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COURT OF APPEALS

STATE OF NEW YORK

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MATTER OF CHENANGO FORKS CENTRAL  
SCHOOL DISTRICT,

Petitioner-Appellant,

-against-

No. 104

NEW YORK STATE PUBLIC EMPLOYMENT  
RELATIONS BOARD, ET AL.

Respondents-Respondents.  
-----

20 Eagle Street  
Albany, New York 12207  
April 25, 2013

Before:

CHIEF JUDGE JONATHAN LIPPMAN  
ASSOCIATE JUDGE VICTORIA A. GRAFFEO  
ASSOCIATE JUDGE SUSAN PHILLIPS READ  
ASSOCIATE JUDGE ROBERT S. SMITH  
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.  
ASSOCIATE JUDGE JENNY RIVERA

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Sharona Shapiro  
Official Court Transcriber

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CHIEF JUDGE LIPPMAN: 104, Matter of  
Chenango Forks.

Counselor, would you like any rebuttal  
time?

MR. MEAD: I would request two minutes.

CHIEF JUDGE LIPPMAN: Two minutes, sure.  
Go ahead, counselor.

MR. MEAD: May it please the Court. I am  
Lars Mead on behalf of the appellant, Chenango Forks  
Central School District.

The District submits that PERB in this  
case, under the specific circumstances of this  
dispute, should have deferred to the arbitrator's  
determination.

CHIEF JUDGE LIPPMAN: What - - - what does  
PERB's jurisdiction have to do with what the  
arbitrator did?

MR. MEAD: Well - - -

CHIEF JUDGE LIPPMAN: The arbitrator says  
that there's nothing in the agreement that prevents,  
right? That's what the arbitrator says.

MR. MEAD: Right, and PERB's jurisdiction  
specifically applies only to noncontractual disputes.  
Our position is that this benefit, the Medicare Part

1 B reimbursement benefit - - -

2 CHIEF JUDGE LIPPMAN: PERB can't say that  
3 this was something that was done, that was customary,  
4 that they depended on, and that therefore, if you're  
5 going to change it - - -

6 MR. MEAD: Well, what's different - - -

7 CHIEF JUDGE LIPPMAN: - - - you have to  
8 negotiate?

9 MR. MEAD: What's different - - -

10 CHIEF JUDGE LIPPMAN: That's not within  
11 their jurisdiction?

12 MR. MEAD: What's different about this case  
13 from other cases is that the Medicare part - - -

14 CHIEF JUDGE LIPPMAN: Why are they in  
15 conflict - - -

16 MR. MEAD: Well - - -

17 CHIEF JUDGE LIPPMAN: - - - what the  
18 arbitrator did and what PERB did?

19 MR. MEAD: Well, the arbitrator reviewed  
20 the contractual rights - - -

21 CHIEF JUDGE LIPPMAN: Yeah.

22 MR. MEAD: - - - of the parties and  
23 determined that there was no contractual right to  
24 this benefit.

25 CHIEF JUDGE LIPPMAN: They determined there

1 was no provision that prevented that benefit from  
2 being withdrawn, right?

3 MR. MEAD: Well, under the circumstances, I  
4 think it was a little bit more than that because the  
5 Medicare Part B reimbursement benefit had a  
6 contractual basis. It was a provision of a  
7 negotiated health insurance plan under a collective  
8 bargaining agreement in the 1980s. Prior to 1988,  
9 the negotiated plan, known as The Empire Plan,  
10 required Medicare Part B reimbursement. Thus,  
11 Medicare Part B was a contractual benefit.

12 CHIEF JUDGE LIPPMAN: Right, but then - - -  
13 but then it didn't require it anymore, but they kept  
14 doing it, right?

15 MR. MEAD: Well, but the reason they didn't  
16 require it anymore was that the parties negotiated a  
17 change to a Blue Cross/Blue Shield plan, and when the  
18 parties negotiated that change, the Blue Cross/Blue  
19 Shield plan no longer required Medicare Part B  
20 reimbursement.

21 JUDGE SMITH: So they kept doing it  
22 voluntarily?

23 JUDGE GRAFFEO: But the District kept  
24 paying, correct?

25 MR. MEAD: Yes, and I think the record here

1 is somewhat - - -

2 JUDGE GRAFFEO: So - - -

3 MR. MEAD: - - - murky as to why that  
4 happened.

5 JUDGE GRAFFEO: - - - why can't PERB look  
6 at that and say that that was custom and practice for  
7 - - - in the minds of the existing employees? I  
8 understand PERB can't confer a benefit on retirees.  
9 We're talking about the existing - - -

10 MR. MEAD: Well, what I - - -

11 JUDGE GRAFFEO: - - - union members.

12 MR. MEAD: - - - would submit is that under  
13 the circumstances here, where the benefit at issue  
14 was contractual, where the parties effectively  
15 negotiated it away, PERB should have deferred to the  
16 arbitration that occurred subsequently.

17 JUDGE SMITH: You concede, I think, that it  
18 is the law that if you have a benefit given  
19 voluntarily and not in the contract, you can't change  
20 it unilaterally without - - - without a negotiation  
21 process?

22 MR. MEAD: I think, as a general  
23 proposition, I would agree with that statement.

24 JUDGE SMITH: I mean, I - - - maybe I just  
25 don't know this area well enough, sort of, what's the

1 point of having contracts if you're bound by the  
2 things that are in the contract and also the things  
3 that are out of the contract?

4 MR. MEAD: Well, that's a good point.  
5 That's - - -

6 JUDGE SMITH: Just wondering, you know; I  
7 don't understand these things.

8 MR. MEAD: What we're saying here is, look,  
9 the parties had a negotiated agreement. They  
10 negotiated a change that, as a result, this benefit  
11 was no longer part of the contract. Subsequently,  
12 they then engage in a dispute resolution process.  
13 That dispute resolution process was heavily  
14 negotiated by sophisticated parties.

15 JUDGE PIGOTT: You're talking about the  
16 arbitration?

17 MR. MEAD: Yes.

18 JUDGE READ: Yeah, what did the arbitrator  
19 specifically say on the issue of binding past - - -  
20 on the issue of past practice?

21 MR. MEAD: Well, he determined that there  
22 was insufficient evidence of mutuality of agreement.  
23 But if you look at his decision, he did a detailed  
24 analysis of the positions of the parties with respect  
25 to the past practice argument.

1 JUDGE SMITH: But it is - - - PERB was  
2 correct, wasn't it, that it was not essential to his  
3 decision to decide the past practice question; that's  
4 almost by definition.

5 MR. MEAD: But I think, given the passage  
6 of time between the time when the parties negotiated  
7 the change from a health care plan that required  
8 Medicare Part B to one that didn't, the issue of past  
9 practice was before the arbitrator. And again, it  
10 was heavily litigated before the arbitrator. And  
11 under those circumstances - - -

12 JUDGE READ: You can infer he decided it?

13 MR. MEAD: Well, he - - - no, I'm not  
14 inferring it. It's specifically in his decision.

15 CHIEF JUDGE LIPPMAN: Yeah, but what's the  
16 legal basis of saying that PERB - - - and this is  
17 clearly within their wheelhouse of what they're  
18 supposed to be doing - - - defers to the arbitrator  
19 on an issue that, I think you agree, is not necessary  
20 for them to determine.

21 MR. MEAD: The legal basis for it  
22 specifically is that this particular benefit was  
23 contractual. The parties engaged - - - sophisticated  
24 parties engaged in negotiation and ended up with a  
25 contract that no longer required this - - -

1 JUDGE PIGOTT: Well - - -

2 MR. MEAD: - - - particular benefit.

3 JUDGE PIGOTT: - - - do we know that - - -  
4 I get your point on the - - - you know, you have - -  
5 - you have one insurance plan and it - - - and it  
6 takes care of Medicaid (sic) B. Then you tell your  
7 employees we're going to get a new plan and they say  
8 that's okay, you know, we're with you. Then all of a  
9 sudden it occurs - - - you know, once it all kicks  
10 in, somebody says, hey, wait a minute, I'm getting a  
11 bill from Medicaid (sic) B that wasn't in the other  
12 one. And they say, well, we'll cover that. And it  
13 sounds like that's what happened here. And so as an  
14 accommodation to the employees, and then the retirees  
15 as well, they just did that. They didn't go back and  
16 say, well, let's then renegotiate the whole issue of  
17 fringe benefits. They just took care of it and  
18 that's the way it's gone on.

19 MR. MEAD: Well, I don't know that you can  
20 say that or reach that conclusion from what's in - -  
21 - what's in the record.

22 JUDGE PIGOTT: You can't, huh?

23 MR. MEAD: There's a letter from the  
24 district superintendent prior to the determination in  
25 June of 2003 that we're not going to provide this



1 reimbursement any longer. And it outlines some of  
2 the financial constraints that the District was  
3 under. And I think it was in the circumstances of  
4 analyzing the budget that they came to realize that  
5 they were providing a benefit that there wasn't a  
6 contractual basis or requirement that they provide.

7 JUDGE GRAFFEO: Well, while they were - - -

8 JUDGE PIGOTT: But you're still providing -  
9 - -

10 JUDGE GRAFFEO: I'm sorry.

11 JUDGE PIGOTT: I'm sorry.

12 JUDGE GRAFFEO: While they were  
13 negotiating, did - - - does the record tell us if  
14 either or both parties was even aware that the  
15 Medicaid (sic) B reimbursement was not a mandatory  
16 term of the new insurance plan?

17 MR. MEAD: The record does not tell us  
18 that. However, the parties did negotiate specific  
19 language into the contract which covers the event of  
20 - - - of rights and benefits not discussed or  
21 specifically known. And - - -

22 JUDGE GRAFFEO: And it said what?

23 MR. MEAD: - - - and said, this is the  
24 complete agreement of the parties and that any  
25 practice that's contrary to the terms of the - - - or

1           - - - of the contract is effectively null and void.

2                   JUDGE PIGOTT: Well that - - - you know,  
3 this hap - - - this isn't new. I mean, it's new, but  
4 I mean, it's not uncommon. Let's assume you've got,  
5 you know, the first contract for insurance, and among  
6 the benefits is plastic surgery. Now, things are  
7 tight, you know, everybody gets on their green  
8 eyeshades, and they say we're going to go to a  
9 different insurance company now, and it does not  
10 include plastic surgery. Doesn't it have to be  
11 negotiated?

12                   MR. MEAD: I don't think so, if you have  
13 the contractual language that - - - that they had in  
14 this case. I don't think - - -

15                   JUDGE SMITH: You could have put in  
16 language that said "and no other benefits shall be  
17 required and any other benefits voluntarily provided  
18 can be terminated at the employer's discretion". You  
19 could have asked for that; maybe you would have got  
20 it.

21                   MR. MEAD: That specific language is pretty  
22 close to what we did get. Any benefit that is  
23 contrary to the specific benefits set forth here is -  
24 - - is declared null and void. I mean, I think what  
25 the District wants here is for the - - - the

1 negotiations of these sophisticated parties to be  
2 given their plain and strict meaning.

3 JUDGE SMITH: If you - - - if you lose this  
4 case, is there any way you can ever stop paying these  
5 Medicaid (sic) B benefits without the - - - or you  
6 have to get the union's consent?

7 MR. MEAD: I don't know. I guess - - - I  
8 guess I hope I don't come to that question.

9 JUDGE READ: The answer's probably no,  
10 though, isn't it?

11 MR. MEAD: It may be. I mean, as the Court  
12 might be aware, there is a companion case to this  
13 case. And - - -

14 JUDGE GRAFFEO: That's the retiree's  
15 lawsuit, right?

16 MR. MEAD: The retiree's lawsuit - - -

17 JUDGE GRAFFEO: Under the - - -

18 MR. MEAD: - - - correct, and - - -

19 JUDGE GRAFFEO: - - - moratorium statute or  
20 - - -

21 MR. MEAD: And - - -

22 JUDGE GRAFFEO: - - - the moratorium - - -

23 MR. MEAD: - - - and that's correct. My  
24 understanding is that the moratorium extender, which  
25 had been annually reenacted, has now been permanently

1 enacted. And essentially, what it requires is that  
2 if you are going to have any diminution of retiree  
3 benefits, there must be a corresponding diminution  
4 for current employees. I mention that really only as  
5 just a point of interest about this whole view - - -

6 JUDGE SMITH: So the bottom line may be  
7 that you've got to pay the retirees and the current  
8 employees forever?

9 MR. MEAD: Potentially. I mean, obviously,  
10 you know, we don't want - - -

11 JUDGE SMITH: And - - -

12 MR. MEAD: - - - negotiation - - -

13 JUDGE SMITH: - - - and that's something  
14 that no contract ever required you to do? Well,  
15 maybe - - - or you say a contract once did require  
16 you to do it, but it doesn't anymore?

17 MR. MEAD: Well, that's really where I come  
18 down on the - - - the issue of PERB's jurisdiction  
19 over this dispute is that this was a contractual  
20 requirement, and then they negotiate it away. That's  
21 what differentiates it between this case and the  
22 other - - -

23 CHIEF JUDGE LIPPMAN: But they negotiate it  
24 away and then you keep paying it. Doesn't that bring  
25 it into the - - - the PERB domain?

1 MR. MEAD: Well, there's no getting around

2 - - -

3 CHIEF JUDGE LIPPMAN: And - - -

4 MR. MEAD: - - - the fact that if they had  
5 stopped paying it right away I might not be here.

6 CHIEF JUDGE LIPPMAN: Right. But I'm just  
7 saying that that's PERB's jurisdiction; that's what  
8 they do. They agree or disagree with, you know, what  
9 their ruling is, but after you have a custom and  
10 usage, we're going to say that, but you have no  
11 jurisdiction because the arbitrator found that  
12 there's no specific provision - - - and I - - - I  
13 think it's the thrust of what they found - - -  
14 there's no specific provision that prevents that  
15 benefit from being pulled away. That's the - - -

16 MR. MEAD: The arbitrator found that, but  
17 he also additionally found that there was a lack of  
18 evidence of mutuality between the parties. And what  
19 we're arguing for here is that - - -

20 CHIEF JUDGE LIPPMAN: You're saying is he  
21 had the authority to decide this issue and he did,  
22 and it can't go into the PERB jurisdiction because  
23 that issue is finished, they've determined it.

24 MR. MEAD: Right. What I'm saying is the  
25 arbitrator had the authority under the contract to

1 analyze any ambiguities and determine whether or not  
2 the contract required continued provision of the  
3 benefit. Given the passage of time, past practice  
4 has that analysis as part of it. And - - -

5 JUDGE PIGOTT: But that's the nub, though,  
6 isn't it? In other words, as I understand it, the  
7 other courts were saying he could certainly determine  
8 whether it was contractual, and he did and he said -  
9 - - and that's over. But now we've got to deal with  
10 custom and usage.

11 MR. MEAD: Well - - -

12 JUDGE PIGOTT: That's PERB - - - that's - -  
13 - isn't that essentially what they said?

14 MR. MEAD: That is - - - that is, and PERB  
15 argues, well, his - - - his conclusion regarding past  
16 practice is dicta and/or that it's antithetical to  
17 the purposes of the Taylor Law. But what our  
18 position is here is that where the benefit was  
19 contractual and was negotiated away, and where  
20 there's, according to the arbitrator, a lack of  
21 evidence of mutuality about the continuation of this  
22 benefit after it was negotiated away - - -

23 JUDGE PIGOTT: Why is mutuality important?

24 MR. MEAD: Well, as PERB found, actually,  
25 in this case, they imposed a requirement in order for

1 it to even be found as a past practice. And I think  
2 under General Rules of Contract interpretation there  
3 would have to be some indication there that the other  
4 party believed that they had a right to it.

5 JUDGE PIGOTT: Well, no, what I was  
6 thinking is, let's assume for a minute that you're -  
7 - - you know, it's a school and they find an  
8 opportunity to provide parking. And they say we can  
9 provide parking, we're going to provide parking.  
10 There's no mutuality to it; it's just that there was  
11 a benefit that they found they could provide and they  
12 do, out of the goodness of their heart. And - - -  
13 and why wouldn't - - - I mean, couldn't that be the  
14 case here? They said, you know, we're - - - we've  
15 got the money and Medicaid's (sic) important and  
16 we're going to pay it.

17 MR. MEAD: Well, but the parking spot's - -  
18 -

19 JUDGE PIGOTT: Medicare.

20 MR. MEAD: - - - obvious; everybody knows  
21 it. I mean, in this case none of the current  
22 employees ever got this benefit. The parties  
23 stipulated to that. So - - - so I think - - -

24 JUDGE RIVERA: But that doesn't mean they  
25 didn't know. That's a different question, right?

1                   MR. MEAD: Well, that's a different  
2 question, and certainly I would argue that the  
3 evidence that they did know here doesn't rise to the  
4 level of being substantial evidence, but that's a  
5 different argument.

6                   CHIEF JUDGE LIPPMAN: Okay, counselor.  
7 Thanks, counselor.

8                   MR. QUINN: Good afternoon.

9                   CHIEF JUDGE LIPPMAN: Good afternoon.

10                  MR. QUINN: May it please the court. My  
11 name is David Quinn. I represent PERB in this  
12 proceeding.

13                  CHIEF JUDGE LIPPMAN: Why - - - your  
14 adversary's argument is that this is a different  
15 case, that the fact that they negotiated this new,  
16 you know, provision that doesn't provide those  
17 benefits anymore, even though they were continued to  
18 be paid, makes this case different and takes it out  
19 of your jurisdiction.

20                  MR. QUINN: Well - - -

21                  CHIEF JUDGE LIPPMAN: Is that possible,  
22 from your perspective? And - - - and then the second  
23 part, he says really that the arbitrator determined  
24 the issue that you want to determine. So what's your  
25 answer to both of those that I think are the nub of



1 this case, those two different - - -

2 MR. QUINN: As to the first - - -

3 CHIEF JUDGE LIPPMAN: Yeah.

4 MR. QUINN: - - - there's no nego - - - it  
5 is a fact that the contract, at some point, between  
6 these parties, provided for a different health  
7 insurance carrier. There's no negotiations history  
8 on that other than the fact is that they did provide  
9 this new insurance carrier, and it is stipulated that  
10 under that insurance carrier there was no requirement  
11 of the Medicare Part B premiums to be paid.

12 JUDGE SMITH: Even - - -

13 MR. QUINN: That is a fact.

14 JUDGE SMITH: Even though there's been no  
15 contractual requirement for a long time. I mean, is  
16 it right that he - - - under your ruling, which the  
17 Appellate Division upheld, it goes on forever now?

18 MR. QUINN: Well, it goes on forever. The  
19 statute - - - the bargaining statute that the  
20 legislatures imposed on school districts, as opposed  
21 to anybody else, does not have a conciliation  
22 procedure that provides for finality and bargaining.  
23 So there is no interest arbitration or legislative  
24 imposition for school districts, so that there - - -  
25 it is - - - and at PERB we call it bargain until

1 death with respect to school districts - - -

2 JUDGE SMITH: So - - -

3 MR. QUINN: - - - because it only goes to -

4 - -

5 JUDGE SMITH: So what - - -

6 MR. QUINN: And that's what you - - -

7 JUDGE SMITH: - - - what advantage did - -

8 - did the school district get when this thing dropped

9 out of the contract?

10 MR. QUINN: Oh - - -

11 JUDGE SMITH: They could have stopped it

12 immediately - - -

13 MR. QUINN: I suspect - - -

14 JUDGE SMITH: - - - I suppose, but if they

15 chose not to do that they got no advantage?

16 MR. QUINN: I suspect that in fact if they

17 had stopped it immediately that we would not be here,

18 certainly, today.

19 JUDGE SMITH: Okay. But - - -

20 MR. QUINN: There would be no practice.

21 JUDGE SMITH: But if you are foolish enough

22 to continue to give - - - give voluntarily something

23 you don't have to give, then you're - - - then you're

24 stuck for - - - for the - - - till the end of time?

25 MR. QUINN: No. No, in the collective

1 bargaining process the District could easily turn to  
2 the union and say, hey, look, we can't afford to pay  
3 your raises because we don't - - -

4 JUDGE SMITH: You can do that without  
5 anything in the agreement.

6 MR. QUINN: I'm sorry?

7 JUDGE SMITH: You could leave it in the  
8 agreement and you could still do that, say I'll buy  
9 it from you - - -

10 MR. QUINN: Absolutely.

11 JUDGE SMITH: - - - I'll buy you out.

12 MR. QUINN: Certainly. It's bargainable.

13 CHIEF JUDGE LIPPMAN: So you're saying  
14 subject to negotiations, it doesn't - - -

15 MR. QUINN: It's subject to negotiations.

16 CHIEF JUDGE LIPPMAN: - - - it doesn't  
17 change?

18 MR. QUINN: That is correct.

19 CHIEF JUDGE LIPPMAN: And how many  
20 employees does that affect, like, in this - - - this  
21 particular case?

22 MR. QUINN: Well, it affects the retirees  
23 under the moratorium - - -

24 CHIEF JUDGE LIPPMAN: Right.

25 MR. QUINN: - - - of the statute. The way

1 the stipulated record is here it does not affect the  
2 current employees at all so that in the collective  
3 bar - - -

4 JUDGE SMITH: Until they retire?

5 MR. QUINN: Until they retire, that's  
6 correct. So that if the District, in a good faith  
7 negotiations with a union that was engaged in good  
8 faith negotiations, were to lay the economics on the  
9 table for negotiations, it could be worked out any  
10 number of ways. So in answer to your question, it  
11 goes on forever, subject to collective bargaining.

12 CHIEF JUDGE LIPPMAN: What about the second  
13 issue, that the arbitrator really - - - that your  
14 adversary says the arbitrator determined this - - -  
15 this issue.

16 MR. QUINN: Well - - -

17 CHIEF JUDGE LIPPMAN: I know you're saying  
18 it's dicta, but why didn't he determine that issue?

19 MR. QUINN: Why did he?

20 CHIEF JUDGE LIPPMAN: Why didn't he?

21 MR. QUINN: Well, I don't think - - -

22 CHIEF JUDGE LIPPMAN: According to your  
23 adversary, because - - -

24 MR. QUINN: I don't think the arbitrator  
25 had the jurisdiction to determine the noncontrac - -

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CHIEF JUDGE LIPPMAN: So he didn't have the power; even if he tried to determine that, he couldn't determine that issue?

JUDGE PIGOTT: We've had some pretty crazy decisions from arbitrators, and we say, you know, once you agree to go to arbitration, you know, you're walking along in the dark.

MR. QUINN: These parties - - - under PERB's jurisdictional deferral policy, PERB deferred this matter to the grievance arbitration process for a determination as to whether PERB has jurisdiction to entertain the Taylor Law allegation.

CHIEF JUDGE LIPPMAN: So he went beyond what you gave him, is that what you're saying?

MR. QUINN: Well, he clearly went beyond what we deferred. If in fact his finding that there is no binding past practice was intended to address a Taylor Law obligation, I think it's just as reasonable to conclude that his finding on the past practice was directed to determine whether there is a contractual obligation, not a Taylor Law obligation. In other words, a contract construction tool, look at past practices to see how it applies to the terms of the agreement.

1 CHIEF JUDGE LIPPMAN: Are you saying that  
2 your jurisdiction really can't cross because they  
3 have jur - - - their jurisdiction, you have yours,  
4 and they're just two entirely different things?

5 MR. QUINN: They're - - -

6 CHIEF JUDGE LIPPMAN: What he did couldn't  
7 have affected what you did later?

8 MR. QUINN: They are very different  
9 jurisdictions. And if the arbitrator - - - for  
10 example, in this case, PERB did defer or grant  
11 deference to the arbitrator's determination. It did.  
12 The arbitrator held that there is no contractual  
13 source of right, and PERB said we agree.

14 JUDGE SMITH: And the practical impact of  
15 that turns out to be zero.

16 MR. QUINN: I'm sorry?

17 JUDGE SMITH: And the practical impact of  
18 that turns out to be zero.

19 MR. QUINN: Well, the practical impact - -  
20 - the real impact of that is that because there is no  
21 contractual source of right, there was no impediment  
22 to PERB's exercise of its jurisdiction - - -

23 JUDGE SMITH: Is it - - -

24 MR. QUINN: - - - under the Taylor Law.

25 JUDGE SMITH: So - - -

1 MR. QUINN: That's a huge impact.

2 JUDGE GRAFFEO: So the clause that your  
3 adversary talked about that the - - - well, let me  
4 rephrase it. Your adversary mentioned that there was  
5 a provision in the contract that indicated that any  
6 rights that hadn't been continued wouldn't be  
7 imposed.

8 MR. QUINN: Well - - -

9 JUDGE GRAFFEO: PERB doesn't take that into  
10 account?

11 MR. QUINN: No, that was an argument raised  
12 to us. It's such a broad alleg - - - we would call  
13 that a - - - the issue is a waiver - - - such a broad  
14 language under PERB's precedence for many, many years  
15 does not establish the Association's agreement to  
16 waive its right to negotiate concerning all  
17 noncontractual practices. The only thing that  
18 happened here is that the arbitrator found that there  
19 was no contractual source of right. PERB then  
20 reopened the matter saying we agree with that and,  
21 therefore, we have jurisdiction. And the question  
22 then launched off to a national analysis.

23 CHIEF JUDGE LIPPMAN: And that's why you  
24 sent it to them, to determine whether you had  
25 jurisdiction? That's why you sent it to them - - -

1 MR. QUINN: Yes.

2 CHIEF JUDGE LIPPMAN: - - - to determine -

3 - -

4 MR. QUINN: Yes, Your Honor.

5 CHIEF JUDGE LIPPMAN: - - - whether you had  
6 jurisdiction?

7 MR. QUINN: When the charge came in, it was  
8 stipulated that the union had filed a contract  
9 grievance, suggesting to PERB that at least the union  
10 believed that there might be a contractual source of  
11 right, might be. So PERB, in order to assess - - -  
12 as a tool, to assess its own jurisdictional  
13 determination, said take it to your grievance  
14 procedure.

15 JUDGE SMITH: This - - - maybe again, I'm  
16 just naive in this area; this doesn't seem like the  
17 most efficient possible way of handling this whole  
18 problem. How long did it take to figure out whether  
19 they have to keep paying these benefits?

20 MR. QUINN: Well, now, I will grant you  
21 that it took a long time. The - - - the case came in  
22 and it was quickly deferred to the arbitration. It  
23 took some time for the arbitrator to get his  
24 decision. And then it was immediately reopened, upon  
25 the arbitrator's determination.



1 JUDGE SMITH: But the bottom line is you're  
2 standing here in 2013 arguing whether a 20 - - -  
3 whether a 2003 memorandum is okay or not.

4 MR. QUINN: Yeah, I understand that, Your  
5 Honor, and that was of concern to the dissent below,  
6 and I am not unsympathetic to the time it took.  
7 However, the time it took was simply because of the  
8 due process at PERB. It went through an ALJ for a  
9 full hearing, several - - - no, excuse me, a  
10 stipulated record, went to the board based on  
11 exceptions filed by the District. The board  
12 accepted, to a certain degree, the District's  
13 position, sent it back to the ALJ where a hearing was  
14 conducted; I think it was two days.

15 CHIEF JUDGE LIPPMAN: Is this a normal - -  
16 -

17 MR. QUINN: It went back up to the board.

18 CHIEF JUDGE LIPPMAN: Is this a normal kind  
19 of - - - is this the way it works? I mean, is this -  
20 - -

21 MR. QUINN: Oh, we - - -

22 CHIEF JUDGE LIPPMAN: - - - is this what  
23 happens all the time, what went on here?

24 MR. QUINN: We have jurisdictional  
25 deferrals as a regular basis. We have two kinds of

1           deferral. One is jurisdictional where - - - where  
2           it's questionable whether we have jurisdiction at  
3           all, and in order to make that determination we send  
4           it off to the party's grievance procedure.

5                     The other is a merits deferral where we,  
6           indisputably, have Taylor Law jurisdiction, the  
7           source of right is the Taylor Law right, but the  
8           parties have a negotiated grievance procedure that  
9           can resolve the dispute, and that's a merits  
10          deferral.

11                    So yes, the deferral policy that PERB uses,  
12          particularly jurisdictional or merits, is routine, in  
13          answer to your question, routine. The time it took  
14          was a long time, but it took a long time because  
15          there were two hearings at the ALJ level, two board  
16          decisions, and then it took a long time to get the  
17          case transferred to the Appellate Division, Third.  
18          None of the delay was occasioned by PERB, and - - -

19                    CHIEF JUDGE LIPPMAN: But I guess what  
20          you're saying is it's built into the system. I mean,  
21          this is the way it works.

22                    MR. QUINN: To some extent, it is. It's  
23          unfortunate, but to some extent that's correct, Your  
24          Honor.

25                    CHIEF JUDGE LIPPMAN: Okay.

1                   MR. QUINN: So ultimately, the point that I  
2 want to make sure that the Court understands is that  
3 PERB did defer - - - grant deference to the  
4 arbitrator's decision that there was no contractual  
5 source of right. Now, to the extent that the  
6 arbitrator, arguably - - - and we're not sure that he  
7 did, but to the extent that the arbitrator, arguably,  
8 addressed a Taylor Law right, the Taylor Law right -  
9 - - the standard that the arbitrator applied, outside  
10 of his contract jurisdiction, mind you - - - the  
11 standard that the arbitrator applied was totally  
12 antithetical to the standard that PERB uses to assess  
13 a Taylor Law violation.

14                   So if the arbitrator had the jurisdiction  
15 to entertain the Taylor Law violation, which we  
16 submit that he did not, and he did address the Taylor  
17 Law violation, it was entirely anti - - - contrary to  
18 PERB's standard of what is a negotiable practice.  
19 The voluntariness of the practice is precisely what  
20 gives rise to the bargaining obligation.

21                   JUDGE SMITH: So is there something that  
22 tells us when you defer to arbitrators and when you  
23 don't?

24                   MR. QUINN: Something. Let me say this,  
25 I'll tell you, we mostly do, but if the arbit - - -

1 and I just want to make sure, there's two kind of ar  
2 - - - deferrals.

3 JUDGE SMITH: Is there anything written  
4 down anywhere about where we defer - - - I saw one  
5 case from, like - - -

6 MR. QUINN: Brooklyn County - - -

7 JUDGE SMITH: - - - 1971.

8 MR. QUINN: Yeah - - - oh, well, yeah,  
9 that's the Bordansky criteria where we - - - that is  
10 the criteria that we apply to assess whether we're  
11 going to grant deference to an arbitrator's decision,  
12 whether on the jurisdiction or on the merits. It's  
13 the Bordansky criteria, and that is perhaps the most  
14 cited case in PERB's lexicon.

15 CHIEF JUDGE LIPPMAN: Okay. Thanks,  
16 counselor.

17 MR. QUINN: Thank you very much.

18 MR. REICH: Good afternoon, Your Honors.  
19 My name is Frederick K. Reich. I'm of counsel to  
20 Richard E. Casagrande, and I have the privilege of  
21 representing the Teacher's Association in this case.

22 As Mr. Quinn said, and as we've briefed,  
23 the arbitrator had no jurisdiction in this case to  
24 determine any Taylor Law issue. And with due respect  
25 to counsel, the past practice issue, the Taylor Law

1 past practice issue was neither litigated nor was it  
2 decided. The only - - - as we read the arbitrator's  
3 decision, the concept of the historical practices of  
4 the parties was raised by the union to try to show -  
5 - - to support its argument that there was an  
6 agreement. And the union said there was an  
7 agreement, and consistent with that agreement is the  
8 historical practices of the parties. The arbitrator  
9 specifically and repeatedly limited himself only to  
10 the contract, the language of the contract. He  
11 specifically said I am not going to deal with any  
12 Taylor Law issues, and I am not going to deal with  
13 any moratorium issues. Counsel may be referring to -  
14 - - there is reference in the arbitrator's decision  
15 that the union, and I'm putting it in brief sum, Your  
16 Honors, said that because this is a mandatorily  
17 negotiable subject it can't be changed. There was no  
18 reference to past practice.

19 JUDGE PIGOTT: Well, he said: "The  
20 voluntariness of the District's conduct, given the  
21 origin of the District's Medicare B reimbursements  
22 does not contain sufficient evidence of a mutual  
23 understanding and agreement to establish a binding  
24 past practice."

25 MR. REICH: Again, Your Honor, with no

1 reference to Taylor Law past practice - - -

2 JUDGE PIGOTT: No, but he refuted - - - he  
3 did address the past practice.

4 MR. REICH: He addressed the historical  
5 practices of the parties, and it's dicta; I don't  
6 think there can be any doubt about that. As Mr.  
7 Quinn said, it's an analysis; we don't actually know  
8 what his analysis was, but to the extent as from his  
9 own language, it relied on the concept of agreement.  
10 It's antithetical to what the Taylor Law does. But I  
11 think it's pretty clear from the decision, at best,  
12 it only runs from the union trying to say that the  
13 historical practices showed agreement.

14 JUDGE PIGOTT: Right.

15 MR. REICH: And the union - - - the union  
16 lost. There was no agreement.

17 CHIEF JUDGE LIPPMAN: So basically you're  
18 saying it had nothing to do with the Taylor Law, is  
19 your - - -

20 MR. REICH: There was - - - the arbitrator  
21 made it very clear; we're not doing Taylor Law here  
22 in this arbitration. And if I could just finish up  
23 with the point I was making before, the union cited a  
24 case; it was from another arbitrator, another well-  
25 known arbitrator, Mr. Selchick. And the arbitrator

1 in that case said, well, there's kind of a  
2 continuation-of-benefits clause; if you can show that  
3 something's negotiable I'll enforce it as part of the  
4 contract. But in this case that did not exist.

5 JUDGE PIGOTT: What would have happened if  
6 you'd won in the arbitration?

7 MR. REICH: Well, if we won in the  
8 arbitration, Your Honor's concern about the amount of  
9 time - - -

10 JUDGE PIGOTT: No, you would have - - - you  
11 would have gotten the benefit?

12 MR. REICH: We would - - - yes, we would  
13 have gotten the benefit.

14 JUDGE PIGOTT: Right. Now, what happened  
15 because you lost?

16 MR. REICH: Because you lost - - -

17 JUDGE PIGOTT: You got the benefit.

18 MR. REICH: Well, Your Honor, what we got  
19 was the benefit of PERB's very clear - - -

20 JUDGE PIGOTT: You got it for a different  
21 reason, but you - - -

22 MR. REICH: We got - - -

23 JUDGE PIGOTT: - - - by losing, you won.

24 MR. REICH: Well, we were - - -

25 JUDGE PIGOTT: In fact, you won better

1           because, as Mr. Quinn has pointed out, what we call  
2           negotiation until death, or whatever. I mean, this  
3           is never going to go away unless and until inflation  
4           goes to the point where the teachers want a raise,  
5           and they're not going to get one until and unless  
6           this gets negotiated.

7                         MR. REICH: Well, clearly the way to  
8           terminate a practice is to negotiate it away.

9                         JUDGE SMITH: But you got - - - you have  
10          got from PERB everything that you were looking for  
11          from the arbitrator, haven't you?

12                        MR. REICH: Your Honor, what we got - - -  
13          we lost in front of the arbitrator.

14                        JUDGE SMITH: I understand you lost, but  
15          there's nothing that the arbitrator could have given  
16          you that you haven't now got, is there?

17                        MR. REICH: Well, what we don't have is a  
18          determination that this is a contractual right that  
19          itself is imbued - - -

20                        JUDGE GRAFFEO: Why would that be - - -

21                        MR. REICH: - - - with rights to con - - -

22                        JUDGE GRAFFEO: Why would that be more  
23          beneficial than what you got from PERB?

24                        MR. REICH: Well, one of the - - - it - - -  
25          rather than trying to weigh it as more beneficial or



1 not right now, Your Honor, one of the things that  
2 would happen is if it was determined to be a  
3 contractual right, the Triborough Amendment,  
4 subdivision (e) to the Taylor Law improper practice  
5 procedures - - - statute, would require that that  
6 term continue.

7 JUDGE PIGOTT: But what - - - all right, so  
8 that's what would have happened if it had been  
9 contractual. Now that's it's been found not  
10 contractual, how long is it going to continue?

11 MR. REICH: It's going to continue until  
12 it's negotiated out, Your Honor.

13 JUDGE PIGOTT: So I mean, there's no  
14 change. I mean - - -

15 MR. REICH: It's all - - -

16 JUDGE PIGOTT: - - - you - - - by losing  
17 you won, and had you won, you would have won.

18 MR. REICH: But - - -

19 JUDGE PIGOTT: I'm not complaining, I'm  
20 just - - -

21 MR. REICH: No, and I think, Your Honor, if  
22 I may, without being presumptuous or trying not to  
23 be, this is one of the very, very valuable salutary  
24 points of PERB's deferral policy. The union is not  
25 put at risk at having to choose, at risk, a forum.

1 PERB's Herkimer County - - - Herkimer BOCES decision  
2 makes that clear. The union gets to - - - as the  
3 exclusive bargaining representative, has to and does  
4 exercise, and exercised in this case, its  
5 responsibilities to protect its members from  
6 diminution of benefits. And it did so by seeking a  
7 grievance. It did so by going to PERB.

8 JUDGE SMITH: You mentioned a continuation-  
9 of-benefits clause a while ago. What's the point of  
10 having those if benefits continue as a matter of law  
11 anyway?

12 MR. REICH: Well, laws do change, Your  
13 Honor, and they can be different from a contractual  
14 obligation. And in this case, we got to the right  
15 place; we got to the right forum. The union's  
16 responsibilities were able to be properly exercised  
17 under its statutory obligations. PERB properly  
18 exercised its statutory obligations, set forth by  
19 precedent as well, by protecting its jurisdiction, by  
20 also protecting, after the arbitrator clearly found  
21 that there was no contractual right - - -

22 CHIEF JUDGE LIPPMAN: So PERB properly sent  
23 you to the arbitrator, and then it properly went back  
24 to PERB?

25 MR. REICH: PERB to arbitrator; arbitrator

1 - - -

2 CHIEF JUDGE LIPPMAN: I mean, that's - - -

3 MR. REICH: - - - back to PERB.

4 CHIEF JUDGE LIPPMAN: That's - - - this  
5 business of you not having to choose, this is the way  
6 it works.

7 MR. REICH: This is the way it works.

8 CHIEF JUDGE LIPPMAN: And that's my point.

9 MR. REICH: Yes, and I - - - and I think it  
10 balances everybody's rights. It also favors  
11 arbitration, to see if there is a contractual right.

12 And I would like to add, and I know I'm - - -

13 CHIEF JUDGE LIPPMAN: Very quickly,  
14 counselor. Your time's up.

15 MR. REICH: I see the light is on.

16 CHIEF JUDGE LIPPMAN: Go ahead.

17 MR. REICH: There is nothing in the record  
18 here, there is no evidence here that the employer  
19 didn't know what it was doing.

20 CHIEF JUDGE LIPPMAN: Okay. Thanks,  
21 counselor.

22 MR. REICH: Thank you very much, Your  
23 Honors.

24 CHIEF JUDGE LIPPMAN: Counselor, rebuttal?

25 MR. MEAD: Just very briefly, Your Honors.

1 It seems to me that the Court is certainly catching  
2 on to the fact that this is a somewhat circular  
3 argument. In fact, it would seem that there's no  
4 point in going to the arbitration because where the  
5 arbitrator concludes that there's no contractual  
6 right, well now PERB has jurisdiction and they're  
7 going to find that - - -

8 CHIEF JUDGE LIPPMAN: But isn't - - -

9 MR. MEAD: - - - they're going to find that  
10 it's - - -

11 JUDGE RIVERA: No, but then you've got to -  
12 - -

13 MR. MEAD: - - - a noncontractual practice.

14 JUDGE RIVERA: But then you've got to make  
15 your case in front of PERB and you might lose. Of  
16 course there's a point to it.

17 MR. MEAD: Well, the - - -

18 JUDGE RIVERA: They might have won in front  
19 of the arbitrator. Of course there's a point.

20 MR. MEAD: Well, but it presupposes, then,  
21 that there has to be a contractual obligation anytime  
22 there's any sort of practice, even though the  
23 parties, in the past, negotiated that practice away.

24 JUDGE RIVERA: The implication under your  
25 argument.

1 MR. MEAD: Correct.

2 JUDGE RIVERA: Because there's nothing  
3 explicit, right?

4 MR. MEAD: Well, the explicit is that they  
5 negotiated a change from The Empire Plan to the Blue  
6 Cross plan, and those plans are in the record.

7 JUDGE RIVERA: They took a different health  
8 plan, and you're saying you can imply from that,  
9 because the second one, the one that they now  
10 negotiated themselves into - - -

11 MR. MEAD: Did not require - - -

12 JUDGE RIVERA: - - - doesn't have this  
13 requirement, even though you kept providing it,  
14 doesn't have the requirement, so therefore, that side  
15 - - - that's an agreement that you've negotiated that  
16 away.

17 MR. MEAD: Correct. And again, this  
18 somewhat goes to the waiver argument also, I would  
19 point out; these are sophisticated parties.

20 CHIEF JUDGE LIPPMAN: But these are  
21 sophisticated parties that understand this process.  
22 This is the process, right?

23 MR. MEAD: Well, that's true.

24 CHIEF JUDGE LIPPMAN: Okay. Thank you both

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MR. MEAD: Thank you.

CHIEF JUDGE LIPPMAN: - - - all of you.

Appreciate it.

(Court is adjourned)

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C E R T I F I C A T I O N

I, Sharona Shapiro, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of Chenango Forks Central School District v. New York State Public Employment Relations Board, No. 104 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

*Sharona Shapiro*

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