

NATIONAL CENTER

**for the Study of Collective Bargaining in Higher
Education and the Professions**

HUNTER

The City University of New York

Via Email

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Proposed Rule I.D. No. PRB-01-22-00006-P

**Rules and Regulations to Effectuate the Purposes of the State Employment Relations Act
(Labor Law Art. 20)**

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I. Introduction

The National Center for the Study of Collective Bargaining in Higher Education and the Professions, Hunter College, City University of New York (hereinafter “National Center”)

submits these comments in response to the notice of proposed rulemaking published in the State Register at Public Employment Relations Board to amend current procedural rules¹ to effectuate the State Employment Relations Act (SERA),² Labor Law §§700-718 as amended by the 2019 Farm Laborers Fair Labor Practices Act (FLFLPA). 2019 N.Y. Laws, Ch. 105. In 2010, PERB's jurisdiction had been expanded, effective July 22, 2010, beyond its historic role of administering the Taylor Law to handling private sector labor issues under SERA. 2010 N.Y. Laws, Ch. 45.

The National Center is a labor-management research center with a primary focus on collective bargaining and unionization in higher education and the professions. As part of its mission, however, the National Center also conducts research and reports on developments at federal and state labor relations agencies. In November 2019, the National Center filed comments in response to proposed rulemaking by the National Labor Relations Board (NLRB).

The National Center was formed by the City University of New York in 1972 following passage of the Public Employees' Fair Employment Act (commonly referred to as the Taylor Law) in 1967, Civ. Serv. Law §§200, *et seq.*, the 1968 amendment to expand the State Labor Relations Act (N.Y. Laws of 1968, Ch. 890) to cover private non-profit higher education institutions, and the 1970 NLRB decision in *Cornell University*, 183 NLRB 329 (1970) to begin asserting jurisdiction over private non-profit institutions of higher education. The NLRB's decision resulted in the preemption of New York's extension of collective bargaining rights to college and university employees under SERA.³

II. The Historic Relationship Between PERB and the National Center

In submitting these comments, it is important to underscore the historical professional relationship between PERB and the National Center, dating back to the latter's creation.

PERB Chairpersons Robert Helsby and Harold Newman were early members of the National Center's Board of Advisors. Future PERB Chairpersons Jerome Lefkowitz and Pauline Kinsella, and current PERB Chairperson John Wirenius, have presented papers and participated in panel discussions at National Center conferences and programs. Prior to becoming the National Center's Executive Director in 2013, William A. Herbert was PERB's Deputy Chairperson.

In 2017 and 2018, the National Center was active in events celebrating the 50th anniversary of the Taylor Law and PERB. In September 2017, the National Center held a program "The Taylor

¹ 12 NYCRR §§250.1-258.18. In the body of these comments, the applicable rule section, rather than the full citation, will be referenced.

² The statute's original name was the New York State Labor Relations Act which was administered by the State Labor Relations Board (SLRB). Laws of 1937, ch. 443. In 1991, the statute was retitled the State Employment Relations Act and the agency renamed by the Legislature. 1991 N.Y. Laws, Ch. 166. For purposes of clarity, the acronym SERA will be used throughout these comments when referencing the statute, its provisions, and precedent. The comments are dedicated to the memory of Robert Helsby, Harold Newman, and Jerome Lefkowitz, three early PERB leaders. They are also dedicated to the memory of SLRB agency heads who administered SERA for decades, leaving a large body of precedent that has become more relevant again today.

³ William A. Herbert. 2017. "The History Books Tell It? Collective Bargaining in Higher Education in the 1940s." *Journal of Collective Bargaining in the Academy* 9(3): 16-18.

Law in Perspective at 50” at the Roosevelt House Institute of Public Policy at Hunter College, which included welcoming remarks by PERB Chairperson Wirenius. National Center Executive Director Herbert was a member of the Taylor Law 50th Anniversary Committee, which organized a statewide conference, “The Taylor Law at 50: Bright Spots and Pressure Points,” held in Albany in May 2018. He also participated in conference panels and wrote an article celebrating the career and legacy of PERB Chairperson Jerome Lefkowitz.⁴

Following the 2018 conference, National Center Executive Director Herbert co-authored a law review article with PERB Chairperson Wirenius and current Federal Mediation and Conciliation Services General Counsel Sarah W. Cudahy on the probable impact of the Supreme Court’s decision in *Janus v. AFSCME, Council 31*.⁵

In January 2020, National Center Executive Director Herbert organized and moderated a panel discussion titled Farmworker Collective Bargaining: New Rights and Responsibilities under New York Labor Law at the New York State Bar Association Labor and Employment Section’s annual conference. Panelists included PERB Chairperson Wirenius and New York Farm Bureau General Counsel Elizabeth C. Dribusch. At the time, it was not contemplated nor reasonably foreseen that within less than two months a deadly catastrophic worldwide pandemic would disrupt our world, our lives, and our health.

While the National Center applauds the agency’s preliminary effort to update its SERA rules following the FLFLPA amendments, it is concerned that the proposed rules will not adequately effectuate the fundamental labor rights granted by the New York State Constitution, SERA, and the FLFLPA amendments. The 2019 amendments resulted in the largest expansion of private sector collective bargaining rights in New York in over a half-century.

In response to the expansion of its jurisdiction, we encourage PERB to adopt a new administrative structure for processing and determining private sector representation cases and unfair practice charges under SERA and the FLFLPA amendments. We also encourage PERB to advocate for additional state budgetary allocations from the State Division of the Budget to ensure that SERA and the FLFLPA amendments are administered effectively and efficiently. In addition, we urge the agency to modify the proposed changes to SERA rules to ensure the expedited resolution of private sector labor disputes, including those between farm laborers and agricultural employers.

In support of our recommendations, we present legal and administrative history, SLRB precedent and practices, PERB precedent and practices, and data relevant to determining the necessary means for effectuating the constitutional and statutory labor rights granted to private sector employees, including farm laborers, under SERA.

⁴ See, William A. Herbert, *Jerome Lefkowitz: A Pragmatic Intellect and Major Figure in Taylor Law History*, 36 Hofstra Lab. & Emp. L.J. 29 (2018).

⁵ 138 S. Ct. 2448 (2018); see, Sarah W. Cudahy, William A. Herbert, and John F. Wirenius. *Total Eclipse of the Court? Janus v. AFSCME, Council 31 in Historical, Legal, and Public Policy Contexts*, 36 Hofstra Lab. & Emp. L.J. 55 (2018).

III. Proposed Rules Must Effectuate Constitutional and Statutory Rights

A. PERB's Rules Must Satisfy State Constitutional Requirements

At the outset, it is important to underscore the constitutional source for private sector collective bargaining rights in New York. In 1938, the New York State Constitution was amended to create a fundamental constitutional right for workers in New York to organize and bargain collectively: “Employees shall have the right to organize and to bargain collectively through representatives of their own choosing.” New York Constitution, Art. 1, §17.⁶

As Dr. Martin Luther King, Jr. stated over sixty years ago, the mere declaration of labor rights does not guarantee their delivery.⁷ It took over seven decades before farmworkers were declared to have a state constitutional right and statutory rights to organize and bargaining collectively in New York. It is incumbent upon PERB to adopt procedural rules and practices for SERA and the FLFLPA amendments that deliver, and do not undermine, those fundamental rights.

B. PERB Must Establish a New Separate Procedural Structure for SERA Cases

In 2010, when PERB became responsible for administering SERA, the agency made an administrative choice to start processing private sector cases within its pre-existing structure for handling public sector cases.⁸ The policy was premised on the expected small number of SERA cases and staff shortages at PERB. It was adopted despite explicit staff concerns about having to start “administering a labor relations statute for private sector employment in New York.”⁹

At the time of PERB's jurisdictional expansion, SERA's applicability had dissipated to a very small number of private sector employees and employers because of the NLRB's expansion of its jurisdictional standards over the decades.¹⁰ Since PERB became responsible for SERA, it has handled only a small number of private sector cases, compared to the almost 40,000 SERA cases filed between 1937 and 1962.¹¹ The relatively few reported PERB decisions under SERA since 2010 shows that the agency remains largely inexperienced in determining private sector issues.

With enactment of the FLFLPA amendments, however, things have changed. The change in circumstances requires PERB to end its original decision to administer SERA within the agency's pre-existing public sector structure and decide to adopt a new alternative distinct

⁶ See, *Hernandez v. State*, 173 A.D.3d 105, 113-115 (3d Dept., 2019).

⁷ Martin Luther King Jr. 1961. “Address Delivered at the Fourth Constitutional Convention of the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO)” at 284.
http://umdlabor.weebly.com/uploads/2/9/3/9/29397087/speech_transcript.pdf.

⁸ See, *Monsignor Farrell High School*, 45 PERB ¶3405 (2012).

⁹ Herbert, *Jerome Lefkowitz: A Pragmatic Intellect*, 36 Hofstra Lab. & Emp. L.J at 53.

¹⁰ See, New York State Department of Labor. 2010. “Feasibility of Domestic Worker Collective Bargaining.” <https://www.ilo.org/dyn/migpractice/docs/147/Feasibility.pdf>, 11. (Hereinafter referred to as “2010 NYSDOL Feasibility Report”).

¹¹ Kurt L. Hanslowe. 1964. *Procedures and Policies of the New York State Labor Relations Board*. Ithaca, NY: Cornell University, Appendix A., 154-59.

internal structure for cases involving farm laborers, agricultural employers, and other private sector employees and employers.

Under the FLFLPA amendments, SERA's protections now cover 56,000 farm laborers working on approximately 9,000 farms in New York State.¹² This large increase in workers covered under SERA will result in many new demands on the agency and its staff. SERA's coverage will likely increase even further following New York's legalization of recreational marijuana that might result in agricultural employers hiring more farm laborers to work on expanded crop operations.

The demographics, geography, and practicalities of agricultural labor in New York warrant PERB to adopt a separate internal agency structure for the handling of private sector labor disputes. A large percentage of farm laborers are foreign born with different immigration statuses, and a majority unable to, or limited in, speaking English.¹³ A 2017 study reported that 97% of farm laborers working on daily farms are housed at the farm.¹⁴ A new PERB process for private sector case handling will help to overcome these practical barriers as well as legal ignorance, fear of government agencies, and the unavailability of counsel.

Despite these new private sector challenges, PERB's proposed rules would extend practices and procedures developed under its public sector jurisdiction to farm laborers, agricultural employers, and their representatives, when they are not a part of the "great majority of PERB's constituency" groups and there is no evidence to suggest that they have any familiarity with PERB's existing rules.¹⁵ The agency's current practices fail to recognize the unique labor-management aspects of agricultural labor relations, the distinctions between private and public employers, as well as the substantive differences between SERA and the Taylor Law.

Another pragmatic reason for PERB to adopt a distinct structure for processing private sector cases is the fundamental differences between the private and public sectors. As future PERB Board member Joseph R. Crowley stated in 1969 there is a "substantial difference between private employers and public employers," with the former motivated by profit and the latter with a desire to serve the public.¹⁶

¹² See, United States Department of Agriculture, National Agricultural Statistics Service. "2017 Census of Agriculture Volume 1, Chapter 2: County Level Data, New York," Table 7: Hired Farm Labor -- Workers and Payroll: 2017.

https://www.nass.usda.gov/Publications/AgCensus/2017/Full_Report/Volume_1,_Chapter_2_County_Level/New_York/st36_2_0007_0007.pdf.

¹³ United States Department of Labor. "Findings from the National Agricultural Workers Survey (NAWS) 2017–2018: A Demographic and Employment Profile of United States Farmworkers, Demographic and Employment Characteristics," Table 3. https://www.dol.gov/sites/dolgov/files/ETA/naws/pdfs/Table3_EastDemographics.xlsx.

¹⁴ Carly Fox, Rebecca Fuentes, Fabiola Ortiz Valdez, Gretchen Purser, Kathleen Sexsmith. 2017. "Milked: Immigrant Dairy Farmworkers in New York State." Workers' Center of Central New York and the Worker Justice Center of New York.

https://nmcdn.io/e186d21f8c7946a19faed23c3da2f0da/a29f2f1c37e543079c60fb7823277a44/files/resources/milked-immigrant-dairy-farmworkers-in-new-york-state/milked_053017.pdf

¹⁵ NYS PERB Proposed Rule Making PRB-01-22-00006-P, §8 Alternatives (Jan. 5, 2022).

¹⁶ Joseph R. Crowley, *The Resolution of Representation Status Disputes Under the Taylor Law*, 37 Fordham L. Rev. 517, 528 (1969).

Indeed, PERB is mandated when applying the Taylor Law “to recognize the fundamental distinctions between private and public employment...and no body of federal or state law applicable wholly or in part to private employment, shall be regarded as binding or controlling precedent.” Civ. Ser. Law §209-a(6). The converse is equally true: PERB must administer SERA and the FLFLPA amendments in an expedited manner separate and distinct from the structure and procedures used in public sector cases. This can be accomplished by PERB through agency policy changes and/or through the rulemaking process.

PERB’s blurring of the private and public sectors has already resulted in understandable confusion within and without the agency. In *Archdiocese of New York*,¹⁷ an administrative law judge (ALJ) dismissed a SERA unfair labor practice charge citing Taylor Law precedent. The year before, a SERA unfair labor practice charge was dismissed in *New York City Transit Authority*,¹⁸ because the charge was filed against a public employer. Unless the different sectors are disentangled, there will be continued confusion and the undermining of SERA’s broader provisions.

Among SERA’s differences with the Taylor Law is the former’s mandate that its provisions “be liberally construed” to effectuate the rights granted, and that labor disputes be resolved promptly. *See*, Labor Law §700.¹⁹ Unlike the Taylor Law, SERA (and the NLRA) guarantees private sector workers “full freedom of association, self-organization and designation of representatives of their own choosing” and the right to “to engage in other mutual aid and protection.” *See*, Labor Law §700; 29 U.S.C. §151.²⁰ Thus, the associational rights protected under SERA are far broader than the rights of public sector employees under the Taylor Law.²¹

Administering SERA’s substantive provisions by methods like those under the NLRA, rather than those under the Taylor Law, would be fully consistent with the history of New York’s private sector law.²² The New York State Department of Labor has observed that SERA “largely mirrors the NLRA in its purpose, coverage and process.”²³

Despite that historical truth, PERB states in its notice of rulemaking that it chose not to adopt “rules more akin to those applicable under the National Labor Relations Act (NLRA).”²⁴ The rejection of emulating NLRA practices is particularly troubling because less than a decade ago the NLRB modernized its representation case handling procedures through rulemaking. The final NLRB rule streamlined representation procedures to expedite resolution of questions of

¹⁷ 49 PERB ¶4401(2016).

¹⁸ 48 PERB ¶4402(2015).

¹⁹ *See, Metropolitan Life Ins. Co. v. New York State Lab. Rel. Bd.*, 280 N.Y. 194 (1939).

²⁰ *See also, New York State Lab. Rel. Bd. v. Holland Laundry*, 63 N.E.2d 68 (N.Y. 1945).

²¹ *See, Rosen v. New York Public Empl. Rel. Bd.*, 526 N.E.2d 25 (N.Y. 1988); *New York City Tran. Auth. v. New York Public Empl. Rel. Bd.*, 864 N.E.2d 56 (N.Y. 2007) (Limiting the scope of Taylor Law protections because of the lack of “mutual aid and protection” language in Civ. Serv. Law §202); *See also, Count. of Tioga*, 44 PERB ¶3016 (2011) (Concerted activity of public employees wearing a ribbon to express their shared disdain for their supervisor was unprotected under the Taylor Law because the conduct was unrelated to forming, joining, or participating in a union).

²² Hanslowe, *Procedures and Policies*, 2, 9-19.

²³ 2010 NYSDOL Feasibility Report, 10.

²⁴ NYS PERB Proposed Rule Making PRB-01-22-00006-P, §8 Alternatives (Jan. 5, 2022).

representation by setting a specific time for hearings and reducing unnecessary administrative litigation.²⁵

Another reason for processing SERA cases in a manner akin to the NLRA is the jurisdictional interplay between the laws. While SERA is inapplicable to employees and employers covered under the NLRA, questions of federal-state jurisdiction have a long legal and evolutionary history. Labor Law §715.²⁶ In fact, a third of the reported PERB decisions under SERA dealt with the jurisdictional line between the NLRA and SERA.²⁷

Adopting a new agency procedural structure for handling SERA representation and unfair labor practice cases is prudent because PERB's private sector jurisdiction is likely to expand again. The 2010 NYSDOL Feasibility Report set forth a blueprint for the Legislature to eliminate SERA's exclusion of domestic workers. Legislative action on that report would further expand the agency's private sector jurisdiction and cover approximately 328,000 domestic workers and their employers.²⁸ Similarly, the existing agency jurisdiction over representation issues involving childcare providers could be extended by the Legislature to include unfair labor practice claims like those permitted in Oregon. *See*, Labor Law §§695-A-695-B.

Additionally, there is a possibility that PERB will be asked to assert jurisdiction over independent contractors, a growing class of workers not excluded from SERA's definition of employee. *See*, Labor Law. §701(3). Alternatively, the Legislature might decide to create new forms of collective rights for independent contractors or other misclassified workers under SERA that avoid potential federal antitrust and preemption arguments.²⁹

Lastly, PERB's jurisdiction can expand in situations where the NLRB decides to decline jurisdiction over a labor dispute involving a class or category of employees or employers. *See*, 29 U.S.C. §164(c). This is not a hypothetical. In 2015, NLRB declined jurisdiction over a representation case involving collegiate scholarship athletes.³⁰ Currently, there is a bill pending to expand SERA to cover those individuals working for New York colleges and universities.³¹

For these reasons, PERB needs to adopt a new distinct structure, procedure, and practice for private sector cases that satisfies the mandates and public policies of the New York State Constitution, SERA, and the FLFLPA amendments, and the needs of its private sector constituencies.

²⁵ Federal Register Vol. 79, No. 240 (Dec. 15, 2014).

²⁶ Hanslowe, *Procedures and Policies*, 128-143.

²⁷ *See*, *Neshoma Orchestras*, 46 PERB ¶3401 (2013); *Neshoma Orchestras*, 46 PERB ¶3402 (2013); *Leg Apparel LLC*, 50 PERB ¶4401 (2017).

²⁸ Shamier Settle. 2021. "Domestic Workers Are Essential Workers: By the Numbers in New York." Fiscal Policy Institute. https://fiscalspolicy.org/wp-content/uploads/2021/04/Domestic-Workers-in-New-York_By-the-Numbers.pdf.

²⁹ *See*, *Chamber of Commerce v. City of Seattle* 890 F.3d 76 (9th Cir. 2018); *See also*, Dmitri Iglitzin and Jennifer L. Robbins, *The City of Seattle's Ordinance Providing Collective Bargaining Rights to Independent Contractor For-Hire Drivers: An Analysis of The Major Legal Hurdles*, 38 Berkeley J. Emp. & Lab. L. 49 (2017).

³⁰ *See*, *Northwestern University*, 362 NLRB 1350 (2015).

³¹ *See*, 2022 NY Assembly Bill A8153; 2022 NY Senate Bill S7287.

C. Creation of an Office of Private Employment Practices and Representation

To meet the agency's current and future private sector responsibilities under SERA and the FLFLPA amendments, PERB should create a new Office of Private Employment Practices and Representation (OPEPR). Creation of the new office would be a clear statement by the agency of the importance of its private sector jurisdiction.

OPEPR would be responsible for giving expedited treatment to private sector representation petitions and unfair labor practice charges, separate and distinct from PERB's public sector administrative structure. This would help guarantee agency prioritization of all SERA cases, a need noticeable absent from the proposed rules.

OPEPR would be responsible for developing necessary practices and applying the rules to meet the needs of private sector employees and employers, particularly farm laborers and agricultural employers. Those practices would include: a) hiring experienced bilingual full-time ALJs and clerical staff to be assigned to the agency's three offices; b) maintaining a centralized system for prompt telephonic and electronic responses to SERA and FLFLPA questions and pre-filing requests for assistance; c) developing an NLRB-PERB jurisdictional referral system; d) keeping a record of all questions and requests for assistance; e) interfacing with NYSDOL officials and staff; f) following legal developments under the NLRA, state labor, and immigration laws; g) preparing bilingual forms and materials; h) creating and maintaining a distinct bilingual webpage for SERA and FLFLPA; and i) providing for the filing and personal service to and from board agents in the field.

OPEPR would also work with the New York State Bar Association's Labor and Employment Section, other legal organizations, and law school labor clinics, to establish a pro bono attorney panel to provide representation for pro se farm laborers and agricultural employers in cases filed with the agency.

To accomplish OPEPR's purpose, PERB's policies and rules need to comport with SERA's mandate that its provisions, including those added by FLFLPA, are liberally construed. Labor Law §700.

FLFLPA amendments should not be interpreted or applied as separate and distinct from SERA's findings, public policies, and other provisions.³² All the provisions in SERA are subject to the same liberal construction thereby prohibiting the use of textualism for interpretative purposes. The proposed rules need modifications consistent with SERA's interpretative mandate and to require recognition of the fundamental differences between private and public employment when applying SERA and the FLFLPA amendments.

³² See, *The Reynolds Library*, 6 SLRB 844, 850-852 (1943).

Therefore, we suggest that PERB proposed rule §250.1 be modified to read as follows:

§ 250.1 Scope.

These rules apply to all proceedings brought under the New York State Employment Relations Act (SERA). Rules promulgated under, and to enforce the **amendments in provisions of,** the Farm Laborers' Fair Labor Practices Act (FLFLPA) do not repeal or supersede extant Rules as applied to matters outside of the scope of the FLFLPA **amendments. All SERA provisions, including its FLFLPA amendments and these rules, shall be construed liberally to effectuate the statutory rights granted. In applying the rules, fundamental distinctions between private and public employment shall be recognized.** (Proposed modifications in bold.)

As part of establishing OPEPR, PERB proposed rule §250.4 should be amended to provide for an OPEPR Director. The OPEPR Director will be responsible for supervising OPEPR and ensuring the expedited processing of private sector cases including the authority to issue certifications of exclusive bargaining agents.

§ 250.4~~3~~ Director and Director of Conciliation.

The term director shall mean the agent of the board designated as director of **private public** employment practices and representation. The term director of conciliation shall mean the agent of the board so designated. (Proposed modification in bold.)

D. Funding the Office of Private Employment Practices and Representation and Other Agency Responsibilities

In creating OPEPR, PERB should follow the precedent set by the agency's earliest leaders, Robert Helsby and Jerome Lefkowitz. Before the original PERB structure was established in 1967, Helsby and Lefkowitz advocated with the State Division of the Budget for sufficient staff with the necessary skills and qualities to meet the agency's mission.³³

To make OPEPR fully operational, PERB needs to advocate with the State Division of the Budget for increased funding to hire full-time OPEPR staff. This would include budgetary allocations to fund a new OPEPR director along with OPEPR ALJs and other bilingual board agents to be assigned to each of the agency's office. In addition, PERB needs to seek additional budgetary allocations for business travel by OPEPR board agents for day and evening meeting, conferences, and to conduct elections in the field.

Like PERB's long-standing conciliation practices, OPEPR should provide services at or near agricultural worksites rather than expect farmworkers, farm owners, and their representatives to travel to agency offices in Buffalo, Albany, or Brooklyn for filings, conferences, or hearings. Revamping PERB practices is necessary to accommodate the distinct nature of agricultural labor relations that includes farm laborers residing on the farms where they work.

³³ See, Jerome Lefkowitz. 2010. "Summary & Annual Report, Message from Jerome Lefkowitz," *PERB News* 43(2). <https://perb.ny.gov/perb-news/>; Herbert, *Jerome Lefkowitz: A Pragmatic Intellect*, 36 Hofstra Lab. & Emp. L.J at 35.

It is not a secret that PERB has not been fully funded for decades, resulting in direct administrative consequences. When Chairperson Lefkowitz returned to PERB in 2007 he was “keenly aware of the adverse impact that austerity budgets had had on agency functioning, including its statutorily mandated research mission.”³⁴ Indeed, austerity expresses policy values, undermines efficiencies in governmental operations, discourages trust in state administrative procedures, and perpetuates the demonization of public employees.

State data demonstrates that since 1995 state personal services allocations for PERB declined by 11.6%, factoring in inflation. *See*, Figure 1. This decline continued even after PERB’s jurisdiction was expanded to administer SERA in 2010 and following enactment of the FLFLPA amendments in 2019. The drop in funding continued despite the 2010 NYSDOL report to the Governor and Legislature, which stated that expanding PERB’s jurisdiction “will require additional staff and resources.”³⁵

Public Employment Relations Board

The Public Employment Relations Board (PERB) was created by the Public Employees Fair Employment Act of 1967 to resolve labor disputes between public employers and employees. The Board’s jurisdiction includes State, county and local governments, certain special service districts, school districts, public authorities; and since July 2010, private employers that are not provided services by the National Labor Relations Board, the Federal Mediation and Conciliation Service, or the National Mediation Board.



Figure 1: Source: OpenBudget.NY.Gov

At PERB, austerity has led to continued delays in the timely processing of cases and in issuing decisions. Staff shortages are publicly cited by the agency to explain its inability to accurately report conciliation case closings.³⁶ The lack of sufficient staff and resources has led the agency to avoid conducting on-site elections. It is well known, that “on-site elections can be very costly for the labor relations” because of “travel and lodging expenses along with the inherent cost in staff time.”³⁷ Instead, PERB has increasingly relied on mail-ballot elections that results in inherent delays in electoral outcome.³⁸

Moreover, insufficient resources have stalled the agency’s commendable aspiration to technologically modernize like its sister federal and state agencies. *See*, 4 NYCRR §200.12; 12 NYCRR §§250.2 and 250.7. Due to the lack of sufficient staff and a modern electronic filing and case management system, PERB continues to rely extensively on the United States mail system for sending notices and accepting filings. This practice results in inherent delays in the

³⁴ Herbert, *Jerome Lefkowitz: A Pragmatic Intellect*, 36 Hofstra Lab. & Emp. L.J at 47.

³⁵ 2010 NYSDOL Feasibility Report, 13-14. The report’s conclusion about the agency’s resource needs if its jurisdiction was expanded reflected comments made to NYSDOL by PERB Chairperson Lefkowitz. Herbert, *Jerome Lefkowitz: A Pragmatic Intellect*, 36 Hofstra Lab. & Emp. L.J at 25.

³⁶ New York State Public Employment Relations Board. “PERB by the Numbers: Public Employment Relations Board Activities New York State – Fiscal Years 2006-07 to 2020-21.” <https://perb.ny.gov/perb-by-the-numbers/>.

³⁷ Sara Slinn and William A. Herbert, *Some Think of the Future: Internet, Electronic, and Telephonic Labor Representation Elections*, 56 St. Louis U. L.J. 171, 181-182 (2011).

³⁸ *See, Hudson River Park Trust*, 43 PERB ¶ 3040 (2010) (Mail ballot election held although PERB’s regional office was approximately five miles from the employer’s location).

processing of cases and in rendering timely determinations. Even the simplest matter of transferring a case file from one PERB office to another is subject to unnecessary delays.

Based on the agency's expanded jurisdiction and the inefficiencies that austerity has caused, PERB needs to successfully advocate with the State Division of the Budget for full OPEPR funding. It also needs to advocate for additional funding for the Office of Public Employment Practices and Representation and the Office of Conciliation. Finally, the agency needs to seek additional resources for an agency-wide electronic filing and case management system and computer equipment to hold electronic elections. Increased state budgetary allocations for these purposes will bring PERB's processes into the 21st century and will enable the agency to provide efficient services for its private and public sector constituencies.

With history as a guide, however, sufficient increased state funding for PERB should not be assumed. Therefore, the following section presents suggested interim measures to staff and operate OPEPR. In proposing them, we are not suggesting that they are adequate or appropriate to meet the mandates of the law or the needs of PERB's constituencies. In fact, many of the proposed interim measures are nothing more than necessary deferred maintenance of PERB's administrative infrastructure.

E. Interim Measures: Office of Private Employment Practices and Representation

In the absence of new budgetary allocations for an OPEPR Director, PERB could designate its Deputy Chairperson or Counsel to perform those duties on an interim basis. The interim OPEPR Director would be responsible for the expeditious processing of all private sector representation petitions and unfair labor practice charges and assigning cases. If necessary, a case can be assigned to an ALJ to hold a conference and hearing within the timeframes mandated by SERA rules, as modified. In addition, the interim OPEPR Director would be the primary agency responder for SERA and FLFLPA questions, would help develop OPEPR plans and practices for bilingual services, forms, and materials, and supervise all staff handling cases involving private sector representation and unfair labor practice charges.

The designation of a staff member to be the interim OPEPR Director is consistent with PERB history. Deputy Chairperson Lefkowitz presided over the most significant and lengthy representation case about the appropriate bargaining units for state employees.³⁹ Later, other Deputy Chairpersons took on special assignments including one who helped lead the agency's transition to administering SERA.

Without supplemental allocated funds to hire new full-time ALJs, and only as a last resort, PERB might consider creating a new per diem ALJ panel to hear private sector cases. Members of the new per diem ALJ panel could include neutrals on PERB's Private Sector Voluntary Grievance Arbitration Panel with some experience in representation and unfair labor practice cases under the NLRA.

In suggesting a per diem ALJ panel, we are not claiming it to be a good idea. In fact, there are many strong policy and practical arguments against the idea, including PERB's unsuccessful

³⁹ Herbert, *Jerome Lefkowitz: A Pragmatic Intellect*, 36 Hofstra Lab. & Emp. L.J at 38-39.

experience in utilizing per diem hearing officers in the early days of the Taylor Law. The complexity of labor relations requires PERB to employ full-time ALJs with special knowledge, experience, and abilities. Furthermore, it is unlikely that the idea would be supported by PERB's private sector constituency groups, who might perceive adoption of a per diem panel as demonstrating an indifference to their needs and interests.

Another interim measure for consideration is the designation, with their consent, of neutrals on the current PERB mediation and fact-finding panels as board agents to provide for personal filing and service in the field, for ensuring agency notices are received and responded to, to promptly investigate complaints, and for holding meetings and conferences at or near agricultural worksites. Alternatively, PERB should develop arrangements with the NYSDOL Division of Immigrant Policies and Affairs for its bilingual field staff and supervisors to be designated as PERB board agents to provide those services.

Lastly, PERB should contact other federal and state labor agencies to ascertain the designs and costs for their systems of electronic filing, case management, and electronic elections. It should then seek assistance from the New York State Office of Information Technology Services in obtaining or building similar systems for PERB.

IV. PERB's Proposed SERA Rules Need Additional Revisions

The proposed rules for questions of representation need to be revised to ensure that they serve the broad substantive objectives of SERA and its FLFLPA amendments. This next section sets forth suggested revisions to certain provisions in PERB's proposed rules. There is, unfortunately, insufficient time to make comments about other proposed rule changes, which also need modification.

A. The Proposed Rules on Declarations Should Be Withdrawn or Redrafted

§ 250.7 Declaration

Proposed rule §250.7, and related changes in proposed rules §§251.4(f) and (g), should be withdrawn or redrafted for clarity. The rules impose a new requirement for a declaration of authenticity for SERA representation cases. The formalism of the proposed rules appears to be based on a textualist rather than a liberal construction of SERA and is a procedural departure from how the statute has been interpreted and administered since 1937. It is unclear why the proposed rules are necessary, and why their aims cannot be accomplished through other means after a petition is being processed or in the petition itself.

Moreover, proposed rule §250.7 is clearly patterned on PERB's existing rule for public sector representation cases. 4 NYCRR §201.4(d). While unstated, the new proposed rules strongly suggest an agency intent to strictly enforce representation pleading rules in private sector cases upon filing as it does under the Taylor Law.

PERB precedent establishes that the agency’s strict enforcement of formalistic representation procedures under the Taylor Law were designed to respond to austerity by avoiding “needless dissipation of our resources and wasting public funds to conduct representation proceedings only to later dismiss the petition because the petitioner neglected to comply with the Rules.”⁴⁰

Limited agency resources, however, is not a compelling reason to replace SERA’s mandate for liberal construction with textualism and does not justify imposing procedural barriers for farm laborer and other private sector questions of representation to be heard.

If proposed rule §250.7 and related proposed changes are not withdrawn, they should be substantially redrafted. The second sentence of proposed rule §250.7 is difficult to decipher even for those with legal training. The rule should be divided into subsections and redrafted in a manner that avoids overreliance on legalese.

B. SERA Representation Cases Should Be Given Expedited Treatment

Following the example of early SLRB leaders, PERB should consult with the NLRB, particularly with respect to the NLRB’s expedited representation casehandling process.

It has long been a NLRB General Counsel policy that the “expeditious processing” of representation cases is “one of the most significant aspects of” that agency’s operations and the “processing and resolution of petitions raising questions concerning representation...are to be accorded the highest priority.”⁴¹

When the NLRB Board adopted a final rule in 2014 to modernize its representation procedures, it referenced, *inter alia*, the longstanding agency policy of prioritizing representation matters, the NLRA’s legislative history, and the agency’s experiences with representation case litigation that “has at times been disordered, hampered by surprise and frivolous disputes, and side-tracked by testimony about matters that need not be decided at the time.”⁴²

PERB’s proposed rules do not include any prioritization of SERA cases. In contrast, PERB’s public sector rules expressly mandate agency expedition of two types of public sector cases: where an injunction has been issued and in public sector scope of negotiation cases. *See* 4 NYCRR §§204.4 201(c) and 204.10. The lack of similar prioritization of scope cases under SERA in PERB’s proposed rules suggests an intent to treat private sector issues as secondary to issues under the Taylor Law. *See*, Proposed Rules §§261 and 262.

1. Expedited Treatment of Petitions Following Filing

To expedite resolution of private sector questions of representation, the proposed changes to §251.1 should be modified to mandate that upon filing, a representation petition must be given expedited treatment by the agency.

⁴⁰ *Buffalo Municipal Housing Authority*, 35 PERB ¶3009 (2002).

⁴¹ *See*, NLRB Casehandling Manual Part Two Representation Proceedings, § 11000 (September 2020).

⁴² Federal Register Vol. 79, No. 240 (Dec. 15, 2014), pp. 74308, 74316.

§251.1 Petitions; filing-; **expedited treatment and determinations**

A petition for investigation pursuant to section 705 of SERA may be filed with the board by employees, employers, or their representatives, **and shall be accorded with expedited treatment and determinations**. The petition shall be in writing. The original **petition** shall be signed, dated, and, except for cases brought under the FLFLPA, verified before any person authorized to administer an oath. In representation cases brought under the FLFLPA, that is, cases brought by involving farm laborers, labor organizations seeking to represent farm laborers, or agricultural employers or their representatives, a petition may be supported by the unsworn declaration of such person, the content of which is declared as true under penalty of perjury or, alternatively, verified before any person authorized to administer an oath. The original and ~~four~~ three copies of the petition shall be filed with the director. For cases in which electronic filing is applicable or approved (see § 250.10), the filing of one paper original and filing and service of an electronic copy constitute compliance with the filing requirements. Petition forms will be supplied by the board upon request and will also be available on the board's website. (Proposed modifications in bold).

2. Director's Deficiency Notice Practice Should be Limited to Agency Jurisdiction

§251.4 Sufficiency of petition **and showing of interest**

Proposed amendments to §251.4 should be modified because it would impose an inappropriate rigid formalistic approach to representation petitions inconsistent with the statutory mandate that SERA be liberally construed.

PERB's proposed amendment to §251.4(a) would make all SERA representation petitions subject to the agency's deficiency notice practice. Under that practice, pleadings are subject to a "gate-keeping function to weed out facially deficient" claims to "avoid the administrative burden of holding unnecessary conferences and hearing."⁴³

However, adoption of that procedure for SERA representation cases is inappropriate because it would unnecessarily delay resolution of questions of representation, and it is inconsistent with §252.31. Nevertheless, it is arguable that the jurisdictional line between the NLRA and SERA warrants a Director of Private Representation and Practices to have the authority to require additional information and/or dismiss a petition for lack of subject matter jurisdiction in cases that do not involve farm laborers and agricultural employers under the FLFLPA amendments.

Therefore, we propose the following modification of proposed amendment to proposed rule §251.4(a):

⁴³ *Manhattan and Bronx Surface Transit Operating Authority*, 40 PERB ¶3023 (2007).

No petition in a proceeding under section 705 of SERA shall be dismissed for failure of the petitioner to set forth in the petition all the information required. The director is entitled to require amendment of a petition for that fails to provide **all necessary required** information to **determine subject jurisdiction in cases not involving FLFLPA. If, upon amendment and after granting all reasonable inferences to the amended petition, the petition remains deficient it is determined that subject jurisdiction does not exist, it the petition** may be dismissed by the director **with an explanation and a referral to another agency with potential jurisdiction.** (Proposed modifications in bold)

3. Showing of Interest and Certifications Without an Election

§§251.4(b) and (c)

Proposed rule §251.4(b) would substantially and inappropriately narrow the evidence that can form the basis for a certification without an election in representation cases involving one union under SERA and the FLFLPA amendments. Under the proposed rule, certifications without an election would be issued based solely on dues authorization cards and no other probative evidence.

The proposed rule is apparently premised on a literal reading of Labor Law §705(1-a) without contextualizing it with other SERA's provisions and the statute's history. To paraphrase the SLRB, PERB's predecessor agency, "the Legislature has specifically enjoined the Board to construe all provisions of the Act "liberally" in order that its policies may be effectuated and not "literally" as PERB's proposes in this rule.⁴⁴ While the modern interpretative methodology of textualism has its supporters and critics, its use concerning SERA provisions would violate the explicit interpretative mandate codified in Labor Law §700.⁴⁵

Since 1937, Labor Law §705(3) has permitted card check certification based on "any other suitable means to ascertain such representatives."⁴⁶ Early on, the section was interpreted to grant a certification without an election based on "signatures on union authorization, application or members cards."⁴⁷ In 2001, the Legislature broadened card check certifications under SERA by enacting Labor Law §705(1) to provide that a certification without an election can be "on the basis of dues deduction authorization *or other evidence*" (emphasis added).⁴⁸

PERB's literal and narrow construction of Labor Law §705(1-a) is unsupported by the purpose of the 2019 amendments, which were intended to expand and not constrict unionization rights. Indeed, the legislative history of the FLFLPA does not include any evidence of a legislative

⁴⁴ *The Reynolds Library*, 6 SLRB at 850.

⁴⁵ See generally, Tara Leigh Grove, *Which Textualism?* 134 Harv. L. Rev. 265 (2020) (describing the rise of textualism, its variants, and its use in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020)).

⁴⁶ See, *Crawford Clothes, Inc.*, 1 SLRB 6 (1937).

⁴⁷ William A. Herbert, *Card Check Labor Certification: Lessons from New York*, 74 Alb. L. Rev. 93, 108-109, n. 46 (2010/2011).

⁴⁸ Herbert, *Card Check Labor Certification*, 74 Alb. L. Rev. at 165-167.

intent to narrow, for the first time since 1937, the necessary showing for a card check certification under SERA.⁴⁹

Consistent with a liberal construction of SERA, as amended, and the history of the statute, proposed rules §251.4(b) and (c) should be modified in the following manner:

(b) Selection of Employee Organization Where Only One Such Organization is Involved: Pursuant to section 705.1 a of the SERA, where the choice available to employees in a negotiating unit is limited to selecting or rejecting a single labor organization, a submission of dues deduction authorizations sufficient to demonstrate majority support for a single labor organization, along with a petition identifying the labor organization, the employer, and the negotiating unit alleged to be appropriate, shall suffice to warrant certification of said labor organization without election.

§251(b) (e) Selection of Employee Organization in General: Pursuant to sections 705.1, 705(1-a) and 705(3) of the SERA, a petition for certification shall be accompanied by dues deduction authorizations, individually signed petitions in favor of recognition, membership cards, or other similar evidence of support for a labor organization. A showing of interest may consist of any combination of the foregoing evidence. If the evidence is sufficient to demonstrate majority support of a single labor organization in a unit alleged to be appropriate, the labor organization shall be certified qualify for certification by the director without an election. In the event that the evidence submitted proves to represent less than a majority of the appropriate negotiating unit, the submitted evidence shall be treated as a showing of interest.
(Proposed modifications in bold)

4. Procedures Leading to the Certification of a Bargaining Agent

We propose modifications below to the rules to streamline private sector procedures for certifications without an election, and the conduct of elections.

Under the modifications, the showing necessary for a certification without an election would be consistent with the content, purpose, and history of SERA and its amendments. The authority for issuing a certification without an election would lie with the director, subject to a procedure for objections to the Board. In addition, the director would be delegated the authority to issue a certification following an election.

With respect to the conduct of elections, the proposed modifications would permit the practice of holding electronic elections similar to the practices of other labor relations agencies in the United States and Canada.⁵⁰ Consistent with Labor Law §705(4) and SLRB precedent, the modified rules would permit PERB to hold on-site elections at a location other than the employer's

⁴⁹ See, Legislative Bill Jacket to 2019 N.Y. Laws, Ch. 391.
<https://digitalcollections.archives.nysed.gov/index.php/Detail/objects/85343>.
⁵⁰ Slinn and Herbert, *Some Think of the Future*: 56 St. Louis U. L.J. 192-204.

premises.⁵¹ Off-site manual elections are particularly important for representation elections involving farm laborers who live in on-farm housing.

INVESTIGATION, CERTIFICATIONS WITHOUT AN ELECTION, AND ELECTIONS
§251.158 Investigation; ascertainment of desires of employees; notice.

(a) In the course of ~~its~~ **an** investigation of a question or controversy concerning representation, ~~the director or the Board~~ may certify a labor organization as the exclusive representative for purposes of collective bargaining when the labor organization demonstrates a showing of majority support by employees in an appropriate unit for purposes of collective bargaining. The director shall ascertain employee choice of a labor organization on the basis of dues deduction authorizations, individually signed petitions in favor of recognition, membership cards, or other similar evidence of support for a labor organization or any combination thereof pursuant to sections 705.1, 705(1-a) and 705(3) of SERA, or if necessary, by conducting an election under section 705(1) of SERA. ~~When a hearing has been directed, the director shall prepare and cause to be served upon the parties a notice of hearing before an administrative law judge, at a time and place fixed therein. A copy of the petition shall be served with the notice of hearing.~~

(b) The determination by the director that the indications of employee support are not sufficient for certification without an election is a ministerial act and will not be reviewed by the board. When the director determines that the indications of employee support are sufficient for a certification without an election, [t]he director shall inform all parties in writing if the director determines that the indications of employee support are sufficient for certification without an election and issue a certification of the labor organization. The director's ~~determination~~ certification in this respect is reviewable by the board pursuant to a written objection ~~to certification~~ filed with the board by a party within five two working days after its receipt of the director's certification notification. An objection to certification shall set forth all grounds for the objection with supporting facts and shall be served on all parties to the proceedings. A response to the objection may be filed within five two working days after a party's receipt of the objection. The Board shall issue a decision within ten working days of the filing of the objections. (Proposed modifications in bold)

§251.169 Elections; terms and conditions.

If the director determines, as part of ~~the~~ **its** investigation of a question or controversy concerning representation, that an election or elections by secret ballot is necessary, the director shall provide that such election or elections be conducted by an agent of the board at such time and place and upon such terms or conditions as the director or the board may specify. The director shall have the discretion to conduct elections manually, electronically, or by mail. Manual elections shall be conducted at a location as may be required under conditions set by the director and not under the employer's supervision or control. (Proposed modifications in bold)

⁵¹ *Id.*179.

5. Expedited Representation Conferences and Hearings in SERA Cases

The adage of Oliver Wendell Holmes, Jr., “the life of the law has not been logic: it has been experience,” is relevant to modifying the procedures for conferences and hearings in private sector representation cases at PERB. In fact, both experience and logic support streamlining the conference and hearing process for rendering determinations on questions of representation under SERA and the FLFLPA amendments.

The NLRB has vastly more experience than PERB handling private sector representation cases. The NLRB’s experience and its representation case rulemaking in 2014 are valuable resources for PERB in developing its own modernized streamlined process under SERA and the FLFLPA amendments.⁵²

Logic would also indicate that a streamlined PERB private sector representation hearing process is necessary to effectuate the encouragement of collective bargaining and the prompt resolution of disputes. Labor Law §§700, 704-b(2)(c). To paraphrase Joseph Crowley, the profit motive of a private employer renders it likely that it will act more aggressively in opposition to a unionization effort than a public employer. As Cynthia Estlund has noted, private employers “generally have good economic reasons for seeking to avert unionization or minimize its scope.”⁵³ In fact, private employers employ many different tactics to avoid unionization, many unlawful and others legal, like delay.⁵⁴ SERA rules regarding conferences and hearing need to be designed to ensure that questions of representation are expeditiously and efficiently determined.

To effectuate the purposes of SERA and the FLFLPA amendments, we recommend below certain modifications to the proposed rules for private sector representation cases, which are based, in part, on current PERB and NLRB procedures.⁵⁵ Under these proposed modifications,⁵⁶ the rules for representation case conferences and hearings would be distinct from the rules for unfair labor practice cases under SERA and the FLFLPA amendments.

§251.7 Notice of Conference and Hearing in Representation Cases Response
Upon the filing of a representation petition, unless there is an insufficient showing of interest on its face to support the petition or the petition fails to allege sufficient information to establish subject matter jurisdiction, the director shall issue and serve upon the parties within two business days of filing, a notice scheduling a conference and hearing, if necessary, before an administrative law judge to take place ten business days from the

⁵² Federal Register Vol. 79, No. 240 (Dec. 15, 2014), pp. 74308, 74316.

⁵³ Cynthia L. Estlund, *Economic Rationality and Union Avoidance: Misunderstanding the National Labor Relations Act*, 71 Tex. L. Rev. 921, 948, 962-63 (1993).

⁵⁴ See, John Logan. 2006. “The Union Avoidance Industry in the USA,” *British Journal of Industrial Relations*, 44:4 (December) 651-675.

⁵⁵ 29 CFR §102.62. In adopting in whole, or in part, NLRB procedures, PERB must be mindful of the purposes and intent of SERA and the FLFLPA amendments.

⁵⁶ The deadlines set forth in these proposed modified rules are premised on PERB’s successful advocacy with the State Division of the Budget for resources to accomplish the agency’s decade-long aspiration of implementing an electronic filing and case management system. If advocacy for the needed resources is unsuccessful, the streamlined deadlines will have to be adjusted accordingly.

date of the notice. The notice from the director shall be served on all parties. The notice shall direct the respondent to file **with the administrative law judge** an original and three copies of a **response and an offer of proof** to the petition **four business days before the scheduled conference and hearing** containing a signed declaration of its truthfulness by an identified representative of the responding party, with proof of service of a copy thereof upon all other parties. In cases in which electronic filing is used (see § 250.10), the filing of one signed original response and electronic filing and service of the response shall be deemed compliant service and filing. (Proposed modifications in bold)

§251.8 Response

The response shall include a specific admission, denial or explanation of each allegation made by the petitioner, a description of the unit claimed to be appropriate by the responding party, **if not the unit sought in the petition,** ~~for the purpose of collective bargaining~~ and a clear and concise statement **to support a denial that petitioned for unit is not appropriate, along with** any other facts which the responding party claims may affect the processing or disposition of the petition. **The response shall also include an offer of proof concerning the agency's subject matter jurisdiction if the responding party objects to jurisdiction; identify classifications, locations, or other employee groupings that must be added to or excluded from the proposed unit to make it an appropriate unit; and describe all other issues the employer intends to raise at the hearing. The response shall also include a list of the full names, work locations, shifts, and job classifications of all individuals in the proposed unit as of the payroll period preceding the filing of the petition who remain employed at the time of filing, and if the employer contends that the proposed unit is inappropriate, the employer shall separately list the full names, work locations, shifts, and job classifications of all individuals that the employer contends must be added to the proposed unit to make it an appropriate unit. The employer shall also indicate those individuals, if any, whom it believes must be excluded from the proposed unit to make it an appropriate unit.** ~~Except for the petitioner, all parties shall file with the director within 10 working days after receipt of a copy of the petition from the director, an original and three copies of a response to the petition containing a signed declaration of its truthfulness by an identified representative of the responding party, with proof of service of a copy thereof upon all other parties. In cases in which electronic filing is used (see § 250.10), the filing of one signed original response and electronic filing and service of the response shall be deemed compliant service and filing. The response shall include a specific admission, denial or explanation of each allegation made by the petitioner, a description of the unit claimed to be appropriate by the responding party for the purpose of collective bargaining² and a clear and concise statement of any other facts which the responding party claims may affect the processing or disposition of the petition.~~ (Proposed modifications in bold)

§251.9 Petitioner's Offer of Proof

Following the timely filing and service of the response, petitioner shall file an original and three copies with the administrative law judge, and serve on all the parties, an offer of proof responding to the issues raised in the response, such that it is received no later than two business days before the scheduled conference and hearing. The offer of proof will include proof of service of a copy thereof upon all other parties. In cases in which electronic filing is used (see § 250.10), the filing of one signed original response and electronic filing

and service of the response shall be deemed compliant service and filing. (Proposed modifications in bold)

~~§ 253.35~~10 Conferences and hearings **in Representation Cases; conduct.**

(a) ~~Prior to the~~ **On the day of the** scheduled ~~date of any~~ hearing, the designated administrative law judge shall hold a pre-hearing conference with the parties to the proceeding **for the sole purpose of resolving and narrowing issues in dispute.** The failure of a party to appear at the conference may, in the discretion of the administrative law judge, constitute ground or dismissal of the absent party's pleading. ~~The administrative law judge may, at their discretion, conduct the conference one day prior to the scheduled hearing by videoconference in whole or in part.~~ (Proposed modifications in bold)

~~§ 253.39~~14 Hearings; continuation of

The administrative law judge ~~may shall continue a~~ **conduct the representation hearing and continue from day to day until completed unless the administrative law judge concludes that extraordinary circumstances warrant otherwise from day to day or adjourn it to a later date or adjourn** to a different place by announcement thereof at the hearing or by other appropriate notice. (Proposed modifications in bold)

6. SERA Unfair Labor Practice Charges Should Be Given Expedited Treatment

A. Director's Deficiency Notice Practice in Unfair Labor Practice Cases Should be Limited to Subject Matter Jurisdiction Issues

In contrast to the liberal interpretation mandated by SERA and §257.1, PERB's proposed rules would inappropriately impose the strict scrutiny of pleadings applied under the Taylor Law to SERA unfair labor practice charges. Indeed, the proposed change to §252.4 is derived from 4 NYCRR §204.2, which established PERB's pleading deficiency procedure and practice for improper practice charges under the Taylor Law.

Under that public sector procedure and practice, the Director of Public Employment Practices and Representation engages in a "gate-keeping function to weed out facially deficient charges and thereby avoid the administrative burden of holding unnecessary conferences and hearing."⁵⁷ Under the procedure, pleadings are returned by mail to the party with a notice requiring amendments before the case will be processed. If the party does not mail back an adequately amended pleading, the case can be dismissed.

This procedure has been described by PERB as being equivalent to "a *sua sponte* regulatory demurrer to the facial allegations of a charge."⁵⁸ For PERB to adopt such a procedure under SERA would be a departure from SLRB practice, which did not dismiss unfair labor practice charges for technical deficiencies and was "consistently lenient regarding the formal adequacy of" of pleadings."⁵⁹ *See*, §257.1.

⁵⁷ *Manhattan and Bronx Surface Transit Operating Authority*, 40 PERB ¶3023 (2007).

⁵⁸ *Id.*

⁵⁹ Hanslowe, *Procedures and Policies*, 33, 82.

While the procedure might be administratively convenient under the Taylor Law, it will not effectuate the rights under SERA and FLFLPA, particularly in cases where the charging party is pro se and not proficient in English or legal terminology. Therefore, we strongly encourage PERB to withdraw its proposed change to §252.4, except when the charge on its face demonstrates that PERB lacks jurisdiction.

B. Unfair Labor Practice Procedures Must Include Timeframes that Ensure Expeditious Conferences, Hearing, and Final Determinations

In addition, we encourage that the rules be modified to include specific timelines for the expeditious processing of unfair labor practice charges, particularly cases involving farm laborers and agricultural employers. This would include having the OPEPR Director issue the notice of conference and hearing before a designated ALJ two days following the filing of a charge.

In drafting FLFLPA, the Legislature prohibited agricultural employers from “discouraging union organization or [discouraging] an employee from participating in a union organizing drive, engaging in protected concerted activity, or otherwise exercising the rights guaranteed under this article.” Labor Law §704-b(2)(c). This important and unique employer neutrality provision would have little meaning if a farm laborer’s unfair labor practice charge took months to be heard and determined. In fact, such delays would only exacerbate the adverse impact of the violation and undermine the effectiveness of a remedy. Similarly, the prohibitions against lockouts and strikes in the FLFLPA amendments would have little value if the processing and determination of unfair labor practice charges were needlessly delayed. Labor Law §§704-b(1) and (2)(a).

We, therefore, propose the following modifications to PERB’s proposed rule changes to effectuate the expeditious handling of unfair labor practice charges:

§252.4 Initial processing by director

(a) Initial review. After a charge is filed, **it shall be accorded with expedited treatment and determinations.** The director shall conduct a review of the charge ~~to determine whether the facts as alleged may constitute an unfair labor practice as set forth in section 704, 704 a, or 704 b of the SERA.~~ **If the director concludes that the charge fails to allege sufficient facts to suggest that agency has subject matter jurisdiction, in cases not involving FLFLPA, determines that the facts as alleged do not, as matter of law, constitute a violation, the director may dismiss it, with a written explanation, subject to review by the board under Section 253.22 of this Chapter; alternatively, the director may permit the party to amend the charge to cure such deficiency in the charge. If the deficiency is not cured, the director may dismiss the charge with a written explanation of the grounds for the dismissal or deem the charge, or any part thereof, withdrawn.** Such dismissal is ~~likewise~~ **likewise** subject to review of the board under Section 253.22 of this Chapter. (Proposed modifications in bold)

(b) Notice of conference **and hearing**. A notice of conference pursuant to Section 253.10 of this Chapter shall be prepared by the director ~~or a designated administrative law judge~~, **issued and served upon the parties within two business days of filing**, specifying the time and place for the conference **and hearing before an administrative law judge within ten business days and**, together with a copy of the charge, shall be delivered to the charging party and each named respondent **within two days of the filing of the charge**. (Proposed modifications in bold)

Lastly, we strongly urge PERB to modify proposed rules §252.625-252.726, 252.827, and 252.928 by including shorter timeframes for the filing of answers and motions for particularization in unfair labor practice cases. We also encourage the agency to modify its procedures to substantially diminish inherent delays in the holding of conferences and hearings and issuing unfair labor practice decisions.

V. Conclusion

The National Center appreciates the opportunity to comment on PERB's proposed SERA rule changes. Time and space did not permit us to comment on all the proposed SERA rules and to suggest other changes. We would welcome an opportunity to comment on certain other SERA rule provisions at another point during the rulemaking process. In addition, the National Center would be willing to participate in future facilitated rulemaking meetings and discussions, if PERB chooses to pursue that option.

The 2019 amendments to SERA substantially expanded the agency's jurisdiction to cover labor relations in New York's important agricultural industry. As a result of the FLFLPA amendments, at least 56,000 farm laborers are protected under SERA, constituting the largest expansion of private sector collective bargaining rights in New York in five decades.

To properly effectuate the fundamental labor rights granted by the New York State Constitution, SERA, and the FLFLPA amendments and to prepare for the future, PERB needs to create a new internal structure for private sector cases, advocate for greater state budgetary allocations, and adopt rules to ensure the expedited resolution of private sector labor disputes, including those between farm laborers and agricultural employers.

In our comments, we have outlined a series of recommendations, which if adopted, will assist PERB in meeting its new challenges.

In summary, the following are the National Center's recommendations:

1. Reverse the 2010 agency policy decision to handle private sector cases under the structure of public sector cases under the Taylor Law.
2. Create a new Office of Private Employment Practices and Representation (OPEPR) within the agency for handling all SERA and FLFLPA amendment cases. OPEPR would be supervised by the new position of OPEPR Director.
3. Advocate with the State Division and the Budget to fully fund and staff OPEPR including new full-time OPEPR ALJs and other positions along with resources for

travel by OPEPR board agents to conduct meetings, conferences, and elections in the field.

4. Adopt interim measures for OPEPR's operation if additional budgetary allocations are not forthcoming.
5. Seek supplemental state budget allocations for the Office of Public Employment Practices and Representation and the Office of Conciliation.
6. Advocate for funding for an agency-wide electronic filing and case management system and equipment to the holding electronic elections.
7. Modify PERB's proposed SERA rules to:
 - a. Establish the OPEPR Director position.
 - b. Require that SERA and its rules be liberally construed.
 - c. Mandate recognition of the fundamental distinctions between private public employment when applying SERA, FLFLPA amendments, and the rules.
 - d. Withdraw or redraft the proposed rules on Declarations.
 - e. Require that representation petitions and unfair labor practice charges receive expedited treatment.
 - f. Limit the preliminary review of petitions and charges filed with the agency to issues of subject matter jurisdiction in cases not involving FLFLPA.
 - g. Follow SERA precedent to permit a broader range of evidence to demonstrate majority status for a certification without an election consistent with the text, history, and precedent under Labor Law §§705.1, 705(1-a) and 705(3).
 - h. Delegate to the OPEPR Director the authority to issue a certification without an election, subject to Board review of objections.
 - i. Consider the 2014 NLRB representation case rules and the rulemaking record when amending the representation procedures under SERA as amended by FLFLPA.
 - j. Mandate the expedited treatment and determination of representation petitions and unfair labor practice charges.
 - k. Adopt new procedures and timeframes for pleadings, offers of proof, conferences, and hearings in representation and unfair labor practice cases.
 - l. Provide that representation elections can be conducted manually, by mail, or electronically.

The adoption of these recommendations will lead to the delivery of the fundamental labor rights declared in the New York State Constitution, SERA, and its FLFLPA amendments.