STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

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ALBANY, NEW YORK 12205-2604
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www.perb.state.ny.us

MICHAEL R. CUEVAS
CHAIRMAN

MONTE KLEIN
DIRECTOR

OFFICE OF
PUBLIC EMPLOYMENT PRACTICES
AND REPRESENTATION

May 15, 2002

M. David Zurndorfer, Esq.
Proskauer Rose LLP
1585 Broadway
New York, NY 10036

RE: Case No. U-23357 – NASSAU COUNTY PBA

Please be advised that the Charge in the above-referenced matter, as amended, is deficient for the reasons stated on the attached notice and is not now being processed to pre-hearing conference or hearing. A copy of the amendment is enclosed to each nonfiling party; however, no response need be filed at this time.

If the pleading can be corrected, an appropriate sworn amendment (original and four copies) should be submitted to me by May 29, 2002. It may also be withdrawn by submission of the enclosed withdrawal request form by the same date. If you do not seek to submit a withdrawal or amendment, but instead wish to preserve an opportunity to file exceptions to the determination that the Charge is deficient, you may so notify me in writing by such date, in which event it will be dismissed. Any response should refer to the case number set forth above. If you do not file an amendment or otherwise respond by such date, the Charge will be deemed withdrawn and the matter will be closed. If you have any questions, I can be reached at (518) 457-5973.

Respectfully,

J. Albert Barsamian
Assistant Director and
Supervising Administrative Law Judge
Public Employment Practices
And Representation
(518) 457-5973

JAB:ran

cc: Nassau County PBA

RE: U-23357 – NASSAU COUNTY PBA

DEFICIENCY NOTICE

The pleading in the above-referenced matter is still deficient for the reasons set forth below:

On April 26, 2002, you were advised that "Detail paragraphs 4, 6, 7 and 8 lack necessary factual detail, including dates and and names of actors and acts where relevant."

1. Your Amended paragraph 4 needs the days of the "occasions in March" and name(s) of PBA person(s) who refused to schedule a requested meeting, and how was it "attempted" to schedule such a meeting.

2. Your amended paragraph 6 remains conclusory, and is essentially unchanged from paragraph 6 of the original charge. It requires dates, names, etc.

3. Your amended paragraph 7 remains the same as originally filed.

4. Your amended paragraph 8 amends the original with one sentence referring us to another document to find the facts. This responsibility remains yours. See Section 204.1(a)(3) of the Rules.

Oral Argument Before the Board

If a party desires to argue orally before the Board, a written request with reasons therefor shall accompany the exceptions filed, the response thereto, or the cross-exceptions filed. The Board may grant such a request; it may also direct oral argument on its own motion.

Board Action

(a) Upon receipt of the case, the Board may adopt, modify or reverse the Director's or ALJ's decision or order.

(b) Unless a party files exceptions to the decision and recommended order of the Director or ALJ within 15 working days after receipt thereof, the decision and any accompanying order will be final, except that the Board may, on its own motion, decide to review any remedial action recommended within 20 working days after receipt by the parties of the decision and recommended order.

* * * * * * * * * * * * * * * *

Party

The term "party", as used in PERB's Rules of Procedure, means any person, organization or public employer filing a charge, petition or application under the Act or these Rules; any person, organization or public employer named as a party in a charge, petition or application, filed under the Act or these Rules; or any other person, organization or public employer whose timely motion to intervene in a proceeding has been granted.

Working Days

The term "working days", as used in PERB's Rules of Procedure, shall not include a Saturday, Sunday or legal holiday.

Filing; Service

(a) The term "filing", as used in PERB's Rules of Procedure, shall mean delivery to the Board or an agent thereof, or the act of mailing to the Board, or deposit with an overnight delivery service for overnight delivery.

(b) The term "service", as used in PERB's Rules of Procedure, shall mean delivery to a party or the act of mailing to a party, or deposit with an overnight delivery service for overnight delivery.

* * * * * * * * * * * * * * * *

NOTICE TO PARTIES

Judicial Appeal of Board Orders.

A party may appeal a final order of the Board by filing with the court and serving the necessary parties the pleadings and papers required by Article 78 of the New York Civil Practice Law and Rules (CPLR) and New York Civil Service Law (CSL) §213 within thirty days after service of the Board's order. The Board's "filing" and "service" definitions (above) do not govern the filing and service requirements of the CPLR or CSL, which are covered by the terms of those statutes. Failure to comply with a final order of this agency will result in an enforcement proceeding in New York Supreme Court pursuant to CSL §213.

(12/98)

The following is an extract of PERB's Rules of Procedure, 4 N.Y.C.R.R. Parts 200-215. Any party filing exceptions or other papers with the Board should consult the Rules of Procedure to ensure compliance with all requirements.

Exceptions to Decision of Director; Exceptions to Administrative Law Judge's (ALJ) Decision and Recommended Order; Action by Board

(a) Within 15 working days after receipt of the decision of the Director or the decision and recommended order of the ALJ, a party may file with the Board an original and three copies of a statement in writing setting forth any exceptions thereto, and a separate original and three copies of a brief in support thereof, together with proof of service of copies of such exceptions and brief upon each party.

(b) The exceptions shall:

(1) Set forth specifically the questions of procedure, fact, law or policy to which exceptions are taken;

(2) Identify that part of the decision or order to which objection is made;

(3) Designate by page citation the portions of the record relied upon; and

(4) State the grounds for exceptions. An exception to a ruling, finding, conclusion or recommendation which is not specifically urged is waived.

Cross-Exceptions

Within seven working days after receipt of exceptions, any party may file an original and three copies of a response thereto, or cross-exceptions and a separate brief in support thereof, together with proof of service of copies of these documents upon each party to the proceeding. Within seven working days after receipt of cross-exceptions, any party may file an original and three copies of a response thereto, together with proof of service of a copy thereof upon each party to the proceeding.

Request for Extension of Time

A request for an extension of time within which to file exceptions and briefs shall be in writing, and filed with the Board at least three working days before the expiration of the required time for filing, provided that the Board may extend the time during which to request an extension of time because of extraordinary circumstances. A party requesting an extension of time shall notify all the parties to the proceeding of its request and shall indicate to the Board the position of each other party with regard to such request.

Objection to Certification Without Election

A written objection to the Director's determination that an employee organization should be certified without an election may be filed within five working days after receipt of the Director's determination. A party may file a response to the objection within five working days after its receipt of the objection. The objection and any response must be served on all parties.

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

IMPROPER PRACTICE CHARGE

INSTRUCTIONS: File an original and four (4) copies of this charge with the Director of Public Employment Practices and Representation, New York State Public Employment Relations Board, 80 Wolf Road, Albany, NY 12205-2604. If more space is required for any item, attach additional sheets, numbering item accordingly.

DO NOT WRITE IN THIS SPACE

Case No. U- 23357 AMENDED

Date Received:

RECEIVED
NYS PUBLIC EMPLOYMENT
RELATIONS BOARD

MAY 10 2002

REPRESENTATION

1. CHARGING PARTY

a. Name (If employee organization, give full name, including any affiliation and local name and number):
COUNTY OF NASSAU

b. Address (No. & Street, City and Zip Code, County): Telephone Number:
ONE WEST STREET, MINEOLA, NY 11501

c. Name and title of the representative filing charge:
M. DAVID ZURNDORFER, ATTORNEY, PROSKAUER ROSE LLP
NEIL ABRAMSON, ATTORNEY, PROSKAUER ROSE LLP

d. Name, address and telephone number of attorney or other representative, if any, to whom correspondence is to be directed:
1585 BROADWAY
NEW YORK, NY 10036
Telephone Number:
212-969-3001

2. PUBLIC EMPLOYER AND/OR EMPLOYEE ORGANIZATION AGAINST WHICH CHARGE IS BROUGHT

a. Name and Address (No. & Street, City and Zip Code, County): POLICE BENEVOLENT ASSOC., POLICE DEPARTMENT, COUNTY OF NASSAU, N.Y., INC., 89 E. JERICO TPK., MINEOLA, NY 11501

b. Telephone Number: 516-294-6230

3. Is the charging party filing a separate application for injunctive relief pursuant to §204.15 of the Board's Rules of Procedure?

__ YES _X_ NO

4. VIOLATIONS ALLEGED

Pursuant to Article 14 of the Civil Service Law, as amended (Public Employees' Fair Employment Act), the charging party hereby alleges that the above-named respondent(s) has (have) engaged in or is (are) engaging in an improper practice within the meaning of the following subsections of Section 209-a of said Act (check the subsection(s) allegedly violated):

If by a public employer	If by an employee organization
( ) 209-a.1(a)	( ) 209-a.2(a)
( ) 209-a.1(b)	(X) 209-a.2(b)
( ) 209-a.1(c)	( ) 209-a.2(c)*
( ) 209-a.1(d)	
( ) 209-a.1(e)	
( ) 209-a.1(f)	

* If the charge alleges a violation of Section 209-a.2(c) of the Act based on an employee organization's processing of or failure to process a claim that a public employer has breached its agreement with such employee organization, identify the public employer:

Name and Address (No. & Street, City and Zip Code, County):

b. Telephone Number:

5. Specify in detail the alleged violation(s). Include names, dates, times, places and particular actions constituting each violation. Use additional sheet(s), if necessary. Failure to supply sufficient factual detail may result in a delay in processing or dismissal of the charge.

PLEASE SEE ATTACHED RIDER

6. If the charge alleges a violation of Section 209-a.1(d) or 209-a.2(b) of the Act, has the charging party notified the Board in writing of the existence of an impasse pursuant to Section 205.1 of the Board's Rules of Procedure?

X YES ___ NO

7. The charging party is available immediately to participate in a pre-hearing conference and a formal hearing.

X YES ___ NO

STATE OF NEW YORK)
COUNTY OF New York) SS.:

M. DAVID ZURNDORFER, being duly sworn deposes and says, that (s)he is the charging party above named, or its representative, and that (s)he has read the above charge consisting of this and 4 additional page(s), and is familiar with the facts alleged therein, which facts (s)he knows to be true, except as to those matters alleged on information and belief, which matters (s)he believes to be true.

M. David Zurndorfer
(Signature)

Attorney
(Title)

Subscribed and sworn to before me
this 9th day of May 2002

PETER D. CONRAD
Notary Public, State of New York
No. 31-4788473
Qualified in New York County
Commission Expires April 30, ~~199~~ 2003

RIDER (No. 5)

1. The County of Nassau (the "County") and the Police Benevolent Association, Police Department, County of Nassau, N.Y., Inc. ("PBA") were parties to a collective bargaining agreement that covered the period January 1, 1991 through December 31, 1995. Thereafter, the parties participated in an interest arbitration that resulted in an award dated August 29, 1997, and that covered the period January 1, 1996 through December 31, 2000.

2. On or about April 19, 2001, after a series of bargaining sessions, the PBA filed a Declaration of Impasse with PERB, pursuant to Section 209.4 of the Taylor Law. PERB subsequently appointed Philip Maier as mediator. When the mediation process ended without a new agreement, the PBA informed the County that it intended to file a Petition for Interest Arbitration with PERB.

3. The PBA, however, never filed such a Petition. Instead, on or about March 5, 2002, the PBA commenced an action in New York State Supreme Court, County of Nassau (Index No. 003382/02) that, upon information and belief, was designed to, and if successful will, circumvent the Taylor Law's statutorily mandated binding interest arbitration procedures for dispute resolution set forth in Section 209.4 of the Act. The PBA contends there was agreement pursuant to Section 209.2 of the Act, when in fact there was no such agreement. The County has moved to dismiss the action in Index No. 003382/02 on the grounds, inter alia, that the subject matter of the action is within PERB's exclusive jurisdiction and that the Court does not have the authority to grant the relief requested in the action. A copy of the County's motion papers are annexed to this Charge. The County's motion to dismiss is presently pending before the Court.

4. Since filing the action in Index No. 003382/02, the PBA has refused the County's requests to meet and negotiate in a further effort to reach a voluntary settlement of the parties' dispute. On at least two occasions in March 2002, Anthony Cancellieri, Nassau County Deputy County Executive, attempted to schedule a bargaining session between the County and the PBA and the PBA refused to schedule such a meeting. On April 3, 2002, in light of the PBA's refusal to meet, Cancellieri wrote to Harry Greenberg, counsel for the PBA, to provide the PBA with the County's modified, comprehensive bargaining demands. In the April 3, 2002 letter, Cancellieri requested that the PBA contact him if it was interested in continuing the negotiations process. At no time since March 5, 2002, has the PBA agreed to meet with the County to negotiate a successor collective bargaining agreement.

5. On or about April 3, 2002, the County served upon the attorneys for the PBA and filed with PERB a Petition Pursuant To Section 209.4 Requesting That PERB Refer An Impasse To A Public Arbitration Panel. On or about April 17, 2002, the PBA served and filed a response to that Petition contesting PERB's jurisdiction over this dispute, even though PERB has exclusive and non-delegable jurisdiction over this matter, and asserting that there was an agreement pursuant to Section 209.2 of the Act, even when there was no such agreement.

6. Upon information and belief, the PBA has breached its obligation to negotiate in good faith with the County by refusing to adhere to the dispute resolution procedures established in Section 209.4 of the Act, even though the PBA already had commenced that process by filing with PERB a Declaration of Impasse on April 19, 2001 and had in or about August 2001 advised the County that it would be filing a petition for arbitration with PERB pursuant to Section 209.4 of the Act. As detailed in Paragraph 3 above, rather than abiding by

the statutorily mandated procedures, the PBA filed the action in Index No. 003382/02 seeking to evade PERB's jurisdiction and to compel arbitration outside of the purview of the Act.

7. Upon information and belief, as detailed in paragraph 4 above, the PBA has breached its obligation to negotiate in good faith with the County by failing and refusing to meet and negotiate with the County in a further effort to reach a voluntary settlement of the parties' dispute.

8. Upon information and belief, as evidenced by the action in Index No. 003382/02 and the improper practice charge filed with PERB by the PBA on or about April 17, 2002, the PBA has breached its obligation to negotiate in good faith with the County by insisting that Roger Kaplan serve as an interest arbitrator with jurisdiction over this dispute and by insisting that the parties resolve their dispute outside of the Section 209.4 process and in accordance with an alleged private agreement under Section 209.2, when the County has not agreed that Mr. Kaplan would serve as the arbitrator of this dispute, has not agreed to resolve the dispute outside of the Section 209.4 process, and has not entered into an agreement pursuant to Section 209.2. The factual basis supporting this allegation is further set out in the County's Memorandum of Law in Support of its Motion to Dismiss the PBA's Verified Petition to Compel Arbitration filed in the action in Index No. 003382/02.

9. Upon information and belief, the PBA has violated its obligations under the Act to bargain in good faith by seeking to divest PERB of its exclusive jurisdiction over the matters raised in the action in Index No. 003382/02.

10. Upon information and belief, the PBA has violated its obligations under the Act by failing or refusing to file with PERB a petition for interest arbitration as the PBA had agreed.

11. Upon information and belief, the totality of the PBA's aforementioned actions frustrate the collective bargaining process because they have a dilatory effect on said process.

By the foregoing actions, the PBA has refused to negotiate in good faith with the County in violation of Section 209-a.2(b) of the Act.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

GARY DELARABA, President of the Police Benevolent Association, Police Department, County of Nassau, N.Y., Inc.,

Petitioners,

v.

THOMAS R. SUOZZI, as County Executive of the County of Nassau and the COUNTY OF NASSAU,

Respondents.

Index No. 02-003822

RESPONDENTS' MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS VERIFIED PETITION TO COMPEL ARBITRATION

PROSKAUER ROSE LLP

Attorneys
1585 Broadway
New York, NY 10036-8299

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

GARY DELARABA, President of the Police Benevolent Association, Police Department, County of Nassau, N.Y., Inc.,	:	Index No. 02-003822
Petitioners,	:	
v.	:	
THOMAS R. SUOZZI, as County Executive of the County of Nassau and the COUNTY OF NASSAU,	:	
Respondents.	:	

RESPONDENTS' MEMORANDUM OF LAW
IN SUPPORT OF MOTION TO DISMISS
VERIFIED PETITION TO COMPEL ARBITRATION

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PRELIMINARY STATEMENT

Respondents, Thomas R. Suozzi and the County of Nassau (collectively referred to herein as "Respondents" or the "County"), submit this Memorandum of Law in Support of their Motion to Dismiss the Petition of the Police Benevolent Association, Police Department, County of Nassau, N.Y., Inc. (the "PBA" or "Petitioner") purportedly brought pursuant to Article 75 of the C.P.L.R.

The petition attempts to thrust this Court into the middle of a collective bargaining dispute between the PBA and the County that is within the exclusive jurisdiction of — and that is presently pending before — the New York State Public Employee Relations Board ("PERB"). Specifically, the petition on its face attempts to have this Court declare that the County has violated the Public Employees' Fair Employment Act (commonly known as the "Taylor Law") — the Act governing municipal labor relations in New York State. The New York State Legislature, however, has expressly and unambiguously vested PERB with "exclusive non-delegable jurisdiction" to investigate and adjudicate allegations of violations of the Taylor Law raised by the PBA here.

The petition also seeks to remedy this alleged violation of the Taylor Law by compelling the County to comply with an alleged contractual commitment to submit the parties' dispute over terms for a new collective bargaining agreement to final and binding interest arbitration.[1] PERB, however, is the only governmental entity with the authority to evaluate

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[1] "Interest" arbitration is a term used to describe the process of submitting disputes over new terms and conditions of employment to a third-party for resolution. "Grievance" arbitration is intended to resolve disputes regarding the interpretation of an existing

whether a dispute is at the stage where interest arbitration under the Taylor Law is required, or to order the parties to appear before a public arbitration panel to resolve the impasse dispute. Indeed, the Taylor Law establishes a comprehensive and detailed regulatory scheme — administered by PERB — to resolve precisely this type of police collective bargaining dispute. Absent a negotiated resolution, that scheme culminates in an interest arbitration under PERB's statutory jurisdiction. The PBA initially commenced this statutory process by filing a declaration of impasse with PERB and there is currently a petition pending before PERB, filed by the County, seeking PERB's appointment of a public arbitration panel.

Accordingly, this action is nothing more than an effort on the part of the PBA to evade the Taylor Law's statutorily mandated procedures — procedures it already had triggered — for resolving both collective bargaining disputes and claimed violations of the Taylor Law. Because this Court plainly lacks jurisdiction over the subject matter over the dispute, the petition should be dismissed so that PERB can proceed with its administration of the dispute without any interference or delay.

Moreover, even assuming the Court is prepared to divest PERB of its jurisdiction over the dispute and adjudicate these Taylor Law issues, and even accepting the facts as stated in the Petition, the PBA has failed to state a cognizable claim for the relief sought. In particular, as set forth more fully below, the PBA has failed to plead allegations of fact sufficient to establish the existence of an alternative procedure between these parties to submit an alleged impasse to binding interest arbitration outside of the otherwise comprehensive and controlling procedures

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contract.

established in the Taylor Law. Additionally, even assuming there were such an alternative procedure, the PBA has failed to plead facts sufficient to establish that the conditions precedent for that interest arbitration have been satisfied. For these independent reasons as well, the Petition should be dismissed.

BACKGROUND

The Taylor Law Impasse Resolution Procedures For Police Officers

The Legislature, by enacting the Taylor Law, provided a specific, detailed procedure to be used to resolve impasses in public sector police collective bargaining. If either the employer or the union believes an impasse in bargaining exists, it may notify PERB by filing a Declaration of Impasse. The Declaration must provide PERB with, among other things, a clear and concise history of negotiations leading to the impasse and a list of all unresolved issues. PERB Rules of Procedure § 205.1.

After receiving a Declaration of Impasse, PERB must investigate the dispute to determine if an impasse in bargaining in fact exists. If the Board determines that the parties are at an impasse, PERB is required to appoint a mediator to assist the parties in attempting to reach a negotiated settlement. N.Y. CIV. SERV. LAW § 209(4)(a) (McKinney 2001).

If the mediator is unable to achieve a voluntary resolution, either party may petition the Board to refer the dispute to a public interest arbitration panel for a final and binding resolution. N.Y. CIV. SERV. LAW § 209(4)(b) (McKinney 2001). In the Petition for Arbitration, the party must provide PERB with a statement describing each term and condition of

employment raised during bargaining, those terms, if any, agreed upon by the parties, and the petitioner's position regarding all terms on which there is no agreement. PERB Rules of Procedure § 205.4. The other party has ten (10) days after the filing of the Petition for Arbitration to provide a formal response, stating the items it views as resolved during negotiations and its position on all unresolved items. PERB Rules of Procedure § 205.5. At this stage in the process, the parties also may challenge before PERB the demands the other intends to submit to the arbitration panel on the grounds, *inter alia*, that the demand is not a mandatory subject of bargaining, the subject of the demand already has been resolved by prior agreement, or that the demand was not the subject of prior negotiations. PERB Rules of Procedure § 205.6.

If PERB determines that the dispute is ripe for arbitration, the Board will then appoint a three-person interest arbitration panel. The panel consists of one representative selected by the employer, one representative selected by the union, and a neutral chairperson selected jointly by the parties. N.Y. CIV. SERV. LAW § 209(4)(c)(ii) (McKinney 2001). Once appointed, the panel holds formal hearings to take evidence and argument and, following the close of the hearings, issues an award based on statutorily mandated criteria. N.Y. CIV. SERV. LAW § 209(4)(c)(iii)-(v) (McKinney 2001). Although the panel, once appointed by PERB, has broad powers, the panel may not resolve any demand that is the subject of a challenge before PERB. PERB Rules of Procedure § 205.6. The panel's award is final and binding on the parties and serves as their new collective bargaining agreement for a period of no more than two years

from the expiration of the prior agreement or arbitration award. N.Y. CIV. SERV. LAW § 209(4)(c)(vi) (McKinney 2001).[2]

In addition to the foregoing statutory procedure, the Taylor Law also provides parties an opportunity to enter into written agreements providing for their own comprehensive scheme for resolving bargaining disputes. N.Y. CIV. SERV. LAW § 209(2) (McKinney 2001). "[U]pon the failure of such procedures," to resolve the dispute, however, either party is entitled to invoke the procedures established in Section 209(4), described above. Id.

The Parties and the Current State of Their Collective Bargaining Relationship

The County and the PBA were parties to a collective bargaining agreement governing the terms of employment for police officers employed by the County (the "bargaining unit") that covered the period January 1, 1991 through December 31, 1995. (Pet. Exh. 1) When the parties were unable to reach agreement on terms for a successor contract, the parties participated in final and binding interest arbitration and an award was issued in August 1997 establishing terms of employment for the bargaining unit for the period January 1, 1996 through December 31, 2000.[3] (Pet. Exh. 1)

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2 Although the Panel's decision on the merits of the dispute is deemed "final and binding," it is subject to limited judicial review. N.Y. CIV. SERV. LAW § 209(4)(c)(vii) (McKinney 2001).

3 Prior to the expiration of the most recent collective bargaining agreement, the parties also entered into several memoranda of agreement and understanding regarding various subjects.

In late 2000, the parties began the process of attempting to establish new terms and conditions of employment for the bargaining unit. Following a series of bargaining sessions during which the parties failed to reach an agreement, the PBA on April 19, 2001, filed a Declaration of Impasse with PERB pursuant to Taylor Law Section 209(4) and the applicable PERB Rules of Procedure. (Cancellieri Aff. ¶ 2, Exh. A)[4] As required by Section 209(4), PERB appointed Phil Maier of PERB's Brooklyn Office to mediate the dispute and "the parties participated in mediation under the auspices of [PERB] in an attempt to resolve their differences at the bargaining table." (Pet. ¶ 12) Mediation, however, was unsuccessful. (Pet. ¶ 13)

Following the unsuccessful PERB mediation effort, the PBA informed the County, through correspondence described below, that it would take the next step in the Section 209(4) process and "be filing the appropriate documents with PERB to proceed with resolution of this contract impasse" (Pet. Exh. 5) — i.e., the petition requesting that the dispute be referred by PERB to a public arbitration panel. N.Y. CIV. SERV. LAW § 209(4)(c)(i) (McKinney 2001). The PBA, however, never filed the appropriate documentation with PERB and instead filed this action.

The County, in compliance with the procedure in Section 209(4) of the Act and PERB's Rules of Procedure, filed a petition with PERB on April 3, 2002, requesting that the dispute be referred to a public arbitration panel for a final, binding decision. (Cancellieri Aff. ¶ 6, Exh. D) Following the receipt of the PBA's response to the petition, PERB will administer

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[4] The affidavit of Anthony M. Cancellieri, the County's Deputy County Executive, Public Safety/Labor Relations, is attached to Respondents' Notice of Motion ("Cancellieri Aff.").

the public panel selection process as well as other matters incident to the petition, including determining which demands of the parties properly may be submitted to the interest arbitration panel and whether the parties have complied with the Taylor Law in the impasse resolution process. See, e.g., PERB Rules of Procedure § 205.6.

Correspondence Regarding An Arbitrator For The Parties' Contract Dispute

During 2001, after negotiations and mediation failed to produce a new agreement, the parties engaged in preliminary discussions regarding the identity of a possible arbitrator should the contract dispute reach the point where the union in fact filed a petition for interest arbitration with PERB pursuant to Taylor Law Section 209(4). (Pet. Ex. 3).

These discussions were followed by a brief exchange of correspondence between Harry Greenberg, counsel for the PBA and the County's former Director of Personnel, Todd Goldfarb. On August 23, 2001, Goldfarb wrote to the PBA confirming that the Union had indicated to the County that it "will likely file a Petition for Interest Arbitration in the immediate future" and "in anticipation of your filing a Petition" provided a list of arbitrators, including Roger Kaplan, that would have been acceptable to the then-administration. (Pet. Ex. 3) On October 1, 2001, Greenberg responded stating that the PBA would approve of Roger Kaplan as arbitrator and would file the appropriate documents with PERB to proceed to arbitration. (Pet. Ex. 5) As noted above, the PBA has not filed a Petition for Interest Arbitration, nor has the Union served any formal demand for arbitration. (Cancellieri Aff. ¶ 3)

On December 26, 2001, after learning of these discussions and correspondence, the new Deputy County Executive, Anthony Cancellieri, on behalf of the newly-elected County Executive, Thomas Suozzi, wrote to PERB Chairman Michael Cuveas, pointing out that no petition for arbitration had yet been filed by the PBA and "strongly objecting to the premature appointment of any public member of an interest arbitration panel." (Cancellieri Aff. ¶ 4, Exh. B) Cuveas responded by letter dated January 8, 2002, confirming that "we have not received a petition for interest arbitration from the PBA," and assured the County that it "will be afforded the full opportunity to participate in the selection of the public member of the panel as provided for in our rules and procedures." (Cancellieri Aff. ¶ 5, Exh. C)

ARGUMENT

I. THE COURT DOES NOT HAVE JURISDICTION TO ADJUDICATE THIS DISPUTE OR TO REQUIRE THE COUNTY TO SUBMIT TO FINAL AND BINDING INTEREST ARBITRATION.

A. PERB Has Exclusive Jurisdiction Over Petitioner's Claims Of Violations Of The Taylor Law.

The Legislature has vested PERB with the power "to establish procedures for the prevention of improper employer and employee organization practices." N.Y. CIV. SERV. LAW § 205(5)(d) (McKinney 2001). The Act explicitly provides that the "Board shall exercise exclusive nondelegable jurisdiction" of this power. Id. (Emphasis added).

As a result of this unambiguous legislative grant of authority, it is well-established that the state courts may not adjudicate claims concerning asserted violations of the Taylor Law or, indeed, claims (irrespective of how they are stylized) that may also constitute an improper

employer practice under the Act. For example, in Suffolk County Association of Municipal Employees v. County of Suffolk, 217 A.D.2d 612, 613, 629 N.Y.S.2d 792, 794 (2d Dep't 1995), the Court rejected an attempt to litigate a claim that the County had improperly implemented new policies without bargaining with the union. The court held that such a claim was an "unfair employer practice allegation" and "is subject to the 'exclusive, nondelegable jurisdiction' of the Public Employee Relations Board."

Similarly, in Corbin v. County of Suffolk, 54 A.D.2d 698, 387 N.Y.S.2d 295 (2d Dep't 1976), the Union sought injunctive relief to prevent the County from modifying terms of employment after the expiration of the parties' collective bargaining agreement. The court held that it could not issue such relief, because:

> [t]he county could not be required, after contract expiration, to honor those provisions, unless to avoid the improper employer practice of unilaterally and coercively altering the status quo during negotiations for a new contract and thus not negotiating in good faith. However, only PERB has jurisdiction (original, exclusive and nondelegable) to determine an improper practice charge.

Id. at 54 A.D.2d 699, 387 N.Y.S.2d at 296. See also, e.g., Collins v. Manhattan & Bronx Surface Transit Operations Auth., 62 N.Y.2d 361, 373, 477 N.Y.S.2d 91, 97 (1984) (recognizing that a claim implicating a public employer's obligations under the Act "would be committed to the 'exclusive nondelegable jurisdiction' of the Public Employment Relations Board."); Lagenor v. Weed, 127 A.D.2d 970, 971, 513 N.Y.S.2d 70, 70 (4th Dep't 1987) ("the cause of action . . . is one for an unfair labor practice, which is within the exclusive jurisdiction of the Public Employee Relations Board") (citations omitted); Bd. of Educ. of Plainedge Union Free Sch. Dist. v. Plainedge Sec. Ass'n, 26 PERB ¶ 7518 (Sup. Ct. New York Co. 1993) (staying arbitration,

because "if proven, the actions complained of in the demand for arbitration would constitute an improper practice charge [of a refusal to bargaining in good faith and] . . . enforcement of the Union's demand for arbitration requires resolution of issues which the Legislature intended belongs with the special competence of PERB").[5]

There can be no dispute that the PBA in this action is requesting that the Court adjudicate a claimed violation of the Taylor Law. Paragraph 29 of the petition alleges that the County's alleged refusal to "proceed to arbitration under the jurisdiction [of] arbitrator Kaplan [is] in violation of Section 209 of the Taylor Law." Additionally, the petition specifically states as part of its first and only cause of action:

> 31. That by refusing to participate in the interest arbitration under the jurisdiction of arbitrator Kaplan, Respondents have violated Section 209 of the Taylor Law.
>
> 32. That Section 209 of the Taylor Law requires respondents to enter into binding arbitration should they fail to reach a negotiated agreement with the PBA.

Finally, and if there were any remaining doubt about the true nature of the action, the "wherefore" clause of the petition requests "that an Order be Issued . . . compelling respondents to submit to interest arbitration . . . as required under Section 209 of the Taylor Law." (Emphasis added).

But even if the Petition had been totally devoid of any reference to the Taylor

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[5] The rule prohibiting courts from adjudicating matters that may also constitute improper practices under the Act is purposefully broad. See decisions cited supra. If the rule were otherwise, parties could easily avoid the exclusive jurisdiction of PERB merely by omitting references to the Taylor Law in their pleadings. PERB's exclusive jurisdiction over improper employment practices would quickly become a nullity.

Law, the conclusion that the subject matter of the action is within the exclusive jurisdiction of PERB would still be required. Regardless of how phrased, the beginning, middle and end of the PBA's claim is that the County has refused to comply with the impasse dispute resolution procedures established in Section 209 of the Act. If proved, this conduct is an employer improper practice under the Act, because it is a violation of the employer's duty to bargain in good faith. See, e.g., In re Odessa-Montour Transp. Ass'n., 28 PERB ¶ 4572 (1995) (failure to participate in Section 209 impasse procedure of fact finding constitutes employer improper practice under the Act). See also, e.g., In re Uniformed Fire Fighters Ass'n, 11 PERB ¶ 3095 (1978) (refusal to participate in mediation required by Taylor Law "constituted a refusal to negotiate in good faith" in violation of Act); In re Roosevelt Pub. Library, 18 PERB ¶ 4585 (1985) (refusal to participate in mediation under Section 209 constitutes bad faith negotiations in violation of Act); In re Poughkeepsie City Sch. Dist., 27 PERB ¶ 3079 (1994) ("The obligation to negotiate in good faith extends to the mediation and fact-finding processes").

As the foregoing makes clear, the petition is an attempt to require the Court to adjudicate an alleged employer improper practice under the Act. Because PERB, and not this Court, has exclusive jurisdiction over that subject matter, the petition must be dismissed.

B. The Court Does Not Have Jurisdiction To Order That The County Submit To Section 209 Interest Arbitration; Rather, That Authority Rests With PERB.

In the Taylor Act, the Legislature declared "that it was the Public Policy of the State and the purpose of the act to promote harmonious and cooperative relationships between government and its employees and to protect the public by assuming, at all times, the orderly and

uninterrupted operations and functions of government" by, *inter alia*, "creating a public employment relations board to assist in resolving disputes between public employees and public employers." N.Y. CIV. SERV. LAW § 200 (McKinney 2001).

Consistent with this expressly stated legislative purpose, as discussed above, the entire Section 209 regulatory framework has PERB at its centerpiece. Thus, PERB — and PERB alone — determines whether the parties are at impasse in the first instance, whether the mediation process should be continued, whether the dispute is ripe for arbitration and a public arbitration panel should be appointed or the parties must return to the bargaining table,[6] whether challenged demands may be submitted to the interest arbitration panel, and whether both parties have complied with all of their respective obligations under the Taylor Law. PERB also has broad discretion to intervene in a bargaining dispute whether or not it has been requested to do so by the parties. See N.Y. CIV. SERV. LAW § 209(4) (McKinney 2001) (providing that PERB may determine an impasse exists "upon its own motion").

Indeed, prior to this action, the parties proceeded entirely consistently with its PERB-administered framework. The PBA petitioned PERB for a declaration that the parties were at impasse; both parties participated without objection in PERB-supervised mediation and the PBA acknowledged in writing that it would be filing a petition with PERB for the

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[6] PERB, in its discretion and expertise, may reject a request to proceed to interest arbitration where the Board believes the parties have not bargained in good faith or have not sufficiently endeavored to reach an agreement prior to seeking arbitration. See In re Town of Haverstraw, 9 PERB ¶ 3062 (1976) (instructing PERB Director of Conciliation not to assign an interest arbitrator); In re Village of Johnson City, 12 PERB ¶ 3020 (1979) ("Ordinarily, we would not permit interest arbitration to proceed until the parties have first attempted to reach an agreement through substantial negotiation").

appointment of an interest arbitration panel. Because the PBA has not adhered to its promise, the County has now filed a petition with PERB for the appointment of an interest arbitration panel.

Now, however, at this late date and in direct contradiction of its prior conduct and previously stated position, the PBA seeks a judicial remedy to its bargaining impasse. In stark contrast to the express role reserved under Section 209 of the Act to PERB, reference in that Section (and, indeed, in the entire Act) to judicial resolution of or involvement in impasse disputes is conspicuous in its absence. The judiciary is not authorized by the terms of the Act to declare impasse, appoint a mediator, terminate the mediation process or, as is of most immediate relevance here, appoint a public arbitration panel or require that a party submit to its jurisdiction.

And, in light of the express authority reserved to PERB over these matters in the first instance, there is no possible justification for inferring or implying that the Legislature intended for the Court to have that authority. To the contrary, where the Legislature in the Act intended to carve out a role for the judiciary in the impasse resolution process, they said so expressly. Thus, a party that believes it has been aggrieved by a public interest arbitration panel's decision may seek limited judicial review of that decision. N.Y. CIV. SERV. LAW § 209(4)(c)(vii) (McKinney 2001). Additionally, a party that is aggrieved by a PERB decision on any of the subjects described above over which PERB has express jurisdiction, including whether PERB has correctly adjudicated that a party has violated the terms of the Act, may seek appellate review of those decisions. N.Y. CIV. SERV. LAW § 213 (McKinney 2001). Finally, the

Legislature has provided for extremely limited judicial intervention in the nature of injunctive relief against an improper practice under the Act, but only when PERB specifically requests that relief. N.Y. CIV. SERV. LAW § 209-a(4) (McKinney 2001).

The Legislature simply did not provide that the judiciary would have a roving commission to oversee or administer the Section 209 impasse resolution process — as the PBA now requests. This obviously was no mere oversight given the care with which the Legislature described both PERB's expansive responsibilities and the judiciary's limited role.

As importantly, remaining faithful to the legislative framework avoids the very real possibility of inconsistent decisions between PERB and the Court. Just by way of example, PERB in adjudicating the petition for the appointment of an arbitration panel now before it may determine that the dispute is governed by Section 209(4) of the Act rather than an alternative procedure or determine that, notwithstanding the PBA's assertions to the contrary, Mr. Kaplan may not or should not serve as the public member of the public arbitration panel. If the Court is not bound by PERB's decisions (as this petition argues) and reaches a contrary conclusion, the critical purposes of the Act discussed above obviously will be frustrated as the otherwise orderly impasse resolution procedure descends into utter confusion.

C. Section 209(2) Of The Taylor Law Does Not Authorize This Court In This Case To Compel Arbitration.

The PBA does not seriously dispute that the relief it seeks in this action is not available under the impasse resolution procedures described in Section 209(4) of the Act. At

best, the PBA petition could be viewed as arguing that the parties entered into an alternative dispute resolution procedure pursuant to Section 209(2) of the Taylor Law and that this voluntary alternative procedure is enforceable by the Court independent of any other provision of Section 209(4). This argument is incorrect for several reasons.

1. *The Parties Could Not Have Entered Into A Section 209(2) Procedure After PERB Had Already Declared The Existence Of An Impasse Under Section 209(4).*

The Taylor Law provides only two possible methods for the parties to resolve their impasse in negotiations. Either the parties may agree to a voluntary procedure under Section 209(2) or, "in the absence or the failure of such procedures" to resolve the dispute, either party may invoke the assistance of the Board under Section 209(4). Once PERB's assistance is requested under Section 209(4), however, PERB's statutory obligations under that provision are triggered. The statute mandates that PERB thereafter "shall render assistance" by providing a mediator and, if necessary, appointing a public arbitration panel. There are no provisions in Section 209(2) or elsewhere in the Act to allow the parties to enter into voluntary procedures after the procedures of Section 209(4) have been initiated or to modify the Board's legislatively mandated duties under Section 209(4).

Here, the PBA informed PERB of the existence of an impasse in the parties' negotiations on April 19, 2001. Pursuant to PERB's Rules of Procedure Section 205.1, the PBA filed a Declaration of Impasse and requested "that PERB should declare contract negotiations between the County and the PBA at impasse." (Cancellieri Aff. ¶ 2, Exh. A) As the PBA

requested, PERB found an impasse to exist and, as required by Section 209(4), appointed a mediator to attempt to resolve the dispute.

Because the PBA started the dispute resolution process before PERB and triggered PERB's jurisdiction, it is now required to continue with that process, including permitting PERB to adjudicate the County's petition for the appointment of an interest arbitration panel. At a minimum, the PBA must now seek PERB's permission to undo the process it has commenced. Not only has the PBA failed to obtain PERB's permission, PERB already has stated in response to Mr. Cancellieri's letter that upon receipt of a proper petition (such as the one now filed by the County), the County "will be afforded the full opportunity to participate in the selection of the public member of the panel as provided for in our rules and procedures." (Cancellieri Aff. ¶ 5, Exh. C)

2. *Any "Agreement" Between The Parties Is Insufficient To Constitute An Agreement To Resolve A Bargaining Impasse Under Section 209(2).*

Section 209(2) authorizes public employers and unions "to enter into written agreements" which set "forth procedures to be invoked in the event of disputes which reach an impasse in the course of collective negotiations." The agreement that the PBA claims to exist, even assuming all the facts as pled are true, clearly does not meet the requirements of Section 209(2).

In Newburg v. Newman, 69 N.Y.2d 166, 513 N.Y.S.2d 79 (1987), the Court of Appeals declined to interpret an agreement that provided for arbitration of "any grievance or

complaint" as one intended to cover interest arbitration disputes. In finding that this agreement was not an "agreement" within the meaning of Section 209(2), the Court reasoned:

> The agreement, however, does not contain any reference, either expressly or by implication, to matters subject to collective bargaining, impasse in the bargaining process, or to the authority granted by section 209(2) of the statute and it does not include any standards or limitations for the establishment of new rights subject to collective negotiations. In view of these omissions, and considering that collective bargaining is the favored method of resolving interest disputes, the reasonable interpretation of the agreement is that the procedure outlined was intended to apply to grievances involving rights contained in the existing contract and no more.

Id. at 69 N.Y.2d at 172, 513 N.Y.S.2d at 82.

Similarly, in Police Benevolent Association of the New York State Troopers, Inc. v. Frucher, 13 PERB ¶ 7521 (N.Y. Sup. Ct. 1980), the parties included a "reopener" provision in their collective bargaining agreement which provided that "such reopened negotiations will be subject to Last Offer Binding Arbitration subject to such procedures as the parties may develop prior to commencement of reopened negotiations." The Court held that this limited language was insufficient to constitute a binding agreement to submit to interest arbitration, because, among other things, "[i]t is not clear from the above language whether or not arbitration may be compelled before, or must await, the completion of the procedures described in Section 209(3) of the Civil Service Law" and "the phrase 'Last Offer Binding Arbitration' does not have a clear and unequivocal meaning in the context of this dispute." Id. at 7554.

As in Newman and Frucher, the documents here that purport to establish the "agreement" simply do not contain the necessary terms to be considered a Section 209(2)

agreement. To begin with, there is no "written agreement" between the parties — a necessary requirement according to the express language of Section 209(2). The only documents that are alleged to constitute the agreement are an exchange of two letters between the County and the PBA.

Moreover, even assuming this correspondence is sufficient to be a "written agreement," there is only a single issue addressed by the correspondence — the identity of a potential arbitrator should the dispute ever go to arbitration. This could not reasonably be considered an agreement establishing all of the "procedures" necessary to resolve the dispute. Thus, by way of illustration, the "agreement" does not address the mechanical procedures to be used in the arbitration (e.g., the process for presentation of testimony), whether there is to be a single arbitrator or a panel of arbitrators, the arbitrator's authority in selecting between the parties' proposals (e.g., complete package final offer, issue-by-issue final offer, a broad discretion to develop an award consistent with the evidentiary record), the criteria to be used by the arbitrator in making his decision, the manner in which disputes concerning the arbitrator's authority must be resolved, or whether any arbitration panel decision is final and binding or merely advisory.

The purported agreement leaves far too many questions about the arbitration process unanswered and is insufficient to justify compelling the County to arbitrate outside the scope of PERB's purview.

3. *Assuming A Section 209(2) Agreement Existed, It Has Failed To Resolve The Dispute Between The Parties And The County Has Now Properly Initiated Proceedings Under Section 209(4).*

One of the primary objectives of the Taylor Law is to provide for the orderly resolution of collective bargaining disputes. In order to effectuate this purpose, the Legislature ensured that, even where parties initially enter into voluntary Section 209(2) agreements, "upon failure of such procedures" the parties may invoke the mandatory arbitration provisions of Section 209(4).

Here, the parties' bargaining impasse remains almost one year after the PBA filed its Declaration of Impasse. Any attempt to resolve the dispute through a voluntary agreement for arbitration clearly has been unsuccessful and, indeed, has only engendered additional disputes (as most clearly evidenced by the instant action). The County's request to move to interest arbitration under Section 209(4) now is currently pending before PERB. As any Section 209(2) agreement failed to resolve the dispute and the Section 209(4) interest arbitration process already has been commenced, Section 209(2) cannot be a proper source of judicial authority to compel interest arbitration.

4. *Even Assuming The Existence Of An Enforceable Section 209(2) Agreement, Jurisdiction To Enforce That Agreement Rests In The First Instance With PERB, Not This Court.*

The fatally incorrect premise of the PBA's cause of action is that a valid Section 209(2) Agreement concerning an alternative impasse procedure is enforceable by the Court in the first instance and not PERB. The PBA has not cited a single decision in support of that

proposition.

The absence of case law in support of that proposition is not surprising. As discussed in greater detail in Section I.A. above, the Legislature gave PERB the authority to oversee and administer the entire Section 209 impasse resolution process. The failure to comply with a Section 209(2) agreement or proceed to interest arbitration if proved, clearly is an improper employer practice under the Act within PERB's exclusive and non-delegable jurisdiction. See supra at 10-11. Thus, the PBA could have filed an improper practice charge with PERB but inexplicably chose not to do so.

Permitting the PBA to circumvent PERB's jurisdiction by adjudicating the existence and alleged enforceability of a Section 209(2) agreement in a special proceeding raises precisely the same risks of inconsistent decisions and threats to the Taylor Law regulatory framework as permitting the PBA to litigate in this Court an alleged employer improper practice charge. The PBA must in the first instance seek relief from PERB.

II. ASSUMING THE COURT PROPERLY HAS JURISDICTION OVER THE SUBJECT MATTER OF THE ACTION, THE PETITION MUST BE DISMISSED BECAUSE THERE IS NO ENFORCEABLE AGREEMENT TO ARBITRATE.

A court evaluating a petition to compel arbitration under Article 75 must decide first "whether the parties made a valid agreement to arbitrate," and then, determine "whether if such an agreement was made it has been complied with." County of Rockland v. Primiano Construction Co., 51 N.Y. 2d 1, 6, 431 N.Y.S.2d 478, 480-81 (1980). Even if this Court had jurisdiction over the parties' dispute, the facts pled by the PBA are insufficient to establish a

valid and binding agreement to arbitrate the dispute outside of the Section 209(4) procedure. Alternatively, if an agreement did exist, the conditions for arbitration have not been met, and thus, arbitration cannot be compelled.

A. The Parties Have No Clear And Unequivocal Written Agreement To Arbitrate.

Article 75 allows a Court to compel arbitration only where the parties have entered into a written agreement to submit to arbitration. C.P.L.R. § 7501 (McKinney 2001). The "agreement to arbitrate must be express, direct, and unequivocal as to the issues or disputes to be submitted to arbitration." Gangel v. DeGroot, 41 N.Y.2d 840, 393 N.Y.S. 2d 698 (1977). See also, e.g., A.F.C.O. Metals, Inc. v. Local Union 580, Int'l Ass'n of Bridge, Structural & Ornamental Iron Workers, 87 N.Y.2d 222, 638 N.Y.S.2d 585 (1995) (citing Gangel); State Farm Mut. Auto. Ins. Co. v. Torvica, 277 A.D.2d 321, 715 N.Y.S.2d 75 (2d Dep't 2000) (same). There is no presumption of the arbitrability of public sector labor disputes. Bd. of Educ. v. Local 891, Int'l Union of Op. Eng'rs, 270 A.D.2d 7, 705 N.Y.S.2d 29 (1st Dep't 2000).

The PBA moves to compel arbitration based on the existence of just two letters — Todd Goldfarb's letter of August 23, 2001 and Harry Greenberg's letter of October 1, 2001. Neither of these letters, individually or taken together, can constitute a "written agreement" to arbitrate. Indeed, a plain reading of the documents shows that there is no indication in either letter that the parties had voluntarily agreed to submit any dispute to arbitration outside of the statutorily mandated interest arbitration procedures. To the contrary, the letters discuss only the

possible identity of the arbitrator if the PBA filed a Petition for Interest Arbitration with PERB. This is far from sufficient to rise to the level of an "express, direct, and unequivocal" agreement to arbitrate, and, thus, the Court reasonably cannot compel arbitration under Article 75.

B. The Conditions Precedent To Arbitration In The Purported Agreement To Arbitrate Have Not Been Satisfied.

Even if it is assumed that the parties have a clear and unequivocal agreement to arbitrate their impasse dispute, the Court may not compel arbitration because the necessary preconditions to arbitration have not been satisfied.

As the Court of Appeals explained in County of Rockland v. Primiano Construction Co., 51 N.Y. 2d 1, 7-8, 431 N.Y.S.2d 478, 481 (1980), "the parties may have erected a prerequisite to the submission of any dispute to arbitration, in effect a precondition to the arbitrable forum. In such event, the reluctant party may be forced to arbitration only if the court determines that this portion of the agreement to arbitrate has been complied with." The Court also recognized that "[i]n this same category with conditions precedent to arbitration agreed to by the parties are included statutory conditions precedent." Id. at 8 n.1 See also, e.g., Salmon River Cent. Sch. Dist., 122 A.D.2d 421, 505 N.Y.S.2d 233 (3d Dep't 1986) (granting stay of arbitration where construction company failed to satisfy obligation to file required Notice of Claim pursuant to Education Law § 3813 prior to serving demand for arbitration against school district).

A review of the August 23, 2001 Goldfarb letter and the October 1, 2001

Greenberg letter indicates that there was a necessary precondition to any possible arbitration — specifically, that the PBA submit a Petition for Interest Arbitration to PERB. Goldfarb's letter specifically states that he has been informed that "the PBA will likely file a Petition for Interest Arbitration" and is submitting the names of potential arbitrators "in anticipation of your filing a Petition." In response, Greenberg's letter states "I will now be filing the appropriate documents with PERB to proceed with the resolution of this contract impasse." Under these circumstances, it is clear that any agreement by the parties that might have existed was based exclusively on the assumption that the PBA would first be filing a Petition for Arbitration with PERB, thereby triggering the Section 209(4) arbitration process. The PBA, however, has never filed such a Petition.

Further, as discussed in detail above, once a declaration of impasse has been filed with PERB, the Taylor Law grants PERB the power to determine whether parties have adequately exhausted the bargaining process and are prepared for interest arbitration. See, supra, fn. 6. Thus, the Act establishes a statutory condition precedent — PERB's approval — to any interest arbitration that undisputedly has not been satisfied here. And to be clear, nothing in the alleged agreement to arbitrate purports to remove this authority from PERB, even assuming that such an attempt to strip PERB of its jurisdiction would be lawful. Indeed, just the opposite is true; the parties specifically referenced the PERB procedures in their so called "agreement."

Thus, neither the contractual nor statutory conditions precedent for interest arbitration in this case have been satisfied, the Court cannot compel the County to arbitrate based on these letters, and the petition, therefore, should be dismissed.

III. THE COUNTY HAS NOT WAIVED ITS RIGHT TO OPPOSE THIS PETITION.

The PBA's argument that the County has waived its right to oppose the petition is based on a fundamental misunderstanding of the applicable C.P.L.R. provisions.

The Union claims that the County's alleged "participation" in selecting an arbitrator precludes it from opposing the petition. The PBA supports its contention by citation only to C.P.L.R. § 7503(b), and cases applying this provision. C.P.L.R. § 7503(b), however, is simply irrelevant to this matter. That provision by its terms relates only to parties applying for a stay of arbitration and limits the right to bring such an action to "a party who has not participated in the arbitration." The County has not commenced an action seeking a stay, and thus, cannot be considered to have waived under C.P.L.R. § 7503(b) its rights to contest the Union's request that the Court order arbitration.[7]

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[7] The County is not required to seek a stay of arbitration because, for the reasons discussed above, this Court has no jurisdiction *ab initio* over the subject matter of the dispute at all. As importantly, the County was not required to seek a stay under Article 75 because the PBA has not complied with the requirements of Article 75 in requesting arbitration. C.P.L.R. § 7503(c) provides that the County was required to seek a stay of arbitration if, but only if, the PBA had served upon the County:

> a demand for arbitration or a notice of intention to arbitrate, specifying the agreement pursuant to which arbitration is sought and the name and address of the party serving the notice, or of an officer or agent thereof if such party is an association or corporation, and stating that unless the party served applies to stay the arbitration within twenty days after such service he shall thereafter be precluded from objecting that a valid agreement was not made or has not been complied with and from asserting in court the bar of a limitation of time. . . .

It is undisputed that the PBA never made a formal demand for arbitration in compliance

Moreover, the County cannot be deemed to have waived its right to object to the petition by "participation" because any participation in the selection of the arbitrator was expressly predicated on the PBA's representation that it would be filing a Section 209(4) petition for the appointment of an interest arbitration panel with PERB. That, however, undisputedly did not occur. At a minimum, the PBA should be estopped from relying on any alleged participation in these circumstances.

IV. IF THE COURT DENIES THIS MOTION TO DISMISS, RELIEF ON THE PETITION MAY NOT BE GRANTED BECAUSE THERE ARE SIGNIFICANT FACTUAL ISSUES WHICH MUST BE RESOLVED IN AN EVIDENTIARY HEARING ON THE PETITION.

Although it is the County's position that the motion to dismiss should be granted as a matter of law based on the pleadings and the undisputed facts before the Court, should the Court deny the motion, a hearing pursuant to C.P.L.R. § 410 will be necessary to address the triable issues of fact raised by the Petition.

In particular, given the sparse nature of the correspondence alleged to constitute the "agreement" to arbitrate allegedly pursuant to Section 209(2), an evidentiary hearing would be necessary to resolve disputed issues with respect to a myriad of material facts, including the parties' intent when exchanging the Goldfarb and Greenberg letters, representations made by the PBA in connection with that correspondence, the parties' intent with respect to the various conversations referenced in the petition, the intended scope of the submissions to the arbitrator and the procedures the parties intended to use in the arbitration process.

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with this provision. (Cancellieri Aff. ¶ 3)

Accordingly, should the Court deny this motion to dismiss, the County requests a reasonable opportunity to answer the petition and the opportunity to address these factual issues at an evidentiary hearing.

CONCLUSION

For the foregoing reasons, the Court should grant the County's motion and dismiss the petition.

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