



ASSOCIATION
of LABOR RELATIONS
AGENCIES

ALRA Advisor



December 2018

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On the Cover: Columbus Park, Boston,
Massachusetts / Photo Credit: Kyle Klein
(<https://www.bostonusa.com/asset-request/>)

FROM THE PRESIDENT



Greetings from snowy Gatineau, Quebec. During one of the busiest falls in Canadian labour relations history, we have also been blessed with one of the coldest and snowiest in history—not exactly the scenario we had been hoping for.

All of which makes it easier to look forward to next summer's ALRA conference, to be held in Cincinnati, Ohio. A first planning meeting was held in October, in Toronto, and in early March the ALRA Executive Board and Committees will be on site in Cincinnati to finalize agendas and other details for the conference. At the October meeting, both the Program and the Professional Development Committees were hard at work identifying themes and speakers to populate the busy conference agenda. Information on the 2019 conference and links to registration will appear on the ALRA website in late spring.

They have big shoes to fill: the conference in Boston this past July, on the larger theme of "Individual and Collective Rights: Finding a Structure that Works," was a fantastic event, full of thought-provoking and challenging presentations. I was struck by many of the presentations, but "Navigating Mental Health Issues Within the Conflict" by Kathy Sanders from the Massachusetts Department of Mental Health was both moving and inspiring. And because ALRA conferences are also about finding entertaining ways to connect to the community around us, delightfully engaging events like Professor Tom Juravich's song-filled tribute to Massachusetts labour history are a huge hit with participants. Advocates' Day was also another big success—timely discussions about "Moving Forward After *Janus*" fit in perfectly with the innovative examination of "The Ethics of Non-Lawyer Advocacy."

The Arrangements Committee did a great job in Boston, and the prospects for Cincinnati are at least as promising. The beautiful Westin Hotel in downtown Cincinnati will be our home base for the conference, and local trips are being planned to help newcomers to the scenic and historically rich city take home some great memories.

In the end, ALRA conferences are ways for us to connect with each other and to widen and deepen the professional development that comes from scheduled sessions and spontaneous conversation with experienced colleagues. My commitment to ALRA began with the unique opportunity presented to me, as a new mediator, and it continues because of the recognition I have of the amazing lift ALRA gave my career and my desire to pay that forward to other colleagues—and to continue to grow. I look forward to seeing as many of you as possible in Cincinnati—and look for further 2019 conference updates.

And don't forget that there are five grants of up to \$1,000 available for employees of member agencies and organizations to travel to Cincinnati. For further details please contact Sarah Cudahy, Vice President of Professional Development and Executive Board member, at scudahy@ieerb.in.gov.

—Peter Simpson

SAVE THE DATE!

68th Annual ALRA Conference Labor Agencies: Bridging Workplace Divides Cincinnati, Ohio | July 20–23, 2019



Photo Credit: Amanda Rossmann



Photo Credit: Jeff Swinger



Photo Credit: Alias Imaging

<https://www.barberstock.com/cincinnatiusa>

Join over 100 mediators and adjudicators from across North America to hear innovative ideas for the future workplace from knowledgeable and engaging speakers. Better yet, be part of the conversation!

The conference will be held at **The Westin Cincinnati** overlooking Fountain Square in downtown Cincinnati. Room rates are **\$141USD/night**. Check out the hotel's website at <https://www.marriott.com/hotels/travel/cvgwi-the-westin-cincinnati/>.

Why Cincinnati?

Cincy is a great place to visit! Don't believe us? Check out <https://www.cincyusa.com/>.

Some fun facts—Cincinnati was . . .

- The first settlement in Ohio to publish a newspaper (1793)
- The first city to have a bag of airmail lifted by a hot air balloon (1835)
- The first city to have a professional baseball team—the Cincinnati Red Stockings (now the Reds) (1869)
- The first and only city to build and own a major railroad (1880)

Where is Cincinnati, Ohio?

Cincinnati is located in the Midwest on the Ohio River. It borders Indiana and Kentucky.

2018 CONFERENCE RECAP

By Marjorie Wittner, Chair, Massachusetts Commonwealth Employment Relations Board



Sylvie
Guilbert,
Marjorie
Wittner, and
Peter Simpson

The 67th annual ALRA conference, held at the beautiful Boston Park Plaza Hotel in Boston, Massachusetts, from July 21–24, 2018, was a huge success. It was attended by over 130 delegates from Canadian and US member agencies. The theme of the conference, "Individual and Collective Rights: Finding a

Structure that Works," resonated with delegates, especially in the wake of the US Supreme Court's *Janus* decision, which had issued just three weeks earlier.

The conference began on Saturday afternoon with Scot Beckenbaugh, Ginette Brazeau, and Tim Noonan leading another information-packed and well-attended ALRAcademy. Even longtime attendees were able to learn things that they never knew or had forgotten about ALRA's history and comparative Canadian and US labor relations. ALRAcademy was followed by a

welcome reception, filled with good food, drink, and lively chatter as old friends and new mingled and caught up.

Sunday morning started with ALRA's traditional roundtable discussions for administrators/general counsel (moderated by Virginia Adamson and Sarah Cudahy); for board and commission members (moderated by Ginette Brazeau and Susan Panepento); and for mediators (moderated by Michael Franczak and Peter Simpson). Later that morning labor historian, folk singer, and University of Massachusetts Professor Tom Juravich regaled the crowd with the fascinating tale of how the song "Bread and Roses" became an anthem for the labor movement in the 20th century, including—most famously—the Lawrence, Massachusetts, mill strike of 1912.

After a delicious brunch, Sunday programming continued with a thoughtful and well-planned discussion of representation developments in the US and Canada led by Mike Sellars and Natalie Zawadowsky. They were followed by Javier Ramirez teaching delegates how to use "mind mapping" as a powerful and intuitive way of organizing information and ideas during mediation and bargaining.

The delegates spent the remainder of the day and evening exploring Boston's museums, breweries, and historic sites on both land and



Roundtable discussion for board and commission members.



Roundtable discussion for mediators.



Roundtable discussion for administrators/general counsel.

sea. (Sadly, the Boston Red Sox were away that weekend.) Many delegates enjoyed a Boston Harbor dinner cruise highlighted by the sunset firing of the USS Constitution's (Old Ironsides) cannons.

On Monday, ALRA opened its doors to Boston-area labor relations practitioners. Massachusetts Secretary of Labor and Workforce Development Rosalin Acosta welcomed delegates and advocates to Boston and gave an update on workforce trends and initiatives in Massachusetts. Other notable and distinguished presenters included newly appointed NLRB Chair, the Honorable John F. Ring, who described his transition from the private sector to public service. The Honorable Nicholas Geale, Chief of Staff for the US Department of Labor (DOL), closed the day with a fact-filled presentation on the DOL's initiatives and goals. In between, Brandeis University Provost and labor economist Lisa Lynch gave the keynote address, which explored collective and individual options for employees facing disruption due to globalization and technological changes. Ginette Brazeau moderated a lively and timely panel that discussed cannabis regulation in the US and Canada and legislative responses to healthcare worker fatigue. William Herbert, Director of the National Center for Collective Bargaining in Higher Education, led a six-person panel discussing precarious employment in higher education. Sarah Cudahy moderated a panel of experts that analyzed the *Janus* decision and unions' and managements' response moving forward. John Wirenius led the final panel of the day on the ethical challenges posed by non-lawyer litigants.



Marjorie
Wittner
introducing
Dr. Kathy Sanders



Rosalin
Acosta

Mike Sellars, Scot Beckenbaugh, Marjorie Wittner, and Jacques Lessard



Above: Kevin
Flanigan and
Ginette Brazeau



Above:
Dario
de la Rosa, Sarah
Cudahy, John Henry,
and Jamie Siegel

Following an Advocates' Day reception at the hotel and dinner at some of Boston's fine restaurants, delegates gathered in the Hospitality Suite for conversation and musical entertainment led by Kevin Flanigan.

Tuesday was back to business as Dr. Kathy Sanders, Deputy Commissioner of the Massachusetts Department of Mental Health, detailed the trauma-based approach to dealing with mental health issues in the labor relations context. Dr. Sanders' excellent PowerPoint presentation will soon be posted on the ALRA website. The delegates then broke into groups for adjudicators and mediators where—with the assistance of Dr. Sanders and two psychiatrists on her staff, and ably facilitated by Susan Atwater, Virginia Adamson, Lucie Morneault, and Scot Beckenbaugh—delegates participated in interactive role-playing sessions utilizing the tools Dr. Sanders shared.

The Basics of Ethics was the final topic of the conference, as delegates, in the style of the

popular Canadian radio show, "The Debaters," showed off their advocacy skills by debating vexing case scenarios posed by facilitators Jarrod Baboushkin and Eileen Hennessey.

The conference closed with a general meeting that elected a new slate of officers and board members, and the final conference banquet where outgoing president Marjorie Wittner handed over the reins (and the official ALRA tiara) to newly elected President Peter Simpson.

Congratulations and many thanks to all conference organizers, including Programming Committee co-chairs Scot Beckenbaugh and Catherine Gilbert, Professional Development co-chairs Virginia Adamson and Mike Sellars, and Arrangement Chair Tim Noonan. Marjorie Wittner, who was "boots on the ground" in Boston, could not have done it without their help and the hard work of all of the committee members. ■

2018 Conference – Attendee Perspective

By Jean-Daniel Tardif and Natalie Zawadowsky, Canada Industrial Relations Board



The 67th annual ALRA conference in Boston was another great success. Located in front of an amazing park where people from around the world come to take pictures, the Boston Park Plaza Hotel was, for a few days, the home of some of the leading practitioners and "neutrals" in North American labour relations. It was very interesting to exchange information and ideas with our colleagues and again realize that our interests are so similar notwithstanding such different political realities. Canadians and Americans were privileged to build on each others' strengths and passion and to hopefully bring back home the desire to continue our missions in these challenging times.

It all began with a very well-attended ALRAcademy followed by a delicious reception. The next morning, we broke off into smaller workshops to discuss best practices, resulting in some very useful insight and exchange. We then had the opportunity to hear a great singer, Professor Tom Juravich, who serenaded us with the historic song "Bread and Roses" to help explain the rich labour history of Massachusetts. An interesting presentation on representation developments in both the US and Canada followed, and the day concluded with an extremely useful and practical session on mind mapping.

Advocates' Day was another tremendous success. The first presentation was on the disruptive impact of technology and

"Serving as ALRA president while simultaneously organizing the Boston ALRA conference was a challenging but ultimately very rewarding endeavor. Not only did I have the privilege of working with an incredible team of ALRA stalwarts, I was, as always, grateful for the opportunity to connect with labor relations neutrals through thought-provoking, substantive programming and fun social events. Many, many thanks to all of you who planned, attended and participated in the conference."

—Marjorie Wittner,
Chair, Massachusetts
Commonwealth Employment
Relations Board, ALRA
Immediate Past President

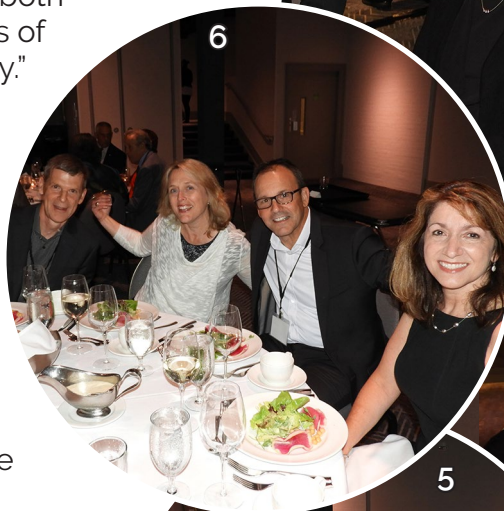
"Attending the ALRA conference gave the DLR staff practical and valuable information about navigating the mental health issues that often exist in labor disputes. The Massachusetts Department of Mental Health's presentation gave us tools for recognizing and addressing the concerns of litigants with mental health challenges, reducing conflict, and structuring dispute resolution environments that are respectful, supportive and fair. We left with fresh ideas, new perspectives, and a renewed enthusiasm for resolving labor disputes."

—Susan Atwater,
Chief Hearing Officer,
Massachusetts Department of
Labor Relations

globalization on work. A very knowledgeable and well-facilitated panel then discussed fatigue and impairment challenges in order to shift the paradigm in health and safety. We then heard from an excellent panel in the session titled "Response to Foundational Challenge, Going Forward After *Janus*." Listening to the discussion on some of the challenges our US member agencies are facing following the historic *Janus* decision made us very proud and relieved to be Canadian! The well-deserved reception immediately followed a presentation regarding a topic of interest for both countries—the "Ethics of Non-lawyer Advocacy."

The final day began with Dr. Kathy Sanders giving a practical, inspirational, and positive presentation titled "Navigating Mental Health Issues Within the Conflict." In a time where mental health issues are a reality for all members of our society, no matter their education and background, this presentation was extremely timely and relevant. We also had the chance, in productive small-group sessions, to discuss concrete ways to adapt our approaches in mediation, administration, and adjudication in order to assist our clients facing such difficult circumstances. Like last year, the annual meeting concluded the final day of ALRA, but not before we engaged in small-group discussions on relevant ethics issues.

It is with great enthusiasm that we are now preparing for the next annual conference in beautiful Cincinnati. Hope to see you all there next summer! ■



Pictured above:

- (1) Jill Kielblock, Melinda Moz-Knight, and Connor Parker
- (2) Cathy McCann, Jim Mackenzie, Linda Puchala, and Eva Durham
- (3) Liz Brenner and Javier Ramirez
- (4) Christy Yoshitomi and Sarah Cudahy
- (5) Scott Blake, Peter Donatello, Barbara Rumph, and Alan Willard
- (6) Hervé Leblay, Julie Beauchesne, Tom Clairmont, and Lucie Morneau
- (7) Justine Abel and Gaétan Ménard

EDUCATION GRANTS

ALRA provides education grants of up to \$1,000 to allow first time attendees or returning attendees from member agencies to attend the ALRA conference. In 2018, we had 5 education grant recipients. Three of those grant recipients described their experience and benefits of the ALRA conference.

“As a full time practicing lawyer and (very) part time member of the Maine Labor Relations Board, I rarely have the opportunity to set aside time to network with fellow adjudicators, to reflect on trends in public sector labor relations, or to learn about the workings of other agencies. This conference was a wonderful opportunity to do all of these things, and, given the size and resources of the MLRB, my attendance likely would not have been possible without the support of an Education Grant. I left the conference feeling inspired and more connected to the public sector labor relations community.”

—Katy Rand, Maine Labor Relations Board

“I really enjoyed the ALRA Conference in Boston. I learned so much not only from the sessions, but also from talking to counterparts from other agencies. This is the only conference I have found that really is applicable to my day-to-day work experiences. I took a lot of information and ideas back to Iowa to share with my office and the advocates around the state. Without the ALRA Education Grant providing the registration fee, I would not have been able to attend. Thank you for this opportunity!”

—Amber DeSmet, Iowa Public Employment Relations Board

“I am incredibly grateful to have had the opportunity to attend the ALRA conference in 2018. I don't know whether we will have the funding to attend in coming years, so I am especially glad to have had the opportunity. At the time of the conference I was completing my first year on the job as the Administrator for the Alaska Labor Relations Agency. As the neutral agency in Alaska to decide cases between public employers and unions, it had been a very lonely year and oftentimes I had wished I could pick up the phone, or shoot off an email to someone for advice. Since attending the ALRA conference I realized that the ALRA equivalents around the continent often experience this, which was comforting. And, now I have contacts to reach out to when I want to get some help with a question. Both the content and the experience of the conference were so impactful to my job – I can't thank you enough and it is a top priority of mine to make it to the 2019 conference.”

—Nicole Thibodeau, Alaska Labor Relations Agency



Nicole
Thibodeau,
Mila Cosgrove,
Genevieve Shiroma,
Mary Beth
Hennessy-Shotter,
Jill Kielblock, Mary Jo Vannelli,
Dan Vannelli

PROFESSIONAL DEVELOPMENT UPDATE

By Sarah Cudahy, Vice President of Professional Development

Professional Development Costs Money, but Good News—Grants Are Available!

Education Grants to Attend Annual Conference

Grants of **up to \$1,000** are available for attendance at the 2019 annual conference. Grants are approved on a first-come, first-served basis so apply today! Applications are due to scudahy@ieerb.in.gov no later than **June 1, 2019**.

Criteria (non-exclusive list):

- The applicant is a member or employee of an ALRA member agency
- Whether the person is a first-time attendee at the conference
- Ensuring diverse representation from member agencies
- The actual costs that will be offset by the education grant
- The agency's difficulty in underwriting the full cost of attendance at the annual conference

The grant will be payable upon submission of receipts following the conference.

Training Grants

Training grants are available to member agencies who wish to engage in organizing and delivering training opportunities for its members and staff.

Grant applications are due September 30th of each year, so you have time to prepare for the next round of applications!

The submissions should include the following:

- A description of the proposed training
- An explanation of how the initiative will benefit the member agency (or agencies)
- A detailed cost structure, identifying the agency's contribution and the rationale for an ALRA subsidy

- A description of the trainer(s), their background and the value they will bring to the training
- A description/explanation of any other grant or subsidy that the agency will receive for the training

More information about both grants can be found in the April 2018 ALRA Advisor: http://www.alra.org/newsletter/ALRA_Advisor_April_2018.pdf.

Professional Development During the Annual Conference

Credit Where Credit is Due—Continuing Education Credits

ALRA will be requesting CLE (inc. ethics), CME, SHRM, and PGP for the annual conference.

Have other continuing education credits you want to apply for? Contact Sarah Cudahy.

I Wish the Conference Had Addressed....Topics at the Conference

Have a topic you want to hear at the conference? Email Sarah Cudahy.

Professional Development Doesn't End at the Annual Conference

In addition to the conference, ALRA communicates through the following means:

ALRA Advisor

The Advisor is published biannually and includes updates from the conference and ALRA's member agencies. The Advisor is always looking for new articles and photos!

ALRA Website

The Members section of the website contains information from member agencies, including best practices. The Neutrality Report is a comprehensive guide for member agencies navigating neutrality in a political world.

Other Communications

Have an issue you want to discuss with other member agencies during the year? Let Sarah Cudahy know and she can set up an email thread or a conference call.

Social Media

ALRA is on Twitter! Follow us (better yet—like and retweet) @LaborAgencies! ■

THE NEUTRAL AGENCY'S GUIDE TO JANUS

Part I: 5 Months Later

By Sarah Cudahy, Indiana Education Employment Relations Board, and Nicole Thibodeau, Alaska Labor Relations Agency

On June 27, 2018, the United States Supreme Court in [Janus v. AFSCME](#) held that it is unconstitutional for public employees to be required to pay agency fees—payments by non-union members to help defray the cost of union representation.

This guide is intended to provide a survey of reactions to *Janus*. We anticipate that this is only the beginning—we plan to provide updated information as more states pass laws and more lawsuits are decided. In the meantime, we encourage you to share via email to scudahy@ieerb.in.gov:

- Thoughts or questions regarding agency (or agency employee) statements/guidance to the public or stakeholders about *Janus*;
- Additional information on reactions to *Janus*, including any cases filed or issues at the bargaining table;
- Thoughts and questions for the *Janus* presentation at the 2019 annual conference.

Agency Member Guidance:

- [Massachusetts DLR](#)
- [New York PERB](#)
- [Washington PERC](#)

Lawsuits:

- About 30 lawsuits, many in the form of federal class actions against teacher unions, have been filed citing *Janus*.

- Theories:
 - Agency Fee Clawback: *Janus* applies retroactively; requests refund of agency fees paid prior to *Janus*. Some claims that agency fee payments violated various state tort laws.
 - Dues Clawback: Plaintiff would not have joined union if agency fees not required; requests refund of membership dues paid prior to *Janus*.
 - Exclusivity: Exclusive representation unconstitutionally associates employees with unions.
 - Consent after *Janus*: Employees must provide affirmative consent prior to any dues deductions.
- Locations: Suits pending in Alaska, California, Connecticut, Maine, Maryland, Massachusetts, Minnesota, New Jersey, New York, Ohio, Oregon, Pennsylvania, Washington.

State Actions to Limit *Janus*'s Impact:

- In anticipation of *Janus*, some states passed laws to limit its impact. Many legislatures, some with new members after the 2018 election, will be back in session soon so more legislation may be forthcoming.
- Requires notice of new employees and/or rights during orientation
 - California – [Assembly Bill 119](#)
 - Maryland – [HB 811/ SB819](#) and [HB 1017/ SB677](#)
 - New Jersey – [A3686](#)
 - New York – [Budget Bill](#) ([Press Release](#))
 - Washington – [SB 6229](#)

- Gives unions the option to charge non-members for certain representation activities
 - New York – [Budget Bill](#)
 - Rhode Island – [Senate Bill 2158 substitute A](#)
- Limits dues/fees revocation windows
 - [Delaware HB 314](#)
 - [HB1725 HD2](#)
- Protects employee information
 - [Alaska Exec. Order 296](#)
 - [New York Exec. Order](#)

Other State Agency Guidance:

Neutral labor relations agencies are not the only state agencies to provide information regarding *Janus*. Below is a survey of guidance from non-labor-relations agencies (mostly attorneys general but also a department of labor).

- | | |
|--|----------------------------------|
| • California | • New Mexico |
| • Connecticut | • New York (DOL) |
| • District of Columbia | • Oregon |
| • Illinois | • Pennsylvania |
| • Maryland (1) | • Rhode Island |
| • Maryland (2) | • Vermont |
| • Massachusetts | • Washington |

Additional Resources:

- *Janus* session at 2019 ALRA Conference – Save the Date! July 20–23!
- Members section of ALRA Website: http://alra.org/member_login.php
- SCOTUS Blog: [SCOTUS](#)
- #LifeAfterJanus, #JanusvAFSCME, #abalel
- Sarah Cudahy, William Herbert, and John Wirenius, Total Eclipse of the Court? The Impact of State Government Responses to the Supreme Court's Ban on Public Sector Agency Fees in *Janus v. AFSCME* will Eclipse its Direct Impacts, 36 HOFSTRA LAB. & EMP. L. J. (forthcoming 2019) (outlining the history of agency fees and possible state government responses).
- Catherine Fisk and Martin Malin, After *Janus*, 107 CALIFORNIA LAW REVIEW (forthcoming 2019) (recommending a cost sharing approach to representation in which members are reimbursed the cost of representation by unions and unions are encouraged to incentivize the cost of membership).

Thanks to Marjorie Wittner, Mike Sellars, John Wirenius, and Emily Martin and the "Life After *Janus*" panel of the ABA's Section of Labor and Employment Law's Annual Conference for their contributions. ■

ALUMNI NEWS



Dan Nielsen Nominated as President-Elect of National Academy of Arbitrators

Former Wisconsin Employment Relations Commission (WERC) Mediator and ALRA Past President Dan Nielsen has been nominated as President-Elect of the National Academy of Arbitrators. He is scheduled to take office as President at the close of the Academy's 2020 meeting in Denver. Dan will be the third ALRA President to also serve as President of the Academy, joining Arthur Stark and Arvid Anderson.

Marv Schurke Awarded the Arvid Anderson Award

Former Washington State Public Employment Relations Commission (PERC) Executive Director and past ALRA President Marv Schurke has been awarded the Arvid Anderson Award by the American Bar Association. This award recognizes an attorney whose career substantially contributed to the development of public sector labor law as exemplified by Arvid Anderson.

Arvid Anderson pioneered labor law for public employees at the state and local level first as Secretary and Commissioner of WERC from 1948 to 1967 and then as Chairman of the New York City Office of Collective Bargaining from 1968 to 1987. Mr. Anderson was the president of the National Academy of Arbitrators in 1987. Marv was cited for his many contributions to the development of public sector labor relations in the United States. He joins Arvid Anderson and Parker Denaco, who was present at the award presentation, as former ALRA presidents who have received the award. In receiving the award, Marv expressed his deep gratitude to the ABA for the honor.

“This award is particularly meaningful to me because Arvid Anderson was one of my mentors and our careers had uncanny parallels. Arvid's name came up frequently when I joined the WERC staff 1970 (at age 26). Arvid had joined the WERC staff at age 26 (in 1948), after growing up just across the Indiana state line from the Republic Steel Chicago plant where I worked in the 1960s, and he witnessed Chicago police killing 10 unarmed union supporters during a recognition strike there in the 1930s. Arvid gained national recognition for his implementation of the 1962 Wisconsin statute usually credited as the first public sector collective bargaining law in the country. He became the first Chairman of the New York City Office of Collective Bargaining in 1968. He was a president of ALRA. He took me under his wing and provided guidance when I became the first Executive Director of PERC in 1976. His advice served me well during my 30+ years at PERC.”

—Marv Schurke



Current and former PERC Executive Directors Mike Sellars and Marv Schurke

ALRARCHIVES

The Evolution of ALRA's Public Employment Relations Treatise

By Tim Noonan, Vermont Labor Relations Board



Many current members and staff of ALRA agencies are likely unaware that the shelves of member agencies once contained, and many hopefully still do contain, copies of a public employment relations treatise

published by ALRA. This lack of knowledge is excusable since the most recent edition of the treatise was published 18 years ago.

The first edition of the treatise, published in 1979, was actually not even produced by ALRA,

although ALRA member agencies were integral to its development. It was a project undertaken by the Public Employment Relations Services (PERS). The establishment of PERS was made possible due to funding by the Carnegie Corporation of New York through the American Arbitration Association. The book, *Portrait of a Process: Collective Negotiations in Public Employment*, was developed by PERS with the assistance of 30 nationally known labor relations practitioners, many of whom were connected with ALRA member agencies. The Director of PERS was Robert Helsby, former Chair of the New York Public Employment Relations Board and former ALRA President.

The public sector labor relations process was broken into its various components. Nationally recognized authorities in the various facets were asked to develop a concise summary of each of the areas “avoiding philosophy and opinion.” Twenty-five chapters formed the content of the

book. *Portrait of a Process* was "an attempt to accurately and succinctly reflect the present nature and character of collective negotiations in the various governmental structures of the United States."

PERS went out of existence and its activities were turned over to ALRA in the early 1980s. One of the activities ALRA assumed was to revise and update *Portrait of a Process*. The resulting product developed by ALRA, *The Evolving Process – Collective Negotiations in Public Employment*, was published in 1985 by Labor Relations Press. It updated the public sector changes which had occurred during the previous six years. All of the original *Portrait* topics were rewritten in expanded and updated form, and new topical areas also were included. As in its predecessor, *The Evolving Process* compiled the efforts of nationally recognized authorities who probed the changes occurring in their fields of expertise. Jerome Lefkowitz engaged in "tireless efforts" as editor.

The third and final edition of the treatise proved to take much longer than six years to produce. Although an update to the second edition was discussed as early as 1990, it would take another nine years before the third edition was published. The slowness with which some authors submitted their chapters delayed publication, as did the need to revise some already-submitted chapters which became outdated due to the delay. The persistence of Editor John Bonner, and the leadership of Rick Curreri when he became ALRA President in 1998, provided the impetus to finally complete the challenging project.

Labor-Management Relations in the Public Sector: Redefining Collective Bargaining was published in late 1999. Rick Curreri greeted the long-awaited publication with the following comments in his Editor's column in the *ALRA Advisor*: "Is it not entirely fitting that it took the advent of a new millennium for 'The Book' to at least see the light of day?" As the cover story attests, the new edition of ALRA's public sector textbook is at long, long, LONG last, a reality. I gave serious consideration to using a *New York Post* style headline for this issue of the *Advisor*, something like **'DONE!'** or maybe even Marv Albert's trademark **'YESSS'** in, say, 144 point type."

The text of the completed work runs 557 pages and contains 24 chapters written by leading authorities in the field, including many ALRA activists. Topics include union organizing, agency administration, unit determination, selection of a representative, scope of bargaining, the negotiations process, mediation, fact-finding, interest arbitration, unfair labor practices, strikes and public policy, content and enforcement of agreements, individual rights, union security, public and higher education, police and fire and mass transit issues, labor-management cooperation, the federal sector, and Canadian laws.

The passage of nearly 20 years obviously diminishes the work of this excellent treatise. Nonetheless, it remains of significant importance in capturing the evolution of aspects of public sector labor relations which form the foundation of much of the ongoing work of our agencies. ■

MARK YOUR CALENDAR!

68th Annual ALRA Conference
Labor Agencies: Bridging Workplace Divides
Cincinnati, Ohio | July 20–23, 2019

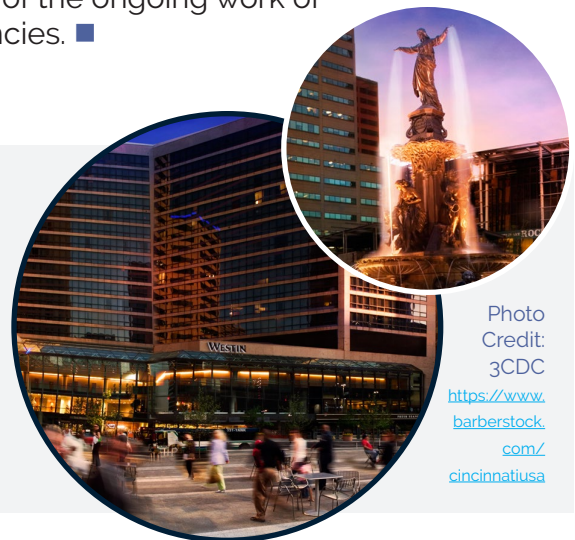


Photo
Credit:
3CDC
[https://www.
barberstock.
com/
cincinnatiusa](https://www.barberstock.com/cincinnatiusa)

CANADA



CANADA INDUSTRIAL RELATIONS BOARD

Case Summaries

**669779 Ontario Limited O/A CSA
Transportation, 2018 CIRB 882**

The Board granted an unfair labour practice complaint filed by Teamsters Local Union No. 31 (the union) alleging that 669779 Ontario Limited O/A CSA Transportation (the employer) had violated sections 94(1)(a), 94(3)(a), and 96 of the *Canada Labour Code* (Code) by terminating the employment of three key union supporters over a period of less than a week during the organizing campaign. In parallel, an application for certification pursuant to section 24 of the Code was also filed by the union.

After examining each of the terminations individually, the Board found a pattern to the employer's conduct. The coincidence in timing of all three terminations was persuasive in establishing the existence of anti-union animus. All three terminations took place within one week, which happened to be the culminating week of the union's drive, before the filing of the certification application. The three individuals who had been terminated happened to be the three main organizers and supporters who had been actively speaking with employees about unionization and soliciting memberships during that time. The terminations all came about quite suddenly and in relation to an incident or conduct that appeared to have taken on somewhat exaggerated significance. In all three cases, the actual alleged misconduct was not clearly established by the employer to have occurred or to have been contrary to the employer's disciplinary practices.

Ultimately, in the Board's view, it was not unreasonable in all of the circumstances to infer that the employer indeed had some

knowledge of the union's organizing drive and knowledge of who the main supporters were and that anti-union animus played a part in the employer's decision to terminate the employment of the three key organizers during the organizing drive.

The Board also extensively analyzed the relevancy of outright certification under section 99.1 of the Code. It is an extraordinary form of relief available to the Board where it feels the circumstances warrant granting it. As a general principle, such a remedy is designed to deter the employer from engaging in unlawful tactics by denying it the fruits of its misconduct and also to attempt to repair the harm caused by the employer's conduct to the ability of employees to choose freely and voluntarily when deciding whether or not they wish to have union representation. Its purpose is directed at remedying those circumstances where the employer's conduct renders true employee wishes and the level of support for the union impossible to determine by the usual means, that is, by way of membership evidence filed or by way of a representation vote. When the employer's conduct renders those means of verifying employee support ineffective or unreliable, then such a remedy pursuant to section 99.1 may be resorted to, and certification granted, without evidence of majority support. This may only be done, however, if the Board is also able to find that, but for the illegal conduct, the union could reasonably be expected to have majority support.

The two types of employer conduct that may be influential in these types of cases would be terminating the employment of known union organizers and threatening job security and working conditions, such as loss of benefits, or layoffs, shutdowns and plant

closures. However, there are no set criteria and in any given case, the Board must look at the nature and severity of the employer's unlawful conduct and the impact it is likely to have on the employees and their ability to freely express their true wishes in the particular circumstances.

It was during the brief period of legislated mandatory votes that the application for certification was filed. The evidence established that the employees would be attending the vote with the knowledge that if they supported the union, they might suffer the same fate as the union organizers and lose their jobs, or otherwise suffer adverse terms and conditions of employment. In the circumstances, the Board concluded that the results of the vote that had been ordered previously would not likely reflect the true wishes of the employees.

The Board was also satisfied on the facts of the case and the sufficiency of the membership evidence filed with the Board in support of its certification application that, but for the actions of the employer, the union could reasonably have been expected to have had the support of a majority of the employees in the unit. The conditions for warranting the exercise of the Board's discretion pursuant to section 99.1 of the *Code* were met in the circumstances of this case.

Ultimately, the Board stated that it would prefer that certification be based on the exercise of free choice of employees. However, where the actions of the employer, as in this case, have seriously compromised or interfered with the free choice of the employees by its violations of the *Code*, the Board will certify the union, despite a lack of evidence of majority support, where it is reasonable to expect that the union would otherwise have had majority support.

Rogers Communications Canada Inc., 2018 CIRB 879

This decision was the redetermination of a section 18 application filed by the Metro Cable T.V. Maintenance and Service Employees' Association (the union) seeking to expand an existing bargaining unit. The matter was returned to the Board by the Federal Court of Appeal (FCA) on judicial review. The Board was asked

by the FCA to determine two questions: the extent to which, if at all, amendments made to the *Code* impacted the union's application; and, whether the union had demonstrated that there was double majority support, having noted the Board's conflicting jurisprudential approaches to the issue.

The Board first described its longstanding policy and procedure for determining bargaining unit reviews in *Teleglobe Canada* (1979), 32 di 270; [1979] 3 Can LRBR 86; and 80 CLLC 16,025 (partial report) (CLRB no. 198) (*Teleglobe*), which established the double majority rule. It confirmed the importance of the rule and its underlying principles and policy objective of not permitting a union to sweep employees into an altered unit based on its initial support, without regard for the wishes of those sought to be added. It then took the opportunity to clarify and modernize the policy and communicate the manner in which the double majority rule would be applied in the future, with a view to resolving any confusion and conflicting statements and approaches contained in the Board's previous jurisprudence.

The Board, in answering the first question, determined that the *Employees' Voting Rights Act*, which introduced the statutory requirement that a secret ballot vote be held to determine majority support in all instances of certification and revocation applications, had no impact on the expansion application. The legislative amendments did not introduce the mandatory vote requirement into any other Board processes and did not remove the Board's broad discretion to determine the manner by which it would measure union support in other circumstances, including section 18 expansion applications. The Board further rejected the employer's suggestion that the Board was obligated to "read in" Parliament's public policy choice of a mandatory vote into all of its other processes, finding no evidence of legislative intent to implicitly remove the Board's discretionary power under any other provision of the *Code*. In the Board's view, if Parliament had intended for the mandatory vote system to apply to all of the Board's processes, including the section 18 process for determining bargaining unit reviews, it could have and would

have done so expressly through additional legislative amendments; however, it did not.

In answering the second question, the Board confirmed that the union had demonstrated majority support within the expanded unit. The Board reviewed its case law that applied the double majority test, noting the Board's struggle to apply the methods outlined in *Teleglobe* for demonstrating overall majority support in a practical or meaningful way. It noted the Board's approach stated in *Royal Canadian Mint*, 2003 CIRB 229, whereby the Board would be prepared to accept that a union had continuing support of a majority of its members unless serious questions arose. The Board found that this was not an unreasonable approach, maintaining that a union should be entitled to rely on the ongoing effect of its existing certificate to establish majority support of those within the existing unit. There is no labour relations reason to doubt that support unless serious questions arise causing it to do so. The Board held that going forward, it may presume continuing majority support, and will not be required to test the level of support within the existing unit without compelling reasons to do so. The Board rejected the employer's suggestion that this gutted the protections that the double majority test put into place and effectively eliminated the second double majority requirement, stating that the Board retains the ability and discretion to test the union's level of overall support where it deems it appropriate.

The Board did, however, eliminate the consent requirement outlined in *Teleglobe*, which required a union to demonstrate that a majority of its members supported the addition of new employees to the unit. It noted that it is up to the Board to make any determinations as to the appropriateness of the unit or any expansion of a unit.

The Board then applied the double majority rule to the application at hand. It confirmed majority support amongst those employees sought to be added, as evidenced by way of membership cards filed (and not by secret ballot vote) and presumed the ongoing majority support of the union's existing bargaining unit members on

the basis that it had no information or reason to doubt that continuing support. Taken together, the Board was satisfied that the union enjoyed majority support within the overall expanded unit and had thus demonstrated double majority support. The Board granted the application to expand the existing unit.

TVA Group Inc., 2018 CIRB 889

The Syndicat des employé(e)s de TVA, Local 687, CUPE (the union) filed an application pursuant to section 18 of the *Canada Labour Code* (Code). It asked the Board to declare that Mr. Denis Lévesque was an employee covered by the scope of the bargaining unit it represents. In their respective responses, TVA Group Inc. (TVA) and the Union des artistes (UDA) submitted that the duties of host performed by Mr. Lévesque were instead covered by the scope of the UDA's certification order and that Mr. Lévesque was an independent contractor within the meaning of the Status of the Artist Act (SAA).

The Board first examined the duties performed by Mr. Lévesque. It found that Mr. Lévesque was a host and that his involvement in the programs he hosts could not be compared to that of the unionized employees working as journalists.

In light of the evidence suggesting that the position of host has existed since 1970, the history of the union's certification order and the comparison between Mr. Lévesque's duties and those of various hosts who are members of the UDA, the Board also considered that the position of host was not covered by the intended scope of the union's certification order.

The Board then sought to determine whether Mr. Lévesque was an artist within the meaning of the SAA and whether he was covered by the intended scope of the UDA's certification order.

The evidence established that the UDA negotiates scale agreements with producers, which set out all of the working conditions of performers, including hosts who are independent contractors. The UDA and TVA have signed many collective agreements since 1970, and the current collective agreement contains a definition of the position of host that has not

changed for almost 50 years. The evidence also established that, for many years, hosts who have hosted programs broadcast on the TVA network have signed contracts with the UDA. In the Board's view, this meant that the position of host falls within the purview of the UDA.

The Board was satisfied that Mr. Lévesque performs or acts in a dramatic work within the meaning of section 6(2)(b) of the SAA and that he is a professional within the meaning of section 18(b), since he is a member of the UDA and is paid for his services as a host. It explained that TVA, the UDA, and Mr. Lévesque agreed on Mr. Lévesque's status when he decided to resign in 2014 and to enter into two employment contracts as a host of two programs at TVA. In concluding these employment contracts, Mr. Lévesque became subject to the terms and conditions of the collective agreement between the UDA and TVA as a "performer who is an independent contractor" hired by a producer governed by the SAA.

For the first time before the Board, this case raised the issue of whether an artist is an independent contractor within the meaning of the SAA or, rather, a dependent contractor within the meaning of the *Code*.

The Board was of the opinion that the test for determining whether a worker is an independent contractor should be applied, taking into consideration the reality of artists and the purpose of the SAA. Artists may have a relationship of subordination to a certain degree with the producer and be integrated into the business for a given period while maintaining independence with respect to their working

conditions and freedom of choice as to how to benefit from their creative talent.

Regarding Mr. Lévesque specifically, even though his duties as host in his programs have not changed since 2006, the Board was of the opinion that his status did indeed change when he severed the employer-employee relationship with TVA and entered into employment contracts with it, pursuant to the scale agreement between the UDA and TVA.

The evidence established that Mr. Lévesque is in a true bargaining relationship with TVA, including in regard to the value of the services and work he provides. In 2014, he stopped being paid every two weeks; instead, he bills TVA once a week. He also maintains control over his working conditions by choosing, among other things, when he goes on vacation and whom he works with. Moreover, Mr. Lévesque has great freedom of choice when he performs his duties as host, particularly with respect to the topics chosen and his hosting style, which is the backbone of his work. Mr. Lévesque also performs several other artistic activities at the same time, and his business's revenues are not solely derived from TVA—he takes part in advertising and sometimes writes articles for newspapers. In addition, Mr. Lévesque fulfills a role that is similar to that of other performers hired by TVA and covered by the UDA's certification order.

In light of the above, the Board found that Mr. Lévesque is an "artist" within the meaning of the SAA and that he performs the duties of a host, which are covered by the scope of the UDA's certification order. ■



ONTARIO LABOUR RELATIONS BOARD

Recent Developments

The Board has completed implementation of its e-filing project. The Board now allows parties to file applications, submissions, and documents

with the Board electronically. Additionally, the Board now accepts filing fees for grievances through its electronic pay system.

Important Decisions

Judicial Review – *Canada Bread*, 2018 ONSC 548 (Div. Court) Panel: Justice Swinton

The employer and union parties to certification application brought a joint motion before a single judge of the Divisional Court to quash an interim decision of the Board. The court concluded that it did not have jurisdiction to grant the order, as only the panel hearing the proceeding could grant relief in the nature of certiorari, unless section 6(2) of the Judicial Review Procedure Act [which permitted an application for judicial review to a single judge of the Superior Court, as opposed to the Divisional Court, if the case was urgent and that delay involved in an application to the Divisional Court would likely involve a failure of justice] applied. In view of the strong privative clauses protecting the Board's decisions contained in the Labour Relations Act (Act), the Divisional Court must consider the merits of the application for judicial review when quashing a decision – Motion could therefore only be heard by the panel of the Divisional Court – No urgency to the motion and other options available to the parties.

Interim Relief – *Nation Judicial Institute*; OLRB File No. 0442-18-IO; Dated May 31, 2018, Panel: Brian McLean (22 pages)

The union filed an application under section 98 of the Act seeking an interim order requiring the employer to give employees a pay raise of 4.85% each year until the conclusion of the outstanding unfair labour practice application. The union alleged that following a representation vote in an application for certification, the employer gave employees raises which were lower than those set out in its administrative policy. In so doing, the union alleged that the employer violated sections 70, 72, and 86(2) of the Act. The employer argued that the wage increases established in the administrative policy were not guaranteed and were always subject to the approval of its Board of Governors on an annual

basis. The employer further argued that given its financial position, management decided not to give the full increase set out in the administrative policy.

Given that this is one of the first section 98 applications since section 98 was amended by Bill 148, the parties made submissions on the appropriate test to be used. The union argued that the Board should adopt the test established in *Loeb Highland* following the Bill 40 amendment to the Act. The employer argued that the Board should apply the three part test for interlocutory relief established in the Supreme Court of Canada decision *RJR-Macdonald Inc.*

The Board held that given the broad authority conferred upon it under the amended section 98 of the Act, it should adopt a test that could be applied in the wide variety of labour relations circumstances which the Board may face. The Board held that the fundamental question is, "Does the making of an interim order, of whatever kind, make labour relations sense in all of the circumstances?" In making this determination the Board held that it would consider a number of factors including the purpose of the Act, the nature of the interim order sought, the urgency of the matter, the apparent strength of the applicant's case, the balance of convenience/inconvenience, the balance of labour relations and other harm, whether the damage is irreparable, delay, and any other labour relations consideration.

The Board found that the union had stated a prima facie case. The Board found the remedy requiring an employer to pay employees on an interim basis is an extraordinary remedy. The Board held that the employer has a reasonable defence on the merits and therefore, these facts do not justify an extraordinary remedy. The Board directed the employer to post a notice to employees in the workplace. ■

UNITED STATES



FEDERAL MEDIATION AND CONCILIATION SERVICE

FMCS Commissioner Appointed New Agency Acting Director

Federal Mediation and Conciliation Service (FMCS) Commissioner Richard Giacalone was appointed by President Trump to serve as the Acting Director for FMCS, effective June 2018.

Mr. Giacalone began his mediation career at FMCS in the Chesapeake, Virginia, field office in 1995. He was the former Director of the FMCS International/ADR Department and Special Assistant to the Director of FMCS. Prior to receiving his commission with FMCS, Mr. Giacalone was Labor Relations Advisor for the Department of the Navy and has an extensive background in labor relations representing management.

During his 23-year FMCS career, Mr. Giacalone mediated thousands of domestic labor and employment cases, comprising many cases of national significance, ranging from labor disputes involving multiple symphonies and orchestras to bus and transportation disputes and scores of cases involving shipbuilding and repair industries with national impact. He has also mediated numerous significant collective bargaining agreements covering nationwide bargaining units in the Federal sector. His international

experience at FMCS includes both mediation and the development and delivery of dispute resolution programs in some fourteen countries.



Among his professional honors, Mr. Giacalone was awarded the Meritorious Civilian Service Medal for his contributions to the Department of Navy Labor and Employee Relations program and the Society of Federal Labor and Employee Relations Professionals Lifetime Achievement Award. He was also elected national President of the Society of Federal Labor and Employee Relations Professionals.

Mr. Giacalone holds a Bachelor of Science degree in Industrial Psychology and a Master of Public Administration degree from Old Dominion University in Norfolk, Virginia. He has served on the faculty and regularly lectured at several universities on topics such as collective bargaining and arbitration.

FMCS Announces Key Personnel Positions

FMCS Acting Director Rich Giacalone announced on June 26 during a regularly scheduled managers' meeting that, effective immediately, FMCS Commissioner Gary Hattal would replace John Pinto as Deputy Director of Field Operations in preparation for Pinto's upcoming retirement.

Pinto served FMCS for almost 30 years, beginning his career as a field mediator in 1988



WASHINGTON, D.C. (June 26, 2018) FMCS Acting Director Rich Giacalone announces his selection of FMCS commissioners Gary Hattal (right) and David Thaler to serve as the new Deputy Director of Field Operations and Senior Advisor to the Director's Office, respectively. (FMCS Photo/Released)

and assuming the duties of Deputy Director, Field Operations in 2016.

The Deputy Director, Field Operations oversees the FMCS field office structure and ensures maximum support to all field staff, including administrative assistants, mediators, and managers.

Hattal has been with FMCS since 1995 and has served as a field mediator in three field stations (Washington, D.C.; Oakland, CA; and Seattle, WA), director of Arbitration Services for the FMCS, director of the FMCS Institute for Conflict Management, and as a special assistant to the FMCS's former Agency Director. He has served across a variety of arenas including dispute settlement, preventive mediation, training, assessment, coaching, and facilitation skills to achieve enhanced work relationships. He has varied and extensive experience in the phases of interest-based negotiations procedures, organizational culture, and labor-management partnership development.

Prior to receiving his FMCS appointment, Hattal's experience includes over 15 years of labor relations representation and contract

negotiations, and he has served as an adjunct professor for numerous colleges and universities.

Giacolone also announced that FMCS Commissioner David Thaler will be transitioning to a new position as Senior Advisor to the Director's Office. In this capacity, Thaler will advise and support senior managers in the Office of the Director in policy development and implementation.

Thaler, previously based out of the Metro New York field office, mediated disputes involving collective bargaining, and designed and facilitated labor-management committee cooperation efforts involving major hospitals and unions in the New York City area. He also trained labor and management partners in a variety of industries in core relationship and communications skills so that they could excel in the administration phase of their collective bargaining agreements. Prior to joining FMCS, Thaler practiced employment and commercial litigation in New York City, handling cases involving employment-related statutes such as the Fair Labor Standards Act and Title VII. He later served as an International Programs Officer with the Bureau of International Labor Affairs at the US Department of Labor.

FMCS Welcomes New Chief Operating Officer

On October 15, FMCS welcomed Mr. Gregory Goldstein as the new Chief Operating Officer, responsible for overseeing critical operations initiatives. Mr. Goldstein's considerable leadership and management expertise will help ensure proper development, execution, and coordination of FMCS's management and administrative functions. His skill in the areas of information technology, organizational development and analysis and leading management activities will ensure appropriate support, training, and assistance to maximize human capital.

Mr. Goldstein's more than 25-year career in public service, business, and military life has included positions in the US Marine Corps and Army National Guard, and most recently as a member of the Senior Executive Service, serving



FMCS Acting Director Rich Giacolone and Chief Operating Officer Gregory Goldstein

as Executive Officer and Director of Operations, Management and Technology Office within the Substance Abuse Mental Health Services Administration (SAMHSA). In that role, he provided executive leadership to federal, state, public, and private organizations to develop comprehensive prevention systems to reduce the impact of substance use and misuse and mental illness within America's communities. Before joining SAMHSA, Mr. Goldstein was the Assistant Branch Head for Behavioral Health Integration at Headquarters, United States Marine Corps. In this capacity, he led public health initiatives which included research and program evaluation, data surveillance, program development and information technology for Marine Corps Behavioral Health programs. His

previous positions include Senior Drug Policy Advisor within the Immediate Office of the Assistant Secretary for Health, Department of Health and Human Services, a drug demand reduction analyst, a prevention specialist, and substance abuse counselor. Mr. Goldstein is also a National Guardsman with more than 27 years of military service.

Mr. Goldstein has a master's degree in Health Science from Touro University and is nearing completion of his Doctorate in Health Science from Trident University. He was recently honored being named a Fellow of the American College of Military Public Health in recognition of contributions to behavioral health in the United States Marine Corps.

FMCS To Begin Administration of Federal Shared Neutrals Program

In December, the Federal Mediation and Conciliation Service will assume administration of the Shared Neutrals program, an interagency mediation program operating in the metropolitan Washington, D.C. area. Formerly administered by the US Department of Health and Human Services, Shared Neutrals offers mediation services at little or no cost, operating through a

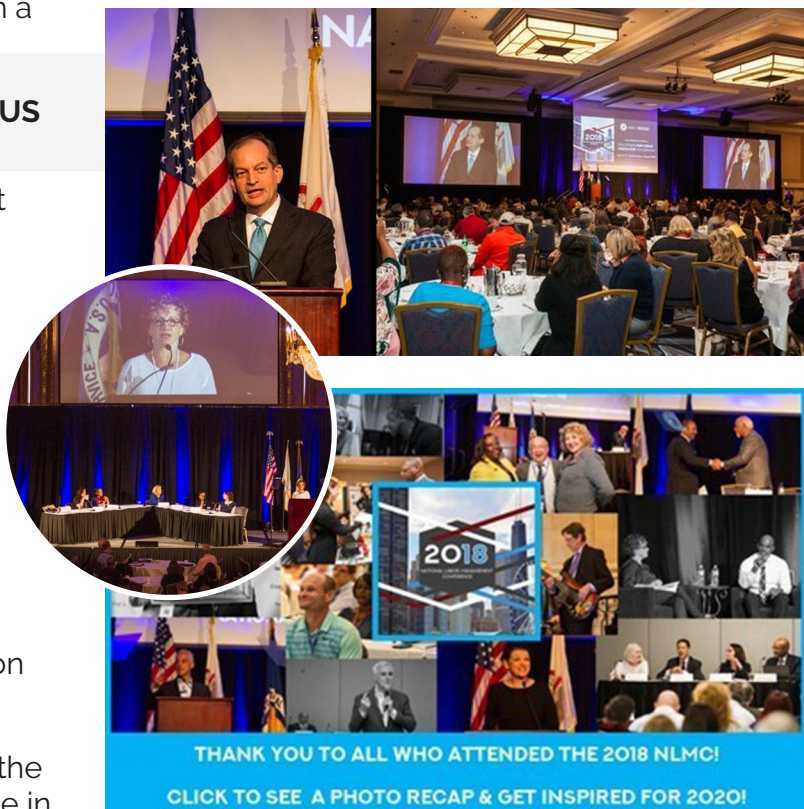
pool of trained neutrals from about 42 federal agencies. In the Washington, D.C. area, the program will be coordinated by FMCS, while Federal Executive Boards will continue to run regional Shared Neutrals Programs. For more information, contact Arthur Pearlstein, FMCS Director of Arbitration, at 202-606-5111.

FMCS 2018 National Labor-Management Conference Heard from Top Labor Experts, US Secretary of Labor

The FMCS 2018 National Labor-Management Conference concluded August 23 in Chicago after hearing from a lineup of distinguished speakers during the three-day event, including US Secretary of Labor R. Alexander Acosta as well as experts on dispute resolution, negotiation, collective bargaining, and other labor relations topics.

The conference was captured with a variety of imagery, and attendees and stakeholders were able to follow along on FMCS's Twitter handle @FMCS_USA and join the conversation using the hashtag #FMCSatWork.

FMCS hopes to see attendees from ALRA at the next National Labor-Management Conference in 2020!



<https://www.youtube.com/watch?v=QocOMynsgYo&feature=youtu.be>



NATIONAL LABOR RELATIONS BOARD

NLRB Proposes Rule to Change its Joint-Employer Standard

In September 2018, the National Labor Relations Board (NLRB or Board) published a Notice of Proposed Rulemaking in the Federal Register regarding its joint-employer standard. Under the proposed rule, an employer may be found to be a joint-employer of another employer's employees only if it possesses and exercises substantial, direct, and immediate control over the essential terms and conditions of employment and has done so in a manner that is not limited and routine. Indirect influence and contractual reservations of authority would no longer be sufficient to establish a joint-employer relationship.

A majority of the Board believes that rulemaking in this important area of the law would foster predictability, consistency, and stability in the determination of joint-employer status. The proposed rule reflects the Board majority's initial view, subject to potential revision in response to public comments, that the intent of the National Labor Relations Act (NLRA or the Act) is best supported by a joint-employer doctrine that does not draw third parties, who have not played an active role in deciding wages, benefits, or other essential terms and conditions of employment, into a collective bargaining relationship for another employer's employees.

In announcing the proposed rule, Board Chairman John F. Ring stated, "I look forward to receiving the public's comments and to working with my colleagues to promulgate a final rule that clarifies the joint-employer standard in a way that promotes meaningful collective bargaining and advances the purposes of the Act."

Chairman Ring was joined by Board Members Marvin E. Kaplan and William J. Emanuel in proposing the new joint-employer standard. Board Member Lauren McFerran dissented. The

NLRB invited public comments on all aspects of the proposed rule.

NLRB Invited Public Input on its Representation Election Rules

In December 2017, the NLRB published a Request for Information in the Federal Register, asking for public input regarding the Board's 2014 Election Rule, which modified the Board's representation-election procedures located at 29 CFR parts 101 and 102. The Board sought information from interested parties regarding three questions:

1. Should the 2014 Election Rule be retained without change?
2. Should the 2014 Election Rule be retained with modifications? If so, what should be modified?
3. Should the 2014 Election Rule be rescinded? If so, should the Board revert to the Representation Election Regulations that were in effect prior to the 2014 Election Rule's adoption, or should the Board make changes to the prior Representation Election Regulations? If the Board should make changes to the prior Representation Election Regulations, what should be changed?

The Request for Information was approved by Board Chairman Philip A. Miscimarra and Board Members Marvin E. Kaplan and William J. Emanuel. Board Members Mark Gaston Pearce and Lauren McFerran dissented.

NLRB Invited Briefs Regarding Whether Section 9(a) Bargaining Relationships in the Construction Industry May Be Established by Contract Language Alone

In September 2018, in *Loshaw Thermal Technology, LLC*, 05-CA-158650, the NLRB invited the filing of briefs regarding whether it



National Labor Relations Board Members: Chairman John F. Ring, Lauren McFerran, William J. Emanuel, and Marvin E. Kaplan

should revisit the holding of *Staunton Fuel & Material*, 335 NLRB 717 (2001). Under the NLRA, most bargaining relationships are governed by Section 9(a) of the Act, which requires the union to have the support of a majority of employees in the bargaining unit. In the construction industry, however, bargaining relationships are presumed to be governed by Section 8(f), which does not so require. Under *Staunton Fuel*, this 8(f) presumption can be overcome, and a Section 9(a) relationship established, by contract language alone—specifically, where language in the parties' collective bargaining agreement unequivocally indicates that the union requested and was granted recognition as the majority or 9(a) representative of the unit employees, based on the union having shown, or having offered to show, evidence of its majority support. The Board invited briefs on whether it should adhere to, modify, or overrule *Staunton Fuel*.

In addition, the Board invited briefing on *Casale Industries*, 311 NLRB 951 (1993), which governs the limitation period for challenging the extension of Section 9(a) recognition by a construction industry employer. Under *Casale Industries* and its progeny, a union's 9(a) status cannot be challenged more than six months after the employer recognized the union as the unit employees' 9(a) representative. This limitation period applies both where 9(a) recognition is alleged as an unfair labor practice and where the invalidity of the recognition is advanced as a defense against a refusal-to-bargain charge. Chairman John F. Ring was joined by Members Lauren McFerran, Marvin E. Kaplan, and William

J. Emanuel in issuing the Notice and Invitation to File Briefs.

NLRB Invited Briefs Regarding Employee Use of Employer Email

In August 2018, the NLRB invited the filing of briefs on whether the Board should adhere to, modify, or overrule the standard articulated in *Purple Communications, Inc.*, 361 NLRB 1050 (2014). In *Purple Communications*, the Board held that employees who have been given access to their employer's email system for work-related purposes have a presumptive right to use that system, on nonworking time, for communications protected by Section 7 of the NLRA. In doing so, the majority in *Purple Communications* overruled *Register Guard*, 351 NLRB 1110 (2007), which held that while union-related communications cannot be banned because they are union-related, facially neutral policies regarding the permissible uses of employers' email systems are not rendered unlawful simply because they have the incidental effect of limiting the use of those systems for union-related communications. In addition, while *Purple Communications* and *Register Guard* addressed only email systems, the Board also invited comment on the standard it should apply to evaluate policies governing the use of employer-owned computer resources other than email.

The case is *Caesars Entertainment Corporation d/b/a Rio All-Suites Hotel and Casino*, 28-CA-060841. Chairman John F. Ring was joined by Members Marvin E. Kaplan and William J.

Emanuel in issuing the Notice and Invitation to File Briefs. Members Mark Gaston Pearce and Lauren McFerran dissented.

NLRB Administrative Law Judges Validly Appointed

In August 2018, the NLRB rejected a challenge regarding the appointment of its administrative law judges (ALJs), concluding that all of the Board's ALJs have been validly appointed under the Appointments Clause of the United States Constitution.

On June 21, 2018, the Supreme Court issued its decision in *Lucia v. SEC*, 585 US ___, 138 S. Ct. 2044 (2018), finding that administrative law judges of the Securities and Exchange Commission (SEC) are inferior officers of the United States and thus must be appointed in accordance with the Appointments Clause, i.e., by the President, the courts, or the Head of Department. *Id.* at 2051. Unlike the SEC's ALJs, the NLRB's ALJs are appointed by the full Board as the "Head of Department" and not by other Agency staff members.

The challenge had been raised by WestRock Services, Inc. (WestRock) in Case 10-CA-195617 on a motion to dismiss. Chairman John F. Ring was joined by Members Mark Gaston Pearce, Lauren McFerran, Marvin E. Kaplan and William J. Emanuel in the order denying WestRock's motion.

NLRB Announces Alternative Dispute Resolution Program Pilot

In July 2018, the NLRB launched a pilot program to enhance the use of its Alternative Dispute Resolution (ADR) program. The new pilot program will increase participation opportunities for parties in the ADR program and help to facilitate mutually satisfactory settlements. Since 2005 the NLRB's ADR program has assisted parties in settling unfair labor practice cases pending before the Board. Participation in the Board's ADR program is voluntary, and a party who enters into settlement discussions under the program may withdraw its participation at any time.

Under the pilot, the Board's Office of the Executive Secretary will proactively engage parties with cases pending before the Board to determine whether their cases are appropriate for inclusion in the ADR program. Additionally, parties may also contact the Office of the Executive Secretary to request that their case be placed in the ADR program. No fees or expenses are charged to the parties for using the program.

The ADR program can provide parties with more creative, flexible and customized settlements of their disputes by allowing parties greater control over the outcome of their cases. In addition to savings in time and money, parties who use the ADR program can broaden their resolution options, making the program particularly useful for cases where traditional settlement negotiations have been unsuccessful. ■



NATIONAL MEDIATION BOARD

Sims Appointed as Director of the Office of Mediation Services

The National Mediation Board (NMB) is pleased to announce that Ms. Patricia S. Sims has been selected as the new Director of the Office of Mediation Services effective October 28, 2018. Ms. Sims is the first woman to hold the position as Director of Mediation Services. She replaces

Michael Kelliher who has elected to return to practicing mediation with the agency. Terri D. Brown remains as a Supervisory Senior Mediator at the Board.

Ms. Sims brings more than 20 years of experience in mediation in both the Air and Rail Industries. She has mediated major disputes with all of the legacy air carriers and their unions

along with regional carriers and unions. Ms. Sims has successfully mediated agreements with Class I, II, and III railroads and their unions. She is known for her expertise in bringing difficult cases to closure.

Ms. Sims joined the NMB in 1997 as a Mediator after a successful career as a union leader at USAirways. She was promoted to a Senior Mediator in 2000, where she supervised a team of mediators and advised senior management and the Board on case management strategy. Additionally, Ms. Sims worked to create the Alternative Dispute Resolution (ADR) department at the NMB, which provides problem-solving training to the parties in both industries.

In the rail industry she mediated the first interest-based contract in the rail industry at CSX with their yardmasters. This was precedent setting as the rail industry historically engaged in a traditional style of negotiating.

In the airline industry, Ms. Sims facilitated the first and only expedited mediation to achieve an

agreement. Additionally, she was responsible for oversight on the United Airlines/Continental Airline merger negotiations which included separate negotiations for each class and craft. More recently, her accomplishments include successful outcomes with Hawaiian Airlines and Spirit Airlines, whose pilots are represented by ALPA.

Ms. Sims earned her BA in education from Virginia Tech and received her mediation certification at Harvard Law School, and at the Private Adjudication Program at Duke University Law School. Ms. Sims is a native of Richmond, Virginia, and credits her late father, William C. Sims, for his unwavering support of her professional success.

Ms. Sims attended an ALRA conference for the first time in 2004. She worked on the ALRA Program and PD Committees in 2005 and was a Board member from 2010 to 2017. Ms. Sims was ALRA President in 2016 for the Halifax conference. ■



MASSACHUSETTS COMMONWEALTH EMPLOYMENT RELATIONS BOARD

PERSONNEL CHANGES

On August 20, 2018, Philip Roberts was sworn in as the new Director of the Massachusetts Department of Labor Relations (DLR). Prior to joining the DLR, Phil had thirty-two years of federal-sector labor relations experience, most recently as the Regional Director of the Boston Regional Office of the Federal Labor Relations Authority. Philip received a Bachelor of Arts Degree from Northwestern University in Evanston, Illinois, and a Juris Doctor degree from George Washington University in Washington, D.C. The DLR wishes to acknowledge the



Ed Palleschi, Deputy Chief Secretary, Boards and Commissions, and Phil Roberts, DLR Director. Location: Massachusetts State House, Governor's balcony.

outstanding service of Acting Director/Executive Secretary Ed Srednicki, who assumed the duties of Acting Director, on top of those of Executive Secretary, during the transition period.

CASE DEVELOPMENTS

Amicus Briefs Requested in Post-*Janus* Appeal

Branch et. al. v. Commonwealth Employment Relations Board, Case Docket, SJC-12603

On October 10, 2018, the Massachusetts Supreme Judicial Court (SJC) issued an [announcement](#) inviting amicus briefs in a case challenging exclusive representation rights under Massachusetts' public sector collective bargaining statute. The request arises out of an appeal of a pre-*Janus*, unpublished Commonwealth Employment Relations Board (CERB) ruling that dismissed three separate prohibited practice charges for lack of probable cause. The charges alleged that the appellants' respective unions violated M.G.L. c. 150E, §§2, 10(b)(1), 12 and the US Constitution by seeking payment of agency service fees. The charges also alleged that the plaintiffs' respective employers (a public school, and the University of Massachusetts (Amherst)) violated M.G.L. c. §§2, 10(a)(1) and (3), 12 and the US Constitution by entering into collective bargaining agreements containing what they considered invalid agency fee provisions. Among other things, the appellants argued that a union's right of exclusive representation unconstitutionally infringes on public employees' free-speech rights.

The SJC decided to hear the appeal in the first instance, and its judicial announcement identified three legal questions to be addressed by amici:

1. *Whether the imposition of compulsory agency or service fees, pursuant to G.L.C. 150E, on public employees who choose not to become union members, but who may benefit from collective bargaining, violates the United States Constitution.*
2. *Whether G.L.C. 150E, § 12, impermissibly burdens the constitutional rights of non-union public employees by requiring them to apply*

for a rebate of certain fees rather than requiring affirmative consent to the payment of fees.

3. *Whether, by permitting a union to be the exclusive employee representative with respect to bargaining on the terms and conditions of employment, but failing to require that non-union public employees have a voice and a vote with respect to those terms and conditions, G.L.C. 150E impermissibly coerces non-union member public employees to discontinue the free exercise of their First Amendment rights.*

Amicus Briefs Requested in Higher Education Contract Repudiation Case

Board of Higher Education v. Commonwealth Employment Relations Board, Case Docket No. SJC-12621

On October 12, 2018, the SJC issued an [announcement](#) inviting amicus briefs in a case brought by the Massachusetts Board of Higher Education (BHE) challenging a CERB decision reported at 41 MLC 217, SUP-08-5396 (February 6, 2015). In that decision, the CERB concluded that the BHE had repudiated the provisions of Article XX, § C (10) of the collective bargaining agreement when it assigned part-time faculty to teach courses in excess of the contractual limitation which, depending on the college, stated that no more than 15 or 20 percent of an academic department's total number of three credit courses could be taught by part-time employees during an academic year.

The SJC decided to hear the appeal in the first instance, and its judicial announcement identified the following issue to be addressed by amici:

Where a provision in the collective bargaining agreement between the Board of Higher Education and the union representing faculty at certain Massachusetts State colleges and universities limits the percentage of courses that may be taught by part-time faculty, whether that provision impermissibly intrudes on the statutory authority under G.L.C. 15A, § 22, to appoint, transfer, dismiss, promote and award tenure to all personnel, or on the board's authority to determine and effectuate educational policy. ■



MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Summaries of Recent Noteworthy Decisions

Ann Arbor Education Ass'n -and- Jeffrey Finnan -and- Cory Merante, Case Nos. CU15 K-040 & CU16 B-006, issued April 13, 2018

We note that in light of the United States Supreme Court's decision in Janus v. AFSCME, Council 31, et al, 138 SCt 2448; 201 L.Ed.2d 924; 86 USLW 4663 (2018) issued on June 27, 2018, the provision of §10(5) of the Public Employment Relations Act (PERA) that was relied upon by the union may no longer be valid.

The Commission affirmed the ALJ's Decision and Recommended Order as modified. The Commission agreed with the ALJ's conclusion that the union violated § 10(2)(a) of PERA by demanding that charging parties pay agency fees. The Commission disagreed with the ALJ's findings with respect to the union's intent and held that parties' intentions in entering into a union security provision are immaterial.

Charging parties Jeffrey Finnan and Cory Merante are both teachers employed by the Ann Arbor Public Schools (the employer). Both were members of the respondent union, the Ann Arbor Education Association (AAEA).

In August 2009, the employer and the union entered into a collective bargaining agreement (Master Agreement) that included an agency shop provision. Under the terms of that provision, bargaining unit members who failed to submit a union membership form would be considered agency shop fee payers. The Master Agreement expired on August 30, 2011. On June 14, 2010, the employer and the union entered into an agreement extending the Master Agreement through the 2011–2012 school year. That agreement (2010 TA) included wage concessions and a wage freeze, as well as promises by the employer regarding AAEA members' job security and a financial package that detailed certain benefits that would be

provided to employees when the employer's financial condition improved. On March 18, 2013, (Michigan's Right to Work statute was enacted on December 11, 2012, but did not become effective until March 28, 2013), the employer and the union executed and ratified a Memorandum of Agreement (2013 MOA) that contained several changes in employee compensation and other matters. As the employer and union had done in prior agreements, the 2013 MOA noted the employer's financial difficulties. It also specified that the language of the parties' agency shop provision would be effective from the time of the ratification of the MOA until June 30, 2016.

Charging party Finnan resigned from the union in August 2014 and charging party Merante resigned in August 2015. Subsequently, the union sent each charging party letters demanding that they pay an agency fee. None of the letters threatened that either charging parties' employment would be jeopardized if they failed to comply. Each charging party paid at least some of the amounts demanded by the union and subsequently filed unfair labor practice charges alleging that the union violated provisions of §§ 9 and 10 of PERA.

On summary disposition, the ALJ found that by collecting and attempting to collect agency fees from the charging parties after they resigned their union memberships, the union violated § 10(2)(a) of PERA, which prohibits labor organizations from restraining or coercing public employees in the exercise of their rights to engage in, or refrain from engaging in, protected concerted activity for their mutual aid and protection. The ALJ recommended that the union be ordered to repay the amount it received from charging parties during the six-month period prior to the filing of each of their charges. The ALJ also found that the union did not violate § 10(3) of PERA, which prohibits requiring public employees to pay dues, fees, or other charges as a condition of maintaining their employment.

The ALJ found no violation of § 10(3) because charging parties did not claim, nor did the record support a finding, that their continued status as public employees was conditioned on the payment of fees to the union.

The Commission noted the union's argument that the 2013 MOA is lawful under § 10(5) and noted that the charging parties admitted that the 2013 MOA was lawful until it expired, was renewed, or was extended. However, the Commission agreed with the ALJ that under the Court of Appeals decision in *Taylor Sch Dist v Rhatigan*, 318 Mich App 617 (2017), there was no merit to the union's argument that § 10(5) of PERA makes lawful any union security agreement that was in effect prior to the effective date of Act 349. The *Taylor* majority held that § 10(5) only makes lawful those agreements that violate § 10(3) and were in place before the effective date of Act 349.

Section 10(3) prohibits requiring the payment of union dues or fees as a condition of obtaining or continuing public employment. The Commission observed that charging party Finnan admitted that the union did not threaten to discharge him if he failed to pay the agency fee, and there was no evidence that the union threatened the employment of either charging party. Since there was no evidence that the 2013 MOA violated § 10(3), § 10(5) does not apply to the 2013 MOA and under *Taylor*, the 2013 MOA is not lawful. The Commission stressed that it must follow the opinion of the Court of Appeals majority in *Taylor*, but noted the incongruity of finding that a union security agreement entered into before the effective date of Act 349 that does not jeopardize employment is unlawful, when another union security agreement entered on the same date would be both lawful and enforceable if that agreement conditioned employees' continued employment on the payment of union dues or fees.

The Commission acknowledged the union's exception to the ALJ's finding that the union had acted to protect its own financial interest (by seeking the employer's agreement to the union security provision) at the expense of its members (who received wage reductions in the same

agreement). Based upon an examination of the record in this case, the Commission disagreed with the ALJ's finding. There was no evidence that the changes in the employees' wages were the quid pro quo for the agency shop provision. Instead, the record indicated that as early as 2010 through at least 2013, the employer experienced financial difficulties and that the wage reductions were bargained in that context. The Commission further noted that the parties' intent in negotiating a union security agreement is immaterial.

Under § 9, charging parties had the right to refrain from financially supporting the union once they resigned their union membership. By demanding that charging parties pay agency fees, the union was restraining or coercing charging parties in the exercise of their § 9 rights and, thereby, violated § 10(2)(a).

The Commission found no merit to charging parties' cross-exceptions, which contended that the ALJ erred by failing to recommend that the union be ordered to pay a civil fine under § 10(8) of PERA for violating § 10(3). The Commission agreed with the ALJ that charging parties failed to allege facts sufficient to establish a violation of § 10(3) because charging parties did not allege that their continued employment was conditioned on their payment of agency fees. Therefore, the ALJ did not err by failing to recommend that the Commission award a civil fine under § 10(8). On that basis, the Commission affirmed the ALJ's Decision and Recommended Order as modified.

Macomb County Clerk -and- International Union, UAW Region 1, Local 412, Case No. C17 C-023, issued July 18, 2018,

E was employed in the Macomb County Clerk's office prior to Karen Spranger's election as the Macomb County Clerk and during Spranger's term in that office. E was also the union steward for the supervisory bargaining unit represented by charging party, International Union, UAW Region 1, Local 412.

Several days after Spranger took office as the Macomb County Clerk, she asked E whether E had a problem with the staff whom Spranger

had appointed and who were not members of the bargaining unit. E said that she did not wish to get involved in the matter. Spranger responded by saying, "That's okay, grievances have to be signed and I'll know what side of the fence you are on." E was disturbed by Spranger's comments and reported the incident to the County's human resources department and to her union, which filed an unfair labor practice charge.

The ALJ found the remarks made by Spranger to be threatening and coercive under PERA and found that to the extent that there was a credibility issue between Spranger and E with respect to whether Spranger made those remarks, E's testimony was more credible. The Commission found that the ALJ's credibility finding was supported by the record and agreed with the ALJ that Spranger's statement to E contained an implied threat that would cause a reasonable employee to believe that Spranger would take adverse action against E, if E submitted grievances in her capacity as a union steward. Respondent's comments would have tended to interfere with E's free exercise of her PERA protected rights, and therefore, violated § 10(1)(a).

The Commission denied respondent's motion to reopen the record. The Commission found that, with reasonable diligence, the documents for which respondent sought to have the record reopened could have been discovered and produced at the hearing. Further, respondent claimed that the documents would show that E was not at work on the day that E testified that Spranger made the comments about which E complained. The Commission reasoned that whether E was correct about the date on which the comments were made was not material to the issue of whether respondent violated § 10(1)(a) by making the comments.

Lastly, respondent contended that she had been denied due process because she was not personally provided with copies of communications between the ALJ, the Macomb County human resources department, and the attorneys for charging party and respondent. The Commission explained that service of those

documents on respondent's attorney of record was service on respondent. Accordingly, the Commission concluded that respondent had failed to show that she had been denied due process.

Hurley Medical Center -and- Office and Professional Employees International Union, Local 459, Case No. C16 D-042, issued February 14, 2018

In 2013, the employer implemented a Salary Administration Plan (Plan) to address annual compensation for non-bargaining unit employees, including physician assistants (PAs) and nurse practitioners (NPs). In accordance with the Plan, the employer budgeted certain amounts for wage increases for the 2013 and 2014 fiscal years. In October 2014, the union was certified as the exclusive representative of PAs and NPs, and eligible bargaining unit employees received performance increases for that fiscal year in November. For the 2015 fiscal year, the PAs and NPs were not given performance wage increases by the employer. As a result, the union filed its unfair labor practice charge alleging that the employer failed to bargain in good faith by violating the status quo.

The ALJ found that the employer's practice of conducting performance evaluations and granting wage increases based on the evaluations and certain other fixed criteria was an established practice that employees regularly expected which, therefore, the employer was not entitled to discontinue without first reaching an agreement with the union or bargaining to impasse. On that basis, the ALJ concluded that the employer violated its duty to bargain under § 10(1)(e) when it unilaterally ceased to provide performance wage increases to employees after the union became certified as their exclusive representative. The Commission disagreed with the ALJ and dismissed the charge.

In its decision, the Commission found that the wage increases were discretionary i.e., not governed by any practice or pattern as to timing or amount. The Commission held that where wage increases in the past were "discretionary," an employer is neither required nor allowed to

give a wage increase without bargaining with the union. Consequently, the Commission found that respondent was not obligated to implement the discretionary performance increases provided for by the Plan in 2015 or 2016 because no set wage increase was due to the employees. Further, the Commission concluded that the Plan did not become a condition of employment which the employer was obligated to implement after the union's certification to avoid violating the status quo.

University of Michigan -and- University of Michigan Skilled Trades Union -and- American Federation of State, County & Municipal Employees, Council 25, Local 1583, Case No. UC16 I-014, issued July 18, 2018

The petitioner, the University of Michigan Skilled Trades Union (UMSTU), represents a bargaining unit consisting of various skilled trades employees at the University of Michigan (University). The intervenor, American Federation of State, County and Municipal Employees Council 25, Local 1583 (AFSCME), represents all the service-maintenance workers employed by the University, including hundreds of individuals employed as maintenance mechanics. The parties have recognized that there may be some overlap in the work performed by members of the two bargaining units and have, therefore, included provisions in each collective bargaining agreement to provide for resolution of issues in which one of the unions claims that members of the other bargaining unit are performing work within the purview of its unit.

In 2016, the four individuals then employed as maintenance mechanics in the University's Athletic Department expressed to management their belief that their current pay grade did not adequately reflect the work assigned to them. As a result, a new job series was created by the University's Athletic Department entitled athletic maintenance technician (AMT), and a plan was developed to transition the current Athletic Department maintenance mechanics into the AMT positions after they completed designated building maintenance classes to expand their knowledge in job-related subjects. The classes that the maintenance mechanics were required

to take to become AMTs were to enhance their ability to perform the duties assigned to them as maintenance mechanics.

After the University placed the job series within AFSCME's bargaining unit, UMSTU filed its unit clarification petition asserting that the AMT positions should be placed in its unit because the positions were newly created and shared a community of interest with positions in its unit. The University and AFSCME argued that the petition should be dismissed because the AMT positions were neither new nor substantially changed.

The Commission agreed with the employer and AFSCME that the unit clarification petition was inappropriate because the essential nature of the job performed by the maintenance mechanics would not undergo any material change when the mechanics become AMTs. Moreover, UMSTU failed to offer evidence that the AMT position would be assigned any duties that would fundamentally change the nature of the position.

Further, the Commission explained that even if the AMT position could be considered a new or substantially changed position, Commission precedent requires that it defer to the employer's good faith decision in unit placement, if that decision is reasonable and the position shares a community of interest with the unit in which it is placed. The record establishes that the position has a community of interest with the AFSCME unit. Overriding the University's decision to place the AMTs in the AFSCME unit would require the Commission to make a determination as to relative degrees of community of interest, and such a determination would be contrary to well-established precedent. Accordingly, the Commission dismissed the petition for unit clarification.

Michigan State University -and- Michigan University Administrative Professional Supervisors Association, MERC Case No. UC16 G-011, issued March 26, 2018

The Commission granted the union's petition to clarify the bargaining unit to include the newly created position of neighborhood director.

In 2016, the employer abolished the engagement center manager position and replaced it with a new unrepresented supervisory position titled neighborhood director. From 2012-2016, the duties of the engagement center manager had expanded to include formation, implementation, and management of student services initiatives. They eventually hired and supervised clerical staff and oversaw academic supervisors and other staff.

The union argued that the neighborhood director position should be placed in its bargaining unit because it shares a community of interest with its bargaining unit; the union noted that the neighborhood director position is the engagement center manager position with a few extra insignificant duties.

The employer asserted that the neighborhood director position was academic in nature and that academic employees were historically excluded from the union's bargaining unit.

In granting the petition, the Commission noted its reluctance to move positions from one unit

to another unit or to unrepresented status without a significant change in the nature of the position. The Commission also noted that when an employer seeks to remove an existing position from an established bargaining unit, it must consider whether, because of the change in duties, the position no longer shares a community of interest with the established unit.

Although the Commission recognized that the engagement center manager position underwent significant changes between the time of its creation in 2012 and the time of its abolition in 2016, almost all the responsibilities assigned to the new neighborhood director position had previously been performed by the engagement center managers. Therefore, the Commission concluded that the inclusion of the neighborhood director position in the petitioner's bargaining unit was appropriate.

The full text of each of the decisions summarized here is available on MERC's website at www.Michigan.gov/MERC. ■



OHIO STATE EMPLOYMENT RELATIONS BOARD

Recent Appointments/Promotions

Robert E. Fekete is the Staff Attorney and an Administrative Law Judge at the Ohio State Employment Relations Board (SERB). He joined SERB in June 2018 from the Office of the Ohio Attorney General where he was a Senior Assistant Attorney General in the Employment Law Section. In that position he appeared before state and federal courts and administrative agencies and represented the State of Ohio in an array of employment, civil service, and traditional labor matters including labor arbitrations, unfair labor practice charges, and representation matters.

Prior to returning to his home state of Ohio, Judge Fekete practiced law in the New York City metropolitan area. He last worked at a large firm

representing both private companies and public entities.

Judge Fekete is an active member of the legal community. He serves as the President of the Central Ohio Labor and Employment Relations Association and was appointed in 2010 to the Labor and Employment Law Section Council of the Ohio State Bar Association where he is the co-editor of the Labor and Employment Law Newsletter.

Judge Fekete received his Bachelor of Arts in psychology from Chaminade University and his law degree from Hofstra University. While in law school he interned at the Equal Employment Opportunity Commission in Washington, D.C. and

in the Investor Protection and Securities Bureau in the Office of the New York Attorney General. He is a veteran of the United States Navy where he served in naval intelligence.

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Ray Geis was hired by SERB in April 2016 as an Administrative Law Judge for SERB/the State Personnel Board of Review. He received his Bachelor of Arts in social studies and secondary education, summa cum laude from Walsh University. Ray earned his law degree from the University of Akron School of law, cum laude, where he served as an associate editor on law review and interned at the National Labor Relations Board, Region 8, Cleveland. Ray was first exposed to the field of labor relations and employment law as a high school history/government teacher while serving as his school district's local union president. To further his interest in labor/employment relations, Ray

attended law school at night, and earned his juris doctor degree while teaching and clerking during the day. Upon graduation, Ray began his career as a labor relations manager for the State of Ohio. While working for three state agencies, Ray successfully handled grievances, administered contracts, participated in collective bargaining, advocated at arbitration, and mediated EEO cases among other duties. Ray's varied experiences give him the perspective to understand diverse parties' interests and points of view.

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Upcoming Conference and Training Dates

SPBR Conference is set for March 22, 2019, to be held at the Crown Plaza Dublin in Dublin, Ohio.

Advanced Negotiations Training is tentatively set for April 16, 2019, at the State Library of Ohio. ■



WASHINGTON STATE PUBLIC EMPLOYMENT RELATIONS COMMISSION

Teacher Strikes

In 2012, the Washington State Supreme Court ruled that the state was not adequately funding K-12 education. In the 2017 and 2018 legislative sessions, the legislature contributed nearly \$2 billion more for K-12 education while eliminating the state salary schedule for teachers, limiting what local school districts can raise through local levies, and limiting uses of levy funds.

As a result, all 295 school districts in Washington State needed to bargain the impact of the legislature's changes. By early summer 2018,

the union representing the teachers and many other school employees was publicly advocating a minimum of 15 percent increases for teachers and a 37 percent increase for other school employees.

In any given year, the Washington State Public Employment Relations Commission (PERC) receives approximately 10 teacher mediation requests. In 2018, PERC received 51 teacher mediation requests, with 46 filed between July 1 and September 30 alone. This was the most teacher mediation requests received in any one

year since 1983. The statute granting collective bargaining rights for teachers is silent on strikes, and no court has held that teachers have a right to strike in Washington State. Nonetheless, since August 23, there have been 15 teacher strikes, which is the highest annual number of strikes by public employees in Washington in PERC's more-than-40-year history. This taxed all of PERC's labor relations professionals; even staff not regularly in the field were assigned to mediate teacher disputes.

While the teacher mediation wave has subsided, there are still two open teacher mediation cases. We have also received 52 mediation requests for other school employees, and as of December 5, 33 of those cases were still open. The settlements have been unprecedented, with teachers seeing double-digit raises in one year and some districts agreeing to raises over 20 percent.

Commission Changes

In September, Mark Brennan completed his term on the Commission. Spencer Nathan Thal was appointed by Governor Jay Inslee to the Commission in October. Spencer has represented public and private sector unions, guilds, and employees in Washington State since 1990 in federal and state courts and before arbitrators, hearing examiners, and administrative agencies. He served a term as Chair of the Washington State Bar Association Labor and Employment Section, and he has helped establish and present training programs and seminars for union representatives on labor and employment law. Spencer's term expires September 8, 2023.



Updated Unfair Labor Practice Guidance Materials

In an effort to better assist potential complainants and decrease the number of deficient filings, PERC updated the unfair labor practice guidance

materials on its website. The materials, which include an interactive decision-tree tool, provide potential complainants with guidance on the types of unfair labor practice complaints that they may file and the information required for those types of complaints.

Annual Report

PERC's Annual Report for 2017 is now available at <https://perc.wa.gov/forms-guides-and-publications/>.



LERA Conference

With the Federal Mediation and Conciliation Service, PERC is pleased to cohost the Labor and Employment Relations Association's 42nd Annual Collective Bargaining and Arbitration Conference. The conference will be held on March 28–29, 2019, in Seattle, Washington. Details for the conference will be on www.perc.wa.gov as they become available.

Decisions of Interest

King County, Decision 12582-B (PECB, 2018)

The employer implemented changes to its vacation leave approval policy without bargaining with the union. During a quarterly staff meeting, the employer presented the changes to bargaining unit employees. A bargaining unit employee, who was also the union's second vice president, engaged in a tense and heated exchange with management. Following the meeting, the employer disciplined the employee by ending her lead status early, investigating her conduct, and issuing a written reprimand. The union alleged the discipline was in retaliation for the employee's protected activity at the meeting.

The Commission held that an employee must go to extremes before his or her activity loses protection. When determining that the employee did not lose protection, the Commission considered the context and forum of the discussion, the subject of the discussion, and how the employer handled the discussion.

While the employee said things that management found offensive—including accusations against management of not caring about employee safety, questions why a supervisor supervised only two employees, and referrals to employees who worked in other units and were not present—the exchange took place during a staff meeting in which the employer created an open forum. The exchange between the employer and the union's second vice president covered mandatory subjects of bargaining and the employer's recent unilateral change. Some of the employee's comments that the employer found offensive were in response to employer statements. The employee's behavior, questions, tone, and accusations did not cost her protection of the act. The Commission concluded that the employer could have managed the meeting differently.

Ultimately, the Commission found that the employer had discriminated against the employee by demoting her, investigating her, and disciplining her because of her protected activity during the staff meeting.

Seattle School District, Decision 12842-A (PECB, 2018)

Custodial employees of Seattle School District are supervised from a central facilities department. The school principal is not the direct supervisor of the custodial employees. The principal asked the custodian to perform certain tasks. The custodian told the principal, "I'm not doing it. Not my job. You do it" and "[y]ou can't tell me what to do. You're not my boss." The principal told the employee, "This is my school. This is my building. So if you not [sic] listening to me, you have to get out of here. You have to find another job."

The Commission found that the principal's statements interfered with employee rights. A statement can interfere with employee rights even when an employee knows the employer official is unable to take any threatened action because interference chills union activity of the employee or others. The purpose of a comment may not be to carry out a certain action but to cause an employee to change his or her actions.

An employer official need not have the authority to follow through with its statements for those statements to interfere with employee rights.

The union also alleged the employer had discriminated against the custodian by creating a hostile work environment. The Commission has jurisdiction over allegations of a hostile work environment in retaliation for protected activity. The protected activity must occur before the hostile work environment begins. Borrowing from Washington's Law Against Discrimination, the Commission established a standard for an employee to prove a hostile work environment as part of a discrimination claim. The complainant must show that the harassment (1) was unwelcome, (2) was because of the employee's protected union activity, (3) affected the terms or conditions of employment, and (4) was imputable to the employer. Additionally, the harassment must be severe and pervasive. Ultimately, the union did not meet its burden to prove a hostile work environment.

Lincoln County, Decision 12844-A (PECB, 2018)

This case presented competing unfair labor practice complaints alleging refusal to bargain filed by the employer and the union. The employer had enacted a resolution to conduct all collective bargaining negotiations in a manner that was open to the public. The employer and union began negotiating in an open session. At the next bargaining session, the union stated that it was willing to bargain but would do so in accordance with the parties' prior practice of bargaining in private. The employer responded that it was ready to bargain and would do so in accordance with its resolution. Both parties repeated their statements and the union left.

The Commission found that both the employer and the union had refused to bargain. Both parties had conditioned their willingness to engage in good-faith negotiations on how negotiations were to be conducted. How to conduct negotiations relates neither to the employees' interests in wages, hours, and working conditions nor to the employer's entrepreneurial control. The "how" is the framework for discussing wages, hours, and

working conditions and is a permissive subject of bargaining.

Washington State's Public Employees' Collective Bargaining Act does not prescribe how parties will bargain. How to conduct negotiations is something the parties must agree on. Determining how to conduct negotiations required more than the parties saying they were available and ready to bargain but only in a predetermined manner. By conditioning bargaining on agreement on ground rules, the employer and the union each refused to bargain.

To remedy the violations, the Commission ordered the parties to engage in two good-faith negotiation sessions. If the negotiation sessions were unsuccessful, then the parties were required to engage in mediation. If mediation proved unsuccessful, then the parties would negotiate consistent with their previous manner—in private.

Read the full decisions on PERC's website at <https://decisions.perc.wa.gov/>. ■



Photo Credit: 3CDC

68th Annual ALRA Conference Labor Agencies: Bridging Workplace Divides

Cincinnati, Ohio | July 20–23, 2019

We hope to see you in Cincinnati!



Photo
Credits:
Amanda
Rossmann (left)
and Jeff Swinger
(right)

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