ALRA Advisor

February 2017

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Portland, Oregon

Upcoming 66th Annual ALRA Conference

Portland, Oregon – July 2017

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

alra.org

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ARTICLES AND PHOTOS:
All articles are subject to editing for length and clarity. Photos/images should be at a resolution of at least 100 kb .jpg, preferably 500 kb or greater.

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ON THE COVER: Portland, Oregon with Mount Hood in the background.

From the President . . .

Ginette Brazeau

Message from the ALRA President

With its unofficial slogan of "Keep Portland Weird," Portland provides an environment that fosters individual expression and is celebrated for its tolerant culture. There could not have been a better choice of destination for the 2017 ALRA Conference and backdrop to this year's projected conversations around the overall theme for the Conference: *Labour Relations in 2017: Relic or Relevant?* The planning committees are continuing their work to ensure the conference offers plenty of opportunity to engage in discussions on the recent developments at the state and national levels with a change in political directions for many. Advocates' Day will feature key topics of the day, including the changing course on trade agreements, the minimum wage dilemma and collective activism on a number of work related issues. Collective bargaining is still very much present and available for a large number of workers in North America and it is our role and responsibility to safeguard the process and lead the way in times of uncertainty. That is why we will showcase success stories of employers and trade unions that have worked together collaboratively to ensure the success of their business.

As in previous years, several sessions during the conference are dedicated to our own professional development through formats that help us share best practices, discuss new tools and ideas and reflect on the ethical considerations that permeate our work as neutral practitioners. I am indebted to the members of the Program, Professional Development and Arrangements Committees that are dedicating a significant amount of their time to ensure a successful conference that provides participants with targeted and effective sessions that support our learning and development.

In these uncertain times, the partnership inherent in the mission of ALRA is more relevant than ever. As always, the annual conference is the centerpiece of our activities. In my term as President, I have also asked what more can we do as partners to ensure that all ALRA members have opportunities to develop. Our Executive Board will be reviewing the Training Grants Program that historically served as a pillar of ALRA, to determine whether it would be relevant and of assistance to our member agencies today. Our strength is our membership and I strongly believe that we need to support and capitalize on that strength.

In the meantime, look for the conference registration link soon on our website. In addition to the varied learning opportunities that the conference will offer, Portland, also known as the Rose City, is uniquely situated to appeal to everyone's interest. From Portland, you can easily spend a day in the mountains, a day on the coast, a day touring wine country, or a day exploring the eclectic side of the city. In addition to the noted Oregon wineries, the area ►

From the President . . .

Message from the President, cont.

is celebrated for its craft breweries and distilleries and varied array of restaurants. And, best of all, no sales tax! The conference hotel is "The Benson," a Portland landmark since 1913 that is within walking distance of all that Portland has to offer.

I hope many of you will be joining us on the West Coast in July for what promises to be an exciting conference. ■

Meet the ALRA Executive Board

Ginette Brazeau, President – *Canada Industrial Relations Board*

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

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

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

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

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

Jennifer Abruzzo, Member – *National Labor Relations Board*

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

Catherine Gilbert, Member – *Ontario Labour Relations Board*

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

Peter Simpson, Member – *Federal Mediation & Conciliation Service (Canada)*

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

ALRA Committees

Conference Arrangements Committee – Mike Sellars & Beth Schindler, Co-Chairs

Professional Development Committee – Mike Sellars & Sheri King, Co-Chairs

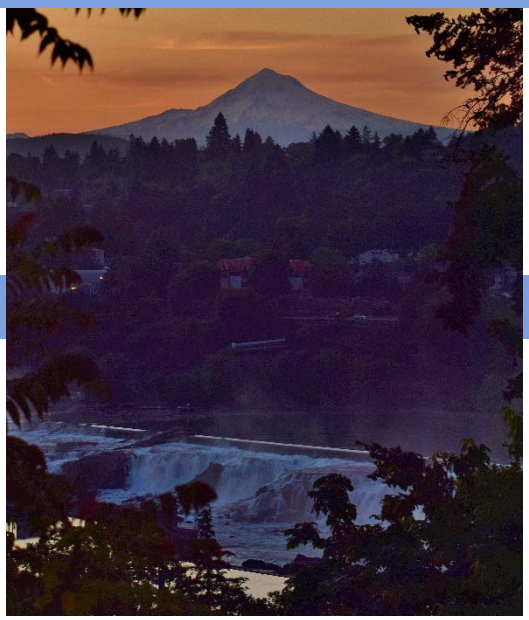
Program Committee – Scot Beckenbaugh & Kathy Peters, Co-Chairs

Publications, Communications & Technology Committee – Sylvie Guilbert, Chair

2017 ALRA Conference

Portland, Oregon

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



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Conference Schedule

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

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

The ALRA Conference Planning Committee is working diligently to put together a diverse and stimulating program. The full conference schedule will be posted on www.alra.org in the near future.

Travel Grants

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

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Portland, Oregon

ALRArchives

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

ALRA's Annual Conference

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

In the last edition of the Advisor, the *ALRArchives* column focused on the evolving nature of the ALRA organizational structure. This column features the development of what have become two longstanding features of the annual ALRA conference: Advocates Day and ALRAcademy.

Advocates Day, like the existing administrative structure, was not a feature of ALRA for much of its history. Advocates Day was not included as a regular feature of ALRA conferences until the 1982 conference in San Francisco. The April 1982 ALRA newsletter reported:

> (T)he first day of the conference . . . is designed as a one day conference within our conference to which advocates and neutrals will be invited. The program on that day will be broad in scope in order to appeal both to our members and to non-members.

This Advocates Day experiment went well, as noted in the December 1982 ALRA newsletter:

> This proved to be successful both financially and in terms of providing an opportunity for ALRA members to meet and mingle with advocates and other neutrals for one day. At the same time, it left the remaining days of the conference for sharing among representatives of our member agencies.

Advocates Day has not been without it detractors, but has maintained sufficient support over the years to become a regular component of annual conferences. As ALRA President Marv Schurke stated in a 1987 ALRA newsletter:

> The decision to admit the general public, even for just one day of a (multi-day) meeting, was (and perhaps still is) the subject of some debate . . . ALRA's public programs have been greeted with enthusiasm, however, and there can be little doubt that ALRA's 'Professional Development Fund' has been the beneficiary of Advocates Day.

ALRA's Conference History, cont.

Advocates Day has maintained its viability over the years as it has provided a first-rate program for the local labor-management community with prominent speakers from throughout North America addressing the leading labor relations issues of the day, as well as providing sufficient revenues on balance for ALRA to support the professional development of its member agencies.

ALRAcademy, too, did not become part of the ALRA landscape until well into its history. There are still a few ALRA "old-timers" who remember "Airlie House" and "Wingspread". These were forerunners of ALRAcademy.

For ten years, the United States Department of Labor, through its Labor Management Relations Division, conducted training sessions at Airlie House, a conference center in northern Virginia, for newly appointed members and professional staff of state public employment relations boards. Federal funding cutbacks resulted in the end of Airlie House programs in 1981.

The loss of training was felt, and ALRA revived such training in 1986 at the Johnson Foundation's Wingspread Conference Center in Wisconsin. The U.S. Department of Labor's Bureau of Labor-Management Relations and Cooperative Programs, the American Arbitration Association and the Johnson Foundation co-sponsored the program with ALRA and defrayed many of the expenses. Approximately 40 individuals participated in the two and a half day program, entitled "A Symposium on Labor-Management Dispute Resolution: The State of the Art."

The success of the Wingspread program resulted in the ALRA Executive Board initially deciding to offer similar training on an every other year basis. ALRAcademy was born, the first one being offered in 1988 in Seattle, Washington, on the Friday through Sunday immediately preceding the annual conference. The second ALRAcademy was held immediately preceding the 1990 annual conference in Cincinnati.

The continuing popularity of ALRAcademy resulted in it being offered more frequently for new members and staffs of Boards and Commissions and on an annual basis from 1990 through 2012, immediately preceding annual conferences. The training began on Friday evening and continued through Sunday morning until the conference began on Sunday afternoon. It provided an introduction to the world of labor relations, the ethics of neutrality and the services and collegiality of ALRA. The academy program reviewed public and ►

ALRArchives

ALRA's Conference History, cont.

private sector labor law, representation procedures, unfair labor practice charges, dispute resolution techniques, hearing procedures and professional ethics. ALRAcademy attendees consistently rated the program and presenters as outstanding.

The severe fiscal constraints of recent years have adversely affected the ability of many member agencies to expend the funds to send members and staff to ALRAcademy. This resulted in ALRAcademy not being offered in 2013. ALRAcademy was resurrected in a more condensed format in 2015 and 2016. The topics addressed during a four-hour session on the Saturday afternoon immediately preceding the annual conference were a comparison of Canadian and U.S. labor relations laws, neutrality, and mediation. There have been many attendees at these sessions the last two years. ■

Mark Your Calendar!

July 22-25, 2017

66th Annual ALRA Conference in Portland, Oregon

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The International Rose Test Garden, Portland, Oregon

Federal - United States

National Labor Relations Board

The President appoints Philip A. Miscimarra Acting Chairman of the NLRB

Acting Chairman Philip A. Miscimarra

President Donald J. Trump has named Board Member **Philip A. Miscimarra** Acting Chairman of the National Labor Relations Board.

"It is an honor to be named NLRB Acting Chairman by the President," Miscimarra said. "I remain committed to the task that Congress has assigned to the Board, which is to foster stability and to apply the National Labor Relations Act in an even-handed manner that serves the interests of employees, employers and unions throughout the country."

Miscimarra also recognized former Chairman **Mark Gaston Pearce** for his service on the Board. Pearce will continue as a Board Member in a term expiring on August 27, 2018 and has served as a Board Member since 2010, including as Chairman since 2011. The Board also currently includes Board Member **Lauren McFerran**, whose term expires on December 16, 2019. Two Board Member seats are currently vacant.

Miscimarra has served as a Board Member since August 7, 2013. He was nominated by President Obama on April 9, 2013, and he was approved unanimously by the Senate Committee on Health, Education, Labor and Pensions on May 22, 2013. He was confirmed by the Senate on July 30, 2013, and his current term expires on December 16, 2017.

Before joining the Board, Acting Chairman Miscimarra was a Senior Fellow at the University of Pennsylvania's Wharton Business School in the Wharton Center for Human Resources, and a labor and employment law partner with Morgan Lewis & Bockius LLP in Chicago. He also previously worked as a labor and employment attorney with Seyfarth Shaw LLP, Murphy Smith & Polk PC (now the Chicago office of Ogletree, Deakins, Nash, Smoak & Stewart, PC), and Reed Smith Shaw & McClay (now Reed Smith LLP). ■

Federal - United States

National Labor Relations Board, cont.

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

NLRB Supreme Court Roundup

Submitted by Jennifer Abruzzo, Deputy General Counsel, NLRB
Written by NLRB attorney Amanda Jaret

As you may know, the current U.S. Supreme Court term is well under way. The Court is already beginning to decide which cases it will hear during its next term, which begins in October 2017. The most prominent Supreme Court case involving the NLRB this term is *NLRB v. SW General, Inc.,* a case involving the validity of former Acting General Counsel Lafe Solomon's appointment under the *Federal Vacancies Reform Act of 1998*. On November 7, 2016, the Court heard oral argument in the case. The Court has not yet issued its decision.

Next term, the NLRB will be involved in a case that raises significant issues about the validity of certain kinds of individual arbitration agreements. On January 13, 2017, the Court granted petitions for writs of certiorari in three cases related to the NLRB's decisions in *D. R. Horton* and *Murphy Oil USA, Inc*. The issue in these cases is whether an employer unlawfully interferes with its employees' rights under the *National Labor Relations Act* by maintaining an arbitration policy that requires employees to resolve employment disputes in individual arbitration and precludes employees from filing or participating in class and collective actions. ►

National Labor Relations Board, cont.

NLRB Supreme Court Round Up, cont.

In *D. R. Horton* and *Murphy Oil,* the Board held that employers' policies that preclude employees from pursuing class or collective actions violate Section 8(a)(1) of the Act because they interfere with employees' Section 7 rights to join together for the purpose of mutual aid or protection. The United States Court of Appeals for the Fifth Circuit did not enforce the Board's order on appeal in *NLRB v. Murphy Oil USA, Inc.*, but the United States Courts of Appeals for the Seventh and Ninth Circuits endorsed the Board's interpretation of the Act and its approach in *D. R. Horton* and *Murphy Oil* in *Epic Systems Corp. v. Lewis* and *Ernst & Young LLP v. Morris*, respectively.

Because two circuit courts took the Board's position and one did not, the Supreme Court has stepped in to resolve the circuit split among the Courts of Appeals.

Stay tuned to hear more about both *S.W. General* and the consolidated cases that address the Board's decisions in *D. R. Horton* and *Murphy Oil* in one of our future issues. ■

Federal - United States

Federal Mediation & Conciliation Service

The President appoints John Pinto Acting Director of the FMCS

Acting Director John Pinto

John Pinto, formerly Deputy Director for Field Operations, is the newly named Acting Director of the U.S. Federal Mediation & Conciliation Service.

Mr. Pinto will serve as Acting Director until a replacement is appointed to the post by newly elected President Trump and confirmed by the U.S. Senate. The position of FMCS Director is a Presidential appointment subject to Senate confirmation.

In his new role, Mr. Pinto oversees all aspects of the administration of FMCS operations and the Washington headquarters, including formulating consistent policies and procedures across regions, implementing the Agency's goals and priorities, reviewing and revising, as necessary, the field office structure, and ensuring maximum support to all field staff, including administrative assistants, mediators, and managers.

Mr. Pinto began his career as a field mediator with FMCS in 1988 and worked in the Pittsburgh, PA regional office from 1989. In 1999, Mr. Pinto became a Director of Mediation Services (currently Regional Director) for FMCS Region 3, based in Pittsburgh. In March 2015 he was appointed Manager of Field Operations, and assumed the duties of Deputy Director, Field Operations in 2016.

Over the course of his career with FMCS, Mr. Pinto has served as the lead mediator in over 700 collective bargaining mediation meetings across a variety of industries including manufacturing, service, freight, oil & chemical, steel, healthcare, utilities, law enforcement and education. Mr. Pinto has also worked on numerous training efforts in the area of collaborative labour-management processes in the federal, public, and private sectors.

He earned a Masters Degree in Personnel Administration & Industrial Relations from St. Francis College in 1992. He received a B.A. Degree from Antioch College in 1986. ■

Federal - United States

Federal Mediation & Conciliation Service, cont.

FMCS Headquarters Relocates to State-of-the-Art Offices

The FMCS opened its doors in two separate open house events for scores of visitors in January to show off its new headquarters with state-of-the-art meeting and conferencing facilities and to demonstrate the latest in dispute resolution techniques and science.

The Agency was required to relocate its headquarters from its longstanding address at 2100 K Street, NW in Washington, D.C. due to the planned demolition of the building. Although unquestionably disruptive to the normal flow of Agency operations, the relocation was also seen as an opportunity to re-align headquarters space with re-organized FMCS administrative operations.

The relocation represented an opportunity to expand FMCS's training and mediation space, shrink the footprint that its support operations required, and rethink how employees could work together more effectively. Efforts to secure new space, implement design and build-out requirements, plan for continuation of operations and transition nationwide IT server operations during the move-in period had to be completed by an October 2016 deadline. A focus of the design for the new FMCS headquarters space was to meet the 21st century needs of labor, management, and government customers by ensuring state-of-the-art meeting and training facilities.

As an Agency whose primary mission involves direct customer engagement, whether through training, mediation or facilitation of labor-management and government ►

Federal Mediation & Conciliation Service, cont.

Headquarters Relocation, cont.

relations, the ability to deliver effective and efficient services with comprehensive, versatile, and reliable technology was an essential design consideration. User-friendly and comprehensive technologies were installed to allow FMCS mediators to offer adaptable meetings and training programs able to handle in-person and remote participants seamlessly.

Additionally, the final headquarters design differed substantially in layout for FMCS administrative operations, shifting from a multi-floor configuration at 2100 K Street NW to a single-floor layout at the new FMCS offices. The single-floor design offered the Agency and its employees greater capability for fluid collaboration between different support functions, modeling the problem-solving processes and principles the Agency promotes as best practices for organizational success. Employees of the FMCS Headquarters reported for duty at the new 250 E Street SW location on October 24, 2016, shortly after the completion of the 2016 fiscal year.

As a result of the positive labor-management relationship that had been developed at FMCS between the Washington headquarters employee bargaining unit and Agency leaders, FMCS reaped the benefit of a highly productive exchange of ideas and joint problem-solving that led to a reduced Agency footprint, improved work flow and processes and new, more efficient space design and service delivery. ■

This page and prior page: FMCS staff at work in their new headquarters

Federal - United States

Federal Mediation & Conciliation Service, cont.

FMCS Honors American Water & the Utility Workers Union of America with 2016 Director's Award for Excellence

In December, the FMCS honored the outstanding leadership of the **American Water Works Company, Inc.** and **the Utility Workers Union of America** (UWUA) as a shining example of labor-management cooperation in the United States with the presentation of the FMCS Director's Award for Excellence in Labor-Management Cooperation.

In bestowing the Agency's highest award to labor and management, FMCS cited American Water CEO Susan Story and Utility Workers Union of America President Mike Langford for their efforts to rebuild the national water infrastructure with public-private partnerships and to improve the skills and safety of American Water employees with training.

American Water Works, headquartered in New Jersey, is the largest publicly traded water and wastewater utility company in the country, serving over 15 million people in 47 states and Ontario, Canada. The Utility Workers Union of America is the company's largest union.

Many years of contentious labor-management relations between the company and union changed when the company and union agreed to explore a more cooperative labor-management approach and sought FMCS assistance in transforming their relationship. With FMCS guidance, the new approach became an immediate success story in labor-management relations, resulting in a number of joint projects and awards, including recognition in 2016 for American Water as the only water utility named to Newsweek magazine's list of 500 of "America's Top Green Companies."

American Water and the UWUA spoke at the FMCS 2016 Labor-Management Conference in Chicago in August where company and union officials discussed their experience in transforming the labor-management relationship and the benefits of their partnership. ■

FMCS Staff Honored with Top Agency Award

FMCS recognized 3 employees in December with the Agency's top performance award for 2016. Grants Program Specialist **Linda Gray-Broughton** and IT Director **Doug Jones** were honored with the FMCS Director's Award in a presentation ceremony for their outstanding work in 2016 in coordinating and executing the smooth relocation of FMCS Agency headquarters. The FMCS Director's Award also went to Buffalo-based Commissioner **Ken Armes** who was honored with the Agency's highest award for his outstanding work in mediating a packed schedule of high-profile disputes in the Buffalo area. ■

Federal - United States

Federal Mediation & Conciliation Service, cont.

FMCS Again Ranks Among the

Best Places to Work

in the Federal Government

FMCS was once again rated among the top five Federal government's small agencies in December as being a "best place to work" in the yearly 2016 government rankings by the non-profit Partnership for Public Service.

In two individual categories within the overall rankings, FMCS received a top-rated, number one ranking among small Federal agencies—for employee "Empowerment" and for "Training and Development." Throughout the other rating categories, FMCS ranked at or near the top.

The 2016 rankings add to many years of recognition for FMCS as a "best place to work" within the Federal government. FMCS achieved the Partnership's overall number one ranking in 2015 among all small Federal agencies. Based on previous surveys, FMCS was also the top-ranked "best place to work" among small agencies in 2005 and 2007. The rankings began in 2003, and since 2007 have been conducted annually. FMCS generally has scored among the top five finishers for small agencies in every year that Agency results were available for comparison.

Produced by the Partnership and Deloitte, the Best Places to Work rankings provide critical information to help individual agencies, the Administration, and Congress assess workplace health and performance. The FMCS carefully reviews and analyzes the results of each year's survey to identify areas where improvements can be made. 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.

Agencies are ranked based on the responses of their own employees to the government-wide, Federal Employee Viewpoint Survey conducted each year by the Office of Personnel Management. For details: http://bestplacestowork.org/BPTW/rankings/detail/FM00. ■

Indiana Education Employment Relations Board

Appellate Court Deference to Agency Determinations in Indiana

Submitted by John Henry and Sarah Cudahy, IEERB

***Jay Classroom Teachers Ass'n v. Jay Sch. Corp.*, 55 N.E.3d 813 (Ind. 2016).**

The Indiana Education Employment Relations Board (IEERB) recently won a case before the Indiana Supreme Court challenging its agency discretion and interpretation of the statutory scheme IEERB administers. The matter originated with a determination by IEERB that a collective bargaining agreement made through a statutory last best offer (LBO) process complied with Indiana law. The statutory LBO process requires the factfinder to accept one or the other party's submission. Jay School Corporation's LBO was accepted by the factfinder and affirmed by IEERB on appeal as having been deemed collectively bargained by operation of law.

The Jay Classroom Teachers Association (Teachers Association) challenged IEERB's final determination via judicial review by a trial court. The trial court deferred to IEERB's determination.

The Teachers Association appealed the trial court's judgment to the Indiana Court of Appeals, arguing that the trial court erred in concluding that IEERBs determination was reasonable and a provision in the accepted LBO contract violated teachers' statutory right to collectively bargain because it gave discretion to the School Superintendent to set new teacher pay. IEERB countered that the provision was statutorily collectively bargained, and the Superintendent was still limited by the bargained salary range and needed the authority to determine salaries in that range for new hires, as parties are not permitted to bargain during the school year in Indiana.

The Court of Appeals declined to defer to IEERB's interpretation of the statutory scheme. Reversing the trial court, it found that IEERB's interpretation conflicted with the statutory bargaining rights of the Teachers Association as to salary and wages and was therefore unreasonable. ►

The States & Territories

Indiana Education Employment Relations Board

Appellate Court Deference, cont.

Both the School and IEERB asked the Indiana Supreme Court to hear the case on the sole issue of IEERB's determination supporting the Superintendent's bargained salary flexibility.

The Indiana Supreme Court reversed the Court of Appeals, relying heavily on the Court of Appeals' failure to defer to IEERB's reasonable conclusion that the contractual provision at issue was collectively bargained and contained key checks on the superintendent's discretion. In so doing, the Court in Jay refreshed the deferential standard of review for agency determinations holding that:

> [W]e review an agency's conclusions of law de novo. Although an agency's interpretation of a statute presents a question of law entitled to de novo review, the agency's interpretation is given "great weight." In fact, "if the agency's interpretation is reasonable, we stop our analysis and need not move forward with any other proposed interpretation." This is true even if another party presents "an equally reasonable interpretation."

The Court's holding deferring to IEERB provides clear guidance that reasonable, rational agency action and statutory interpretation will be upheld in Indiana.

Note: IEERB's Executive Director and ALRA member, Sarah W. Cudahy, argued the case before the Indiana Supreme Court. Indeed, although IEERB was represented by the Indiana Attorney General's Office throughout the legal proceedings, IEERB staff participated in litigation strategy and drafting throughout the matter. ■

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Michigan Employment Relations Commission

Summaries of Noteworthy Decisions

City of Novi -and- Michigan Association of Public Employees

Case No. UC15 G-013, issued December 22, 2016

Issues: Unit Clarification; Historical Exclusion; Acquiescence; Community of Interest

Petition for Unit Clarification Granted: The GIS/NEAMS technician position was not historically excluded from the bargaining unit and shared a community of interest with unit members. Historical exclusion requires agreement by the parties. Petitioner was unaware of the position's existence until, six years after Petitioner's election as bargaining representative, the Employer posted a notice to fill the vacant position. Acquiescence in a position's exclusion from the bargaining unit does not occur unless the bargaining unit representative is aware of the position's existence. Unit clarification petition was appropriate to determine the bargaining unit status of the position. Although there were differences between GIS/NEAMS technician and bargaining unit positions, there were sufficient common factors to find that they shared a community of interest.

The Michigan Association of Public Employees (petitioner) represented non-supervisory, non-confidential employees of the City of Novi (employer).

The employer employed an individual in the position of GIS Technician from 2001 through 2005. At that time, the position was not included in a bargaining unit and the bargaining unit, currently represented by petitioner, was represented by Teamsters Local 214. The position became vacant in 2005 and remained vacant until 2015. Petitioner was elected to represent the bargaining unit in 2009. Petitioner was unaware of the position's existence because the position was not covered by the Teamsters' certification of representative or the collective bargaining agreement between the employer and the Teamsters. The employer never informed petitioner of the position's existence.

The employer posted notice of its intent to fill the GIS/NEAMS Technician position in May or June of 2015. Petitioner filed its petition to clarify its bargaining unit to include the GIS/NEAMS Technician position in July 2015. The employer contended that unit clarification was not appropriate because the position was the same as the GIS ►

Michigan Employment Relations Commission

Summaries of Noteworthy Decisions, cont.

Technician position that had existed since 2001. The employer contended that the position was historically excluded from the bargaining unit, and that it did not share a community of interest with the bargaining unit's members.

The Commission noted that a position is historically excluded from a bargaining unit when the employer and the union representing the bargaining unit expressly agree to its exclusion, or when they acquiesce in its exclusion. The Commission found that the record failed to establish that petitioner had ever agreed to exclude the position from the bargaining unit. The Commission also found that petitioner had not acquiesced in the position's exclusion since it filed the petition for unit clarification within a couple months of learning of the position's existence. The Commission noted that although there were several differences between the GIS/NEAMS Technician position and many of the bargaining unit positions, there were also common interests. The position and some unit members worked in the same location, performed work requiring specialized training, and had considerable independence in the performance of job duties. Thus, the Commission found the position shared a community of interest with bargaining unit members and granted the petition to clarify the bargaining unit to include the GIS/NEAMS Technician.

Davison Township -and- Police Officers Labor Council

Case No R15 J-090, issued October 17, 2016

Issues: Petition for Election; Community of Interest; Act 312 Eligibility; Emergency Telephone Operators

Election Directed: Clerk/Dispatcher Positions Shared a Community of Interest With Township Police Officers Based on Their Act 312 Eligibility; To Qualify as an Emergency Telephone Operator under Act 312, an Employee Must Relay Emergency Calls to Police, Fire, or Emergency Medical Service Personnel on a Regular and Continuing Basis; The Amount of Time Spent on Dispatch Duties, Compared to Other Job Functions, is Not Determinative of Act 312 Eligibility.

The Police Officers Labor Council (POLC) represented a bargaining unit consisting of police officers employed by Davison Township (Employer). POLC filed a petition to accrete the classification of dispatcher/clerk to its unit. The POLC asserted that the two dispatcher/ ►

Michigan Employment Relations Commission

Summaries of Noteworthy Decisions, cont.

clerks employed in the Employer's police department were eligible for binding interest arbitration under the Compulsory Arbitration of Labor Disputes in Police and Fire Departments Act, 1969 PA 312, MCL 423.231-247 (Act 312). POLC contended that the dispatcher/clerks qualified as emergency telephone operators under the Act because they dispatched calls for emergency services. The Employer argued that the dispatcher/clerk positions did not regularly dispatch emergency calls, were not otherwise eligible for Act 312 arbitration, and thus, lacked a community of interest with the police officers in the bargaining unit.

The Commission found that the record sufficiently established that the dispatcher/clerks handled emergency calls on more than an occasional basis, and that dispatching calls was a regular part of their responsibilities. The Commission reasoned that the percentage of time a position spends on dispatch duties versus other job functions is not determinative of Act 312 eligibility as long as the employees at issue regularly and continually relay emergency calls to police, fire, or emergency medical service personnel as part of their duties. As a result, the Commission concluded that the dispatcher/clerks were emergency telephone operators within the meaning of § 2(2) of Act 312, and therefore, shared a community of interest with the police officers in the POLC. The Commission directed an election for the dispatcher/clerks to vote whether they wish to accrete to the bargaining unit represented by POLC.

Ionia County Intermediate Education Association, MEA/NEA -and- Ionia County Intermediate School District

Case No. CU15 H-024, issued August 15, 2016 (before Court of Appeals)

Issues: Duty to Bargain; §15(3)(m); 2011 PA 103; Prohibited Subjects of Bargaining; Grievance Arbitration; Commission Rule 176a(3); Extensions of time

Unfair Labor Practice Found: Respondent Violated § 10(2)(d) by Demanding to Arbitrate a Grievance Over Teacher Discipline, a Prohibited Subject of Bargaining; Grievance Arbitration Regarding a Prohibited Subject Constitutes an Effort to Enforce Provisions Made Unenforceable by § 15(3); § 15(3)(m) Does Not Affect the Constitutional Right to Due Process or Enforcement of that Right in Forums Other Than Grievance Arbitration; the Order Granting Respondent's Request for an Extension of Time was Appropriately ►

Michigan Employment Relations Commission

Summaries of Noteworthy Decisions, cont.

Issued Because Commission Rule 176a(3) Does Not Require a Party to Give a Reason for a First Extension of Time.

The Ionia County Intermediate Education Association, MEA/NEA (Union) represented employees of the Ionia County Intermediate School District (Employer). The Employer learned that male and female students had been permitted to change clothes together in the same locker room. A probationary teacher and bargaining unit member, E, was questioned by the Employer about the incident but was not told that the questioning could lead to discipline. Subsequently, the Employer gave E a written reprimand. The Union filed a grievance alleging that E was denied due process because the Employer failed to tell her that the questioning was investigatory, that the Employer's investigation was not fair or thorough, and that the discipline was arbitrary and excessive.

The parties met at levels two and three of the grievance process. The Employer denied the Union's allegation that E had been denied due process because, as a probationary employee, she could be terminated for any reason. Further, the Employer pointed out that teacher discipline is a prohibited subject of bargaining within the sole discretion of the Employer. At level three of the grievance process, the Employer agreed to make changes regarding the locker room and stated that the parties had resolved the issue of E's written reprimand. The Union disagreed and formally demanded arbitration.

The Employer objected to the arbitration and informed the arbitrator that the grievance involved a prohibited subject of bargaining, which could not be subject to grievance arbitration. The arbitrator decided to hold the matter in abeyance until the issue of the arbitrability of the matter was resolved. The Union objected to the arbitrator's ruling, stated that it would no longer pursue the discipline part of the grievance, but wanted the arbitrator to decide the due process issue and the issue of working conditions that resulted in E's discipline. With those changes, the Union contended that the matter was properly before the arbitrator. The Employer responded by asking the arbitrator to dismiss the grievance for lack of arbitrability. The Employer then filed an unfair labor practice charge, and the arbitrator decided to hold the arbitration in abeyance until the issuance of a decision on the unfair labor practice charge.

The ALJ found that by demanding that the Employer arbitrate a grievance over teacher discipline, a prohibited subject of bargaining, the Union violated its duty to bargain in good faith. ►

Michigan Employment Relations Commission

Summaries of Noteworthy Decisions, cont.

On exceptions, the Commission explained that a public school employer's decision regarding teacher discipline is a prohibited subject of bargaining and can never become an enforceable part of a collective bargaining agreement. The Commission noted that parties may discuss prohibited subjects of bargaining and processing a grievance may be considered to be no more than discussion. However, taking that grievance to arbitration goes beyond the discussion stage and is much like insistence upon bargaining a prohibited subject when the other party has refused to do so. Citing its decision in *Pontiac Sch Dist*, 28 MPER 34 (2014), the Commission explained that because § 15(3)(m) prohibits parties from bargaining over a public school employer's decisions regarding teacher discipline, a demand to arbitrate a grievance over teacher discipline is illegal under § 15(3)(m).

Noting the Union's earlier assertion that it would drop the part of the grievance challenging E's discipline, but wished to pursue the due process issue, the Commission explained that a grievance questioning whether a public school employer complied with constitutional due process requirements in teacher discipline, questions the employer's decisions about disciplinary procedures. Thus, if the Union had limited its request for arbitration to the issue of whether E had been denied due process, the Union would be seeking review of decisions the Employer made regarding disciplinary procedures, a prohibited subject under § 15(3)(m).

The Commission went on to explain that that while § 15(3)(m) prohibits arbitration regarding due process in teacher discipline, it does not limit the enforceability of due process rights in venues other than grievance arbitration. However, contractual provisions covering prohibited subjects of bargaining cannot be enforced through grievance arbitration or through other means.

The Union contended that the ALJ erred by finding that the Employer's discipline of E could not be challenged in arbitration as being arbitrary and capricious. The Union contended that § 15(3)(m) requires that the Employer use the "arbitrary and capricious standard" in teacher discipline. The Commission explained that although § 15(3)(m) prohibits public school employers from adopting any standard for teacher discipline other than the "arbitrary and capricious standard," it does not require public school employers to include that standard in a collective bargaining agreement. If a public school employer and the labor organization representing its employees choose to incorporate the "arbitrary and capricious" standard in their contract "…the provision incorporating that standard ►

Michigan Employment Relations Commission

Summaries of Noteworthy Decisions, cont.

would be no more enforceable by the labor organization than any other contract provision regarding teacher discipline or discharge."

The Commission also addressed a procedural issue on changes to the Commission's Rules regarding extensions of time for filing exceptions. The Union requested an extension of time to file its exceptions. The Employer responded by requesting that the Commission deny the request for extension of time, and contended that the Union was required to and failed to provide an explanation as to its need for additional time. Prior to the amendment to the Commission's General Rules in December 2014, the Commission granted all timely initial requests for extensions of time for filing exceptions that were for extensions of 30 days or less. The language of the rule authorizing the Commission to do so was changed when the rules were amended in December 2014. The amended rule increased the Commission's discretion with respect to granting initial extensions of time, but like the prior rule, does not require parties to justify their need for an initial extension. Therefore, the Commission found that the order granting Respondent's request for extension of time was appropriately issued pursuant to Commission Rule 176a(3).

In sum, the Commission concluded that the Union's efforts to arbitrate the grievance over E's discipline and the alleged denial of E's due process rights were attempts to enforce provisions of the collective bargaining agreement that were related to teacher discipline. As such, the Union's actions breached the Union's duty to bargain in good faith in violation of § 10(2)(d) of PERA. ■

ALRA Members' comments

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

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

- Mike Cormack, Board Chair, Iowa PERB

The States & Territories

WASHINGTON STATE
PUBLIC EMPLOYMENT
RELATIONS COMMISSION

PERC Commission Appointments

Marilyn Glenn Sayan

Commission Chair Sayan appointed to fifth term

With the support of both labor and management, and in recognition of the need for continuity and stability as well as excellence, Governor Jay Inslee appointed **Marilyn Glenn Sayan** to a fifth term as Commission Chair. **Commissioner Sayan** was originally appointed as Chair by Governor Gary Locke in 1996, and she has served continuously since. Serving as a mentor to many ALRA members, **Commissioner Sayan** also served as ALRA President in 2006-2007. Her term expires in 2021.

Mark R. Busto appointed as new Commissioner

In January, Governor Inslee appointed **Mark Busto** to the Commission to fill the vacancy created by **Tom McLane's** resignation last September. **Commissioner Busto** has over 30 years of experience representing public and private employers in all facets of labor and employment law. His term expires in 2019.

The Commissioners work on a part-time per diem basis, hearing appeals of decisions by staff examiners or the executive director. The Commission also has rulemaking authority.

Decisions of Note

The Commission determined that an agreement between an employer and union to extend a collective bargaining agreement deprives the employees in future bargaining units of the right to bargain through a representative of their choosing as guaranteed by statute.

Representing employees at a branch campus of a university, an exclusive bargaining representative negotiated a collective bargaining agreement with the university. The ►

Washington Public Employment Relations Commission, cont.

agreement contained a provision that it would apply to all employees in bargaining units in which the union has been certified as the exclusive representative during the term of the agreement. Subsequently, the union became the exclusive representative of a separate bargaining unit of employees at the university's main campus. The employer applied the terms of the bargaining agreement based upon the provision in the agreement which, in this instance, resulted in the loss of a pay step. The union brought an unfair labor practice complaint. An examiner dismissed the complaint, finding a waiver by the union.

The Commission overturned the examiner. The Commission held that the union should not be allowed to waive the statutory rights of employees it does not represent. The employees never had the opportunity to bargain following the selection of the union as the exclusive representative. The employer's application of the collective bargaining agreement to the new bargaining unit without those employees having the opportunity to bargain was an unfair labor practice. *Washington State University*, Decision 12385-A (PSRA, 2016).

An interest arbitration eligible party can only breach its good faith bargaining obligation by insisting to impasse on a permissive subject of bargaining if that party advances a permissive issue to interest arbitration.

In Washington, only certain statutorily identified groups of employees are eligible for interest arbitration. The statutes and Commission rules specify that impasse for interest arbitration eligible parties is determined by the executive director, in most statutes, upon recommendation of the mediator. Only those issues certified by the agency may go forward to interest arbitration.

In this instance, parties were negotiating a successor agreement. During negotiations, the parties disagreed whether a provision in the current agreement was permissive. The union, believing the provision to be permissive, sought changes. The employer disagreed and did not seek any changes. The parties eventually sought interest arbitration on a number of issues. The employer did not seek certification of the disputed issue. The union did. The issue was certified, and the union filed an unfair labor practice complaint against the employer for insisting to impasse on a permissive subject of bargaining.

The examiner dismissed the complaint on the grounds that the employer did not insist to impasse on the disputed issue. The Commission affirmed. The Commission found that ►

The States & Territories

Washington Public Employment Relations Commission, cont.

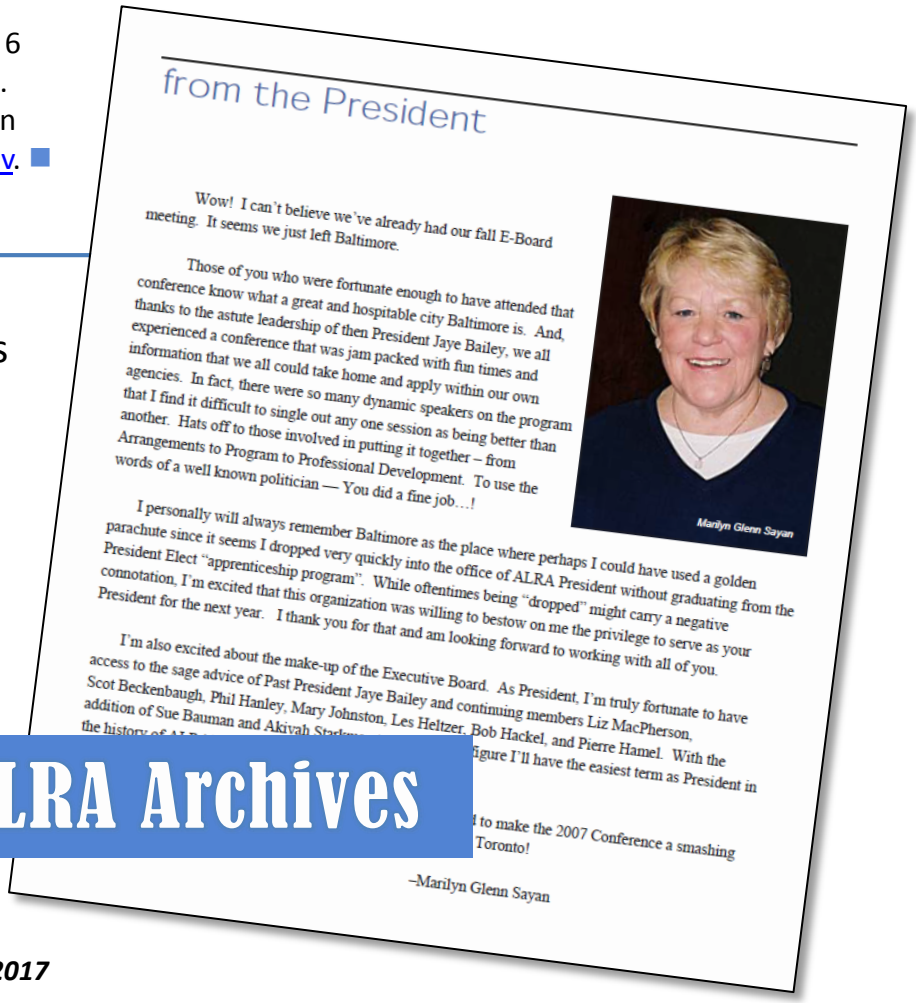
while the union argued that the employer was insisting to impasse in the broader sense, the analysis was different when dealing with employees eligible for interest arbitration. The Commission determined that because the employer did not advance the disputed issue to interest arbitration it did not commit an unfair labor practice. *Cowlitz County*, Decision 12483-A (PECB, 2016).

LERA Conference

With the Federal Mediation and Conciliation Service and the National Labor Relations Board, PERC is pleased to co-host the Labor and Employment Relations Association's 40th Annual Collective Bargaining and Arbitration Conference. The conference will be held April 6 and 7 in Seattle, Washington. Details for the conference can be found at www.perc.wa.gov. ■

From the ALRA Archives

Marilyn Glenn Sayan's "from the President" column for the **ALRA Advisor** in February 2007



from the President

Wow! I can't believe we've already had our fall E-Board meeting. It seems we just left Baltimore.

Those of you who were fortunate enough to have attended that conference know what a great and hospitable city Baltimore is. And, thanks to the astute leadership of then President Jaye Bailey, we all experienced a conference that was jam packed with fun times and information that we all could take home and apply within our own agencies. In fact, there were so many dynamic speakers on the program that I find it difficult to single out any one session as being better than another. Hats off to those involved in putting it together – from Arrangements to Program to Professional Development. To use the words of a well known politician — You did a fine job…!

Marilyn Glenn Sayan

I personally will always remember Baltimore as the place where perhaps I could have used a golden parachute since it seems I dropped very quickly into the office of ALRA President without graduating from the President Elect "apprenticeship program". While oftentimes being "dropped" might carry a negative connotation, I'm excited that this organization was willing to bestow on me the privilege to serve as your President for the next year. I thank you for that and am looking forward to working with all of you.

I'm also excited about the make-up of the Executive Board. As President, I'm truly fortunate to have access to the sage advice of Past President Jaye Bailey and continuing members Liz MacPherson, Scot Beckenbaugh, Phil Hanley, Mary Johnston, Les Heltzer, Bob Hackel, and Pierre Hamel. With the addition of Sue Bauman and Akivah Stad… the history of A… figure I'll have the easiest term as President in

…l to make the 2007 Conference a smashing … Toronto!

–Marilyn Glenn Sayan

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

Member Updates

The Canada Industrial Relations Board is 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 & employers.

The Board is pleased to announce that the Governor-in-Council has reappointed **Richard Brabander** as an employer-side member and **Norman Rivard** as an employee-side member of the CIRB, effective December 21, 2016. In addition, the Board welcomes the appointment of **Mr. Paul Moist** as a part-time employee-side member and **Ms. Barbara Mittleman** as a part-time employer-side member of the CIRB, effective December 21, 2016. A biography for each Board Member can be found at www.cirb-ccri.gc.ca. ■

In Memoriam

Diane Chartrand

It is with great sadness that the Canada Industrial Relations Board announces the passing of **Diane Chartrand** in February, after a courageous battle with primary lateral sclerosis (PLS).

Diane retired from the CIRB in 2016 after 35 years of dedicated service within the public service. Diane was a consummate professional with a passion for the law and a dedication to her craft. She was an active member of ALRA and a member of the Executive Board from 2010 to 2014. She will be greatly missed. ■

Canada Industrial Relations Board, cont.

Case Summaries

***Wilson v. Atomic Energy Canada Ltd*, 2016 SCC 29**

In 1978, the *Canada Labour Code* (the *Code*) was amended by adding a series of provisions to Part III under the heading "Unjust Dismissal". The Unjust Dismissal scheme applies to non-unionized employees with 12 months of employment. Any such employee may submit a complaint in writing to an inspector if the employee considers their dismissal to be unjust. If the complaint cannot be settled within a reasonable time it can be referred to the Minister who may appoint an adjudicator to hear the complaint. The mandate of the adjudicator is to determine whether the dismissal was unjust, and if so, the adjudicator has broad authority to grant an appropriate remedy.

In this appeal, the Supreme Court of Canada (SCC) had to decide whether Parliament's intention behind amendments to the *Code* in 1978 was to offer expansive protections to non-unionized private sector federal employees much like those available to employees covered by a collective agreement, including reinstatement.

The appellant, Mr. Wilson, was hired by Atomic Energy Canada Limited (AECL) in 2005 and was later promoted. He worked for four and a half years until his dismissal in November 2009. He had a clean disciplinary record.

Mr. Wilson filed an Unjust Dismissal complaint. In response to a request from an inspector for the reasons for Mr. Wilson's dismissal, AECL indicated that he was "terminated on a non-cause basis and was provided a generous dismissal package that well exceeded the statutory requirements." Mr. Wilson claimed that his dismissal was in reprisal for having filed a complaint of improper AECL procurement practices.

The Adjudicator concluded that he was bound by the Federal Court's decision in *Redlon Agencies Ltd. v. Norgren*, 2005 FC 804, which held that an employer could not resort to severance payments, however generous, to avoid a determination under the *Code* about whether the dismissal was unjust. Mr. Wilson's complaint was allowed.

The Application Judge found the Adjudicator's decision unreasonable because, in his view, nothing in Part III of the *Code* precluded employers from dismissing non-unionized employees on a without-cause basis.

The Federal Court of Appeal upheld the Application Judge's decision. ►

Canada Industrial Relations Board, cont.

Case Summaries, cont.

In its decision, the SCC determined that the foundational premise of the common law scheme — that there is a right to dismiss on reasonable notice without cause or reasons — has been completely replaced under the *Code* by a regime requiring reasons for dismissal. In addition, the discretionary remedies, reinstatement in particular, and the open-ended equitable relief available under s. 242(4)(c), are inconsistent with the right to dismiss without cause.

The SCC stated that if an employer can continue to dismiss without cause under the *Code* simply by providing adequate severance pay, there is virtually no role for the plurality of remedies available to the adjudicator.

The SCC found that Parliament intended the remedies newly available in 1978 to non-unionized employees reflect those generally available in the collective bargaining context. To infer instead that Parliament intended to maintain the common law under the *Code* regime, creates an anomalous legal environment in which the protections given to employees by statute — reasons, reinstatement, equitable relief — can be superseded by the common law right of employers to dismiss whomever they want for whatever reason, so long as they give reasonable notice or pay in lieu thereof.

The SCC stated that such interpretation would somersault the Court's understanding of the relationship between common law and statutes, especially in regard to employment protections, by assuming the continuity of a more restrictive common law regime notwithstanding the legislative enactment of benefit-granting provisions to the contrary.

Accordingly, the SCC found that the purpose of the 1978 provisions was to offer a statutory alternative to the common law of dismissals and to conceptually align the protections from unjust dismissals for non-unionized federal employees with those available to unionized employees. These provisions were also a cost-effective alternative to the civil court system for dismissed employees to obtain meaningful remedies which are far more expansive than those available at common law.

According to the SCC, only by interpreting the provisions as representing a displacement of the employer's ability at common law to dismiss an employee without reasons if reasonable notice is given, does the scheme and its remedial package make sense. To decide otherwise would fundamentally undermine Parliament's remedial purpose.

The appeal was allowed and the decision of the Adjudicator was restored. ►

Canada Industrial Relations Board, cont.

Case Summaries, cont.

MedReleaf Corp., 2016 CIRB 829

The United Food and Commercial Workers, Local 206 filed an application for certification for a bargaining unit at MedReleaf Corp. The employer operates a 55,000 square-foot facility in Ontario that grows, harvests, dries, sells, and distributes licensed medical marijuana. The employer is privately owned, operating under a license from Health Canada pursuant to the *Marihuana for Medical Purposes Regulations* (MMPR), and manufactures marijuana for use as a pharmaceutical by patients with prescriptions.

The union took the position that the strict regulatory framework permitting MedReleaf to operate its business legally makes it a federal undertaking within the Board's jurisdiction. The union submitted that the Board's jurisdiction over the labour relations of a business like MedReleaf's is derived from Parliament's exclusive authority over criminal law under section 91(27) of the *Constitution Act, 1867* and the regulation of marijuana as a controlled substance through the MMPR. The union argued that the Board, in applying the functional test, should consider the regulatory environment within which MedReleaf conducts its normal activities and find it a federal undertaking.

The employer's position was that its employees are subject to provincial labour relations legislation because, just as any company that produces pharmaceuticals or pharmacy that dispenses prescriptions, the production and distribution of pharmaceuticals does not fall within federal jurisdiction. The employer argued that its normal and habitual activities as a going concern were that of an ordinary, commercial business and that Health Canada merely issues licensing for the industry but does not have a role in the growing, selling, or distributing of medical marijuana.

The Board applied the functional test in looking at the nature of the employer's operations to examine what the business does, not how it is permitted to do it. The Board found the operation to be commercial in nature for the purpose of growing, harvesting, selling, and distributing medical marijuana as a licensed product. The Board looked to Health Canada's explanation of the MMPR which creates conditions for a commercial industry responsible for the production and distribution of marijuana for medical purposes in Canada. The Board emphasized that while the license was issued by Health Canada, it does not change what MedReleaf does on a daily basis. The Board did not find the union's argument that Parliament's exclusive power over criminal law ▶

Canada Industrial Relations Board, cont.

Case Summaries, cont.

renders MedReleaf a federal undertaking by way of section 2(i) of the *Code* to be compelling. Rather, the Board found that Parliament's authority over criminal law doesn't change the nature of MedReleaf's business or make it a federal undertaking.

The Board determined that the essential nature of its daily operations is that of an ordinary local commercial business that produces and sells a medical product. Despite that MedReleaf's activity would be illegal without holding the license, the Board stated that did not change the operational nature of its business. Therefore, the Board found that the employer's business was not a federal undertaking under section 2(i) of the *Code* and that provincial jurisdiction over its labour relations had not been ousted.

This was a novel case because the Board had not previously dealt with the constitutional jurisdiction of a medical marijuana operation and it is rare that the Board is asked to look at whether a business falls within its jurisdiction under section 2(i) of the *Code*.

***Roy*, 2016 CCRI 822**

On June 5, 2013, the complainant filed a harassment complaint with her employer. Two days later, the employer terminated her employment. It was in this context that the complainant filed a complaint with the Board claiming that her dismissal was a reprisal for her having made an occupational health and safety complaint. She alleged that her filing of a harassment complaint was protected under Part II of the Code which deals with occupational health and safety matters.

In complaints filed under Part II of the *Code*, the Board has a limited role. It conducts a three-step analysis to determine whether: (1) the employer imposed or threatened to impose discipline; (2) the employee was participating in a process under Part II of the *Code*; and (3) a nexus existed between participation in the process and the imposition of discipline.

In *Roy*, 2016 CIRB 822, the first step of the analysis was not disputed. However, the Board had to determine whether filing a harassment complaint through an employer's internal procedure constituted a process under Part II of the *Code*.

The Board began its analysis by noting that human rights legislation and labour legislation in Canada deal unevenly with harassment complaints. It noted that Quebec and Ontario legislation deals expressly with harassment and retaliation. ►

Canada Industrial Relations Board, cont.

Case Summaries, cont.

Conversely, the term "harassment" is found nowhere in Part II of the *Code*, even though the employer has a duty to ensure the protection of its employees' health and safety. The Board stressed that the employer must take steps to prevent and protect against violence in the workplace. In light of these provisions, the Board questioned whether a harassment complaint made pursuant to an employer's internal policy could constitute a process under Part II of the *Code*.

In a decision regarding a similar situation (*Perron-Martin*, 2014 CIRB 719), the Board concluded that a harassment complaint filed pursuant to an internal policy was not usually a process under Part II of the *Code*, and dismissed the complaint.

However, the Federal Court had since determined that the notion of violence in the workplace may include harassment "if after a proper investigation by a competent person it is determined that the harassment includes actions, conduct or gestures that can reasonably be expected to cause harm or illness to the employee." The Federal Court of Appeal confirmed this, adding that an allegation of harassment does not necessarily fall within the definition of workplace violence. It also clarified that the burden on the employee alleging harassment should be quite low to invoke the procedure provided in the *Regulations*. Thus, the Board determined that a harassment complaint may, depending on the circumstances, constitute a process under Part II of the *Code*.

The Board considered the content of the harassment complaint in light of the complainant's explanations and accepted that she was participating in a process under Part II of the *Code* when her employment was terminated. The harassment alleged by the complainant corresponds to psychological harassment and the complaint stated that this harassment impacted her health; therefore, the alleged harassment falls within the notion of violence as described in the *Regulations*.

In the absence of clarification from Parliament, the Board noted that it would have to continue considering how to identify harassment complaints that may meet the requirements of the *Regulations*.

Accordingly, the Board dismissed the complaint after considering the context, having determined that a nexus did not exist between the complainant's termination and the filing of the harassment complaint. In fact, the Board accepted that her termination was simply the end result of a progressive disciplinary process. ■

Federal - Canada

Federal Mediation & Conciliation Service

On the Move . . .

Peter Simpson

In January of 2017, **Peter Simpson** succeeded Guy Baron as Director General, Federal Mediation and Conciliation Service (Canada). Peter came to FMCS from the Ontario Ministry of Labour (MOL), where he was the Assistant Deputy Minister, Labour Relations Solutions Division, responsible for conciliation and mediation activities as well as programs designed to improve labour relations practices. Peter started his career as a lecturer and professor at various universities, including Laurentian University where he became involved in union activities. Peter then became Assistant Executive Director of the Canadian Association of University Teachers, where his primary responsibility was providing advice on and participating in collective bargaining by university faculty. In 2013, Peter joined the Ontario Ministry of Labour as Director, Dispute Resolution Services.

Peter has been actively involved with ALRA since 2013. He has served on the Program Committee, including as Program Co-Chair for the Halifax conference in 2016. He is currently a member of the ALRA Board.

Guy Baron will be retiring from the Canadian federal public service in March of 2017 after a long and distinguished career culminating in nine years at the helm of FMCS. We thank Guy for his support of ALRA over the years and wish him a long and happy retirement. ■

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

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

Ontario

Ontario Labour Relations Board

Updates . . .

The Board welcomes **Harvey Beresford**, **Graham Clarke** and **Paulene Pasieka** as part-time Vice-Chairs. The Board continues to add to its complement of part-time Members representative of both management and union-side labour relations.

Long-time Vice-Chair and former Board Solicitor **Harry Freedman** has retired from the OLRB and returned to private practice.

On the construction industry labour relations front, an employer sought to challenge the Board's longstanding practice of considering only the employees working in the bargaining unit on the date of application as the criteria for member eligibility. The Board rejected the employer's arguments that the applicant trade union was committing a fraud on the Board by manipulating the timing of the application for certification or by orchestrating the attendance at the worksite of certain individuals supportive of the union. There is no statutory duty on a union or an employee to disclose their purpose for applying for certification (unlike the legal obligations binding employers in the context of an employee's application to terminate bargaining rights). The employer's motion for dismissal was disallowed, but the matter continues with a constitutional challenge to the protected right of freedom of association. ***GOVAN BROWN & ASSOCIATES*** 2016 CanLII 82805 (ON LRB)

On the legislative front, amendments to the *Ontario College of Trades and Apprenticeship Act, 2009* in December 2016 give the Board jurisdiction to review administrative penalties that may be levied against persons practising trades without appropriate certificates of qualification. The authority is expected to come into effect on June 6, 2017.

The Board awaits the final report of the *Changing Workplaces Review*, a two-year commission looking at working conditions, minimum employment standards and labour relations issues in the province of Ontario. The report is due later this spring. ■

Provinces & Territories

Nova Scotia Labour Relations Board

Updates . . .

The Nova Scotia Labour Board is pleased to announce the appointment of **Karen Hollett** as the new Chair.

Karen Hollett was appointed as the Chair of the Nova Scotia Labour Board effective January 3, 2017. Karen graduated from Dalhousie Law School in 1991. She has a Master of Laws (2011) from Osgoode Hall Law School. Prior to her appointment as Chair, Karen practised as a dispute resolution neutral with a practice including arbitration, mediation, workplace investigation and professional disciplinary matters. She also has extensive in-house labour relations experience on both the union and management sides. Karen is a member of the Canadian Bar Association's National Alternative Dispute Resolution (ADR) section Executive. ■

Karen Hollett

Save the Dates!

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

July 22 - 25, 2017

More information is available at www.alra.org