

¶18-5002

OPINION OF COUNSEL

INDEX NOS. 11.16,11.7,41.8

Regarding proposed consolidation of three school districts to form new entity, it would appear that dissolved districts, pursuant to Education Law § 1518, would continue to exist for purpose of satisfying obligations already incurred under collective bargaining agreements still in effect. In addition, pursuant to Education Law § 1514, property rights of dissolved districts would succeed to consolidated entity. Such property rights would include all assets of dissolved districts, and might include collective bargaining agreements and their attendant rights and obligations [see *Barringer v. Powell*, 230 NY 37 (NY Ct.App. 1920)]. Further, assuming that workforce of consolidated entity would be comprised largely of same employees that were employed by dissolved districts, new entity's duty to negotiate with employees' unions might not arise pending restructuring of former bargaining units.

The Deputy Chairman has referred your letter of January 23, 1984 to this office for reply. In it, you discuss a possible consolidation of three school districts into a single new entity. Specifically, you ask whether it is reasonable to assume that the parties to prior collective bargaining agreements, i.e., the individual school districts and the employee organizations which represent their employees, cease to legally exist as of the date of consolidation. You also inquire as to what rights and obligations attach with regard to negotiations after such consolidation is effectuated.

The Board has not had occasion to deal at any length with questions regarding "successor employers," and public sector law dealing with this subject area is not well developed. Consequently, the nature of your questions is such that I can only offer some general observations which may be of assistance to you.

I do not believe that either the individual school districts or the employee organizations with whom the districts were party to a collective agreement, cease to legally exist upon consolidation. Certainly, there would appear to be no reason for the employee organization to lose their status as legal entities merely because the identity of the public employer has changed. While questions concerning their representation status may be raised, I believe the employee organizations would continue to legally exist, absent a provision to the contrary in their constitution or by-laws.

By virtue of § 1518 of the Education Law, neither does it appear that the dissolved school districts would cease to exist for all purposes. That section provides that:

Though a district be dissolved, it shall continue to exist in law, for the purpose of providing for and paying all its just debts...

Thus, it would appear that if, at the time of consolidation, the dissolved districts had already incurred obligations under a collective bargaining agreement or arbitration award, they would continue to exist for the purpose of satisfying such obligations. Obligations which arise after consolidation, on the other hand, are the responsibility of the consolidated entity, and this leads to your second question.

Generally, questions regarding the obligations of the consolidated entity or successor employer fall into two general categories: one, its duty, if any, to continue the substantive provisions of any existing or expired agreements which were negotiated by its predecessor(s) in interest, and two, its duty, if any, to continue negotiations with the existing negotiating representatives of its predecessor's employers. In the private sector, it is clear that a successor employer is not obligated to continue in effect the substantive provisions of its predecessor's labor contracts, and that, as a general rule, the successor employer is free to set initial terms and conditions of employment. *NLRB v. Burns International Detective Agency Inc.*, 406 US 272 (1972); *Howard Johnson Co. v. Detroit Joint Board Hotel and Restaurant Employees*, 417 US 249 (1974). PERB looked

somewhat favorably upon this private sector rule in *Monroe-Woodbury Teachers Association*, 10 PERB ¶ 3029, but only in the context of a particular scope of negotiations question. I cannot say with any certainty that the Board will choose to adopt this rule when and if the question is directly presented to it in a fully litigated case. Peculiar private sector concerns, such as the ability to freely alienate property and an employer's willingness to take over a moribund business, were of key significance in the *Burns* and *Howard Johnson* cases, and may not be applicable in the public sector. Moreover, peculiar public policy considerations, such as the absence of a right to strike and the Legislature's recent enactment of CSL § 209-a.1(e), which makes it an improper practice for a public employer "to refuse to continue all the terms of an expired agreement until a new agreement is negotiated....," may also support a contrary conclusion.

Of greater importance, however, is the fact that whatever general Taylor Law rule might be promulgated by the Board with regard to the obligations of successor employers, § 1514 of the Education Law appears to govern specifically with regard to school districts. That provision states that:

When two or more districts shall be consolidated into one, the new district shall succeed to all the rights of property possessed by the annulled districts.

In *Barringer v. Powell*, 230 NY 37 (1920), the Court of Appeals had occasion to apply this provision (then § 137) to an employment contract entered into between a teacher and a school district which subsequently was party to a consolidation. The Court found that the employment contract was a right of property which passed to the consolidated district, stating:

Under this section, all the assets of the dissolved district, of every kind and description, including the contract in question, became the property of the consolidated district immediately upon the taking effect of the order of consolidation. It acquired whatever benefits and assumed whatever obligations were imposed by the contract.

As regards the negotiating obligations of the consolidated entity, the private sector rule is that the successor employer does have a duty to bargain with the employee organization(s) representing its predecessor's employees as long as certain criteria are met. The latter include a continuity of the work force and the continued appropriateness of the prior negotiating unit(s). *NLRB v. Burns*, *supra*; *Border Steel Rolling Mills Inc.*, 204 NLRB 814 (1973). While it is likely that, in the event of the consolidation of school districts, the work force will remain largely the same, there is certainly a possibility that the individual negotiating units will no longer be appropriate, particularly in light of the fact that this Board deems most appropriate the largest unit which is consistent with the standards set out in CSL § 207.1. Thus, were the Board to adopt the private sector case law in this area, it may well be that, if the consolidated entity did not wish to bargain on the basis of the former uniting arrangement, it could, at the outset of its existence, require its employees and their employee organizations to seek new recognition or certification. If the consolidated district chose this course, then negotiations would have to await clarification of any representation questions which might arise.

As you can see, there are many more questions than there are answers in this area. In the event consolidation is a real possibility, I would urge you to sit down with all affected parties well in advance of the proposed date of consolidation and attempt to resolve these problems in a mutually satisfactory fashion. In this regard, PERB remains fully willing and available to lend its assistance.

This opinion is advisory only, since binding determinations are restricted by statute to the Board in actual cases presented to it.