

An Initial Guide to Collective Bargaining Rights
and Responsibilities Under the Farm Laborers'
Fair Labor Practices Act

(NY Laws 2019 ch. 105)

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I. **Overview:**

This guide examines the basic provisions and procedures under the Farm Laborers' Fair Labor Practices Act ("FLA"), which amends several portions of the New York State Labor Law. **Any expressions of opinion are those of the author alone, and have not been approved by the other Board members of the NYS Public Employment Relations Board.**

In this guide, the FLA is discussed only to the extent it amends the State Employment Relations Act ("SERA"), Labor Law Art. 20, §§ 700-718. SERA, which used to be known as the State Labor Relations Act, governs the rights of private sector employees to join (or not join) unions, to organize, to collectively bargain, and to do so free of unlawful employer discrimination, retaliation, interference or other improper action. The SERA also protects the right to concerted protected activity by employees, even absent membership in a union.

Prior to 2010, the State Labor Relations Board administered SERA. Their decisions were reported in volumes abbreviated as "SLRB," some of which are cited here.

Since 2010, cases under SERA have been under the jurisdiction of the NYS Public Employment Relations Board ("PERB"). (NY Laws 2010, c. 56, pt. O, § 3) (effective July 22, 2010). In the nearly 10 years that PERB has had jurisdiction over the SERA, cases under it have been a relatively small part of PERB's caseload, but a steady flow of these cases have allowed PERB Administrative Law Judges ("ALJs") and the Board to be familiar with the workings of the law.

The FLA was passed nearly two months after the decision in *Hernandez v. State of New York & NY Farm Bureau*, 173 A.D.3d 105 (3d Dept., May 23, 2019). In that case, the Appellate Division (the State's second highest court) found that SERA violated the State Constitution by excluding farm laborers from the rights:

- to join (or not join) a union,

- to collectively bargain with their employers over terms and conditions of employment, and
- to act together—even in the absence of a union—to raise group concerns together to their employers, free from fears of retaliation, discrimination, and being fired.

In very broad terms, the FLA amended the SERA to extend the rights of unionization and collective bargaining to farm laborers (except for laborers who are “the parent, spouse, child, or other member of the employer’s immediate family”).

The rights extended to farm laborers are:

- The right of self-organization, to form, join, or assist labor organizations,
- To bargain collectively through representatives of their own choosing,
- To engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection, free from interference, restraint, or coercion of employers. Concerted activities are protected, even if no union has been involved.
- These rights do not prevent farm laborers from speaking with their employer at any time, as long as the employer does not, during such conferring, attempt, directly or indirectly, to interfere with, restrain or coerce employees in the exercise of the rights. [§ 703]
- Recognizing the unique issues confronting farmers, the FLA *forbids strikes, or other concerted slowdowns or stoppages of work by employees.* (§ 703).
- Just like unions (or employees) can’t strike, employers can’t unilaterally change the status quo by refusing to continue all the terms of an expired agreement until a new agreement is negotiated. [§ 704-b (2)(b)]

- NOTE: What if a Union organizer is seeking access to farm laborers who reside on a farm, but the property owner won't let them enter?

If this is the only reasonable way to obtain access to these employees, the employer may be committing an unfair labor practice, and a charge could be filed with PERB. Additionally, the right of individuals living on farm property to have guests may be implicated, raising issues under other laws.

An approach that can avoid a charge or other legal issues would be for one or both parties to reach out to PERB's Office of Conciliation, and ask for a mediator to be assigned to help the employer and the union reach an agreement that will provide reasonable access to employees while minimizing the disruption on the farmer's property.

II. Who's Covered, and How Are Unions Certified?

1. Who is an "employee" entitled to union representation, if they choose to be in a union?

All "farm laborers," meaning any individual engaged or permitted by an employer to work on a farm. Members of an agricultural employer's immediate family who are related to the third degree of consanguinity or affinity shall not be considered to be employed on a farm if they work on a farm out of familial obligations and are not paid wages, or other compensation based on their hours or days of work. § 701(3) (c), revised by L.2020, c.58, pt. II, § 2, eff. April 3, 2020, deemed eff. Jan. 1, 2020.

The FLA provides that the Board shall determine whether any supervisory employee shall be excluded from any negotiating unit that includes rank-and-file farm laborers. The FLA further provides nothing in this subdivision shall be construed to limit or prohibit any supervisory employee from organizing a separate negotiating unit. § 705.1 (b), revised by L.2020, c.58, pt. II, § 2, eff. April 3, 2020, deemed eff. Jan. 1, 2020.

2. Who is an “Employer” covered by the FLA? § 701(2) (b).

The term “employer” includes agricultural employers. The term “agricultural employer” shall mean:

- any employer engaged in cultivating the soil or in raising or harvesting any agricultural or horticultural commodity including custom harvesting operators, and
- employers engaged in the business of crops, livestock and livestock products as defined in section 301 of the agriculture and markets law, or other similar agricultural enterprises. § 701(2) (b).

3. How is an Appropriate Negotiating Unit Determined? [§ 705(2)].

The board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization, to collective bargaining and otherwise to effectuate the policies of this article, the unit appropriate for the purposes of collective bargaining shall be:

- The employer unit (“All employees of Watership Down Farm”);
- A multiple employer unit (“All apple orchards in Columbia County”);
- A craft unit (specialists), plant unit, or any other unit;

However, in any case where the majority of employees of a particular craft shall so decide the board shall designate such profession or craft as a unit appropriate for the purpose of collective bargaining. § 705(2).

4. How does a Union get certified? [§ 705-1 (a)].

A. If the choice available to the employees in a negotiating unit is limited to selecting or rejecting a single employee organization, that choice may be ascertained by the board on the basis of **dues deduction authorizations instead of by an election.**

- In such case, the employee organization involved will be certified without an *election if a majority of the employees within the unit have*

executed dues deductions authorizations. § 705-1 (a).

- The board designates a union when the union demonstrates a showing of majority interest by employees in the unit (submission of dues deduction cards to PERB).
- Where the parties to a disputed choice disagree on how to certify a union as the collective bargaining representative, the board shall ascertain such employees' choice of employee organization, on the basis of dues deduction authorization and other evidence, or if necessary, by conducting an election.
- If either party provides to the board, prior to the designation of a representative, **clear and convincing** evidence that the dues deduction authorizations, and other evidence upon which the board

would otherwise rely to ascertain the employees' choice of representative, are fraudulent or were obtained through coercion, the board shall promptly conduct an election.

- The board shall also investigate and consider a party's allegations that the dues deduction authorizations and other evidences submitted in support of a designation of representative without an election were subsequently changed, altered, withdrawn or withheld as a result of employer fraud, coercion or any other unfair employer labor practice.
- If the board determines that a representative would have had a majority interest but for the employer's fraud, coercion or unfair labor practice, it shall designate the representative without the conduct of an election. [§ 705 (1)]

B. What if there are Three or More Unions Seeking to Represent the Same Unit? [§ 705 (5)]

If there are 3 or more unions seeking to be the exclusive collective bargaining representative, and no one of them receives a majority of the votes cast at the election, the two nominees who received the highest number of votes shall appear on the ballot of a second election, and the one receiving a majority of the votes cast at the second election shall be the exclusive representative of all the employees in such unit for the purpose of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment.

C. Eligibility to be on Ballots. [§ 705 (6)]

A union nominated as the representative of employees *shall* be listed by name on the ballots.

- In any investigation conducted by the board pursuant to this section the board may make a finding as to whether any committee, employee representation plan, or association of employees involved is a company union.
- If any such committee, employee representation plan, or association of employees be found to be a "company union" (one

dominated by the employer), it *shall not* be listed on the ballots, certified or otherwise recognized as eligible to be the representative of employees under this article. [§ 705 (6)]

D. What if an Employee or the Employer Thinks a Showing or an Election is Invalid? (§ 705 (3))

- Whenever it is alleged by an employee or his representative, or by an employer or his representative, that there is a question or controversy concerning the representation of employees, the board shall investigate such question or controversy and certify in writing to all persons concerned the name or names of the representatives who have been designated or selected.

- In an investigation, the board shall provide for an appropriate hearing upon due notice and may conduct an election by secret ballot of employees or use any other suitable method to determine the representative (either before or after the hearing). **Misconduct around an election may constitute an Unfair Labor Practice. [§ 705 (3)]**

E. Who gets to Vote in an Election & How is it Conducted? [§ 705 (4)]

- **The Board** has the power to determine who may participate in the election and to establish the rules governing any such election;

- **The Board** or its agent determines where and how an election is held. The mechanics of an election, such as the date, time, place, and method are left to the discretion of an Election Supervisor, Administrative Law Judge or other designee of the Board.

See Brooklyn Eye and Ear Hospital, 32 SLRB 34, at 119, 121 (1969); *Manchester Knitted Fashions*, 108 NLRB 1366, 1366 (1954); *San Diego Gas & Electric*, 325 NLRB 1143, 1144 (1998).

- Under both the NLRA and the SERA, the presumption is that the election will be held on the employer's premises. Kurt L. Hanslowe, *Procedures & Policies of the New York State Labor Relations Board* (1964), p. 102; John E. Higgins, Jr., *The Developing Labor Law*, vol. 2, p. 3-33 (2017).

- **Can an Employer or Unions Have Observers at an Election?**

Yes, *if* the Administrative Law Judge, Election Supervisor, or other agent of the Board agrees. If observers are permitted, all sides may have observers. *Brooklyn Eye and Ear Hospital*, 32 SLRB 34, at 119.

Observers are only permitted to challenge the eligibility of voters, or mishandling of votes during the balloting. *Brooklyn Eye and Ear Hospital*, 32 SLRB 34, at 119.

Although observers may be used at an election, it is only permitted as a matter of courtesy and good public relations. Their absence does not affect the validity of an election. *Brooklyn Eye and Ear Hospital*, 32 SLRB 34, at 119.

However, no election need be directed by the board solely because of the request of an employer or of employees prompted thereto by their employer. [§ 705 (4)]

- **Limitations:**

(1) any individuals employed only for the duration of a strike or lockout cannot be eligible to vote in an election;

(2) No election shall be conducted under the employer's supervision, **or, except as may be required by the board, on the employer's property, during working hours**, or with the employer's participation or assistance. [§ 705 (4)]

F. How Does the Board Know Who Can Vote? [§ 708 (1), (2)]

- The Board, or its designees shall at all reasonable times have access to, for the purposes of examination, and the right to examine, copy or photograph any evidence, including payrolls or lists of employees, of any person being investigated or proceeded against that relates to any matter under investigation or in question, whether relating to unit placements and elections, or unfair labor practices.

- The Board can also issue subpoenas, administer oaths, and take evidence. It can take testimony or depositions within or without New

York State, in such manner and in such form as the board or its member, agent or agency conducting the hearing may by special order or general rule, prescribe [§§ 708 (1), (2)].

III. Unfair Labor Practices (“ULP”) [§ 704-b]

ULPS at a Glance: As one early court ruling put it, “the Act is an implemented warning to employers to keep hands off the union aspirations and activities of their employees. No matter how remote the control, how indirect the domination, how devious the dictation, how subtle the influence, how circuitous the coercion, or how disguised the intimidation, if the absolute freedom of the worker respecting union activities is discouraged or abridged or interfered with, the Act bludgeons it.” [NYS Labor Relations Bd v. Interborough News Corp, 170 Misc 347 (Sup Ct NY Co 1939). [§ 704 (8)]

1. Employee Organization/Employee ULPs. [§ 704-b (1)]

- Any farm laborer or an employee organization representing farm laborers that strikes any agricultural employer commits a ULP.
- The term “strike” shall mean, for the purposes of this section, any strike or other concerted stoppage of work or slowdown by farm laborers.

2. ULPs Specific to Agricultural Employers. [§ 704-b (2)]

An agricultural employer commits a ULP if it:

(1) lockout its laborers.

- A “lockout” is a refusal by an agricultural employer to permit farm laborers to work as a result of a dispute with such farm laborers or employee organization representing such farm laborers that affects wages, hours and other terms and conditions of employment of such farm laborers.

- A lockout is **not** a termination of employment for good cause that does not involve the terminated laborers' exercising any rights guaranteed by SERA. [§ 704-b (2) (a).

(2) refuses to continue all the terms of an expired agreement until a new agreement is negotiated [§ 704-b (2) (b)].;

(3) discourages union organization or discourages an employee from participating in a union organizing drive, engaging in protected concerted activity, or otherwise exercising the rights guaranteed under SERA. [§ 704-b (2) (c)].

Note: the FLA states that this section does not limit the ability to bring either election related proceedings under § 705 or ULP proceedings under the pre-existing ULP § 704 of SERA. § 704-b (3)]

3. **Other Employer ULPs under SERA § 704**

An employer, whether an agricultural employer or other employer under the SERA, commits a ULP if it violates any of the below provisions [§ 704 (1)-(11)]:

A. **No Spying/Surveillance:** An employer is guilty of a ULP if it spies on or keeps under surveillance, whether directly or through agents or any other person, any activities of employees or their representatives in the exercise of the rights guaranteed by § 703. [§ 704 (1)]

B. **No Blacklist:** To prepare, maintain, distribute or circulate any blacklist of individuals for the purpose of preventing any of such individuals from obtaining or retaining employment because of the exercise by such individuals of any of the rights guaranteed by section seven hundred three. [§ 704 (2)]

C. **No Domination/Interference:** To dominate or interfere with the formation, existence, or administration of any employee organization or association, agency or plan which exists in whole or in part for the purpose of dealing with employers concerning terms or conditions of employment, labor disputes or grievances, or to contribute financial or

other support to any such organization, by any means, including but not limited to the following:

(a) by participating or assisting in, supervising, controlling or dominating (1) the initiation or creation of any such employee organization or association, agency, or plan, or (2) the meetings, management, operation, elections, formulation or amendment of constitution, rules or policies, of any such employee organization or association, agency or plan;

(b) by urging the employees to join any such employee organization or association, agency or plan for the purpose of encouraging membership in the same;

(c) by compensating any employee or individual for services performed in behalf of any such employee organization or association, agency or plan, or by donating free services, equipment, materials, office or meeting space or anything else of value for the use of any such employee organization or association, agency or plan; provided that, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.[§ 704 (3)]

D. No Interfering with Employee Choice of Union: It is a ULP to require an employee or one seeking employment, as a condition of employment, to join any company union or to refrain from forming or joining or assisting a labor organization of his own choosing. [§ 704 (4)]

E. No Guiding or Discouraging Employee Choice: It is a ULP for an employer to encourage membership in any company union or discourage membership in any labor organization, by discrimination in regard to hire or tenure or in any term or condition of employment.¹

¹ The last part of this subsection, which reads: “nothing in this article shall preclude an employer from making an agreement with a labor organization requiring as a condition of employment membership therein, if such labor organization is the representative of employees as provided in section seven hundred five” is clearly unconstitutional under, among other decisions, the U.S. Supreme Court’s ruling in *Janus v. AFSCME Council 31*, 585 U.S.____, 138 S. Ct. 2448, 201 L. Ed. 2d 924 (2018). See generally, Cudahy,

[§ 704 (5)]

• **Question: What is “discouragement” under the SERA?**

PERB hasn’t had the chance to rule on the limits of this term; here are examples of “discouragement” found by the SERB and NY courts, and then by the NLRB, which may be helpful until the Board does address the issue:

- Pre-hiring agreements with prospective employees that they won’t join a union. [*Stork Restaurant v. Boland*, 282 NY 256 (1940);
 - Conditioning employment offer to new merged employer on joining different union than that employees already are a member of [*NYS Labor Rel Bd. v. Club Transp Corp*, 275 AD3d 536 (2d Dept 1949);
 - Evicting residential employee from quarters because of union activity. [*NYS Labor Relations Bd v Elenberg*, 80 NYS2d 616 (Sup Ct Bx Co. 1948);
 - Moving the business site to punish unionizing employees [*Abrams v. Allen*, 297 NY 52 (1947)];
- An employer “threatening or cajoling its employees with reference to membership in the labor union” [*NYS Labor Rel Bd v. Toffentti Restaurant Co.*, 180 Misc 326 (Sup Ct NY Co), 266 AD 837 (1st Dept), *app dismissed*, 291 N.Y. 750 (1943)];
 - A contract with a union that forbids an employer from rehiring an employee participating in a strike not authorized by the union. [*Assn of Plumbing & Heating Contractors of Greater NY v Merten*, 261 AD 543 (1st Dept 1941)];
 - Offering money or other things of value to employees if they do NOT join a union. [*In re Almroth*, 171 Misc 314 (Sup Ct Albany Co 1939), 258 A.D. 378 (3d Dept 1940)];

What Has Been Found *Not* to Be Illegal Discouragement?

- Where employer complied with contract providing employer would pay striking employers, employer gave non-striking employees

Herbert & Wirenius, “Total Eclipse of the Court: *Janus v. AFSCME Council 31* in Historical, Legal & Public Policy Context,” 36 Hofstra Lab & Empl L. J. 55, 58-67 (2019).

extra pay [*R.H. Macy v. NYS Labor Relations Bd*, 197 Misc 697 (Sup Ct NY Co 1948), *affd* 275 AD 665 (1st Dept 1949)];

Under the NLRA:

- An employer may forbid employees from talking about a union during periods when the employees are supposed to be actively working, if that prohibition also extends to other subjects not associated or connected with the employees' work tasks. [*Ecology Servs, Inc.* 2011 WL 494916 (N.L.R.B. Div. of Judges) (Jan. 26, 2011); *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969)].
 - Under the NLRA, employers are free under Section 8(c) of the Act to express their views, arguments, or opinions about and regarding unions as long as such expressions are unaccompanied by threats of reprisals, force, or promise of benefits. [*Ecology Servs, Inc.* 2011 WL 494916 (N.L.R.B. Div. of Judges) (Jan. 26, 2011); *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969)].
 - These decisions are based on § 8 (c) of the NLRA, which provides that “The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.” [29 USC § 158 (c)] and the First Amendment to the United States Constitution.
 - The SERA **does not have** an equivalent provision. However, the First Amendment likewise applies to the SERA. While PERB has yet to consider the issue, an employer’s expression of opinion, under circumstances that make it clear that the employer will neither penalize nor reward employees based on their protected activity, **and which makes clear that the**

employer will respect the rights of employees will most likely not constitute a basis for a charge.

F. No Refusal to Bargain in Good Faith: An employer commits a ULP if it refuses to bargain collectively with the representatives of employees, subject to the provisions of section seven hundred five. [§ 704 (6)]

- SERA imposes a duty to bargain in good faith to avoid industrial strife, and the terms “bargaining” and “good faith” contemplate that parties will approach negotiations with an open and fair mind and with a sincere resolve to make an effort to arrive at an agreement, the basic question being whether the employer has negotiated in good faith. [§ 704 (6)]
- The duty to bargain in good faith does not mean that an employer can be compelled to make or accept any particular proposal.
- But an employer has not fulfilled the affirmative duty to “bargain collectively” in all instances where all he has done is to explain the *status quo* and state that he will adhere to nothing else. [§ 704 (6)]
- An employer's insistence upon the right to act unilaterally and of its own will alone upon matters involving legitimate collective bargaining and denying employees the opportunity to bargain collectively constitutes a refusal to “bargain collectively” within meaning of SERA.
- “Bargaining in good faith” under SERA means exploring the subject with an eye to compromise rather than mere adherence to preconceived determinations. There must be a willingness to compromise where possible. *NYS Labor Relations Bd v. Montgomery Ward & Co.*, 179 Misc. 298 (Sup Ct Queens Co. 1942), *affd*, 266 A.D. 878 (2d Dept 1943).
- “While this section requires employer to negotiate with his employees' chosen representative for collective bargaining agreement, it does not compel employer to enter into agreement or accept conditions which he does not deem proper, and he cannot be compelled to make or accept any particular provision of bargaining

agreement, but fulfills his duty, if he makes sincere effort to compromise and endeavors in good faith to arrive at agreement.”-- *NYS Labor Relations Bd. v. Salvagione*, 144 N.Y.S.2d 290 (Sup Ct. West. Co. 1955). [§ 704 (6)]

G. No Refusing to Discuss Grievances: An employer violates the SERA if it refused to discuss grievances with representatives of employees, subject to the provisions of section seven hundred five. [§ 704 (7)]

H. No Discharge or Discrimination: To discharge or otherwise discriminate against an employee because he has signed or filed any affidavit, petition or complaint or given any information or testimony under this article. [§ 704 (8)]

I. No Blacklist (Again): An employer violates SERA if it distributes or circulates any blacklist of individuals exercising any right created or confirmed by this article or of members of a labor organization, or to inform any person of the exercise by any individual of such right, or of the membership of any individual in a labor organization for the purpose of preventing individuals so blacklisted or so named from obtaining or retaining employment. [§ 704 (9)]

J. No Surprises/End Runs: In this catchall provision, it is a ULP to do any acts, other than those already enumerated in this section, which interfere with, restrain or coerce employees in the exercise of the rights guaranteed by section seven hundred three. [§ 704 (10)]

K. No Use of State Funds to Union Bust: It is a ULP to use any state funding appropriated for any purpose to train managers, supervisors or other administrative personnel regarding methods to discourage union organization, or to discourage an employee from participating in a union organizing drive. [§ 704 (11)]

4. Enforcing Improper Practice Jurisdiction: The Board and its agents, shall at all reasonable times have access to, for the purposes of examination, and the right to examine, copy or photograph any evidence, *including payrolls or lists of employees*, of any person being investigated or

proceeded against that relates to any matter under investigation or in question.

- The board may issue subpoenas requiring the attendance and testimony of witnesses and the production of any evidence that relates to any matter under investigation or in question before the board, its member, agent, or agency, conducting the hearing or investigation. Any member of the board, or any agent designated by the board for such purposes, may administer oaths and affirmations, examine witnesses, and receive evidence.

[§ 708 (1)]

- **Any person who shall willfully resist, prevent, impede, or interfere with any member of the board or any of its agents or agencies in the performance of duties pursuant to this article, or who shall in any manner interfere with the free exercise by employees of their right to select representatives in an election directed by the board, shall be punished by a fine of not more than five thousand dollars or by imprisonment for not more than one year, or both. [§709]**

5. Proving Discrimination, Discouragement, Interference:

In *Our Lady of Lourdes High School (Zenz)*, 49 PERB ¶ 3401 (2016), the PERB Board discussed the burden of proving a charge. This discussion is based on that decision. In interpreting § 704, the Court of Appeals long ago explained that:

The policy of the statute is that employees shall be free to join a union of their choice or, if they prefer, to join no union. The statute confers upon the Board power to prevent discrimination by the employer which interferes with such freedom of his employees. The Board may not command an employer to retain in his employ a discharged employee who is a member of the union unless it appears that the discharge was influenced by the employee's membership in the union and was calculated to interfere with the freedom of choice guaranteed by the act to all employees. [*Stork Restaurant, Inc. v Boland*, 282 NY 256, 270

(1940)].

Under § 704 of SERA, a charging party must establish that the employer had knowledge of the employee's protected activity prior to the adverse action alleged to be discriminatory.² In *Celia Camhi (New Garden Theatre)*, SERB explained the other elements the charging party (at that time, SERB itself)³ bore in establishing an alleged discriminatory or retaliatory discharge in violation of § 704:

The burden of proving a charge against an employer of unlawful discrimination or discharge rests upon the [charging party]. After a full hearing the Board considers and sifts all of the evidence, including that offered by an employer to establish that a discharge was for cause. While the evidence produced by the [charging party] standing alone, may be enough to establish a *prima facie* case, its effect in proving a causal relationship may be dissipated by the evidence produced by the respondents. At this stage, the Board's task is to determine the real reason for the employer's action. Having considered the evidence produced by the [charging party], in connection with, and in the light of, the evidence produced by the respondent, the Board then determines from the record as a whole whether the respondent's actions were motivated, *in whole or in part*, by reasons prohibited by [SERA]. If we decide that his actions were so motivated, we find that the employer has violated [SERA]. However, if the evidence, considered as a whole, reveals that the discharge was not motivated by union membership or activity, we will dismiss the complaint irrespective of the

² See, e.g., *1165 Fulton Avenue Tenants Corp*, 49 SLRB 174 (1994).

³ As summarized by the drafters, L. 2013, ch.148 § 1, amended § 706(2) of SERA "by eliminating the responsibility of PERB to investigate unfair labor practice charges alleging violations of Labor Law §§ 704 and 704-a, and to issue and prosecute complaints with respect to those charges." Memo in Support, A07668.

justice of the cause alleged for the discharge.⁴

The evidence presented may be of a direct or circumstantial nature, and close proximity in time of the adverse action to the protected activity may be used to establish the *prima facie* case.⁵

Under the SERA, if the discharge is even in part motivated by prohibited reasons, including anti-union animus, the employer will be found to have violated SERA. The second is that, unlike the standard applied by this Board in public sector cases, close proximity in timing between the protected activity and the adverse action is enough to establish a *prima facie* case, and, if not refuted by the employer, a violation.⁶

6. Dispute Resolution Under FLA

A. The board may, when necessary, appoint or designate special mediators who shall have the authority and power of members of the board with regard to such matter, provided that their authority and power to act for the board shall cease upon the conclusion of the specific matter so assigned to them or by revocation by the board of their appointment or designation. [§ 702]

B. Where the Board deems it appropriate, in an existing, imminent or threatened labor dispute, the board may and, upon the direction of the governor, the board shall take such steps as it may deem expedient to effect a voluntary, amicable and expeditious adjustment and settlement of the differences and issues between employer and employees which have precipitated or culminated in or threatened to precipitate or culminate in such labor dispute. [§ 702 (1)]

C. The Board can: (a) to arrange for, hold, adjourn, or reconvene a conference or conferences between the disputants and/or one or

⁴ 13 SLRB 242, 243 (1950) (emphasis added). See also *Milton M. Hollander*, 43 SLRB 276, 287 (1980), quoting *Marlene Transp. Co., Inc.*, 17 SLRB 391, 393-394 (1954), enforced, *NYS Labor Relations Bd v. Marlene Transp Co., Inc.*, 1 AD2d 1002 (1st Dept 1956); *310 85th Street Corp*, 37 SLRB 568, 587 (1974).

⁵ See *Milton M. Hollander*, 43 SLRB at 286; *Stork Restaurant*, 282 NY at 268.

⁶ *Bernard Levine (Broadway Realty Associates)*, 46 SLRB 526, 533 (1985) (citing additional cases); *3554 Dekalb Realty Corp*, 48 SLRB 321, 329 (1990).

more of their representatives; (b) to invite the disputants and/or their representative to attend such conferences and submit, either orally or in writing, the grievances of and differences between the disputants; (c) to discuss such grievances and differences with the disputants and their representatives and in the course of such proceeding, upon the consent of all disputants and their representatives, to appoint fact-finding boards and to arbitrate such grievances and differences; and (d) to assist in negotiating and drafting agreements. [§ 702-a (1)]

D. The board shall have the power at the request of the parties to a collective bargaining agreement between an employer and its employees to arbitrate such grievances and differences as may arise thereunder and to establish panels of qualified persons to be available to serve as arbitrators of such grievances and differences. [§ 702-a (2)]

E. In carrying out any of its work under this article, the board may designate one of its members or an officer or employee of the board to act in its behalf and may delegate to such designee one or more of its duties hereunder and, for such purpose, such designee shall have all of the powers hereby conferred upon the board in connection with the discharge of the duty or duties so delegated. [§ 702-a (3)]

7. Impasse Resolution Procedures for Agricultural Employers and Farm Laborers [§ 702-b]

1. An impasse may be deemed to exist if the parties fail to achieve agreement by the end of a forty-day period from the date of certification or recognition of an employee organization or from the expiration date of a collective bargaining agreement.

2. Upon impasse, agricultural employers or recognized employee organizations may request the board to render assistance as provided in this section. If the board determines an impasse exists in the course of collective negotiations between an agricultural employer and a recognized employee organization, the board shall aid the parties in effecting a voluntary resolution of the dispute.

3. On request of either party, as provided in subdivision two of this section, and in the event the board determines that an impasse exists in collective negotiations between such employee organization and an agricultural employer as to the conditions of employment of farm laborers, the board shall render assistance as follows:

a. to assist the parties to effect a voluntary resolution of the dispute, the board shall appoint a mediator a list of qualified persons maintained by the board;

b. if the mediator is unable to effect settlement of the controversy within thirty days after his or her appointment, either party may petition the board to refer the dispute to a neutral arbitrator;

c. upon petition of either party, the board shall refer the dispute to a neutral arbitrator as hereinafter provided;

i. the neutral arbitrator shall be appointed jointly by the agricultural employer and employee organization within ten days after receipt by the board of a petition for arbitration. Each of the respective parties is to share equally the cost of the neutral arbitrator. If, within seven days after the mailing date, the parties are unable to agree upon the neutral arbitrator, the board shall submit to the parties a list of qualified, disinterested persons for the selection of a neutral arbitrator. Each party shall alternately strike from the list one of the names with the order of striking determined by lot, until the remaining one person shall be designated as the neutral arbitrator. This process shall be completed within five days of receipt of this list. The parties shall notify the board of the designated neutral arbitrator;

ii. the neutral arbitrator shall hold hearings on all matters related to the dispute. The parties may be heard either in person, by counsel, or by other representatives, as they may respectively designate. The panel may grant more than one adjournment each for each party; provided, however, that a second request of either party and any subsequent adjournments may be granted on request of either party, provided that the party which

requests the adjournment shall pay the arbitrator's fee. The parties may present, either orally or in writing, or both, statements of fact, supporting witnesses and other evidence, and argument of their respective positions with respect to each case. The arbitrator shall have authority to require the production of such additional evidence, either oral or written as she or he may desire from the parties and shall provide at the request of either party that a full and complete record be kept of any such hearings, the cost of such record to be borne by the requesting party. If such record is created, it shall be shared with both parties regardless of which party paid for it;

iii. the arbitrator shall make a just and reasonable determination of the matters in dispute. In arriving at such determination, the arbitrator shall specify the basis for her or his findings, taking into consideration, in addition to any factors stipulated by the parties or any other relevant factors, the following:

A. comparison of the wages, hours and conditions of employment of the employees involved in the arbitration proceeding with the wages, hours, and conditions of employment of other employees performing similar services or requiring similar skills under similar working conditions and with other employees generally in agricultural employment in comparable communities;

B. the interests and welfare of the farm laborers and the financial ability of the agricultural employer to pay;

C. comparison of peculiarities in regard to other trades or professions, including specifically,

(i) hazards of employment;

(ii) physical qualifications;

(iii) educational qualifications;

(iv) mental qualifications;

(v) job training and skills;

D. the terms of collective agreements negotiated between the parties in the past providing for compensation and fringe benefits; and

E. the impact on the food supply and commodity pricing;

(iv) the determination of the neutral arbitrator shall be final and binding upon the parties for the period prescribed by the arbitrator, but in no event shall such period exceed two years from the date of the arbitrator's determination;

(v) the determination of the public arbitration panel shall be subject to review by a court of competent jurisdiction in the manner prescribed by law. [§ 702-b]