ALRA Advisor

April 2018

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Boston, Massachusetts

ALRA 67th Annual Conference

Boston, Massachusetts – July 2018

ALRA Advisor

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

In this issue . . .

ALRA News

Updates from our Members

United States

Canada

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ON THE COVER: Boston, Massachusetts skyline.

From the President . . .

Marjorie Wittner

Message from the ALRA President

Greetings from Boston, where, as I write this, we have just finished cleaning up from two giant "Nor'easters," a third one is heading our way. However, despite miserable travel conditions, a critical mass of our Executive Board and Conference Planning Committee members, with others participating by conference call, met at the FMCS Boston offices the weekend of March 3-4 to finalize plans for the upcoming conference at the Boston Park Plaza in July. Our goal for the weekend was to build on the good work we did at last October's planning session at the CIRB's beautiful offices in Montreal (many thanks to Ginette Brazeau and Jean-Daniel Tardif for their warm hospitality). I am delighted to report that, fueled by the delicious food provided by our gracious Boston host, FMCS Commissioner **Marty Callahan**, and refreshed by a good night's sleep at the lovely Boston Park Plaza Hotel, the Programming and Professional Development Committees are close to finalizing the agendas and speakers for Advocates Day and all delegates' sessions.

Some highlights will include a keynote address on Advocates Day from Brandeis University's Provost and Chief Academic Officer, **Dr. Lisa Lynch**. Dr. Lynch has previously served as the Chief Economist at the Department of Labor (1995-1997) and president of the Labor and Employment Relations Association (2013-2014). Other Advocates Day events will include panels on Precarious Employment in Higher Education; Fatigue, Intoxication and Workload-Changing Paradigms in Health and Safety; and Institutional Response to Foundational Challenge: Moving forward after Janus. For the delegates, our plenary speaker on Tuesday, July 24 will be **Dr. Kathy Sanders**, the Deputy Commissioner of the Massachusetts Department of Public Health, who will be addressing effective ways to manage labor-management disputes and procedures when mental health issues are present. Dr. Sanders' workshop will be followed by interactive sessions for adjudicators, administrators and mediators facilitated by other mental health professionals from Dr. Sanders' office. This is just a sampling of the great program our committees are putting together. For more details, please check the ALRA website in April when we will go "live" with conference information and registration materials.

Here's what else been has happening since the fall.

Technology

I continue to work on my goal of expanding the ways in which member agencies can keep the conversation going after the summer conference. Our Technology Communications and Website Committee has been exploring ways that we can add a communications portal on our website. This may lead to other upgrades to our website that will foster better communications year round. I will report on this at the upcoming July Annual Meeting. ►

From the President . . .

Marjorie Wittner

Message from the President, cont.

Moving On

As I mentioned in my fall President's note, ALRA would not exist without the hard work and dedication of its Executive Board and committee members. It is therefore with mixed emotions that we bid a fond farewell to President-Elect **Jennifer Abruzzo**, and former ALRA President **Sheri King**. Both Jennifer and Sheri have worked tirelessly to promote ALRA's mission over the years.

Jennifer Abruzzo, the former NLRB Deputy General Counsel, is now serving as Special Counsel for Strategic Initiatives for the Communications Workers of America. Jennifer served on ALRA's Executive Board for several years and has been active in planning Advocates Day agendas and presenting or moderating a multitude of panels. Jennifer also reports that she is sad to leave ALRA but is hoping to join us on Advocates Day in Boston.

Sheri King, formerly the Regional Director for FMCS-Canada Capital Region, has accepted a position as the Director of Labour Relations of NAV CANADA. Sheri has been involved with ALRA since 2004, serving on and/or co-chairing the Arrangements, Program and Professional Development Committees. Sheri was ALRA's President in 2011-2012, the infamous year when the conference had to be moved to a different hotel two days before the conference started because the staff of the planned hotel went on strike.

I am sure that I speak for everyone involved with ALRA when I say that it has been a real pleasure to work with both Sheri and Jennifer. We wish them both the best of luck in their new positions.

Vacancies/Nominations

Jennifer's vacancy is not the only one we will have to fill at the summer conference. In accordance with Article VI, Section 4 of ALRA's Constitution, you will soon be receiving a letter from me providing information about ALRA's nomination/election process, including a list of all Officer and Board Member positions that will need to be filled at the next Annual Meeting in July. Please look out for this letter.

Looking ahead

It's going to be a busy few months for those of us at ALRA, but having just completed a successful planning weekend, and with the days getting longer and the first day of spring approaching (Nor'easter notwithstanding) I am energized and excited by the work that lies ahead.

Stay in touch, *Marjorie*

2018 ALRA Conference

Boston, Massachusetts

Please join us for ALRA's 67th Annual Conference in historic Boston, Massachusetts

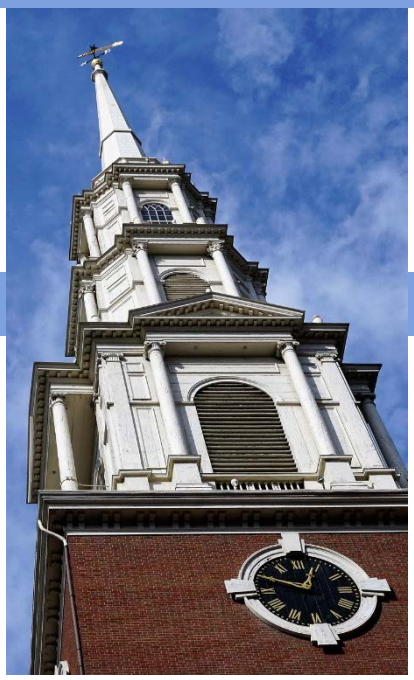


Photo courtesy of www.pixabay.com

Conference Schedule

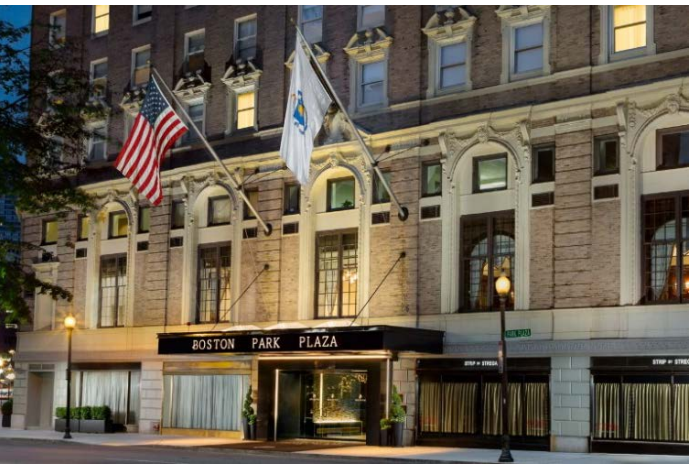
The 2018 ALRA Conference will be held in Boston, Massachusetts **July 21 to 24, 2018**.

The conference will be held at the Boston Park Plaza hotel. Located in downtown Boston, this iconic hotel is steps from many of the city's most popular sites. A block of rooms will be set aside for the ALRA conference. More details about the hotel can be found at https://www.bostonparkplaza.com.

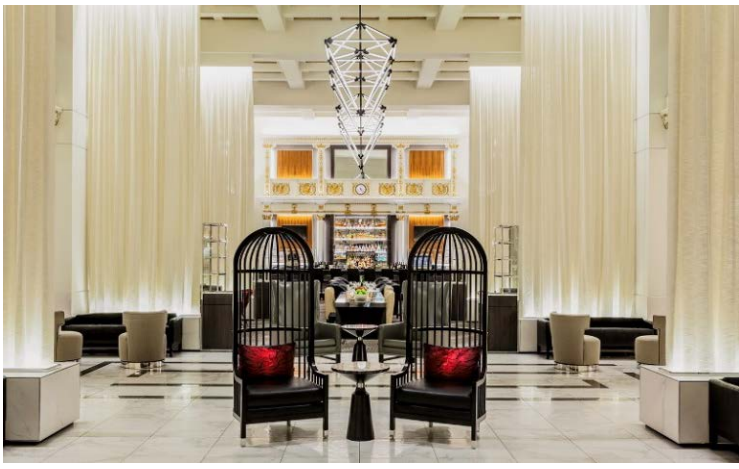
The ALRA Conference Planning Committee is working diligently on a diverse and stimulating program. Details will be posted on the ALRA website as they become available at www.alra.org.

Travel Grants

Travel grants are available for individuals who are attending the ALRA conference for the first time. Information about travel grants for the 2018 ALRA Conference will be available at www.alra.org when registration opens for the conference.



Boston Park Plaza Hotel



Photos courtesy of the Boston Park Plaza Hotel

ALRA Training Grants

Promoting Networking & Education among ALRA members

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

ALRA established a Training Grants Program in 1995. The program offered individual agencies an opportunity to obtain grants of up to $1,000 for staff training with joint requests by agencies being encouraged up to a maximum of $3,000 available during a fiscal year. The program got off to a slow start, and the first grant was not awarded until 1997. The ALRA Professional Development Committee recommended, and the ALRA Executive Board approved, a $3,000 training grant application submitted by the New England Consortium of State Labor Relations Agencies (consisting of nine agencies in New England and New York), the New Jersey Public Employment Relations Commission, and the Pennsylvania Labor Relations Board. In addition to the $3,000 ALRA training grant, the New England Consortium contributed $5,000 towards the cost of the training session. The balance of the costs was distributed among the participating agencies.

The grant was used to help defray the expenses of a two-day training program held in May 1997 in Sturbridge, Massachusetts. The training was conducted by the National Judicial College on an extension basis. Two faculty members of the College, with extensive experience as administrative law judges, conducted training for participating agencies on the subjects of decision writing and case management.

The delayed inception of the ALRA training grants program was made up for by the enthusiastic response from the participating agencies in the 1997 training: there were 79 participants from the 11 agencies. The ALRA grant enabled the participating agencies to bring specialized training to its staff involved in conducting administrative hearings, and encouraged collaboration and interaction among a substantial number of ALRA member agencies.

In the Fall of 1997, ALRA President Rick Curreri led a charge to light a fire under the Training Grants program. Foremost among his priorities was to eliminate window periods for staff training grant applications and double the amount of annual grants available to individual agencies and to joint agency requests. In the January 1998 edition of *ALRA Advisor*, he stated:

Any organization in existence for 65 years has much in its past to provide guidance for the present & future. This column on ALRA's history is a regular feature of the ***ALRA Advisor****.*

ALRA Training Grants, cont.

> To my mind, this is one of the best uses ALRA can make of its now rather healthy treasury. . . ALRA should expand its resources in furtherance of its mission, which basically is to promote networking and education among its members. To that end, a leading agenda item for this year is to actively encourage and oversee the development and implementation of cooperative staff training workshops, programs and conferences in which there is joint participation by two or more member agencies.

Rick's legendary persistence and persuasiveness did not bear immediate fruit, since he gave himself and the ALRA Executive Board a grade of B-minus in this area at the conclusion of his one-year presidential term. Nonetheless, the seeds were sown and the next several years would see various regional groupings and individual agencies benefitting from the training grants program.

In December 1998, three instructors and 23 participants from five agencies spent four and a half days in a training session in Federal Way, Washington, with the help of a generous ALRA multi-state grant. Three ALRA member agencies – Alaska Labor Relations Agency, Oregon Employment Relations Board, Washington Public Employment Relations Commission – as well as the non-ALRA affiliated Washington State Marine Employees' Commission and Oregon Workers Compensation Board were represented at the training session. The National Judicial College provided the instructors and course materials for workshops on decision-making and opinion writing. Participants overwhelmingly rated the training session a worthwhile use of their time and a beneficial expenditure for their agency, although there was some sentiment that four and a half days was too long to be away from other duties.

ALRA awarded a $3,000 grant to help defray the cost of a joint training program conducted in 1999 by the Iowa Employment Relations Board, Wisconsin Employment Relations Commission, and the Minnesota Bureau of Mediation Services. Eleven mediators from the Michigan Employment Relations Commission, with the assistance of a $2,000 ALRA training grant, participated in a two-day "Train the Trainer" session in collaborative bargaining techniques in the spring of 2000. The well-received training was conducted by the Director of the Labor Studies Center at Wayne State University. The training was designed to equip the mediators to respond to the demand for collaborative bargaining training in Michigan.

Persistent publicizing by ALRA leaders of the availability of training grants resulted in the approval of two grants in 2002. The Minnesota Bureau of Mediation Services, the Iowa Public Employment Relations Board and the Wisconsin Employment Relations Commission ▶

ALRA Training Grants, cont.

teamed up again and received a $5,000 grant for staff training in June 2002 in Wisconsin. The seminar addressed the effectiveness of mediation strategies, techniques and styles.

In another joint effort in 2002, the Illinois Labor Relations Board and the Illinois Educational Labor Relations Board received a $1,500 grant to provide intensive decision-writing training to staff members. Professor Dana Underwood, a presenter at past ALRA conferences, provided the training.

The ALRA Training Grants Program has had fertile and fallow periods since the early 2000's. The experience of the early years of the program demonstrates that the potential value to ALRA member agencies is great. However, both the early period and later years show that the program has been underutilized at times. Are member agencies ready for another fertile period? ■

Mark Your Calendar!

July 21-24, 2018

67th Annual ALRA Conference

Boston, Massachusetts

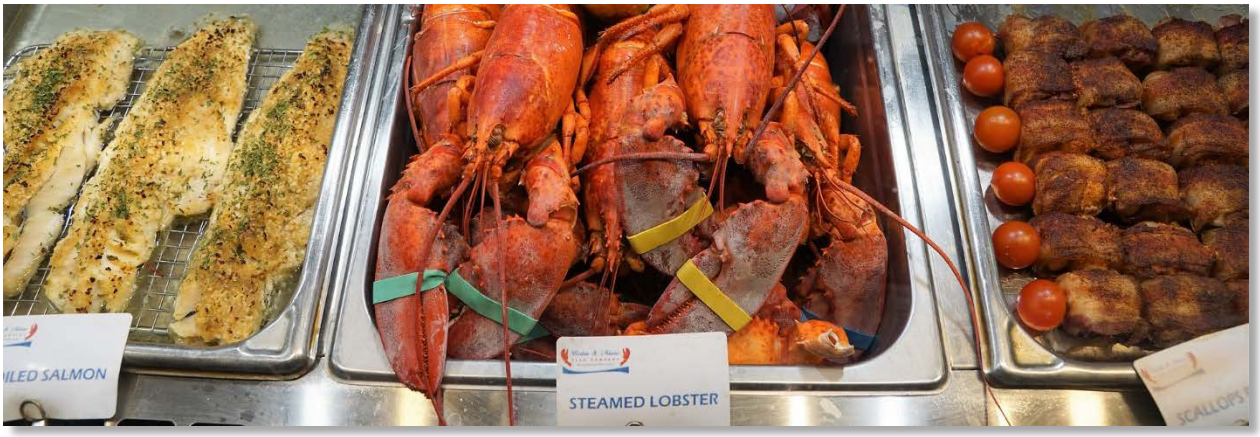


Photo courtesy of www.pixabay.com

Seafood at Boston & Maine Fish Company, Faneuil Hall Marketplace, Boston, MA

ALRA Executive Board Approves New Pilot Programs

Submitted by Ginette Brazeau, Chairperson, Canada Industrial Relations Board

The call was answered!

Over the past year, the Executive Board has examined and discussed how it can best meet the needs of its membership by providing targeted funding to support training and education initiatives amongst agencies. The organization is currently in a solid financial position and as such, the Board was able to approve two programs which it will pilot over the next two fiscal years. The Board will have the opportunity following this pilot period of two years, to determine their effectiveness and sustainability.

TRAINING GRANTS

As described in the ALRArchives article earlier in this publication, a Training Grants Program was in place in the 1990's and early 2000's which provided an opportunity to promote collaboration amongst member agencies in developing and sharing training initiatives. We are pleased to report that the Executive Board recently approved an initiative to revive and support a new Training Grants program, on a pilot basis.

An amount of up to $8,000 per fiscal year, will be made available for training grants to member agencies who wish to engage in organizing and delivering training opportunities for its members and staff.

Applications for a training grant are to be submitted to the Vice-President of Professional Development no later than **September 30th** of each year. The submissions should include:

- 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 a subsidy from ALRA
- 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 initiative. ►

ALRA Pilot Programs, cont.

The applications will be assessed against the following general criteria:

- How the nature and subject area of the proposed training is related to the core mission of ALRA;
- How the initiative promotes cooperation between member agencies; as an example, delivery of the training by a member agency will be preferred over a proposal to use external sources, such as consultants or other specialty services obtained from an outside organization;
- An initiative that sees the grant expended on trainee-related costs over external trainer costs will be prioritized;
- An initiative that proposes to maximize the use of member agencies' existing facilities and other internal resources will also be given priority over proposals that do not.

The Board will review and assess the submissions at its next scheduled Fall meeting, normally held in October or November of the year. Generally, individual grants will not exceed $3,000.

Agencies who receive a training grant will commit to the following:

- Implement/deliver the training initiative no later than April 30 following the approval.
- Submit a report to the Executive Board no later than May 10 following the delivery of the training initiative.
- Submit a summary article for the ALRAdvisor.

This program seeks to support collaboration and innovation in how we offer training opportunities to our professional mediators and adjudicators. We invite member agencies to explore how they can address their internal training challenges through collaboration with other agencies and support from ALRA.

EDUCATION GRANTS (formerly Travel Grants)

For many years, ALRA provided training grants to attract and support new attendees at its annual conference. This year, the Executive Board has decided to expand the program to also enable former participants to return to the conference and re-engage in ALRA activities.

We are pleased to announce that an annual fund of up to $5,000 will be allocated to an Education Grants Program. Grants of up to $1000 will be provided to first-time attendees or returning attendees to enable the grantee to attend the ALRA Annual Conference. ►

ALRA Pilot Programs, cont.

Applications for the Education Grant must be submitted in writing to the Vice-President of Professional Development no later than **June 1st** preceding the annual conference. Applications should provide a detailed description of how it meets the criteria below.

In assessing the requests for education grants, the Executive Board will consider various criteria, including, but not limited to:

- 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 agencies' difficulty in underwriting the full cost of attendance at the annual conference

The Grant will be payable upon submission of receipts following the Conference. Acceptable reimbursable expenses include the hotel cost, transportation to and from the conference location or registration fees. ALRA will not reimburse any other travel-related expenses.

It is with enthusiasm and optimism that these programs were approved by the Executive Board with the objective of promoting greater linkages amongst member agencies and supporting an environment conducive to sharing of skills development initiatives and best practices. We hope that member agencies will seize these opportunities and optimize the true value of ALRA.

Ginette Brazeau, Past-president of ALRA ■

Perspectives from a First-Time ALRA Conference Attendee

". . . the ALRA community transcends being a mere grouping of similarly situated professionals. It is the sincerity and openness of those at the top of their respective fields to engage in authentic conversations with professionals of every experience level that truly makes ALRA exceptionally uncommon.."

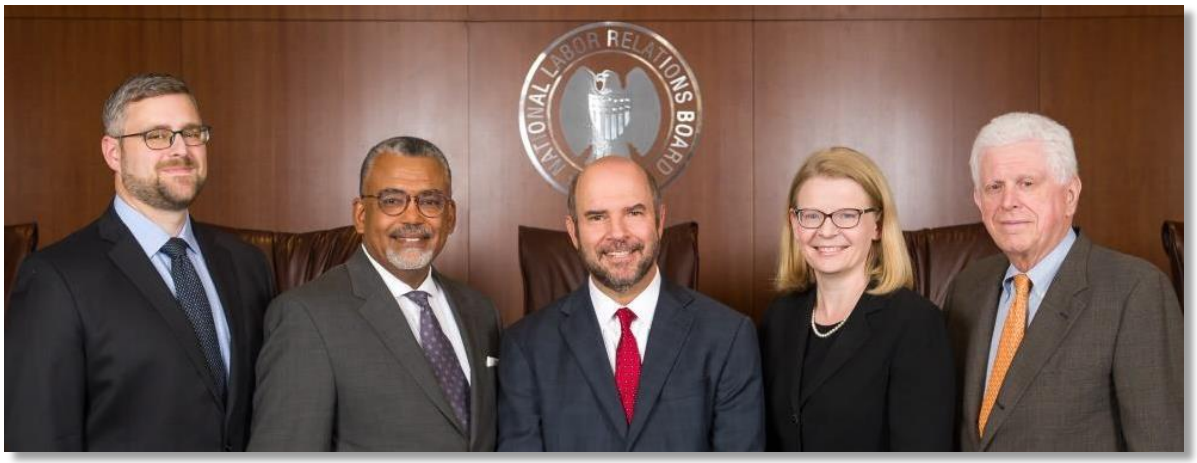
- John A. Henry, Director of Dispute Resolution, Indiana Education Employment Relations Board

Federal - United States

National Labor Relations Board

The Board issues a number of significant decisions at the end of former Chairman Philip Miscimarra's term

Submitted by Roxanne Rothschild, Deputy Executive Secretary, NLRB



National Labor Relations Board Members, pictured left to right: current Chairman Marvin E. Kaplan, Member Mark Gaston Pearce, former Chairman Philip A. Miscimarra, Member Lauren McFerran, and Member William J. Emanuel

The National Labor Relations Board issued a number of significant decisions during the waning days of Chairman Philip Miscimarra's term, which ended on December 16, 2017.

In ***UPMC and its subsidiary, UPMC Presbyterian Shadyside, single employer, d/b/a UPMC Presbyterian Hospital and d/b/a UPMC Shadyside Hospital***, 365 NLRB No. 153 (December 11, 2017), a full Board majority consisting of Chairman Miscimarra and Members Kaplan and Emanuel affirmed the Administrative Law Judge's supplemental decision granting UPMC's partial motion to dismiss a single-employer allegation against UPMC, based on UPMC's offer to guarantee the performance by Presbyterian Shadyside of any remedy ultimately ordered against Presbyterian Shadyside. The case involved a complaint against UPMC and its subsidiary Presbyterian Shadyside, based on unfair labor practices allegedly committed by Presbyterian Shadyside. The majority found, as did the judge, that UPMC's offer to act as guarantor of any remedies ultimately awarded against Presbyterian Shadyside effectuates the purposes of the National Labor Relations Act ▶

National Labor Relations Board, cont.

NLRB significant decisions, cont.

and that the judge properly accepted the proffered terms in settlement of the single-employer allegation against UPMC. In doing so, the majority overruled *United States Postal Service*, 364 NLRB No. 116 (2016) (*Postal Service*), where a divided Board held that the appropriate standard for evaluating orders approving and incorporating settlement terms proposed by a respondent, over the objection of the General Counsel and the charging party, is whether the order provides a full remedy of the violations alleged in the complaint. In overruling *Postal Service*, the majority reinstated the authority of judges to accept settlements over the objection of the General Counsel and the charging party, based on the "reasonableness" factors set forth in *Independent Stave*, 287 NLRB 740 (1987), subject to Board review applying the *Independent Stave* factors if the General Counsel or the charging party files exceptions with the Board. Applying *Independent Stave* to UPMC's guarantee offer, the majority found that the "guarantor" status offered by UPMC was reasonable, and that accepting the offer effectuates the purposes and policies of the Act. Accordingly, the majority dismissed the complaint's single-employer allegation against UPMC.

In separate dissents, Members Pearce and McFerran disagreed with the majority's decision to overrule *Postal Service*, arguing that *Postal Service* is irrelevant to the disposition of the case, which doesn't involve a consent order and in which no party asked the Board to overrule *Postal Service* or even argued that *Independent Stave* was relevant to determining whether the judge correctly dismissed the single-employer allegation.

Member Pearce argued that the sole issue in this case is whether the judge correctly dismissed the single-employer allegation, based on UPMC's offer to serve as a guarantor of any remedies ultimately ordered against Presbyterian Shadyside. Member Pearce found that the judge and the majority erred by finding that UPMC's guarantee was "as effective" a remedy as one that would result from a single-employer finding because as a guarantor UPMC was not immediately liable to remedy the unfair labor practices and the majority's order does not hold UPMC and Presbyterian Shadyside, and their officers, agents, successors, and assigns, jointly and severally liable for the unfair labor practices committed by Presbyterian Shadyside. Member Pearce disagreed with the majority's assertion that applying *Independent Stave* in consent order cases encourages voluntary dispute resolution and promotes industrial peace. In Member Pearce's view, it is absurd for the majority to claim that these purposes of the Act are achieved in consent ►

National Labor Relations Board, cont.

NLRB significant decisions, cont.

order cases where the charging party, in addition to the General Counsel, objects to the proposed settlement terms.

Member McFerran joined the reasoning of Member Pearce's dissent, and, writing separately, found that the circumstances in this case do not fit either the *Postal Service* or the *Independent Stave* framework. She therefore also found that acceptance of UPMC's offer here is manifestly inappropriate regardless of whether *Postal Service* or *Independent Stave* is applied, as none of the policy considerations in those decisions can be achieved by application of the standards to this distinct fact pattern in which there has been no agreement to the proposed settlement adopted by the majority as a resolution by *any* party to the case. Member McFerran concluded that the majority, in imposing its own resolution on the parties by modifying even UPMC's unilaterally proposed language, compromised the Board's role as adjudicator in favor of that of super-prosecutor—a decision that would encourage respondents to improperly negotiate directly with the Board. Additionally, she found that the majority not only restores a flawed rule with respect to respondents' unilateral efforts to terminate Board litigation over the objections of the General Counsel and the charging party, but also reaches a result that allows the Respondents here to frustrate the General Counsel's ability to litigate the Respondents' status as a "single employer" under the Act in this case, a salient issue for this and other pending litigation involving the Respondents. She also found that the majority erred by overruling precedent without notice or an opportunity for briefing, a sharp break from established Board practice. She further found that the majority presented no compelling justification for reversing precedent, noting that a change in the Board's composition is not a basis for revisiting an earlier decision and that the majority did not even assert that *Postal Service* was contrary to the purposes of the Act. She also noted that the majority could not explain how the *Postal Service* Board erred in distinguishing between (1) a respondent's unilateral offer to resolve a case, over the objections of both the General Counsel and the charging party; and (2) a bilateral settlement that actually reflects the agreement of the respondent and at least one opposing party.

In ***The Boeing Company***, 365 NLRB No. 154, (December 14, 2017), the Administrative Law Judge had found, among other things, that the Respondent violated the Act by maintaining a work rule that restricted the use of camera-enabled devices such as cell phones. Under current Board law, a work rule is unlawful if an employee "would reasonably ►

National Labor Relations Board, cont.

NLRB significant decisions, cont.

construe" the rule to restrict protected concerted activity, and the judge so found. The full Board reviewed the judge's decision, and the majority (Chairman Miscimarra and Members Kaplan and Emanuel) decided to overrule existing precedent and to create a new test for evaluating employers' work rules. Under the new test, the Board will find a rule unlawful if it explicitly restricts employees' protected concerted activity. If the rule is not explicitly unlawful, the Board will evaluate two things: (1) the rule's potential impact on protected concerted activity; and (2) the employer's legitimate business justifications for maintaining the rule. If the justifications for the rule outweigh the potential impact on employees' rights, the rule is lawful. Conversely, if the potential impact on employees' rights outweighs the justifications for the rule, it is unlawful. Applying the new test retroactively to Boeing's no-camera rule, the majority found that the Respondent's justifications for the rule, including the protection of information implicating national security, proprietary trade secrets, and employees' personal information, outweighed any potential impact on employees' protected concerted activity.

Writing separately, Members Pearce and McFerran dissented from the majority's decision to overrule precedent and adopt a new test for evaluating employer work rules. The dissenters viewed the new test as more complicated and unpredictable than the test it replaced and as failing to protect employees from the chilling effect of rules that might punish protected concerted activity. The dissents noted that the new test was adopted without notice or public participation, and that no appellate court has rejected the current test in the 13 years since it was established. The dissents criticized the majority for essentially engaging in rulemaking without public input, by declaring all "civility" rules lawful, even though no civility rule was at issue in the case.

The dissents disagreed with the majority's assertions that the current test "does not permit any consideration" of the business justifications associated with a challenged rule and that the current test has not been well-received by the courts. Member Pearce noted that the Board has routinely considered business justifications associated with a challenged rule; however, in order to protect the rights of employees guaranteed by the Act, the Board and courts have required employers to show that a challenged rule is narrowly tailored to serve legitimate interests. Member Pearce argued that by casting aside this requirement, the majority's new test allows employers to maintain overly broad rules that unnecessarily chill employees in the exercise of their Section 7 rights, even when it does not serve a legitimate employer interest. ►

National Labor Relations Board, cont.

NLRB significant decisions, cont.

In her dissent, Member McFerran explained how the Board could have revised and refined its approach to work rules, with public participation, in a way that was consistent with both the National Labor Relations Act and the Administrative Procedure Act.

In ***PCC Structurals, Inc.***, 365 NLRB No. 160 (December 15, 2017), a full Board majority consisting of Chairman Miscimarra and Members Kaplan and Emanuel overruled *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB 934 (2011), and reinstated the traditional community-of-interest standard for determining an appropriate bargaining unit in union representation cases. Under *Specialty Healthcare*, if a union petitioned for an election among a particular group of employees, those employees shared a community of interest under traditional standards, and the employer took the position that the smallest appropriate unit had to include additional employees excluded from the proposed unit, the Board would find the petitioned-for unit appropriate unless the employer proved that the excluded employees shared an "overwhelming" community of interest with the petitioned-for group. The Board has now abandoned the "overwhelming" community-of-interest standard and returned to the traditional community-of-interest test that the Board has applied throughout most of its history. Under that test, the Board will assess whether employees in the proposed bargaining unit share interests that are sufficiently separate and distinct from those of the remainder of the workforce to constitute an appropriate unit for bargaining, considering whether the employees are organized into a separate department; have distinct skills and training; have distinct job functions and perform distinct work; are functionally integrated with the Employer's other employees; have frequent contact with other employees; interchange with other employees; have distinct terms and conditions of employment; and are separately supervised.

The Board also reinstated the standard established in *Park Manor Care Center*, 305 NLRB 872 (1991), for determining appropriate bargaining units in non-acute healthcare facilities.

The case was before the Board on the Employer's Request for Review of a Regional Director's Decision and Direction of Election. The Regional Director found that a petitioned-for unit of approximately 100 welders was appropriate for collective bargaining under *Specialty Healthcare*'s "overwhelming community of interest" standard. Expressing no opinion as to whether the petitioned-for unit was appropriate, the Board remanded the case to the Regional Director for further appropriate action consistent with its Order. ▶

National Labor Relations Board, cont.

NLRB significant decisions, cont.

Dissenting Members Pearce and McFerran criticized the majority's decision not to invite amicus briefs as a break from the Board's tradition of inviting briefing in cases where the majority is considering the reversal of significant precedent as well as the majority's failure to grant parties their opportunity to brief the issue following the Board's grant of review. The dissent noted that all eight circuit courts of appeals presented with employer challenges to *Specialty Healthcare* have approved *Specialty Healthcare's* standard. The dissent argued that the majority's standard improperly shifts the focus of the appropriate-unit analysis from the rights of the petitioned-for employees to self-organize to the interests of the non-petitioned for employees. It also argued that even though the majority decision purported to return to the traditional community-of-interest test, key aspects of its analysis depart from long-standing Board precedent. The dissenting Members additionally found the petitioned-for unit of welders appropriate for bargaining.

In ***Raytheon Network Centric Systems,*** 365 NLRB No. 161 (December 15, 2017), a full Board majority consisting of Chairman Miscimarra, Member Kaplan (who also separately concurred), and Member Emanuel overruled *E.I. du Pont de Nemours*, 364 NLRB No. 113 (2016) (*DuPont*), and reversed the Administrative Law Judge's findings that the Respondent violated the National Labor Relations Act by announcing and unilaterally implementing changes to employees' healthcare benefits.

The majority held that *DuPont* was flawed because it is inconsistent with Sec. 8(a)(5) of the Act, distorts the long-understood understanding of what constitutes a "change," and contradicts well-established Board and court precedent, including *NLRB v. Katz*, 369 U.S. 736 (1962). The majority stated that *DuPont* cannot be reconciled with the Board's responsibility to foster stable bargaining relationships. The majority said it was returning to the rule reflected in the *Shell Oil*, 149 NLRB 283 (1964), line of cases and embodied more recently in the *Courier-Journal* cases (342 NLRB 1093 (2004) and 342 NLRB 1148 (2004)), *Capitol Ford*, 343 NLRB 1058 (2004), and *Beverly Health & Rehabilitation Services*, 346 NLRB 1319 (2006). In so doing, the majority ruled that actions do not constitute a change if they are similar in kind and degree with an established past practice consisting of comparable unilateral action. The majority stated that this principle applies regardless of whether (i) a collective-bargaining agreement was in effect when the past practice was created, and (ii) no collective-bargaining existed when the disputed actions were taken. The majority ruled such actions consistent with an established practice do not constitute a change requiring bargaining merely because they involve some degree of discretion. ►

National Labor Relations Board, cont.

NLRB significant decisions, cont.

The majority determined that its decision was to apply retroactively, that is, to the case before it and all pending cases. Applying its holding to the case before it, the majority found that the Respondent's changes to employees' healthcare benefits in January 2013 were a continuation of the Respondent's past practice involving similar unilateral changes made at the same time every year from 2001 to 2012. Thus, the majority found that the Respondent did not violate the Act by failing to give the Union advance notice and the opportunity to bargain before making the 2013 changes. The majority further found that, because the 2013 changes were lawfully implemented, the Respondent's announcement of those changes in the fall of 2012 was also lawful.

In his separate concurrence, Member Kaplan stated that he joined in the decision to overrule *DuPont*, but was writing separately to express, in dicta, his support for an alternative rationale, not raised by the Respondent, that would also support a finding that the Respondent's January 2013 modifications did not alter the status quo and that, therefore, the Respondent did not violate the Act.

Dissenting, Members Pearce and McFerran stated that the ALJ properly found the Respondent's conduct unlawful, and argued that the majority, in reversing *DuPont,* was giving employers new power to make unilateral changes in employees' terms and conditions of employment after a collective-bargaining agreement expires. They asserted that the majority had failed to provide notice and an opportunity for briefing, violating an agency norm. They further asserted that the majority had changed course even though *DuPont* is under review by the U.S. Court of Appeals for the District of Columbia Circuit, and that the majority had acted with little justification other than a change in the Board's composition. The dissenters also argued that the majority's decision fundamentally misinterprets and deviates from the Supreme Court's decision in *NLRB v. Katz* which, the dissenters stated, holds that an employer's unilateral change violates the duty to bargain under the Act, if the changes involve significant employer discretion. The dissenters argued that the majority's assertion that decades-long precedent and numerous Board and court cases support its position is unfounded. Finally, they stated that the majority's position that permits employers to exercise sole discretion in unilaterally changing terms of employment during successor contract negotiations over those very terms, is impermissible as a policy choice and frustrates the process of collective bargaining. ■

Federal - United States

National Labor Relations Board

New Chairman John F. Ring joins the NLRB

Submitted by Roxanne Rothschild, Deputy Executive Secretary, NLRB

John F. Ring was sworn in on April 16, 2018 as Chairman of the National Labor Relations Board (NLRB) for a term ending on Dec. 16, 2022. He succeeds Philip A. Miscimarra, who served on the Board from Aug. 7, 2013 to Dec. 16, 2017 (serving as Chairman from April 24, 2017 to Dec. 16, 2017). Mr. Ring was confirmed by the Senate on April 11, 2018.

Mr. Ring's predecessor as Chairman, Board Member Marvin E. Kaplan, stated: "It has been my honor to serve as Chairman these past months and it is my pleasure to welcome John Ring to the National Labor Relations Board. His wealth of experience in labor and employment law will undoubtedly serve our Agency and the American people well. My colleagues and I greatly look forward to continuing the important work of the Board under Chairman Ring's leadership."

"I thank the President for the opportunity to serve as Chairman of the NLRB," Ring said. "I am honored to serve alongside the dedicated professionals at the Agency. My career as a labor lawyer has given me a great appreciation for the work of the NLRB and its important mission. I look forward to working with my colleagues to ensure that the NLRA is interpreted and enforced as it is written and consistent with its amendments."

Ring also recognized former Chairman Marvin E. Kaplan for his service on the Board. Kaplan will continue as a Board Member for a term expiring on Aug. 27, 2020, and has served as a Board Member since Aug. 10, 2017, including as Chairman since Dec. 21, 2017. The Board also currently includes Board Members Mark Gaston Pearce, whose term expires on Aug. 27, 2018; Lauren McFerran, whose term expires on Dec. 16, 2019; and William J. Emanuel, whose term expires on Aug. 27, 2021.

Prior to his appointment to the NLRB, Mr. Ring served as a partner with the law firm Morgan Lewis. He has represented client interests in all facets of labor law, including collective bargaining, multi-employer benefit plans, and counseling on labor-management relations issues. He has an extensive background negotiating and administering collective-bargaining agreements, most notably in the context of workforce restructuring and multi-employer bargaining. Mr. Ring received his J.D. and B.A. from Catholic University of America in Washington, DC. ■

Federal - United States

Federal Mediation and Conciliation Service

White House submits nominee for FMCS Director to U.S. Senate for Confirmation

Submitted by FMCS U.S.

On January 18, 2018, the White House submitted President Trump's nominee, Michael Stoker of California, to be the Director of the Federal Mediation and Conciliation Service to the U.S. Senate for confirmation proceedings.

According to the White House announcement, Mr. Stoker has been an attorney at law focusing on labor and agricultural issues for over 30 years, and he served in many positions in State and local government. From 2000 to 2002, Mr. Stoker served as California Deputy Secretary of State. From 1995 to 2000, he served as Chairman of the California Agricultural Labor Relations Board. Mr. Stoker also served as a member of the Santa Barbara County Board of Supervisors from 1986 to 1994. He graduated from the University of California Berkeley with a B.A. in 1976 and from Loyola Law School with a J.D. in 1980.

Mr. Stoker's nomination will be considered by the Senate Committee on Health, Education, Labor, and Pensions, which has legislative jurisdiction over the FMCS. At the time this article was submitted, no hearing date had been set. ■

FMCS Announces Labor-Management Grants Totaling $895,096

The U.S. Federal Mediation and Conciliation Service (FMCS) announced 10 recipients of labor-management grants on November 15, 2017, totaling $895,096 to fund cooperative projects addressing disruptive workplace issues, including the "skills gap" between applicants and job vacancies in fields such as manufacturing and the building trades.

In its grants program, FMCS especially sought applications targeting a shortage of skilled workers for U.S. manufacturing jobs and other vital economic sectors. Grant recipients ►

Federal Mediation & Conciliation Service, cont.

FMCS Grants, cont.

reflected a variety of approaches to developing a more skilled workforce as well as proposals that jointly tackle other workplace issues for labor and management. The successful labor-management applicants reflect both economic and geographic diversity, including diverse industries and regions.

"I am extremely gratified by the outstanding applications we received for this year's grants program. Our grantees represent the best of the best. They offer real creative approaches to building skill levels in young workers for our nation's workplaces. In addition, our grantees are showing innovative ways that labor and management can team up to jointly resolve other, potentially disruptive workplace issues," said FMCS Deputy Director John Pinto.

"It is my belief that management and labor, working collaboratively, and with FMCS assistance, can develop plans to suit their individual circumstances and special needs, whatever they might be," he added. "A strong labor-management relationship is a key factor in the success of businesses and labor organizations that build their communities while they fuel regional and national economies. At FMCS, we are all about growing these relationships."

Under the Agency's grants program, FMCS awards a limited number of competitive grants to encourage and promote labor-management cooperation as well as joint, innovative solutions to workplace issues.

Through its grant awards, the Agency supports best practices in labor-management cooperation as a way of improving collective bargaining and proactively mitigating labor-management disputes. The grants program helps foster the establishment and operation of joint labor-management committees at the company level, on a community or area-wide basis, within a particular industry, or for public sector employees.

The grants program, which began in 1981 under the authority of the Labor-Management Cooperation Act of 1978 (PL 95-524), has funded a broad range of projects including outreach, communications, strategic planning, minority recruitment and process development.

Click for a summary of the FY 2017 FMCS labor-management grant recipients. ■

Federal - United States

Federal Mediation & Conciliation Service, cont.

FMCS Ranks First Among Small Federal Agencies

"Best Places to Work"

Submitted by FMCS U.S.

The U.S. Federal Mediation and Conciliation Service (FMCS) received the top ranking on January 26, 2018 among 28 small Federal agencies as a "best place to work" in the federal government, according to an analysis of survey results by the nonprofit Partnership for Public Service.

"We are pleased and honored at this recognition of FMCS," said John Pinto, Deputy Director of Field Operations. "Once again, FMCS employees have demonstrated their strong commitment to high standards of excellence for themselves and for FMCS leadership, and have shown their dedication to our vital mission of helping to resolve workplace conflict."

FMCS Deputy Director Scot L. Beckenbaugh added, "FMCS has performed consistently well in the yearly ratings because of the hard work of FMCS managers and employees in practicing daily what we advocate for our customers, which is to encourage a workplace culture based on transparency, trust, respect, tolerance, and communication. We pride ourselves in working together as managers and employees to both raise our individual performance levels and achieve our organizational goals."

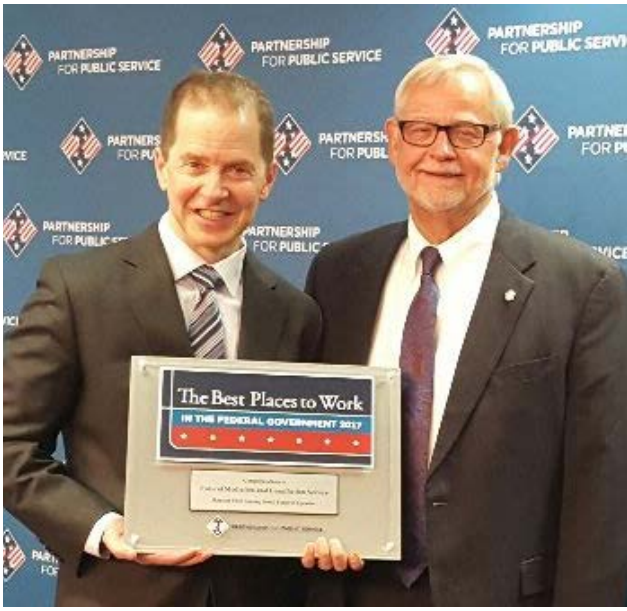
FMCS was recognized at a Partnership for Public Service news conference for its first place ranking in 2017, which also rated FMCS first among small agencies in several individual categories, including "Effective Leadership," "Innovation," and "Empowerment" based on employee responses to survey questions.

The nonprofit Partnership for Public Service, and Deloitte, which released the rankings of Federal workplaces today, based their overall ratings on responses from more than 486,105 civil servants in 410 Federal organizations to the Federal Employee Viewpoint Survey (FEVS) conducted by the U.S. Office of Personnel Management (OPM) from May to June in 2017. ►

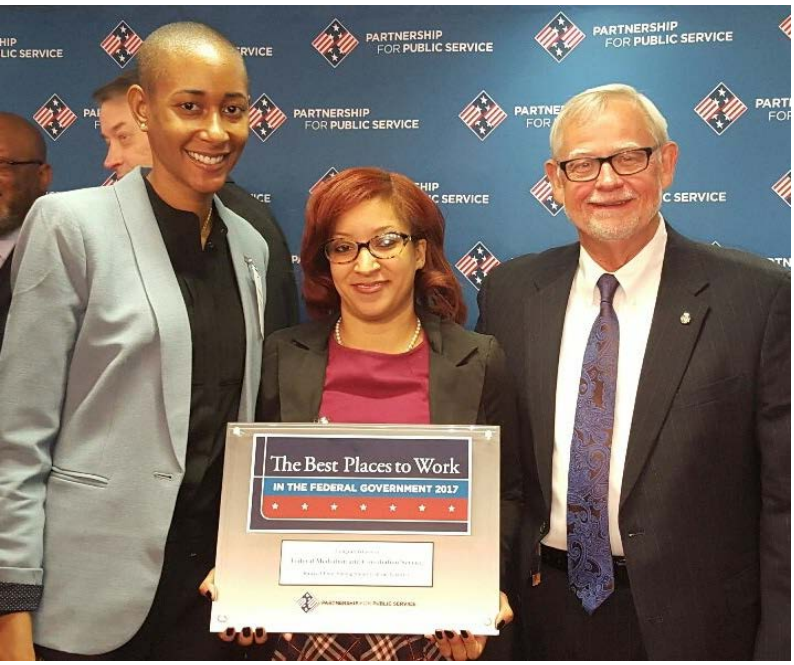
Federal - United States

Federal Mediation & Conciliation Service, cont.

The **Best Places to Work** rankings provide critical information to help Federal agencies and Congress assess workplace health and performance. In addition to overall satisfaction and commitment, the rankings measure employee attitudes on 10 workplace categories, including effective leadership, innovation, support for diversity, work-life balance and pay.



Max Stier, left, President and CEO of the Partnership for Public Service, presents the "Best Places to Work" plaque to FMCS Deputy Director Scot Beckenbaugh at the January 26, 2018 event.



FMCS Human Resources Director Traci Coddington, left, Arbitration Services Assistant Shakima Wright, center, and Deputy Director Scot Beckenbaugh share the spotlight for FMCS first place ranking at the January 26, 2018 Partnership for Public Service Event.

Based on previous surveys, the FMCS was the top-ranked "best place to work" among small agencies in 2005, 2007, and 2015. The rankings began in 2003, and since 2007 have been conducted annually. The FMCS generally has scored among the top five finishers for small agencies in every year that Agency results were available for comparison.

Complete 2017 rankings and information about the survey are available at the Partnership for Public Service website at http://bestplacestowork.org/BPTW/. ■

Federal - United States

Federal Mediation & Conciliation Service, cont.

Online Registration Now Available for the FMCS 2018 National Labor-Management Conference

The FMCS National Labor-Management Conference website is now open, and registration for the Conference is now live. The website will be kept up to date with the latest information on the impressive list of planned programs, registration, and sponsorship information. The Conference will be held at The Hilton Chicago, **August 21-23, 2018**.

Well known in the labor relations community as a traditional biennial event, the FMCS Conference is generally regarded as a must-attend gathering for labor and management practitioners, neutrals, advocates, arbitrators, academics, and government agency representatives. The Conference provides the latest word from a host of experts on new approaches and innovative solutions to labor relations and bargaining issues. The Conference also provides important training to newcomers in the field to help them navigate issues arising from the new economy and the hard realities of today's collective bargaining tables.

This year's conference will feature scores of workshops, panels, and plenary sessions focusing on new rules of the road for labor relations practitioners and new workplace challenges. Practitioners, parties, and experts will share their insights, as well as practical tools and techniques for addressing:

- **Bargaining challenges** posed by new workplace issues
- **Innovative solutions** for health care and pension benefits bargaining
- **Labor-management success stories** with winning examples of how it's done
- **Innovative, expedited bargaining techniques**

The FMCS conference is intended to provide attendees with "Solutions for Today. Vision for Tomorrow," featuring FMCS mediators and other experts speaking on a variety of issues, the latest technologies and communications tools and the most effective techniques in dispute resolution. FMCS is urging even veteran labor relations practitioners to attend the 2018 FMCS National Labor Management Conference to master the latest trends, tools, and techniques needed to succeed at bargaining tables. ■

ALRA Member Agencies Attend ABA midwinter meeting

Submitted by Sarah Cudahy, Indiana Education Employment Relations Board

Above, left to right: ABA Government Fellows Sarah Cudahy, Indiana Education Employment Relations Board and Page Garcia, Washington Public Employment Relations Commission

On January 24-27, 2018, the **State and Local Government Bargaining and Employment Law Committee of the American Bar Association** met for their midwinter meeting in Puerto Vallarta, Mexico. ALRA member attendees included the **Michigan Employment Relations Commission**, the **Washington State Public Employment Relations Commission**, and the **Indiana Education Employment Relations Board**. Although we (sadly) couldn't bring back the sunshine or warm weather, we are happy to share the papers drafted by the committee on a variety of topics, including interest arbitration, unfair labor practice cases, and due process developments:

www.americanbar.org/groups/labor_law/events_cle/mw/SLG_MWMpapers.html

The States

Massachusetts Department of Labor Relations and The Commonwealth Employment Relations Board

Notable Agency Decisions

Duty of Fair Representation – Union liability for unlawful failure to timely file a claim for arbitration

Office and Professional Employees International Union, Local 6, AFL-CIO and John Murphy, 44 MLC 39, SUPL-14-3628 (H.O. August 25, 2017). **Appeal to CERB:** Pending

This decision was notable because it marked the first time that a Department of Labor Relations (DLR) Hearing Officer had to "step into the shoes" of an arbitrator to determine the extent of a union's liability to an individual member in circumstances where the union's breach of its duty of fair representation prevented the employee from proceeding to arbitration. Under Massachusetts law, a finding that a union has breached its duty of fair representation does not automatically result in a make-whole remedy for the affected member. Rather, to recover damages, the charging party also bears the burden of proving that the grievance was "not clearly frivolous." If the charging party meets this low burden, the union will be liable for any losses the charging party suffered as a result of the union's breach, unless the union can prove that the grievance clearly lacked merit, i.e., that the grievance would have been lost through no fault of the union. The DLR offers unions the option of presenting evidence on the merits of the grievance at the unfair labor practice hearing or in a subsequent compliance proceeding.

In this case, the Hearing Officer held that the Union had breached its duty of fair representation to the charging party by filing a late demand for arbitration that resulted in the arbitrator dismissing his grievance as procedurally inarbitrable. The Hearing Officer further found that the charging party had met his burden of proving that the grievance was not clearly frivolous. Because the Union did not elect to bifurcate the proceeding, the Hearing Officer donned her arbitrator's cap and proceeded to analyze whether the Union had met its burden of showing that the grievance lacked merit. Concluding that it had not, the Hearing Officer ordered the Union to make the charging party whole for the loss of compensation he had suffered as a direct result of his termination. ►

Massachusetts DLR and CERB, cont.

Notable Agency Decisions, cont.

Appropriate Bargaining Units

Town of Auburn and Teamsters Union, Local 170, 44 MLC 101, MCR-17-5712 (December 5, 2017).

The issue in this case was whether a petitioned-for unit of one full-time and two part-time custodians was an appropriate bargaining unit. At the time that the petition was filed, the Town of Auburn bargained with eight separate bargaining units, including a bargaining unit of Highway Department workers who were represented by a Laborers local, and a unit of Sewer Department workers who were represented by Teamsters, Local 170, the petitioner in this case. The custodians had been Town employees since 2012, but no union had ever sought to represent them until 2017, when Teamsters, Local 170 filed a petition seeking to represent in a separate bargaining unit.

The Town opposed the petition, arguing that the custodians were more appropriately placed in the Laborer's Highway Department unit because they shared a common supervisor with the employees in that unit. The Town also argued that a 3-person custodians unit would run counter to the DLR's policy favoring broad, comprehensive units instead of small, fragmented ones. The Teamsters disagreed, pointing out that the Laborers had never shown any interest in representing the custodians and had not intervened in the present proceeding.

To decide this matter, the CERB considered whether the 3-person unit was appropriate under the three criteria set forth in Section 3 of M.G.L. c. 150E: community of interest, efficiency of employer operations and effective dealings, and safeguarding employee rights to effective representation. The CERB found that the custodians shared a community of interest amongst themselves. As to the other two criteria, because the Laborers had never expressed an interest in representing the custodians, and because the Town already bargained with the Teamsters, albeit for a different unit, the CERB concluded that the public policy of ensuring effective representation for the three custodians, as opposed to no representation at all, outweighed concerns about the potential effects of the small unit on the efficiency of the Town's operations and effective dealings. ►

Massachusetts DLR and CERB, cont.

Notable Agency Decisions, cont.

Union testing for PCBs

Worcester School Committee and Educational Association of Worcester, Inc**.,** 42 MLC 283, MUP-10-6005 (H.O. June 8, 2016), *aff'd,* 43 MLC 218 (March 30, 2017).

The CERB affirmed a Hearing Officer decision holding that the Worcester School Committee (Employer) violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of M.G.L. c. 150E (the Law) by denying a request made by the Educational Association of Worcester, Inc. (EAW) in February 2010 for access to three schools in the Worcester Public School System. The Union sought access for purposes of having an environmental expert conduct sampling for the presence of PCBs in the schools' exterior caulking. The Employer appealed and as a threshold matter of first impression, the CERB ruled that an employer's duty to furnish relevant and reasonably necessary information encompassed providing access to the worksite to obtain that information. On appeal, the Employer argued that the Hearing Officer erred in concluding that the Union's request for access was relevant and reasonably necessary because she had made no findings as to whether the PCBs actually posed a safety and health risk to Union members. The CERB found no error, because the relevance and reasonable necessity of the request was established by other facts in the record, including federal environmental regulations that required the removal of the caulking when PCB levels reached a certain level, and the fact that employees had approached Union staff with concerns about the cancer rates in one of the schools that the Union sought to test.

Shared Bargaining Obligation between School Committee and Municipality

City of Lynn and AFSCME Municipal Employees Local 1735, 41 MLC 297, MUP-11-1318 (H.O. April 2, 2015), *aff'd,* 42 MLC 336 (June 27, 2016).

This case involved former school department custodial employees who were transferred to the City of Lynn's inspectional services department via local legislation. The question presented was whether the City violated its duty to bargain in good faith when it unilaterally changed the vacation retirement benefit past practice that was in effect when the custodial employees worked for the school department. The City argued that it was not bound to adhere to school department past practices, but the CERB disagreed ▶

Massachusetts DLR and CERB, cont.

Notable Agency Decisions, cont.

based on longstanding precedent holding that a municipality and a school committee share responsibility for bargaining when bargaining obligations are unfulfilled.

Impasse

Everett School Committee and Everett Teachers Association, 42 MLC 206, MUP-09-5665 (H.O. February 16, 2016), *aff'd,* 43 MLC 55 (August 31, 2016). Judicial Appeal: Pending.

The CERB affirmed a Hearing Officer decision holding that the Everett School Committee did not violate Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law when it laid off ten clinical therapists. The Hearing Officer concluded that the School Committee had a duty to bargain over both the decision and the impacts of its decision to lay off the therapists and to transfer their work to an outside contractor. However, because she found that the parties had negotiated to impasse over these issues, she dismissed the case.

The Union appealed to the CERB, arguing that the parties could not have bargained to impasse because the School Committee offered to bargain only after it had already voted to eliminate and outsource the positions. The CERB disagreed because the evidence reflected that the School Committee remained able to move monies around within its budget even after its vote. The Union also argued that the School Committee engaged in surface bargaining. The CERB rejected this argument because the record showed that the School Committee acknowledged that the decision needed to be bargained, and that it repeatedly asked the Union for proposals for cost-saving alternatives to eliminating the positions, but received none. Based on these facts, the CERB concluded that the School Committee had not presented the Union with a *fait accompli* and had otherwise bargained to a good faith impasse.

Notable Court Decisions

Duty to Support Appropriations Request to Fund a Collective Bargaining Agreement

Commissioner of Administration and Finance v. Commonwealth Employment Relations Board & another, 477 Mass. 92 (2017). ►

Massachusetts DLR and CERB, cont.

Notable Court Decisions, cont.

Last May, the Supreme Judicial Court of Massachusetts (SJC) overturned a CERB decision holding that the state Commissioner of Administration and Finance had violated its duty to bargain in good faith when it failed to support a request for funding of a collective bargaining agreement. Under Section 7(b) of the Law, public employers have a duty to submit requests for funding such agreements to the applicable funding body. For over forty years, the CERB had held that an employer's duty to bargain in good faith under Section 6 of the Law includes the duty to affirmatively support that request, i.e., that the duty to bargain in good faith did not end when the parties reached agreement. In this case, the Commonwealth submitted a request for funding to the state legislature that included a letter that pointed out that similar requests for salary increases had been rejected; that the Commonwealth's attempt to renegotiate the agreement in light of the ongoing global economic downturn had failed; and that the state legislature's approval would require renegotiation of several other agreements that already had been funded. After hearing, a DLR Hearing Officer concluded that the Commonwealth had violated its obligation to affirmatively support its request for funding, and the CERB affirmed. The SJC reversed and held that, although an employer might still violate Section 7(b) if it conditioned its funding request on the occurrence of another event, the duty to submit the funding request does not involve a corresponding duty to affirmatively support it. Rather, the Court concluded that an employer does not violate Section 7(b) of the Law if its funding request includes pertinent information concerning fiscal and public policy matters. The Court also held that the Commonwealth did not violate its duty to bargain in good faith by failing to support the request because an employer's good faith should be examined only during the actual period of bargaining. The Court rejected the CERB's longstanding precedent that employers have an ongoing obligation to bargain in good faith that covers the period after the end of the negotiations and the submission of the request. The Court noted, however, that under certain circumstances, the form, contents or legality of a funding request could be probative of the issue of whether the employer had bargained in good faith. Here, however, the thirteen-month "temporal gap" between the negotiations and the funding submission, and the lack of any inaccurate information in the letter led the Court to conclude that there was no evidence that the Commonwealth lacked a fair and open mind during the actual bargaining process. ■

The States

Michigan Employment Relations Commission

Summaries of Noteworthy Decisions

Submitted by Lynn Morison, Staff Attorney, Carl Wexel, Administrative Law Specialist and Ashley Olszewski, Departmental Analyst

61st District Court -and- Grand Rapids Employees Independent Union -and- Association of Public Administrators of Grand Rapids, Case No. UC16 F-009, issued January 12, 2018.

The 61st District Court recognized the Association of Public Administrators of Grand Rapids (APAGR) as the bargaining representative for its supervisory/managerial employees and the Grand Rapids Employees Independent Union (GREIU) as the bargaining representative for its non-supervisory employees.

Following a reorganization study in 2010, the Court began its reorganization process. As part of the reorganization, the Court created several positions, including the Chief Deputy Court Clerk. The Court also retitled and reclassified the position of Lab Manager to Urinalysis Laboratory Manager. Both positions were in the GREIU bargaining unit.

The Court filed its petition seeking the removal of the Chief Deputy Court Clerk and Urinalysis Laboratory Manager positions from the bargaining unit represented by the GREIU on the basis that the two positions were supervisory. The GREIU objected to the removal of the positions from its bargaining unit and claimed that neither position rises to the level of supervisor as that term has been defined by the Commission.

In order to meet the criteria to be a supervisor under PERA, an individual's exercise of authority must involve the use of independent judgment. The Commission found the Chief Deputy Court Clerk's role with respect to schedules, room assignments, time off requests and approval of timesheets, was predominately governed by pre-set routines or policies with little or no exercise of independent judgment. Additionally, the Commission found the position only had the authority to issue "day-to-day" discipline (such as informal counseling) and found no evidence that the Chief Deputy Court Clerk's recommendations in personnel matters would be followed without independent investigation. The Commission found that the responsibilities of the Chief Deputy Court Clerk were insufficient to establish supervisory status, and therefore, the position was appropriately placed in the GREIU unit. ►

Michigan Employment Relations Commission

Summaries of Noteworthy Decisions, cont.

With regard to the Urinalysis Laboratory Manager positon, the Commission found its authority to also be routine and found no evidence to indicate that the position possessed authority to make effective recommendations in matters related to hiring, firing, or discipline, or that those recommendations would be accepted without independent investigation. Similarly, the Commission found the Urinalysis Laboratory Manager was appropriately placed in the GREIU unit as it was not supervisory.

American Federation of State, County & Municipal Employees, Council 25 and its Affiliated Local 1518 -and- Huron County, Case No. UC15 L-023, issued Nov. 17, 2017.

Huron County (petitioner) operates three separate courts, the Circuit Court, District Court, and Probate Court, each with their own judge and administrator. All full-time and regular part-time employees of the Probate Court, including the Probate Court Register/Court Administrator, are members of AFSCME Council 25, Local 1518. The Probate Court Register/Court Administrator was included in the non-supervisory bargaining unit since it was organized in 2000.

Petitioner filed its petition seeking clarification of the bargaining unit status of the Probate Court Register/Court Administrator and argued that inclusion of the position in the AFSCME bargaining unit was inappropriate because the position is supervisory. Petitioner asserted that the positon had the authority to hire, layoff, assign, reward, or discipline other employees and, therefore, is a supervisor under Commission case law. AFSCME asserted that the Probate Court Register/Court Administrator should remain in its bargaining unit because the duties are those of a lead worker, not a supervisor.

The Commission found that the record did not contain evidence that the Probate Court Register/Court Administrator has the authority to issue formal discipline, or to effectively recommend such discipline. At most, she had informal discussions with employees about relatively minor behavioral issues. The Commission noted that such discussions are not an exercise of true disciplinary authority. However, the Probate Court Register/Court Administrator was responsible for determining whether employees of the Probate Court worked overtime. The position also had the authority to lay off employees, provided that such layoffs were consistent with the terms of the collective bargaining agreement. Additionally, The Probate Court Register/Court Administrator possessed the effective authority to make hiring decisions on behalf of the Probate Court. ►

Michigan Employment Relations Commission

Summaries of Noteworthy Decisions, cont.

Regardless of the frequency of its exercise, the Commission found that the existence of any one of the supervisory powers is sufficient to confer supervisory status on the employee, as long as the existence of the power was real, rather than theoretical. On this basis, the Commission granted Huron County's petition to clarify the bargaining unit represented by AFSCME Local 1518 to exclude the Probate Court Register/Court Administrator position as a supervisor.

Carman-Ainsworth Community Schools & Michigan Education Association & Bendle/ Carman-Ainsworth Education Consortium, Case No. R17 A-002, issued Sept. 14, 2017.

The Carman-Ainsworth Education Association, an affiliate of the Michigan Education Association (Petitioner), represented a bargaining unit of certified teaching personnel and registered nurses employed by the Carman-Ainsworth Community Schools (Carman-Ainsworth). The Bendle/Carman-Ainsworth Alternative Education Association, another petitioner affiliate, represented a bargaining unit of teachers and counselors in two alternative high school programs open to students of Carman-Ainsworth, the Bendle Public Schools, and the Flushing Community Schools.

The petitioner asserted that the teachers in the two bargaining units shared a community of interest and sought a self-determination election to combine the two units. Carman-Ainsworth objected to the election on the grounds that the Bendle/Carman-Ainsworth Consortium (B-C Consortium), and not Carman-Ainsworth, employed the alternative education teachers.

The Commission explained that where a consortium is formed by two or more school districts, persons employed to perform services under the consortium are employees of the consortium and not employees of the separate school districts. The Commission found that the evidence in the record was not sufficient to support a finding that the alternative education program was operated solely by Carman-Ainsworth. Therefore, the Commission concluded that the alternative education teachers were employees of the B-C Consortium and not Carman-Ainsworth. Further, the Commission concluded that a bargaining unit consisting of a unit of BC Consortium employees and a unit of Carman Ainsworth employees is not appropriate under § 13 of PERA. The Commission cannot order a public employer to bargain on a multi-employer basis. Accordingly, the Commission dismissed the petition for self-determination. ►

Michigan Employment Relations Commission

Summaries of Noteworthy Decisions, cont.

Clarkston Community Schools & Clarkston Education Association & Michigan Education Association & Ron Conwell, Cases. C15 K-148 & CU15 K-039, issued Sept. 18, 2017.

The Commission affirmed the portion of the ALJ's decision finding: that respondents violated § 10(3) of PERA by maintaining an unlawful union security clause in their collective bargaining agreement; that respondent employer and respondent unions interfered with, restrained or coerced charging party in the exercise of his rights under § 9 of PERA by maintaining the unlawful union security clause in their 2015 collective bargaining agreement; and that respondent unions violated § 10(2)(a) of PERA by sending charging party a letter telling him that he was required to pay an agency fee for the 2015-2016 school year, and impliedly threatening to initiate proceedings to terminate his employment if he refused to pay the fee. The Commission reversed the ALJ's finding that the Commission lacked authority to order the respondents to pay a civil fine pursuant to § 10(8) for violating § 10(3) of PERA. The Commission ordered both respondent employer and respondent unions to pay a civil fine of $500 each for violating § 10(3) of PERA.

Respondents were parties to a collective bargaining agreement covering Sept. 1, 2012 through Aug. 31, 2013. That collective bargaining agreement contained a union security clause providing that if a teacher failed to pay union dues or a service fee, the union president could initiate the process to terminate the teacher's employment. On Mar. 21, 2013, after Act 349 was enacted but before its effective date, respondents entered into a memorandum of understanding (MOU) providing that the union security clause in the existing contract would be carried over to the parties' successor agreement. Respondents entered into 3 successive collective bargaining agreements in Sept. 2013, Sept. 2014, and Sept. 2015. Those agreements included the language of the union security provision that was in the 2012-2013 collective bargaining agreement.

On Aug. 20, 2015, charging party sent a letter to respondents resigning from his union membership. He received a letter from respondent unions on Aug. 31, 2015, stating he was required, as a condition of employment, to either be a member of the union or pay a service fee. Charging party's attorney sent a letter to respondents asserting that Act 349 applied to charging party the day after the expiration of the 2013 collective bargaining agreement. Charging party filed the ulp charges in this case on Nov. 9, 2015. In Dec. 2015 respondent MEA sent a packet of materials to charging party that included a service fee election form with instructions to send payment for the pro rata amount of service fee. ►

Michigan Employment Relations Commission

Summaries of Noteworthy Decisions, cont.

Respondents contended that the Commission had no jurisdiction over this matter because respondent unions were attempting to collect a debt due pursuant to the terms of the 2015 collective bargaining agreement. However, the Commission has subject matter jurisdiction over unfair labor practice charges in which it is claimed that a labor organization restrained or coerced a public employee in the exercise of his or her § 9 rights. Respondents also asserted that charging party did not have standing to bring the charge because he was challenging terms of a collective bargaining agreement to which he was not a party. The Commission explained that PERA implicitly gives public employees, such as charging party, the right to challenge actions by the labor organizations representing the bargaining unit in which they are employed or by their public employer, if those actions interfere with, coerce, or restrain their exercise of § 9 rights. In this case, charging party contended that respondents interfered with, restrained, or coerced him in the exercise of his rights under § 9 of PERA. Therefore, the Commission has jurisdiction over the charge, which charging party has standing to pursue.

Respondents argued that charging party's claim was not ripe because: 1) after the letter from charging party's attorney, respondents had not threatened or initiated legal action or otherwise attempted to collect the service fees, and 2) the union security provision had expired and respondents could take no action to terminate charging party's employment. The Commission pointed out that, given respondents' correspondence to charging party after their receipt of his attorneys' letter and their failure to provide genuine assurances to charging party that they would not proceed with their claims against him, charging party's right to refrain from financially supporting respondent unions remained in jeopardy. Thus, the matter was neither moot nor unripe.

Respondents also asserted that the charge was not timely. Respondents contended that charging party's claim arose when charging party knew that respondents entered into the 2014 agreement containing an unlawful union security clause. The Commission explained that even though charging party was aware of respondents' inclusion of the union security clause in the 2014 collective bargaining agreement at the time it occurred, that was not sufficient to put charging party on notice that respondents were acting to restrain or coerce him in the exercise of his § 9 rights. The statute of limitations did not begin to run until respondents had taken actions specifically detrimental to charging party such as sending him the Aug. 31, 2015 letter stating he was required as a condition of employment to either be a member of the union or pay an agency fee. ▶

Michigan Employment Relations Commission

Summaries of Noteworthy Decisions, cont.

Although each of the three successive collective bargaining agreements that respondents entered into after they agreed to the MOU contained a union security clause, charging party only contended that the 2014 agreement and the 2015 agreements contained unlawful union security clauses. Charging party did not challenge the legality of the MOU. Therefore, the Commission did not consider the lawfulness of the 2013 agreement or the MOU. The Commission agreed with the ALJ that, because the MOU limited its applicability to the collective bargaining agreement that immediately succeeded the 2012 collective bargaining agreement, the only contract covered under the terms of the MOU, was the 2013 agreement. Therefore, the Commission concluded that the union security clauses in the 2014 and 2015 collective bargaining agreements were not lawful.

Under § 10(3) of PERA a public employee cannot be required to pay dues or fees to a labor organization as a condition of continuing public employment. Since the union security clause in the respondents' 2014 and 2015 collective bargaining agreements required bargaining unit members to either pay union dues or agency fees as a condition of employment, those provisions violated section§ 10(3). Moreover, because those provisions were extended or renewed after March 28, 2013, they are unlawful and unenforceable under § 10(5). Therefore, the Commission found that respondents interfered with, coerced, or restrained charging party in the exercise of his § 9 rights, and by so doing, respondent employer violated § 10(1)(a) and respondent union violated § 10(2)(a) of PERA.

The Commission agreed with the charging party's assertion that the ALJ erred by concluding that the Commission did not have jurisdiction to assess a civil fine against respondents for violating § 10(3). The Commission concluded that the ALJ properly found that it had no jurisdiction to issue a civil fine under § 9(3). However, the ALJ should have considered whether a fine could be ordered pursuant to § 10(8) of PERA. Pursuant to § 16 of PERA: "Violations of the provisions of section 10 shall be deemed to be unfair labor practices remediable by the commission." Act 349 expressly granted public employees the right to refrain from financially supporting labor organizations and included specific language providing for remedies and penalties for violations of that right to refrain. Section 10(8) specifically provides one of the means by which violations of § 10(3) are to be remedied by the Commission. Therefore, the Commission ordered the Respondents to each pay a fine of $500.00. ►

Michigan Employment Relations Commission

Summaries of Noteworthy Decisions, cont.

Kent County and Kent County Sheriff -and- Kent County Deputy Sheriffs Association, Case No. C16 F-062, issued December 18, 2017.

The Commission modified the ALJ's decision which recommended dismissal of the charge on the grounds of untimeliness. The Commission noted that the ALJ erred by concluding that the charge had been filed June 27, 2016 when, in fact, the charge had been filed June 17, 2016. However, the Commission explained that regardless of whether the charge was timely, the charge failed to state a claim upon which relief could be granted under PERA. The Commission dismissed the charge because it failed to state a claim under PERA.

The union represents a bargaining unit comprised of corrections deputies and sergeants. The bargaining unit employees are not eligible for compulsory binding arbitration of contract disputes under Act 312, MCL 423.231-247. The parties had a collective bargaining agreement that expired December 31, 2015. They began discussing possible implementation of an increase in employee health insurance costs pursuant to § 15b of PERA, MCL 423.215b, in October 2015. At some point during those discussions, the employers informed the union that the employee share of health insurance costs under the expiring collective bargaining agreement was based on the bundled health care costs of both active employees and pre-65 retirees. The union denied knowing that the employer used a bundled rate to determine the employees' share of health insurance costs under the collective bargaining agreement, and it objected to the employers using a bundled rate to determine the amount of the § 15b increase. The parties had not reached agreement on a new contract by the end of December 2015. On January 1, 2016, the employers increased the employees' share of health insurance costs. That increase was based on bundled active employee health care costs and pre-65 retiree health care costs.

On June 17, 2016, the union filed the charge in this matter asserting that the employers violated § 10(1)(a) and (e) of PERA by unlawfully implementing increases in employees' health insurance costs under § 15b of PERA. The union contended that the § 15b increase should only be based on the health care costs of active employees, and that the employers' use of a bundled rate which was based partly on pre-65 retiree health care costs was unlawful.

The union's position was based in part on the Commission's decision in *Shelby Twp*, 28 MPER 21 (2014). (Affirmed in *Shelby Township v Command Officers Association of* ►

Michigan Employment Relations Commission

Summaries of Noteworthy Decisions, cont.

Michigan, unpublished opinion per curiam of the Court of Appeals, issued December 15, 2015 (Docket No. 323491); aff'd __Mich__ issued November 1, 2017 (Docket No. 153074); 2017 WL 5030885). Public Act 152 of 2011 (Act 152), MCL 15.561 to 15.569, was enacted to limit public employers' expenditures for employee medical benefit plans. Pursuant to § 2(e) of Act 152, medical benefit plans do not include health care benefits provided by public employers to their retirees. Based on that restriction, we found the employer in *Shelby Twp* had violated PERA when it determined the amount of the employees' share of health insurance premium costs based on bundled active employee and retiree health care costs, imposed that amount on the employees without reaching impasse or agreement with the union, and subsequently passed on increases in those bundled costs to employees, also in the absence of impasse or agreement with the union. Inasmuch as Shelby Township's imposition of health insurance premium costs based on the bundled rate was not necessary for compliance with Act 152, the Commission concluded that the employer breached its duty to bargain by imposing changes in a mandatory subject of bargaining without reaching impasse or agreement. This matter is different from *Shelby Twp* because in this case, the employees' share of health insurance costs was negotiated, agreed to by the parties, and included in their collective bargaining agreement.

Section 15b of PERA provides that "Employees who receive health, dental, vision, prescription, or other insurance benefits under a collective bargaining agreement shall bear any increased costs of maintaining those benefits that occur after the expiration date." In this case, the employees' share of health insurance costs that applied before the § 15b increase was negotiated and agreed to by the parties. When that collective bargaining agreement expired, § 15b authorized the employer to pass on to the employees any increases in the cost of maintaining those health insurance benefits.

Subsection 4(b) of § 15b of PERA became effective October 15, 2014. Subsection 4(b) indicates that the increase that Act 312 eligible employees would be required to pay under Act 54 cannot be greater than the amount those employees would have to pay under Act 152. However, no such limitation applies to employees who are not eligible for Act 312 arbitration, such as the employees in this matter. Subsection 4(b) clearly ties Act 152 costs to § 15b cost increases for employees who are Act 312 eligible. There is nothing in PERA to indicate that the Legislature intended to tie increases under § 15b to the requirements of Act 152 for employees who are not eligible for Act 312 arbitration. ►

The States

Michigan Employment Relations Commission

Summaries of Noteworthy Decisions, cont.

Accordingly, the Commission found that the charge did not allege a violation of PERA. Therefore, the Commission dismissed the charge for failure to state a claim upon which relief can be granted under PERA. ■

MERC Grievance Mediation

Fast, Effective, Free Service

Submitted by James Spalding, Mediation Supervisor

Labor mediators at the Michigan Employment Relations Commission (MERC) Bureau of Employment Relations (BER) offer grievance mediation at no cost to the parties. Grievance mediation is a voluntary, informal process whereby a skilled labor mediator assists parties to reach a mutually acceptable resolution to a grievance dispute asserting a violation of the collective bargaining agreement.

BER has experienced a marked increase in grievance mediation activity. In 2010, there were 151 grievances submitted to mediation. In 2017, the number of grievances mediated rose to a total of 266. The increase in popularity of the service through the BER Mediation Division can be attributed to both promotion of the service, and its remarkable success in resolving disputes. Of the 266 grievances mediated in 2017, in addition to some cases carried over from the previous year, a total of 273 grievances were resolved during 2017. Since 2010, a combined total of 1,797 grievances were mediated, resulting in 1,680 settlements, a 93% success rate.

Settlement options include granting the grievance, withdrawal of the grievance, or a compromise. Ultimately, however, settlement of the grievance is within the control of the parties themselves. The mediator is present only as a confidential neutral with an extensive background in contract administration, available to assist or offer suggestions and recommendations. ■

The States

Ohio State Employment Relations Board (SERB)

Save the Dates!

Upcoming Conference and Training dates for the

Ohio State Employment Relations Board

04/26-27/18 **State Employment Relations Board Academy**
Crowne Plaza Hotel, Dublin, Ohio

06/06/18 **Advanced Negotiations Training**
State Library of Ohio *(registrations are at capacity)*

08/24/18 **Fact-Finding Conference**
Crowne Plaza Hotel, Dublin, Ohio

12/06-07/18 **State Employment Relations Board Academy**
Crowne Plaza Hotel, Dublin, Ohio

Vermont Labor Relations Board Issues Decision on Use of Personal Cell Phones in the Workplace

By Tim Noonan, Executive Director, Vermont Labor Relations Board

The ability of an employer to unilaterally restrict employees' rights to monitor and use personal cell phones in the workplace was at issue in an unfair labor practice case decided by the Vermont Labor Relations Board (VLRB).

The Vermont State Employees' Association (VSEA) filed an unfair labor practice charge contending that the State of Vermont Judiciary Department (Employer) violated the Judiciary Employees Labor Relations Act (JELRA) by implementing new restrictions on employees' rights to monitor and use personal cell phones in the workplace. VSEA contended that the Employer's implementations of the restrictions on employees' rights to monitor and use personal cell phones in the workplace constituted a unilateral change in working conditions in violation of the employer's duty to bargain in good faith.

In determining whether an improper unilateral change occurred, the VLRB noted that the State Employees Labor Relations Act and JELRA contain essentially identical pertinent language and the broadest scope of bargaining of the Vermont labor relations statutes. JELRA provides in pertinent part: "All matters relating to the relationship between the employer and employees are subject to collective bargaining to the extent those matters are not prescribed or controlled by law including: . . . working conditions; . . . rules for personnel administration . . ."

VSEA acknowledged that the Employer had the right to unilaterally restrict certain personal cell phone use in the workplace. Examples of restrictions which VSEA indicated are not problematic are prohibiting personal cell phone use in courtrooms, when a member of the public needs assistance, when answering the office phone, or when conducting personal business at a time employees should be working. The VLRB indicated that this was an appropriate recognition by VSEA that, despite the broad scope of bargaining under JELRA, the Employer has the unilateral right to prohibit cell phone use to ensure employees are attending to the work of the Judiciary. The VLRB then stated:

> In seeking to attain this balance when looking at a change in work rules, policies, and procedures, we need to weigh the nexus between the change and the employer's need to manage the productivity of the workplace with ►

Vermont Labor Relations Board, cont.

the union's right to bargain working conditions and rules for personnel administration. In this case, we find that the Employer requiring no use of cell phones in the courtroom, limiting the presence of mobile devises on the desk top, and having personal phones' rings off have a strong nexus to the need to manage work productivity and thus the employer can set such policy.

However, the Employer failed to show that limiting the viewing of personal phones and returning calls or texts only to the lunchbreak has a strong, or even any, impact on work productivity. There was even evidence that stepping out to use a personal phone to call or text might be less disruptive to others than using the Employer's landline and thus increase productivity. Accordingly, the Washington Unit cell phone policy impacts the employer-employee relationship and constitutes a required subject of bargaining in this respect to the extent that limiting the viewing of personal phones and returning calls and texts to the lunchbreak constituted a change for affected employees.

Employees in the Washington Unit have other specific and unscheduled work breaks during the work day in which they are not actively performing work duties. Prior to the implementation of the policy, the Barre office did not enforce restrictions limiting personal cell phone use to scheduled lunch breaks. . . . Further, the practice in the Montpelier office of the Washington Unit prior to implementation of the cell phone policy was that employees were allowed to use personal cell phones beyond lunch breaks. The Court Operations Manager allowed employees to check their personal cell phones without permission when they go to the bathroom, or get coffee or a bagel, in the office. The terms of the cell phone policy differed from this practice.

The unilateral change in the policy prohibiting personal cell phone use during non-lunch breaks thus impacts the employer-employee relationship and constitutes a required subject of bargaining. A contrary ruling would have the strange consequence of the Employer having the ability to implement more restrictions on personal cell phone use than use of state equipment under circumstances where there is no interference with performance of job duties. The Employer's Electronic Communications and Internet Use Policy "allows a limited degree of personal use" of Judiciary telephones, internet services and work emails if the use does "not interfere with an employee's performance of job duties" and the use does "not impose a burden on State resources as a ▶

Vermont Labor Relations Board, cont.

> result of frequency or volume of use." Personal cell phone use that does not interfere with performance of duties places no burden on State resources and does not warrant greater restrictions absent negotiations with the employees' collective bargaining representative.
>
> We appreciate that the cell phone policy addresses use of a personal electronic device that an employee brings into the workplace on his or her own accord that has the potential to have adverse impact on productivity and be disruptive to co-workers. The Employer may unilaterally restrict personal cell phone and/or smart phone use to the extent that it has the potential to adversely impact the productivity of the employee with the device or co-workers. However, unilateral restrictions run afoul of the requirement to bargain when interference with an employees' performance of job duties is not involved.

The VLRB next addressed whether the Washington Unit cell phone policy made an improper unilateral change on a matter affecting the employer-employee relationship by requiring an employee, when making a request to the Court Operations Manager to have a personal cell phone out on their desk due to an out of the ordinary personal issue, to inform the Court Operations Manager of the basics of the personal issue. The Board stated:

> The broad capabilities of smartphones, which include but go well beyond cell phone use, allow management to generally regulate employee access to them unilaterally during work hours. The distracting and addictive nature of smartphones creates the potential for employee access to them to adversely impact employee productivity. In carrying out its mission, management has the unilateral right to take steps to ensure that employee access to such a device does not interfere with performance of duties.
>
> The refined issue which concerns us is whether the unilateral management right to generally regulate employee access to cell phones, including a smartphone containing a cell phone, extends to the ability to specifically require employees to inform the Court Operations Manager of the basics of an out of the ordinary personal issue before being allowed to have their personal cell phones out on their desk. Prior to the implementation of the cell phone policy, the evidence does not indicate that management in the Barre office so required employees to inform the Court Operations Manager. The ►

Vermont Labor Relations Board, cont.

practice in the Montpelier office of the Washington Unit prior to implementation of the cell phone policy was for employees to provide general information to the Court Operations Manager when they requested to have personal cell phones out on their desks . . . The Court Operations Manager in the Montpelier office has never denied such a request and has never asked an employee for more information when they make a request.

The implementation of the cell phone policy has resulted in some employees being required to provide sensitive personal information to management when previously they did not have to do so, and added uncertainty for other employees as to the extent of personal information which they are required to provide to management to conform to the policy. We conclude that this infringes on employees' right to privacy by requiring employees to potentially divulge sensitive personal information to management in order to gain greater access to personal cell phone use outside of lunch breaks. A requirement to provide details as to why on a special occasion an employee needs to have their mobile device in sight on top of their desk is a significant intrusion on the employee's privacy with little or no offsetting gain of productivity for the employer.

This is a unilateral change in a matter affecting the employer-employee relationship and constitutes a required subject of bargaining. The reasonableness of the frequency in which employees may have personal cell phones out on their desks, the degree of access of employees to their personal device, and the required notice employees have to provide to management of the involved personal issue are specific areas of negotiations on this matter. We note that the required scope of bargaining is limited in situations where someone overuses the privilege of having the phone on their desktop to the point where it does affect productivity. Then, the Employer may unilaterally take corrective actions including requiring more details of the need, requiring the use of employer landlines, and even imposing discipline.

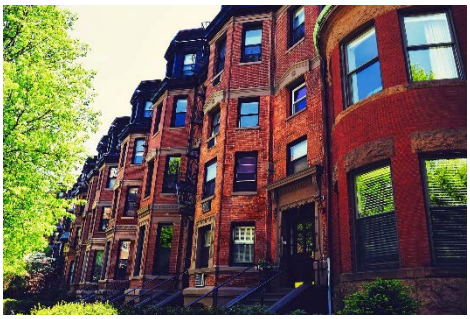
Again, a contrary ruling that bargaining is not required in this area would have the consequence of the Employer having the ability to implement greater restrictions on personal cell phone use compared to the use of state equipment than is warranted. The limited degree of personal use of Judiciary telephones allowed by the Employer's Electronic Communications and ▶

Vermont Labor Relations Board, cont.

> Internet Use Policy contemplates that employees may discuss personal matters on Judiciary telephones without having to divulge to management the personal issues discussed. The same is not true under the cell phone policy implemented in the Washington Unit, and this is an appropriate subject of bargaining with the employees' collective bargaining representative.

In sum, the VLRB concluded that the Employer interfered with employee rights and violated its duty to bargain in good faith in issuing a cell phone policy in the Washington Unit to the extent of: 1) limiting personal cell phone use to lunch breaks; and 2) requiring an employee, when making a request to the Court Operations Manager to have a personal cell phone out on their desk due to an out of the ordinary personal issue, to inform the Court Operations Manager of the basics of the personal issue. The Board determined that the cell phone policy did not otherwise implicate the duty to bargain with VSEA.

As a remedy, the VLRB required the Employer to cease and desist from implementing the cell phone policy imposed in the Washington Unit, and rescind the cell phone policy. The Board also required the Employer to post the decision on bulletin boards in the Washington Unit normally used for employer-employee communications, and to send all affected employees an e-mail transmission of our Order in this matter. *Vermont State Employees' Association v. State of Vermont Judiciary Department (re: Use of Personal Cell Phones)*, 34 VLRB 155 (October 20, 2017). ■



CITY of BOSTON

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With its rich history, diverse neighborhoods, and legacy of arts, culture, education and cuisine, Boston has something for everyone.

The States

WASHINGTON STATE PUBLIC EMPLOYMENT RELATIONS COMMISSION

Online Micro-Training

PERC recently launched on-demand micro-training that focuses on the question "What is Mediation?" This short training module is aimed at the increasing number of participants in our mediation processes who have had no exposure to mediation processes. Visit www.perc.wa.gov to access the training.

Decision of Note

Shift staffing is generally a fundamental prerogative of management. If the union can show a demonstratedly direct relationship between shift staffing and employee safety and workload, the balance may tip and the issue may become a mandatory subject of bargaining. The Commission holds that an employer who filed the unfair labor practice complaint did not present evidence to show that its interest in unilaterally maintaining staffing levels was greater than the union's and public's interest in workload and safety.

The Commission and Washington courts have held that "general shift staff levels are fundamental prerogatives of management" and a minimum shift staffing clause is generally not considered to be a mandatory subject of bargaining; rather, it is a permissive subject of bargaining. A union may overcome that presumption by showing a demonstratedly direct relationship between shift staffing and employee safety and workload, which may tip the balance and render the issue a mandatory subject of bargaining.

The parties in this case (the City fire department and fire fighters) had a minimum shift staffing level clause in their collective bargaining agreement. That same article with the same minimum shift staffing level has been in prior agreements dating back 40 years. The union sought to bargain an increase to the minimum staffing level and the employer refused, claiming that it was a non-mandatory subject of bargaining. The employer filed the unfair labor practice complaint. A hearing examiner found for the employer on the basis that shift staffing is a non-mandatory subject of bargaining.

On appeal to the Commission, the Commission found that the union submitted evidence demonstrating a direct relationship between staffing and employee safety and workload. Specifically, the union showed that call volume had increased fourfold while staffing had ▶

The States

Washington PERC, cont.

remained static, which impacted call response time and employee health and safety. This demonstration of a direct relationship between shift staffing and employee health and safety coupled with the public's interest in receiving assistance from a firefighter that is not physically, emotionally, or psychologically fatigued from the effects of responding to 10 to 16 calls per shift tipped the balance and rendered the issue a mandatory subject of bargaining. The case is currently on appeal to the Washington state court of appeals. *City of Everett (International Association of Fire Fighters, Local 46),* Decision 12671-A (PECB, 2017). ■

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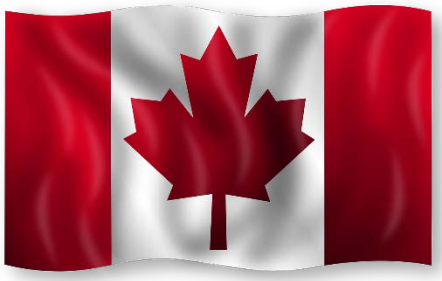
Please join us for ALRA's 67th Annual Conference in historic Boston, Massachusetts

July 21 - 24, 2017

More information is available at www.alra.org

Federal - Canada



Canada Industrial Relations Board

Back row: Barbara Mittleman, PT Member; Richard Brabander, Member; André Lecavalier, Member; Norman Rivard, Member; Gaétan Ménard, Member; Paul Moist, PT Member. Front row: Annie G. Berthiaume, Vice-Chair; Louise Fecteau, Vice-Chair; Ginette Brazeau, Chair; Patric F. Whyte, Vice-Chair; Allison Smith, Vice-Chair. Not pictured: Lynne J. Poirier, PT Vice-Chair; Paul Love, PT Vice-Chair; Thomas Brady, Member, Lisa Addario, Member and Daniel Thimineur, Member.

Member Updates

The Canada Industrial Relations Board is a an independent, representational, quasi-judicial tribunal. As required by section 9(2) of the *Canada Labour Code*, the Board is composed of a Chairperson; Vice-Chairpersons; and Members representing, in equal numbers, employees and employers.

The Board is pleased to announce several reappointments and new appointments to the Board. The Governor-in-Council has confirmed the re-appointment of Ms. Louise Fecteau as full time Vice-Chair of the Board for a term of three years, effective December 1, 2017. The Governor-in-Council also confirmed the re-appointment of Mr. Gaétan Ménard, effective December 14, 2017, and Mr. Richard Brabander, effective December 22, 2017, as full-time representative members of the Board for a term of three years. Ms. Barbara Mittleman and Mr. Paul Moist were each reappointed as part-time members for a term ►

Federal - Canada

Canada Industrial Relations Board, cont.

of three years, effective December 21, 2017. The Board also welcomed the appointment of two new part-time Vice-Chairs to the Board, Ms. Lynne Poirier from Nova Scotia, effective November 29, 2017, and Mr. Paul Love from British Columbia, effective December 1, 2017, each for a term of three years. The Governor-in-Council also announced the appointment of Mr. Daniel Thimineur as a full-time representative member of the Board for a term of three years, effective January 29, 2018.

The Board is currently composed of **Ginette Brazeau**, Chairperson; **Annie G. Berthiaume**, **Louise Fecteau**, and **Allison Smith**, Vice-Chairpersons; **Paul Love** and **Lynne Poirier,** part-time Vice-Chairpersons; **Richard Brabander**, **Thomas Brady** and **André Lecavalier**, Members representing employers; **Lisa Addario**, **Gaétan Ménard,** and **Daniel Thimineur**, Members representing employees; **Barbara Mittleman**, part-time Member representing employers; and **Paul Moist**, part-time Member representing employees. A biography for each Board Member can be found on the Board's Website (www.cirb-ccri.gc.ca). ■

Mark Your Calendar!

July 21-24, 2018

67th Annual ALRA Conference

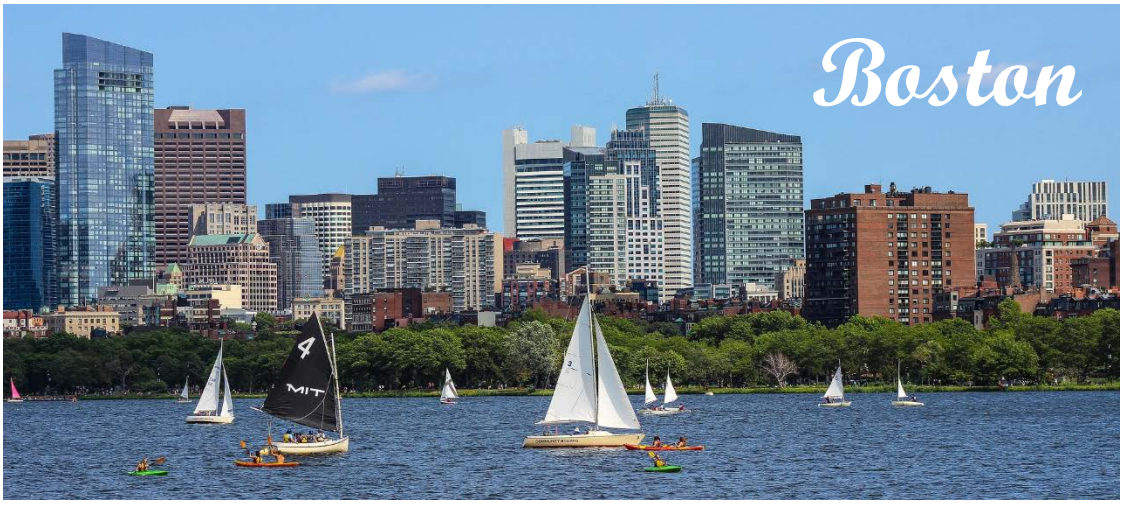


Photo courtesy of www.pixabay.com

Boston, Massachusetts skyline and waterfront

Ontario Labour Relations Board

Recent Developments, Important Decisions and Legislative Update

Recent Developments

Since the Board's last update, the Board has implemented its **e-filing** project allowing parties to file applications, submissions and documents with the Board electronically. This involved redrafting many of the Board's Forms and Rules and is being phased in over time.

Important Decisions

Stay Motion – *Brookfield Multiplex Construction Canada Limited and/or Brookfield Multiplex Canada HSP Holdings Limited and/or Brookfield Multiplex Canada Holdings Limited v Labourers' International Union of North America, Ontario Provincial District Council and The Ontario Labour Relations Board*, 2018 ONSC 548 (Div. Court). Panel: Justice C. Horkins

The applicants sought a stay of the Board's decision pending judicial review. At issue in the Board's Decision was whether two individuals were employees of the applicant. The Board found that Multiplex was the employer of two individuals and consequently certified all construction labourers employed by Multiplex.

Multiplex filed an application for judicial review asserting that the Board breached the rules of natural justice and procedural fairness by excluding relevant evidence going to the issue of whether Multiplex was the true employer. Specifically, Multiplex wanted to introduce evidence about the roles of the two foremen after the date of application. Additionally, Multiplex brought an application to stay the Board's decision pending the outcome of the judicial review.

The applicants argued that the test on a stay application of the Board's decisions is that there is a serious issue to be tried, not a strong *prima facie* case. Additionally, the applicants argued the refusal to allow evidence is denial of natural justice.

The Court held that given the strong privative clauses in the *Labour Relations Act,* and the fact that the Board is a specialized tribunal has "established and recognized expertise ►

Ontario Labour Relations Board, cont.

in the 'complex and sensitive field' of labour law" and is entitled to significant deference, the applicants must establish a strong *prima facie* case on judicial review to be successful on a motion to stay the Board's Decision.

Second, regarding the Board's powers to exclude evidence, the Court found that under section 111 of the *Labour Relations Act*, the Board has the discretion to refuse post-application evidence. The Court held that the Board's decision to exclude evidence is reviewed on the basis of reasonableness and not on the basis of a violation of natural justice. The Court concluded that Multiplex did not establish a strong *prima facie* case and therefore, their motion to stay was denied.

Application For Certification – Charter of Rights and Freedoms – *Hermanns Contracting Limited,* 2017 CanLII 82853 (ON LRB). Panel: Jack Slaughter

In this Application for Certification of horticultural workers, the Union challenged the constitutionality of the of section 3(c) of the *Labour Relations Act* (the *Act*), which provides that the *Act* does not apply to individuals employed by an employer whose primary business is agriculture or horticulture on the basis that it violated individuals' constitutional freedom of association rights. The Board found that there has been substantial interference with the employees' freedom of association. The Board noted that the freedom of association does not guarantee a collective bargaining scheme of one's choice, but does have some minimal requirements allowing for an association. The Board held that the absence of another scheme to engage the freedom of association of horticulture workers means that the workers have no access to their freedom to associate. The Board found that section 3(c) of the *Act* violated the constitution and was inoperative in this context for the purpose of this proceeding.

Legislative Update

Effective January 1, 2018, Ontario enacted Bill 148 the *Fair Workplaces, Better Jobs Act, 2017* (the *Act*) which implemented major amendments to the *Employment Standards Act* and *Labour Relations Act*.

With respect to the *Employment Standards Act*, the *Act* added additional leaves of absence for employees, increased vacation entitlements, increased minimum wage, provided additional minimum standards for employees who are referred through ▶

Ontario Labour Relations Board, cont.

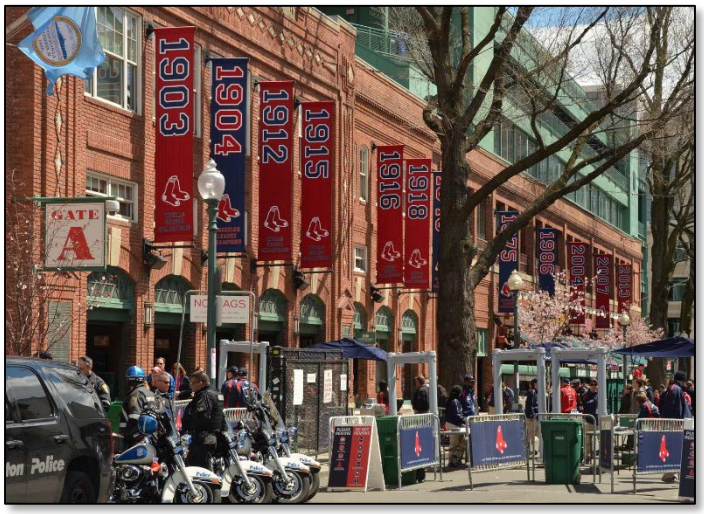
Legislative Update, cont.

temporary help agencies, and instituted penalties for employers who treat employees as independent contractors.

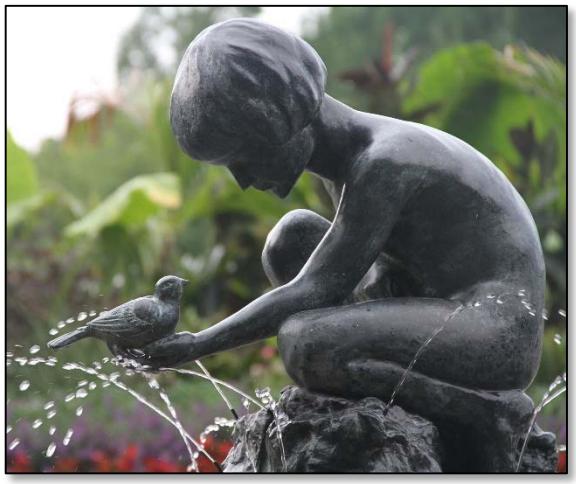
With respect to the *Labour Relations Act*, *inter alia* the *Act* provides that unions can be certified without a vote in specified industries (building services, home care and community services, and temporary help agency industries) if they can demonstrate at the time they file their application that at least 55% of the individuals in the bargaining unit are members of the union. Additionally, the *Act* allows unions to apply for an order directing the employer to provide contact information for its employees in a bargaining unit if the union can demonstrate that at least 20% of individuals in the applied for bargaining unit are members of the union.

In addition to creating these new applications, the bill provides a return to work protocol following a strike, a new process for first contract arbitration-mediation and grants the Board additional discretion in granting interim relief applications.

The Board has already received and processed applications under the new provisions of the *Act*. ■



*Boston's famous **Fenway Park**, home of the Boston Red Sox*



*"**Boy and Bird**" (1934) by sculptor Bashka Paeff graces a fountain in the **Boston Public Garden***

Photos courtesy of www.pixabay.com