JEROME LEFKOWITZ: A PRAGMATIC INTELLECT AND MAJOR FIGURE IN TAYLOR LAW HISTORY

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I. INTRODUCTION

A common omission in labor-related scholarship is an examination of key players who formulated and developed the law.[1] This article examines one such individual, Jerome (Jerry) Lefkowitz, who was a central figure in the history of the Taylor Law, New York's public sector collective bargaining law, and the New York State Public Employment Relations Board (PERB), the state agency responsible for administering that law.[2]

An important accomplishment of Eliot Spitzer's short tenure as New York's Governor was his 2007 appointment of Jerry Lefkowitz to be the fifth PERB Chairperson.[3] Governor Spitzer's astute choice enabled Jerry to spend the remaining years of his illustrious legal career leading the agency he helped shape into existence as an independent labor relations

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1. An important exception was the 2011 special edition of the Hofstra Labor and Employment Law Journal Vol. 28: Iss. 2, dedicated to former Hofstra School of Law Dean Eric J. Schmertz. During his illustrious career Dean Schmertz made important contributions to New York's public sector law as a PERB Board member and as an arbitrator. *See,* Stuart Rabinowitz, Et al., *Dedications to the Memory of Eric J. Schmertz, Distinguished Professor of Law and Dean Emeritus, Hofstra University School of Law (1982-1989),* 28 HOFSTRA LAB. & EMP. L. J. 227, 228 (1964); Seth H. Agata, *Eric J. Schmertz,* N.Y. PERB (last modified Apr. 28, 2018) http://www.perb.ny.gov/wp-content/uploads/2018/04/Schmertz.pdf.

2. Public Employees' Fair Employment Act, 1967 Laws of New York Ch. 392, (codified as N.Y. CIV. SERV. LAW §§ 200-214 (McKinney 1967) (commonly referred to as the Taylor Law).

3. In 2010, the Taylor Law was amended to be gender-neutral resulting in the title of Chairman being changed to Chairperson. 2010 Laws of New York Ch. 56, Pt. O, sec. 1, N.Y. CIV. SERV. LAW §§ 205(1)-205(4)(a) (McKinney 2010) For purposes of consistency the gender-neutral noun will be used in this article.

agency dedicated to the dictates of the Taylor Law and not politics. As PERB practitioner Richard K. Zuckerman aptly stated at the time, it was a "return to the future."

The appointment of Jerry as PERB Chairperson was greeted with broad support from his colleagues in the New York State Bar Association Labor and Employment Section and many other practitioners of public sector labor relations. Over a half-century career, Jerry had a well-earned reputation for fairness, balance, and a dedication to the neutral application of the law.

He served as PERB Chairperson for eight years, stepping down in 2015.[4] Two years later, Jerry's death at the age of 86 was the subject of a New York Times obituary.[5] His steadfast separation of personal beliefs and value judgments from the work of administering the Taylor Law is one of his key legacies. He eschewed explicit ideology and political labels, preferring pragmatism as his guide. He favored reason over militancy and stridency by public employees and public employers. Collective bargaining in his view is a bilateral system of checks and balances in the workplace that has promoted harmonious employer-employee relations in New York for a half-century under the Taylor Law.[6]

He understood that agency decisions must be grounded in the evidence presented, statutory language, legislative history, regulations, and administrative and judicial precedent. While there can be disagreements over doctrines and decisions he helped develop and supported, one cannot reasonably dispute his dedicated desire to properly effectuate the policies of the Taylor Law. As an intellectual with wide interests, Jerry respected creative arguments, informed debate, diversity of opinion, and scholarship. At the same time, he disliked sloppy reasoning and writing, and was very particular when it came to grammar and word usage.

II. BACKGROUND

Jerry was born in the Bronx, and educated at Christopher Columbus High School, New York University's Bronx campus, and Columbia Law School.[7] One of his high school classmates was actress Anne Bancroft.

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4. *See* Sam Roberts, *Jerome Lefkowitz, a Force in New York Labor Law; Dies at 86*, N.Y. TIMES (Jan. 5, 2018), https://www.nytimes.com/2018/01/05/obituaries/jerome-lefkowitz-a-force-in-new-york-labor-law-dies-at-86.html.

5. *Id.*

6. *Id.*

7. *Labor Aide Promoted to Commissioner Post*, KNICKERBOCKER NEWS (ALB.), June 14,

In his youth, Jerry attended Camp Massad, a Hebrew-speaking Zionist summer camp, which substantially shaped his values and worldview, including his devoted support for the State of Israel.[8] Among his many campmates was Noam Chomsky, the noted linguist, scholar, and social critic.[9] Jerry visited Israel over a dozen times during his lifetime; his first trip there was in 1949, when he was 18 years old.[10]

His family was always his top priority. He met his wife Myrna at Camp Massad, and they married in 1956 when he was stationed by the United States Army in West Germany.[11] An emblematic scene from their marriage was captured in a 1966 newspaper article about a sudden storm that caused flooding in New York's Capital District.[12] The article described Jerry, with his pants rolled up, carrying Myrna from their stalled car across a flooded street on their way to a performance by pianist Arthur Rubinstein.[13] Jerry and Myrna had four children and 10 grandchildren. The accomplishments of their children, their spouses, and grandchildren were always a great source of pride and satisfaction.

III. EARLY CAREER IN NEW YORK STATE PUBLIC SERVICE

The trajectory of a legal career is frequently non-linear and fortuitous. The accumulation of hard-earned experiences and skills gained in each position or assignment oftentimes set the stage for the next career move.

Jerry's career in labor law did not stem from an activist's experience in labor organizing or from prior experience in labor relations. His involvement in the field was an outgrowth of his work as an attorney in New York State government, beginning in the late 1950s.

As an Assistant Attorney General, Jerry defended the State of New

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1965, at 35.

8. *See* Matthew Hamilton, *Jerome Lefkowitz—PERB leader, CSEA attorney—86*, TIMES UNION (Dec. 26, 2017 10:15 AM), https://blog.timesunion.com/capitol/archives/279447/jerome-lefkowitz-perb-leader-csea-attorney-86/; *See infra* text accompanying note 13.

9. Personal Interview with Myrna Lefkowitz (July 24, 2017).

10. *Id.*

11. *See Jerome Lefkowitz Obituary*, TIMES UNION (Dec. 23, 2017), https://www.legacy.com/obituaries/timesunion-albany/obituary.aspx?n=jerome-lefkowitz&pid=187611509&fhid=27355; *See* Sam Roberts, *Jerome Lefkowitz, a Force in New York Labor Law, Dies at 86*, N.Y. TIMES (Jan. 5, 2018), https://www.nytimes.com/2018/01/05obituaries/jerome-lefkowitz-a-force-in-new-york-labor-dies-at-86.html.

12. Peter Bradley, *Spring Deluge Drenches Area*, TIMES UNION, Mar. 25, 1966, at 1.

13. *Id.*

York in a variety of cases including negligence actions.[14] In one very tragic and difficult case, he utilized the applicable burden of proof to persuade the Court of Appeals to set aside a verdict concerning a patient who had committed suicide by consuming barbiturates in a state hospital.[15] New York's highest court adopted Jerry's argument that the plaintiff had failed to present sufficient evidence demonstrating causal negligence by the State concerning the patient obtaining the lethal drug.[16]

In June 1960, Jerry was appointed Associate Counsel at the New York State Labor Department and was promoted one year later to be that agency's counsel.[17] Jerry handled a number of appellate cases involving minimum wage enforcement under New York's Labor Law,[18] and led investigations into minimum wage violations at workplaces including Greenwich Village coffeehouses during the heyday of its folk music scene.[19] In 1965, he was promoted to the position of New York State Deputy Industrial Commissioner for Legal Affairs.[20]

IV. DRAFTING THE TAYLOR LAW AND TENURE AS PERB DEPUTY CHAIRPERSON

During the 1966 New York City transit strike, Jerry was summoned to the State Capitol from his office at the New York State Department of Labor by the Counsel to Governor Nelson Rockefeller to explore potential legislative means for ending the strike.[21]

At the meeting, Jerry recommended a public sector bill similar to the 1963 legislation he drafted, when he was counsel to the New York State Department of Labor, which amended the New York State Labor

14. Smith v. State, 193 N.Y.S.2d 447 (N.Y. App. Div. 4th Dept. 1959); Arnold v. State, 187 N.Y.S.2d 578 (N.Y. App. Div. 4th Dept. 1959); Holleran v. State, 188 N.Y.S.2d 682 (N.Y. App. Div. 4th Dept. 1959); Berkshire Mut. Fire Ins. Co. v. State, 189 N.Y.S.2d 333 (N.Y. App. Div. 3d Dept. 1959). Kerr v. State, 189 N.Y.S.2d 294 (N.Y. App. Div. 3d Dept. 1959).

15. Hirsch v. State, 168 N.E. 2d 372 (N.Y. 1960).

16. *Id.* at 373.

17. *See Labor Aide Promoted to Commissioner Post*, KNICKERBOCKER NEWS (ALB.), June 14, 1965, at 35.

18. Levbourne Realty Co. v Indus. Comm'r of the State of N.Y., 180 N.E.2d 796 (N.Y. 1962); Kiamesha Concord, Inc. v. Lewis, 223 N.Y.S.2d 602 (N.Y. App. Div. 3d Dept. 1962); Emerson v. Bd. of Standard and Appeals, 234 N.Y.S.2d 57 (N.Y. App. Div. 3d Dept. 1962).

19. *A Union in 'Village' Arouses Beatniks and Stirs Inquiry*, N.Y. TIMES, Aug. 12, 1964, at 37.

20. *See Labor Aide Promoted to Commissioner Post, supra* note 17.

21. Oral History Interview with Jerry Lefkowitz on July 24, 2001, p. 4, Series 9, CSEA 1000 Project, Civil Service Employees Association, Inc. Local 1000, AFSCME Records, 1918-2015. M.E. Grenander Department of Special Collections and Archives, University Libraries, University at Albany, State University of New York [hereinafter Lefkowitz Interview July 24, 2001].

Relations Act to grant workers at New York City private not-for-profit hospitals with the right to unionize and to engage in collective bargaining but without the right to strike.[22] Although Governor Rockefeller approved of Jerry's concept for a public sector collective bargaining law, the transit strike ended before draft legislation could be fully developed.[23]

On January 15, 1966, Governor Rockefeller appointed a five-member Committee on Public Employee Relations, chaired by Professor George W. Taylor from the Wharton School at the University of Pennsylvania, and was composed of labor relations experts.[24]

After the Taylor Committee issued its March 31, 1966 report,[25] Jerry was assigned the task of drafting legislation that would "embody the Taylor Committee's specific proposals."[26] During the drafting, he was directed to include language for the certification of unions without an election, a procedure supported by the Civil Service Employee Association (hereinafter "CSEA").[27] Unbeknownst to him, CSEA had advocated for card check certification during the Taylor Committee's March 4, 1966 hearing in New York City.[28]

The fierce opposition to the bill by many local governments and New York City public sector unions delayed its enactment until April 1967 and made it unlikely that the law and agency would succeed.[29] At a May 23,

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22. Lefkowitz Interview, July 24, 2001, *supra* note 21, at 4. The state collective bargaining legislation for New York City private non-profit hospitals included interest arbitration, a procedure for ending contract negotiation impasses. The 1963 legislation was strongly opposed by the New York State AFL-CIO because of its anti-strike and interest arbitration provisions. Lefkowitz Interview, July 24, 2001, *supra* note 21, at 10; Legislative Bill Jacket to Act of April 24, 1963, Ch. 515, 1963 N.Y. Laws, Letter from Raymond R. Corbett to Governor Nelson A. Rockefeller (April 23, 1963). Historically, the American labor movement opposed interest arbitration. *See* JOSEPH BARTLETT LAMBERT, "IF THE WORKERS TOOK A NOTION": THE RIGHT TO STRIKE AND AMERICAN POLITICAL DEVELOPMENT, at 91-96 (2003).

23. Lefkowitz Interview, July 24, 2001, *supra* note 21, at 4. The strike began on January 1, 1966 and ended 12 days later. *See Transit Strike Accord is Reached; Service Expected to Resume Today*, N.Y. TIMES, Jan. 13, 1966, at A1.

24. The other Committee members were E. Wight Bakke, David L. Cole, John L. Dunlop and Frederick H. Harbison. *See* MICHAEL MARMO, MORE PROFILE THAN COURAGE: THE NEW YORK CITY TRANSIT STRIKE OF 1966, 270 (1990); Lefkowitz Interview, July 24, 2001, *supra* note 21, at 4.

25. *See* GOVERNOR'S COMM. ON PUB. EMP. RELATIONS, (Mar. 31, 1966), *reprinted in* N.Y. STATE BAR ASS'N, LEFKOWITZ ON PUBLIC SECTOR LABOR AND EMPLOYMENT LAW, (William A. Herbert, Phillip L. Maier & Richard K. Zuckerman, eds., 4th ed. 2016).

26. Lefkowitz Interview, July 24, 2001, *supra* note 21, at 5.

27. *Id.*

28. Testimony of Henry Shemin, State of N.Y. Governor's Comm. On Pub. Emp. Relations Hearing, at 15-16, 19 (Mar. 4, 1966); David Lawrence Cole Papers, box 14, Kheel Center for Labor-Management Documentation and Archives, CORNELL U. LIBR.; *See also* William A. Herbert, *Card Check Certification: Lessons from New York*, 74 ALB. L. REV. 93, 143, 146-47 (2010/2011).

29. Public Employees' Fair Employment Act, 1967 Laws of New York Ch. 392 (codified as N.Y. CIV. SERV. LAW §§ 200-214 (McKinney 1967); Lefkowitz Interview, July 24, 2001, *supra* note

1967 union rally in Madison Square Garden, the statute was condemned as an "evil law" and a pledge was made that the law and its supporters will be "left in the dust bin of history."[30]

The critical reception to the new law was described by Jerry in an article written in honor of PERB Board Member Joseph Crowley, who served during the agency's first decade:

> [P]assed by a reluctant legislature under pressure from an aggressive governor, it was opposed by most local governments and practically all public sector unions. The local governments were disturbed that the statute's policy of fostering collective bargaining would compromise the authority of elected government to manage municipal affairs. The unions, for their part, were unwilling to settle for a law that continued to deprive them of a legal right to strike, and they were convinced that a law administered by an agency, the heads of which were appointed by the governor, the boss of the largest contingent of public employees, could not be trusted.[31]

A 2001 article by Melvin H. Osterman, counsel to the Taylor Committee, provided a similar description of that time:

> Proposing a statute, however, did not end the controversy. It took more than a year to sort through a maze of competing Democratic and Republican bills until the final statute became law. Even then, it was highly controversial. On the day of its enactment, it was described by a prominent labor leader as the "Rockefeller/Travia [the then-Speaker of the Assembly] Slave Labor Act." It also was characterized as the "RAT Bill" (again Rockefeller and Travia).[32]

During an interview with the New York Times in 2002, Jerry

21, at 5-6, 11.

30. *See* RONALD DONOVAN, ADMINISTERING THE TAYLOR LAW: PUBLIC EMPLOYEE RELATIONS IN NEW YORK, 53-54 (1990).

31. Jerome Lefkowitz, *Joseph Crowley—A Dedicated Public Servant*, 54 FORDHAM L. REV. 468, 469 (1986).

32. Melvin H. Osterman *A Formerly Arcane Practice Now Handles A Wide Range of Issues*, 73 N.Y. ST. B. ASS'N J. 40 (2001).

explained that the statute was referenced as the Taylor Law, after Professor George W. Taylor, because no politician wanted "their name on it," due to the strong opposition of New York City unions to the law.[33]

In August 1967, PERB Chairperson Robert Helsby appointed Jerry to be Deputy Chairperson as one of the initial agency appointments.[34] Chairperson Helsby and Jerry had previously worked together at the New York State Department of Labor, and Jerry had great respect for him as "a man of rectitude" and a "superb administrator"[35] Scholar Ronald Donovan has described Jerry as a "forceful intellect on whom Helsby heavily relied."[36]

Jerry joined Chairperson Helsby in meetings with officials from the National Labor Relations Board (NLRB) and the New York State Labor Relations Board in an effort to determine an appropriate structure for the new public sector labor relations agency.[37] One of Jerry's immediate primary responsibilities was preparation of the agency's Rules of Procedure.[38] The rules were drafted in consultation with a committee comprised of academics from Columbia University and Cornell University, and Melvin H. Osterman.[39]

The rules corrected one of the major deficiencies in the original statute by creating a procedure for determining complaints of anti-union retaliation similar to the procedures of the NLRB, the State Labor Relations Board,[40] and under Mayor Robert F. Wagner's 1958 Executive Order 49.[41] Discrimination for union activity in New York's public sector

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33. Robert F. Worth, *The Transit Showdown: The Taylor Law; A Powerful Tool to Use Against Striking Employees*, N.Y. TIMES (Dec. 13, 2002), https://www.nytimes.com/2002/12/13/nyregion/transit-showdown-taylor-law-powerful-tool-use-against-striking-employees.html.

34. Lefkowitz Interview, July 24, 2001, *supra* note 21, at 11; *Helsby Takes State Office*, POUGHKEEPSIE J., Aug. 9, 1967, at 42.

35. Lefkowitz, *supra* note 31, at 469 n. 4.

36. DONOVAN, *supra* note 30, at 62.

37. Lefkowitz Interview, July 24, 2001, *supra* note 21, at 11.

38. DONOVAN, *supra* note 30, at 62.

39. Lefkowitz Interview, July 24, 2001, *supra* note 21, at 11; DONOVAN, *supra* note 30, at 64.

40. *See* Manhasset Union Free Sch. Dist., 41 N.Y. PERB ¶ 3005 (2008), *aff'd in part, modified in part sub nom.* Manhasset Union Free Sch. Dist. v. New York State Pub Emp't Relations Bd, 887 N.Y.S.2d 497, 61 A.D.3d 1231 (N.Y. App. Div. 3d Dept. 2009) *on remittur*, 42 N.Y. PERB ¶ 3016 (2009).

41. Exec. Order No. 49, §8 (Mar. 31, 1958), reprinted in *Labor Relations Program of Employees of the City of New York*, 12 INDUS. & LAB. REL. REV. 371, 618-25 (1959). The Wagner Executive Order granted collective bargaining rights to New York City's municipal workers for the first time. Exec. Order No. 49, §8 (Mar. 31, 1958). It was succeeded by the New York City Collective Bargaining Law, which was enacted in 1967. New York City Collective Bargaining Law, N.Y.C. ADMIN. CODE §§ 12-301, *et seq.*

was nothing new. As far back as 1935, a New York City mayoral committee found that there was a practice of discrimination and surveillance of union activists in a municipal agency.[42] Nevertheless, during a September 1967 meeting with PERB staff, Taylor Committee members expressed vehement opposition to the proposed anti-retaliation rule.[43] Ultimately, PERB's regulatory anti-reprisal procedure was judicially nullified,[44] but it was succeeded by a 1969 amendment that created statutory improper practices.[45]

Jerry played a key role in another important early agency action: the creation of PERB Reports, the official publication of Board and administrative law judge decisions.[46] The concept and design of PERB Reports were based on the annual volumes of decisions issued by the New York State Labor Relations Board, a then three-decade old state agency responsible for administering New York State's private sector collective bargaining statute.[47]

On September 11, 1967, ten days after effective date of the Taylor Law, the United Federation of Teachers (UFT) led by Al Shanker commenced a strike of over 45,000 teachers at approximately 900 schools against the New York City Board of Education after an impasse in negotiations for a new contract.[48] Among the issues in dispute were reduced class size, extra services in select schools, and granting teachers greater authority to remove disruptive students from the classroom.[49] During a PERB Board hearing, CSEA representative Irving Flaumenbaum insisted that the UFT be punished for the strike in order to demonstrate that the new law was not an empty letter.[50] On November 30, 1967, PERB ruled that the UFT strike violated the Taylor Law, and the agency imposed a one year forfeiture of the union's dues deduction

42. *Text of Final Section of the Report on City Relief by the City Mayor's Committee*, N.Y. TIMES, Mar. 30, 1935, at 6L.

43. *See* DONOVAN, *supra* note 30, at 65-66.

44. Helsby v. Bd. of Educ., Central Sch. Dist. No. 2, Town of Claverack, 301 N.Y.S.2d 383 (N.Y. Sup. Ct. Albany Cty. 1969), *aff'd*, 312 N.Y.S. 355, 358 (N.Y. App. Div. 3d Dept. 1970).

45. 1969 Laws of New York , Ch. 24, §7.; N.Y. CIV. SERV. LAW § 209-a.1(a) and (c)(McKinney 1969).

46. DONOVAN, *supra* note 30, at 64.

47. Labor Law §§ 700 *et seq* New York State Labor Relations Act, N.Y. LAB. LAW § 717 (McKinney 1937) (as amended 2010).

48. Lefkowitz Interview, July 24, 2001, *supra* note 21, at 12; *United Fed'n of Teachers, Local 2*, 1 PERB ¶ 300 (1967); RICHARD D. KAHLENBERG, TOUGH LIBERAL: ALBERT SHANKER AND THE BATTLES OVER SCHOOLS, UNIONS, RACE, AND DEMOCRACY 79 (2007).

49. KAHLENBERG *supra* note 48, at 77-79.

50. Thomas Poster, *Slap UFT or New Law is Dead: Labor Leader* N.Y. DAILY NEWS Sept. 29, 1967, at 22.

rights under the law.[51]

In his role as Deputy Chairperson Jerry worked closely with Chairperson Helsby, who resigned in 1977,[52] and his successor Harold Newman.[53] Jerry drafted approximately 95% of all PERB Board decisions including dissenting and concurring opinions over the first two decades of the agency's existence.[54] The drafting required him to work closely with the Board members including labor relations experts Joseph R. Crowley, Ida Klaus, and Eric J. Schmertz.

Jerry's intellectual and emotional intelligence were essential to enable the PERB Board to issue hundreds of timely and frequently scholarly decisions during his tenure as Deputy Chairperson.[55] In later years, he reminisced about the challenges caused by the particularity, and sometimes inconsistencies, of Board member Ida Klaus concerning phrasing and grammar that led to innumerable draft decisions.

Another important factor in the early success of the PERB Board's decision making was Board member Crowley's sense of humor:

> Joe's wit was the assurance that his other attributes would be well taken. Frequently, he would make a humorous comment that would disrupt a serious meeting at which his associates were futilely wrestling with a difficult problem. The changed mood usually facilitated more innovative thinking. At the least, it would be an antidote to obstinacy and self-righteousness. And since he was the frequent butt of his own jokes, he rarely permitted himself the opportunity of being closed-minded.[56]

Jerry's counsel was critical in establishing PERB's independence as a labor relations agency. He was the primary proponent of the agency's first courageous act of independence when the PERB Board on November 30, 1967 issued a restraining order to the State Negotiating Committee to cease and desist from negotiating with CSEA two weeks after Governor Rockefeller had voluntarily recognized CSEA as the exclusive

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51. United Fed'n of Teachers, Local 2, supra, note 48.

52. *PERB Head Quits*, Tonawanda News, Sept. 2, 1977, at 10.

53. *PERB through the years*, N.Y. PERB, http://www.perb.ny.gov/perb-through-the-years/ (last visited Oct. 31, 2018).

54. Lefkowitz Interview, July 24, 2001, *supra* note 21, at 6.

55. Jerome Lefkowitz, *2009-2010 Summary Annual Report, Message from Jerome Lefkowitz*, PERB News (Feb. – Apr. 2010), http://www.perb.ny.gov/perb-news/ (last visited Oct. 31, 2018) (table displaying PERB's activity, including decisions, from the Fiscal Years of 2005-06 – 2009-10).

56. Lefkowitz, *supra* note 31, at 469.

representative of a general unit of State employees.[57]

The restraining order was issued in response to the request by six employee organizations that had filed representation petitions challenging the voluntary recognition of CSEA as well as the composition of the three state bargaining units established by the State.[58] In the court litigation that followed, Jerry unsuccessfully defended PERB's restraining order all the way up to the New York Court of Appeals.[59]

In a 1973 monograph Jerry acknowledged the conflicting considerations and the relatively weak legal basis underlying the order.[60] He explained, however, that "[r]esponding to the realization that excessive zeal might be remedied by the court, whereas excessive timorousness would be unremedied, the Board decided upon the more aggressive course."[61] This explanation reveals a central truth: while conservative and humble by nature, he was willing to take necessary risks after carefully weighing the available options.

PERB's intention to be independent was reaffirmed by its handling of the numerous petitions seeking to represent various groups of employees in the general State bargaining unit unilaterally established by Governor Rockefeller.[62] Over the years, Jerry frequently described his key role in the agency's resolution of the complicated legal and practical issues presented by those representation cases.

Jerry presided over the contentious representation hearing, which lasted ten months and resulted in 26,000 pages of transcript and exhibits.[63]

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57. Lefkowitz Interview, July 24, 2001, *supra* note 21, at 12-13; State of New York, 1 N.Y. PERB ¶ 301 (1967). In the decision, PERB ordered

> the State Negotiating Committee to refrain from negotiating with the Civil Service Employees Association on an exclusive basis with respect to the terms and conditions of employment of employees of the State of New York within the general unit until this Public Employment Relations Board receives the dispute concerning representation status within such unit. We further order that the State Negotiating Committee be neutral in its treatment of employee organizations which file timely petitions supported by the requisite showing of interest to represent employees of the State of New York within the general unit until this Public Employment Relations Board resolves the dispute concerning representation status.

DONOVAN, *supra* note 30, at 76 (describing Jerry as the "principal proponent" of the injunctive order).

58. State of New York, 1 N.Y. PERB ¶ 301 (1967).

59. Lefkowitz Interview, July 24, 2001, *supra* note 21, at 17-18; Civil Serv. Emp. Ass'n v. Helsby, 285 N.Y.S.2d 806 (N.Y. Sup. Ct. Albany Cty. 1967), *rev'd*, 286 N.Y.S.2d 956 (N.Y. App. Div. 3d Dept. 1968), *aff'd*, 236 N.E.2d 481 (N.Y. 1968).

60. JEROME LEFKOWITZ, THE LEGAL BASIS OF EMPLOYEE RELATIONS OF NEW YORK STATE EMPLOYEES 8 (1973).

61. *Id.*

62. Lefkowitz Interview, July 24, 2001, *supra* note 21, at 12-13.

63. *Id.* at 14-16.

Following the hearing, he recommended that there should be six bargaining units instead of one general State unit: Operational Services Unit; Security Services Unit; Institutional Services Unit; Administrative Services Unit; Professional, Scientific and Technical Services Unit; and a unit of all seasonal employees of the Long Island State Park Commission.[64]

The decision was praised by the New York Times editorial board as a declaration of independence from Governor Rockefeller, and one that "skillfully avoids the twin pitfalls of excessive fragmentation and of groupings so broad that they strip workers of any effective device for consideration of their specialized problems."[65] CSEA, however, was infuriated by the decision and demanded Jerry's discharge.[66] The PERB Board, on review, accepted the uniting decision apart from rejecting the appropriateness of a seasonal unit.[67] CSEA was unsuccessful when it sought to stay the representation elections for the five units.[68]

PERB's early challenge to state executive authority concerning union representation of state workers is striking in the present era when rigid hierarchical subservience within government on policy issues has become an expectation, if not a requirement.[69] The modern authoritarian impulse within government today is aided by the judicial constriction of First Amendment protections in the public workplace and the on-going concerted political drive in other states to eviscerate collective bargaining and due process protections for public employees.[70]

Although there was a strong pushback from Rockefeller Administration officials in response to PERB's decision in 1969, it did not result in retaliatory personnel actions. Secretary to the Governor Alton G. Marshall was livid at the decision and viewed Chairperson

64. *Id.* at 16-17.

65. *Freedom for State Employees*, N.Y. TIMES, Aug. 29, 1968, at 34.

66. Lefkowitz Interview, July 24, 2001, *supra* note 21, at 17.

67. *Id.* at 18.

68. Civ. Serv. Emp. Ass'n v. Helsby, 296 N.Y.S.2d 246 (N.Y. Sup. Ct. Alb. Cnty. 1969) *rev'd*, 31 A.D.2d 325 (3d Dep't 1969), *appeal dismissed*, 24 N.Y.2d 915 (1969) *aff'd*, 24 N.Y.2d 993 (1969).

69. *See* Lewis v. Cowen, 165 F.3d 154 (2d Cir. 1999), *cert. denied*, 528 U.S. 823 (1999) (holding that the termination of a public official who refused to speak favorably before a state agency about a policy change he opposed did not violate the First Amendment.); *see also* Wolfgang Saxon, *Harold A. Jerry Jr., 81; Helped Preserve the Adirondacks as Forever Wild*, N.Y. TIMES, June 20, 2001 (State agency chair demoted after casting a dissenting vote on a state environmental board against a policy change sought by Governor George E. Pataki).

70. *See* Garcetti v. Ceballos, 547 U.S. 410 (2006) (excluding speech made by public officials pursuant to official duties from First Amendment protections); *see also* William A. Herbert & Alicia McNally, *Just Cause Discipline for Social Networking in the New Gilded Age: Will the Law Look the Other Way?* 54 U. LOUISVILLE L. REV. 381, 382-383 (2016) (describing the ascendency of opposition to workplace procedural protections against discipline).

Helsby as a traitor.[71] Nevertheless, Governor Rockefeller ultimately accepted the decision based on advice from his long-time labor advisor Victor Borella who recognized the importance of agency independence in insuring the Taylor Law's success.[72] At a private meeting with Helsby at the Rockefeller estate in Pocantinco Hills, the Governor apologized for his senior staff's reaction to the decision and explained that his reputation depended on PERB's successful administration of the Taylor Law.[73] Subsequent governors continued the policy of respecting PERB's decision-making independence during Jerry's tenure as Deputy Chairperson.[74]

Legislative leaders frequently consulted Jerry about amending the Taylor Law, and he helped draft amendments and legislative reports. He was responsible for drafting the 1974 amendment mandating binding interest arbitration for impasses in negotiations involving firefighters, and a similar bill with respect to police officers.[75] Interest arbitration had been excluded from the original Taylor Law although it was advocated for by the Uniform Fire Officers Association, Local 854 during the Taylor Committee's March 6, 1966 hearing.[76] The much more influential New York State AFL-CIO opposed interest arbitration before the Taylor Committee on the ground that arbitration suppressed strike activity.[77] Similarly, Uniformed Sanitationmen's Association President John J. DeLury opposed binding arbitration to resolve impasses during the 1966 Taylor Committee hearing[78]

While the Taylor Law was strongly criticized by most of New York's

71. DONOVAN, *supra* note 30, at 77.

72. Oral History Interview with Jerry Lefkowitz. (Apr. 13, 2005) pp. 6, 14-5, Series 9, CSEA 1000 Project, Civil Service Employees Association, Inc. Local 1000, AFSCME Records, 1918-2015. M.E. Grenander Department of Special Collections and Archives, University Libraries, University at Albany, State University of New York [hereinafter Lefkowitz Interview, April 13, 2005].

73. Jerome Lefkowitz, *2009-2010 Summary Annual Report, Message from Jerome Lefkowitz,* PERB NEWS, Vol. 43, No. 2, p. 2 (Feb.-Apr. 2010).

74. Lefkowitz Interview, April 13, 2005, *supra* note 72, at 6-7. Jerry stated during the interview that the administration of Governor Mario M. Cuomo was the first to have intervened in the agency's administration through patronage appointments. However, he could not recall actual or attempted intervention by that administration concerning agency decisions. *Id.* at 7.

75. Lefkowitz Interview, July 24, 2001, *supra* note 21, at 10. 1974 Laws of New York, ch. 724, §§ 1 to 3 and Ch. 725, §§ 1 to 3.

76. Testimony of Charles J. Stephens, *State of N.Y. Governor's Committee on Public Employee Relations Hearing* (Mar. 4, 1966) 54-58; David Lawrence Cole Papers, *supra* note 28.

77. Lefkowitz Interview, July 24, 2001, *supra* note 21, at 10; Testimony of Raymond R. Corbett, *State of N.Y. Governor's Committee on Public Employee Relations Hearing* (Mar. 4, 1966) 88-89; David Lawrence Cole Papers, *supra* note 28.

78. Testimony of John J. DeLury, *State of N.Y. Governor's Committee on Public Employee Relations Hearing* (Mar. 4, 1966) 64-67; David Lawrence Cole Papers, *supra* note 28.

labor movement for its anti-strike penalties, the law's enactment triggered a substantial increase in strikes and threatened strikes over the next fifteen years.[79] The increase was a direct consequence of the massive number of new public sector collective bargaining relationships created under the Taylor Law, and the inexperience of negotiators on both sides of the table.[80] The strike data during the first two decades of the Taylor Law undermines contemporary ahistorical claims that Taylor Law strike penalties are the sole cause for the current low level of strikes in New York's public sector.[81]

As Deputy Chairperson, Jerry witnessed the decline in public sector strikes in New York that he attributed to negotiators becoming more sophisticated, and the impact of the Triborough Amendment.[82] That 1982 amendment to the Taylor Law mandates a public employer to continue the negotiated terms of an expired agreement until a successor agreement has been reached unless the union has engaged in strike-related activity.[83]

Jerry's work as an adjunct law professor at his alma mater Columbia

79. JANET MCENEANEY & ROBERT P. HEBDON, *Public Sector Labor Law and Experience in New York State* COLLECTIVE BARGAINING IN THE PUBLIC SECTOR: THE EXPERIENCE OF EIGHT STATES 182, Table 7.7, Lefkowitz Interview, July 24, 2001, *supra* note 21, at 10; Terry O'Neil & E.J. McMahon, *Taylor Made: The Cost and Consequences of New York's Public Sector Laws*, EMPIRE CTR. FOR N.Y. ST. POL'Y, at 10. (Oct. 2007) https://www.empirecenter.org/wp-content/uploads/2013/06/Taylor-Made.pdf.

80. Lefkowitz Interview, July 24, 2001, *supra* note 21, at 10-11; O'Neil & McMahon, *supra* note 79, at 10.

81. Changes in public sector labor relations over the past half century does justify a sober reexamination of aspects of the Taylor Law including its anti-strike provisions, and the limited scope of protected activities under the law. A reexamination of the ban on strikes is warranted in light of the 2011 report by the International Labour Organization's Freedom of Association Committee finding that the Taylor Law's broad strike prohibitions violate international freedom of association principles. Int'l Labour Office [ILO], *362nd Report of the Committee on Freedom of Association,* at 740-75, Case No. 2741 (Nov. 2011). *See also*, Joshua Freeman, *Nixon strikes a blow for labor: Why returning public-sector workers the to strike, as a last resort, makes sense*, Daily News, Aug. 12, 2018 available at https://www.nydailynews.com/opinion/ny-oped-nixon-strikes-blow-for-labor-20180809-story.html; Kate Montgomery Swearengen, *Tailoring the Taylor Law: Restoring a Balance of Power to Bargaining,* 44 COLUM. J. L. & SOC. PROBS. 513, 539-40 (2011) (advocating for a right to strike for public employees in non-essential services); Jason A. Zwara, *Left in the Dark: How New York's Taylor Law Impairs Collective Bargaining*, 31. HOFSTRA LAB. & EMP. L. J. 193 (2013) (advocating for repeal of a requirement that public employers maintain the status quo following the expiration of an agreement and proposes changes to the Taylor Law's strike penalties).

82. 1982 Laws of New York, chs. 868, 921; JANET MCENEANEY & ROBERT P. HEBDON, *Public Sector Labor Law and Experience in New York State* COLLECTIVE BARGAINING IN THE PUBLIC SECTOR: THE EXPERIENCE OF EIGHT STATES 185, 188 (Joyce M. Najita & James L. Stern, eds., 2001).

83. CIV. SERV. §209-a(e)(stating that it is an improper practice for a public employer "to refuse to continue all the terms of an expired agreement until a new agreement is negotiated, unless the employee organization which is a party to such agreement has, during such negotiations or prior to such resolution of such negotiations, engaged in conduct violative of subdivision one of section two hundred of this article.").

Law School while he was Deputy Chairperson brought him enormous satisfaction.[84] During labor law seminars, he took great pedagogical pleasure in challenging the predisposition of students by assigning them to advocate on behalf of positions they personally disagreed with.[85]

His best-known book, the New York State Bar Association treatise, which is now entitled Lefkowitz on Public Sector Labor and Employment Law,[86] was begun during this period. His other published works include a book on public sector unionism in Israel,[87] an article on classical Jewish labor law,[88] a monograph on the legal foundations of New York State employee relations,[89] a law review article with Melvin H. Osterman examining overlapping agency jurisdictions regarding labor relations,[90] an article on collective bargaining in human services agencies,[91] and a book chapter on unfair labor practice procedures.[92]

During his two decades as Deputy Chairperson, Jerry was active as an educator, scholar, and consultant in the field of public sector labor relations. In 1971, Chairperson Helsby, Jerry, and other PERB representatives traveled to other countries as part of the planning for an International Symposium on Public Employment Labor Relations in New York City convened by PERB and co-sponsored by over a dozen other States, universities, and organizations.[93] The international conference attracted attendees from thirteen other countries and twenty-six states.[94]

Many agencies and jurisdictions consulted Jerry on public sector labor relations including Japan, which he visited in 1984.[95] He maintained a very good working relationship with Arvid Anderson, the first Director

84. N.Y. STATE BAR ASS'N, LEFKOWITZ ON PUBLIC SECTOR LABOR AND EMPLOYMENT LAW at iii (William A. Herbert, Phillip L. Maier & Richard K. Zuckerman, eds., 4th ed. 2016).

85. *Id.*

86. *See Id.*

87. JEROME LEFKOWITZ, PUBLIC EMPLOYEE UNIONISM IN ISRAEL, INSTIT. OF LAB. AND INDUS. REL. (1971).

88. Jerome Lefkowitz, *Labor in Halacha (Classical Jewish Law)*, 24 CERL Review (Sept./Fall 1981).

89. Lefkowitz, *supra* note 60.

90. Jerome Lefkowitz & Melvin H. Osterman, *Jurisdictional Gaps and Overlapping Jurisdiction in Labor Relations*, 47 BROOK. L. REV. 1105 (1981).

91. Jerome Lefkowitz, *Unionism in the Human Services Industries*, 36 ALB. L. REV. 603 (1971-1972).

92. ASSOCIATION OF LABOR RELATIONS AGENCIES, THE EVOLVING PROCESS – COLLECTIVE NEGOTIATIONS IN PUBLIC EMPLOYMENT 316-328 (Labor Relations Press 1985).

93. The Post-Standard Bureau, *$7,000 Bill for Trips*, SYRACUSE POST-STANDARD, Mar. 24, 1971, at 15; *Wilson of Britain to Speak at Labor Symposium Here*, N.Y. TIMES, Apr. 26, 1971, at 31.

94. Damon Stetson, *'Legislated' Arbitration Urged in Public Disputes*, N.Y. TIMES, May 5, 1971, at 51.

95. Interview with Myrna Lefkowitz (July 24, 2017), *supra* note 9.

of the New York City Office of Collective Bargaining.[96] Jerry chaired a Public Employment Relations Services Review and Evaluation Team that studied the functioning of the Massachusetts Labor Relations Commission and the Massachusetts Board of Conciliation and Arbitration.[97] He also participated in many conferences sponsored by groups such as the Association of Labor Relations Agencies, and the Society of Professionals in Dispute Resolution.[98]

At the first annual conference of the National Center for the Study of Collective Bargaining in Higher Education and the Professions in April 1973, Jerry presented a paper examining the varying approaches by different jurisdictions concerning bargaining unit composition in higher education.[99] The paper began with an emphasis on the distinction between a bargaining unit and a union selected to represent that unit, and it analogized bargaining units to electoral districts in our representative democracy.[100] He made another presentation concerning the scope of collective bargaining in higher education at a 1979 national collective bargaining conference.[101]

The most interesting and little-known of Jerry's activities during his tenure as Deputy Chairperson was his two-week vacation trip to Russia in 1977 to gather information and to report on the status of Jewish dissidents.[102] The cover for the journey was research into Russian labor law for an article in a scholarly journal.[103] The trip is another example of Jerry's courage and willingness to take calculated risks.

On May 1, 1977, Jerry and his wife Myrna landed in Moscow on their planned mission to meet with Jewish dissidents and to attend the trial

96. *See* Arvid Anderson, *The Office of Collective Bargaining: A New Concept*, 14 N.Y.L.F. 270 (1968) (showing the New York City Office of Collective Bargaining was created as a mini-PERB pursuant to the Taylor Law, CIV. SERV. LAW 212).

97. PUB. EMP'T REL. SERV. REV. AND EVALUATION TEAM, REPORT AND RECOMMENDATIONS TO THE MASSACHUSETTS LABOR RELATIONS COMMISSION AND MASSACHUSETTS BOARD OF CONCILIATION AND ARBITRATION (1980).

98. WorldCat Identities: Lefkowitz, Jerome, WORLDCAT, http://worldcat.org/identities/lccn-n88021889/ (last visited Oct. 12, 2018).

99. Jerome Lefkowitz, *Certification of Units in Higher Education*, Proceedings, First Annual Conference, NAT'L CTR. FOR THE STUD. OF COLLECTIVE BARGAINING IN HIGHER EDUC. 81-88 (April 1973). available at http://thekeep.eiu.edu/jcba/pre-2006/1/article.pdf.

100. *Id.*

101. Jerome Lefkowitz, *Scope of Bargaining: Implications for Traditional Faculty Governance II*, LANDMARKS IN COLLECTIVE BARGAINING IN HIGHER EDUC. 57-63 Proceedings, Seventh Annual Conference, NAT'L CTR. FOR THE STUD. OF COLLECTIVE BARGAINING IN HIGHER EDUC available at http://thekeep.eiu.edu/jcba/pre-2006/7/article.pdf (1979).

102. Interview with Myrna Lefkowitz (July 24, 2017)..

103. JERRY & MYRNA LEFKOWITZ, REPORT ON TRIP TO RUSSIA, at 4 (undated).

of Josif Begun, a mathematician arrested after attempting to emigrate.[104] During their trip, they met with dissidents in Moscow, Kiev, Odessa and Leningrad.[105] They also met with a Russian prosecutor in an unsuccessful attempt to get permission to attend the Begun trial.[106] On the day of the scheduled trial, they went to the courthouse and learned that it had been adjourned until June based on a claim that Begun's prison was under quarantine.[107] Upon their return to the United States, Jerry and Myrna prepared a detailed written report concerning their trip, and Jerry gave a presentation before the Albany Chamber of Commerce.[108]

V. FOLLOWING AND APPLYING THE TAYLOR LAW FROM THE OUTSIDE

In 1986, Jerry resigned as Deputy Chairperson, and became a PERB Board Member with CSEA's support.[109] After exploring other options, including becoming an arbitrator, a full-time law professor, and joining a prominent New York City management law firm, Jerry commenced a new professional journey by accepting a position as CSEA's Deputy Counsel in 1987.[110] He cherished the irony of being hired by an organization that had sought his termination twenty years before.[111] At the time of his CSEA appointment, Jerry explained his strong interest in labor law as opposed to other legal areas: "When you deal with corporate law, it tends to be amorphous. When you're dealing with labor law from any side, you're dealing with real problems and you can see the people." [112]

The move to CSEA was mistakenly viewed by some, who were ignorant of Jerry's personal views and intellectual independence, as evidence of a lack of neutrality.[113] It is hard, however, to correctly label someone as "pro-union" when he was an opponent of the right to strike by public employees,[114] a registered Republican, an avid reader of the journal Commentary, and an opponent of publicly-funded universal health care and other social programs. Nevertheless, blessed with a long

104. *Soviet is Said to Arrest Jew Seized at Embassy*, N.Y. TIMES, Mar. 11, 1977, at A5.

105. LEFKOWITZ, *supra* note 103 at 4, 6, 7.

106. *Id.* at 4.

107. *Id.* at 5.

108. JEROME LEFKOWITZ, *A "PARASITE" IN RUSSIA* (1977).

109. Lefkowitz Interview, July 24, 2001, *supra* note 21, at 17; DONOVAN, *supra* note 30, at 157.

110. DONOVAN, *supra* note 30, at 157.

111. *Id.*

112. Kathleen Daly, *PERB lawyer joins CSEA*, THE PUB. SECTOR, (July 13, 1987), at 8, https://library.albany.edu/speccoll/findaids/eresources/csea/The-Public-Sector_1987-07-13.pdf.

113. DONOVAN, *supra* note 30, at 237.

114. Jerome Lefkowitz, *Civil Servants and the Strike*, GOOD GOV. PUB. EMP. UNIONS–PROS AND CONS, Spring 1968, *passim*.

memory, Jerry understood the historical importance and value of collective bargaining and job security in governmental labor relations. His views concerning public sector strikes were premised, in part, on a belief that political action by government employee unions was an adequate substitute for the traditional economic weapon of a strike,[115] a perspective that was influenced by the early study by Harry H. Wellington and Ralph K. Winter, Jr.[116]

When he joined CSEA, Jerry was very familiar with its history, and knew it to be a moderate, lobbying-oriented association rather than an organization with a long tradition of trade union militancy.[117] During his subsequent two decades with CSEA, Jerry functioned as a litigator before PERB, in arbitration, and in the courts.[118] He approached litigation with practicality and fair-mindedness.

Among his many litigated successes was persuading the New York Court of Appeals that the Triborough Amendment,[119] extended contractual obligations protected by the Contract Clause of the United States Constitution.[120] He also successfully argued before PERB that a school district was mandated to negotiate its decision to subject a bus driver to compulsory urinalysis testing for drugs,[121] and that a state agency had a duty to negotiate a dress code concerning the wearing of blue denim jeans to work.[122] The citation of these Taylor Law cases is not to suggest he supported drug use or wore blue jeans. Instead, they reflect his professionalism as an attorney and his continued faith in public sector collective bargaining under the Taylor Law.

Following the 1994 amendment to the Taylor Law creating an injunctive relief procedure,[123] Jerry played an important supervisory role in CSEA's application to PERB that led to the grant of an injunction related to an improper practice charge.[124] The charge and injunction was against the City of Troy after its city manager unilaterally suspended

115. *See* Lefkowitz Interview, April 13, 2005, *supra* note 72, at 13.

116. *See* HARRY H. WELLINGTON & RALPH K. WINTER, JR., THE UNION AND THE CITIES: STUDIES OF UNIONISM IN GOV. 25-26 (Brookings Institution Press, 1971).

117. *See* Lefkowitz Interview, July 24, 2001, *supra* note 21, at 12.

118. Daly, *supra* note 112, at 8.

119. N.Y. CIV. SERV. LAW § 209-a(1)(e).

120. *See* Ass'n of Surrogates & Sup. Ct. Reporters v. State, 79 N.Y.2d 39, 53 (1992).

121. Arlington Cent. Sch. District, 25 N.Y. PERB ¶ 3001, No. U-10496 (1992).

122. State of New York (Dept. of Tax & Finance), 30 N.Y. PERB ¶ 3028, at 3068 (1997).

123. 1994 Laws of New York, Ch. 695 N.Y. CIV. SERV. LAW § 209-a(4) (McKinney 1994).

124. *See* City of Troy, 29 N.Y. PERB ¶ 3004 (1996). *See also*, New York State Pub. Empl. Rel. Bd. v. City of Troy, 164 Misc. 2d 9 (Alb. Co., 1995), *mot. to withdraw app granted*, 28 N.Y. PERB ¶ 7006 (3d Dept. 1995) (court litigation commenced by N.Y. PERB seeking injunctive relief against the City of Troy).

membership dues and agency fee deductions.[125] His keen interest in the injunctive relief application against the City of Troy related back to PERB's failed effort to enjoin Governor Rockefeller's negotiations team at the dawn of the Taylor Law.[126]

In addition to litigation, much of Jerry's work at CSEA involved analyzing PERB decisions, and assisting field staff in constructing improper charge pleadings and arguments to challenge improperly motivated actions and unilateral changes by public employers.[127] He had little involvement in developing union bargaining proposals or policies but was an active participant in the early success of the expedited arbitration procedure negotiated with the State of New York. He mentored scores of attorneys and law students and became a beloved figure among CSEA staff for his knowledge and patience. He also remained active in the American Bar Association Labor and Employment Section and the New York State Bar Association Labor and Employment Section, which he chaired from 1991-92.[128]

VI. RETURNING AS CHAIRPERSON IN 2007 TO REDIRECT THE AGENCY

As an outside observer of PERB and knowledgeable practitioner, Jerry became disheartened at the turn of the century by what he viewed as the politicization of the agency, demonstrated by a "strong pro-management inclination" in Board decisions.[129] He was also very critical of the quality of those decisions, which he described as frequently not "mak[ing] sense" because the PERB Board jumped "to conclusions on facts without reading the record very carefully or reading their past decisions."[130] He believed that the poor quality and unpredictability of

125. City of Troy, *supra* note 124.

126. *See* Lefkowitz Interview July 24, 2001, *supra* note 21, at 1-2.

127. *See id.* at 21, 24.

128. *See* N.Y. STATE BAR ASS'N, LEFKOWITZ ON PUB. SECTOR LABOR AND EMP'T LAW, *supra* note 84, at iii-iv.

129. Lefkowitz Interview, April 13, 2005, *supra* note 72, 24-25. During a plenary discussion at a conference celebration the 50th anniversary of the Taylor Law, former PERB Chairperson Michael Cuevas admitted that the Pataki Administration sought a "minute-by-minute, blow-by-blow description" of what was taking place during the mediation of the 2005 strike by the Transport Workers Union, Local 100. N.Y. STATE BAR ASS'N, THE TAYLOR LAW AT 50: PUBLIC SECTOR LABOR RELATIONS IN A SHIFTING LANDSCAPE (John F. Wirenius, ed. 2019), p. 532. Ultimately, PERB's Director of Conciliation Richard A. Curreri successfully ignored that political pressure and lead the mediation effort that helped to end the strike. Sewell Chan and Steven Greenhouse, *From Back-Channel Contacts, Blueprint for a Deal,* NY Times, Dec. 23, 2005.

130. *Id.* at 25.

agency decisions went "beyond ideology."[131]

In his view, the credibility of the agency had been undermined, which he found personally frustrating.[132] His criticisms and frustration were manifestations of his experience and intellectual analysis, rather than motivated by an ideological predisposition. He believed strongly that the agency's integrity over the years was central to the Taylor Law's success in encouraging the amicable resolution of public sector labor disputes.

In 2007, after two decades as an advocate, Jerry readily accepted Governor Spitzer's nomination as PERB Chairperson and he was unanimously confirmed by the New York State Senate along with Board Member Robert Hite. Arbitrator Sheila Cole was nominated and confirmed as a third PERB Board member in December 2008.[133] Jerry relished the opportunity to lead the agency he helped found to administer a law he helped draft.

Jerry's appointment provided him with the opportunity, at age seventy-six, to reemphasize the agency's commitment to scholarship and practicality, while also reasserting the agency's neutrality. In taking the position, he was keenly aware of the adverse impact that austerity budgets had had on agency functioning, including its statutorily mandated research mission.

Upon his return, Jerry acted to improve the *esprit de corps* among agency staff, held meetings with representatives of public employers and unions, advocated for an increase in the agency's budget, and began the process of organizing a conference celebrating the 40th-anniversary of the Taylor Law. In an era of demonization of public employees, Jerry sought to emulate Chairperson Helsby by supporting and encouraging PERB staff to engage in scholarly and organizational work on a regional and national level. But most importantly, Jerry worked to have the agency's processes and decisions respected by the parties despite fiscal restraints that had adverse administrative consequences.

Shortly after his appointment, the PERB Board scheduled its first oral argument in many years to explore specifically identified issues concerning an Administrative Law Judge's decision finding that a Town violated its duty to negotiate when it unilaterally prohibited the taping of

131. *Id.*

132. *Id.* at 26-27.

133. Monte Klein, *Profiles of Board Members, Sheila Cole*, N.Y. PERB (last modified Apr. 28, 2018), http://www.perb.ny.gov/wp-content/uploads/2018/04/sheila-cole.pdf. Despite New York's diversity, Member Cole was only the third female PERB Board member in the agency's 50-year history. During the same period, the Board has had only two African-American members, and one Latino member.

medical examinations used in determining eligibility for benefits under state law.[134] During the argument, the union's counsel persuasively argued that the PERB Board could not reach an issue it had identified in the oral argument notice because the Town had not raised the issue in its exceptions and therefore, the issue was waived under the agency's Rules of Procedure. The oral argument and resultant decision were clear signs that the new PERB Board would be actively engaged in the issues but, at the same time, understood the limits of its authority.

In *Chenango Forks Central School District (Chenango Forks)*,[135] the new PERB Board faced a major doctrinal issue that had become increasingly confusing due to inconsistencies in decisions over the prior few years: the standard for determining an enforceable past practice.[136] The confusion was due to the fact that the prior Board's decisions had utilized varying language that suggested different meaning, while at the same time citing *County of Nassau*.[137] In that 1991 decision, the PERB Board had concluded that a practice is binding when it is "unequivocal and [is] continued uninterrupted for a period of time sufficient under the circumstances to create a reasonable expectation among the affected unit employees that the [practice] would continue."[138]

In *Chenango Forks*, the PERB Board reiterated the *County of Nassau* standard and stated "that the clear meaning of our decision in *County of Nassau* is that the expectation of the continuation of the practice is something that may be presumed from its duration with consideration of the specific circumstances under which the practice has existed."[139] The subsequent Board decision finding that the school district had unilaterally ended an enforceable past practice under that standard was upheld by the New York Court of Appeals in 2013.[140]

Another doctrinal issue that had become muddled over time was the standard for determining bargaining unit work in the context of a charge alleging the unilateral transfer of work under the Taylor Law. To help clarify that issue, the PERB Board in *Manhasset Union Free School District (Manhasset)*,[141] issued a notice soliciting amicus curiae briefs concerning two specific doctrinal issues. The notice generated five briefs

134. Town of Orangetown, 40 N.Y. PERB ¶ 3008 (2007).
135. 40 N.Y. PERB ¶ 3012 (2007).
136. *Id.* at 5-6.
137. 24 N. Y. PERB ¶ 3029 (1991).
138. *Id.* at 7.
139. *Id.* at 8.
140. *See* Chenango Forks Cent. Sch. Dist. v. N.Y. Pub. Emp't Relations Bd., 21 N.Y.3d 255 (2013).
141. 41 N.Y. PERB ¶ 3005(2008).

by amici, which were responded to by the parties.[142]

Following a careful summary of applicable precedent, the Board determined in *Manhasset* that a past practice analysis was appropriate for determining exclusive unit work because it "is consistent with the dynamics of the bilateral employer-employee organization relationship and the policies underlying the Act" and because it "permits flexibility in the provision of governmental services without undermining the bargaining position of the employee organization or eliminating the respective duties of the parties to bargain under the Act."[143] In its decision, the PERB Board also addressed an issue that had arisen from judicial decisions following Jerry's original departure from the agency, but had not been finally determined by the New York Court of Appeals: the necessity of notices of claim for charges against school districts.[144] In concluding that such notices were not required, the Board relied upon the language of the 1969 Taylor Law amendments creating a "symmetrical and balanced improper practice procedure equally applicable to public employers and employee organizations especially with respect to their conduct during negotiations."[145]

In *County of Tioga*,[146] the PERB Board ruled that the wearing of a ribbon by county employees to express a shared personal dislike of a supervisor was unprotected under the Taylor Law because the record revealed that the ribbon wearing was unrelated to forming, joining or participating in a union.[147] The legal premise for the *County of Tioga* decision was the narrow construction of the Taylor Law affirmed by the New York Court of Appeals in *Rosen v. New York Public Employment Relations Board (Rosen)*.[148] In *Rosen*, the court found that concerted activity for mutual aid and protection was unprotected under section 202 of the Taylor Law.[149] The court reaffirmed that construction in *New York City Transit Authority v. New York Public Employment Relations Board*,[150] shortly before Jerry became PERB Chairperson.[151] Despite the

142. *Id.* at 3.
143. *Id.* at 35.
144. *Id.* at 16.
145. *Id.* at 17.
146. 44 NY PERB ¶ 3016 (2011).
147. *Id.* at 7.
148. 526 N.E.2d 25 (N.Y. 1988).
149. *Id.* at 29.
150. 864 N.E.2d 56 (N.Y. 2007) (holding that public employees lack a right of representation during an interrogation similar to the right found based on mutual aid and protection language in the National Labor Relations Act in NLRB v. J. Weingarten, Inc., 420 U.S. 251 (1975)).
151. An amicus brief filed by CSEA in N.Y.C. Transit Auth. v. N.Y. Pub. Emp't Relations Bd. was co-authored by Jerry, who also attended the oral argument. *See* N.Y.C. Transit Auth. v. N.Y.

rulings by New York's highest court, the New York State Legislature has never amended the scope of Taylor Law protections to include public employee activities limited to mutual aid and protection.[152]

During his tenure as PERB Chairperson, the Board clarified other issues relating to protected activities under the Taylor Law in improper practice cases alleging discrimination and/or retaliation against public employees. The importance of protections against anti-union discrimination in maintaining harmonious labor relations and avoiding strikes under the Taylor Law was described by Jerry in a 1969 article:

> Teachers and other public employees have organized or are in the process of organizing. They insist on a voice in the affairs which affect them and cannot be denied. Unless the Law affords orderly procedures through which this insistence can be given reasonable opportunity for orderly expression, it will burst forth into unreasonable and disorderly expression.[153]

In *County of Tioga*, the Board emphasized that "[e]mployee statements and actions that are organized, prompted or encouraged by an employee organization will, in general, be found to be protected concerted activity" including "statements and activities by a unit employee as part of an employee organizational activity, relates to an employee organization policy, involves employee organizational representation or stems from a dispute emanating from a collectively negotiated agreement."[154]

In *State of New York (Division of Parole)*[155] the PERB Board further explained that:

> Mere inaccurate statements by an employee are protected under the Act, regardless of whether an employer or its representatives are disturbed by the inaccuracies unless the employer establishes that the employee's comments

Pub. Emp't Relations Bd., 864 N.Y.2d 56 (N.Y. 2007).

152. In the aftermath of the decision in N.Y.C. Transit Auth. v. N.Y. Public Emp't Relations Bd, the Legislature amended the Taylor Law to make it an improper practice for an employer to deny union representation, upon request, during disciplinary questioning in certain circumstances. 2007 Laws of New York, Ch. 244. N.Y. CIV. SERV. LAW § 209-a.1(g). (McKinney 2007).

153. Jerome Lefkowitz, *The Taylor Law, Discrimination and Nontenured Teachers*, 20 LAB. L. J. 575, 580 (1969).

154. *See supra* note 148.

155. 41 NY PERB ¶ 3033 (2008).

> were deliberately intended to falsify or were maliciously aimed at injuring the employer. Employee grievances and contract claims are also protected under the Act unless an employer demonstrates that they are undeniably frivolous. Finally, an otherwise protected activity may be found to be unprotected under the Act when, under the totality of the circumstances, the conduct is found to be impulsive, overzealous, confrontational or disruptive.[156]

In another decision, the PERB Board modified the evidentiary burdens in union animus cases based on circumstantial evidence, a decision which was affirmed by reviewing courts.[157] In its decision, the Board emphasized that the burden of establishing an inference of improper motivation based on circumstantial evidence is subject to a relatively "low initial evidentiary threshold."[158] Any demonstrated inference of improper motivation remains subject to refutation through evidence presented by the employer of a non-discriminatory reason for its conduct, with the charging party having the ultimate burden of demonstrating the requisite causation.[159]

There were many challenging cases faced by the PERB Board during Jerry's tenure as Chairperson which required careful consideration of statutes and legislative history external to the Taylor Law. His analytical approach focused on discerning legislative intent based on the terms and policies of the Taylor Law, the external statutory provisions, and other relevant interpretative tools.

The most notable of the cases was a challenge made by charter schools to the mandate of the New York Charter Schools Act of 1998[160] that charter schools and charter school employees be covered by the Taylor Law. Relying on the clear and unambiguous statutory language, the PERB Board found that charter schools were subject to the Taylor Law, as modified.[161] Ultimately, the Board's legal conclusion was

156. *Id.* at 14.

157. United Fed'n of Teachers, Local 2, AFT, AFL-CIO and Bd. of Educ. of the City Sch. Dist. of the City of New York (Jenkins), 41 N.Y. PERB ¶ 3007 (2008), *aff'd sub nom*; Jenkins v. N.Y. Pub. Emp. Relations Bd., 41 N.Y. PERB ¶ 7007 (Sup. Ct. N.Y. 2008), *aff'd*, 67 A.D.3d 567 (N.Y. App. Div. 2009).

158. Jenkins, 41 N.Y. PERB ¶ 3007, at 5.

159. *Id.* at 5-6.

160. N.Y. EDUC. LAW § 2850 *et seq.* (2015).

161. Brooklyn Excelsior Charter Sch. and Buffalo United Charter Sch., 44 N.Y. PERB ¶ 3001 (2011), *petition granted in part and denied in part*; Buffalo United Charter Sch. v. New York Pub. Empl. Relations Bd., 37 Misc. 3d 294 (Erie Co. 2012), *appeal stayed and decision reserved*, 107

overturned when the NLRB concluded that New York charter schools are not political subdivisions and therefore, are covered under the National Labor Relations Act.[162]

The NLRB decision had the effect of creating an historic anomaly in New York. The decision exempted charter school employees from the Taylor Law's strike prohibitions although those employees are defined as public employees under state law and work for an "independent and autonomous public school."[163] Time will tell whether New York charter school employees utilize their right to strike under federal labor law, particularly after the 2018-19 teacher strike wave in other parts of the country.[164]

Some of the other cases determined by the PERB Board during his tenure as Chairperson raised important legal issues, such as the negotiability of police disciplinary procedures and General Municipal Law sections 207-a and 207-c procedures, which required interpretation of appellate court decisions and statutes other than the Taylor Law.

Jerry faced judicial reversal with equanimity and was very reluctant to revisit a statutory interpretation question rendered by the New York Court of Appeals even when he felt that the interpretation constituted judicial activism. He was a strong opponent of such activism whether practiced by politically conservative or liberal judges but respected the finality of the judicial process.

Throughout his tenure as PERB Chairperson Jerry remained fiercely independent and willing to issue decisions that he understood could ruffle feathers among the powerful and partisans.[165] At the same time, he was always a pragmatist. For example, he used reason and agency history to

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A.D.3d 1437 (4th Dept. 2013), *lv. denied,* 22 N.Y.3d 1082 (2014).

162. Hyde Leadership Charter School-Brooklyn , 364 NLRB No. 88 (2016). In 2019, however, the NLRB issued an order and an invitation for amicus briefs on whether it should modify or overturn its precedent with respect to jurisdiction over charter schools. Kipp Academy Charter School, NLRB Case No. 02-RD-191760 2019 WL 656300 (Feb. 4, 2019).

163. N.Y. EDUC. LAW § 2853.1(c) (2015).

164. Steven Greenhouse, *Making Teachers' Strikes Illegal Won't Stop Them*, N.Y. TIMES (May 9, 2018) https://www.nytimes.com/2018/05/09/opinion/teacher-strikes-illegal-arizona-carolina.html; Valarie Strauss, *First charter school teacher strike suspended after union wins concessions in Chicago,* WASH. POST (Dec. 10, 2018) https://www.washingtonpost.com/education/2018/12/11/first-charter-school-teacher-strike-suspended-after-union-wins-concessions-chicago/?utm_term=.deb241c79727; Graham Vyse, *Not Just L.A.: Where Teachers Might Strike in 2019,* GOVERNING, (Jan. 17, 2019) http://www.governing.com/topics/education/gov-lausd-teacher-strike-2019.html.

165. *See* State of New York, 47 N.Y. PERB ¶ 3009 (2014), conf. sub nom, State v. New York Pub. Empl. Rel. Bd, 137 A.D.3d 1467 (3d Dept, 2016) (denying a request from the Governor's Office of Employee Relations to withdraw from a stipulation of settlement with a union concerning a representation matter).

partially overcome objections from a Deputy Secretary to the Governor about PERB Board members and staff participating in conferences with labor relations agency officials and staff from other jurisdictions. From his extensive experience, Jerry understood the vital importance of labor relations agencies sharing information and knowledge with respect to common subjects and issues, even when it might require travel to other states.

His deep knowledge of the Taylor Law was largely untapped by state policymakers concerning statutory amendments during his tenure as Chairperson. The lack of consultation was reflective of the changed political environment in the development of New York public policy rather than a specific disrespect of him.

An instance when his statutory drafting and administrative skills were utilized was with respect to the 2010 legislation expanding PERB's jurisdiction to administer New York's private sector collective bargaining law.[166] His stature and leadership played an important part in assuaging agency staff concerns about becoming responsible for administering a labor relations statute for private sector employment in New York. Jerry was also consulted by the New York State Department of Labor when it prepared a report finding that the grant of collective bargaining rights to domestic workers was feasible.[167]

Lastly, it is important to note that Jerry's seriousness of purpose did not render him immune from enjoying music as well as mischievous humor. In determining an improper practice case involving the mundane issue of whether listening to the radio at work can be a mandatory subject of bargaining, the PERB Board stated that "our decision should not be construed as indicating any obligation under the Act to negotiate over employee musical preferences whether they are Chopin or Schoenberg,

166. 2010 Laws of New York Ch. 56, Pt. O, sec. 1, 2 N.Y. CIV. SERV. LAW §§ 205(1)- 205(4)(a) (McKinney 2010).

167. NEW YORK STATE DEPARTMENT OF LABOR, FEASIBILITY OF DOMESTIC WORKER COLLECTIVE BARGAINING (2010), https://labor.ny.gov/legal/laws/pdf/domestic-workers/domestic-workers-feasibility-study.pdf. Despite the findings in the 2010 report, domestic workers in New York remain excluded from the protections of the New York State Employment Relations Law. Labor Law §§700 *et seq.* Labor Law § 701(3)(a) excludes from the definition of "employee" individuals who are "in the domestic service of and directly employed, controlled and paid by any person in his home, any individual whose primary responsibility is the care of a minor child or children and/or someone who lives in the home of a person for the purpose of serving as a companion to a sick, convalescing or elderly person." N.Y. Labor Law § 701(3)(a) (McKinney 2015). *See*, William A. Herbert, *Make N.Y. a labor leader again: It's time for Albany to usher in 21st-century employment protections*, Daily News (Feb. 6, 2019), https://www.nydailynews.com/opinion/ny-oped-make-ny-a-labor-leader-again-20190123-story.html.

Monk or Mingus, Ella or Hendrix."[168]

VII. CONCLUSION

Jerry's long career provides a welcome antidotal model at a time when ideological partisanship and *ad hominem* attacks on adversaries, friends, and strangers have become normative. His decency, intellectual independence, and pragmatism are traits that substantially helped the Taylor Law and PERB succeed over the past half-century. His professional accomplishments led to him being honored in 2011 by the New York State Bar Association with the Excellence in Public Service Award and by the American Bar Association Section of Labor and Employment Law with the Arvid Anderson Public Sector Award. At the end of his career, Jerry had the satisfaction of observing the many improvements resulting from the grant of collective bargaining rights by the Taylor Law and the statute's improper practice and impasse procedures, which created a legal framework for more harmonious relations in New York's public sector labor relations.

On top of his many professional accomplishments, Jerry was always well-regarded for his respectful and kind treatment of those around him. He was considerate to professionals and non-professionals alike. The only notable exception to that trait was his tenacious competitive spirit on the tennis court and while participating in other sports. His tenacity in those arenas was perhaps motivated by a desire to prove Leo Durocher wrong: nice guys can finish first.

168. State of New York (Dept. of Transp.), 46 N.Y. PERB ¶ 3029 (2013).