

ALRA Advisor

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September 2016



ASSOCIATION
of LABOR RELATIONS
AGENCIES



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Inverness Beach, Nova Scotia

ALRA 65th Annual Conference Recap Halifax, Nova Scotia – July 2016

ALRA Advisor

The ALRA Advisor is published for members of the Association of Labor Relations Agencies (ALRA) and their staff.

alra.org

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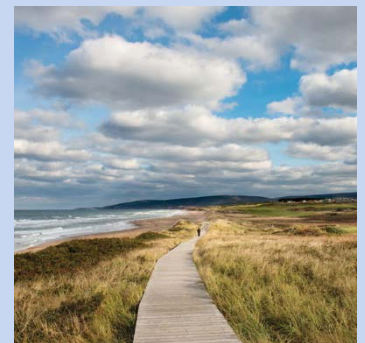
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ON THE COVER: A boardwalk along Inverness Beach in Nova Scotia.

From the President . . .



Ginette Brazeau

Meet the ALRA President

I am very honored to serve as ALRA's 65th President. I never thought, as a francophone woman from a small town in Northern Ontario, that I would be given the opportunity to lead an organization with such breadth and that consists of so many talented, dedicated members. I wish to take this opportunity to recognize my predecessors, who have all done excellent work in challenging times – in keeping ALRA relevant and maintaining it as a key network for labor relations neutrals of government agencies from across North America.

Looking back at the 2016 Conference in Halifax, I applaud everyone, and especially the local committee, who contributed to making the conference such a success. They really gave true maritime hospitality in a beautiful setting by the harbour. Congratulations to then-President of ALRA, Patricia Sims, for her work and continued dedication to the organization, and to the co-chairs of the various committees who put together an agenda filled with thought-provoking topics. With several new attendees, the conference showed signs of renewal and a great deal of enthusiasm for ALRA and for all that this unique organization has to offer.

In my participation at the ALRA Conference and beyond, I see an engaged and dedicated community of practitioners. Thank you to all of you that are currently participating in this year's committees – you will be instrumental in ensuring the success of next year's conference, to be held in Portland in 2017. Special thanks as well to the co-chairs who have graciously accepted to take the lead on the key planning committees this year. They are: Beth Schindler and Mike Sellars, Local Host Committee; Scot Beckenbaugh and Kathy Peters, Program Committee; Mike Sellars and Sheri King, Professional Development Committee. For those of you looking for even more opportunities to interact with other member agency practitioners, it is never too late to get involved and participate in one of the committees that have been set up for the coming year as we prepare for the next conference.

While we look forward in anticipation to Portland in 2017, there is even more that ALRA can do to promote the linkages that are so critical to our agencies as we face challenges on numerous fronts: a changing political landscape, challenges with budgets and travel restrictions and a shifting economy that impacts the world of work. It is crucial that we come together as a community of practice to share ideas, best practices and learn from each other on how to best address those challenges. This is the true value of ALRA – a unique forum where representatives from government agencies acting as neutrals in labour disputes can come together to discuss challenges, trends, commonalities, differences, new opportunities, tools and approaches to the practice. ►

From the President . . .



Ginette Brazeau

Meet the ALRA President, cont.

I am usually not one to shy away from raising new issues, or to try to look at things differently. I hope to optimize the experience we have amongst our group and the enthusiasm and ideas of our newer participants, and use these to set the stage for ALRA 2026, just in time to celebrate ALRA's 75th anniversary!

With a focus on maintaining and expanding on the opportunities that ALRA provides its members, I look forward to working with an extremely dedicated Executive Board.

ALRA Executive Board

Ginette Brazeau, President – *Canada Industrial Relations Board*

Pat Sims, Past-President – *National Mediation Board*

Marjorie Wittner, President-Elect – *Commonwealth Employment Relations Board (Massachusetts)*

Scot Beckenbaugh, Vice-President, Finance – *Federal Mediation & Conciliation Service (U.S.)*

Sylvie Guilbert, Vice-President, Administration – *Canada Industrial Relations Board*

Mike Sellars, Vice-President, Professional Development – *Washington Public Employment Relations Commission*

Jennifer Abruzzo, Member – *National Labor Relations Board*

Peter Simpson, Member – *Ontario Ministry of Labour*

Catherine Gilbert, Member – *Ontario Labour Relations Board*

Barney Dobbin, Member – *Federal Mediation & Conciliation Service (Canada)*

Josh Tilsen, Member – *Minnesota Bureau of Mediation Services*

Susan Panepento, Member – *New York City Office of Collective Bargaining*

Finally, I hope you will enjoy this issue of the *Advisor*. The content of the *Advisor* was repurposed last year, with a view to informing member agencies of useful resources and developments relevant to your daily work. In this issue, we are resurrecting a column entitled *ALRArchives*, which sheds light on the interesting history of the organization. We hope you will continue to enjoy and benefit from these pages.

On behalf of the entire ALRA Executive Board, I wish to thank you for your ongoing support of the organization and we hope to see all of you in Portland in July, 2017. ■

2017 ALRA Conference

Portland, Oregon

*Please join us for ALRA's
66th Annual Conference in
scenic Portland, Oregon*

Conference Schedule

The 2016 ALRA Conference will be held in Portland, Oregon from **July 22 to 25, 2017**.

The conference will be held at [The Benson Hotel](#), an elegant historic building in downtown Portland. A block of rooms has been set aside for ALRA at the guaranteed rate of \$204/night.

The ALRA Conference Planning Committee is working diligently to put together a diverse and stimulating program. The full conference schedule will be posted on www.alra.org in the coming months. Look for more information in the next issue of the *Advisor*.

Travel Grants

Travel grants are available for individuals who are attending the ALRA conference for the first time. Information about travel grants for the 2017 ALRA Conference will be available at www.alra.org when registration opens for the conference.



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The International Rose Test Garden, Portland, Oregon

2016 Conference Recap



Perspectives from a First-Time Attendee

By Lindsay Foley, Canada Industrial Relations Board



Lindsay Foley

I was elated to be included as a delegate to the ALRA Conference. As a whole, the conference was a great experience as it provided a forum completely dedicated to labour relations and professional development. As a first-time attendee, I found it especially valuable to attend the ALRA Academy held on the first day of the conference. The facilitators presented a very thorough workshop designed to provide an understanding of the ALRA; the various differences in the American and Canadian labour law frameworks; approaches to mediation; a discussion on neutrality; and an opportunity to meet the ALRA Executive. It was great to connect with other first-time delegates and build a base on which to participate in the remainder of the conference.

The various workshops and panels that were provided throughout the conference were thought-provoking, engaging, and relevant. The compliment of presenters was very well balanced, providing insight from labour relations practitioners, academics, and advocates. The workshops and roundtables provided a space for delegates to reflect, debate, discuss, and share best practices. For example, the workshops on “when and where does the mediator’s job end” and “the ethics of neutrality” resulted in lively and productive dialogue among delegates and were expertly facilitated by the presenters. These forums also provided an opportunity to discuss emerging issues in our field, including the transition of stakeholders at the table and the impact of social media on neutrality.

By providing structured opportunities for networking, the conference facilitated connecting with other labour relations practitioners at various stages in their careers. This was a unique opportunity to meet colleagues in government agencies dedicated to labour relations and gain not only a regional and national perspective, but an international perspective as well.

Attending the conference provided an opportunity to learn from our colleagues, contribute to their learning, and created a space for sharing knowledge and tools, all while fostering the building and maintenance of long-term professional connections. ■

Lindsay Foley has worked as an Industrial Relations Officer (IRO) for the Canada Industrial Relations Board since 2008. She previously worked as an Industrial Relations Intern with Federal Mediation and Conciliation Services Canada. Lindsay holds a Bachelor’s degree in Sociology and Labour Studies, and a Master’s degree in Industrial Relations and Human Resources. In her capacity as an IRO, Lindsay investigates and mediates applications and complaints under Part I (Industrial Relations) and certain provisions of Part II (Occupational Health and Safety) of the Canada Labour Code.

2016 Conference Recap



Photos from the 2016 ALRA Conference



Left, L to R: Kevin Flanigan, Virginia Adamson, Allison Beck, Ginette Brazeau, and Bernard Fishbein

*Below, the ALRA Executive Board
L to R front row: Josh Tilsen, Tim Noonan, Catherine Gilbert, Peter Simpson, Barney Dobbin, Jennifer Abruzzo. Back row: Scot Beckenbaugh, Sylvie Guilbert, Pat Sims, Ginette Brazeau, Marjorie Wittner, Mike Sellars.*



Left & Middle below: Breakout sessions

Below, L to R: Scot Beckenbaugh, Leo Gerard, Ginette Brazeau



2016 Conference Recap



Photos from the 2016 ALRA Conference



Panel speakers, back row: Allison Beck, Ginette Brazeau, Linda Puchala, Mike Sellars. Front row: Virginia Adamson, Louise Aubertin, Bernard Fishbein



Rodger Cuzner, Parliamentary Secretary to the Minister of Employment, Workforce Development and Labour, Canada



Above left: Attending the sessions

Above: Socializing in Halifax

Left, some of the hard working people who made it all possible.

L to R: Molly Fall, Barney Dobbin, Caroline Mann, Louise Sorensen, and Jeanette Taverner



2016 Conference Recap



Photos from the 2016 ALRA Conference



Above, L to R: former ALRA President Reg Pearson, former ALRA President Richard Curreri, Maureen Flanigan, Pam Otis, former ALRA President Bill McCallum and former ALRA President Kevin Flanigan.

“A bunch of us got together with Bill McCallum during the conference. Bill was ALRA Prez back in 1975 when he was with the Nova Scotia DOL. . . . [W]e visited him at the Veteran’s Home in Halifax, and played guitars and sang with him there in front of about 20 other residents.”

- Richard A. Curreri, Esq., Arbitration & Neutral Services



Left, L to R:

Sheila McCallum, Richard Curreri, former ALRA Board Member Jim Breckenridge, Kevin Flanigan, Bill McCallum, Reg Pearson, Pam Otis, and Maureen Flanigan



Discovering Resources to Guide Our Work

By Tim Noonan, Executive Director, Vermont Labor Relations Board

Member Sign In



Publications ▾ Resources ▾ Conferences ▾ ALRA Administration ▾ Home

The ALRA website (www.alra.org) has been updated and reorganized during the past few years. It now provides many useful resources relevant in informing our essential work.

The website has two components: the public section and the members-only section. The public section is generally accessible to the public. It is where you can find information on the annual ALRA conference. It also has the last nine years of the *ALRA Advisor*, ALRA's newsletter which is issued twice annually. The Neutrality Report, ALRA's authoritative statement of the essential principles and practices on the critical subject of "neutrality" or "impartiality," is found in the public section. The public section also contains a directory of ALRA member agencies and information on ALRA administration.

The members-only section is password protected. Each member agency has been assigned, through the primary ALRA contact at the agency, a user name and password unique to that agency. The user name and password can be used by any member of, or person employed by the agency to access the section. There, agency members will find articles, presentations and other resources on topics pertinent to the work of ALRA member agencies.

A wealth of useful materials for agencies is found under the "resources" tab in the members-only section. Handout materials from past conferences – including the most recent conference in Halifax – *ALRA Advisor* articles, and other helpful documents shared by member agencies are separated into four general categories: administrator, adjudicator, mediator and training. This library of resources provides valuable information-sharing among ALRA member agencies.

Is your agency considering electronic filing? How about electronic voting? Is it time for a new case management system? Are you having difficulty navigating IT improvements? Documents providing guidance in these areas are in the administrator category under the "resources"

Continued on page 12



Any organization in existence for 65 years has much in its past to provide guidance for the present and future. In this edition of the **Advisor**, we resurrect a column on ALRA's history which was a feature of the newsletter in the late 1990's. This column will continue in future editions of the **Advisor**.

ALRA's Governance History

Submitted by Tim Noonan, Executive Director, Vermont Labor Relations Board

At present, ALRA relies primarily on "inside volunteer" efforts to conduct its operations. This was not always the case. In the late 1970's and early 1980's, ALRA had a close connection with Public Employment Relations Services and the Institute of Management and Labor Relations, Rutgers University. The following tribute to Robert Helsby, excerpted from the October 1981 ALRA newsletter, provides some insight into these relationships and a snapshot view of ALRA at the time:

Aside from his service as President of the organization and from his support of ALRA by permitting it to be housed in the New York State Public Employment Relations Board while Bob was PERB Chairman, it was Bob who sought and obtained support from the Carnegie Foundation to establish the Public Employment Relations Services. PERS was in business for almost four years. During that time, under Bob's direction, it undertook many new and creative efforts: team reviews of ALRA member agencies, the beginning of the development of agency guidelines and standards, publication of *Portrait of a Process: Collective Negotiations in Public Employment*, a year-long study of the data needs of the public sector, culminating in the publication of a report, *Data Probe '80*, and numerous other projects. Bob's final effort at securing ALRA's future was frustrated by the loss of Federal funds to support regional consortia throughout the country. The main thrust of these consortia was to have been regional training activities. Nevertheless, Bob did succeed in making arrangements with the Institute of Management and Labor Relations at Rutgers University to serve as the secretariat of ALRA. It is hoped that this will be a secure enough base to help the organization survive even in times when outside funding is difficult to obtain.

The permanent ALRA office/secretariat structure lasted from 1981 to 1987. Jeffrey Tener, a Rutgers professor and past ALRA president, assumed the title of ALRA Executive Director for that period. He was paid a stipend and, with the institutional support of Rutgers for the ►



ALRA's Governance History, cont.

first few years of that period, assumed much of ALRA's administrative responsibilities. When Tener resigned in 1987, Beverly Westcott, formerly Administrative Officer of the Washington PERC, was appointed on an interim basis to perform administrative responsibilities and a new round of discussions began on ALRA's long-term stability. A permanent institutional base for ALRA, such as an agency office or university, was explored.

Ultimately, however, in 1989 ALRA opted to transform its vice president offices into "functional" vice-presidents – VP-Administration, VP-Finance, VP-Professional Development – to assume many of the administrative responsibilities formerly performed by the Executive Director. This structure of vice presidents performing specific duties was combined with the existing ALRA offices of President, President-Elect, Immediate Past President and Executive Board members. This has provided the core of the ALRA administrative structure from 1989 to present. ■

Discovering Resources, cont.

Continued from page 10

tab. The adjudicator category contains extensive material on topics such as managing the hearing process, dealing with challenging clientele, effective decision making, and decision writing.

The mediator category under the "resources" tab lists "mediator mantras" and offers practical tips for mediators on topics such as questions to ask before a first mediation session. It also provides timely guidance on emerging topics such as cross cultural dispute resolution and the impact of social media and electronic tools on mediation. It contains the *Code of Conduct for Professional Mediators*.

The members-only section also contains materials from the most recent ALRA conferences, as well as materials under the "archive" tab from annual conferences dating back to 2000. The section has minutes of annual and Executive Board meetings and other ALRA administrative materials.

The ALRA website is a continual work in progress. There will be substantial efforts undertaken this year to add even more useful materials to the website to provide timely guidance to ALRA member agencies. ■

Federal - United States



National Labor Relations Board

The Board issues a number of decisions involving educational institutions at the close of Board Member Hirozawa's Term

Submitted by Roxanne Rothschild, Deputy Executive Secretary, NLRB
Case summaries prepared by NLRB attorneys Thomas Clark, Paul Edenfield & Laura Pho



National Labor Relations Board Members pictured left to right: Member Philip A. Miscimarra, Chairman Mark Gaston Pearce, Member Kent Y. Hirozawa and Member Lauren McFerran

During the waning days of National Labor Relations Board Member Kent Y. Hirozawa's term, which ended on August 27, 2016, the Board issued many significant decisions, including a number of decisions involving educational institutions. As to these institutions, the Board grappled with jurisdictional issues applicable to teachers of religious studies, and consideration of who falls within the definition of "employee" under the NLRA.

In ***Seattle University***, [364 NLRB No. 84](#), a Board panel majority consisting of Members Hirozawa and McFerran applied *Pacific Lutheran University*, 361 NLRB No. 157 (2014) in denying review of the Regional Director's determination that the University's contingent faculty are generally covered by the Act and that a unit comprising those faculty is appropriate for bargaining. However, the majority granted review and reversed the Regional Director's determination to include in the unit those faculty who teach in the University's Department of Theology and Religious Studies and in its School of Theology ►



National Labor Relations Board

NLRB Decision summaries, cont.

and Ministry because the University holds them out “as performing a specific role in creating and maintaining the school’s religious educational environment” within the meaning of *Pacific Lutheran*. The majority emphasized that in excluding these contingent faculty from the unit, they had not assessed the religious content of courses taught by the faculty or otherwise compared the content of those courses to those taught by faculty in other departments and schools. Rather, they had assessed only the University’s presentation of those courses to the faculty, students, and public at large.

Dissenting, Member Miscimarra would grant the University’s request for review in its entirety. First, in his view, the instant case illustrates the First Amendment problems created by the Board majority test in *Pacific Lutheran*, in which he dissented. He stated that it now appears that, under *Pacific Lutheran*, the Board majority will scrutinize the content of courses to determine whether to assert jurisdiction, contrary to the teachings of *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979). Second, as in *Pacific Lutheran*, he believes that when determining whether a religious school or university is exempt from the Act’s coverage based on First Amendment considerations, the Board should apply the three-part test articulated by the D.C. Circuit in *University of Great Falls v. NLRB*, 278 F.3d 1335, 1343 (D.C. Cir. 2002). Third, even assuming that *Pacific Lutheran* applies, his view is that a substantial issue is raised by the Regional Director’s denial of the Employer’s attempt to introduce evidence concerning the University’s religious purpose, and limiting other evidence to the second prong of the *Pacific Lutheran* test.

The Board applied the same rationale from *Seattle University* in ***Saint Xavier University***, [364 NLRB No. 85](#), which issued the same day.

In ***The Trustees of Columbia University in the City of New York***, [364 NLRB No. 90](#), a full-Board majority consisting of Chairman Pearce, Member Hirozawa, and Member McFerran reversed the Board’s 2004 decision in *Brown University*, which categorically excluded student teaching and research assistants from the Act’s coverage. Instead, the Board held that student teaching and research assistants are employees under the Act if they meet the Act’s broad definition of an employee, which encompasses individuals who meet the common law test for employment. Further, the Board found no policy reasons for excluding student assistants, noting that there is no basis to conclude that the Act’s coverage will interfere with laws or practices pertaining to university education. The ►

Federal - United States



National Labor Relations Board

NLRB Decision summaries, cont.

Board noted that collective bargaining has been successfully carried out in the public sector without infringement on academic concerns. Applying the common-law test, the Board found that Columbia's student assistants were employees, as they performed services under the direction of their university in exchange for compensation. Finally, the Board determined that, in view of their substantial community of interest, a unit of undergraduate, Master's, and Ph.D. assistants is an appropriate unit, and that none of those categories should be excluded as temporary employees.

Member Miscimarra dissented, arguing that *Brown University* should be upheld. He reasoned that, in view of the substantial financial investment of students in postsecondary education and the long-term importance of their university education, collective bargaining rights, with their attendant prospects of strikes or other labor conflict, pose too great a risk to warrant extending such rights to student assistants. He further observed that various protections and procedures that the Act provides to unions and employees would be at odds with the traditional educational relationship between students and universities. He also asserted that differences in tenure and job duties among the various petitioned-for classifications negated the appropriateness of the unit.

In *The Pennsylvania Virtual Charter School*, [364 NLRB No. 87](#), a full-Board majority consisting of Chairman Pearce and Members Hirozawa and McFerran reaffirmed and applied the Board's longstanding test, as set forth by the Supreme Court in *Hawkins County*, 402 U.S. 600 (1971), and found that the School is not exempt from the Board's jurisdiction as a "political subdivision" of the Commonwealth of Pennsylvania within the meaning of Section 2(2) of the Act. Nor did the majority find any persuasive reason for the Board to exercise its discretion to decline to assert jurisdiction over the School or all charter schools under Section 14(c)(1). The majority stated that it was not announcing a bright-line rule asserting jurisdiction over charter schools by its decision.

Applying the two-pronged *Hawkins County* test, the majority found the School fails the first prong because it was not "created directly by" the Commonwealth to be "an administrative arm" of government, but by private individuals as a nonprofit corporation, which holds a charter to operate as an independent public school, more like a subcontractor than a governmental department. Under the second prong of the *Hawkins County* test, the majority, adopting the reasoning in *Charter School Administration* ►



National Labor Relations Board

NLRB Decision summaries, cont.

Services, 353 NLRB 394 (2008), found that the dispositive inquiry is whether a majority of individuals who administer the School, the governing board, are appointed by and subject to removal by public officials. Applying that test, the majority found that the School fails this prong because its board is a self-perpetuating entity where the appointment and removal of members are acted upon by a majority vote of the members, none of whom are public officials. Further, the majority declined to discretionarily assert jurisdiction over all 14 cyber charter schools in Pennsylvania under Section 14(c)(1), as the Employer requested, or over charter schools as a category, as their dissenting colleague would do. The majority rejected the School's and the dissent's argument that charter schools do not have a substantial effect on commerce, noting that the School itself serves 3000 students and its operating budget is in the millions of dollars annually. Further, the majority found that, even though charter schools may be subject to state and local regulatory oversight, they are similar to government contractors, over which the Board has routinely asserted jurisdiction. The majority was not persuaded by the dissent's argument that the fact-specific inquiry required under *Hawkins County* would provide parties with no way to reliably predict whether they will be subject to the Board's jurisdiction and would lead to instability and confusion, reasoning that, as more cases are decided, predictability will emerge.

Dissenting, Member Miscimarra did not address the majority's finding that the School fails to constitute a political subdivision under the *Hawkins County* test. Rather, in his view, the Board should decline to exercise jurisdiction over charter schools because charter schools have an insubstantial effect on interstate commerce and because asserting jurisdiction would result in instability and confusion about whether parties fall under the Act's coverage.

The Board applied the same rationale from *Pennsylvania Virtual Charter School in Hyde Leadership Charter School – Brooklyn*, [364 NLRB No. 88](#), which issued the same day.

The NLRB posts summaries of Board, Administrative Law Judge and Appellate Court decisions reviewing decisions of the Board every week at www.nlr.gov. The "[Weekly Summaries of Decisions](#)" can be found under the "Cases & Decisions" tab on the home page. A link for signing up for an email subscription to the weekly summaries is available on the Weekly Summaries page as well. ■



National Labor Relations Board

Remedial Relief:

Search for work & interim employment expenses

By Jennifer Abruzzo, Deputy General Counsel, National Labor Relations Board

On August 24, 2016, the National Labor Relations Board (the Board) issued a decision in *King Soopers*, [364 NLRB No. 93](#), adopting a new policy of awarding search-for-work and interim employment expenses, regardless of discriminatees' interim earnings and separately from taxable net backpay, with interest. The case involved the unlawful suspension and discharge of an employee for engaging in protected, concerted activity in asserting a right grounded in a collective bargaining agreement when she honestly and reasonably questioned whether she should be bagging groceries because the work belonged to a different bargaining unit or union.

After finding a violation, the Board considered the General Counsel's and amici's positions on appropriate remedial relief in this and other cases involving unlawful discharges. The Board cited to Section 10(c) of the *National Labor Relations Act* (the Act) which grants the Board "broad discretionary" authority to order remedies that will "effectuate the policies" of the Act. The underlying policy is a restoration of the situation, as nearly as possible, to that which would have obtained but for the illegal discrimination. It noted that, in providing make-whole relief, the Board serves the dual purposes of reimbursing discriminatees for losses suffered as a direct result of the unlawful conduct and furthering the policy interest of deterring illegal actions.

In agreeing with the General Counsel's position, the Board determined that the remedial framework in place failed to truly make whole aggrieved victims of unlawful conduct. Specifically, it found that the Board's treatment of search-for-work and interim employment expenses failed to fully compensate discriminatees for losses incurred as victims of unlawful conduct. While the traditional approach found it appropriate to compensate discriminatees for expenses, such as increased transportation costs in seeking or commuting to interim employment, room and board while seeking and/or working away from home, and the cost of moving if required to assume interim ►

Federal - United States



National Labor Relations Board

Remedial Relief, cont.

employment, it treated these additional expenses as an offset to interim earnings, rather than a separate element of the backpay award. The practical effect has been that those who are unable to find interim employment receive no compensation for these expenses, and those who find interim jobs paying lower wages than their expenses do not receive full compensation.

The Board determined that the remedial framework in place failed to truly make whole aggrieved victims of unlawful conduct.

Thus, the Board modified its treatment of search-for-work and interim employment expenses to eliminate the offset. It noted that no other expenses incurred by discriminatees as a result of a respondent's unlawful actions, such as medical expenses, vacation benefits, bonuses, employee discounts, and retirement fund contributions are treated as an offset to interim earnings. Therefore, in order to fully compensate discriminatees for their losses, the Board stated that it will now treat search-for-work and interim employment expenses in a manner consistent with its treatment of other losses suffered by the aggrieved employee, which is to award those separately from taxable net backpay, with interest. The Board also noted that the separation will avoid the potential complication created by mixing nonwage components with backpay, resulting in a clearer accounting for the employee, the IRS and the Social Security Administration. ■



**NATIONAL LABOR
RELATIONS BOARD**

Federal - United States



Federal Mediation & Conciliation Service

FMCS National Labor-Management Conference Returns with Impressive Showcase of Insights into the Future@Work



FMCS Director Allison Beck with AFL-CIO President Richard Trumka

The long-awaited revival of the FMCS National Labor-Management Conference the week of August 16th in Chicago attracted a sell-out crowd of more than 1,000 U.S. and international labor, management, and neutral professionals, experts and academics for a four-day program that included more than 70 information-packed sessions on 21st century workplace issues. It was the first time the event was held since 2008, and the theme “Future@Work: Trends, Tools, and Techniques for Partnering in the New Economy,” echoed the Agency’s call to improve and expand labor-management partnerships as a means to overcome the enormous challenges new technologies and business models have presented in nearly every sector of the U.S. economy.

A Warm Welcome

Having returned to Chicago for the first time in more than a decade, it was fitting that Jorge Ramirez, President of the Chicago Federation of Labor and Mayor Rahm Emanuel kicked off the main conference with remarks on how labor-management partnerships have improved the city’s public services and health care. Bernard Tyson, CEO and Chairman of Kaiser Permanente, followed with a keynote on the prospect of technological change and a coming “Fourth Industrial Revolution.” ▶

Federal - United States



Federal Mediation & Conciliation Service

National Labor-Management Conference, cont.



Panel on Partnering for Success in the New Economy (L to R)- Jim Conigliaro Jr., Esq., Assistant Directing Business Representative, General Counsel, District 15, Machinists Union; Christina Stembel, Founder and CEO, Farmgirl Flowers; Michelle Miller, Co-founder of Coworker.org; David Rolf, President, SEIU 775; and Moderator Sharon Block, Principal Deputy Assistant Secretary for Policy, U.S. Department of Labor

Spotlight on Partnerships

A deep dive into the experiences and best practices of some of the country's most durable and collaborative labor-management environments began the event in a pre-conference Partnership Day led by former Secretary of Labor Robert Reich, and brought together union, business, and government leaders including Kaiser Permanente and the Coalition of Kaiser Permanente Unions; United Auto Workers and Ford Motor Company; United Steelworkers and International Paper, and SEIU Local 721 and Los Angeles County Health System, among others. This preliminary series of panel discussions contrasted the results of traditional labor strategies with the more collaborative approaches implemented by the panelists, and offered a realistic look inside those partnerships and at what it takes to successfully sustain them.

Dennis Dabney, Kaiser Permanente's senior vice president of National Labor Relations and Office of Labor Management Partnership shared his perspective on building labor-management partnerships with the panel. "I've seen so many companies engaged in a race to the bottom," Dabney said. "I'd like to see more engaged in a race to the top."

The main conference, held August 17-19, continued to spotlight high-profile labor-management partnerships and the emerging collaboration models that have brought ►

Federal - United States



Federal Mediation & Conciliation Service

National Labor-Management Conference, cont.

them success. The Federal sector track featured a *Partnering for Better Public Service* panel with the presidents of four federal unions – J. David Cox, AFGE; Tony Reardon, NTEU; Bill Dougan, NFFE; Greg Junemann, IFPTE; Forest Service Asst. Deputy Chief Jane Cottrell and OPM Acting Director Beth Cobert— who discussed the role of labor-management relations and employee engagement in delivering high-quality public services. EEOC Commissioner Chai Feldblum and UFCW Secretary-Treasurer Esther Lopez led a panel called *Evolving Cultural Dimensions of Diversity and Inclusion* that provided information on trends, policies and innovative practices that labor and management can leverage for enhanced recruitment, retention and organizational success.

Other inventive sessions such as *Making Conflict Work*, *Hardwired for Battle*, and *Your Brain in Conflict* tackled conflict neuroscience topics and offered attendees new insights from industry leaders such as Columbia University’s Professor Peter T. Coleman, Certified Clinical Research Coordinator for Children’s National Medical Center, Percy Lavon Julian and Neuroawareness expert Jeremy Lack on how the brain operates in conflict situations as well as mastering self-awareness as a leadership competency.

Thought-leaders and new economy experts from labor and management rounded out the conference, which included a candid exchange between FMCS Director Allison Beck and AFL-CIO President Richard Trumka. Trumka treated the audience to a special tribute to FMCS when he told Federal mediators, “On behalf of the 12.5 million working women and men of the AFL-CIO, I just want to say thank you for everything you do, and the spirit in which you do it.”

“In this new economy, people have to work together and trust each other.”

- FMCS Director Allison Beck

President Trumka went on to share his views on the power of collective bargaining to create income equality in the future at work. “America needs collective bargaining. We need it to help

businesses grow, workers succeed and communities thrive,” he remarked. “We need it to create a level playing field, a fairer economy and a stronger country. Labor and management, working together, communicating and compromising. Sacrificing and listening. Reaching common ground. Using common sense. Benefitting the common ▶

Federal - United States



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National Labor-Management Conference, cont.

good. That is the future at work. And if we stumble, FMCS will be there to get us back on track.”

Main conference attendees also heard from a remarkable lineup of labor and management leaders and new economy experts such as: Susan N. Story, President and Chief Executive Officer of American Water; Christina Stembel, Founder and CEO Farmgirl Flowers; Thomas Kochan, George Maverick Bunker Professor of Management and Co-Director, MIT Sloan Institute for Work and Employment Research; Wilma B. Liebman, Former Chairman, National Labor Relations Board; and Dan Yager, President and CEO of the HR Policy Association, along with many others.

Mission Accomplished

Throughout the conference, each session delivered on its promise to serve as a beacon to all seeking innovative solutions to workplace conflict. From combining new and traditional bargaining approaches to the application of new tools for the 21st century workplace such as conflict neuroscience and generational diversity—there were abundant conflict resolution strategies for the public, private and federal sectors.

On the final morning of the conference attendees enjoyed *NLRB Trends in the Future@Work*, a panel discussion of critical legal issues facing the future at work with Mark Gaston Pearce, Chairman, NLRB and Richard F. Griffin, Jr., General Counsel, NLRB. Discussion moderators were Lynn Rhinehart, General Counsel, AFL-CIO, and Randel K. Johnson, Senior Vice President, Labor, Immigration and Employee Benefits, U.S. Chamber of Commerce. NLRB Member Philip A. Miscimarra appeared via pre-recorded video.

The conference wrap-up included author and international expert on Generational Dynamics, Jason Dorsey, who presented an entertaining, timely and highly informative plenary on recruiting, retaining and engaging the next generation of workers. Dorsey explained that having five generations in the workplace is an asset and that melding each generation’s unique views benefits everyone.

In a concluding summary of insights and lessons from the conference, FMCS Director Allison Beck pointed to the new problem-solving tools and techniques prescribed by ►

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National Labor-Management Conference, cont.

speakers and presenters to help unions and employers find their way through complex new workplace issues. In summing up the three days of expert speakers, more than 70 workshops and informal dialogue among attendees and participants, Director Beck told the more than 1,000 attendees that a main point emerging from the program was, “In this new economy, people have to work together and trust each other.”

“Working together,” she told attendees, “it’s possible to find common ground, to find solutions.”

“We can fix our economy and make our country stronger—if labor and management work together: communicate and compromise, sacrifice and listen, find common ground, and use common sense for the common good.”

As a follow-up to the extraordinarily successful Future@Work conference, FMCS received positive reviews from the attendees who described it as a terrific learning and networking opportunity. The Federal Sector track panel on partnership featuring union leaders and Acting OPM Director Beth Cobert was spotlighted at length on the influential Federal News Radio website in Washington, DC as was a panel on the timely topic of telework in Federal agencies.

“The solutions aren’t complicated,” Director Beck said as she closed the conference with the assurance that the Agency will be there to help labor and management leaders embrace, not fear, the generational and technological shifts underway in workplaces, so together they can address future work issues and apply collaborative solutions. ■

Future@Work

Trends, Tools and Techniques for Partnering in the New Economy

The States & Territories



Michigan Employment Relations Commission

By Ruthanne Okun, Director, Bureau of Employment Relations

Natalie P. Yaw Re-appointed to Commission

Natalie P. Yaw was appointed a member of the Michigan Employment Relations Commission (MERC) on June 25, 2013, and was re-appointed on June 9, 2016. Commissioner Yaw has several years' experience in business law, from both a litigation and regulatory perspective. Currently, she is a partner at Erskine Law, PC, in Rochester, where she focuses her practice on commercial litigation for corporate clients. Commissioner Yaw previously served as Vice President and Senior Counsel at Citizens Financial Group, Inc., and as an attorney at Dickinson Wright, PLLC, where she specialized in commercial and consumer lender liability litigation. She is a member of the State Bar of Michigan and serves as Vice Chancellor for the Episcopal Diocese of Michigan. She has a bachelor's degree from Rice University and a *juris doctorate summa cum laude* from Michigan State University College of Law. Commissioner Yaw's appointment is for a 3-year term, which expires on June 30, 2019.

The Michigan Employment Relations Commission is comprised of three members – one of whom is the designated chairperson – appointed for staggered terms of three years by the Governor with the advice and consent of the Senate. By statute, no more than two members may be of one political party.

Biographies of the current Commission members – Edward D. Callaghan, Chair; Robert L. LaBrant, Member, and Natalie P. Yaw, Member are posted on MERC's website at www.michigan.gov/merc.

Summaries of Noteworthy Decisions

By Lynn Morison, Staff Attorney, with the assistance of Ashley M. Olszewski and Carl Wexel

Shiawassee Intermediate School District Education Association, MEA/NEA -and- Shiawassee Regional Education Service District

Case No. CU15 F-019, issued July 25, 2016

Issues: Duty to Bargain; Prohibited Subjects of Bargaining; Grievance Arbitration

The Commission affirmed the ALJ's finding that the union violated its duty to bargain in good faith by attempting to arbitrate a grievance over prohibited subjects of bargaining. ►

The States & Territories



Michigan Employment Relations Commission

Summaries of Noteworthy Decisions, cont.

The Shiawassee Intermediate School District Education Association, MEA/NEA (union) represented employees of Shiawassee Regional Education Service District (employer). The employer gave a bargaining unit member, C, a two-day unpaid disciplinary suspension. The union filed a grievance on behalf of C seeking rescission of the discipline and back pay. After the employer denied the grievance at each step of the grievance process, the union then demanded arbitration of the grievance. Contending that the union was attempting to advance prohibited subjects of bargaining to arbitration, the employer filed an unfair labor practice charge.

The ALJ explained that § 15(3)(m) of the *Public Employment Relations Act* (PERA) makes decisions by public school employers regarding teacher discipline and discharge prohibited subjects of bargaining. She therefore concluded that by seeking to arbitrate a grievance regarding teacher discipline, the union violated its duty to bargain in good faith.

The Commission found that although § 15(3)(m) does not say that it prohibits bargaining over “any decision,” the list of prohibited subjects is extensive. The Commission explained that nothing in the language of § 15(3)(m) indicates that its applicability is limited to decisions on whether an individual employee should be disciplined or discharged, and found the decisions listed in § 15(3)(m) to be broad enough to include the employer’s decisions regarding the procedures it chose to use, or to forego, in its discipline of C.

The union contended that § 15(3)(m) did not prohibit arbitrating a grievance alleging a violation of a statutory or constitutional right that had been incorporated into the collective bargaining agreement. The union also asserted that the Commission should interpret § 15(3)(m) to give arbitrators authority to address grievances over decisions relating to teacher discipline or discharge. The Commission disagreed, explaining that “the Legislature has made it clear that those issues are prohibited subjects of bargaining and, therefore, not subject to grievance arbitration.” The Commission held that under § 15(3)(m) provisions of the parties’ collective bargaining agreement guaranteeing adherence to employees’ statutory or constitutional rights are prohibited subjects of bargaining and unenforceable in grievance arbitration to the extent that those provisions apply to teacher discipline or discharge. On this basis, the Commission concluded that portions of the parties’ collective bargaining agreement or the Employer’s policies that contained provisions promising to honor employees’ Weingarten rights and due ►

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Michigan Employment Relations Commission

Summaries of Noteworthy Decisions, cont.

process rights are not enforceable in grievance arbitration if the grievance addresses teacher discipline or discharge. However, the Commission explained that even in the context of teacher discipline or discharge, employees' Weingarten rights and due process rights are not changed by § 15(3)(m) where enforcement of those rights is sought in a forum other than grievance arbitration.

In conclusion, the Commission held that the union's actions in attempting to arbitrate a grievance regarding employee discipline breached its duty to bargain in good faith and violated § 10(2)(d) of the PERA.

This case is currently on appeal to the Michigan Court of Appeals.

City of Ecorse-and-Ecorse Fire Fighters Local 684, IAFF

Case No. C15 I-123, issued May 13, 2016

Issues: Duty to Bargain, Period of Exemption from Duty to Bargain; 2011 PA 4, 2012 PA 436

The Commission affirmed the ALJ's Decision and Recommended Order finding that the respondent employer violated § 10(1)(a) and (e) of the PERA when, on August 24, 2015, it refused the union's written demands to meet and bargain for a new collective bargaining agreement.

The union represented a bargaining unit consisting of all full-time firefighters employed by the employer. The collective bargaining agreement applicable to this bargaining unit expired on July 1, 2014.

On October 26, 2009, then-Governor Jennifer Granholm notified the employer that, in accordance with 1990 PA 72 (Act 72), a local government financial emergency existed in the City of Ecorse. Subsequently, an emergency financial manager was appointed for the City.

Act 72 did not eliminate the duty of a local government to bargain with the representative of its employees under the PERA. However, the Michigan Legislature subsequently ►

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Michigan Employment Relations Commission

Summaries of Noteworthy Decisions, cont.

enacted 2011 PA 4 (Act 4), which mandated that local governments in receivership had no duty to bargain. Section 26(3) of Act 4 provided, “Subject to section 30(2), a local government placed in receivership under this act is not subject to section 15(1) of 1947 PA 336, MCL 423.215, for a period of 5 years from the date the local government is placed in receivership or until the time the receivership is terminated, whichever occurs first.” On November 6, 2012, however, Act 4 was repealed by referendum and, as a result, Act 72 was revived.

In December 2012, the Legislature passed the *Local Financial Stability and Choice Act*, 2012 PA 436 (Act 436). Section 27(3) of that act continued the exemption from the duty to bargain that had been contained in Act 4.

On March 26, 2013, the employer’s emergency financial manager received a letter from Governor Rick Snyder that confirmed her status as an emergency financial manager and noted that she was “appointed pursuant to Section 18(1) of Public Act 72 of 1990, the Local Government Fiscal Responsibility Act and now maintained under Section 9(10) and Section 31 of Public Act 436 of 2012.”

On March 3, 2015, the union sent the employer a demand to bargain for a successor collective bargaining agreement. The union reiterated its demand on August 14, 2015. On August 24, 2015, the employer sent the union a letter refusing to meet and informing the union that it had no obligation to bargain under § 15(1) of the PERA because it was in receivership under Act 436. As a result, the union filed an unfair labor practice charge alleging that the employer violated §10(1)(a) and (e) of the PERA.

The ALJ found that the employer violated § 10(1)(a) and (e) of the PERA when it refused the union’s demands to meet and bargain for a new collective bargaining agreement because the employer’s exemption from its duty to bargain under § 15(1) expired five years after the date on which an emergency financial manager was appointed to address its financial emergency, October 26, 2009.

Regarding exceptions, the employer argued that the Act 436 exemption contained in § 27(3) should begin on March 28, 2013, the effective date of Act 436. The employer noted that under § 27(3) of Act 436, a local government must be “placed in ►

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Michigan Employment Relations Commission

Summaries of Noteworthy Decisions, cont.

receivership under this act” and that it could not have been placed in receivership under Act 436 until that statute took effect on March 28, 2013.

Contrary to the employer’s contention, the Commission found that the language of Act 436, when read as a whole, supported the ALJ’s conclusion that the employer’s five-year exemption from the duty to bargain under § 15(1) began on the date that an emergency financial manager was first appointed in October 2009. The Commission noted that the Legislature’s clear intent, as expressed in § 30 and § 31 of Act 436, was to make the process for addressing local government financial emergencies continuous despite the replacement of one statute by another. Act 436, therefore, was intended to function and be interpreted as a successor statute to Act 72 and Act 4.

The Commission also found that § 27(3) of Act 436 set a maximum exemption of five years and that, under the employer’s interpretation of the statute, the employer would realize an exemption in excess of five years because it was exempt from the duty to bargain under Act 4 prior to the enactment of Act 436, a result the Commission believed was contrary to the clear language of § 27(3).

Consequently, the Commission concluded that the employer’s five-year exemption from the duty to bargain under § 15(1) began on the date that an emergency financial manager was first appointed and that the employer violated § 10(1)(a) and (e) of the PERA by refusing the union’s demand to meet to negotiate a new collective bargaining agreement.

City of Rochester and Rochester Public Employees Association

Case No. R15 I-080, issued May 13, 2016

Issues: Representation; Executive Status; Confidential Exclusion

Rochester Public Employees Association (petitioner) filed its petition for a representation election in a unit consisting of full-time, nonsupervisory employees of the City of Rochester (employer) not included in a collective bargaining unit. The employer argued that the three positions of (1) account technician, human resources and risk management, (2) assistant to the city manager/financial analyst, and (3) executive assistant to the city manager should be excluded from the bargaining unit. ►

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Michigan Employment Relations Commission

Summaries of Noteworthy Decisions, cont.

According to the employer, the positions were executive and/or confidential. The petitioner asserted that neither the account technician, human resources and risk management position nor the assistant to the city manager/financial analyst position qualified as executive under the Commission's definition. Similarly, the petitioner asserted that the executive assistant to the city manager position was not confidential because the individual did not perform sufficient confidential work to warrant the confidential exclusion.

The Commission found that none of the disputed positions were executive positions under its definition and that there was no basis for excluding the assistant to the city manager/financial analyst position from the bargaining unit.

Based on the confidential exclusion, however, the Commission found that the account technician, human resources and risk management position should be excluded from the unit because the position had regular access to information relevant to collective bargaining and not made available to its unions, was consulted on grievances, and participated in disciplinary decisions. Also, while the executive assistant to the city manager had little involvement in collective bargaining, the Commission's longstanding policy is to permit a public employer to designate one clerical employee as confidential, and therefore, permitted the employer to designate the executive assistant to the city manager position as confidential and exclude it from the bargaining unit.

On this basis, the Commission directed an election in a residual unit consisting of all non-supervisory employees, excluding the account technician, human resources and risk management position and the executive assistant to the city manager.

Grand Blanc Clerical Association, MEA, and Michigan Education Association -and- Mary Carr -and- Battle Creek Educational Secretaries Association, MEA and Michigan Education Association -and- Alpha Snyder

Case No. R15 I-080, issued May 13, 2016

Issues: Union Duty of Fair Representation; Right-to-Work Statute; Commission Jurisdiction; Impairment of Contractual Rights; Union Dues; Debt Collection Threat ►

The States & Territories



Michigan Employment Relations Commission

Summaries of Noteworthy Decisions, cont.

The Commission affirmed the ALJ's Decision and Recommended Order as modified, and found that the respondents violated § 10(2)(a) of the PERA by refusing to accept the charging parties' union resignations outside of their August window period.

Charging party Mary Carr was an employee of the Grand Blanc Community Schools and became a member of the respondents, Grand Blanc Clerical Association (GBCA) and the Michigan Education Association (MEA) in 1997. The collective bargaining agreement between respondent GBCA and Carr's employer contained a union security agreement and a dues check-off provision which expired on June 30, 2013.

Charging party Alpha Snyder was an employee of the Battle Creek Public Schools and became a member of respondents Battle Creek Educational Secretaries Association (BCESA) and the MEA. The collective bargaining agreement between Snyder's employer and BCESA also contained a union security agreement and expired sometime prior to April 2013.

Upon joining their respective unions, each charging party signed a Continuing Membership Application, authorizing that dues be deducted from their paycheck, and acknowledging that revocation of their authorization must be done in writing between August 1 and August 31 of any year.

After the expiration of the governing collective bargaining agreements, both charging parties attempted to resign their union memberships and revoke their dues check-off authorizations. The respondents notified the charging parties that their resignations were untimely, since they were not submitted during the annual August window period. Carr was also notified that if her 2013-2014 dues were not paid, her debt would be sent to collections. As a result, the charging parties each filed unfair labor practice charges.

The ALJ found that because of the right to refrain language added to the PERA by Michigan's Right to Work statute, 2012 PA 349 (Act 349), the respondents' enforcement of their August window period violated § 10(2)(a) of the PERA because it restricted the right of employees to resign their union memberships at will. The ALJ also found that precedent established that the Commission does not have jurisdiction to find an unfair labor practice based on a union's attempts to enforce the terms of a private agreement when the ►

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Michigan Employment Relations Commission

Summaries of Noteworthy Decisions, cont.

attempts do not affect the individual's employment. For that reason, the ALJ concluded that respondent MEA did not violate § 10(2)(a) by threatening Carr that it would hire a debt collector.

In their exceptions, the respondents contended that Snyder's charge was untimely. The Commission agreed with the ALJ that Snyder's e-mail correspondence to respondents occurred within the six-month statute of limitations period. The Commission also disagreed with the respondents' assertion that MERC lacked jurisdiction in the matter. Citing its decision in *Saginaw Ed Ass'n*, 29 MPER 21 (2015), the Commission reiterated that it has jurisdiction over matters in which a public employee chooses to refrain from engaging in activities protected under § 9(1)(a), but is restrained by their labor organization from doing so.

Respondents also argued that both charging parties had contractual obligations to pay dues until they resigned during the August window period. Further citing its decision in *Saginaw Ed Ass'n*, the Commission explained that where employees have a right to refrain from union activities, the union is prohibited from making rules to interfere with that right. On this basis, the Commission stated, "Charging Parties' membership obligation to Respondents, including their obligation to pay dues, ended at the point the Charging Parties provided the Unions with notice of their resignations."

The respondents also contended that the ALJ erred by recommending that the Commission order respondents to cease and desist from enforcing their August window period. The respondents argued that such an order would unconstitutionally impair their existing contractual relationship with their members. Again, following the rationale used in *Saginaw Ed Ass'n*, the Commission applied the three-pronged test used to analyze Contract Clause issues and concluded, "[A] legitimate public purpose is served by requiring the immediate application of the right to refrain."

In their cross exceptions, the charging parties contended that the ALJ erred by finding that the Commission does not have jurisdiction to find a PERA violation based on threats to hire a debt collector. The Commission explained that it has jurisdiction to determine whether threats to use a debt collector to collect unpaid dues unlawfully restrain an employee in his or her right to refrain from union activity. The Commission concluded ►

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Michigan Employment Relations Commission

Summaries of Noteworthy Decisions, cont.

that a union's threats to use a debt collector to collect dues to which the union was not entitled, such as the dues that the respondent MEA contended accrued after Carr's resignation from the union, were unlawful. However, since this case was prior to the Commission's decision in *Saginaw Ed Ass'n*, the Commission's first decision interpreting Act 349, the MERC concluded that it could not find that the MEA knew, or should have known, that it was unlawful to attempt to collect dues that accrued after Carr resigned, since her resignation was outside the formerly legal window period. The Commission pointed out that such a threat made in the future would be considered a violation of § 10(2)(a).

The Commission affirmed the ALJ's Decision and Recommended Order as modified, finding that respondents violated § 10(2)(a) of the PERA by refusing to accept the charging parties' union resignations outside of their August window period.

This case is currently on appeal to the Michigan Court of Appeals. ■

ALRA Members' comments

The value added to my agency by participation in ALRA is . . .

" . . . the ability for our staff to receive other perspectives on the work that we do from other states, FMCS and our colleagues in Canada."

- Mike Cormack, Board Chair, Iowa PERB

The States & Territories



Puerto Rico Labor Relations Board

How conciliation is changing the way labor relations disputes are viewed in Puerto Rico

By Jeffrey J. Pérez Cabán, Esq., Chairman of the Puerto Rico Labor Relations Board

In Puerto Rico, the Labor Relations Board was created by the *Labor Relations Act* in 1945. The Act marks the beginning of all labor-related legislation in the Island. The Board is a quasi-judicial body that investigates, conciliates and adjudicates labor relations disputes. The Act that created the Board was born from the *National Labor Relations Act* of 1935, better known as the *Wagner Act*.

It is the Government of Puerto Rico's public policy to encourage collective negotiation to achieve maximum production development, industrial peace, fair and suitable wages and employment conditions for Puerto Rican workers and thus achieve the best possible quality of life for our people. In keeping with the origins and motivations that led to the creation of the Board, we continue to encourage all unions and management to sit at the negotiating table and reach fair agreements.

Roughly, we can say that the *Labor Relations Act* created two fundamental goals: first, this labor legislation vigorously encourages collective negotiation as the ideal vehicle to reach pacific agreements between workers and management, and that those agreements lead to a functional and operational industrial environment. Further, negotiations should be based primarily on what is the best for the people of Puerto Rico. Secondly, the legislation also aims to ensure that Puerto Rican workers enjoy certain basics rights. Apart from organization and collective negotiation, employees can hold concerted activities that enable them to negotiate on equal ground.

On paper, in the Act, we can say that everything is "peaches and cream". That is, until one of the parties, the employees or the employer, believe that something is wrong with a procedure; then, the Board must take action. Until recently, the most traditional methods used to resolve matters were litigation and arbitration, but we are now moving to alternative methods.

In Puerto Rico, we define alternative methods of conflict resolution as the inclusion of every kind of method, practice and technique, both formal and informal, that does not involve traditional adjudication and which is aimed at resolving disputes. The most ►

The States & Territories



Puerto Rico Labor Relations Board

How conciliation is changing the way labor relations disputes are viewed in Puerto Rico, cont.

common alternative methods used in the labor relations field are arbitration, mediation and conciliation.

Once appointed by the former Governor in 2010, the Board made dialogue its trademark. The Board believes that dialogue is an easier way to resolve disputes, particularly when Puerto Rico is facing a fiscal crisis and lack of economic growth. Processes that facilitate lasting relationships between employees and employers are needed. Conciliation was the answer, and it became our mechanism for a fast, easy and economical way to end disputes.

Between 2010 and 2015, the Board carried on an informal process of dialogue. The results were amazing: eight of every ten cases referred to conciliation resulted in agreement between the parties. Therefore, we decided to create a Conciliation Rule to make the process formal and to increase confidence in the system of labor justice. In July 2015, after due process, the Rule was approved as the Regulation for the Settlement of Cases seen by the Labor Relations Board, Rule num. 8621.

The role of the conciliator is very important as the conciliator has to actively facilitate the achievement of an agreement. The work of the conciliator should demonstrate the values that the process of conciliation offers: swiftness, neutrality, confidentiality, veracity, equity, procedural economy, impartiality and legality.

In Puerto Rico, we face important challenges, such as promoting economic growth and participation in the global economy. Our most prominent resource is our workers and we must do everything we can avoid losing them to the United States or other jurisdictions. Alternate methods of resolving conflicts are the best way to meet the needs and demands of today's workers. This is the ideal way to resolve labor disputes in integrated economies, and Puerto Rico is ready. ■

The States & Territories



WASHINGTON STATE PUBLIC EMPLOYMENT RELATIONS COMMISSION

PERC Implements New Decision Search Engine

Last year, PERC launched a new website. While we received favorable feedback on the website, the decision search tool on the website did not improve as we had hoped. This month, we launched a new decision search engine called *Decisia* by Lexum. Several Canadian tribunals, including the Canada Industrial Relations Board, use the tool. The tool, on our website, is more robust and offers more capability than we have ever experienced with prior decision search tools. One exciting feature of the new tool is the ability to show decision history – whether the examiner’s decision was appealed to the Commission, whether the Commission’s decision was appealed to the courts, and the results. This is a feature that even paid services, such as Westlaw, do not offer. The tool allows us to more quickly and efficiently post decisions to the website. Finally, the tool will allow us to further enhance search capability in the future.

Commission Changes

The Commission hears and rules on appeals from decisions of the examiners and executive director and is the rule-making authority for the agency. The three commissioners, who are appointed by the Governor for a five year term, serve on a part-time “per diem” basis. Commissioner Tom McLane submitted his resignation from the Commission in August. Tom has served on the Commission since 2008 and was in the middle of his second term. Tom was the employer side representative to the Commission. There is no word on when the Governor will appoint a replacement. Tom was a supporter of PERC and our mission. He was also a supporter of ALRA and our agency’s participation in ALRA. We thank him for his service.

Electronic Elections

In March, the Commission adopted a rule giving the agency the discretion to conduct electronic/telephonic representation elections. This comes on the heels of a successful pilot E-vote in 2015. We have subsequently conducted one E-vote under this new rule. ►

The States & Territories



Washington Public Employment Relations Commission, cont.

We are finding that the E-vote expands an employee's ability to exercise his or her right to choose whether to be represented. This innovation and advancement comes as a direct result of the collaboration and sharing of best practices with fellow ALRA members.

Demand for Training Continues to Grow

By July, PERC matched the number of training and outreach cases for all of 2015. The number of training and outreach cases in 2015 doubled that from 2011. Since 2012, PERC has steadily emphasized the availability of training and outreach and expanded the types of training offered. PERC views its training program as a preventative dispute resolution program. Our expanded offerings include training on collaborative bargaining, improving relationships and other custom courses. In 2017, we will launch an online, on-demand PERC fundamentals training in recognition of the growth of the number of clientele with little to no labor relations experience. Our training offerings can be found on our website at www.perc.wa.gov. ■

Mark Your Calendar!

66th Annual ALRA Conference July 22-25, 2017

ALRA will host its annual conference at [The Benson Hotel](#) in Portland, Oregon.

Additional details will be available in the near future at www.alra.org

"The ALRA conference in Halifax not only provided a great opportunity to brainstorm with one another about best practices, but it promoted significant engagement about more creative and cutting-edge resolutions. It was energizing."

- Jennifer Abruzzo, Deputy General Counsel, National Labor Relations Board

Federal - Canada



Canada Industrial Relations Board

Member Updates

Over the past few months, a number of the Canada Industrial Relations Board member's terms have ended. The Board wishes to recognize the valuable contributions of **Graham Clarke** and **Judith F. MacPherson**, Vice-Chairpersons; **Robert Monette** and **Richard Brabander**, Members representing employers; **Norman Rivard** and **Daniel Charbonneau**, Members representing employees; and part-time members **William Terence Lineker** and **Cynthia Catherine Oliver**. The former Vice-Chairpersons and Members will complete their duties related to matters still pending and to which they were assigned as members of the Board.

The Board is currently composed of **Ginette Brazeau**, Chairperson; **Louise Fecteau**, **Patric F. Whyte**, **Allison Smith** and **Annie G. Berthiaume**, Vice-Chairpersons; **André Lecavalier**, Member representing employers; and **Gaétan Ménard**, Member representing employees. A biography for each Board Member can be found on the Board's Website (www.cirb-ccri.gc.ca).

Panelli retires after 19 years with the CIRB

The CIRB also wishes to recognize Tom Panelli, who recently retired from his position as the Regional Director, Western Region. Tom distinguished himself by constructing a career built on trust, confidentiality and long-standing relationships with the Board's clients.

Tom came to the Board in 1997 and, over the years, worked tirelessly to assist clients find labour relations solutions in many complex and lengthy disputes. His skills and abilities to think outside the box, to forge relationships and to establish common ground are some of the characteristics that earned him great respect as a mediator.



Tom Panelli

Board members and staff recognize Tom for his immeasurable contribution to the success of the Board and wish him well on his well-earned retirement. ■

Provinces & Territories



Ontario

Ontario Labour Relations Board New Members, Important Rulings and Legislative Update

The Ontario Labour Relations Board welcomes **Gita Anand**, **Geneviève Debané** and **Adam Beatty** to its complement of full-time Vice-Chairs. The Board also welcomes a number of new part-time Members, representative of both management and union-side labour relations.

Recent rulings from the Board touched on a variety of interesting and sometimes novel arguments:

The Board was asked to determine whether the employees who work at a company operating under a license from Health Canada to grow cannabis or marijuana for human consumption are exempt from the *Labour Relations Act, 1995*, because they are involved in agriculture. The Board's analysis began by explaining that its jurisprudence made it clear that the interpretation of agriculture did not exclude purpose-built indoor facilities that more resemble a factory than anyone's picturesque view of a farm. After noting that the definition of "agriculture" in the *Act* is inclusive ("includes farming in all its branches, including...the cultivation, growing and harvesting of agricultural commodities"), the Board noted that although the production, distribution and use of the medical marijuana is highly regulated, this does not change the fact that cannabis is a plant that is grown and the employer grows, harvests and sells these plants. The employees in question were exempt from the *Act* because they were covered by the provisions of the *Agricultural Employees Protection Act* and were therefore outside the jurisdiction of the Board. **MEDRELEAF** 2015 CanLII 85534 (ON LRB)

In a failure to bargain in good faith complaint, when the parties were negotiating a renewal collective agreement the employer agreed to resume administration of the employees' health and welfare benefits plan, which the union had agreed to manage in the previous round of bargaining. The employer alleged that the union failed to advise it that the benefit plan was running at a deficit and was being subsidized; the failure to come clean, in the employer's view, amounted to bargaining in bad faith (the employer believed it could save money by taking the benefits plan back). The Board noted that the union did not tell the employer at any time during the negotiation process about the deficit in the benefit plan or that it had been subsidizing it; conversely, at no time ►

Provinces & Territories



Ontario Labour Relations Board, cont.

during the process did the employer request information from the union about the funding of the plan. The Board accepted that silence could be “tantamount to a misrepresentation,” but found that did not happen in this case. The Board said that, absent any communication by the employer about the assumption underlying its proposal, and in the absence of any request for information by the employer or any misrepresentation by the union upon which the employer relied, the union was not obliged to volunteer information about the subsidy. The union’s silence in these circumstances did not demonstrate bad faith such that it could trigger the duty to provide unsolicited disclosure. Finally, the Board concluded that the concept of due diligence is present in the law of collective bargaining and that the employer did not advise the union of its rationale, ask for information about the financial circumstances of the plan or even ask the union why it was proposing to double employer benefit contributions for the life of the upcoming collective agreement. The employer’s bad faith bargaining complaint was dismissed. **CARE PARTNERS** 2016 CanLII 43470 (ON LRB)

In an application for certification in the construction industry, an employer argued that a membership card allegedly signed by an individual under 18 years of age was void. The Board noted that its statutory obligation is to examine whether the union has the necessary membership support in the bargaining unit (individuals who are members of the union or who have applied for membership) and not to determine the contractual relationship between the union and its members. The Board stated that it is indisputable that persons under the age of 18 can be employees within the meaning of the *Labour Relations Act*; it would be entirely inconsistent with the purposes of the *Act* to suggest that a minor can agree with his or her employer to become an employee, become subject to all the provisions of the *Act* that govern the representation of such employees, but have no ability to participate in the free selection of that representation. Moreover, finding that minors could not join a union would mean they become a part of the bargaining unit as employees, but could not exercise a fundamental freedom of choice as reflected in the certification provisions. **LANCA CONTRACTING LIMITED** 2015 CanLII 85986 (ON LRB)

On the legislative front, amendments to the *Occupational Health and Safety Act* introduce “workplace sexual harassment” into the statute and provide for more stringent investigation protocols for employers into complaints about sexual harassment. The *Employment Standards Act, 2000* was also amended to protect employees’ tips and gratuities from being misappropriated by employers. ■