STATE OF NEW YORK

PUBLIC EMPLOYMENT RELATIONS BOARD

Text of Adopted Rules:

1. A new section 204.15 is adopted to read as follows:

204.15 Application for injunctive relief. (a) Filing of application. A party filing an improper practice charge pursuant to Part 204 of this Chapter may apply to the board for injunctive relief by filing with the office of counsel at the board's Albany office an original and two copies of a signed application for injunctive relief pursuant to section 209-a.4 of the act. An application filed by mail or overnight delivery service shall be filed in an envelope or container prominently bearing the legend "INJUNCTIVE RELIEF APPLICATION" in capital letters on its front.

(b) Application form. The application shall be filed on a form prescribed by the board which shall give notice of the right to respond pursuant to section 204.16 of this Part. The application form shall include the following:

(1) the name, address, telephone number, fax number, and affiliation, if any, of the charging party;

(2) the name, title, address, telephone number, and fax number of any representative filing the application on behalf of the charging party;

(3) the name, title, address, telephone number, and fax number of any attorney or other representative who will represent the charging party during the processing of the application, if different from the representative named in response to paragraph (2) above;

(4) the name, address, and telephone number of any public employer or employee organization named as a party to the improper practice charge;

(5) the date when the improper practice charge was filed, if available; and

(6) the case number of the improper practice charge, if available.

(c) Additional contents of application. The charging party shall attach to the application form the following documents:

(1) a copy of the improper practice charge;

(2) an affidavit or affidavits stating, in a clear and concise manner: (i) those facts personally known to the deponent that constitute the alleged improper practice, the date of the alleged improper practice, the alleged injury, loss, or damage arising from it, and the date when the alleged injury, loss, or damage occurred or will occur; and (ii) why the alleged injury, loss, or damage is immediate, irreparable, and will render a resulting judgment on the merits of the improper practice charge ineffectual if injunctive relief is not granted by the court, and why there is a need to maintain or return to the status quo in order for the board to provide meaningful relief;

(3) copies of any documentary evidence in support of the application;

(4) proof of the date of actual delivery of a copy of the completed application form and the attached documents (except proof of delivery), by mail, personal delivery, or overnight delivery service, in an envelope or container bearing the legend "ATTENTION: CHIEF LEGAL OFFICER" in capital letters on its front, addressed to every public employer and employee organization named as a party to the improper practice charge; and

(5) at the option of the charging party, a memorandum of law in support of the application for injunctive relief.

2. A new section 204.16 is adopted to read as follows:

204.16 Response to application for injunctive relief. (a) Filing of response. A party to whom an application for injunctive relief is delivered pursuant to section 204.15 of this Part may file with the office

of counsel within five days after such delivery an original and two copies of a response to the application, with proof of service of a copy of the response on all parties. Alternatively, one copy of a response, with proof of service of a copy of the response on all parties, may be filed by fax at a fax number designated by the board for that purpose within five days after delivery of the application. If the response is filed by fax, the responding party shall mail or deliver an original and two copies of the response to the office of counsel by the next working day. Unless otherwise authorized by the office of counsel, copies of the response shall be served on all other parties in the same manner in which the response is filed with the office of counsel. The response shall be signed and sworn to before any person authorized to administer oaths and shall be deemed filed when received by the office of counsel.

(b) Contents of response. (1) The response, if any, shall assert any defense that the responding party, at the time of filing, believes it could rightfully assert in an answer or responsive pleading to the improper practice charge, including any affirmative defenses pursuant to section 204.3(c)(2) of this Part. The response shall not constitute an answer or responsive pleading to the improper practice charge pursuant to section 204.3 of this Part, and asserting or not asserting any affirmative defense or other defense in the response shall not prejudice any party with regard to defenses or affirmative defenses that party may plead or not plead in an answer or responsive pleading filed pursuant to that section.

(2) Any affidavit submitted in support of the response shall be made on the basis of personal knowledge of the relevant facts and documentary evidence attached to the affidavit.

(3) The response may be accompanied by a memorandum of law in opposition

to the application for injunctive relief.

(c) Accelerated response. Upon presentation of clear evidence of a compelling need for determination of an application for injunctive relief in fewer than 10 days from its receipt by the board, and upon a determination by the office of counsel that such compelling need exists, the office of counsel may direct that a response, if any, shall be filed within a specified time earlier than otherwise required by this section.

STATE OF NEW YORK

PUBLIC EMPLOYMENT RELATIONS BOARD

Text of Adopted Rule:

1. A new section 204.17 is adopted to read as follows:

Section 204.17 Review of application for injunctive relief. Within 10 days after receipt of an application for injunctive relief by the board, where the board by its office of counsel determines that a sufficient showing has been made pursuant to section 209-a.4 of the act, the board by its office of counsel shall petition supreme court upon notice to all parties for injunctive relief or shall issue an order, with notice to all parties, permitting the charging party to seek injunctive relief by petition to supreme court. Where a sufficient showing has not been made, notice of that determination, stating the reasons for it, shall be issued by the board by its office of counsel to all parties within 10 days after receipt of the application by the board. Orders permitting the charging party to seek injunctive relief by petition to supreme court and notices to the parties that a sufficient showing has not been made may be issued by fax.

STATE OF NEW YORK

PUBLIC EMPLOYMENT RELATIONS BOARD

Text of Adopted Rules:

1. A new section 204.18 is adopted to read as follows:

Section 204.18 Expedited treatment where injunctive relief imposed. Notwithstanding the time limits stated in sections 204.2, 204.3 and 204.6 of this Part, when injunctive relief is imposed by a court pursuant to section 209-a.4 of the act, after affording the parties an opportunity for consultation, the administrative law judge assigned to the proceeding shall issue a scheduling order or orders setting the dates and times for service and filing of answers, responsive pleadings, motions, responses, briefs, and proposed findings of fact and conclusions of law, and for conduct of a prehearing conference and hearing. Unless the parties mutually agree to waive the time limit for concluding the hearing and issuing a decision pursuant to section 209-a.4(d) of the act, scheduling orders shall be fashioned in such a manner as to permit the administrative law judge to issue a decision on the improper practice charge within 60 days after the imposition of injunctive relief in accordance with section 209-a.4(d) of the act.

State of New York

Public Employment Relations Board

Assessment of Public Comment

Comment: There is no requirement for service of the application upon a responding party's counsel, and it may take some time for the application to get from a responding party to its attorney, if they have one. Charging party should be required to serve a copy of the application on a responding party's counsel if the charging party knows the other party to be represented.

Response: The proposed rule was amended to specify a requirement of actual delivery of the application to any responding party, addressed "ATTENTION: CHIEF LEGAL OFFICER," before filing. Requiring a charging party to find out if a responding party is represented and, if so, by whom, before being able to apply for injunctive relief would require the charging party to make assumptions about or investigate the identity of the responding party's counsel, and would be impractical.

Comment: Should a responding party, as part of its response, be required to respond to the charging party's claim that injunctive relief is required, in addition to being required to assert defenses to the improper practice charge?

Response: The rule allows a responding party to respond to the application and requires as a minimum that the responding party assert any known defenses. In light of the opportunity to respond, it is presumed that the respondent will offer, as it deems appropriate, argument against the need for an injunction.

Comment: It might be helpful if the charging party were required to

include a draft of the papers to the court for injunctive relief.

Response: The affidavits or affidavits accompanying the application will serve substantially the same effect without imposing a separate additional requirement on charging parties.

Comment: References to "days" should be changed to "working days" in sections 204.16(a) and 204.16(c).

Response: New section 209-a.4 of the act requires the board to determine the application for injunctive relief within ten calendar days of its receipt, during which time the application must be evaluated and, if the board elects to bring the petition for injunctive relief, necessary papers for submission to the court must be prepared. The rule, as adopted, allows responding parties five calendar days to submit a response. The adopted rule equitably apportions the limited time available under the statute.

Comment: Section 204.16 does not require personal service of respondents' temporary restraining order papers, while section 204.15 does require personal service of charging parties' temporary restraining order papers. There is no basis in the law or rules of practice for such a distinction.

Response: An application to PERB for injunctive relief is not a quasi-judicial, adversarial proceeding between the parties. Therefore, the rules require that a copy of the application for injunctive relief be actually delivered to the responding party before the application may be filed with the board not in order to establish jurisdiction over a responding party, but to accommodate the ten-calendar-day constraint of the statute. The adopted rule requires that copies of the response be served on all other parties in the same manner in which the response is filed with the office of counsel.

Comment: Section 204.15(b)(5) uses the word "precise" in regard to the

"nature of the injury, loss, or damage arising" from the conduct complained of. This standard is unnecessary and may lead to unnecessary litigation as to the sufficiency of the showing of damages.

Response: The word "precise" was deleted.

Comment: Section 204.16 provides that the assertion of any defense or affirmative defense in the responsive papers shall not prejudice respondent with respect to its answer to the underlying charge. Charging party may be prejudiced when its application and follow-up in court, and possibly on appeal, is thus evaluated on the basis of stated defenses to which respondent is not going to be held.

Response: The existence of defenses is relevant to the inquiry whether there is reasonable cause to believe that an improper practice has occurred. However, given the limited time available under the statute, it would be unreasonable to restrict a responding party's responsive pleading to the underlying improper practice charge to defenses stated in response to an application for injunctive relief on the basis, in some cases, of two days' or less investigation of the charge.

Comment: Questioned why the director would not consider the evidence presented in the temporary restraining order application when evaluating the improper practice charge.

Response: The adopted rule requires an application for injunctive relief to be filed with the office of counsel and to be procesed independently from the director who is responsible for adjudication of the improper practice charge.

Comment: Requiring respondent's fax numbers as part of the charging party's petition is unnecessarily burdensome and perhaps prejudicial.

Response: The adopted rule eliminates the requirement.

Comment: This proposed rule states that a party that has filed an improper practice charge may apply to the board by filing an application. As worded, that proposed rule would permit a party that might have filed an improper charge prior to January 1, 1995, to subsequently file an application for injunctive relief, if the charge is still pending before the agency. Although the statute providing for potential injunctive relief takes effect January 1, 1995, the wording of the proposed rule and its potential application to pending charges would have the resultant effect of making the injunctive relief statute retroactive to charges filed before January 1, 1995. Such a result would be contrary to the legislative history and intent.

Response: The proposed rule was amended to read "A party filing an improper practice charge . . .," as stated in the statute.

Comment: Section 204.16(c) would authorize a determination that, upon the existence of a compelling need, a respondent to an improper practice charge in which an application for injunctive relief has been made may be required to file a response sooner than would otherwise be required by the proposed rules. There is no need to expedite the response procedures, since doing so would impose an undue hardship on public employers while affording to a charging party a process that at best would only be accelerated a few days.

Response: The statute defines only an outside time limit of ten days within which an application for injunctive relief is to be determined by the board. There is no other way to both address an application for injunctive relief that compellingly alleges that an act that will render the board's remedial powers ineffectual is going to occur in fewer than ten days, and to still afford responding parties an opportunity to respond.

Comment: The statutory "irreparable injury" criteria should be defined so

as to clarify its limits.

Response: The statute states a specific standard for review of the sufficiency of an injunctive relief application which the board cannot amend.

Comment: Section 204.15(b)(5) provides for a charging party to file an affidavit stating, among other things, facts that would constitute the alleged improper practice, including the date of the alleged improper practice. Section 204.15(b)(8) provides for the charging party to include a copy of the improper practice charge filed. It appears, therefore, that subsection (5), at best, calls for redundant information, and, at worst, provides the charging party an opportunity to state facts different from those alleged in the charge.

Response: Section 204.15(b)(5) of the proposed rule was deleted.

Comment: Section 204.16(a) allows the filing of a response to an application for injunctive relief "within five days of such service." It is recommended that the word "of" be changed to "after" to parallel language used elsewhere within the Rules (see, e.g., sections 204.3(a), 204.3(b), and 204.10). The term "of" may lead to confusion as to whether or not the day of service is to be counted, especially since "after" is used elsewhere in the Rules when measuring response time. The use of consistent language will preclude any confusion.

Response: Section 204.16(a) was amended as suggested in the comment.

Comment: The last sentence of section 206.16(a) is confusing as to its deeming the response "filed" when received by the counsel. This will make response by mailing virtually impossible since receipt could never be assured within five days. If the response is filed by fax, the last sentence makes it unclear whether the receipt of the faxed copy at the

board's offices is sufficient. Section 204.16(a) should make clear that receipt of the faxed copy in the board's offices with the mailing or delivery of the original and two copies by the next working day constitutes filing on the date faxed under the Rules.

Response: The rule is sufficiently clear that a response is deemed filed when the response has been received by the office of counsel. The rule requires a subsequent mailing of the original and two copies of a response previously filed by fax for administrative purposes only.

Comment: Proposed section 204.16(b)(1) may be unclear as to the result of failure to assert a possible defense in a response. It must be made clear that failure to assert a defense at the time of filing a response in no manner precludes the assertion of such defenses at a later time, either as to the improper practice charge or on the application for injunctive relief. The term "shall" in the first sentence should be changed to "may," and the second sentence should be changed to state "the assertion of or failure to assert any affirmative defenses or other defense in the response shall not prejudice any party with regard to defenses or affirmative defenses that party may plead or not plead in an answer or responsive pleading to the improper practice or to any petition to supreme court for injunctive relief."

Response: The pertinent language in the second sentence of section 204.16(b)(1) was changed to "asserting or not asserting." The board has no jurisdiction to define, limit, or expand the contents of a party's pleadings in supreme court.

Comment: Proposed section 204.16(c) should provide for consideration of other factors, such as the amount of notice the party filing the application had of the impending conduct. A party should not be able to

delay filing an application so as to limit the respondent's time to respond.

Response: The rule, as adopted, does not preclude the office of counsel, in determining whether a compelling need exists, from considering to what extent, if any, a charging party had notice of the impending conduct.

State of New York

Public Employment Relations Board

Assessment of Public Comment

Comment: The requirement that a charging party assist the counsel where the board elects to petition for injunctive relief will increase the perception that the agency has lost its impartial status. Suggests that paragraph (c) be amended to permit the charging party to appear as co-petitioner.

Comment: Does not believe that an agency can mandate that a party serve to supplement agency staff or be directed by agency staff in the presentation of matters to a court. Moreover, such a mandatory arrangement is not included in the statute and from a practical perspective can become problematic where charging party and PERB have different views as to why injunctive relief should be granted. In addition, the statute allows for PERB to find sufficient ground for the application and to authorize the charging party to petition in its own right. In this latter situation, PERB may determine the extent of its own participation without regard to the needs of the party authorized to petition the court on its own. Lastly, there is no basis in the practice of law for the mandatory assistance of an agency attorney by a private attorney and we suggest that there is neither the authority to require such by regulation nor the need to do so. The chilling effect of such regulatory language was clearly not intended by the Legislature in allowing for the agency to determine the level of its own participation from the outset.

Comment: This section provides, among other things, that the charging party shall assist PERB's Counsel in initiating and prosecuting the

petition to Supreme Court and any related hearing, motion or appeal. This section is extremely troublesome and conflicts with PERB's neutrality. If nothing else, this section will make PERB's pursuit of an injunction and its probability of success somewhat contingent upon the resources of the charging party. Rather than serving as the primary focus of the proceedings, the merits of a charge and/or the application for injunctive relief may be subservient to how much assistance PERB will/can receive from the charging party.

This section calls for the joining of PERB's and the charging party's resources to be used against the interests of the respondent. Perhaps a more neutral procedure would be for PERB to require the charging party to prepare all material and for PERB's counsel to do no more than sign the petition to the Supreme Court for injunctive relief and to designate the charging party as his representative in all related matters before the court.

Response: Paragraph (c) was deleted.

Comment: Section 204.17 requires the application to be made by the counsel. What if "the" counsel is sick or out of the office? Shouldn't the determination be made by the office of counsel or by counsel or his or her designee?

Response: References to "the counsel" were amended to read "the board by its office of counsel."

Comment: The references to "days" should be changed to "working days." Without these changes, respondents could conceivably have as few as one or two calendar days to file their response to an application for injunctive relief.

Response: The limit of ten calendar days is statutory.

Comment: Section 204.17 provides that PERB counsel will make the determination as to whether the charging party has made a sufficient showing for injunctive relief. The statute provides that the Board is to make that determination. Although, PERB Counsel may make a recommendation, giving counsel the authority to make the determination may be an unauthorized delegation of authority not envisioned by the Legislature.

Response: The intent of the proposed rule was to continue to vest in the Board the duty to carry out its statutory function, by its attorneys, but not to remove the Board's ultimate authority. The language of the rule is amended to clarify this role.

Comment: The fax referred to in section 204.17(b) of the proposed rule should be followed by a copy sent certified mail, return receipt requested, as indicated elsewhere in the proposed rules.

Response: The requirement of mailing copies of a previously faxed response on the next day in section 204.16 of the Rules, also published today, arises from the board's administrative need in regard to the possible preparation of a petition to the court. The provision referred to does not involve any similar administrative need, its purpose being only to authorize a method for giving all parties the most expeditious notice possible of the board's determination. A later mailing of an order or notice is not precluded.

Comment: Urges the board to amend section 204.17(b) to read " . . . the counsel shall petition supreme court upon prior or contemporaneous personal notice to all parties for injunctive relief or shall issue an order, with prior or contemporaneous personal notice . . . ." Without this change, it is conceivable that a respondent will not have adequate notice of counsel's actions.

Response: The rule, as adopted, exceeds the minimum requirements of the statute, which explicitly requires only that a petition by the board to supreme court be on notice to all parties. The rule strikes an equitable balance between the board's administrative burdens and respondents' interest in prompt notice of the board's determination of the application. The proposed change was not adopted.

Comment: Proposed section 204.17 should be changed to provide that PERB notify the respondent of a determination to seek an injunction at the time the determination is made. Such notice may provide a basis for voluntary resolution of the immediate action causing the need for such relief prior to having to file a petition and will also provide additional time to prepare responsive papers if an application is filed. PERB should also be required to notify respondent's counsel of an appeal of a determination not to seek injunctive relief within three working days of receipt. The current proposed rule does not require notice of an appeal to the respondent, which certainly is an interested party.

Response: It would not be practical to adopt the proposed changes by rule at this time. While the board will consider these suggestions for adoption as a practice, they would impose new duties on the board in addition to those imposed by the statute, some with time constraints even shorter than those imposed by the statute, and they are not necessary to implement the statute.

State of New York

Public Employment Relations Board

Assessment of Public Comment

Comment: The administrative law judge decision should be issued in less than sixty days to be consistent with the purposes of the legislation. Perhaps thirty days should be considered.

Response: The legislature is presumed to have believed that issuing the administrative law judge's decision within sixty days of the imposition of injunctive relief was consistent with the purposes of the statute. The proposed change was not adopted.

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

U-

Date Received:

PERB

A-

APPLICATION FOR INJUNCTIVE RELIEF PURSUANT TO CIVIL SERVICE LAW §209-a.4

Do Not Write In This Space

INSTRUCTIONS TO CHARGING PARTY

COMPLETE BOTH SIDES OF THIS FORM. File the original and two copies of the completed form and attachments with the Office of Counsel, New York State Public Employment Relations Board, 80 Wolf Road, Albany, New York, 12205-2604. Please Note: In Item 4 below, you must identify the public employers and/or employee organizations against whom the charge is brought, as well as any public employer you are required to identify in the charge because the charge alleges a violation of Civil Service Law §209-a.2(c) based on an employee organization's processing of or failure to process a claim that the public employer breached its agreement with that employee organization. If you need more space for any item, use the additional space on the back and number that item the same. *You cannot file this application without proof that copies have already been received by all other parties.* (See reverse.)

NOTICE TO PUBLIC EMPLOYERS AND EMPLOYEE ORGANIZATIONS IDENTIFIED IN ITEM 4 BELOW

The charging party named below is filing the attached improper practice charge with the Public Employment Relations Board ("Board"), naming you as a party under §209-a of the Public Employees' Fair Employment Act ("Act"), Civil Service Law §§ 200–214. The charging party also is filing this application to petition the Board for injunctive relief pursuant to §209-a.4 of the Act. You have a right to respond to this application as explained in the Rules and Regulations of the Board ("Rules"), 4 NYCRR Part 204.16. Your response, if any, must be received by the Board within five days after the day you receive this application or within a shorter time on notice from the Board's Office of Counsel. Any response that you may make to this application is *not* your answer or responsive pleading to the improper practice charge. You may have other rights under the Act, other laws, or the Rules.

1 CHARGING PARTY

NAME (If an employee organization, give the unit, affiliation, and local number, if any):

ADDRESS:

TELEPHONE:

FAX:

2 REPRESENTATIVE FILING FOR CHARGING PARTY (If any):

NAME AND TITLE:

ADDRESS:

TELEPHONE:

FAX:

3 ATTORNEY OR OTHER REPRESENTATIVE TO BE CONTACTED (If different from Item 2):

NAME AND TITLE:

ADDRESS:

TELEPHONE:

FAX:

4 PUBLIC EMPLOYERS AND/OR EMPLOYEE ORGANIZATIONS NAMED IN THE CHARGE:

NAME, ADDRESS AND TELEPHONE:

NAME, ADDRESS AND TELEPHONE: