CSEA

LEGAL DEPARTMENT

TAYLOR LAW MANUAL

A GUIDE FOR CSEA LABOR RELATIONS STAFF

- *The "Taylor Law"*
- *NYS PERB*
- *PERB Rules/Procedures*
- *Related Cases*
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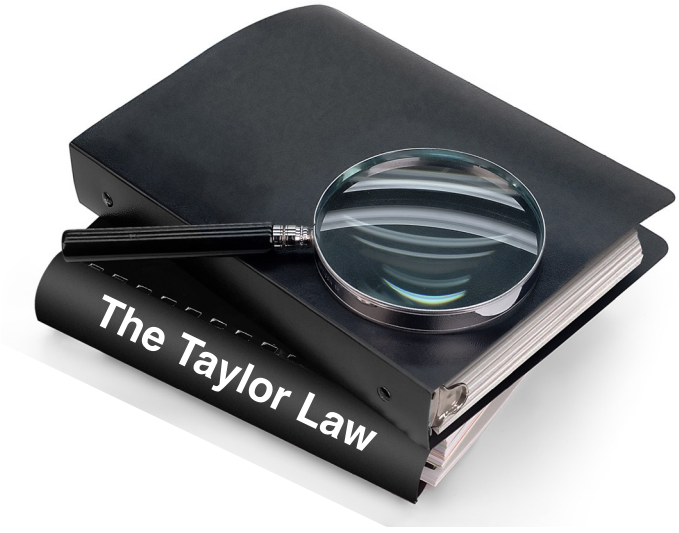

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INTRODUCTION

This manual has been designed to assist the Labor Relations Staff with learning and understanding the law and procedures affecting public sector labor relations in New York State. We have provided an outline that discusses the Taylor Law, PERB's procedures and rules, some PERB decisions, as well as some sample formats for filings with PERB, especially in improper practice cases.

Our objective is to enhance the Labor Relations Staff's ability and comfort in assessing situations which may fall under the jurisdiction of PERB and in applying PERB's procedures efficiently and expeditiously.

We hope you find this guide helpful. And, of course, you may contact the Legal Department attorney of the day, if you have any questions or need further assistance in understanding and applying the Taylor Law or PERB's rules and procedures.

CSEA LEGAL DEPARTMENT

Daren J. Rylewicz, General Counsel

CHAPTER ONE: Representation

A. Recognition

1. Represented Employees

   Recognition is the designation by the employer pursuant to a request by a union, that such union is the representative of a unit of employees. A public employer may not recognize one union as the representative of a unit of its employees when another union has been recognized or certified as the representative of that union. (County of Orange and Sheriff of Orange County, 25 PERB ¶3004 [1992])

2. Unrepresented Employees

   When seeking to represent a unit of unrepresented employees, a union must first request recognition and either be refused or receive no response for at least 30 days and not more than 120 days before it can seek certification (Rule §201.3[a] and [b]).

3. Recognition Bar

   A union is barred from petitioning to decertify a recognized union for one year after 30 days have passed following the publication of a public advertisement in a newspaper of general circulation in the area of the public employer for at least one day. The published notice must include the name of the union which has been recognized, the date of the recognition and the job titles included in the unit for which recognition has been granted (Rule §201.6[a][2], [b]). If a public employer fails to publish notice of the recognition promptly, the recognized union may publish the notice itself, and should do so (Rule §201.6[c]); otherwise a petition by a competing union for certification and decertification may be filed, unless the competing organization has received actual written notice of the recognition more than 30 days prior to such filing (Rule §201.6[d]).

B. Certification

Certification is the designation by PERB that the union is the representative of a specified unit of employees.

1. Time for Filing Petitions

   a. To represent unrepresented employees. Such a petition may be filed within 90 days after a public employer has refused the union's request for recognition (Rule §201.3[b]). Alternatively, such a petition may be filed between 30 and 120 days after the public employer has been asked to recognize the union but has not responded to the request (Rule §201.3[a]).

b. For employees represented by another, non-AFL-CIO union. The petitioning union must check the boxes for certification and decertification on the PERB form.

(1) When seeking to decertify an existing union that is a party to a collective bargaining agreement, and to be certified in its stead, the petition must ordinarily be filed during the eighth month before the expiration of that agreement (Rule §201.3[d]). Thus, for school districts, the filing time is in November before the expiration of the agreement; for most other local governments, the filing time is the May before the expiration of the agreement; and for state employees, the filing time is the August before the expiration of the agreement. This is known as the "window period." If, as is usual, the collective bargaining agreement is co-terminus with the fiscal year of the public employer, the window period falls during the eighth month before the expiration of the term of the agreement (Taylor Law §208.2 and Rule §201.3[d]).

(2) After the passage of the window period, the incumbent union enjoys a renewed period of unchallenged representation of approximately 11 months, becoming subject to challenge 120 days after the expiration of the agreement (Rule §201.3[e]). That new challenge would commence on October 29th for school districts, April 29th for most other local governments, and July 29th for the State.

(3) Where a petition has been filed and processed to completion, no further petition may be filed for one year for a unit that includes job titles that were within the unit covered by the PERB decision. This applies both if the petitioning union was certified but did not succeed in getting a collective bargaining agreement during that year, or if the petition was dismissed after being processed to completion (Rule §201.3[f]). A petition that was dismissed for procedural grounds, such as lack of timeliness or an insufficient showing of interest, has not been deemed to be processed to completion.

(4) For a collective bargaining agreement to preclude a petition by a competing union, the agreement must cover substantial terms and conditions of employment and be in writing. If subject to ratification by the union and/or the employer, it must have been so ratified.

(5) In seeking certification by CSEA in place of a previously independent union, be aware that CSEA may not be the true successor of an independent union whose members have voted to become a part of CSEA because successorship requires that successor union have the same officers. As CSEA seeks certification on behalf of CSEA/AFSCME and

not the Local or Unit, the officers of CSEA will differ from those of the previously independent organization.

2. Notification to Legal Department

The LRS should send a copy of each petition that he/she filed to the Legal Department at the same time as he/she files with PERB. Upon receiving a response to the filing of the petition from PERB, the LRS should check the response to ascertain whether a copy has been sent to the Legal Department; if not, the LRS should fax a copy of that response to the Legal Department immediately. It is the responsibility of the Legal Department to file a notice of appearance with PERB.

C. Unit Placement/Unit Clarification

1. Nature of the Petition

A **Unit Clarification** petition seeks a determination by PERB that the at-issue positions are within the scope of the union's bargaining unit by the terms of the existing recognition or certification. A **Unit Placement** petition seeks a determination by PERB that the at-issue positions should be in the union's bargaining unit by reason of application of the statutory standards, the most relevant of which is "community of interest" (Taylor Law §207.1 and Rule §201.2[b]). **The LRS is advised to check the boxes for both Unit Placement and Unit Clarification when filing such a petition.**

2. Showing of Interest

No showing of interest is required for a UC/UP petition. However, PERB has held that a Unit Placement petition is "intended to permit relatively minor adjustments to the composition of an existing negotiating unit" and will grant unit placement only if the number of the employees sought to be added to the unit is less than 30% of the employees in the existing unit (Ogdensburg CSD, 31 PERB ¶3060 [1998]).

3. Removal of Positions from Unit

Neither a UC nor a UP petition may be used to remove positions that have been recognized or certified as being in another unit except where such recognition added positions to another existing unit less than 30 days before the filing of the UC/UP petition.

D. CSEA's Response to a Petition to Decertify CSEA or to Certify Another Union

1. Article XX, AFL-CIO Constitution

A public employer may file a petition to decertify CSEA as the representative of a bargaining unit or for the fragmentation of a unit represented by CSEA. A competing

union may also petition to decertify CSEA and to be certified in its place. If the competing union is in the AFL-CIO, that petition is likely to violate Article XX of the AFL-CIO Constitution; such a situation should be called to the attention of the Legal Department immediately.

2. Timing

CSEA is required by PERB's Rule §201.5(d) to file a response to a petition within 10 days after receiving it. The response is a legal document and should be prepared by a member of the Legal Department who has been assigned to that case. The LRS should check the letter of transmittal of the petition to make sure a copy has been sent to the Legal Department; if a copy has not been sent, the LRS should immediately fax a copy of the petition to the Legal Department.

E. Showing of Interest

1. Timing, Nature

A showing of interest must be filed simultaneously with a petition or a motion to intervene. A showing of interest may consist of (1) evidence of current memberships; (2) original designation cards; (3) petitions which were signed and dated within six months of the submission of the showing of interest; (4) or a combination of the three. Designation cards must be submitted in alphabetical order (Rule §201.4).

2. Number, Intervention

a. Whether submitted by a petitioner or intervenor, the showing of interest must amount to at least 30% of the unit that the petitioner or intervenor, as the case may be, claims to be appropriate (Rules §§201.3 & 212.1[b]). Thus, a petitioner may seek one unit while the intervenor seeks a larger or smaller unit, in which event, the size of the showing of interest of the two will vary.

b. Where CSEA is the current representative of a unit of public employees, it can intervene in a proceeding brought by a petition of another employee organization to represent employees, at least some of whom are in the CSEA-represented unit, without any showing of interest (Rule §212.1[b]).

3. Declaration of Authenticity

A showing of interest must be accompanied by a notarized declaration of authenticity containing the name of the individual executing the declaration, a statement of the declarant's authority to execute it and his/her position with the union, and a statement that the persons whose names appear upon the showing of interest have themselves signed the documents on the dates specified therein, the persons specified as current members are in fact current members and that inquiry was made regarding the signatories' inclusion in any existing unit which is the subject of the representation

petition. It shall also state whether the declaration is made upon the basis of the declarant's personal knowledge or inquiries made, and if the latter, it shall specify the nature of those inquiries (Rule §201.4[d]).

4. Unit Clarification, Unit Placement

   No showing of interest is required in a Unit Clarification or Unit Placement proceeding.

F. Conference

PERB usually holds a conference with the parties to a representation proceeding for the purpose of ascertaining the issues and getting stipulations. If there is no issue as to the appropriateness of the unit sought, or any other issue requiring a hearing, the administrative law judge conducting the conference will determine the time and place of the election, and whether the election shall be in person or by mail ballot. As a general rule, a CSEA Legal Department Attorney will attend the conference with the LRS.

G. Hearing

Where appropriate, the representation issue will be sent to a hearing. A CSEA Legal Department Attorney will represent CSEA at the hearing. The most common issue is whether the unit sought by petitioner is appropriate.

1. Previously Unrepresented Employees

   If the unit sought is one of unrepresented employees, the hearing officer will be looking for evidence as to whether: (1) there is a community of interest among the employees sought to be included in the unit; (2) officials of the government at the level of the unit have the power to agree or to make effective recommendations with respect to the terms and conditions of employment; and (3) whether the unit is compatible with the joint responsibilities of the public employer and the union to serve the public (Taylor Law § 207.1).

2. Fragmentation of Long-Standing Units

   If the petition would affect a long-standing unit, a party seeking to fragment that unit will have to show that the union has not properly represented the group sought to be fragmented. An employer seeking to remove supervisors other than high level supervisors will have to show the union has interfered with the performance of supervisory duties by those supervisors (Uniondale UFSD, 21 PERB ¶3060 [1988]). Nurses will also be removed from units of non-professional employees (Ichabod Crane CSD, 33 PERB ¶3042 (2000), conf'd 753 N.Y.S. 2d 171 (3rd Dept 2002)).

3. Per se Separate Units

Fragmentation will be granted automatically in certain circumstances. Firefighters, police officers, deputy sheriffs who predominately perform police officer duties, employees of an elected sheriff and employees of a community college, will be automatically fragmented from other employees with whom they have been represented in a long-standing unit (City of Amsterdam, 10 PERB ¶3031 [1977, firefighters & police], County of Erie and Erie County Sheriff, 29 PERB ¶3031 [1986, law enforcement deputy sheriffs], County of Putnam, 33 PERB ¶3001 [2000, employees of an elected sheriff], Genesee Community College, 24 PERB ¶3017 [1991, employees of community colleges]).

H. Selection of Majority Representative

1. Certification without an election

   a. If the choice available to employees in a negotiating unit is limited to selection or rejection of a single union, that choice may be ascertained without an election on the basis of the showing of interest. The showing of interest must represent a majority of all the employees within the negotiating unit. If the showing of interest submitted in support of the petition is no longer timely, a new showing of interest must be submitted (Rule § 201.8[c][1], Village of Webster, 21 PERB ¶3002 [1988]).

   b. A determination, by PERB's Director of Public Employment Practices and Representation, that the evidence in support of certification without an election is not sufficient is a ministerial act and will not be reviewed by the Board (Rule §201.8[c][1]).

2. Elections

   a. Elections are conducted under the supervision of PERB's Director of Public Employment Practices and Representation and are by secret ballot; absentee ballots are not permitted (Rule §201.8[d][1]).

   b. The winner of the election is the entity on the ballot for which a majority of the votes were cast. Where there are three or more choices on the ballot and no selection has a majority of the votes cast, PERB will conduct one run-off election (Rule §201.8[e]).

   c. Objections may be filed by a losing party to the following issues: (1) the conduct of the election; (2) the conduct affecting the results of the election; (3) or if challenged ballots are sufficient in number to affect the results of the election. PERB's Director of Public Employment Practices and Representation investigates such objections or challenges, which investigation may include a hearing (Rule §201.8[d][4]).

3. Briefs

   After proceedings in a representation case, including one instituted by an application to designate employees as managerial or confidential, or for unit clarification/placement, the parties are given an opportunity to submit briefs. These are prepared and submitted by the CSEA Legal Department Attorney who has been assigned to the case.

   a. The briefs are submitted by all parties on the same date.

   b. A PERB staff decision is issued after receipt of the briefs.

4. Exceptions

   a. A party that is dissatisfied with the PERB staff decision may file "exceptions" to the PERB Board within 15 working days after receipt of the staff decision. Other parties may file responses to the exceptions and/or cross-exceptions within seven working days after receipt of those exceptions. Requests for extensions of these time limits must be made in writing before the expiration of the time limit (Rule § 213.7). The Legal Department is responsible for filing exceptions, responses to exceptions and cross-exceptions on behalf of CSEA.

   b. The Board's decision on the exceptions may adopt, modify or reverse the staff decision (Rule § 213.10). Whether or not exceptions have been filed, it is the PERB Board that issues the certification to a union where that is the appropriate disposition of the case.

The following is a reminder of the procedure upon the completion of an organizing campaign.

5. Completion of Campaign

Upon the successful conclusion of an organizing campaign (either through voluntary recognition or certification):

   a. Any new Local or Unit that needs formal creation shall be in coordination with the Region and Membership Department. Where a new Local is required, the matter will be referred to the CSEA Charter Committee.

   b. The Region will write to the Executive Office to request that the new Unit or Local be placed into Administratorship. The Executive Office will assign administrators, and the new Unit or Local will be placed into Administratorship for purposes of holding an election of officers.

c. A copy of all paperwork used to formally create the new Unit or Local, establish the Unit number, elect officers, etc. will be shared with the Organizing Department and the Legal Department and the Membership Department, which will help facilitate the process of establishing the new Unit or Local, as appropriate.

d. The Notice to CSEA Headquarters for Payroll Source/Newly Organized form will be forwarded to the Membership Department, along with the completed membership applications. All information must be completed on the Notice to CSEA Headquarters form and on the CSEA membership application form before Membership can commence the dues and fees deduction processes with the payroll departments. This applies to voluntary recognition or certification situations.

e. Applications should only be submitted with the Notice to CSEA Headquarters form. Should there be extenuating circumstances where the form cannot be submitted with the applications, a memo will be attached indicating the name of the Local or Unit, the payroll officer, and any other pertinent information and when the form's submission can be expected. This will allow Membership to begin processing the new account so dues can begin shortly thereafter.

f. Before membership applications are submitted, all information should be filled out on the applications. Incomplete applications may cause a delay in processing. The Membership Department staff will be in contact if any applications are incomplete.

g. All membership applications should be originals if paper, or electronic. Should there be extenuating circumstances when photocopies are submitted, and then originals mailed, a note must be attached to the originals indicating photocopies were previously sent.

h. It is imperative to have voluntary recognition or certification in an area BEFORE forwarding the applications.

CHAPTER TWO: Improper Practice Charges

A. Against a Public Employer

1. Intentional interference, restraint or coercion of public employees for the purpose of depriving them of organizational rights (Taylor Law §209-a.1[a]). This generally consists of threats or promises that are intended to influence a public employee's right to form, join and participate in a union or to refrain from doing so.

2. Domination or interference with the formation or administration of a union for the purpose of depriving employees of organizational rights (Taylor Law §209-a.1[b]).

This is a very rare violation and requires direct interference in the internal affairs of a union. Every violation of this provision also violates the prohibition against interference in (a) above.

3. Discrimination against an employee for the purpose of encouraging or discouraging membership in or participation in the activities of a union (Taylor Law §209-a.1[c]). Every violation of this provision also violates the prohibition against interference in (a) above. However, for there to be a violation of this provision, there must have been discriminatory actions taken against the employees. The mere threat of discriminatory acts is only a violation of the prohibition against interference.

4. Refusal to negotiate in good faith with a recognized or certified union (Taylor Law §209-a.1[d]). The duty to negotiate in good faith includes the duty not to act unilaterally with respect to a mandatory subject of negotiation. Thus, unilateral action by a public employer involving a change in a long-standing term and condition of employment that is not the subject of an agreement is a violation of this provision. So is direct dealing by an employer with represented bargaining unit members.

5. Refusal to continue all the terms of an expired agreement until a new agreement has been reached in negotiations (Taylor Law §209-a.1[e]). This is the "Triborough" amendment and it applies to both mandatory and nonmandatory subjects of negotiation. Under a decision of the Board, the employer cannot refuse to negotiate as to the extension of a nonmandatory subject of negotiation that was covered by the predecessor agreement because the inclusion of that subject in that predecessor agreement converts the subject into a mandatory subject of negotiation (Greenburgh No. 11 UFSD, 32 PERB ¶3024 [1999]).

6. Utilization of state funds appropriated to a local government to discourage employees from participation in a union organizing drive or to train managers, supervisors or other administrative personnel in methods designed to discourage union organization (Taylor Law §209-a.1[f]).

7. Refusal to afford, upon an employee's demand, a union representative, during questioning of the employee by the employer where it reasonably appears that employee is a target of disciplinary action. However, it is a defense by the employer to such an IP if the employee has the contractual right to present to an arbitrator or hearing officer evidence of the employer's refusal. (Taylor Law §209-a.1[g]).

B. Against the Union

1. Interference, restraint or coercion of public employees in their rights of organization, or an effort to cause the public employer to do so (Taylor Law §209-a.2[a]).

   Note that this is not limited to situations where the actions were for the purpose of interfering with organizational rights.

2. Refusal of a recognized or certified union to negotiate with the employer in good faith (Taylor Law §209-a.2[b]).

3. Breach of the union's duty of fair representation (Taylor Law §209-a.2[c]).

A union owes all employees whom it represents, whether union members or not, a duty to represent them fairly. This means that the union may not reject their grievances or negotiation interests arbitrarily, discriminatorily, or in bad faith. It does not mean that the union must take all grievances or press the negotiation demands of each group of its unit employees with equal fervor. A union may reject grievances on a nondiscriminatory basis in accordance with its assessment of merit, and reject even meritorious non-contract grievances and legal assistance requests for representation in other proceedings; it may also choose which negotiation demands it wishes to advocate vigorously and which it wishes to drop, so long as the basis for those determinations are not arbitrary, discriminatory or taken in bad faith.

Moreover, in 2018, anticipating the US Supreme Court's *Janus* decision, the Legislature approved and the Governor signed into law amendments to this section of the Taylor Law clarifying that a union's duty of fair representation to a bargaining unit employee who declines to become a union member is limited to just the negotiation or enforcement of the terms of the collective bargaining agreement. Thus, CSEA is not required to provide representation to non-members: (1) during questioning by the employer; (2) in statutory or administrative proceedings or to enforce statutory or regulatory rights; or (3) in any stage of a grievance, arbitration or other contractual process concerning the evaluation or discipline of an employee where the non-member is permitted to proceed without CSEA and may be represented by his or her own advocate. Additionally, CSEA is now expressly permitted to provide to only its members legal, economic and job-related services and benefits beyond those provided in the collective bargaining agreement.

C. Notice of Claim

In some instances a notice of claim is required before a charge can be filed.

A notice of claim should be served upon a school district, town, and some public authorities, within 90 days of the action by the school district, town and public authority which CSEA believes to constitute an improper practice. The improper practice charge may be filed after 30 days have elapsed following the serving of a notice of claim. In the case of a school district, the notice of claim must be served on the board of education of the school district. In the case of a town, the notice of claim must be served upon a person authorized to accept service of a summons or to the town attorney. Such service may be made in person or by registered or certified mail (Education Law §13, Town Law §50-e.3). When in doubt as to its necessity, a notice of claim should always be served as a precaution.

D. Timeliness of Charge

Generally, the charge must be filed within four (4) months of the time that a responsible agent of charging party became aware, or should have become aware, of the conduct constituting the alleged improper practice (Rule §204.1[a][1]). Where a notice of claim had been filed against a school district, this time limit is probably extended by 30 days (Hall-Kimbrell v. E. Ramapo S.D., 177 A.D.2d 56 [3rd Dept. 1992]), but there is no PERB or Court decision directly on point.

E. Prototype Draft of the Details of an Improper Practice Charge

Model statements

PARAGRAPH A: Identify the employer and those individuals whose action on behalf of the employer are the subject of the complaint. If against a State agency, it is the State and not the agency that is the employer.

Example 1 (State):

> The State of New York is a public employer within the meaning of the Taylor Law; [OMRDD] is an agency of the State. [Bronx, P.C.] is an institution operated by [OMRDD]: [Jane Smith] is the Administrator of [Bronx, P.C.]; [John Doe] is the [Director of Personnel] of [Bronx, P.C.] [this presupposes that the subsequent details of the charge will allege specific improper conduct by Jane Smith and John Doe.].

Example 2 (Local Governments):

> [Onondaga County] is a public employer within the meaning of the Taylor Law; The [Onondaga County Probation Department] is an agency of [Onondaga County]; [Richard Roe] is the [Director of Probation] for [Onondaga County].

PARAGRAPH B: Identify Charging Party.

Example:

a. [If CSEA is the recognized or certified organization] The Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO (hereinafter "CSEA"), is an employee organization within the meaning of the Taylor Law; [it is unnecessary to write hereinafter "CSEA" if you refer to CSEA as "Charging Party" elsewhere in the charge].

b. [If the local or unit is the recognized or certified organization] Local [000] is a subdivision of The Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO (hereinafter "CSEA"), the [ABC] Unit is a subdivision of Local [000] (collectively hereinafter "CSEA"); [it is unnecessary to write hereinafter "CSEA" if you refer to CSEA as "Charging Party" elsewhere in the charge]. If in doubt, use the recognition clause from the collective bargaining agreement.

c. [You should identify the CSEA staff or members who were adversely affected by the conduct of the employer that is complained about in the charge if they are to be mentioned later in the charge]. [Stanley Sloane] is a Labor Relations Specialist on the staff of the charging party. [Janice Stone] is a Shop Steward for the ABC Unit.

PARAGRAPH C: Describe relevant background.

Example:

1) Charging Party is the exclusive representative of a negotiating unit of employees of [identify the public employer] consisting of [define the negotiating unit].

   (This allegation is usually relevant but is not always so. It is advisable to specify "charging party" in such an allegation in order to avoid confronting the question of whether the certification or recognition was issued to CSEA or to the Unit.)

2) Charging party and [identify the other party to the collective bargaining agreement] are parties to a collective bargaining agreement covering the period of (date) through (date).

Alternative for a unilateral action charge.

Example:

There is a collective bargaining agreement between Respondent and Charging Party covering the period (date) through (date). [or] The last collective bargaining agreement between Respondent and Charging Party covered the period (date) through (date) no successor agreement having been concluded. That agreement is silent with respect to the subject matter of the charge.

(This allegation is often extraneous to the basis of the charge. Where it is extraneous, it should be omitted).

PARAGRAPH D: Etc. Specify the facts of the alleged violation of a discrimination and/or interference charge. (These are the most important paragraphs.)

Alternative for a discrimination and/or an interference charge.

> State the facts that establish the employer's violation of the Taylor Law. It is essential that the statement of facts include the dates on which the incidents complained about occurred.

It is not sufficient to allege conclusions such as "the employer discriminated against Janice Stone." It is necessary to specify precisely what was said to, or done to, Janice Stone, and the date or dates on which the words were spoken and/or the actions taken. However, it is not necessary to specify the evidence that would establish the facts that are stated. Thus, for example, it is not necessary to specify that Jimmy Jones heard the Director of Probation reprimand Janice Stone because Janice pursued a grievance aggressively. Neither is it necessary to attach copies of memoranda issued by the employer in order to prove that the employer took a position that was specified in the memorandum. A statement that management engaged in the offending conduct on the specified date is sufficient, but the charge must specify what the offending conduct was. Nevertheless, the inclusion of evidentiary material in the charge will not render it defective. It merely gives the respondent employer more information than we have to give at that stage of the proceeding.

PARAGRAPH E:

Example:

> For at least __ years prior to (date), it had been a practice that [e.g. the work of cleaning debris in the school yards had been performed exclusively by unit employees.]

PARAGRAPH F:

Example:

> On (date), Respondent [or a named representative of Respondent] announced that, effective (date), [e.g. the cleaning of debris in school yard would be performed by part-time employees who are not in the negotiating unit or by a contractor, etc.] and such work was performed by such non-unit employees starting (date).

CONCLUDING PARAGRAPH:

It is not necessary to include a statement of law such as: Respondent violated its duty to negotiate in good faith; or, Respondent violated §209-a.1(d). This is

covered in paragraph 5 on the front side of the charge. However, there is no harm in doing so. It is also unnecessary to include a request for specific relief such as: Charging Party seeks an order providing Janice Stone with back pay. This can be done at the hearing. Again it is usually not harmful to do so, but it may have the effect of limiting the remedy that the ALJ would have otherwise ordered.

F. Deficiency Notices

PERB's Director of Public Employment Practices and Representation reviews the charges for sufficiency. Where the charge is found to be insufficient, the Director issues a deficiency notice which specifies the inadequacy of the charge and gives the charging party a specified time to correct the charge by amendment, if such correction is possible. (Rule §204.2[a][1]). The amendment must be sworn and notarized. The LRS is urged to consult with the Legal Department attorney assigned to the case to discuss the action that should be taken in response to the deficiency notice. On occasion, an argument can be made by the attorney that the charge is, in fact, sufficient.

G. Conference and Answer

1. Notice from PERB

   If the Director of Public Employment Practices and Representation finds the charge to be sufficient, a letter will go to the parties notifying them that a prehearing conference will be held on a specified date, and directing the respondent to submit an answer by a specified date. (Rule §204.2[a][2]).

2. Appearances at Conference

   The Legal Department submits a notice of appearance informing PERB whether the LRS who signed the charge and/or the attorney will be appearing on behalf of CSEA at the conference, and that the attorney assigned will be appearing on behalf of CSEA at the hearing. Legal Department attorneys generally do not appear at conferences unless the charge is against CSEA, or there are unique legal issues and the LRS and attorney have agreed to this approach.

   a. If the LRS is unavailable on the designated date of a conference which he/she is scheduled to attend, he/she can apply to PERB for the conference date to be rescheduled, and that request will usually be honored. The LRS will probably be requested to provide a list of alternate dates when he/she is available and obtain the other side's consent.

   b. The purpose of the conference is to discuss the issues. The ALJ will try to mediate a settlement. Failing that, the ALJ will try to reach a stipulation as to agreed-upon facts.

c. No witnesses need be present at the conference. However, it may be useful to have a responsible representative of the person on whose behalf the charge was brought present, so that settlement talks can be pursued profitably. However, proposed settlements may be conditionally accepted, subject to approval by an authorized representative of CSEA.

d. Everything that occurs at a prehearing conference is "off-the-record;" testimony regarding such off-the-record discussions is not permitted at the hearing.

e. If the charge is against CSEA, the answer will be drafted by the Legal Department attorney assigned to the case.

H. Hearing

1. ALJ Presiding

   If the matter is not settled, the ALJ will send a letter to the parties advising of the time/place set for the hearing. If that time is inconvenient to any party, an alternative time can usually be arranged.

2. Formality

   The hearing is a formal proceeding with witnesses being sworn, examined, and cross-examined, but the rules of evidence are followed more loosely than in a court proceeding.

3. Burden of Proof

   Charging party has the burden of proof and presents its case first in all improper practice hearings.

I. Post-hearing

1. Interlocutory Appeals

   Rulings made by the administrative law judge during the course of the hearing cannot be appealed to the Board at that time, except upon specific permission from the Board. This permission is rarely granted.

2. Briefs, ALJ decisions

   A transcript of the proceeding is taken by a court reporter. After the transcript is produced, the parties are given about 30 days to file and exchange briefs. The Legal Department Attorney prepares and files the brief. A decision is usually not issued until at least a year after the receipt of the briefs by the administrative law judge.

3. Exceptions (appeal)

   Within 15 working days after the receipt of the ALJ's decision, a party may file exceptions with the PERB Board. Within seven working days thereafter, any other party may file a response to exceptions and/or cross-exceptions. The exceptions and the response and/or cross-exceptions should be accompanied by a supporting brief. The exceptions and briefs are prepared by the Legal Department attorney assigned. The decision to take exceptions is usually made by the attorney, in consultation with the LRS.

CHAPTER THREE: Injunctions

A. Grounds

In support of an improper practice charge, a Court may issue an injunction which would require the respondent to return to the status quo or preclude it from changing the status quo. To secure an injunction, the charging party must show that "there is reasonable cause to believe an improper practice has occurred and it appears that immediate and irreparable injury, loss or damage will result thereby rendering a resulting judgment on the merits ineffectual…" (Taylor Law § 209-a.4[a]).

Invariably courts reject the proposition that loss of money is an irreparable injury, ruling that a judgment restoring the money plus interest repairs ("makes whole") such an injury. An example of irreparable injury would be the eviction of an employee from employer-provided housing; the loss of medical insurance might also be deemed irreparable injury, especially where information is submitted in support of the injunction which shows that employees or their dependents are receiving ongoing necessary medical or pharmaceutical services which they could not afford without the insurance.

B. Procedure

An injunction application must be made to PERB. If PERB finds that the statutory standards have been met, it can either petition a Supreme Court judge to grant the injunction or it can authorize the charging party to go to court for the injunction. Such applications are prepared, served and filed by a Legal Department Attorney.

C. Appeal by Respondent

Where the State or a local government appeals a court order granting an injunction, the injunction is automatically stayed (held in abeyance) (CPLR §5519), although the Appellate court may direct that the injunction continue in effect.

CHAPTER FOUR: Duty of Fair Representation

The duty of fair representation ("DFR") is the obligation of a union to represent all employees in its negotiating unit in good faith and without discrimination. Thus, certain distinctions cannot be made among union members and non-members in the administration of the contract and representation of grievants in contract grievances. The aforementioned recent amendment to Section 209-a.(2) of the Taylor Law allows distinctions to be made in the representation of unit employees with respect to non-contract issues such as a Civil Service Law §75 disciplinary action.

Unions are afforded great discretion in selecting the negotiation proposals that will be advanced and under what circumstances particular negotiation proposals will be compromised. (ATU [Lynch], 22 PERB ¶3058 [1989]) To prove a DFR violation, the charging party would have to establish that the union's negotiation strategy was the consequence of deliberate discriminatory motivation. A charging party must also prove that a union's handling of a grievance involved "fraud, deceitful action, or dishonest conduct, or evidence of discrimination that is intentional, severe, and unrelated to legitimate union objective" for it to constitute a breach of the duty of fair representation. (Mellon v. Benker, 186 A.D.2d 1020 [4th Dept. 1992]).

To better enable unions to represent their members, in 2018 the Legislature approved and the Governor signed into law several amendments to Section 208 of the Taylor Law, which require employers: (1) to provide unions with new employee information within 30 days of hiring; (2) to allow a union to meet with new employees, on employer time; and (3) to permit the use of electronic membership cards. The amendments also addressed the "churn" problem, which is where a member goes off payroll and then returns and is considered a non-member until a new card is signed. Now the employee remains a member. The same holds true for a member who leaves the payroll for up to one year and then returns to another bargaining unit of the same employer, provided both units are represented by the same union.

CHAPTER FIVE: Requests For Information

A. The Rule

PERB has held that a union is entitled to be supplied with certain information by a public employer. It has stated:

> [A]n employee organization may request, and is entitled to receive, information which is necessary for the preparation for collective negotiations, …and information necessary for the administration of a contract including the investigation of grievances. In both cases, the obligation of the employer would be circumscribed by rule of reasonableness, including the burden upon the employer to provide the information, the availability of the information elsewhere, necessity therefor, the relevancy thereof and, finally, that the information supplied need not be in the form requested as long as it satisfies a

demonstrated need. (Albany City School District, 6 PERB ¶3012 [1973])

PERB has also held that a union would have a right to inspect the employer's facilities in an investigation of a grievance, subject to a similar showing of need. The union would have to show, among other things, that the person who would conduct the inspection on its behalf has sufficient expertise so that a visual inspection would be informative. (Albany City School District, 6 PERB ¶3012 [1973])

B. A Sample Letter Demanding Information

The following is a sample letter demanding information needed for the evaluation and/or presentation of a grievance:

Dear _____:

I am hereby writing to you on behalf of CSEA, demanding any documents that you have which indicate the qualification, or lack thereof, for the promotion of [NAME] to the position of [TITLE] at [EMPLOYER], [EMPLOYER'S ADDRESS], pursuant to a posting dated [DATE] through [DATE].

CSEA requires this information to evaluate a grievance filed by [GRIEVANT], who asserts that [HE/SHE] should have gotten the promotion pursuant to the collective bargaining agreement for the [UNIT DEFINITION] unit. In the event that it determines to pursue the grievance to arbitration, CSEA also requires this information to prosecute such grievance.

Please be advised that it is a violation of the Taylor Law for a public employer to refuse to comply with a demand for information that the union needs to represent bargaining unit employees in the administration of its collective bargaining agreement. Please note that CSEA requires this information by [DATE] because the arbitration is scheduled for [DATE].

Very Truly Yours,

_____

Note that the demand letter must contain a statement of why the information is required, as is written in the second paragraph. Also note that the third paragraph should request the information by a specified date. The reason for this is that the failure of the employer to meet that date, if the date is reasonable, will trigger the time (four months) for filing an improper practice charge against the employer.

CHAPTER SIX: Declaratory Rulings

A. Grounds for Filing

A petition for declaratory ruling may be filed for one of two reasons: (1) to seek a declaratory ruling with respect to the applicability of the Taylor Law to any person, union or employer, or (2) to obtain a declaratory ruling as to whether a particular demand is within the scope of negotiations under the Taylor Law. Almost all declaratory ruling petitions have involved the latter question. Where CSEA has submitted a demand for negotiations and the employer has refused to negotiate the demand, saying that the demand is not a mandatory subject of negotiation, the filing of improper practice charge alleging a violation of Section 209-a.1(d) may be an alternative to the filing of a declaratory ruling petition. (PERB Rule §210.1[a])

B. Petitions

1. Forms

   The petition is filed on a form prescribed by PERB and must be signed and sworn to. (Rule §210.1[a]) Upon request, PERB will furnish blank copies of the petition form.

2. Processing

   a. PERB's Director of Public Employment Practices and Representation may dismiss the declaratory ruling petition because the Director determines that the issuance of a declaratory ruling in the specific case would not be in the public's interest. (Rule §210.2[a]) Such a dismissal is subject to exceptions to the Board.

   b. If accepted by the Director, further processing will be in accordance with the procedures set forth in PERB's rules for the processing of improper practice cases.

CHAPTER SEVEN: Conciliation

A. Impasses

1. Negotiations

   Prior to the declaration of impasse, the union and the public employer must engage in head-to-head negotiations.

2. Declaration of Impasse

   An impasse may be deemed to exist if the parties fail to achieve agreement at least 120 days prior to the end of the public employer's fiscal year. (Taylor Law §209.1) PERB may determine that an impasse exists upon the request of the union or the

public employer, or it may declare an impasse on its own. (Taylor Law §209.3) However, PERB rarely, if ever, declares an impasse on its own.

3. Voluntary Procedures

Unions and public employers are empowered to enter into written agreements that establish agreed-upon procedures for resolving unresolved negotiation issues, including the submission of these disputes to impartial arbitration (called interest arbitration). (Taylor Law §209.2) The establishment of such agreed upon rules is very rare.

B. Cases Other Than Those Involving Police and Firefighters etc. and Employees of School Districts and Other Educational Institutions.

1. Mediation

When PERB determines that an impasse exists, it appoints a mediator to help the parties resolve their negotiation dispute. (Taylor Law §209.3[a]) A mediator will usually meet with both parties together and separately, while exploring the parties' most serious concerns and their openness to trade-offs and compromises. The mediator can be expected to pressure both parties to encourage such trade-offs and compromises, in order to get a voluntary agreement. Consistent with this goal, the mediator will make suggestions to the parties both individually and, on occasion, at joint meetings. Except in extreme situations, the mediator's objective is to obtain any settlement that both parties will subscribe to, and the mediator will not be concerned about the economic or social justice of that agreement. Thus, it is the responsibility of each of the parties to protect the interests of its constituency as best as it can.

2. Fact-finding

a. If mediation does not resolve the impasse, PERB is directed to appoint a fact-finding board of not more than three members (Taylor Law §209.3[b]), but, in fact, it is very rare that the fact-finding board consists of more than one member. The term fact-finder is something of a misnomer, as the facts are rarely in doubt. Rather, the fact-finder usually sifts among the facts given to him/her by the parties and indicates which of the facts the fact-finder considers to be the most relevant to the dispute. On the basis of these findings, the fact-finder makes public recommendations for the resolution of the dispute. Some fact-finders base their recommendations upon consideration of social and economic justice. Others try to ascertain the terms of the agreement that the parties would have reached given their respective strengths and weaknesses. These fact-finders give significant consideration to concerns about social and economic justice.

b. Unless both parties consent, PERB will not designate the same person to act both as mediator and fact-finder.

3. Superconciliation

   Frequently, the negotiators for one or both sides are unable or unwilling to agree upon compromises because they believe their own propaganda or because of campaign promises made to their constituency during election campaigns. A fact-finder's recommendation that does not give them all that they have ardently sought often makes it easier for the negotiators to compromise thereafter, as they can blame the fact-finder for encouraging the other side to resist capitulation in the negotiations. Accordingly, PERB often renews the mediation process after a fact-finding report has been issued; mediation at this state is often called "superconciliation."

4. Legislative Determination

   a. The Taylor Committee Report recommended that there be "finality" in the negotiation process and proposed that the final determination be left in the hands of the legislative body of the government involved, with such legislative body taking "such action as it deems to be in the public interests, including the interest of the public employees involved." Such a provision has been incorporated into the Taylor Law. (§209.3[e]) It continues to apply to all but police and fire department employees and related occupations and to employees of school districts and other educational institutions. However, the imposition of terms and conditions of employment by a legislative body is not frequent.

   b. PERB has ruled that the Triborough amendment pre-empts a legislative determination, so a legislative determination cannot delete the terms of an expired collective bargaining agreement. Moreover, such a legislative determination cannot exceed one year. (County of Niagara, 16 PERB ¶3071 [1983], conf'd 104 A.D.2d 1 [4th Dept. 1984])

C. Police and Fire Department Impasses

The following applies to impasses growing out of negotiations involving officers or members of an organized fire department, a group which was previously part of an organized fire department which is responsible for the prevention and control of aircraft fires; employees of police forces and police departments of any county, city, town, village; police officers of Sheriffs' Department; fire or police districts; detectives, investigators, or criminal investigators employed in the office of a district attorney not within New York City; and several other law enforcement employers. (Taylor Law §209.4)

1. Mediation

   Mediation applies exactly as in the case of other negotiating units.

2. Fact-finding

   There is no fact-finding in negotiation disputes involving such employees.

3. Arbitration

   The Taylor Law requires arbitration of such negotiation disputes upon the petition of either party. (Taylor Law §209.4[b])

   a. Unless otherwise agreed upon, the arbitration is before a tripartite arbitration panel, with each party appointing one of the three panel members, which members may be advocates for the party appointing him/her, and a third member to be agreed upon mutually or, if there is no agreement upon such neutral party, to be designated in accordance with a statutorily prescribed procedure. Each party is responsible for the fee of its advocate panel member and for half the fee of the neutral member. (Taylor Law §209.4[c][ii]) The arbitration panel is authorized to hold hearings and receive written as well as testamentary evidence, and it may require the production of additional evidence; it must maintain a full and complete record of any such hearings, with a cost of such record to be shared by the parties. (Taylor Law §209.4[c][iii])

   b. In making its determination, the arbitration panel must consider: (1) a comparison of wages, hours and working conditions with those of other employees performing similar services and requiring similar skills; (2) the interests and welfare of the public, and the financial ability of the employer to pay; (3) a comparison of peculiarities in regard to other trades or professions including hazardous employment, physical qualifications, educational qualifications, mental qualifications, and job training and skills; and (4) the terms of prior collective bargaining agreements affecting such employees. (Taylor Law §209.4[c][v]) The determination shall be dependent upon a majority vote of the panel members. (Taylor Law §209.4[c][iv])

   c. The determination of the arbitration panel shall, subject to review by a court, be binding on the parties for a period of not more than two years from the termination date of the previous collective bargaining agreement. (Taylor Law §§209.4[c][vi] and [vii])

4. State Police

   Interest arbitration is also imposed for the State Police, but only with respect to the terms of the collective agreement directly related to compensation, including salary, stipends, location pay, insurance and medical and hospitalization benefits. (Taylor Law §209.4[e]) The same limitation applies to members of an organized unit of investigators, senior investigators and investigator specialists of the division of State Police and the police officers in the Sheriff's Departments. (Taylor Law §209.4[e])

5. Triborough Implications

   An arbitration panel may not impose changes in the terms of an expired collective bargaining agreement, unless the union has consented to the exercise of such jurisdiction by the arbitration panel. (Niagara Co., 16 PERB ¶3071 [1983], conf'd 104 A.D.2d 1 [4th Dept. 1984]) PERB may find that such consent was inherent in the union's participation in the arbitration process by presenting evidence in support of its position on such issues. A union that wishes to rely upon its Triborough rights rather than upon the determination of an arbitration panel should refuse to participate in the proceedings of the arbitration panel with respect to terms of the most recent collective bargaining agreement, and inform the panel as to why it is taking that position.

6. Local Legislature Involvement

   There is no legislative hearing or determination in a negotiation dispute subject to compulsory arbitration. Neither is an arbitration award subject to approval by the local legislature. (Taylor Law §209.4 [c][vii])

D. School Districts and Other Educational Institutions

1. Mediation, Fact-finding and Superconciliation

   The normal procedures of mediation, fact-finding and superconciliation are applicable to such employment.

2. Legislative Action

   If the impasse is not resolved during the above-mentioned procedures, PERB may afford the parties an opportunity to explain their positions with respect to the report and recommendations of the fact-finding board, at a meeting at which the legislative body of the government, or a committee thereof, may be present. Thereafter, the legislative body "may take such action as is necessary and appropriate to reach an agreement" (emphasis supplied) but it may not dictate the terms and conditions of employment. (Taylor Law §209.3[f])

CHAPTER EIGHT: Grievance Arbitration

CSEA and the public employer, by contract, may choose to select grievance arbitrators from lists provided by PERB, the American Arbitration Association, or other agencies. The following applies where arbitrators are selected from lists provided by PERB.

A. Demand for Arbitration

1. By CSEA or Another Single Party

   CSEA, or any other union, must serve a demand for arbitration upon the employer by registered or certified mail, return receipt requested, and file two copies of the demand with PERB's Director of Conciliation, with proof of service upon the employer. The demand must include:

- Date
- Name of the Local, Unit or individual grievant, if any, in whose name CSEA is bringing the demand
- Name of the employer
- Name, title, address and telephone number of the representative(s) of the parties to whom correspondence from PERB should be directed
- Effective date and expiration date of the agreement
- Identification of the provision of the agreement providing for arbitration, together with the copy thereof
- Identification of the provision(s) in the agreement claimed to be violated together with a copy thereof
- Description of the nature of the dispute(s) to be arbitrated and the remedy(ies) sought, including the name(s) of the grievant(s)

The following language must be included in the demand verbatim:

> The undersigned, a party to a written agreement which provides for arbitration as ascribed herewith, hereby demands arbitration. You are hereby notified that copies of this demand for arbitration are being filed with the Director of Conciliation, New York State Public Employment Relations Board, Empire State Plaza, Agency Building 2, Post Office Box 2074, Albany, New York 12220, with a request that the administration of the voluntary arbitration rule procedure be commenced.

> Pursuant to the New York Arbitration Law, Article 75, Section 7503, Civil Practice Law and Rules, you have twenty (20) days from the date of service of this demand to apply to stay the arbitration or be precluded from such application.

The demand must state the title of the CSEA representative who has served the demand for arbitration and must be signed. (Rule §207.4[b])

2. A Joint Submission to Arbitration

   Joint submission to arbitration need not identify the provision in the collective bargaining agreement providing for arbitration. Also, in place of the long quotation cited in #1 above, the following language should be stated verbatim:

   "The parties named herein hereby jointly request arbitration of the dispute described herein under the voluntary arbitration rules of procedure of the New York State PERB." (Rule §207.4[c][6])

B. Arbitrability

A party that contests arbitrability in court should file a copy of its court application with the Director of Conciliation within 20 days of service of the demand for arbitration, in which event, the Director of Conciliation will hold the designation of an arbitrator in abeyance pending final court determination of the arbitrability question. (Rule §207.6)

C. Selection Process

PERB sends the representative of the two parties identical lists of seven arbitrators, including a resume and per diem fee for each arbitrator. Each party has 10 days from the date of the letter forwarding the list in which to select, rank and return their selections to the Director of Conciliation. (Rule §207.7)

1. Acceptable Lists

   A list is deemed acceptable if both parties select and rank at least four of the seven names supplied to them. (Rule §207.7[a])

2. Unacceptable Lists

   A party that has stricken at least four names from a panel list may request that an additional panel list be substituted for the one originally sent. Each party has the right to request one additional list. (Rule §207.7[b])

3. Designation of Arbitrator

   a. Upon the timely receipt of each party's selection, the Director of Conciliation shall designate an arbitrator consistent with the selected order of preference.

   b. If the parties have failed to agree upon a list, PERB's Director of Conciliation may designate an arbitrator.

   c. If one party failed to make a timely return of its selections to the Director of Conciliation, all names submitted in the panel list shall be deemed acceptable to such party and the Director shall designate the arbitrator in accordance with the preferences of a party whose selections have been timely received. (Rule §207.7[c][2]) It is therefore very important that the LRS returns the list of selections to the Director within 10 days.

   d. The Board of Directors has capped the per diem at $850/day (half payable by CSEA; half by the employer). Where selection is made involving a per diem in excess of $850, the Local/Unit is back-charged the excess against its rebate.

   e. The LRS is strongly encouraged to consult with the CSEA Regional or Legal Department attorney assigned to the case regarding the selection and ranking of arbitrators. If an attorney has not yet been assigned to the case, the Attorney of the Day is available for such consultation.

CHAPTER NINE: Strike Charges

Section 210.1 of the Taylor Law prohibits public employees from striking and public employee unions from causing, instigating, encouraging or condoning a strike. The law goes on to specify penalties for its violation.

A. Penalty Applicable to Unions

While there are several penalties for violation of the law prohibiting strikes, only one is administered by PERB. PERB is directed by Taylor Law §210.3 to suspend an offending union's check-off rights to dues deductions. Among other considerations in determining the duration of this suspension, PERB is directed to consider: (1) the extent of willful defiance of the law by the union; (2) the impact of the strike on public health, safety and the welfare of the community; (3) the financial resources of the union; and (4) whether the public employer has engaged in such acts of extreme provocation as to detract from the responsibility of the union for the strike. (Taylor Law §2103[f])

B. Fines of Employees

Taylor Law Section 210.2 provides for the public employer to deduct a fine measured as two days of pay for each day, or part of a day, that an employee is found to have engaged in a strike.

C. Other Penalties

1. Contempt of Court

   Where a court issues an injunction against a strike, the violation of that injunction may result in individual employees and/or union leaders being found in contempt of court. The penalties for contempt of court may consist of fines and/or imprisonment for a term not exceeding three months. (Judiciary Law §751)

2. Discipline

   Employees who engage in a strike may be brought up on disciplinary charges under the terms of the collective bargaining agreement or Civil Service Law §75, or Education Law §3020-a, as appropriate.

D. Role of LRS

The defense of CSEA and/or its Unit employees is the responsibility of the Legal Department. An LRS will be requested to assist the attorney assigned in gathering relevant information for such defense.

CHAPTER TEN: Subpoenas

A. Issuance by PERB

1. Authority

   PERB is authorized by Section 205.5(k) of the Taylor Law to issue subpoenas.

2. Procedure

   PERB has delegated this authority to the administrative law judge presiding at a hearing, and given the ALJ the discretion whether or not to issue a subpoena requested by a party to the hearing. Such a request will not be granted if made within 15 days of a scheduled hearing, absent good cause shown by the party requesting the subpoena for the lateness of the request. (Rule §211.2)

B. Issuance by Others

An attorney representing a party at a hearing may issue a subpoena; however, a subpoena to compel a governmental agency to produce documents (subpoena duces tecum) cannot be issued by an attorney.

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