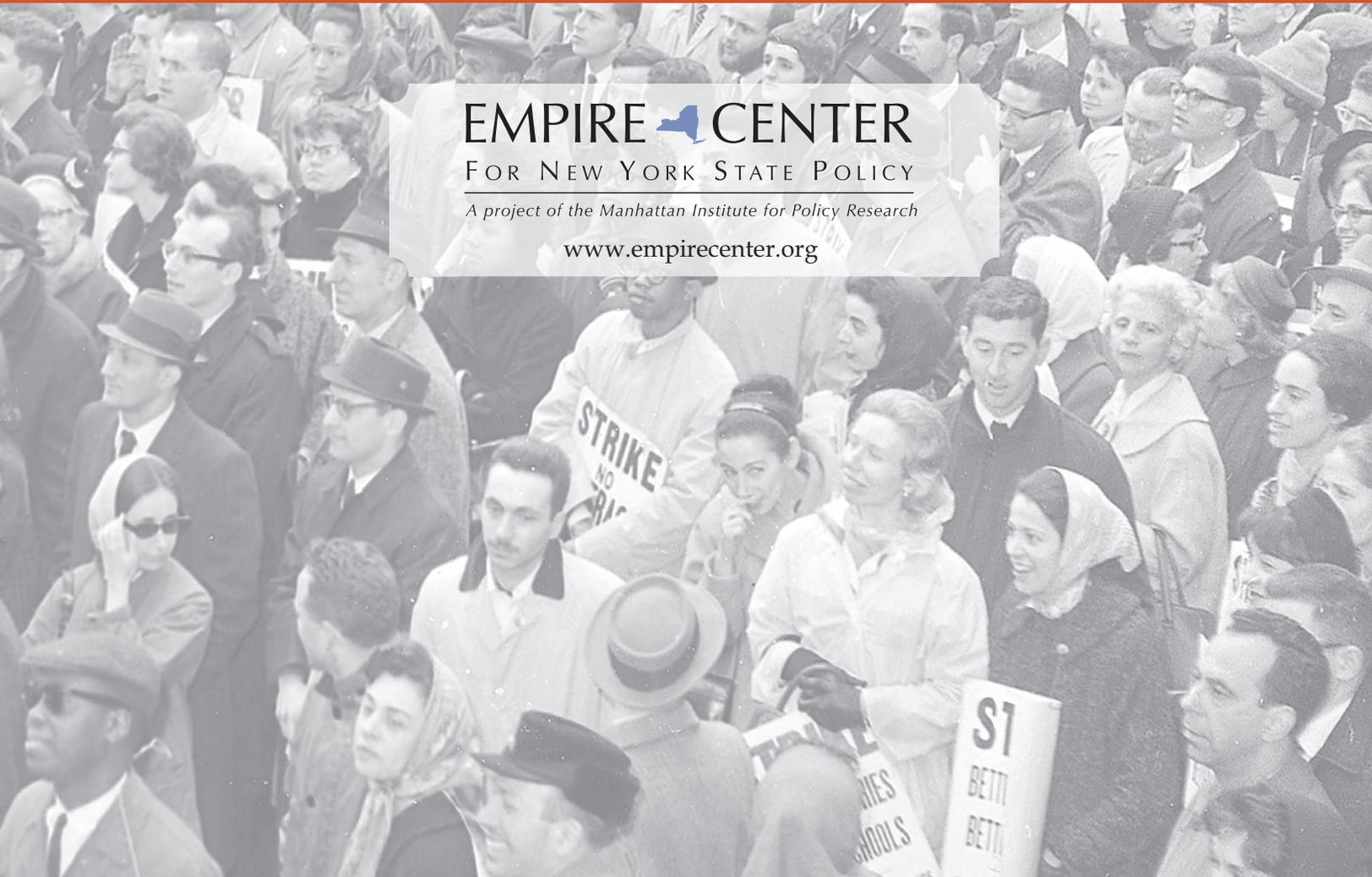




TAYLOR MADE

The Cost and Consequences of New York's Public-Sector Labor Laws

Terry O'Neil and E.J. McMahon



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COVER: Striking teachers rally in New York City on April 11, 1962, when their union staged the biggest walkout by public employees in United States history up to that time. *Photo by Associated Press.*

OVERVIEW

The Empire State was a scene of growing public-sector labor unrest in the mid 1960s. Government employees from Long Island to Buffalo were lobbying for the same organizational and collective bargaining rights as private-sector workers. Municipal unions in New York City had been negotiating contracts since the late 1950s, yet essential city services had been repeatedly interrupted by strikes or threats of strikes—culminating in a disastrous walkout by transit workers in January 1966.

From this atmosphere of recurring crisis would arise a trailblazing new statute establishing the ground rules for unions to organize public employees and collectively bargain contracts with New York’s counties, cities, towns, villages, school districts, public authorities and special districts.

The Taylor Law was designed to create a comprehensive framework for orderly resolution of labor-management disputes in state and local government. After a rocky start, it succeeded. Strikes by public employees in New York are now rare. The vast majority of contract negotiations are settled without resort to third-party intervention.

But New Yorkers have paid a steep price for labor peace. Over the past 40 years, the number of state and local government jobs has grown at more than twice the rate of private-sector employment in New York, and the average pay of state and local government workers is higher than that of private-sector workers in most regions of New York.

Personnel costs are a major element in what Governor Eliot Spitzer has described as a “perfect storm of unaffordability” threatening the state’s future. Employee salaries and benefits—which account for 71 percent of municipal government operating expenses and fully three-quarters of school district expenditures across New York—are a key ingredient in the nation’s heaviest state and local tax burden.

Efforts to reduce this burden are hampered by aspects of the Taylor Law that have evolved to the distinct disadvantage of management.

Informed by the perspective of an experienced labor negotiator, this paper reviews the background of the Taylor Law and highlights Taylor Law provisions and precedents in need of reform. These include:

- **Compulsory “interest arbitration”** for police and firefighters, which has tended to drive up salaries for uniformed services while hindering creative approaches to improving efficiency and reducing costs. The primary issue in binding arbitration should be a more rigorous standard of “ability to pay” on the part of the affected community, and the option of “last-best-offer” arbitration should be introduced.
- **The Triborough Amendment**, which has perpetuated generous pay arrangements, especially for teachers. The law should be amended to prevent automatic pay increases in an expired contract from continuing in the absence of a new contract.

- **Public Employment Relations Board (PERB) rulings** on “mandatory items of negotiation” that restrict the ability of government employers to pursue subcontracting of services and other cost-saving alternatives.

The 40th anniversary of the Taylor Law also is an appropriate time for state officials to strongly reaffirm their commitment to the law’s prohibition on strikes by public employees. Any weakening of the law’s penalty provisions for unions and employees who participate in illegal strikes clearly would be against the public interest.

This paper is organized into three sections. The first reviews the background and development of the Taylor Law. The second explains how subsequent amendments and PERB rulings have limited management options. The third recommends needed reforms to better balance the playing field between the legitimate interests of government employees and broad public interest. Interspersed throughout are narrative exhibits and charts illustrating the cost and consequences of the Taylor Law.

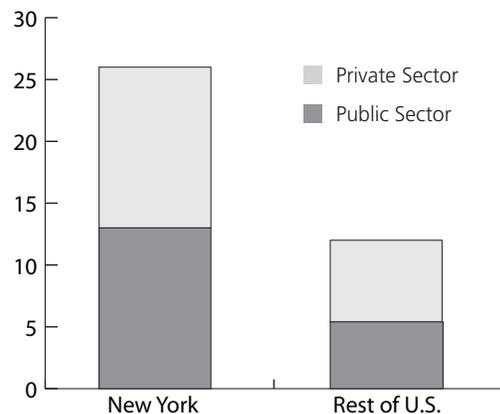
Government With a Union Label

The nearly 2 million New Yorkers who are union members comprise 24 percent of the state’s workforce—the highest rate of unionization in the country, double the average for all states, although New York has tracked the national decline in union membership over the past 35 years.

Fully half of all union members in New York State work in the public sector. Although most states allow at least some government workers to unionize and collectively bargain, New York has the most heavily unionized public-sector workforce of any state. At least 69 percent of New York government workers—including a small component of federal employees—are union members, compared to a national average of 36 percent.

These estimates probably understate the true extent of unionization in New York’s state and local governments and school districts, where supervisors (such as principals, police sergeants and maintenance foremen) as well as line workers commonly are unionized. At least one out of every eight workers in the Empire State is a unionized government employee; in the rest of the country, the ratio is roughly one out of 19.

Figure 1. Union Members as a Percent of All Workers, 2006



Source: Barry T. Hirsch and David A. Macpherson, “Union Membership and Coverage Database from the Current Population Survey,” posted at www.unionstats.com

—E.J. McMahon

I. THE BACKDROP

Employees in New York were granted the right to organize and collectively bargain under Article 1, Section 17 of the state Constitution, adopted in 1938. At that point, however, government employees were under no reciprocal obligation to negotiate with their worker organizations. Prior to the 1950s, courts across the country generally held that collective bargaining by government employees could be denied under the common-law doctrines of sovereign immunity¹ and illegal delegation of powers.² As late as 1937, even President Franklin D. Roosevelt opposed public-sector unionism.³

The civil service salary grading system, including annual pay increments, was introduced in New York in 1937. By 1941, civil service employees won the right to a hearing if faced with disciplinary charges. In 1955, all competitive class employees were granted tenure. Public pensions, guaranteed by the state constitution, were available to virtually all full-time public employees by the 1950s. In other words, before collective bargaining commenced anywhere in New York's public sector, the floor from which public employee unions would negotiate was already strewn with the kind of benefits that private sector unions had to negotiate for themselves.⁴

Government employee organizations became increasingly assertive in the years immediately following the end of World War II, which saw an increase in labor militancy in all sectors of the economy. A strike by Buffalo teachers precipitated the passage in 1947 of New York's first statutory prohibition on public employee strikes, the Condon-Wadlin Act.⁵

New York State courts historically had treated public-sector strikes as illegal and never hesitated to enjoin unions from striking. Condon-Wadlin, however, created new penalties that would come to be seen as draconian. Under the law, striking workers were automatically fired and could be reappointed only if they derived no fi-

nancial benefit from the strike. Employee compensation following a strike could be no higher than pre-termination levels for at least three years, and rehired workers were placed on probation for five years.

Adopted the same year as the federal Taft-Hartley Act, which reined in some of the rights granted to private-sector labor unions under the New Deal's Wagner Act, New York's Condon-Wadlin law had mixed effectiveness through the 1950s. However, after a series of strikes including walkouts by New York City teachers in 1960 and 1962, the law came to be widely seen as flawed and unenforceable. In 1963, it was temporarily amended. Striking employees no longer automatically lost their jobs but risked incurring a "2 for 1" penalty—two days lost pay for each day they refused to work. The proba-

The floor from which public employee unions would negotiate was already strewn with the kind of benefits that private sector unions had to negotiate for themselves.

tionary period for strikers was reduced from five years to one year, and the pay freeze period following a strike was reduced from three years to six months.

The 1963 Condon-Wadlin amendments were due to expire in 1965, at which point the more onerous penalties of the original law would return. That same year, employees of the New York City Welfare Department struck for 28 days – the longest strike in the history of the state at that time. Over 5,000 workers were automatically "terminated," and 19 union leaders were jailed. The law itself became a major obstacle to making a settlement. Consequently, the strike settlement called for: (1) a fact finding panel; (2) the release of the jailed union leaders; and (3) the suspension of Condon-Wadlin until the union could test the law's constitutionality in the courts.

In January 1966, Mike Quill, the President of the Transit Workers Union (TWU), led a 12-day strike in New York City that resulted in economic losses estimated in excess of \$100 million per day. The transit strike was the final straw for Condon-Wadlin. The Legislature ultimately granted amnesty from Condon-Wadlin penalties to both the welfare and transit workers. Governor Nelson Rockefeller appointed a committee to “make legislative proposals for protecting the public against the disruption of vital public services by illegal strikes, while at the same time protecting the rights of public employees.”⁶

The committee was chaired by Professor George W. Taylor of the University of Pennsylvania, an eminent industrial relations expert and labor arbitrator.⁷

The Taylor Committee

Mayor Robert F. Wagner had granted collective bargaining rights to nearly all of New York City’s municipal employees under an executive order issued in 1958⁸. President John F. Kennedy issued an executive order extending collective bargaining rights to federal employees in 1962.⁹ But as of 1966, there was still no similar collective bargaining law on the state level in New York. Condon-Wadlin dealt only with strike penalties.

Although New York City employees enjoyed extensive organizational and collective bargaining rights by the early 1960s, the city’s public-sector labor relations were in frequent turmoil. This was seen in Albany as evidence of the need to move beyond the purely punitive approach on a statewide basis.

“There is now widespread realization that protection of the public from strikes in the public services requires the designation of other ways and means for dealing with claims of public employees for equitable treatment,” the Taylor Committee said in the opening to its March 1966 final report.¹⁰

Strikes are “an integral part of the collective bargaining process” in the private sector, the committee said, but the same should not be true in government. It explained the difference as follows:

A work stoppage in the private sector involves costs primarily to the direct participants. They also undertake considerable risk in fixing the terms of settlement; the volume of sales and opportunities for employment are at stake. On the other hand, a strike of government employees ... introduces an alien force in the legislative processes. With a few exceptions, there are no constraints of the marketplace. The constraints in the provision of ‘free services’ are to be found in the budget allocation and tax decisions which are made by legislators responsive to the public will.¹¹

While acknowledging that some public services might be viewed as more “essential” than others, the committee indicated that it was unable and unwilling to identify which was which. It ultimately concluded that a strike by any group of state or local government workers was not compatible with the orderly functioning of the democratic form of representative government.

The committee also pointedly rejected compulsory arbitration as a dispute-resolution tool.

Compulsory arbitration is not recommended. There is serious doubt whether it would be legal because of the obligation of the designated heads of government departments or agencies not to delegate certain fiscal or other duties. Moreover, it is our opinion that such a course would be detrimental to the cause of developing effective collective negotiations. The temptation in such situations is simply to disagree and let the arbitrator decide.¹²

Blueprint for a Revolution

The key recommendations of the Taylor Committee in 1966 would form the basis for the law adopted a year later. The committee said the Condon-Wadlin Act should be replaced with a new statute that would, among other things:

- grant public employees the right to organize for collective bargaining purposes;
- empower state and local governments and other political subdivisions to recognize, negotiate with, and enter into written agreements with organizations representing public employees;

The Public Sector Compensation Edge

Table 1. Averages Wages and Salaries, 2006 State and Local Government vs. Private Sector

| | State | Local | State & Local Government | Private | Ratio* |
|---|----------|----------|--------------------------|----------|--------|
| Statewide | \$48,528 | \$47,155 | \$47,402 | \$56,878 | 0.83 |
| <i>Statewide Private, Excluding Finance and Insurance</i> | | | | \$46,833 | 1.01 |
| Capital Region | \$51,077 | \$37,409 | \$43,959 | \$38,253 | 1.15 |
| Central New York | \$38,510 | \$38,506 | \$38,507 | \$37,298 | 1.03 |
| Finger Lakes | \$48,806 | \$37,098 | \$39,122 | \$38,321 | 1.02 |
| Long Island | \$44,065 | \$57,251 | \$55,563 | \$45,036 | 1.23 |
| Mid-Hudson | \$47,755 | \$50,979 | \$52,006 | \$51,817 | 1.00 |
| Mohawk Valley | \$49,486 | \$32,481 | \$36,564 | \$30,064 | 1.22 |
| New York City | \$53,207 | \$50,805 | \$51,008 | \$77,045 | 0.66 |
| North Country | \$50,578 | \$33,096 | \$38,727 | \$29,300 | 1.32 |
| Southern Tier | \$41,223 | \$32,719 | \$34,672 | \$36,750 | 0.94 |
| Western New York | \$44,027 | \$38,859 | \$40,063 | \$34,610 | 1.16 |

* State and local government average divided by private sector average.

Source: New York State Department of Labor

State and local government employees were paid higher average salaries than private-sector workers in eight out of 10 regions of New York as of 2006, as shown in table 1. Private-sector average salaries were higher only in New York City and in the Southern Tier.

On a statewide basis, the average state and local government salary was only 83 percent of the average private-sector salary. However, excluding the well-paid financial sector, employees of private firms earned slightly less than state and local government employees.

Wages and salaries are only part of the compensation package, however. The public-sector premium is larger when benefits are considered as part of the mix. As shown in Table 2, state government employees—whose benefit package is typical of those available to most public employees in New York—have more paid time off than private-sector workers and are universally eligible for retirement and health benefits not available to all private-sector workers. One additional and invaluable benefit is job security: government workers are tenured in their jobs, and layoffs in government are exceedingly rare and generally affect only on the most junior employees.

Table 2. Selected Employee Benefits
Private Sector* and New York State Government**

| | State | Private avg |
|--|-------|-------------|
| Number of paid holidays | 12 | 9 |
| Number of paid vacation days: | | |
| After 1 year | 14 | 10.2 |
| After 5 years | 18 | 15 |
| After 10 years | 20 | 18.1 |
| Percent with access to: | | |
| Retirement benefits of any kind | 100 | 78 |
| Defined-benefit pension | 100 | 34 |
| Percent with access to employer-supported health benefits: | | |
| Medical | 100 | 84 |
| Dental | 100 | 64 |
| Vision | 100 | 40 |
| Outpatient prescription drug | 100 | 81 |
| Percent employer share of health insurance premium: | | |
| Individual coverage | 90 | 82 |
| Family coverage | 75 | 74 |

* Firms with more than 100 employees.

** CSEA classified service employees in the Executive Branch who are subject to the Attendance Rules for Employees in New York State Departments and Institutions

Source: U.S. Department of Labor, Bureau of Labor Statistics, National Compensation

Survey: Employee Benefits in Private Industry in the United States, March 2007

—E.J. McMahon

- create a state Public Employment Relations Board (PERB), consisting of three “public members” appointed by the governor with Senate confirmation, to assist in the resolution of disputes between unions, public employees and their employers.
- continue the ban on strikes, broadly defined as “concerted work stoppage(s) or slowdown(s) by public employees for the purpose of inducing or coercing a change in the conditions of their employment.”

The committee recommended that employees who participated in an illegal strike should be subject to misconduct charges under Section 75 of the Civil Service Law—which contains penalties up to and including dismissal, depending on the extent of the misconduct—and that the representation privileges of striking unions, including the valuable dues check-off, should be subject to cancellation by PERB. A union guilty of striking would not be reinstated under the committee’s recommendations without agreeing that it would not assert the right to strike going forward.

Underscoring its desire to see the prohibition on strikes enforced, the committee also recommended that it be “obligatory by law” for a public employer’s chief executive or legal officer to initiate court action for injunctive relief as soon as it became apparent that a public employee strike was imminent, and to institute a criminal contempt proceeding against a striking union as soon as such an order was violated.

As for the specific steps to be followed in negotiating contracts, the committee recommended that collective bargaining agreements include procedures “developed by the parties themselves”¹³ to be invoked in the event of an impasse. In the event these procedures failed to produce a settlement, the committee recommended PERB intervention through a series of steps, proceeding from mediation, through fact-finding and possible voluntary arbitration. If a final fact-finding report was not accepted by both sides, the committee recommended a show cause hearing before the employer’s legislative

body—usually an elected board or council—with the chief executive officer taking on a negotiator’s role separate from the legislative body.¹⁴

The committee concluded that when all other efforts to resolve an impasse failed, the ultimate determination should rest with the people’s elected representatives.

Taylor Law I

In 1967, after a year of political wrangling—and over the strenuous objections of public employee unions angered by the prohibition on strikes—the Legislature passed and Governor Rockefeller signed the Public Employees Fair Employment Act, which immediately became known as the Taylor Law.¹⁵

Public employee unions received some invaluable benefits in the Taylor Law—including the right to automatic dues check-off, and certification on the basis of dues authorization cards alone without a secret-ballot election.

The law, which took effect in September 1967, incorporated nearly all the key recommendations of the Taylor Committee Report, including the creation of PERB. However, it left room for substantially equivalent local statutes, which paved the way for a separate but parallel Collective Bargaining Law to be passed and administered by New York City.¹⁶

Public employee unions received some invaluable benefits in the statute—including the right to automatic dues check-off, and certification on the basis of dues authorization cards alone without a secret-ballot election, except in cases where more than one union was vying to represent a group of employees.¹⁷

The Taylor Law granted state and local government employees the right to collectively bargain with their employers over “terms and conditions of employment,” including wages, salaries and hours. However, in line with the Taylor Committee Report,

Taylor-Made Trends: Wages, Salaries and Employment

The state and local government share of total public- and private-sector wage and salary disbursements reflects the relative size of government payrolls. In New York, this percentage began to rise significantly above the national average around the time the Taylor Law was passed in 1967, as shown in Figure 2. By the mid-1970s, the state and local government share of wages and salaries in New York was 20 percent above the national average. While this difference narrowed slightly during subsequent economic expansions, the Empire State remained significantly above the national average by this measure for the next two decades.

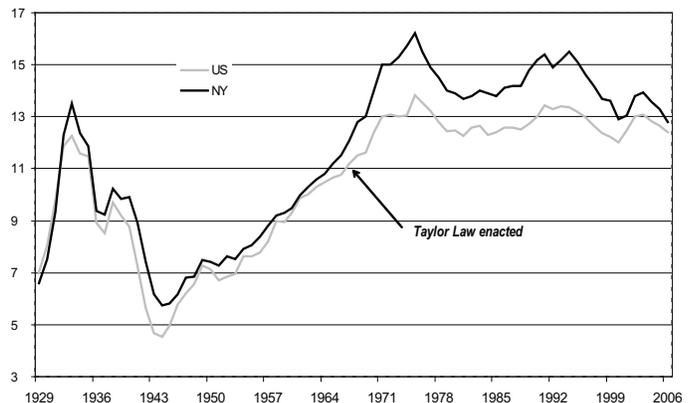
Wages and salaries for state and local government workers in New York represented 12.8 percent of the total paid to employees in all sectors of the economy in 2006, compared to a national average was 12.4 percent.

There appears to have been a convergence between New York State and the rest of the country since the mid-1990s, when state and local government salaries in the Empire State began dropping relative to wage and salary totals for all industries. However, this trend is misleading. New York's pay equation has been increasingly distorted by a significant increase in the share of all wages and salaries flowing to employees of finance, insurance and real estate (FIRE) firms—especially since the stock market boom of the 1990s. As of 2006, the FIRE sector employed only 8 percent of New York workers but accounted for nearly 22 percent of total wages and salaries in the state. By comparison, FIRE firms account for only 10 percent of total U.S. wages and salaries.

Adjusting the totals to exclude the FIRE sector, public-sector pay in New York has remained significantly higher than the national average throughout the past four decades. As of 2006, state and local government accounted for 16.3 percent of all non-FIRE wages and salaries in New York, compared to a national average of 13.7 percent.

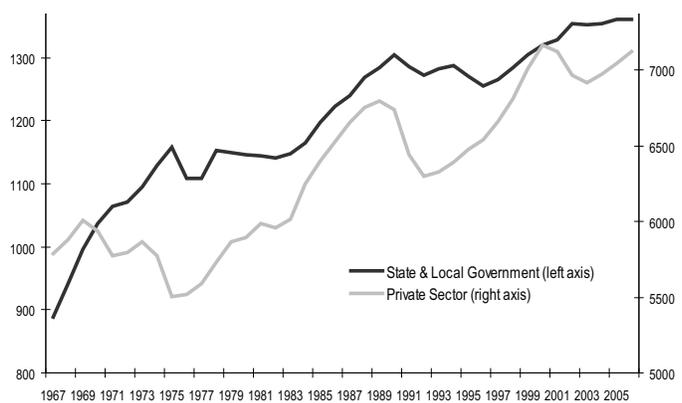
Among the 10 most populous states (including New York), which have the most mature and diversified economies, the next-largest public-sector payrolls were found in California, where 14.9 percent of all non-FIRE wages and salaries flowed to state and local government workers.

Figure 2. State and Local Government Wages and Salaries as Percent of All Wages and Salaries, 1929-2006 (percent)



Source: U.S. Commerce Department, Bureau of Economic Affairs

Figure 3. Private Sector v. State and Local Government Employment 1967-2006 (in thousands)



Source: U.S. Bureau of Labor Statistics

Note: Due to reclassification, until 1990 "private" is all non-farm less total government

Since 1967, state and local government payrolls in New York have grown by 53 percent, adding 472,000 jobs. The private sector added 1.3 million jobs, a growth rate of only 23 percent. In other words, the growth rate for government was more than twice the growth rate for the private sector in New York. State and local government employment also increased throughout the country during this period—but only 20 percent faster than private payrolls. Private-sector employment in New York experienced sharp ups and downs during the 1970s and in the wake of recessions in 1990 and 2001. But state and local government employment has been less volatile.

—E.J. McMahon

the law did not otherwise specify what government employers had to negotiate (“mandatory” subjects), what they need not negotiate (“nonmandatory” or “permissive” subjects), and what they could not negotiate (“prohibited” subjects).¹⁸ The answers would evolve over the next several decades on the basis of PERB decisions.¹⁹

Less than two years after it first took effect, in the wake of strikes by New York City teachers and sanitation workers in 1968, the Taylor Law was amended to revive the “2 for 1” penalty that had been part of the 1963-65 version of the Condon-Wadlin Act. Consistent with the Taylor Committee recommendations, the 1969 amendments also lifted the ceiling on fines against unions involved in illegal strikes and provided

for legislative determinations as the ultimate end of unresolved impasses.

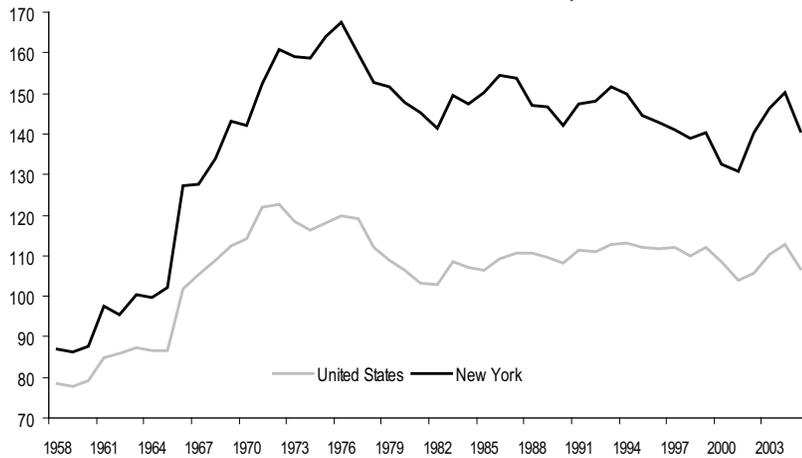
Impasse procedures under the Taylor Law, as amended in 1969, consisted of four successive steps that would become familiar to New Yorkers following the twist and turns of local government and school labor relations over the next few years:

1. mediation;
2. fact-finding;
3. superconciliation (*i.e.*, post-fact finding mediation or voluntary arbitration); and, if all else failed,
4. legislative determination (*i.e.*, a final settlement by vote of the local school board, city council or other elected body with budgeting power).

New York's Tax Burden

New York as of 2005 had the nation's second heaviest state and local taxes relative to income, according to unadjusted Census Bureau data. (Wyoming, which taxes minerals more heavily than people, was highest.) New York's taxes per \$1,000 of personal income were 34 percent heavier than the 50-state average. But the difference wasn't always so great. As recently as 1962, state and local taxes were only 9 percent above average, placing New York well down on the list of states ranked by overall tax burdens. The upsurge in New York's relative tax level in the mid-1960s followed two key events: the establishment of the state's Medicaid program, and the passage of the Taylor Law.

Figure 4. State and Local Taxes per \$1,000 of Personal Income U.S. and NY, 1958-2005



Source: U.S. Census Bureau and U.S. Commerce Department, Bureau of Economic Analysis

—E.J. McMahon

2. REVISIONS AND WRONG TURNS

Within eight months of its enactment, the Taylor Law was described as having an “almost revolutionary effect” on public-sector labor relations.²⁰ By the fall of 1968, an additional 360,000 state and local government employees had been unionized, in addition to the roughly 340,000 (mostly in New York City) who were already engaged in collective bargaining before the law passed.²¹

It was inevitable that the new law would undergo a period of trial and testing – in and out of court. Municipal officials and school boards were often less well prepared to begin collective bargaining than professional union negotiators. Misunderstandings and miscalculations were frequent during a period when negotiators on both sides were still trying to establish the law’s limits.

Newly empowered teachers’ unions around the state proved especially willing to flout the law’s anti-strike penalties during the first decade-and-a-half of the Taylor Law’s existence. Indeed, the majority of public employee strikes in New York during the 40-year history of the Taylor Law have involved teachers.²² In the law’s early years, many were undoubtedly influenced

by the example of New York City’s militant United Federation of Teachers (UFT) and its nationally prominent leader, Albert Shanker, who led several strikes during the 1960s and 70s.

In 1973, the Taylor Law was amended to specifically exclude retirement benefits from the definition of “terms and conditions of employment” considered mandatory items of negotiation. As explained in the most authoritative legal treatise on the law,²³ “this provision was included because of growing concern over the cost of public employee pensions and the excessive burden they were putting on taxpayers, particularly because of their open-ended costs.”

The 1973 amendment marked the last major legislative change to the Taylor Law that was specifically designed to protect taxpayers from rising employee compensation costs.

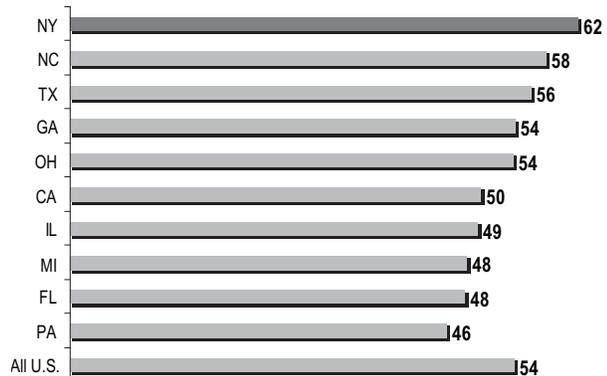
Interest Arbitration Arrives

The Taylor Law was in existence for only seven years when, in 1974, the State Legislature adopted amend-

Big Government, Big Headcount

With 62 employees per 1,000 residents, New York’s state and local government workforce is 14 percent larger than the national average. As shown in Figure 5, New York has a bigger state and local government workforce than any of the 10 most populous states. The Empire State ranks 11th overall on this measure.

Figure 5. State and Local Government Employment* per 1,000 residents 10 Most Populous States



* Full-Time Equivalent employees.

Source: US Census Bureau, *State and Local Governments 2006 Public Employment Data* and *Population Estimate July 2006* and *State and Local Governments 2006 Public Employment Data*.

—E.J. McMahon

The Strike-Out Record

The Taylor Law was designed to prevent the kind of public-sector strikes that periodically disrupted public services in various New York State cities in the 20 years following the end of World War II. However, once the new law had opened the floodgates to mass unionization of New York's public sector, strike activity and job actions by government workers sharply increased. In the first 15 years after the Taylor Law was enacted in 1967, the state Public Employment Relations Board was asked to intervene in 299 walkouts, the vast majority involving teachers' unions. Strikes averaged 20 a year in the 1970s, despite PERB's willingness to impose the Taylor Law's full sanctions on striking workers and their unions in roughly two-thirds of those cases.

The trend abruptly changed in the early 1980s. Since 1983, PERB has recorded only 41 strikes of government workers in New York—an average of fewer than two per year. Compared to the tumultuous 1960s and 70s—with some significant exceptions—the last quarter-century has been an era of labor tranquility in the state and local government throughout New York.

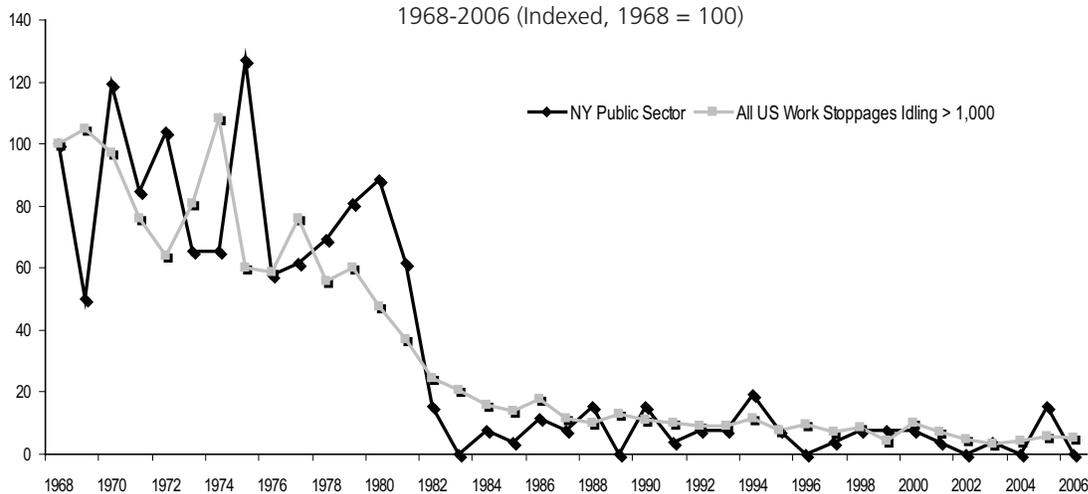
Does the Taylor Law—and in particular the 1982 Triborough amendment freezing salary increments in the absence of a contract—deserve credit for the change?

Some—but clearly not all. In fact, federal labor statistics show that strikes of all sorts, in both the public and private sectors, decreased sharply across the country in the 1980s. (See chart.) Analysts have offered a variety of reasons for the trend, including corporate restructurings and increased global competition affecting the once heavily unionized manufacturing sector. A watershed event in the history of American labor relations came in 1981 with President Ronald Reagan's tough response to a strike by federal air traffic controllers. Overwhelming public support for Reagan's decision to fire and replace all the striking workers played an important role in changing the climate of labor relations across the country.

Another possible explanation for the decrease in New York public-sector strikes: The walkouts of the 60s and 70s succeeded in winning enriched pay and benefits for the vast majority of state and local government employees in New York. Increasingly shielded from management pressure by Taylor Law amendments, court precedents, and PERB rulings, the state's public-sector unions by the 1980s no longer had much to strike over.

Figure 6. Public Sector Strikes in New York State and Major Work Stoppages in U.S.

1968-2006 (Indexed, 1968 = 100)



Source: NYS Public Employment Relations Board statistics from Annual Report and U.S. Department of Labor

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ments making binding “interest arbitration”²⁴ by a tripartite panel²⁵ the final step in resolving police and fire impasses.²⁶ There was no evidence unions representing uniformed services were having an exceptionally difficult time settling contracts without the ability to strike or to invoke arbitration.²⁷ Rather, the changes more likely reflected the lobbying effectiveness of police and firefighter unions in a statewide election year. The law was regarded as an “experiment” when enacted²⁸, but it has been extended every two years for the past 33 years.

Affluent communities have less difficulty settling for what seems to be the going rate in arbitration awards to police and fire unions, even if this rate is somewhat inflated by the fear of arbitration.

Armed with the right to seek compulsory arbitration of contrast disputes, police and firefighter unions would ultimately start winning bigger percentage pay increases than other municipal employees. The average salaries of police and firefighters over the past decade have risen faster than those of non-uniformed state and local government employees, other than teachers, outside New York City.²⁹ Their salaries are now considerably higher, without even factoring in costly added benefits (see Figures 7, 8 and 9 in “The Police and Fire Pay Premium”).

Compulsory arbitration promoted this salary surge in several ways:

- As the Taylor Committee had predicted, the ability to turn to compulsory arbitration created an incentive for many government employers and their unions to simply “disagree and let the arbitrator decide.”
- Arbitration made it possible for some government employers to steer contract talks towards “imposed” settlements with costs that otherwise would have been difficult to defend before voters. Elected officials could thus avoid direct responsibility for big pay increases—pinning the blame on

the unelected arbitrator—while avoiding tension with police and fire unions.

- Employers have settled on terms they would otherwise find unacceptable out of fear that an arbitrator would award an even worse result. Affluent communities, in particular, have less difficulty settling for what seems to be the going rate in arbitration awards to police and fire unions – even if this rate is somewhat inflated by the fear of arbitration. This ignited a vicious cycle: since arbitrators often attached insufficient importance to a community’s ability to pay higher salaries, poorer municipalities suffered from the ripple effect of generous precedents set by richer areas.

Because many communities – for better or worse – engage in some form of pattern bargaining, whereby the settlements of every unit have a significant impact on the settlements with other units, generous awards to police and fire unions also have had a way of driving up salaries for other employees. In a poor community where the police might get a 4 percent raise from an interest arbitration panel, public employers have felt pressure to give the same raise to blue collar, white collar and even non-union workers.

Stifling Creativity

In addition, arbitrators in police and firefighter cases generally have not been inclined to address creative means of financing pay increases through concessions in other areas, such as employee health insurance contributions. Meaningful contributions have rarely been awarded in interest arbitration. While health insurance contributions for newly hired workers have been awarded in some cases, these contributions have generally ended as the employees climb the pay ladder. Such agreements therefore produce little long-term savings for the employer.

The Police and Fire Pay Premium

Salary statistics indicate that police and firefighter unions outside New York City have used their access to compulsory arbitration to build a significant edge in salaries over other state and local government employees.

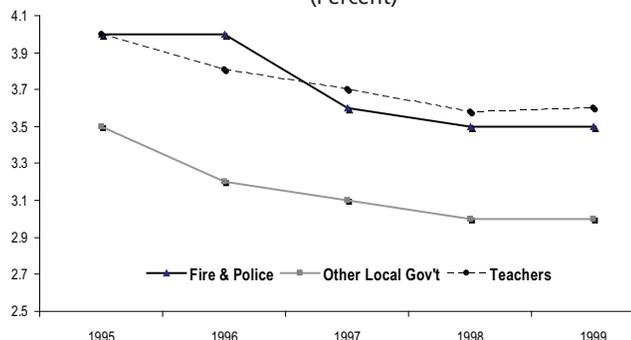
Between 1995 and 1999, the latest five-year period for which PERB contract settlement data are available, the median annual pay increase for police and fire unions was at least a half percentage point higher than those won by other government employees. Police and fire salary hikes only slightly trailed those won by teachers during this period.

Between 1997 and 2007, the average salary for police officers and firefighters outside New York City rose 59 percent, from \$54,308 to \$86,099, according to data from the state retirement system.¹ Police and firefighters now earn more than twice as much as other state and local employees, whose average salary during the same period rose 33 percent, from \$31,829 to \$42,408, closely tracking the inflation rate. The added compensation costs for police officers and firefighters are even higher once pensions are considered. Because PFRS members can retire younger—after as few as 20 years in the system, compared to no fewer than 30 for most ERS members—the required employer pension contribution is 16.6 percent of pay for police and firefighters, compared to 9.6 percent of pay for other employees.

The most highly paid public employee union members in New York are county police officers, whose average salary as of 2006-07 was a whopping \$121,608 (including overtime). This group consists mainly of Nassau and Suffolk County police, who have benefited from a series of exceptionally large compulsory arbitration awards over the past 20 years. New York State police—mainly state troopers—are the second best-paid group, with an average salary of \$95,103. The average state police salary has doubled since this group was granted the right of compulsory interest arbitration in the mid-1990s.

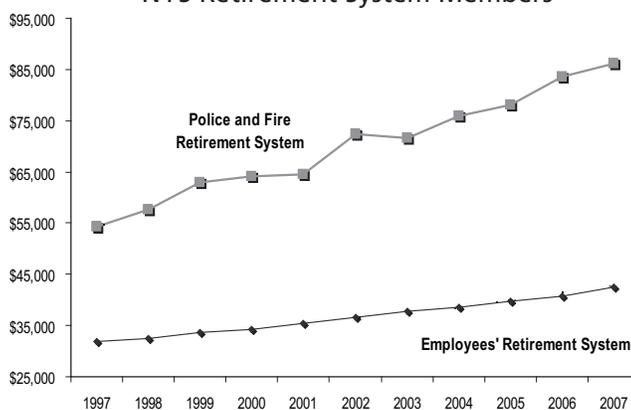
¹ Members of the New York State Retirement System include all state and local government employees, except teachers and other educational professionals belonging to the New York State Teachers Retirement System, and employees of New York City, which has separate retirement systems. The state system in turn has two components: the Police and Fire Retirement System (PFRS), which includes all firefighters and most law enforcement officers, other than corrections officers and county sheriff's department employees; and the Employees' Retirement System (ERS), which includes everyone else. Both the PFRS and ERS also include employees of public authorities, including the bistate Port Authority of New York and New Jersey.

Figure 7. Median Percentage Wage Increases (Percent)



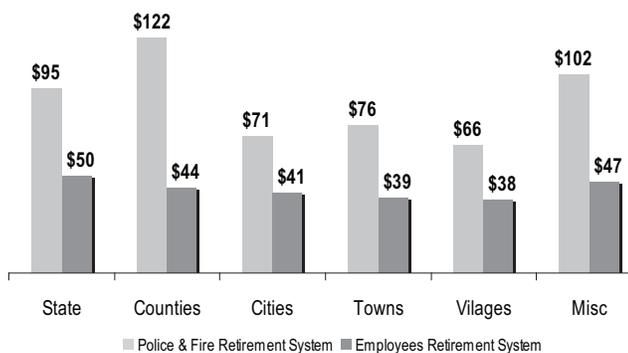
Source: New York State Public Employment Relations Board, Contract Analysis Program

Figure 8. Average Salaries, NYS Retirement System Members



Source: New York State and Local Retirement System, Comprehensive Annual Financial Report

Figure 9. Average Salaries, by Employer, 2006-07 (thousands of dollars)



Source: New York State and Local Retirement System, Comprehensive Annual Report

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Public employers have had much more success negotiating increased health insurance contributions in contracts with teachers and other non-uniformed employees not subject to the compulsory arbitration provisions. Bargaining units unable to lean on the crutch of compulsory arbitration are more willing to consider alternatives when an employer is sufficiently determined to win offsetting savings from other areas of the contract.

Some recent interest arbitration awards have included permanent contributions to health insurance for new hires; a longer salary schedule to get to top rates; and additional “tiers” of benefits. However, historically, the interest arbitration process for police and firefighters has remained far more favorable to the interests of employees than of taxpayers.

Under the original *Triborough* doctrine, public employers were prohibited from unilaterally altering “terms and conditions” following the expiration of a contract. But “nonmandatory” provisions could be challenged in the absence of a successor agreement.

The 1974 amendment to the Taylor Law also eliminated the legislative hearing step from impasse procedures for school districts. This meant that boards of education would no longer have the ultimate say in deadlocked contracts talks. However, since that provision was seldom invoked in teacher contract disputes, its elimination did little to stem the tide of teacher strikes during the 1970s.

The Triborough Amendment

Within a few years of the Taylor Law’s enactment, PERB held that, following the expiration of a contract, public employers were prohibited from unilaterally altering “terms and conditions of employment” while negotiating a successor agreement following the expiration of a contract. This doctrine was adopted in 1972 in a case involving Triborough Bridge and Tunnel Authority

employees, and thus became known as the *Triborough* doctrine.³¹ The rationale was based on a *quid pro quo* theory – since unions could not strike to protest a failure to agree on a new contract, employers should not be able to unilaterally change “terms and conditions of employment” while negotiations continued.

However, nonmandatory subjects of bargaining were not deemed “terms and conditions of employment” under the Taylor Law, even if they were contained in a collective bargaining agreement. As a result, after a contract expired, the original Triborough doctrine allowed employers to alter any nonmandatory subjects even if included in the expired agreement. Employers could also refuse to negotiate a union’s demand to continue contractual provisions that were nonmandatory subjects of bargaining, such as staffing levels.

Unions thus lost some nonmandatory provisions in a successor agreement when they did not settle prior to the expiration of an existing agreement and invoked arbitration. This often occurred when police and fire negotiations reached compulsory arbitration. Employers filed “improper practice” charges in connection with such subjects (also known as “scope changes,” because they involved the scope of

bargaining), and such provisions were “scoped” out of the contract during the interest arbitration process.

If a union went on strike, it lost all the protections of the *Triborough* doctrine – the “quid” was gone, so the employer did not have to grant the “quo.”³²

For decades, most government employees in New York, as in other states and the federal government, have been paid according to salary schedules with multiple pay grades and “steps” based on years of service. Teachers also can move to higher pay “lanes” by accumulating additional graduate credits. As a result, the resulting pay progression is especially steep and rapid for teachers. (See Figure 10 in “The Triborough Effect”).

During the first 10 years after enactment of the Taylor Law, union negotiators for teachers commonly insisted on treating costs associated with step and lane move-

The Triborough Effect

Teacher salary schedules in New York State typically include 20 to 30 annual pay “steps” on each of at least four “lanes”—for teachers with bachelor’s degrees, master’s degrees, master’s plus 30 credits of graduate credits, and a master’s plus 60 credits. The following is a simplified example; many districts actually have more steps and lanes than shown here.

Most teachers spend most of their careers moving up salary steps—and, occasionally, across salary lanes—even if their union contract has expired, because the Triborough Amendment guarantees these changes. As a result, a school district’s salary costs rise even when union negotiations have reached impasse and there is no new contract. For the same reason, contract settlements calling for seemingly modest, inflation-level increases in base salaries can be far more costly than they look. This is especially true in districts with predominantly younger teaching staffs.

Figure 8 illustrates the projected 10-year pay history of a newly hired teacher, fresh out of college, working in a district with

a salary schedule matching the reported medians for all Suffolk County districts in 2006-07. Assuming the teacher earns a master’s degree within two years—a prerequisite for certification—and assuming all base salary steps also increase annually by 2.6 percent under the union contract, her salary by Step 6 will reach \$68,753, a pay boost of 58 percent after five years. Even if the salary schedule is frozen at 2006-07 levels due to a contract impasse, the Triborough Law guarantees that the Step 6 salary for a certified teacher with the same level of experience will reach \$60,472, an increase of 39 percent in five years.

Earning 30 more graduate or “in-service” credits by the end of her sixth year will move the teacher up yet another lane on the salary schedule. Assuming continued annual inflation-level increases in base steps, the salary for this teacher in the “Masters + 30” lane by Step 10 will reach \$100,687—an increase of 132 percent after 10 years on the job. Even if the salary schedule remained frozen throughout the period, Triborough would guarantee that the teacher’s pay by Step 10

Table 3. Sample Teachers’ Salary Schedule Based on Suffolk County Medians, 2006-07

| STEPS | LANES | | | |
|-------------|-----------|---------|------------|------------|
| | Bachelors | Masters | Masters+30 | Masters+60 |
| 1 | 43,455 | 49,499 | 53,904 | 65,127 |
| 2 | 45,397 | 51,694 | 56,285 | 67,685 |
| 3 | 47,338 | 53,888 | 58,666 | 70,243 |
| 4 | 49,280 | 56,083 | 61,047 | 72,800 |
| 5 | 51,221 | 58,277 | 63,428 | 75,358 |
| 6 | 53,163 | 60,472 | 65,809 | 77,916 |
| 7 | 55,333 | 62,870 | 68,226 | 80,666 |
| 8 | 57,503 | 65,268 | 70,643 | 83,416 |
| 9 | 59,672 | 67,667 | 73,059 | 86,165 |
| 10 | 61,842 | 70,065 | 75,476 | 88,915 |
| 11 | 64,012 | 72,463 | 77,893 | 91,665 |
| 12 | 65,888 | 74,889 | 80,193 | 92,319 |
| 13 | 67,763 | 77,314 | 82,493 | 92,974 |
| 14 | 69,639 | 79,740 | 84,794 | 93,628 |
| 15 | 71,514 | 82,165 | 87,094 | 94,283 |
| 16 | 73,390 | 84,591 | 89,394 | 94,937 |
| 17 | 73,890 | 85,851 | 90,914 | 96,444 |
| 18 | 74,391 | 87,111 | 92,434 | 97,951 |
| 19 | 74,891 | 88,370 | 93,953 | 99,458 |
| 20 | 75,392 | 89,630 | 95,473 | 100,965 |
| 21 | 75,892 | 90,890 | 96,993 | 102,472 |
| Annual Avg. | 2.7% | 2.9% | 2.8% | 2.2% |

Source: “Salary Workbook and Fringe Benefit Study, Long Island, NY, 2006-2007,” Long Island Schools Boards Association. Assumes uniform increments between selected steps reported as the 50th percentile for Suffolk County school districts.

reached \$77,893—an increase of 79 percent from Step 1. By tacking on another 30 graduate or in-service credits during this period, the teacher could move to the “Masters + 60” lane and climb the ladder even faster, reaching \$122,000 in her 11th year assuming continued inflation-level increases in base salaries.

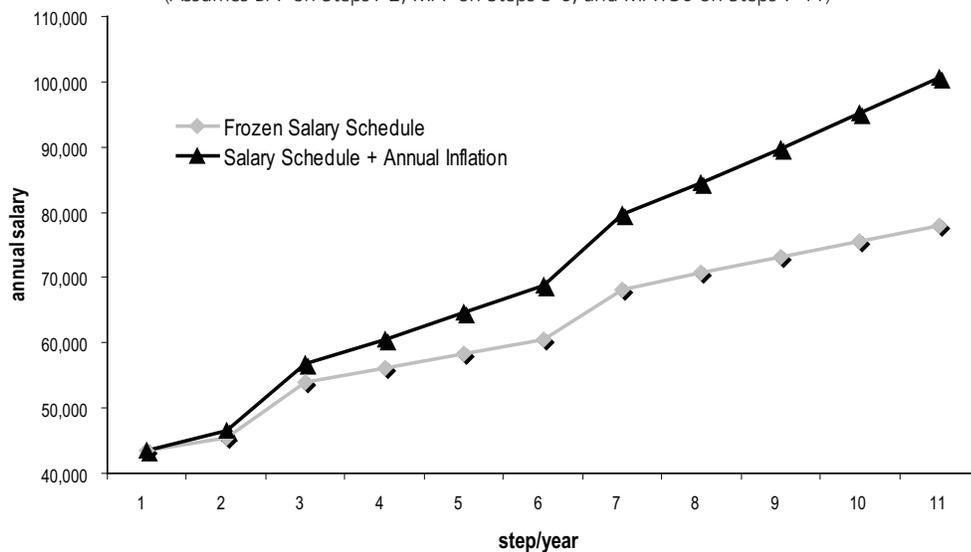
Higher pay for most public schools teachers is based solely on two factors: continued employment and extra training. But these are measures of inputs, not outcomes. According to the 2007 annual survey of the New York State School Boards Association, less than 2 percent of school districts said they

based pay on performance, and only 9 percent said they used extra pay incentives to attract highly qualified teachers to their classrooms.

Few districts have even experimented with “performance pay” or other productivity measures, because unions and school administrators inevitably disagree over the outcome measures to be used in evaluating performance. However, it remains clear that any outcome measure, whatever its failings, would be a better measure of performance than longevity and added training alone.

Figure 10. A Teacher Climbs the Pay Scale*

(Assumes BA on Steps 1-2, MA on Steps 3-6, and MA+30 on Steps 7-11)



* Based on Suffolk County Salary Schedules at 50th Percentile
Source: Calculations based on data from Nassau-Suffolk School Boards Association

—E.J. McMahon

ments as “old money”; only raises applied to base salaries on the pay schedule were considered “new money.” The unions generally refused to acknowledge the costs of increments as part of a final settlement, regarding them as “guaranteed.” Thus, a 4 percent raise, plus increment, generally meant a 5 to 7 percent settlement cost to the employer. An added percentage point was usually also added to the cost of the agreement to cover the cost of lane movements.

In 1977, public employers scored a major victory in the state’s highest court on the applicability of the *Triborough* doctrine to step increments. In the case of *BOCES v. PERB*, the Court of Appeals found that the doctrine “should not apply where the employer maintains the

salaries in effect at the expiration of the contract but does not pay increments.” The unanimous court explained:

The concept of continual successive annual increments ... is tied into either constantly burgeoning growth and prosperity on the part of the public employer, or the territory served by it, or a continuing general inflationary spiral, without admeasurement either of the growth or inflation and without consideration of several other relevant good faith factors such as comparative compensation, the condition of the public fisc and a myriad of localized strengths and difficulties. *In thriving periods the increment of the past may not squeeze the public purse, nor may it on the other hand be even fair to employees, but in times of escalating costs and diminishing tax bases, many public employers simply may not be able in good faith to continue to pay automatic increments to their employees.*³³ [emphasis added]

The *BOCES* ruling meant all pay increases were truly negotiable – and the employer was not required to implement the approximately 2.5 percent to 6 percent increases applicable to individuals who had not yet reached top step.³⁴ This leveled the playing field for both employers and taxpayers, putting more pressure on unions to settle without prolonged negotiations because no member of the unit was assured of a raise until a settlement was reached.

However, this pro-taxpayer precedent lasted less than five years. In 1982, then-Governor Hugh Carey and the Legislature amended the Taylor Law to make it an “improper practice” for an employer to refuse to

PERB subsequently ruled that an employer could not exercise its right to initiate interest arbitration unless a union first waived its own rights under the law to have the contract continued or filed its own arbitration petition.³⁹ Thus, a union may “stand on the contract,” leaving the employer with no way of initiating compulsory interest arbitration.

While compulsory interest arbitration has driven up salaries for police and firefighters, there are some circumstances in which an employer might find it beneficial to pursue the arbitration option. However, as a result of the Triborough Amendment, a union that has a favorable contract – especially

The Triborough Amendment also had an unintended impact on the use of compulsory interest arbitration. PERB held that under Triborough, the provisions of a contract could not be altered by an interest arbitration award

one protecting a costly non-salary item, such as a “no-layoff” guarantee – may simply stop the bargaining process at mediation and refuse to go any further. Interpreted strictly, the law would allow a union to block arbitration indefinitely if the impasse involves a crucial item.⁴⁰ There has yet to be a case in which a government

continue all of the terms of an expired agreement until a new agreement was negotiated. The *Triborough* doctrine thus gave way to what became known as the Triborough Amendment.³⁵ Within a year, PERB had interpreted the amendment to require employers to continue paying for both steps and lane movements in the absence of a new contract.³⁶

employer in New York has been able to proceed to arbitration over a union’s objections.

Technically, the continuation of pay steps and lanes could still be negotiated like any other provision of a contract. Practically speaking, however, unions have treated these provisions as off limits in contract talks.

Impact of PERB Decisions

The police and firefighter interest arbitration amendments – which are subject to renewal every two years – and the Triborough Amendment are the two major provisions of the Taylor Law that affect the size of pay increases and the resulting burden on taxpayers. A number of decisions by PERB also have had financial impacts.⁴¹

The Triborough Amendment also had an unintended impact on the use of compulsory interest arbitration. PERB held that under the Triborough Amendment, the provisions of existing contract could not be altered by an interest arbitration award.³⁷ This was based on the statutory language that provisions of an expired agreement could only be changed by a new “negotiated contract.”³⁸

PERB has generally taken a balanced approach in determining “scope of negotiations” cases; i.e., those items public employers should not be required to negotiate under the law, such as staffing levels, layoffs and class size. However, public employers are greatly restricted as a result of PERB decisions holding some items to be mandatory subjects of negotiation.

1. *Subcontracting and Reassignment of Unit Work*

PERB has consistently held that both subcontracting and the reassignment of “unit work”—work done by members of a particular union bargaining unit—are mandatory subjects of bargaining. Virtually any idea for saving money through outsourcing or consolidation of services must first be negotiated and agreed to by the union representing the employees who currently provide the service.⁴² Thus, absent a union’s agreement, the taxpayers may be forced to shoulder the burden of outdated, inefficient or costly delivery of services. PERB’s “emergency doctrine,” which theoretically should allow some relief in these areas, has not been applied to circumstances where “mere monetary savings” are at stake. PERB has held that the goal of saving money is “insufficient” to overcome an employer’s obligation to fully bargain the topic.⁴³

It is also clear under current law that with regard to police and fire, absent any waiver by the union, subcontracting issues must be negotiated, mediated and ultimately subject to interest arbitration. Thus, crucial decisions – such as whether a city can contract with the county sheriff’s department for services currently provided by city police officers – require the union’s agreement or are subject to the decision of an arbitrator. This is also true for decisions on whether to move certain tasks from uniformed employees to other employees of the same municipality.⁴⁴

2. *Binding Past Practices*

PERB has found many unilaterally established, outdated inefficient and/or expensive “past practices” to be binding on public employers. It has done so even where the establishment and/or continuation of the practice was not approved by the employer’s chief executive officer and legislative body—the two parties necessary to produce a binding contractual guarantee.

There was encouraging news for public employers in some relatively recent PERB decisions that said approval and knowledge of a practice by a supervisor or department head was insufficient to bind a public employer to a practice. For example, PERB ruled in 2003 that a school district could not be bound by an

alleged past practice allowing some buildings and grounds employees to take home school district equipment—because the practice, supposedly authorized by their immediate supervisor, had never been authorized by the district superintendent of schools (i.e., the chief executive officer).⁴⁵

However, these rulings were watered down in the subsequent *County of Nassau* case,⁴⁶ where PERB found that the county police commissioner could bind the entire county government to a practice (personal use by employees of departmental vehicles) that was not approved by the county executive and the county legislature. Most recently, in a case involving health benefits for some school district retirees, PERB may have signaled an intention to further depart from the previous standard by broadening the definition of past practices that can be binding on an employer without the approval of the chief executive officer and/or legislative body.⁴⁷

3. *Retiree Health Insurance*

PERB has held that health insurance for future retirees is a mandatory subject of negotiation.⁴⁸ However, once employees actually retire, there is no way for an employer to negotiate a change in their benefits.⁴⁹ Moreover, a separate state law affecting only school districts prohibits employers from “diminishing” health insurance for current retirees unless a “corresponding diminution” in benefits is negotiated with active employees in the same bargaining units.⁵⁰ This effectively prevents school districts from making any alteration in health insurance for any retirees, unless the same change is negotiated with a corresponding group of active employees. The Legislature has also repeatedly passed bills that would extend the same protection to all public employees. These measures have been vetoed by former Governor George Pataki and Governor Spitzer, but are likely to reappear in the future.⁵¹

Management: Alive and Fighting

Through all of this, public employers have succeeded in excluding certain crucial issues from the bargaining

table. Perhaps the most important and controversial of the items found to be “nonmandatory” has been police disciplinary procedures. The state Court of Appeals has held that such procedures are generally not negotiable for the overwhelming majority of employers in New York State.⁵² In 2007, at the urging of Mayor Michael Bloomberg and other municipal leaders, Governor Spitzer vetoed two different bills that would have overturned this ruling.⁵³

Another key area in which employers have retained a modicum of managerial control involves the generous and costly disability benefits available to uniformed officers. Under General Municipal Law Sections 207-a and 207-c, respectively, firefighters or police officers (including sheriff’s deputies) who suffer a disabling injury “in the performance of (their) duties” are entitled to continue at full salary until the disability has passed, or they reach the maximum retirement age, whichever comes first. Firefighters outside New York City who are retired with a performance-of-duty pension receive 100 percent of their salary tax-free until age 70, plus whatever annual raises and longevity increases are granted to active firefighters. This amount is almost always supplemented by tax-free Social Security disability payments.

These laws were originally based on the understandable premise that police work and firefighting are inherently more dangerous than other work, and that uniformed employees are entitled to financial security when injured in the line of duty. However, the disability provisions are easily subject to abuse. This was dramatized in a Pulitzer Prize-winning 1994 investigative series in *Newsday*, which documented “a boom in police disability cases” that had cost Long Island taxpayers tens of millions of dollars. As *Newsday* reported:

The police disability system, whose financial rewards have been stretched and sweetened over the years by the State Legislature and the courts, has evolved into a program that invites malingering and fraud and pays a large portion of

its benefits to officers whose injuries had nothing to do with fighting crime. Long Island police officials believe that as many as one in three disability claims may be fraudulent or highly exaggerated.⁵⁴

While police disabilities on Long Island reportedly have decreased since the *Newsday* series, the Legislature has not changed the law that made possible the abuses.⁵⁵ The Court of Appeals has not helped matters in recent years by abandoning its previous standard limiting 207-a and 207-c disability status to those injuries resulting from the “heightened risk” involved in public safety work.⁵⁶ As a result, uniformed officers injured in routine workplace accidents can qualify for the same disability benefits as officers who are shot

“Performance of duty” disability provisions for police and firefighters have proven subject to abuse, but PERB has ruled that procedures for administering these benefits must be bargained with unions.

in the line of duty.⁵⁷ In 2003, for example, the court approved 207-c benefits for a corrections officer who pulled his back while opening a stuck door to admit some inmates to a kitchen; an officer who was hit in the shoulder by a closing office door while supervising an inmate who was cleaning a hallway; and an officer who bumped his head on a television set hanging from the ceiling of the correctional facility where he was taking an inmate count.⁵⁸

Unions have sought to make disability determinations a mandatory subject of negotiation, which effectively means they could force arbitration of an employer’s denial of benefits. With direction from the state Court of Appeals, PERB has held that the decision on whether an employee is eligible for Section 207-a or 207-c disability is a nonmandatory subject of negotiation.⁵⁹ On the other hand, PERB has ruled that the procedures for administering these statutes are mandatory subjects of bargaining, with the definition of “procedures” gener-

ally covering whether to remove an officer from the disabled category or place him on light duty.

Unions on the Lobbying Offensive

In recent years, unions have been increasingly successful in persuading the Legislature to adopt their agenda for changing the Taylor Law, as well as for beefing up pension benefits.

In 2006, the State Legislature passed a series of bills that collectively must be regarded as the most significant legal assault on public-sector management in New York since 1967. The most sweeping of these measures would have:

- Required acceptance of a union’s “last offer” by an employer found to have committed an improper practice by refusing to negotiate in good faith—a violation that could involve something as minor as pursuing a nonmandatory subject of bargaining to impasse over the union’s objection. The union offer would then become a binding agreement that could not be changed or modified except by mutual agreement. From an employer standpoint, the result would have been as draconian as the old Condon-Wadlin strike penalties—in reverse. Moreover, there was no demonstrated need for this

legislation. The New York State Public Employer Labor Relations Association noted that in the four years prior to the bill’s passage, there had been not a single PERB decision finding an employer had engaged in a “pattern” of bad faith negotiations.⁶⁰

- Required PERB to rule on bad-faith bargaining charges on an expedited 10-day basis if a contract had expired. If it were found that an employer had failed to negotiate in good faith, PERB would have the power to order an immediate 1 percent salary increase for the unit members—increased by 0.5 percent for every three months without a settlement, to a maximum of 2.5 percent. Such penalty wage payments could not be used to “offset” future bargaining increases.⁶¹
- Reduced the “2 for 1” wage penalty for illegal strikes to a “one for one” wage deduction and prohibited the suspension of a striking union’s dues check-off privilege if the public employer was found guilty of a refusal to negotiate in good faith during the strike period.⁶²

While these and other bills were vetoed by then-Governor Pataki, the overwhelming support they received in both houses of the Legislature is a troubling sign that they will re-emerge.

3. RECOMMENDATIONS

First and foremost, New York State should reaffirm its strong commitment to the principle that public employees have no “right” to strike. At a minimum, this means preserving the no-strike penalties contained in the Taylor Law, including the 2-for-1 penalty for workers and stiff financial sanctions for unions that illegally go on strike. Perhaps not coincidentally, two of New York’s largest public employee strikes in recent years—by transit workers in New York City in 2005 and teachers in Yonkers in 1999—were directed against employers headed by appointed boards. Unions chose to violate the law when they could not achieve their aims through political pressure on elected officials, and only the employers remained bound by the Taylor Law’s provisions.

Public employees have done well in negotiations—to say the least—without this added weapon in their arsenal. The Taylor Committee had it right to begin with: “The strike cannot be a part of the negotiating process.”

Moving from what needs to be preserved to what needs to be changed in the Taylor Law, three reform priorities stand out.

1. *Make Arbitrators Consider Affordability*

The Taylor Committee was also right about compulsory arbitration. The state would have been better off—and police and fire would still be fairly paid—if the Legislature had continued following its advice. As the state Conference of Mayors noted in its 2006 Legislative Program, “The compulsory arbitration process is an unfunded mandate upon municipalities and should be repealed.”

The ultimate problem with compulsory interest arbitration is the way it undermines accountability in government. After all, unions are single-mindedly focused on protecting and promoting the interests of their members. Professional arbitrators are considered successful if they produce results perceived by both sides as “fair.” Elected officials must think beyond the demands of a particular group of employees in a particular arbitration proceeding and make tough decisions on how to allocate scarce resources among a variety of public services. Yet unelected arbitrators can

essentially end up making these decisions for them.

However, after more than three decades of this practice, it may be argued that compulsory arbitration is so deeply ingrained in the negotiating systems for police and firefighters that simply repealing it now would be severely disruptive and destabilizing, even if politically feasible.

At a minimum, some changes in the arbitration process can help control costs without undue disruption of the process. The most heavily weighted issue in interest arbitration should be the question of whether there is “ability to pay” on the part of the community whose taxes must support a pay increase.⁶³ In making this determination, the arbitration panel should look beyond simplistic fiscal capacity measures, such as constitutional tax limits, to consider and analyze potential tax rate increases, total tax burdens and the income of the taxpayers who live in the community.

In other walks of life, those who work for poorer employers generally earn less. But as things now stand, some cash-strapped municipalities in New York are pressured to pay police and fire salaries rivaling those in wealthier communities. Although the current statute does require some consideration of this issue, “ability to pay” needs to be defined and applied in a way that reflects the true *affordability* of a proposed contract. The goal should be to protect poorer communities from inflated arbitration awards without allowing arbitrators to inflate the salaries of police and firefighters in communities that are not financially distressed.

In addition, New York State should move from its traditional issue-by-issue interest arbitration format to a last-best offer system—one in which an impartial arbitrator could choose between the complete “final offers” of the employer and the union. This would avoid the “splitting the baby” approach so prevalent in our current structure. Last-best-offer arbitration is not a panacea—it reportedly did not work well in New Jersey, for example—but experience suggests that management advocates in New York would use the opportunity to present more reasonable packages to the panels. This approach would offer a better chance of addressing

the skyrocketing cost of health insurance benefits in a manner that has been resisted by traditional arbitration panels. Like the existing interest arbitration provision, last-best-offer arbitration could be regarded as an “experiment,” scheduled to sunset after several years.

2. Tackle the Triborough Amendment

Since the majority of teachers in most districts are eligible for some step or lane movement every year, the Triborough Amendment means only the most senior and highly paid teachers go without a pay increase while negotiations for a new contract continue. Consequently, there is less pressure on the union to settle things quietly or quickly.

Protracted negotiations generally are more difficult for a school board than for a teachers’ union to withstand. During this period, union members can put pressure on boards through legal job actions such as picketing and distributing leaflets, or through illegal job actions such as refusing to volunteer for co-curricular activities. In many districts, lawn signs ticking off a local union’s “days without a contract” mislead district residents into assuming that the teachers are enduring a hard pay freeze while negotiations continue.

If there is to be any real economic control over rising costs in school district negotiations, employers should not be required to continue financing step increments and lane movements after the expiration of a collective bargaining agreement. Pay hikes that require new taxes should not be considered “old” money.

Salaries and benefits make up 75 percent of total operating expenditures for an average school district in New York State. School budget increases are driven primarily by the cost of personnel—not extras like clubs, sports or transportation, although these are usually the first areas cut when money must be found to accommodate the steadily growing teacher pay packages protected by the Triborough Amendment.

In addition to preventing automatic pay increases, the Triborough Amendment needs to be modified to give employers the same right as unions to petition for interest arbitration. The rights at issue are analogous to the Taylor Committee’s recommendation that employers and unions have equal access to mediation

and fact-finding. PERB interpretations and subsequent legislative history that produced this inequity should be overridden by new statutory language.

3. Modify PERB’s Approach to Key Issues

- The ultimate decision on **subcontracting and reassignment of “unit work”** should—after good-faith bargaining with affected unions—be left to elected officials who ultimately are responsible for managing costs and delivering services. Given the difference in the nature of private and public employment, a public employer should have far more flexibility in this area than it currently possesses under PERB’s decisions.⁶⁴
- o With health insurance costs rising and with the advent of “GASB 45,”⁶⁵ a new government accounting rule that will force local governments and school districts to disclose the full value of **health insurance promised to retirees**, this issue is coming to dominate contract talks across the state. All retiree benefits, not just pensions, should be removed from the scope of negotiations. Employers need the flexibility to address this challenge in a manner that balances the legitimate interests of employees, retirees and taxpayers. They should not be required to negotiate contract clauses they effectively can never change.
- o **Past practices** in the workplace, such as policies allowing personal use of vehicles or equipment, should only be held contractually binding if explicitly authorized by the chief executive. For practices involving the direct expenditure of funds, the approval of the legislative body should also be required. If the Taylor Law requires the consent of these parties to create a binding contract, how can it require something less to bind employers to a practice they never even negotiated with their unions?
- o Given the demonstrated potential for serious and costly abuse of the **police and firefighter disability provisions** of the General Municipal Law, employers should retain as much discretion as possible in determining the fitness of employees to return to light duty or full duty.⁶⁶

CONCLUSION

The Taylor Law was a response to the challenges of a previous era. But 40 years later, in a more intensely competitive global economy, New York faces very different challenges that demand new solutions. These include:

Consolidating local governments and school districts.

Governor Spitzer has formed a commission to study ways of improving the efficiency and competitiveness of New York's 4,200 taxing jurisdictions, including mergers and sharing of services. Left unchanged, PERB's interpretation of the subcontracting and "unit work" issues will make it very difficult for taxpayers to achieve real savings or efficiency improvements from attempted consolidations.

Financing government retiree health care. Under new accounting rules, the total unfunded liability for retiree health care among New York's local governments and school districts is expected to range into the tens of billions of dollars statewide. Once the true costs of these

long-term obligations become clear, it will also become clear that local governments and school districts cannot possibly afford to pay them without creatively restructuring and reforming retiree benefits—as was recently agreed to by automakers and their employers. But the Taylor Law, as currently interpreted, could hinder or prevent such changes from even being considered in many places.

Over the past four decades, the Taylor Law has made it possible for public employee unions to secure significant gains in wages and benefits for their members—with significant costs and consequences for New York, its taxpayers and its economy. Meanwhile, in recent years, the state Legislature has been increasingly receptive to union proposals that would further tilt the collective bargaining rules in favor of employees. Lawmakers should be moving in the opposite direction—updating and improving the Taylor Law in ways that can benefit all New Yorkers.

1. A government or government agency cannot be sued or forced into a contract without its consent.
2. The legislature cannot delegate its powers to a third-party.
3. Samuel I. Rosenman, ed., *The Public Papers and Addresses of Franklin D. Roosevelt* (New York, 1937) 6: p. 325, as cited by William Gomberg in "The Problem of Arbitration-The Resolution of Public Sector Disputes," *Proceedings of the American Philosophical Society*, Vol. 118, No. 5 (Oct. 15, 1974), pp. 409-414. To quote Roosevelt: "The process of collective bargaining as usually understood cannot be transplanted into the public service. It has its distinct and insurmountable limitations when applied to public personnel management. The very nature and purpose of government makes it impossible for administrative officials to represent fully or bind the employer in mutual discussions with government employee organizations."
4. Various New York State laws other than the Taylor Law guarantee additional benefits for public employees, including: paid military leave; limits on suspensions without pay for almost all government workers; limits on the number of hours police officers can work in the "open air," on a daily and weekly basis; the maximum number of hours firefighters can work; the number of holidays and vacation days to which police and firefighters are entitled; the maximum number of consecutive hours teachers may work; the minimum number of sick leave days for teachers; maximum sick leave accumulations for teachers; and terminal leave calculations for teachers based on accumulated sick days.
5. Contributing to the climate of public unhappiness with government work stoppages, Rochester city workers had gone on strike in 1946, and New York City transit workers threatened to strike the following year.
6. State of New York, Governor's Committee on Public Employee Relations, Final Report, March 31, 1966, as reprinted in Jerome Lefkowitz, Melvin H. Osterman and Rosemary A. Townley, eds, *Public Sector Labor and Employment Law, Second Edition*, New York State Bar Association (1998), 60.
7. In addition to Taylor, the committee consisted of E. Wight Bakke of Yale University; David L. Cole, a New Jersey lawyer and labor mediator; John T. Dunlop of Harvard; and Frederick H. Harbison of Princeton. None of the committee members were from New York State.
8. Police were initially excluded, but collective bargaining provisions were extended to them in 1962.
9. Unlike state and local government in New York, the federal government is an "open shop" employer, meaning that employees can choose not to join a union or pay union dues. Moreover, since pay and benefits are set by statute on the federal level, the scope of bargaining between the federal government and its employee unions is limited to personnel policies and working conditions. The current statute governing labor relations in the federal government includes a strong management rights provision, further constraining the scope of bargaining.

10. Governor's Committee on Public Employee Relations, *op cit*, 60.
11. *Ibid.* 67.
12. *Ibid.* 95
13. Experience indicates that reliance on impasse procedures in a local contract, as opposed to the state statutory process, has been the exception rather than the rule.
14. In practice, elected municipal executives exercise a more clear-cut role as negotiators separate from their legislative bodies than do superintendents of schools, who function both as chief executives and school board employees.
15. Article 14 of the New York State Civil Service Law.
16. Collective bargaining by public employees in New York City is overseen by a city agency, the Office of Collective Bargaining, whose adjudicatory body for dispute resolution is the Board of Collective Bargaining (BCB). In case of impasse, the city and its unions can turn to PERB for factfinding.
17. Agency fee (the obligation placed on employees to pay a fee to the union to represent them even if they do not join the union) was a hotly contested issue in early negotiations. In 1977 it was mandated for state employees and made negotiable at the local level. It was not until 1992 that it was mandated for all public employees.
18. The 1967 law did not contain the remedial improper practice sections, which were not enacted until 1969.
19. As of 2006, PERB had defined 367 mandatory subjects, 256 nonmandatory subjects, and 13 prohibited subjects. See State of New York, Public Employment Relations Board, *Mandatory/Nonmandatory Subjects of Negotiation, 2006 Edition*.
20. "New Taylor Law Has Wide Impact," *The New York Times*, May 5, 1968.
21. Ronald Donovan, *Administering the Taylor Law: Public Employee Relations in New York*, Cornell University ILR Press (1990), 67.
22. From 1967 to 1981, the peak period for illegal public employee strikes in New York State, teachers unions were involved in 121 of the 215 total walkouts, according to PERB.
23. Jerome Lefkowitz, Melvin H. Osterman and Rosemary A. Townley, eds, *Public Sector Labor and Employment Law, Second Edition*, New York State Bar Association (1998); pension and retirement benefits issue cited at pp. 489-91.
24. Interest arbitration is where a third-party arbitrator awards all the term of a new contract. In the more traditional forms of rights or grievance arbitration, a third-party arbitrator decides disputes over the meaning of disputed clauses in collective bargaining agreements.

25. The union and the employer each appoint one panel member. The parties choose the third, neutral member from a list of professional arbitrators supplied by PERB.
26. The amendments initially maintained the existing fact-finding procedures in contract disputes, but ultimately eliminated that step in 1977 after most interest arbitrations had become rubber stamps of the preceding fact-finding recommendations.
27. Out of 86 public employee strikes in New York between 1967 and 1974, only five involved police or fire unions.
28. "End Jailings in Strikes, Taylor Law Panel Urges," *The New York Times*, March 29, 1975.
29. New York City police also have had the ability to take impasses to compulsory interest arbitration, but until the late 1990s, their arbitration panels were appointed by the city Board of Collective Bargaining. Hoping to duplicate the success of police elsewhere in the state, the city Patrolmen's Benevolent Association (PBA) waged a long and ultimately successful battle to have their contracts arbitrated by a state PERB panel, which the Legislature approved over the city's objections in 1998. So far, however, this has not produced the quantum leap in city police salaries that the PBA might have hoped for. Impartial arbitrators have attached strong weight to New York City's long tradition of pattern bargaining, in which the pay increases for one group of workers do not vary significantly from those won by others. The first PBA arbitration award under PERB auspices in 2002 gave police the same pay increase over 24 months that had already been granted over a 30-month period to the city's firefighters and other uniformed employees. The next police arbitration award, in 2005, was more controversial. It financed a two-year, 10.25 percent pay raise for incumbent officers in part by reducing the starting salary for newly hired police to \$25,100. City officials have complained that this result has made it difficult to recruit qualified officers, while the PBA is citing it as evidence in support of their demands for a larger pay increase in their next contract—which, as of September 2007, had gone to arbitration.
30. The going rate itself is inflated by the process. Smaller employers settle for higher amounts rather than incur the time and expense (lawyers fees plus \$1,700 per day for some arbitrators) of interest arbitration. It is also difficult to get major concessions in interest arbitration – even where justified. Thus, employers are forced to pay larger increases than they ordinarily would agree to in order to secure these concessions in negotiations.
31. *Triborough*, 5 PERB ¶ 3037 (1972)
32. PERB also recognized another exception to the *Triborough* doctrine when an employer had a "compelling need" to change a term and condition of employment before it could get the union's agreement. Under this exception: (a) the employer's action must have been required at the time it was taken; (b) the employer must have bargained to impasse with the union over the proposed change; and (c) the employer must have recognized a continuing willingness to negotiate over the change after it was made *Wappingers CSD*, 5 PERB ¶ 2074 (1972). Despite this exception, PERB does not appear to have allowed any meaningful change of a term and condition of employment made by an employer. In such cases, the board generally found the employer's actions only rose to the level of "administrative convenience" or an

“economic benefit” – as would be gained, for example, by moving ahead with a plan to contract out bus service in time for the start of school.

33. *BOCES v. PERB*, 41 N.Y.2d 753 (1977)

34. The overall cost of steps generally ranges from 1-3 percent for an employer. This is the “average” cost for an entire unit. The movements from one step to another for an individual generally range from 2.5 to 5 percent. The overall cost to the employer is lower because there are some teachers on top step who are no longer eligible for increments. When these “zero” increases on the top steps are averaged with the 2.5 percent to 5percent increases on lower steps, they generally produce an average 1 percent to 3 percent overall cost to the employer depending upon the seniority of the staff.

35. 1982 N.Y. Laws chs. 868, 921.

36. *Cobleskill Central School District*, 16 PERB ¶ 3057 (1983).

37. *City of Kingston*, 18 PERB ¶ 3036 (1985).

38. PERB applied the same rationale to legislative determinations—but given their limited frequency, this ruling had little impact.

39. *City of Kingston*, op. cit.

40. In *Matter of Utica (Zumpano)*, 672 N.Y.S.2d 844, 91 N.Y.2d 964 (1998), the state Court of Appeals rejected a city’s challenge to the continuation of a minimum staffing and equipment provision in an expired collective bargaining agreement with its firefighters. The city unsuccessfully argued that continuing the provision after expiration of a contract would violate the state constitution’s home rule provisions.

41. Because PERB is unlikely to revisit and reverse the cases presented here, legislation would be necessary to address the problems they create.

42. Some public employers have negotiated contract provisions that explicitly allow subcontracting actions. However, these provisions were generally negotiated long ago and are the exception rather than the rule.

43. *Enlarged CSD of Troy*, 11 PERB ¶ 3056 (1978).

44. A line of PERB decisions—see, for example, *Town of Mamaroneck*, 33 PERB ¶ 3010 (2000)—allows for the civilianization of certain police functions when various preconditions are met. However, analysis of these cases is beyond the scope of this paper.

45. *Sherburne-Earville School District*, 36 PERB ¶ 3011 (2003)

46. *County of Nassau*, 38 PERB ¶ 3030 (2005).

47. *Chenango Forks Central School District*. 40 PERB ¶ 3012 (2007).

48. *Lynbrook*, 10 PERB ¶ 3067.
49. Unions do not represent retired workers, leaving employers no one to negotiate with.
50. 1994 N.Y.S. Laws Ch. 729, as last amended by 2006 N.Y.S. Laws Ch. 27. The law sunsets every two years.
51. The latest such bills were S.6030 and S.6031. rejected by Spitzer in Veto Memos 119 and 120, respectively.
52. *Matter of Patrolmen's Benevolent Association of The City of New York, Inc., v. New York State Public Employment Relations Board, et al.*, and *Matter of Town of Orangetown, et al., v. Orangetown Policemen's Benevolent Association, et al.*, 2006 NY Int. 32 at http://www.law.cornell.edu/nyctap/106_0032.htm.
53. See A.4592 and Veto Memo 1 of 2007; and A.8139, Veto Memo 96 of 2007. If such a bill became law, many cases now resolved within police departments (through what is commonly referred to as "command discipline") would be pursued to disciplinary arbitration, which involves costly fees for lawyers and arbitrators. Discipline in these paramilitary operations would suffer if employers prove unwilling or unable to bear the costs of such proceedings, as is now often the case with school districts under the teacher discipline provisions in Education Law Section 3020-a.
54. "For Some LI Cops...Lucrative Disability," *Newsday*, June 26, 1994, 3.
55. As of 2006, disability pensions were being collected by 16 percent of all retired city police and firefighters outside New York City and 22 percent of retired county police officers (nearly all from Long Island), according to the Comprehensive Annual Financial Report of the New York State and Local Retirement System.
56. The "heightened risk" standard was established in *Balcerak v. County of Nassau*, 94 NY2d 253 (1999).
57. In addition, public safety officers stricken by heart disease, strokes, tuberculosis, H.I.V., and hepatitis are automatically deemed to have "line-of-duty" disabilities qualifying them for tax-free disability pensions worth three-quarters of their final salaries.
58. *Theroux v. Reilly*, 2003 N.Y. Lexis 4029
59. *In the Matter of Poughkeepsie Professional Firefighters' Association, Local 596, IAFF, AFL-CIO-CLC, et al., Appellants, v. New York State Public Employment Relations Board, et al., Respondents*, <http://vlex.com/vid/322116>.
60. S.3177, Veto No. 364.
61. S.3178, Veto No. 292.
62. *Ibid.*

63. This is not the same as the “ability to pay” standard proposed by Governor Pataki’s Commission on Local Government Reform (2002-2004) and incorporated in Pataki’s last several executive budget proposals. The standard recommended here would require a more rigorous analysis of fiscal capacity in local communities.
64. For purposes of this limited discussion, decisions to outsource services performed by a public employer, and decisions to move work from one unionized group to another bargaining unit or to other unorganized employees of the same employer, are treated as the same. Although these decisions are quite different, a public employer is bound by the same obligation – that is, it must bargain.
65. “GASB” stands for Government Accounting Standards Board, which regulates the Generally Accepted Accounting Principles (GAAP) that must be used in the financial statements issued by all but the smallest governmental units and school districts. GASB Rule 45 will require government entities using GAAP to disclose their long-term unfunded liabilities for retiree health insurance and other post-employment benefits, which governments now generally finance annually, on a pay-as-you-go basis.
66. Although police and firefighter disability benefits are not within the Taylor Law, Sections 207-a and 207 c clearly need to be amended in light of the most recent Court of Appeals decision in this area. At a minimum, the Legislature needs to restore a common-sense standard of “heightened risk” that stresses injuries incurred in the course of hazardous duties and excludes routine workplace accidents.



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