grievance arbitration provisions of the contract.<sup>148</sup>

Clearly the ALJ relied on the presence of the single word "reasonable" in the language of the management rights clause to find a source of right for the union. It would be reasonable to assume, therefore, that had this one word not been found in the clause, labor might have had no recourse. But it need not be so. Reasonableness is an integral component of good faith behavior and if the obligation of good faith is recognized as an implied term of every contract, then labor is afforded its own source of right within the four corners of the parties' collective bargaining agreement.

### *Preserving the Balance Between Control and Liberty*

The delicate balance between control and liberty in the collective bargaining agreement can only be preserved by explicitly and conclusively recognizing bad faith behavior as a breach of contractual obligation. A willingness to consider bad faith behavior as a breach of an implied term of the parties' collective bargaining agreement would be enormously significant. It would afford labor a forum and possible remedy where one would not otherwise be available. Moreover, it would ensure that labor received the "benefit of its bargain" in negotiating a collective bargaining agreement. In negotiating such agreements, the union bargains for job benefits and certain guarantees from management in exchange for its promise not to strike. In examining these guarantees – whether it is dismissal for just cause only, the administration of grievance procedures, negotiations over the terms and conditions of employment – the common denominator is that none are meaningful without good faith on the part of the employer. Accordingly, management's failure to exercise good faith in negotiations is required by statute. But unless good faith is required in the performance of the terms of the subsequently negotiated collective bargaining agreement, then the union's only purpose in entering into no-strike agreements is ultimately frustrated.

Even in decisions that allude to bad faith behavior on the part of management in invok-

ing its right to act pursuant to a management rights clause, it is difficult to find one that directly confronts the issue. Some come close but nonetheless back off from stating specifically that management acted in bad faith. For example, returning once again to *Lackawanna*, the ALJ declined to read into the management rights provision the authority to manipulate employee schedules but failed to call it bad faith when management did so nonetheless.<sup>149</sup> In this case, the employer claimed that the management rights clause reserved to it the power to make shift assignments. It argued that this clause should be read in conjunction with the workweek terms in the contract because the contract was not specific as to the days which constitute the workweek but provided only that the workweek would consist of 40 hours. The employer contended therefore that the right to determine employee schedules rested solely with management. The ALJ flatly rejected this argument and held that "while the management rights clause reserves to the Authority the right to determine manpower needs and to deploy personnel to carry out those needs, it is silent on the manipulation of employee schedules within that framework."<sup>150</sup> What this ALJ should have added was that the employer's manipulation of schedules was not made in good faith.

Similarly, in *City of White Plains*, while the Board upheld the Administrative Law Judge's finding that the City violated its bargaining obligation by unilaterally adopting a departmental work rule that required fire-unit employees, under the penalty of discipline, to maintain weight in proportion to their height, neither the Board nor the ALJ admonished the City for bad faith behavior in imposing such a regulation.<sup>151</sup> Yet when reading the ALJ's decision and its recitation of the underlying facts, it is hard to countenance any other categorization of such behavior.

In 1983, the City of White Plains adopted a departmental rule requiring all fire department members to maintain their weight within the range specified for their height according to their frame size and sex. Employees who

failed to conform were required to report to a physician. Disciplinary action was authorized against any employee who failed to meet the weight standards within the time prescribed by the examining physician. The problem with the rule, the ALJ discovered, was that the City failed to implement it according to its terms. Instead, only 17 of the approximately 150 unit employees were referred for examination based on their weight because these were the persons the fire chief considered to be grossly overweight. The City claimed that maintenance of defined weight levels was a qualification of employment which it could impose unilaterally upon existing employees. It also argued that it was forced to adopt this rule because its earlier efforts to secure the employees' voluntary participation in a weight reduction program were unsuccessful.

The general rule is that a qualification for employment must have a *bona fide* relationship to the employee's ability to perform the job.<sup>152</sup> In this case, the City asserted that employees' obesity allegedly interfered with their ability to satisfactorily perform their tasks. The ALJ found, however, that the facts in the record did not support the City's assertion, instead compelling the conclusion that "the City itself recognizes that an employee's conformity to any specified weight level is unrelated to his ability to satisfy the requirements of the job."<sup>153</sup>

The ALJ clearly expressed his disapproval of the City's action, finding that the City's only articulated concern was with a few firefighters it considered obese or grossly overweight. He stated that "only those employees were identified as ones who could experience any difficulty in performing certain tasks; only they were referred for examination and subjected to the treatment program. There is simply nothing in this record to evidence or support an argument that persons whose weight is above the maximum according to the table are unable or less able to perform their jobs."<sup>154</sup> The ALJ therefore determined that the City adopted a rule that was "unnecessary to its articulated needs and inconsistent with its actual practice" because it did not follow the

weight ranges as the basis for its referral of employees to the physician nor did it use them as the bases for the physician's determination of satisfactory compliance.<sup>155</sup> Furthermore, the ALJ dismissed each of the City's articulated defenses as deficient both legally and factually. First, the union's failure to attend a public hearing at which the rule was adopted was not a waiver of its right to negotiate because "public debate in the legislative forum is not negotiations." Second, the City's action was not necessitated by the union's refusal to cooperate with a voluntary physical fitness program at the local YMCA when there was no evidence that the City promoted such a program or that it obtained the claimed membership discounts, but instead rejected the union's repeated requests for exercise equipment in the fire station. Finally, adoption of the height/weight rule was consistent with public policy because the Municipal Police Training Council had issued regulations which would subject police officers to the same height/weight chart when the Fire Fighting and Code Enforcement Personnel Standards and Education Commission did not adopt similar regulations.<sup>156</sup>

While the ALJ made a compelling argument against the City's behavior, it would have been more effective to identify such actions as bad faith behavior and consequently provide labor with a recognizable source of right with which to counter such abuses of management discretion.<sup>157</sup> When management abuses its discretion under the guise of a management rights clause, such behavior should be identified and properly admonished as it was in *Town of Carmel*. There the Administrative Law Judge held that the managerial prerogative to control sick leave abuse did not privilege an employer to unilat-

erally implement internal procedures that exceeded the scope of existing rules governing absences from work.<sup>158</sup> The parties had a ten-year practice of loosely enforced residence confinement procedures for police personnel on sick or workers' compensation leave when the Town unilaterally issued a directive altering its previous policy by "adding new terms, new triggers and the specter of enforcement."<sup>159</sup> The

Town defended its action by arguing that confinement of employees to their residence when absent due to injury or illness, whether or not job related, was a right inherent in management. The Administrative Law Judge rejected this argument, holding instead that "while a public employer has the right to unilaterally implement existing internal procedures to insure compliance with

existing rules dealing with absence from work, its right is limited to procedures already in place. To add new rules, or to apply its procedures more stringently than it has in the past,... crosses the line of management prerogatives...."<sup>160</sup> For quite simply, management cannot confine employees under quasi-house arrest under the rubric of "management prerogative."

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## **CONCLUSION**

When labor concludes negotiations with management, it could not have intended that any general clause addressing working conditions in the collective bargaining agreement would privilege an employer at all times to take unilateral action. When an arbitrator or a judge comes to such a determination, therefore, it negates the fundamental nature of agreements and the very basis of their formation – the mutuality of obligation.

The most fundamental limitation on the enforcement of agreements is the requirement of consideration. Consideration requires that the agreement be a "bargained-for exchange" between the parties, signifying that the promise of one induced the return promise of the other. Such a bargained-for exchange is usually easy to identify in business transactions. Each party believes that it made a good deal and its bargain is typically measured by its expectation interest or the expected profit. The expectation interest is also referred to as the "benefit of the bargain" and represents the position the promisee would have been in if the promise had been fully performed. In the event of breach, the court looks to this expectation interest in formulating a remedy. While not the only possible measure of recovery, it is recognized as the measure which

affords the non-breaching party the full benefit of its bargain.

In considering the bargained-for exchange in the context of a public sector collective bargaining agreement, one finds the union's forbearance from striking the consideration for management's granting of certain benefits and job protections. But if management is privileged to act unilaterally pursuant to a broadly-worded management rights clause without any limits on its exercise of discretion, then not only has labor made a "bad deal," it has effectively sealed its fate. Neither result could have been labor's intent in entering the agreement. Only the consistent application of good faith as a valid contractual limitation on management's reserved rights will ensure that the collective bargaining agreement remains a truly bargained-for exchange. ▲

## ENDNOTES

<sup>1</sup> Mayer G. Freed and Daniel D. Polsby, *The Doubtful Provenance of "Wood's Rule" Revisited*, 22 ARIZONA STATE LAW JOURNAL 551 (1990). The employment at will doctrine holds that an employment relationship for which no definite duration has been stated can be terminated at will by either party.

Thus, an employer can discharge an employee for any reason or no reason, as long as it is not an "illegal" reason. An "illegal" reason is one which violates any one of the federal, state, or local antidiscrimination statutes. These statutes prevent discrimination against employees and job applicants by reason of race, color, creed, age, national origin, sex, religion, and physical handicap. Each statute has its own enforcement mechanisms.

<sup>2</sup> Frank Elkouri & Edna Asper Elkouri, *How Arbitration Works* 661-662 (5<sup>th</sup> ed., BNA 1997). The editors cite such legislation as the Sherman Anti-Trust Act, the Clayton Act, the Robinson-Patman Act, and the Securities Exchange Act, as responsible in one way or another for "drain[ing] the reservoir of management rights." Behind such legislation was the "hurricane of reform called Progressivism which

blew through all levels of American political and social life in the years between 1900 and 1917, [which was] above all... a response to the challenge of the city and the factory, an attempt to bring to heel the untamed forces which had almost reduced the American Dream to a mockery." Carl N. Degler, *Out of Our Past* 362 (Rev. ed., 1970).

Even more direct restrictions on management rights came about through passage of the Railway Labor Act of 1926, the National Labor Relations Act of 1935 (NLRA), the Labor-Management Relations Act of 1947 (LMRA), the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA), and the Civil Rights Act of 1964. More recently, legislation such as the Drug-Free Workplace Act of 1988, the Employee Polygraph Protection Act of 1988, the Americans with Disabilities Act of 1990, and the Family and Medical Leave Act of 1993, have placed additional limitations on management rights.

<sup>3</sup> Elkouri & Elkouri, *How Arbitration Works* at 662.

<sup>4</sup> *Id.* at 665.

<sup>5</sup> *Id.* at 655-656.

<sup>6</sup> Elkouri & Elkouri, *How Arbitration Works* 107 (Supp. 1999). In-

deed, of 400 private sector bargaining agreements analyzed by the Bureau of National Affairs (BNA), 80 percent contained a management rights clause. BNA, *Collective Bargaining Negotiations & Contracts, Basic Patterns in Union Contracts* 79 (1996). Of the 400 contracts in the BNA survey, 44 percent contained a savings clause. BNA, *Collective Bargaining Negotiations & Contracts, Basic Patterns in Union Contracts* 79 (1996).

<sup>8</sup> Elkouri & Elkouri, *How Arbitration Works*, 657 (5<sup>th</sup> ed., 1997) citing Goldberg, "Management's Reserved Rights: A Labor View," *Management Rights and the Arbitration Process*, 118, 122-23 (BNA Books, 1956).

<sup>9</sup> Elkouri & Elkouri, *How Arbitration Works*, 660 (5<sup>th</sup> ed. 1997).

<sup>10</sup> *In re Roma v. Ruffo*, 92 N.Y.2d 489, 705 N.E.2d 1186, 683 N.Y.S.2d 145 (1998).

<sup>11</sup> Restatement (Second) of Contracts §205 (1981). According to Restatement Second §205, "Every contract imposes upon each party a duty of good faith and fair dealing in its performance and enforcement."

<sup>12</sup> Restatement (Second) of Contracts §205 Comment d.

<sup>13</sup> E. Allan Farnsworth, *Contracts* 2<sup>nd</sup> §7.17, 551 (1990).

<sup>14</sup> Restatement (Second) of Contracts §205 Comment a.

<sup>15</sup> Restatement (Second) of Contracts §205 Comment d.

<sup>16</sup> Compare Restatement Second §205 with UCC §1-203: "Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement." The Official Comment states that the purpose of this section is to set forth a basic principle of the Act which is "that in commercial transactions good faith is required in the performance and enforcement of all agreements or duties." The Code provides for specific applications of this general principle such as the option to accelerate at will (§1-208), the right to cure a defective delivery of goods (§2-508), the duty of a merchant buyer who has rejected goods to effect salvage operations (§2-603), substituted performance (§2-614), and failure of presupposed conditions (§2-615). Further, under the Sales Article definition of good faith (§2-103), contracts entered into by a merchant contain the explicit standard not only of "honesty in fact" (§1-201), but also observance by the merchant of reasonable commercial standards of fair dealing in the trade. "Good faith"

is defined in § 1-201(19) as "honesty in fact in the conduct or transaction concerned."

<sup>17</sup> Compare Restatement Second § 208 ["If a contract or term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result"] with UCC § 2-302(1) ["If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result."]

<sup>18</sup> UCC § 1-102(3).

<sup>19</sup> UCC § 1-102(1) provides that "[t]his Act shall be liberally construed and applied to promote its underlying purposes and policies." Section 1-102(3) states that "[t]he effect of provisions of this Act may be varied by agreement, except as otherwise provided in this Act and except that the obligations of good faith, diligence, reasonableness and care prescribed by this Act may not be disclaimed by agreement but the parties may by agreement determine the standards by which the performance of such obligations is to be measured if such standards are not manifestly unreasonable." Section 1-102(4) further provides that "[t]he presence in certain provisions of this Act of the words 'unless otherwise agreed' or words of similar import does not imply that the effect of other provisions may not be varied by agreement under subsection (3)."

According to Professor Farnsworth, "even where special rules have evolved for particular types of contracts, it would be a mistake to suppose that they bear no relation to the general body of contract law. For example, the provisions of the Uniform Commercial Code on sales are generally limited to 'transactions in

goods' and do not apply to...contracts for the sale of land or for services. Courts have, nonetheless, used these provisions as a basis for the application of similar rules in analogous cases." Farnsworth, *Contracts* 2<sup>nd</sup> § 1.10, 36 (1990).

<sup>20</sup> James B. White and Robert S. Summers, *Uniform Commercial Code* § 1-2 (4<sup>th</sup> ed., 1995).

<sup>21</sup> Contract formation under the Code is easier in several ways. First, parties may form a contract through conduct rather than the exchange of communications referred to as "offer and acceptance" in the common law. Section 2-204(1) states: A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract." Sections 2-206(1) and 2-207(3) also allow for the formation of contracts partly or wholly on the basis of such conduct. Second, the usual formalities required by the common law for contract formation are significantly reduced. The statute of frauds section 2-201 requires only a writing that "indicate[s]" a contract was made, and 2-206 and 2-207(1) eliminate the requirement that an acceptance must coincide precisely with all of the terms of the offer - gone, therefore, is the common law's "mirror image" rule. In fact, section 2-204(3) states: "Even though one or more terms are left open a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy."

<sup>22</sup> Many Code sections contain "gap fillers" which apply unless the parties otherwise agree. The most common of these open term provisions relate to price, delivery, payment, duration, options respecting performance, and quantity. The Code usually requires such terms to be fixed in good faith: if a price is to be fixed by the seller or by the buyer, it means a price for him to fix in good faith. §§ 2-305(2) and Comment 3, 1-203, 1-201(19), 2-103(1)(b), 1-102(3). Other

terms are supplied by course of dealing, usage of trade, and course of performance. § 1-205. UCC § 1-201(11).

<sup>24</sup> UCC § 1-201(19).

<sup>25</sup> *Digital Equip. Corp. v. Uniq Digital Tech. Inc.*, 73 F.3d 756, 759 (7<sup>th</sup> Cir. 1996). See also *Kham & Nate's Shoes No. 2, Inc. v. First Bank of Whiting*, 908 F.2d 1351 (7<sup>th</sup> Cir. 1990), where Judge Easterbrook had noted earlier that "parties to a contract are not each others' fiduciaries; they are not bound to treat customers with the same consideration reserved for their families." Nevertheless, Judge Easterbrook recognized that "courts often refer to the obligation of good faith that exists in every contractual relation" although he added that "this is not an invitation to the court to decide whether one party ought to have exercised privileges expressly reserved in the document." Despite what appears to be an attempt to narrow the scope of good faith obligations, Justice Easterbrook nonetheless recognized that "courts often refer to the obligation of good faith that exists in every contractual relation." Apparently, his concern with the imposition of good faith obligations was for when a party would seek "to add an overlay of just cause to an already negotiated, fully executed contract. Principles of good faith fill the gap when the contract is silent; "they do not block use of terms that actually appear in the contract."

<sup>26</sup> *Id.* at 758.

<sup>27</sup> *Id.* at 758-759.

<sup>28</sup> *Id.* at 759.

<sup>29</sup> *First Nat'l Bank of Chicago v. Atlantic Tele-Net Network Co.*, 946 F.2d 615 (1991).

<sup>30</sup> *First Nat'l Bank*, 946 F.2d at 520.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Empire Gas Corp. v. American Bakeries, Co.*, 840 F.2d 1333 (7<sup>th</sup> Cir. 1988).

<sup>36</sup> Farnsworth, *Contracts* 2<sup>nd</sup> § 7.17, 551 (1990). Professor Farnsworth describes a requirements agreement as "one under which the seller agrees to sell

and the buyer to buy all of the goods of a particular kind that the buyer may require in its business."

<sup>37</sup> UCC 2-306(1) "such actual output or requirements as may occur in good faith." The complete provision reads as follows: "A term which measures the quantity by the output of the seller or the requirements of the buyer means such actual output or requirements as may occur in good faith, except that no quantity unreasonably disproportionate to any stated estimate or in the absence of a stated estimate to any normal or otherwise comparable prior output or requirements may be tendered or demanded."

<sup>38</sup> *Empire Gas Corp.*, 840 F.2d 1333, 1338 (1988).

<sup>39</sup> *Empire Gas Corp.*, 840 F.2d at 1339.

<sup>40</sup> *Empire Gas Corp.*, 840 F.2d at 1339.

<sup>41</sup> *Empire Gas Corp.*, 840 F.2d at 1341. "The essential ingredient of good faith in the case of the buyer's reducing his estimated requirements is that he not merely have had second thoughts about the terms of the contract and want to get out of it."

<sup>42</sup> UCC § 2-306(2) provides that "a lawful agreement by either the seller or the buyer for exclusive dealing in the kind of goods concerned imposes unless otherwise agreed an obligation by the seller to use best efforts to supply the goods and by the buyer to use best efforts to promote their sale."

<sup>43</sup> Farnsworth, *Contracts* 2<sup>nd</sup> § 7.17, 553 (1990).

<sup>44</sup> *Wood v. Lucy, Lady Duff-Gordon*, 222 N.Y. 88, 118 N.E. 214 (1917). Cardozo wrote, "The law has outgrown its primitive stage of formalism when the precise word was the sovereign talisman, and every slip was fatal. It takes a broader view to-day. A promise may be lacking, and yet the whole writing may be 'instinct with an obligation, imperfectly expressed,'" citing *J. Scott, in McCall Co. v. Wright*, 133 App. Div. 62; *Moran v. Standard Oil Co.*, 211 N.Y. 187, 198.

<sup>45</sup> *Wood*, 222 N.Y. at 92, 118 N.E. at 215.

<sup>46</sup> See *Harris v. McPherson*, 97

Conn. 164, 115 A. 723 (1922) (when the broker "used reasonable efforts to procure a purchaser...and expended money and time in so doing" there "was such an acceptance of the offer...as created a mutual contract").

<sup>47</sup> Farnsworth, *Contracts* 2<sup>nd</sup> §7.17 554 (1990).

<sup>48</sup> Farnsworth, *Contracts* 2<sup>nd</sup> §7.17 554 (1990).

<sup>49</sup> Elkouri & Elkouri *How Arbitration Works* 5<sup>th</sup> Ed. 107 (1999 Supplement). This is generally referred to as a "savings clause" or "reservation of rights clause" whereby management retains all rights not modified by the contract or that the enumerated rights in a detailed clause are not necessarily all inclusive. See also Marvin Hill, Jr. and Anthony V. Sinicropi, *Management Rights: A Legal and Arbitral Analysis* 6 (BNA 1986) for a discussion of this "reserved rights theory," the doctrine that holds that management's authority is supreme in all matters except those it has expressly agreed to share with or relinquished to the union.

<sup>50</sup> K & T Steel Corp., 52 LA 497, 500 (Simon, 1969).

<sup>51</sup> Elkouri & Elkouri, *How Arbitration Works* 680 (5<sup>th</sup> ed., 1997).

<sup>52</sup> Marvin Hill, Jr. and Anthony V. Sinicropi, *Management Rights: A Legal and Arbitral Analysis* 6 (BNA 1986).

<sup>53</sup> Hill & Sinicropi, *Management Rights* 6 (BNA 1986).

<sup>54</sup> Hill & Sinicropi, *Management Rights* 14 (BNA 1986) quoting Goldberg, "Management's Reserved Rights: A Labor View," Proceedings of the 9<sup>th</sup> Annual Meeting of the NAA, 102, 123 (BNA Books, 1956).

<sup>55</sup> UCC §2-306(2) provides that "a lawful agreement by either the seller or the buyer for exclusive dealing in the kind of goods concerned imposes unless otherwise agreed an obligation by the seller to use best efforts to supply the goods and by the buyer to use best efforts to promote their sale."

<sup>56</sup> *Vaca v. Sipes*, 386 U.S. 171, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967).

<sup>57</sup> A mandatory subject of bargaining is one that either party must

negotiate upon demand of the other party. It is a demand that falls within section 201(4) of the Taylor Law, which defines terms and conditions of employment as matters affecting "wages, hours...and other terms and conditions of employment." Civ. Serv. Law §201(4); *City Sch. Dist. Of City of New Rochelle*, 4 PERB ¶3060 (1971); *City of Albany* 7 PERB ¶3078 (1974). A permissive or nonmandatory subject is one that either party may request be included in the contract. PERB has compiled a list of matters determined by the Board or the courts to be either mandatory, nonmandatory, or prohibited subjects of negotiation through December 31, 1997. This list is included as an appendix to Chapter Seven of Jerome Lefkowitz, Melvin H. Osterman, and Rosemary A. Townley, *Public Sector Labor and Employment Law* (2d ed., 1998).

Arguably, the PERB Board's recent ruling in *City of Cohoes* reversed existing case law in this area. 31 PERB ¶3020 (1998). While the Board stated that it was reversing law, however, it acknowledged that it was in actuality substituting "a more focused analysis which will produce the mutuality of bargaining rights and obligations the Act intends." *Id.* Thus, the *Cohoes* Board did not automatically transform a nonmandatory subject of bargaining into a mandatory subject, but rather substituted an inquiry into the nature of the right before making the assessment. *Id.*

<sup>58</sup> *Yorktown Faculty Ass'n*, 7 PERB ¶3030 (1974).

<sup>59</sup> If a union submits a non-mandatory subject to compulsory interest arbitration, it can be found to have violated its duty to negotiate in good faith and subject to an improper practice in violation of the Taylor Law. §209-a.2(b) of the Act; management is subject to the same charge pursuant to §209-a.19(d). *City of Cohoes*, 31 PERB ¶3020 (1998). Arguably, the Board's recent ruling in this case reversed existing case law in this area, adopting a conversion theory of negotiability whereby

nonmandatory subjects contained within a collective bargaining agreement become mandatorily negotiable upon a demand to negotiate. Thus, where a party seeks to modify or delete existing contract language in an expired agreement, those demands are automatically transformed into mandatory subjects. However, the Board did not automatically transform a nonmandatory subject into a mandatory one but rather substituted an inquiry into the nature of the right before making the assessment. Thus, even when such an inquiry is made into a management rights provision, however, it remains a non-mandatory subject of bargaining and management is exempt from the requirement to bargain over it.

<sup>60</sup> *Churchville-Chili Cent. Sch. Dist.*, 17 PERB ¶3055 (1984).

<sup>61</sup> *County of Orange*, 10 PERB ¶3080.

<sup>62</sup> 1967 N.Y. Laws ch. 392; N.Y. Civil Service Law §§200-214 (hereinafter "Civ. Serv. Law").

<sup>63</sup> See Civ. Serv. Law §200.

<sup>64</sup> Civ. Serv. Law §202.

<sup>65</sup> Civ. Serv. Law §203.

<sup>66</sup> The Condon-Wadlin Act, predecessor to the Taylor Law, mandated penalties for public employees who engaged in strikes. 1947 N.Y. Laws ch. 391. The prevailing view, however, was that the Condon-Wadlin Act was unenforceable. Lefkowitz, *Public Sector Labor and Employment Law* 17 (2d ed., 1998). One of the major dissatisfactions with the Act was that by failing to give government employees collective bargaining rights, the Act did nothing to relieve the strains that led to strikes. Leg. Doc. No. 40 at 28, 51 (1966) (Report of the New York State Joint Legislative Committee on Industrial and Labor Conditions for the year 1965-1966) (statement of Paul Greenberg on behalf of the Liberal Party, urging the elimination of strike penalties, and, at 49, statement of N.Y.C. Mayor Wagner urging an easing of penalties).

<sup>67</sup> Civ. Serv. Law §204(3).

<sup>68</sup> *Southampton Police Benevolent Ass'n*, 2 PERB ¶3011 (1969). Good faith negotiations were

first defined in this case as "a matter of intention" of the parties. The Board declared "we find that, basically, the duty to negotiate in good faith means that both parties approach the negotiating table with a sincere desire to reach an agreement. Thus, essentially good faith is a matter of intention. Objectively, intent can be determined only by the actor's word and deeds; and where there is a variance between the two, experience would dictate that greater reliance be placed on the latter. Thus, whether one had approached the negotiating table with a sincere desire to reach agreement can only be determined by this overall conduct in this regard. This determination should not be made on the basis of an isolated act during the course of negotiations, but should be based on the totality of a party's conduct." *Id.* at 3274.

<sup>69</sup> Civ. Serv. Law §209-a(1) provides: "It shall be an improper practice for a public employer or its agents deliberately... (d) to refuse to negotiate in good faith with the duly recognized or certified representatives of its public employees." On the employee side, Civ. Serv. Law §209-a(2)(b) makes it an improper practice for an employee organization to "refuse to negotiate collectively in good faith with a public employer, provided it is the duly recognized or certified representative of the employees of such employer."

<sup>70</sup> *Uniformed Firefighters Ass'n, Mount Vernon*, 11 PERB ¶4539, *aff'd*, 11 PERB ¶3095 (1978).

<sup>71</sup> *Ballston Spa Cent. School Dist.*, 16 PERB ¶4542, at 4599 (1983).

<sup>72</sup> *Town of Riverhead*, 25 PERB ¶4526, *aff'd*, 25 PERB ¶3057 (1992). The Administrative Law Judge found that the union not only set a precondition to negotiations but when dates were agreed upon, it continued to cancel those dates, often at the last minute and with no agreement as to a future date. The ALJ noted that "I find [the union's] conduct as a whole evidences a desire to protract negotiations without any intent to reach an agreement,

in violation of §209-a.2(b) of the Act." *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Deposit Teachers Ass'n*, 27 PERB ¶13020 (1994). See also *County of Wayne* where the Board found that the totality of the county union's conduct during negotiations for a successor agreement violated its bargaining duty whereas one act standing alone might not have done so. In this case, the Board looked at the union's conduct as a whole and found that it evidenced a lack of sincere desire to reach agreement. Such actions included: (1) prematurely declaring an impasse in negotiations; (2) reneging on a commitment to negotiate removal of certain titles from the negotiating unit; (3) refusal to consider county's proposal to change health insurance carriers; (4) refusal to put some of its proposals in writing; and (5) attempting to bypass the county's designated negotiator. 14 PERB ¶13092 (1981).

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*, quoting *Reed & Prince Mfg. Co.*, 96 NLRB 850, 28 LRRM 1608 (1951), enforced, 205 F.2d 131, 32 LRRM 2225 (1<sup>st</sup> Cir.), cert. denied, 346 U.S. 887, 33 LRRM 2133 (1953).

<sup>78</sup> *Matter of Greenburgh*, 32 PERB ¶4512 (1999) quoting *State of New York*, 5 PERB ¶4523, at 4603 (1972).

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> 29 U.S.C. §§141-188.

<sup>82</sup> 29 U.S.C. §141. "It is the purpose and policy of this Act, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce."

tion with labor disputes affecting commerce."

<sup>83</sup> The NLRA allows private sector employees to "engage in ...concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. §157.

<sup>84</sup> Civ. Serv. Law §210(1).

<sup>85</sup> In a case decided shortly after the enactment of the Taylor Law, the Board in *Town of Southampton* found that the summary disposition by the town board of an appointed factfinder's report was a matter of great concern. Consequently, it advised the parties that the state legislature's intent in establishing impasse procedures such as mediation and fact-finding was to make them "meaningful procedures for the resolution of impasses in negotiations" because it had prohibited public employees from engaging in concerted work stoppages. 2 PERB ¶13011 at 3275 (1969).

<sup>86</sup> Elkouri & Elkouri, *supra* n. 9.

<sup>87</sup> Civ. Serv. Law §209-a (1). "It shall be an improper practice for a public employer or its agents deliberately (a) to interfere with, restrain or coerce public employees in the exercise of their rights guaranteed in section two hundred two for the purpose of depriving them of such rights." (The listing of improper practices continues to letter (f) and while it is not necessary to list each here, it is important to note that the word "deliberately" is intended to apply to each of the enumerated actions.) Pursuant to Civ. Serv. Law §209-a (2), employee organizations bear the reciprocal burden: "It shall be an improper practice for an employee organization or its agents deliberately (a) to interfere with, restrain or coerce public employees in the exercise of the rights granted in section two hundred two, or to cause, or attempt to cause, a public employer to do so."

<sup>88</sup> 29 U.S.C. §158. Sec. 8 (a) It shall be an unfair labor practice for an employer - (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

<sup>89</sup> 45 U.S.C. §§151-164.

<sup>90</sup> 323 U.S. 192, 65 S.Ct. 226, 89

L.Ed. 173 (1944).

<sup>91</sup> *Id.*

<sup>92</sup> 29 U.S.C. §§151-164.

<sup>93</sup> 345 U.S. 330 (1953).

<sup>94</sup> 386 U.S. 171 (1967).

<sup>95</sup> See, e.g., *Gosper v. Fancher*, 40 N.Y.2d 867, 387 N.Y.S.2d 1007, 356 N.E.2d 479 (1976), *aff'd in part* 49 A.D.2d 674, 371 N.Y.S.2d 28 (4<sup>th</sup> Dep't 1975), cert. denied, 430 U.S. 915 (1976).

<sup>96</sup> See, e.g., *United Fed'n of Teachers v. PERB*, 19 PERB ¶17020 (1<sup>st</sup> Dep't 1986); *Symanski v. East Ramapo Cent. Sch. Dist.*, 117 A.D.2d 18, 502 N.Y.S.2d 209 (2d Dep't 1986); *De Cherro v. CSEA*, 60 A.D.2d 743, 400 N.Y.S.2d 902 (3d Dep't 1977) (finding that the supreme court and not PERB retained jurisdiction "over all labor contracts when the question of fair representation arises...[p]roviding employees with the assurance of impartial review of union conduct [where] to hold otherwise... would strip the public employee of the protection afforded by the fair representation doctrine;" *Jackson v. Regional Transit Serv.*, 54 A.D.2d 305, 388 N.Y.S.2d 441, 10 PERB ¶17501 (4<sup>th</sup> Dep't 1976) ("the policy underlying the principle that a wrongfully discharged employee may bring an action against his employer,...provided that the employee can prove that the union as bargaining agent breached its duty of fair representation should apply with equal force to the public sector.")

<sup>97</sup> *Vaca v. Sipes*, 386 U.S. 171, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967).

<sup>98</sup> *Symanski v. East Ramapo Cent. Sch. Dist.*, 117 A.D.2d 18, 502 N.Y.S.2d 209 (2d Dep't 1986). Here the Second Department refused to find that the union's error in judgment constituted a breach of its duty of fair representation because "while the plaintiff proffered evidence disputing the wisdom of the union's conclusion that the membership was bound by the memorandum of understanding, he has not controverted the showing that the union's decision to forego arbitration was made after a careful

consideration of the plaintiff's arguments and was not predicted upon irrelevant factors." Apparently, a union can make a mistake in judgment, even one that might appear foolish, if it did so while believing that its course of action was decided in good faith.

<sup>99</sup> *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 107 S.Ct. 2617, 96 L.Ed.2d 572 (1987).

<sup>100</sup> *Symanski*, 117 A.D.2d 18 at 21 (2d Dep't 1986), citing *Gunkel v. Garvy*, 45 Misc.2d 435, 441 (Sup. Ct. 1964).

<sup>101</sup> *Vaca v. Sipes*, 386 U.S. 171, 191, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967).

<sup>102</sup> *Gavenda v. Orleans County*, 1997 WL 65870 (W.D.N.Y.).

<sup>103</sup> *In re Roma v. Ruffo*, 92 N.Y.2d 489, 705 N.E.2d 1186, 683 N.Y.S.2d 145 (1998).

<sup>104</sup> Elkouri & Elkouri, *How Arbitration Works* at 473 (5<sup>th</sup> ed., 1997).

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* In the chapter of their seminal volume entitled "Standards for Interpreting Contract Language," the editors discuss in great detail the standard contract principles routinely used by arbitrators in interpreting disputed collective bargaining provisions such as ambiguity, bargaining history and past practice, and looking to the "intent of the parties." In another chapter entitled "Use of Substantive Rules of Law," the editors examine the contract principles recognized by arbitrators which include "the fundamental principles of contract law such as those concerning offer and acceptance, need for consideration, anticipatory repudiation (breach), and the obligation to perform the contract in spite of hardships." See also Ray J. Schoonhoven, ed., *Fairweather's Practice and Procedure in Labor Arbitration* (3d ed. 1991), Chapter 9 Contract Interpretation.

<sup>107</sup> Farnsworth, *Contracts* §7.7 at 496.

<sup>108</sup> Arbitrators and courts alike are fond of quoting Holmes when called upon to examine the language of contract provisions: "A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and

the time in which it is used." *Towne v. Eisner*, 245 U.S. 418 (1918). Arbitrator Martin Raphael quoted this passage from Holmes in *Yale & Towne Mfg. Co.*, 5 LA 753, 753 (1946).

<sup>109</sup> Corpus Juris, Sec. 481, p. 520.

<sup>110</sup> See Elkouri & Elkouri, *How Arbitration Works*, Chapter 9, Standards for Interpreting Contract Language and compare to Restatement Second §§ 202, 203. Elkouri's discussion of the arbitration decisions in this area is in depth and valuable. An apt summary of the various interpretive devices employed by arbitrators can be found in the above-cited Restatement provisions referring to contract interpretation.

<sup>111</sup> Elkouri & Elkouri, *How Arbitration Works* at 479; when courts look to divine the mutual "intent of the parties," they similarly look to the express language of the agreement, preliminary negotiations, prior dealings of the parties, and custom and usage of the trade, if appropriate. Custom and past practice of the parties is one of the most important standards used by arbitrators in the interpretation of ambiguous contract language. See Chapter 12 in this volume for an extensive discussion of the role of custom and past practice in labor-management arbitration. For our purposes, it is significant that custom and past practice is applied by arbitrators in much the same manner as it is in the Uniform Commercial Code, perhaps evidence of having borrowed heavily from it. For example, in certain instances, a past practice can become an implied term of the agreement and established practices can be used to fill in contract gaps. See also Restatement Second §§ 220, 221, 222, 223. These sections deal with usage as an element of interpretation.

<sup>112</sup> Elkouri & Elkouri, *How Arbitration Works*, at 488; see note 81 for numerous case examples.

<sup>113</sup> Elkouri & Elkouri, *How Arbitration Works*, at 514.

<sup>114</sup> See Elkouri & Elkouri, *How Arbitration Works*, at 509, note 216 for a listing of cases where arbitrators construed contract language against the party that drafted it.

For the common law corollary, see Rest. 2d § 206 Interpretation against the Draftsman.

<sup>115</sup> Elkouri & Elkouri, *How Arbitration Works*, at 500. If a contract is capable of two constructions, one of which would work a forfeiture, the favored construction is the one which would not. The example cited by the editors is *Lithonia Lighting Co.*, 85 LA 627 630 (Volz, 1985) where the arbitrator stated that "it is a familiar principle that the law abhors a forfeiture of a valuable right, such as the termination of seniority...." In this case, the arbitrator applied this principle to set aside the termination of the grievant's seniority under ambiguous contract language.

As Professor Farnsworth explains the court's preference against forfeiture, while freedom of contract generally requires that the parties' agreement be honored even if forfeiture results, if it is not clear from the agreement or surrounding circumstances that the obligee assumed the risk of forfeiture, then an interpretation of the contract that reduces that risk is preferred. Contracts § 8.4 at 579.

<sup>116</sup> Every first year law student learns the legal maxim of "expressio unius est exclusio alterius."

<sup>117</sup> This is the doctrine of *eiusdem generis*, another axiom routinely taught in first year law classes.

<sup>118</sup> A provision for paid vacations for employees in the "active employ" of the company on a specified date, provided they met other requirements would not be interpreted so as to produce the "absurd" result of disqualifying employees absent on such date due to illness or any other valid reason. *Consolidation Coal Co.*, 83 LA 1158, 1159, 1161 (1984). For the common law counterpart see Rest 2d § 203, Standards of Preference in Interpretation, subsection (a), "an interpretation which gives a reasonable, lawful, and effective meaning to all the terms is preferred to an interpretation which leaves a part unreasonable, unlawful or of no effect."

<sup>119</sup> The most notable example deals with the issue of "waiver." This issue arises when examining the question of whether one of the parties to the collective bargain-

ing agreement allegedly "waived" a right, usually with respect to broadly-phrased management rights clauses or "zipper" clauses. In these cases, the arbitrator routinely defines waiver as "the intentional relinquishment of a known right with knowledge of its existence and an intention to relinquish it." *Town of Carmel*, 30 PERB ¶14687 (1997) (quoting *City of New York v. State of New York*, 40 N.Y.2d 659, 669.) Further, *Town of Carmel* stated that "such a waiver must be clear, unmistakable and without ambiguity." (Quoting *CSEA v. Newman*, 88 A.D.2d 685, 15 PERB ¶17011, at 7021 [3d Dep't 1982], *aff'd*, 61 N.Y.2d 1001, 17 PERB ¶17007 (1984)). See *Hoxie v. Home Ins. Co.*, 32 Conn. 21 (1864) ("A waiver is the intentional relinquishment of a known right."); *Clark v. West*, 193 N.Y. 349, 86 N.E. 1 (1908) ("A waiver has been defined to be the intentional relinquishment of a known right.");

<sup>120</sup> Civ. Serv. Law § 209-a(1)(d); Civ. Serv. Law § 209-a(2)(b).

<sup>121</sup> See *County of Rensselaer*, 13 PERB ¶13080 (1980), where the Board examined the County's defense of management prerogative to a union charge of improperly instituting a work rule affecting the terms and conditions of employment and reasoned that "in determining whether a work rule is a mandatory subject of negotiation, the Board must strike a balance between an employer's freedom to manage its affairs and the right of employees to negotiate their terms and conditions of employment." In this case, the County unilaterally instituted a parcel inspection procedure which subjected employees to discipline. The County claimed that the union had waived its right to negotiate a parcel inspection program by agreeing to the contractual management rights clause authorizing the County to discipline employees as necessary "to carry out the mission of the Employer pursuant to existing practices...." The Board held that this was not a waiver of the right to negotiate new procedures and the County was ordered to discontinue the inspection pro-

gram.

<sup>122</sup> *Matter of City of New Rochelle*, 17 PERB ¶14574 (1984).

<sup>123</sup> *Id.* Note that when an employee was designated as an excessive sick leave user, that employee was henceforth required to document future illnesses by the certificate of a physician on a form devised by the City. This is deemed a form of discipline.

<sup>124</sup> *Id.*

<sup>125</sup> *Matter of City of New Rochelle*, 17 PERB ¶14574 (1984).

<sup>126</sup> *Onondaga-Madison Bd. of Coop. Educ. Serv.*, 17 PERB ¶13109 (1984).

<sup>127</sup> In failure to negotiate improper practice charges where the underlying dispute between the parties is essentially contractual in nature, PERB has consistently interpreted the Taylor Law to deprive it of jurisdiction in favor of resolution through the parties' grievance arbitration process. *In re Roma v. Ruffo*, 92 N.Y.2d 489, 705 N.E.2d 1186, 683 N.Y.S.2d 145 (1998). In *Roma*, the school district unilaterally reduced the daily work schedule of school matrons from eight hours to six. The school district and the school board relied upon management rights provisions in the CBA to justify the unilateral reduction in the matrons' daily working hours. The New York Court of Appeals found that such reliance on a term in the contract as a "reasonably arguable source of right" to support a position made this dispute a contractual issue beyond PERB's jurisdiction. *Id.* at 499, 705 N.E.2d 1191, 683 N.Y.S.2d 150. Consequently, the court held that the school district's unilateral change in work hours was a breach of the parties' collective bargaining agreement as opposed to a claim for an unfair labor practice. *Id.* at 497, 705 N.E.2d 1190, 683 N.Y.S.2d 149.

<sup>128</sup> The number of employees assigned to a piece of equipment raises a compelling safety issue but that is outweighed by the employer's general right to fix staffing requirements unilaterally. Staffing per piece of equipment is nonmandatory. *City of White Plains*, 9 PERB ¶13004 and *Amsterdam*, 10 PERB ¶13007 (two-person patrol cars). See also

- Town of Carmel*, where the Board fully articulated management's interest in setting staffing levels, leaving no doubt as to the full extent of management's power and control. "Minimum staffing levels are exactly what the words in the phrase suggest, i.e., changeable minimums. Just as an employer may initially fix unilaterally a specified minimum staff complement, an employer has an equal managerial right to change unilaterally those staffing levels to coincide with its belief regarding the number of personnel needed or wanted for the delivery of a service of a desired type or level. In the delivery of that chosen service, an employer may at any given point in time unilaterally increase, decrease or keep constant the staffing level fixed at an earlier point in time." 31 PERB ¶13006 (1998), *aff'd*, 32 PERB ¶17028 (3d Dep't. 1999).
- <sup>129</sup> *Matter of Pub. Employees Fedn., AFL-CIO*, 23 PERB ¶14565 (1990).
- <sup>130</sup> *Id.*
- <sup>131</sup> *Levitt v. Bd. of Collective Bargaining*, 79 N.Y.2d 120, 127, 589 N.E.2d 1, 4, 580 N.Y.S.2d 917, 920 (1992). The court more fully explained, "although terms and conditions of employment (subject to bargaining) and management prerogatives (exempt from bargaining) may be neatly separated in principle, the practical task of assigning a particular matter to one category or the other is often far more difficult."
- <sup>132</sup> *Id.* See also *Matter of Lezette v. Bd. of Educ.*, 35 N.Y.2d 272, 278, 319 N.E.2d 189, 192, 360 N.Y.S.2d 869, 873 (1974) (finding that "the law is clear that a board of education, acting in good faith and with reasonable judgment, may abolish a teaching position, not only if held by a probationary teacher but even if held by a tenured teacher).
- <sup>133</sup> *Levitt v. Bd. of Collective Bargaining*, 79 N.Y.2d 120, 127, 589 N.E.2d 1, 4, 580 N.Y.S.2d 917, 920 (1992). Utilizing its power under Civil Service Law section 212, the City of New York has promulgated its own regulations governing the collective bargaining of its employees. N.Y. City Admin. Code §§ 12-301-12-316 (the New York City Collective Bargaining Law, hereinafter, "NYCCBL"). This regulatory scheme envisions that the threshold issue of whether a particular subject matter is bargainable should be decided by the impartial body with expertise in the area, i.e., the Board of Collective Bargaining. The Board consists of two members appointed by the Mayor, two designated by a committee of unions, and three elected by unanimous vote of the other four (N.Y. City Charter § 1171). The Board is the impartial body before which both public employers and public employee organizations may be advocates.
- <sup>134</sup> *Lackawanna Mun. Hous. Auth.*, 19 PERB 4632 (1986).
- <sup>135</sup> *Id.*
- <sup>136</sup> *Id.*
- <sup>137</sup> By "agreed common purpose," I refer to the mutuality of obligation understood by parties when entering into a collective bargaining agreement.
- <sup>138</sup> Restatement (Second) of Contracts § 205 Comment a.
- <sup>139</sup> *Steuben-Allegany BOCES*, 13 PERB ¶14511, *aff'd*, 13 PERB ¶13096 (1980).
- <sup>140</sup> *City of Poughkeepsie v. Newman*, 95 A.D.2d 101, 16 PERB ¶17021 (3d Dep't 1983), appeal dismissed, 60 N.Y.2d 859, 16 PERB ¶17027 (1983).
- <sup>141</sup> *County of Onondaga*, 29 PERB ¶14541 (1996).
- <sup>142</sup> *Id.* See also *County of Schuyler*, 31 PERB ¶14507 (1998) where the ALJ found a waiver of the union's right to negotiate the subcontracting out of work traditionally performed by unit employees. The County alleged that the language of the management rights clause afforded it the right "to determine whether and to what extent the work required in operating its business and supplying its services shall be performed by employees covered by this agreement." The ALJ agreed and held that this language allowed the County to subcontract out clerical work that had been performed by union workers for the past 11 years without negotiating with the union. On its face, this appears to be an improper result and in direct conflict with labor's historical mission of job protection. Is it reasonable to assume that labor knowingly and intentionally waived its right to negotiate the subcontracting out of jobs traditionally filled by its members when it agreed to general language in a management rights' clause? It is not likely.
- <sup>143</sup> *County of Onondaga*, 29 PERB ¶14541 (1996). See also *County of Allegheny*, 32 PERB ¶14630 (1999). The County defended its act of subcontracting the work of the installation of sluice pipe and culvert demolition along a county highway to a private contractor, work claimed by the union to be exclusive to its unit, as permissible pursuant to the management rights clause in the parties' collective bargaining agreement.
- <sup>144</sup> *Metro. Suburban Bus Auth.*, 20 PERB ¶13066 (1987).
- <sup>145</sup> *Town of Walkill*, 31 PERB ¶14504 (1998).
- <sup>146</sup> Article 35 of the parties' 1992-1994 agreement provided in part: "Except as expressly modified or restricted by a specific provision of this Agreement, all statutory and inherent managerial rights, prerogatives, and functions are retained and vested exclusively with the Department, including, but not limited to, the rights, in accordance with the sole and exclusive judgment and direction...to make, alter, delete and enforce reasonable rules, regulations, orders and policies...."
- <sup>147</sup> *Town of Walkill*, 31 PERB ¶14504 (1998).
- <sup>148</sup> *Town of Walkill*, 31 PERB ¶14504 (1998) quoting *Town of Carmel*, 29 PERB ¶13073 (1996).
- <sup>149</sup> *Lackawanna Municipal Housing Authority*, 19 PERB ¶14632 (1986).
- <sup>150</sup> *Id.*
- <sup>151</sup> *City of White Plains*, 19 PERB ¶17019 (N.Y. Sup. Ct. 1986), *aff'd* 18 PERB ¶13074 (PERB 1985), *aff'd* 18 PERB ¶14555 (PERB ALJ 1985).
- <sup>152</sup> *City of White Plains*, 18 PERB ¶14555, citing *City of Mount Vernon*, 18 PERB ¶13020 (March 11, 1985); *Beacon CSD*, 14 PERB ¶13084 (1981); *Nassau Chapter, CSEA, Inc. v. Helsby*, 54 A.D.2d 925, 9 PERB ¶17022 (2d Dept. 1976) *aff'd mem.*, 43 N.Y.2d 755, 10 PERB ¶17020 (1977).
- <sup>153</sup> *City of White Plains*, 18 PERB ¶14555, 4612.
- <sup>154</sup> *City of White Plains*, 18 PERB ¶14555, 4612.
- <sup>155</sup> *City of White Plains*, 18 PERB ¶14555, 4612.
- <sup>156</sup> *City of White Plains*, 18 PERB ¶14555, 4613-4614.
- <sup>157</sup> Compare *City of White Plains with Poughkeepsie City School District*, 19 PERB ¶13036 (1986), where the Board found that the District acted appropriately when it set forth objective criteria for determining excessive use of sick leave and provided notice of such standards to the employees. Here the District found it suspicious when employees took more than ten days sick leave during a contract year or more than three such leave days at times when they extended vacations or holidays. Sensing that there was potential abuse afoot, the District announced that its suspicions would be allayed if medical documentation would be provided for some absences. The Board found that an employer has an inherent right to monitor the conduct of its employees who use sick leave by "ascertain[ing] that they are using it for the purposes contemplated by the contract." *Id.*
- <sup>158</sup> *Town of Carmel*, 30 PERB ¶14687 (1997).
- <sup>159</sup> *Town of Carmel*, 30 PERB ¶14687 (1997).
- <sup>160</sup> *Town of Carmel*, 30 PERB ¶14687 (1997). See also *County of Nassau*, 20 PERB ¶13040 (1987).