ALRA Advisor

October 2017

www.alra.org

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Portland, Oregon

ALRA 66th Annual Conference Recap

Portland, Oregon – July 2017

ALRA Advisor

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

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ALRA News

Updates from our Members

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ON THE COVER: Portland, Oregon's iconic Old Town sign.

From the President . . .

Marjorie Wittner

Message from the ALRA President

Greetings from Boston, where the transition from summer to fall is one of the most beautiful and energizing times of year. As I look back on this past summer and ahead to next year, I realize what an honor and a privilege it is to serve as ALRA's President in 2017-2018. In my many years as a labor relations neutral working in state and federal government, I have been fortunate to work with colleagues who are committed to carrying out their responsibilities as adjudicators, arbitrators, mediators and administrators with great care, skill, and good humor, despite the numerous challenges that our agencies face from year to year. For 66 years, ALRA, through its hard-working group of dedicated volunteers who share these attributes, has recognized our common causes and concerns and provided a forum in which we can share information and best practices, learn from experts in our field, and engage in thought-provoking discussions of our relevance in a rapidly-changing world.

I am happy to report that through the hard work of this past year's Executive Board and committees, and the steady and capable leadership of Immediate Past-President Ginette Brazeau, this past July's conference in beautiful and "weird" Portland, Oregon accomplished just that. The theme, "Labor Relations, Relevant or Relic," brought us another well-attended ALRA Academy for those new to ALRA. Our Professional Development Committee, ably co-chaired by Mike Sellars and Sheri King, brought us insightful and information-packed professional training sessions, several of which focused on providing our members with ideas and tools to adjudicate or mediate matters involving non-traditional participants in labor relations. And kudos to the Program Committee, led by Scot Beckenbaugh and Kathy Peters, who brought us a stimulating Advocates Day comprised of panels, lectures and discussions focusing on current developments and trends in our field, and whether and how our existing labor laws and institutions can best address them. Advocates Day concluded with a particularly inspirational panel moderated by the morning's keynote speaker, MIT Professor Tom Kochan, which addressed how collaborative, consensus-based approaches to labor relations at three different work places (public and private), resulted in tangible benefits to all parties involved – workers, management, consumers and stakeholders.

One of my goals as your President in the coming year is to continue to harness our shared expertise year-round. To this end, I will be working with Vice-President of Administration, Sylvie Guilbert, and the rest of the Publications/Communications and Technology Committee to optimize ways we can use available technologies, particularly our website, to keep the dialogue going after we say goodbye in July. In the meantime, please remember that under the "Resources" tab in the members-only section of the ALRA website (www.alra.org), you will find materials from the past four ALRA conferences (including Portland) and other helpful materials provided by our member agencies specifically geared towards ►

From the President . . .

Marjorie Wittner

Message from the President, cont.

administrators, adjudicators, and mediators. (Please contact the primary ALRA contact at your agency if you have any questions about accessing this section of the website.)

My other goal is to work with this year's outstanding Executive Board and committees to put on a successful conference in Boston, Massachusetts next year. The conference will be held at the Boston Park Plaza hotel from July 21-24, 2018, in Boston's historic Back Bay neighborhood, home to some of Boston's finest restaurants, architecture, shopping and green spaces.

Here is a list of this year's Executive Board members:

Marjorie Wittner, President – *Commonwealth of Massachusetts Employment Relations Board*

Ginette Brazeau, Immediate Past President – *Canada Industrial Relations Board*

Jennifer Abruzzo, President-Elect – *National Labor Relations Board*

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

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

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

Jarrod Baboushkin, Member – *Nova Scotia Labour and Advanced Education*

Sarah Cudahy, Member – *Indiana Education Employment Relations Board*

Catherine Gilbert, Member – *Ontario Labour Relations Board*

Eileen Hennessey, Member – *National Mediation Baord*

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

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

Thanks to all of you who have already agreed to chair and participate in this year's key planning committees; Arrangements (Chair, Tim Noonan), Professional Development (co-chairs, Mike Sellars and Virginia Adamson) and Program (co-chairs, Scot Beckenbaugh and Catherine Gilbert). If anyone is still interested in serving on one of those committees, please contact me at marjorie.wittner@state.ma.us. Even if you cannot attend our fall or spring planning meetings, I would be happy to hear any thoughts you may have for content or speakers. We maximize ALRA's potential when we share our ideas, tools, challenges and best practices.

I hope to see all of you in Boston next year. Stay in touch, *Marjorie*

2018 ALRA Conference

Boston, Massachusetts

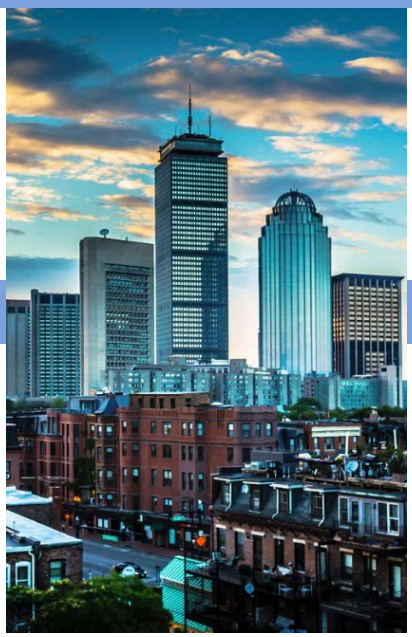


Photo courtesy of www.pixabay.com

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

Conference Schedule

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

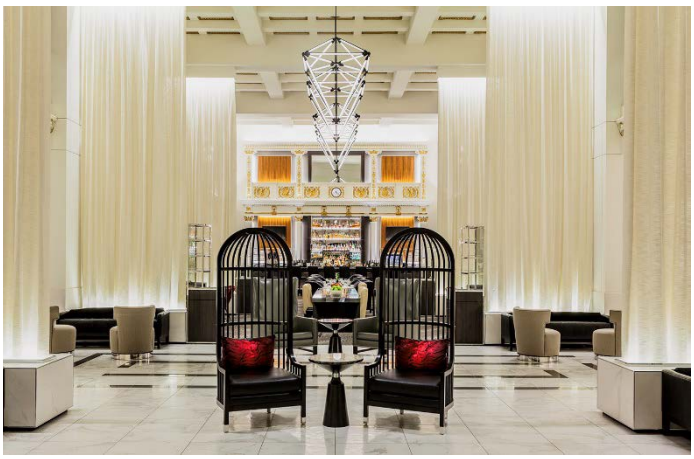
The conference will be held at the Boston Park Plaza hotel. Located in downtown Boston, this iconic hotel is steps from many of the city's most popular historical sites. A block of rooms will be set aside for the ALRA conference.

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 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

2017 Conference Recap

Perspectives from a First-Time Attendee:

"An Uncommon Community"

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

John A. Henry

Every year, ALRA provides travel grants available for first time attendees of the Annual Conference. This year, for the Portland, Oregon conference, I was honored to receive one of those grants. After attending the conference, I can imagine no better way to build ALRA's footprint and the continuity of the labor relations community than facilitating and supporting first time attendees to the conference.

From the outset, I was struck by the sense of community and collegiality of all those present. The ALRA community embraces mentorship and shared learning with young practitioners in a way dissimilar from many bar association or other associations I am a member of. There is a genuine earnestness to the discussion, teaching, debate, and improvement of the field. Certainly, the common commitment of the member agencies as nonpartisan neutrals greatly contributes to that difference, but 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. The highlight of the conference was the many conversations I had with attendees from all experience levels and corners of North America. Notably, a conversation I had with Dario de la Rosa, Representation Case Administrator with Washington State's Public Employment Relations Commission, was phenomenally helpful in guiding current revisions to our administrative rules governing representation matters, including adoption of several components of PERC's rules.

The field of labor relations continues to evolve and flux immensely with the continued evolution of our complex technological world. Many of these changes were the subject of some of the conference's most insightful presentations looking at real world applications through practitioners like ABC Unified School District and International Paper, or scholars like Tom Kochan. No doubt it is these conversations and shared experiences through ALRA that will shape the future of labor relations. They already have for our agency. I look forward to many happy returns to the annual conference and the opportunity to meaningfully contribute to the strong, vibrant, and uncommon community that is ALRA. ■

2017 Conference Recap

Why attend the ALRA Conference?
Highlights from 2017

Ginette Brazeau, Chairperson of the Canada Industrial Relations Board and NLRB Chairman Philip A. Miscimarra

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

Attending the ALRA conference involves time away from family and friends during the middle of summer, often requires significant travel, and can result in a ton of catch-up work upon return to the office and "real" life. This year's conference in Portland, Oregon was no exception. For many people, especially those coming from the East Coast, attending the conference meant an entire weekend away from home, a lengthy plane ride and changing time zones. But, despite these inconveniences, attendance was stellar at the 2017 conference, which ran from July 22 to July 25, 2017 and was held in the historic Benson hotel.

The fact that the host city, Portland, is gorgeous (and a bit weird), with amazing restaurants and activities, probably contributed to ALRA's success this year. As well, ALRA's Professional Development and Programs Committees did a fantastic job ensuring that the agenda was both relevant and useful to labor relations practitioners. The theme, "Labor Relations in 2017 – Relic or Relevant?" was timely and thought-provoking. Many emerging new trends in labor-management collaboration that could better facilitate the resolution of workplace issues were discussed.

The conference commenced on Saturday, with the ALRAcademy, a half-day workshop which provided information about the ALRA organization, the practices in various jurisdictions relating to the mediation and adjudication of labor disputes as well as a comparative analysis of US and Canadian labor law frameworks. A friendly reception followed, allowing participants to mingle, have fun and create solid business contacts. On Sunday, the conference continued with interactive round-table discussions on best practices that were useful in addressing situations that most us are facing in our day-to-day experiences. A lunch speaker then gave a talk on the history of the labor movement in Oregon, and the afternoon continued with an informing presentation on significant developments in labor relations over the course of the past year. ►

2017 Conference Recap

Why attend the ALRA Conference? Highlights, cont.

Advocate's Day, a one-day program for the ALRA delegates and labor relations practitioners from the local area was extremely well-attended. Highlights included presentations such as "Engaging for Change - The Challenges for the Institution of Collective Bargaining". This presentation was filed with factual information and was very revealing in terms of what we could expect in the years to come. A moderated panel discussed the theme "Defining the Issues of Struggle in Transformational Times" and the Chairs of the National Labor Relations Board and the Canada Industrial Relations Board followed with a pertinent and informative presentation called "Managing Change: Trudeau and Trump – Neutrality in a Politically Charged Environment". On the final day, delegates had the privilege of attending presentations and workshops on the challenges of "non-traditional" participation. The day concluded with the customary (and always appreciated) interactive discussions on ethical dilemmas, which allowed for dialogue about some of the challenges that most of us have faced, or will face, in our careers. In the evening, a closing banquet was held in the ballroom of Portland's historic Benson hotel.

Catherine Gilbert, Ontario Labour Relations Board Director & Bernard Fishbein, Chair of the Ontario Labour Relations Board enjoy Portland's famous "Voodoo Donuts" with NLRB Assoc. Executive Secretaries Farah Qureshi & Leigh Reardon.

Given the pertinent agenda, the value of the ALRA conference for delegates in terms of professional development and education is obvious. ALRA member agencies are labor relations neutrals, and it is rare to find conferences with subject-matter so germane to the role of the neutral. Less obvious, but perhaps more important, is the value of the ALRA conference in the opportunities for social interaction it provides. The working life of a neutral can be lonely and demanding. When mediating or adjudicating disputes, the neutral is usually on his or her own, attempting to bring some sort of calm to the chaos of the parties. It is comforting to be in an environment where one's challenges and experiences are inherently understood and where there is a true feeling of camaraderie amongst delegates. It is easy to get caught up in the daily grind and forget about the reasons we do what we do. Spending time with a group of people with such expertise and passion for labor relations is motivating and inspiring. It can renew our appreciation of the meaningfulness and importance of our work.

Thank you to the organizers and delegates of ALRA for another great conference and see you next year in Boston! ■

2017 Conference Recap

Advocate's Day *Labor Relations 2017: Relic or Relevant*

Elana Pirtle-Guiney,
Workforce & Labor Policy Advisor,
Office of Governor Kate Brown speaks on
*"**Bridging the Divide: Oregon Perspectives**"*

*ALRA President **Marjorie Wittner**, Chair of the Massachusetts Commonwealth Employment Relations Board, and **Tom Kochan**, PhD and Co-Director of the MIT Sloan Institute for Work and Employment Research speak on*
*"**Engaging for Change – The Challenges for the Institution of Collective Bargaining**"*

*Left: **Jennifer Abruzzo**, Deputy General Counsel, NLRB moderates a panel on*
*"**Defining the Issues of Struggle in Transformational Times: Collective Bargaining, Collective Activism and Confrontation, New Forms of Work, Collective Representation – Are the Current Laws Adequate?**"*

*Panelists below, left to right: **Matthew Ginsburg**, Associate General Counsel, AFL-CIO; **Harry Secaras**, Attorney, Ogletree, Deakins, Nash, Smoak & Stewart; **Angie Wei**, Chief of Staff, California Labor Federation; **Harry Johnson III**, Attorney, Morgan Lewis; **David Rolf**, President, SEIU 775 and International Vice President, SEIU; and **Jennifer Abruzzo**.*

2017 Conference Recap

Advocate's Day, cont.

Sheri King *(not pictured), Regional Director for FMCS – Canada, moderated a panel on* ***"The Changing Course on Trade – Building Walls and Expanding Trade****."*

Far left: ***Hassan Yussuff****, President, Canadian Labour Congress*

Left: ***Steven Gilbert****, Senior Advisor, Global Human Resources for the HR Policy Association and Executive Director, Latin American Employee Relations Group*

Tom Kochan *moderated a panel on "****Defining & Celebrating Success: Gaining Strategic Advantage Through Collaborative Partnerships****" in which three organizations shared their collective-bargaining success stories.*

Above, left to right:

Portland State University/AAUP – Janet Gillman*, State Conciliator, Oregon Employment Relations Board;* ***Shelly Chabon****, Vice Provost for Academic Personnel and Leadership Development at PSU;* ***Dr. Pam Miller****, Immediate Past President of the Portland State Chapter of the American Association of University Professors and Professor in the School of Social Work at PSU*

ABC Unified School District/ABC Federation of Teachers – Ray Gaer*, President, ABC Federation of Teachers, Local 2317, and Vice-President, California Federation of Teachers;* ***Dr. Gina Zietlow****, HR Supervisor, ABC Unified School District*

International Paper/United Steelworkers International Union – Rusty Adair*, Director of Labor and Employee Relations, International Paper;* ***Jon Geenen****, International Vice President and Member of the Executive Board, United Steelworkers International Union*

2017 Conference Recap

Conference attendees enjoyed a scenic sunset dinner cruise on the Willamette River aboard the Portland Spirit on Sunday evening

***Marjorie Wittner**, current ALRA President, **Ginette Brazeau**, immediate past ALRA President, and **Jennifer Abruzzo**, ALRA president-elect*

***Beth Schindler** (FMCS-US) & **Lucie Morneault** (FPSLREB)*

Below: Attending the sessions

ALRArchives

ASMA to ALMA to ALRA: The Evolution of ALRA

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

The organizational meeting of the association which evolved into the Association of Labor Relations Agencies (ALRA) was held in June 1952 in Detroit, Michigan. The organization was named the Association of State Mediation Agencies, resulting in the unfortunate acronym ASMA. Representatives of eleven states were present at the meeting: Colorado, Connecticut, Georgia, Michigan, Minnesota, Missouri, New Jersey, New York, Oklahoma, Pennsylvania and Wisconsin. George Bowles, Chairperson of the Michigan Labor Mediation Board and the first ASMA president, later explained why ASMA was organized: "In the spirit of federalism, we wanted to learn from each other and to strengthen state mediation in the process. We wanted more recognition for the state function, and after organization, we established strong liaison with the then-Director of the Federal Mediation and Conciliation Service."

By the time the second ASMA conference was held in June 1953 at Rutgers University, six other mediation services from Alabama, Arkansas, Illinois, New Hampshire, North Carolina and Puerto Rico had become ASMA members. By-laws adopted at the 1953 meeting provided ASMA's mission as ". . . promoting and advancing an understanding of mediation; serving as a clearinghouse for information, ideas and experiences in the field of mediation; disseminating periodically current and pertinent literature; meeting annually for the purpose of discussing mutual problems.

Pressure built over ensuing years to expand the scope of ASMA beyond state mediation agencies. A revised constitution was adopted at the 12th annual conference held in Florida in November 1963, extending membership to "State, Provincial and Municipal Conciliation and Arbitration services, agencies or branches". The "Provincial" reference reflected the fact that Canadian agencies had become active participants in the association. The expanded scope of jurisdiction also resulted in a name change to the Association of Labor Mediation Agencies (ALMA). ►

*Any organization in existence for 65 years has much in its past to provide guidance for the present and future. In the last few editions 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**.*

ALRArchives

The Evolution of ALRA, cont.

The 1963 conference also signaled a future step in the evolution of the association. It was agreed at the conference that ALMA would meet with representatives of the Federal Mediation and Conciliation Service to attempt to develop a code of ethics for labor mediators, discuss problems of mutual and general interest, and "to cooperate toward the elevation of mediation services." It took another nine years, but the ALMA constitution was ultimately amended in 1972 to permit formal membership by a federal agency.

The demise of another organization resulted in ALMA changing its name in 1978 to the current Association of Labor Relations Agencies. ASMA and ALMA had held joint annual conferences with the National Association of State Labor Relations Agencies (NASLRA) in 1963, 1966, 1968 and 1971. NASLRA became inactive around 1975 and, in 1978, merged with ALMA. NASLRA turned its treasury over to ALMA, on condition that ALMA change its name to the Association of Labor Relations Agencies. Notably, the National Labor Relations Board highlighted the importance of this merger by becoming an ALRA member in 1978. ■

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

Federal - United States

National Labor Relations Board

The NLRB welcomes two new Board Members

Submitted by Roxanne Rothschild, Deputy Executive Secretary, NLRB

New Board Member Marvin E. Kaplan joins the NLRB

On June 20, 2017, President Donald J. Trump nominated Marvin E. Kaplan to be a Member of the National Labor Relations Board. Following Senate confirmation, Mr. Kaplan was sworn in on August 10, 2017 for a term ending August 27, 2020. Mr. Kaplan succeeds former Board Member Harry I. Johnson III, who served on the Board from August 12, 2013 to August 27, 2015.

Board Chairman Philip A. Miscimarra stated, "It is my pleasure to welcome Marvin E. Kaplan to the National Labor Relations Board. He has devoted his career to public service. My colleagues and I look forward to working with Member Kaplan."

NLRB Board Member Marvin E. Kaplan

Prior to his appointment to the NLRB, Mr. Kaplan served as Chief Counsel to the Chairman of the Occupational Safety and Health Review Commission. Before his work with the Occupational Safety and Health Review Commission, he served as counsel for the House of Representatives' Oversight Government Reform Committee and as policy counsel for the House of Representatives' Education and the Workforce Committee. Mr. Kaplan also worked at the U.S. Department of Labor's Office of Labor Management Standards and with the law firm McDowell Rice Smith & Buchanan. Mr. Kaplan, who originally hails from Kansas, received his J.D. from Washington University School of Law in St Louis, Missouri, and his B.S. from Cornell University in Ithaca, New York. ■

Federal - United States

National Labor Relations Board, cont.

New Board Member William J. Emanuel joins the NLRB

On June 27, 2017, President Donald J. Trump nominated management-side attorney William J. Emanuel to be a Member of the National Labor Relations Board. Mr. Emanuel was confirmed by the Senate on September 25, 2017, and was sworn in the next day for a term ending August 27, 2021. Mr. Emanuel succeeds former Board Member Kent Y. Hirozawa, who served on the Board from August 5, 2013 to August 27, 2016.

NLRB Board Member William J. Emanuel

Board Chairman Philip A. Miscimarra stated, "It is a pleasure to welcome William J. Emanuel to the National Labor Relations Board. He has devoted his extensive legal career to labor and employment law. My colleagues and I look forward to working with Member Emanuel."

Prior to his appointment to the NLRB, Mr. Emanuel served as a shareholder with the law firm Littler Mendelson, P.C. in Los Angeles. Before joining Littler Mendelson, he practiced management-side labor law at several other firms, including Jones Day and Morgan, Lewis & Bockius. He has authored labor publications and several amicus curiae briefs. He served as the former Chairman of the Labor Relations Advisory Committee and as the former Chair of the Employers Group Legal Committee. Mr. Emanuel received his J.D. from Georgetown University, and his B.A. from Marquette University. ■

National Labor Relations Board, cont.

National Labor Relations Board Members, pictured left to right: Member Mark Gaston Pearce, Member Marvin E. Kaplan, Chairman Philip A. Miscimarra and Member Lauren McFerran. Not pictured: Member William J. Emanuel

NLRB Supreme Court Oral Argument on Mandatory Arbitration Clauses

Submitted by Jennifer Abruzzo, Deputy General Counsel, NLRB

On October 2, 2017, the General Counsel of the National Labor Relations Board, Richard F. Griffin, Jr., will address the following issue during oral argument in the U.S. Supreme Court: Whether employer-imposed arbitration agreements that bar individual employees from pursuing work-related claims on a collective basis in any forum, arbitral or judicial, violates the National Labor Relations Act (the NLRA) because these agreements limit the employees' statutory right to engage in "concerted activities" for "mutual aid or protection" in seeking to improve their lot as employees.

In recent years, many employers have required employees to accept, as a condition of employment, arbitration agreements that mandate individual arbitration of all work-related legal claims, thereby prospectively waiving the employees' right to engage in collective legal action in any forum, either arbitral or judicial. There are three cases involving this issue that will be argued on October 2nd. Two involved private party lawsuits and one, *Murphy Oil*, is an NLRB case. Murphy Oil, for example, required each of its employees and job applicants to sign, as a condition of employment, an agreement "to ►

National Labor Relations Board, cont.

NLRB Supreme Court Oral Argument, cont.

resolve any and all disputes or claims * * * which relate in any manner whatsoever [to the employee's or applicant's] employment * * * by binding arbitration." The agreement also provided that the employees and applicants "waive their right to commence, be a party to, or [act as a] class member [in any case] or collective action in any court action," or "in arbitration or any other forum." They also agreed "that any claim * * * shall be heard without consolidation of such claim with any other person or entity's claim."

Four employees engaged in collective legal action by suing Murphy Oil, alleging that they had not been paid for fuel surveys and other work, in violation of the Fair Labor Standards Act (FLSA). Murphy Oil, invoking its arbitration agreement, successfully moved to dismiss the case and compel individual arbitration of the employees' claims. Thereafter, an unfair labor practice charge was filed, a complaint issued and litigation ensued. The NLRB lost the *Murphy Oil* case in the 5th Circuit, but two other private party cases successfully litigated the same issue in the 7th and 9th Circuits, leading to certiorari petitions that were granted, consolidating all three cases. The Acting Solicitor General recently sided with Murphy Oil and the other two employers, a highly unusual step as typically the government speaks with one voice. However, it is expected that the NLRB's voice will ring with clarity and our position will be persuasive.

The argument laid out in our brief includes the following points: The NLRA was enacted during the Great Depression to avoid industrial strife by equalizing bargaining power between employees and their employers. Consistent with Congress' objectives, the ►

National Labor Relations Board, cont.

NLRB Supreme Court Oral Argument, cont.

right to engage in concerted activities for mutual aid or protection has long been understood to protect employees' efforts to persuade administrative and judicial tribunals to enforce laws that would improve their work lives, i.e., to protect the Murphy Oil employees who collectively pursued legal action against their employer in court. Employer efforts to stifle concerted activity by making contracts with individual employees that require them to resolve employment disputes solely on an individual basis have long been enjoined as an unfair labor practice.

Employers have defended such agreements by invoking the Federal Arbitration Act (FAA), which Congress enacted in 1925 to overcome judicial hostility to arbitration by placing arbitration agreements on an equal footing with other contracts. However, the Supreme Court's FAA precedents do not dictate rejection of the Board's position on this issue because none of those cases enforced an agreement that violates an express prohibition in another federal statute and, urging the Supreme Court to enforce an illegal agreement under our statute would give these arbitration agreements a privileged status that violates the FAA's equal-footing principle. Further, enforcing such arbitration agreements would enable employers to use private contracts to eviscerate the public rights that Congress specifically protected in the NLRA.

Expanding upon these principles, we note that the NLRB determined early on that an employer violates that prohibition by insisting employees promise to forego the collective rights Congress afforded them. That interpretation of Section 158 as barring individual prospective waivers of Section 157 rights to engage in concerted activities for mutual aid and protection effectuates the NLRA's policies. Prospective waivers of Section 157 rights deprive employees of the opportunity to decide, when a dispute arises, whether to proceed alone or to initiate or join a concerted response. Individual waivers are inconsistent with the collective nature of Section 157 rights, and diminish those collective rights by permanently removing employees one by one from the group available to engage in concerted activities.

Congress, in enacting the FAA, established a federal policy favoring arbitration by requiring courts to place arbitration agreements "upon the same footing as other contracts." To that end, Section 2 of the FAA provides for the enforcement of arbitration agreements "save upon such grounds as exist at law or in equity for the revocation of any contract." ►

Federal - United States

National Labor Relations Board, cont.

NLRB Supreme Court Oral Argument, cont.

The Board harbors no hostility towards arbitration and recognizes it as an effective forum for vindicating federal laws. In fact, an employer may, consistent with the NLRA, insist that employees pursue all work-related disputes in arbitration; what it may not do is bar employees from pursuing their claims collectively.

Because agreements that preclude collective pursuit of legal claims in any forum, arbitral or judicial, violate the NLRA, they are unenforceable under general contract law. That illegality defense fits within the saving clause of the FAA because it neither facially discriminates against arbitration nor derives its meaning from the fact that an agreement to arbitrate is at issue.

Further, regardless of the analytical framework, the employers' position that the FAA mandates enforcement of arbitration agreements that violate the NLRA distorts the FAA's purpose. Enforcement of an arbitration agreement that requires employees to resolve their disputes with employers solely on an individual basis would give license to evade another federal statute and make the enforcing court a party to illegal interference with the established right of employees to seek vindication of their employment rights through concerted activity.

Protecting employees' statutory rights is what we take pride in doing every day. October 2nd will be another fine example of that! ■

Photos courtesy of www.pixabay.com

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

Federal - United States

Federal Mediation & Conciliation Service

FMCS Observes 70th Anniversary with "Come and Learn About FMCS" Workshops

L-R: Current Deputy Director Scot Beckenbaugh; former Director Ken Moffett (1981-82); former Director Peter Hurtgen (2002-05); Current Acting Director John Pinto; former Director George Cohen (2009-13); and former Director Bernie DeLury (1990-93).

The Federal Mediation and Conciliation Service (FMCS) observed its 70th anniversary with a celebratory cake on August 22, 2017 and a day of seminars and webinars for its labor-management customers and interested parties seeking to improve their collective bargaining relationship, resolve workplace disputes, or bargain more effectively and efficiently.

Anyone interested in learning more about FMCS dispute resolution services was invited to attend the in-person or online events, as well as a noontime anniversary cake-cutting ceremony led by Acting Director John Pinto, with distinguished guests and former FMCS Directors Ken Moffett (1981-82), Bernard DeLury (1990-93), Peter Hurtgen (2002-05), and George Cohen (2009-13).

Workshop presentations during the day included sessions on the following:

Arbitration Services: The FMCS Office of Arbitration Services discussed key issues for customers in how to optimize their experience with the Agency program. FMCS now provides a new technology tool that makes it easier to use the FMCS arbitration roster. FMCS has maintained an arbitration program since the Agency began. It is an integral part of the FMCS program of full service to the labor-management community. Today, FMCS ►

Federal Mediation & Conciliation Service, cont.

Anniversary Celebration & Workshops, cont.

has a roster of approximately 1,000 private practitioners who provide arbitration services to FMCS customers.

Relationship Development Training: FMCS mediators provide exceptional training opportunities in the public, private, and federal sectors on conflict resolution and labor-management relations topics. Customized training programs are delivered in person or remotely based on the needs of participants.

An Interest-Based Bargaining Success Story: Attendees heard from a real-life bargaining team who utilized this process and found it to be a valuable and positive experience. The workshop demonstrated how Interest-Based Bargaining (IBB) can be a process to help parties grow in their relationship as they bargain a contract.

An Affinity Bargaining, Success Story: Attendees learned about how to bargain economics in a collaborative fashion with positive results. A panel discussion provided how-to information in utilizing the Affinity Model of bargaining to tackle difficult economic issues at the bargaining table.

Acting Director John Pinto slices FMCS anniversary cake, and former Director Ken Moffett observes.

The festivities continued in honor of the Agency's 70th anniversary with a West Coast version on August 25 in the Glendale, CA office. FMCS Regional Director Linda Gonzalez and FMCS mediators from Southern California and Nevada welcomed management and union representatives to a regional open house. The program for FMCS customers featured training on two topics: "The Affinity Approach to Negotiations," and "The Art of Inquiry." ■

Federal - United States

Federal Mediation & Conciliation Service, cont.

FMCS Updates

Model Effort by FMCS Mediators Assists Berry Grower and Pickers Reach First Labor Contract

SEATTLE, WA – In a model effort of its kind, Seattle-based Commissioner Ligia Velazquez and Oakland-based Commissioner Rachel Lev successfully mediated an initial contract between Sakuma Brothers Farms, a major berry grower in the state of Washington, and a new farm worker union, Familias Unidas por las Justicia ('FUJ') in a first-ever collective bargaining agreement for the new union.

The key to the contract was a memorandum of understanding (MOU), previously negotiated by the parties, which created a framework for collective bargaining. The MOU was necessary because the parties' bargaining rights and obligations were not subject to the National Labor Relations Act or Washington state labor laws. The parties signed the MOU in 2016 to end several years of conflict between the workers and the Sakuma Brothers Farms over workers' efforts to organize.

Once the MOU had been finalized, Commissioners Velazquez and Lev held an initial mediation session with the parties in February this year. The parties began the mediation process with more than two dozen significant disputes over outstanding issues. Complicating the mediation and negotiation, discussions were conducted in both English and Spanish, with a translator present for most of the sessions.

The bilingual discussions, however, did not prove to be a barrier to frequent brainstorming and creative bargaining solutions that were developed by the parties to successfully address a series of complicated and highly divisive issues. Remarkably, negotiations and the FMCS mediation concluded successfully in a first contract in June after only four months— in time for the summer berry-picking season. The contract was ratified by union members June 15.

For local news coverage, go to http://www.seattletimes.com/seattle-news/union-says-it-has-reached-contract-deal-with-sakuma-bros-berry-farm/. ►

Federal - United States

Federal Mediation & Conciliation Service, cont.

FMCS Updates, cont.

FMCS Assists in AT&T-CWA West Coast Settlement

OAKLAND, CA – After a recommended tentative agreement was turned down by the bargaining unit twice, Oakland-based FMCS Commissioner Erin Spalding was called in to work with the parties over the course of three days to help negotiate another settlement.

AT&T announced July 14 that Pacific Bell and Nevada Bell had reached a new tentative contract with the Communications Workers of America (CWA) in West Region wireline contract talks covering more than 17,000 employees in California and Nevada. The two sides had returned to the bargaining table after the CWA-represented employees narrowly failed to ratify a prior agreement that had been reached in June.

The July settlement, which was later ratified by CWA members, was reached after extensive discussions between the company, the CWA, and Commissioner Spalding, according to statements by the parties to the news media.

FMCS Applauds ILWU-PMA West Coast Ports Announcements

WASHINGTON, D.C. – Federal Mediation and Conciliation Service (FMCS) Acting Director John Pinto applauded announcements from the parties of a three-year contract extension between the International Longshore and Warehouse Union (ILWU) and of the Pacific Maritime Association (PMA).

With their agreement, the ILWU and the PMA ensured stable labor relations among employers and the ILWU at all 29 U.S. West Coast ports to July 1, 2022.

In his July 31 statement, the FMCS Acting Director praised both labor and management representatives for taking early and decisive action to resolve their differences well ahead of the scheduled contract expiration in 2019. “Recognizing and addressing mutual issues of concern in advance of a contract deadline is always our recommendation where difficult and complex issues are involved,” Pinto said.

“ILWU President, Bob McEllrath, PMA Executive Director Jim McKenna, the members of their bargaining committees and the respective members of both organizations are to be commended for their success in utilizing the collective bargaining process to bring the hope of calm, stable, and continued economic progress to the West Coast ports and the U.S. economy.” ►

Federal Mediation & Conciliation Service, cont.

FMCS Updates, cont.

West Coast Ports, cont.

Pinto added, "This is almost a text book example of following the blueprint of FMCS best practices to a successful conclusion at the bargaining table." The extended contract was based upon the one reached in February, 2015 following what were characterized as "volatile union-employer relations."

Those talks, which led to a settlement that ultimately restored the ports to normal operations, were successfully mediated by FMCS Deputy Director Scot L Beckenbaugh. With their announcements on July 31, the ILWU and PMA have extended the main provisions of that contract, with wage, pension and health care amendments, until a July 1, 2022 expiration date.

FMCS Helps National Public Radio & SAG-AFTRA Settle Contract

Thanks to the efforts of FMCS Maryland-based Commissioner Christy Yoshitomi, representatives for U.S. National Public Radio and SAG-AFTRA reached a tentative agreement after lengthy, late-night negotiations Sunday, July 16, averting a looming strike by approximately 430 NPR journalists.

"NPR and SAG-AFTRA's bargaining teams worked tirelessly and constructively to find common ground," according to a joint statement issued by the parties when the agreement was ratified and signed.

FMCS Retiree Named to Texas Hall of Fame

Retired FMCS Commissioner Clint Hart was named to the Texas Labor-Management Hall of Fame in July in front of a crowd of friends, colleagues, and employer and union representatives at the Texas Labor-Management Conference, July 12-14, 2017 in San Antonio, Texas.

Former Commissioner Hart, a longtime veteran of the FMCS Dallas-Fort Worth office and a former board member of the Texas conference, was honored with a Hall of Fame plaque presented by John Patrick, president of the Texas AFL-CIO, and Mike Cunningham, chairman of the Texas Labor-Management Conference and retired president of the Texas Building and Construction Trades. ▶

Federal Mediation & Conciliation Service, cont.

FMCS Updates, cont.

FMCS Mediator Honored as Labor Woman of the Year

New Jersey-based Commissioner Cathy Brady was honored June 12 with the Labor Woman of the Year award, presented by the Coalition of Labor Union Women (CLUW). Commissioner Brady used the presentation as an opportunity to deliver "a good pitch to encourage everyone to call their mediator" in the room full of union leaders and attorneys, she said later.

Airport Workers in Los Angeles Achieve Contract with FMCS Help

LOS ANGELES, CA -- Los Angeles-based Commissioner Tina Marie Littleton helped Los Angeles (LAX) Airport support service companies and SEIU United Service Workers West achieve a safe landing in May for negotiations involving 4,000 bargaining unit employees, including cabin cleaners, wheel chair assistants, security, ticket takers, crowd control sky cabs and janitors employed at LAX.

The parties had encountered considerable turbulence after approximately seven months of negotiations and contacted FMCS for help in mid-February. The complex negotiations were made even more challenging by very large bargaining committees for both sides. Seated at the negotiation table were 14 separate passenger support service companies and the SEIU Service Workers. After 11 mediation sessions, Commissioner Littleton had helped the parties navigate the difficult issues that separated them. With a midnight May 6 deadline looming, she guided the parties through the weekend to a fully recommended agreement on all language and economic issues (involving the complexities of prevailing city and airport pay) in a final, 12th mediation session.

FMCS Employee Receives Award for Government Service

FMCS Regional Administrative Specialist (RAS) Sharon Rafferty was honored for 30 years of government service Friday, May 5 at the 38th Arbitration Symposium in Atlantic City. In tribute to her years of service, RAS Rafferty was honored by a standing ovation from the audience of 250 labor and management representatives, arbitrators, and mediators. ■

Iowa Public Employment Relations Board (PERB)

Sweeping Collective Bargaining Changes in Iowa

Submitted by Mike Cormack, Board Chair, Public Employment Relations Board (Iowa)

Iowa established its modern system of collective bargaining under Republican Governor Robert Ray in 1974. That system has been largely untouched legislatively until this year. During the 2017 edition of Iowa General Assembly, Republican Governor Terry Branstad signed into law House File 291, which was a sweeping revision of the statute that passed with Republican majorities approving the legislation in both chambers. With an immediate enactment date, it changed the scope of spring negotiations. All contracts agreed to prior to February 17 remain in force until their conclusion under their existing terms. Any new or extended contracts established beyond February 17 must adhere to the terms of the new law.

Some school districts and educational associations settled their contracts prior to the signing of the legislation on February 17, extending the contracts under the provisions of the previous statute. Others soon settled, with those remaining in negotiations needing to restart the process from scratch, with proposals that matched the terms of the new law.

One major distinction under the new law is that bargaining units now fall under two major categories, public safety and non-public safety units. There continues to be a system of collective bargaining that includes negotiations and, if needed, mediation and arbitration. If a particular unit has 30 percent or more of their members classified as public safety employees, they are able to continue to negotiate under most of the previous terms of Iowa law concerning mandatory, permissive and illegal items. The majority of the approximately 1,200 bargaining units fall under the category of non-public safety units. The only mandatory subject of bargaining for these groups is base wages. Base wages are limited to no more than 3 percent growth, or the Consumer Price Index-Urban (midwest), whichever is the lower category if they are brought before an arbitrator for final settlement. Labor and management can agree to pay more in a contract, but if it goes to arbitration, it is limited to that amount. The remaining items for the non-public safety groups are then restricted to either permissive or illegal status. Dues deduction is one item that is illegal for both public safety and non-public safety units to place in a contract. ►

Iowa Public Employment Relations Board, cont.

Sweeping Collective Bargaining Changes in Iowa, cont.

Iowa will begin recertification elections for bargaining units to retain their current bargaining representative. Previously, Wisconsin was the only state to have this requirement. Unlike Wisconsin, this is not an annual requirement for all groups. Any bargaining unit that has their collective bargaining agreement set to expire in one year must hold this election. If a bargaining unit has an annual contract with an employer, they will vote every year. If they have a multi-year contract, they will vote when they reach that one year status. In Iowa, contracts range from one to five years in length. As an example, if there is a collective bargaining unit that has a five year contract, their recertification election would take place in the fourth year of the contract. All bargaining units, public safety and non-public safety, must have an election every five years at a minimum.

Iowa's Public Employment Board has reached an agreement after a bidding process to select the firm "Everyone Counts" to conduct the voting in these new elections. The first set of elections will be held in September, with approximately 15 units – 1,200 members – voting. The elections will be conducted by traditional paper balloting. In October, as many as 575 bargaining units – 40,000 voters – may vote. The new vendor will conduct the votes, which will include a two-week voting period and voter choice of either telephonic or computer voting.

The new statute requires a bargaining unit to receive the vote of the majority of eligible voters, not their paid members, but all possible members of the unit. In addition, all non-voters are considered to be voting *no* in the election. In other words, to retain a bargaining unit representative, over half of the unit must vote *yes* in the election to retain their representation. If the vote fails, Iowa law requires a two year bar on that unit having any bargaining representative represent them. Bargaining units may choose not to participate in the election, and where that is the case, will automatically have their representation revoked.

Further, the Iowa statute requires that the cost of the election be assessed to the bargaining unit, not state government monies. The PERB Board has established an initial fee of one dollar per voter for the first year of elections in Iowa, established in emergency rules which the Administrative Rules Review Committee of the Iowa General Assembly passed on Friday, August 4. Those rules passed on a party line six to four vote. ►

Iowa Public Employment Relations Board, cont.

Sweeping Collective Bargaining Changes in Iowa, cont.

The current legislation is in the Iowa Court System with two groups, ISEA and AFSCME, challenging the legality of the new statute. Concerning the Court's interpretation of the legality of the new law, time will tell. Currently, the law provides for immediate enactment, and is the law of Iowa.

The PERB Board has issued rulings on negotiability disputes on topics such as what base pay and what supplemental pay means under the new statute. One of these provisions has been appealed to the Iowa Courts. Many more disputes have been brought before either the Board itself or designated Administrative Law Judges in response to either prohibited practice complaints in negotiations from this year, or concerning the underlying statute. PERB continues to see an increased amount of activity before the agency as a result of the new statute.

The PERB website is a good source of information about the implementation of the new statute in Iowa. Administrative rules have been formed by the agency either to revise rules that are no longer viable under the legislation, or that concern new topics such as the recertification elections that were not previously addressed under Iowa law. Those who are interested in the collective bargaining changes in Iowa and the implementation of those changes by Iowa PERB are encouraged to visit the website on a regular basis. The website, **www.iowaperb.iowa.gov**, is updated on a regular basis.

Iowa PERB remains committed to being a neutral institution, and does not have a position on these changes. Certainly, this has been a major policy change in this state, and there are strong and passionate views from those on both sides of the issue in the public policy arena. PERB maintains a neutral perspective and enforces the law as it is written.

For those who are interested in this area of public policy, Iowa has made the most significant shift in collective bargaining laws since the statute was enacted, and has made the most significant shift of collective bargaining law of any state in the union this year. The changes shared in this article are not the only ones that were done under House File 291, but are major pieces of that statute. A link to the legislation itself can be found on the PERB website, or directly at **www.legis.iowa.gov**, the website of the Iowa General Assembly. ■

The States

Massachusetts Department of Labor Relations and The Commonwealth Employment Relations Board

Publications

In October 2016, the Department of Labor Relations published the 11th edition of its "Guide to Massachusetts Collective Bargaining Law," familiarly referred to as the "Greenbook" due to its distinctive green binding. Unlike past editions of the guide, it was not published in hard copy, but as a digital, fully-searchable, all-electronic version with interactive links to cited laws, regulations and cases. Please visit the DLR's website at www.mass.gov/dlr to access the digital guide.

CERB Changes

The Commonwealth Employment Relations Board (CERB) is the three-member body within the Department of Labor Relations that issues final orders on appeal from hearing officer dismissals and decisions after hearing. The CERB is comprised of one full-time chair and two per diem members. Marjorie Wittner, the current ALRA president, has served as the CERB Chair since October 2008. In February 2016, Katherine Glendon Lev (Katie) was appointed by Governor Baker for a four year term. She succeeds Professor Harris Freeman, who had served with Marjorie since June 2009. Prior to joining the CERB, Katie was the Sr. Director of Labor Relations and sole lead negotiator for a $139B Fortune 10 company. In 2013, she was elected by labor peers to lead the Board of CUE, a non-profit, member-run organization whose mission is to assist member companies in establishing, applying and maintaining positive labor and employee relations practices. Katie currently has her own consulting practice, providing labor relations consulting and bargaining support to clients across the US. Katie earned a BA and MS from Boston College and a JD from Boston College Law School.

In June 2017, Governor Baker appointed Joan Ackerstein to succeed Arbitrator Elizabeth Neumeier, who had served on the CERB since 2008. Prior to joining the CERB, Joan worked in the Boston office of Jackson Lewis, P.C., for 29 years, where Joan practiced employer-side employment law litigation. Joan had a distinguished career at Jackson, including being the first woman elected to the firm's ten-member management committee, five ▶

Massachusetts DLR and CERB, cont.

CERB Changes, cont.

member partner compensation committee, and the first women to be named National Director of Litigation with leadership responsibility for hundreds of litigators around the country. Joan earned a BA from the University of Vermont and a JD from the Georgetown University Law Center.

Selected Agency Decisions

Duty to bargain over impacts of requiring police officers to administer nasal Naxolone (Narcan) to suspected opioid overdose victims

Town of Natick and Natick Patrol Officers Association, 43 MLC 178, MUP-15-4244 (Hearing Officer (H.O.) Decision, February 17, 2017).

The issues in this case were whether the Town failed to bargain in good faith, in violation of Section 10(a)(5) of Massachusetts General Laws Chapter 150E (the Law) by: 1) implementing a Narcan policy in July of 2015 without bargaining to resolution or impasse about the *impacts* of the policy on bargaining unit members' terms and conditions of employment; and 2) delaying providing the Narcan-related Fire Department run sheets that the Union requested in December of 2014 until January of 2016. (At the probable cause stage, the CERB upheld the dismissal of the Union's allegation that the Town violated its statutory bargaining obligation by not bargaining over the *decision* to require police officers to administer Narcan on grounds that this was a level of services decision regarding the deployment of public safety personnel made in further of a state public health advisory.) After hearing, the hearing officer found that the Town violated the Law as alleged. As a threshold matter, the hearing officer determined that the Narcan policy impacted the patrol officers' terms and conditions of employment, including job duties, workload, and safety. The hearing officer also found the Town's one year delay in providing requested information to the Union was unlawful. Finally, the hearing officer concluded that the parties had not bargained to impasse about the impacts of the Narcan policy on patrol officers' terms and conditions of employment and that the Town unlawfully implemented the Narcan policy in July of 2015.

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). ►

Massachusetts DLR and CERB, cont.

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 Massachusetts General Laws Chapter 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 to have its environmental expert conduct sampling for the presence of PCBs in the schools' exterior caulking. As a matter of first impression, the CERB ruled that an employer's duty to furnish relevant and reasonably necessary information encompasses providing access to the worksite to obtain that information. The CERB then considered the Employer's arguments on appeal. The CERB rejected the Employer's argument that the hearing officer erred by concluding that the Union's access request was relevant and reasonably necessary without having first determined that PCBs actually posed a safety and health risk to EAW members. The CERB agreed that the hearing officer did not need to make this finding as a threshold determination because relevancy and reasonable necessity were demonstrated by a number of other factors, including that EPA regulations required removal of caulking with PCB concentrations of greater than 50 ppm, and because EAW members had approached EAW staff with concerns about the cancer rates in one of the schools that the EAW sought to test. That the Union may have already obtained its own caulking samples did not change this result because the School Committee did not accept the validity of those samples. Finally, the CERB rejected the Employer's arguments that the Union's "unclean hands" prevented a finding for the Union. The CERB agreed with the hearing officer that the record did not support a finding that the Union had acted in bad faith or alternatively demonstrated that the Union's purported bad faith either precipitated the Employer's decision to deny the Union's access or prevented it from granting the request.

Jointly-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 (City) inspectional services department via home rule amendment. 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 in effect when the employees were employed by the school department. Relying on longstanding precedent grounded in Section 1 of the Law, holding that a municipality and a school committee jointly share responsibility when bargaining obligations are unfulfilled, the ▶

Massachusetts DLR and CERB, cont.

CERB affirmed the hearing officer's conclusion that the City had violated the Law in the manner alleged. The City argued, both to the hearing officer and to the CERB on appeal, that the Union had waived by contract its right to bargain over the change in past practice when, during negotiations for a successor City agreement, it rejected the City's request that the Union provide a list of all past practices. The City also argued that the Union waived its right to bargain by agreeing to a zipper clause.

The CERB rejected both arguments. It found no evidence demonstrating that the City and the Union had ever addressed the vacation retirement benefit during bargaining and, consistent with this finding, their final agreement was silent on this issue. Thus, notwithstanding a zipper clause, the CERB held that the City remained obligated to give the Union notice and an opportunity to bargain before changing the past practice.

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).

The CERB affirmed a hearing officer decision holding that the Everett School Committee did not violate Sec. 10(a)(5) and, derivatively, Sec. 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 Complaint.

The Union appealed to the CERB, arguing that the School Committee had bargained in bad faith, and thus the parties could not have bargained to a good faith impasse. The Union claimed that the facts showed that, by the time it offered to bargain, the School Committee had already made up its mind to lay off the therapists and outsource their duties. The Union also argued that the School Committee engaged in surface bargaining and unlawfully limited its bargaining to impacts only. The CERB rejected all arguments. The evidence reflected that the School Committee remained able to move monies around within its budget even after it voted to eliminate the therapist positions from the School Committee budget. Further, the School Committee repeatedly acknowledged that the matter needed to be bargained, and, on several occasions, asked the Union for a suggestion or counterproposal for cost-saving alternatives to eliminating the positions. Based on these facts, the CERB concluded that the School Committee had not presented the Union with a *fait accompli* and had otherwise reached a good faith impasse.

Judicial Appeal: Pending. ▶

Massachusetts DLR and CERB, cont.

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)

Last May, the Supreme Judicial Court of Massachusetts (SJC) overturned a CERB decision holding that the 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 Sec. 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 Sec. 6 of Chapter 150E includes the duty to affirmatively support that request, and that the duty to bargain in good faith did not end when the parties reached agreement. Here, 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 agreements 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 violate Sec. 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 Sec. 7(b) of the Law if its 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 is examined only during the period of bargaining. The Court rejected the CERB's longstanding precedent that employers have ongoing obligation to bargain in good faith that covers the period of time 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 caused the Court to find no evidence that the Commonwealth lacked a fair and open mind during the actual bargaining process. ■

Michigan Employment Relations Commission

Summaries of Noteworthy Decisions

Lynn Morison, Staff Attorney, Carl Wexel, Administrative Law Specialist and Ashley Olszewski, Paralegal

Grand Traverse Co & Grand Traverse Co Sheriff -and- Police Officers Association of Michigan -and- Command Officers Association of Michigan & Technical, Professional and Officeworkers Association of Michigan

Case Nos. C16 E-050 thru C16 E-053, issued August 16, 2017

Issues: Duty to Bargain, Repudiation, Publicly Funded Health Insurance Contribution Act, (Act 152)

The Commission affirmed the ALJ's decision finding that the employers breached their duty to bargain by increasing the employees' share of health insurance premium costs from 6% to 20% during the term of the parties' collective bargaining agreements.

The parties entered into collective bargaining agreements extending from January 1, 2015, through December 31, 2017, that contained provisions covering employees' health insurance benefits and specifying that employees would be required to contribute 6% of the health insurance premium. The collective bargaining agreements do not refer to Act 152 or the employers' responsibilities under Act 152. Since 2011, the employers have made an annual choice as to their cost sharing option under Act 152. In April 2016, the employers voted to switch from the hard cap option under Act 152 to the 80% employer share option and to increase the employees' share of health insurance premium costs from 6% to 20%.

During the term of a collective bargaining agreement covering mandatory subjects of bargaining, such as health insurance benefits, both parties are bound by the provisions of that agreement unless and until they reach an agreement to modify it. If there is a charge that a party has made a unilateral change to a mandatory subject of bargaining during the term of the parties' collective bargaining agreement, the Commission must determine whether that change constitutes a repudiation of the contract. Repudiation occurs when the contract breach is substantial and there is no good faith dispute over the interpretation of the collective bargaining agreement. Here, the employers could not ►

Michigan Employment Relations Commission

Summaries of Noteworthy Decisions, cont.

point to anything in the collective bargaining agreements to justify the change in the amount of the employees' share of the health insurance premiums. Therefore, the employers failed to establish a basis for finding that the dispute is a good faith dispute over contract interpretation.

The choice of Act 152 cost sharing options is a permissive subject of bargaining. In this case, the employers did not bargain with the unions over the choice of cost sharing options under Act 152. PERA requires bargaining on health insurance benefits and Act 152 does not interfere with that requirement. When entering into collective bargaining agreements, public employers must comply with both PERA and Act 152. Whether or not a public employer negotiates its choice of cost sharing options under Act 152 with the union, the public employer's choice of options must be consistent with any agreements it has made with that union to contribute to the employees' health-care costs.

The employers contended that their agreement to pay 94% of the employees' health care costs was carried over from predecessor agreements that were adopted before the enactment of Act 152. Provisions in expired contracts do not automatically carry over to the parties' successor agreements. When parties agree to carry over provisions from their predecessor agreement, each party must consider the effect that those provisions are likely to have on their financial and legal obligations throughout the term of the successor agreement.

In negotiating the collective bargaining agreements at issue, the employers had an obligation to ensure that their choice of cost sharing options under Act 152 was consistent with their obligations under the collective bargaining agreements. By ratifying the four collective bargaining agreements that committed the employers to paying 94% of health insurance premium cost for three years, the employers were also committed to doing whatever is necessary for compliance with, or exemption from, Act 152 to enable them to lawfully pay that amount of their employees' health insurance premium costs. That includes agreeing to annually vote on the appropriate Act 152 cost sharing option. Since the collective bargaining agreements between the employers and the unions do not expressly require the employers to select a particular option under Act 152, the employers may change their choice of cost sharing options **as long as that choice does not interfere with their ability to meet their obligations under the collective bargaining** ►

Michigan Employment Relations Commission

Summaries of Noteworthy Decisions, cont.

agreements to pay 94% of employee health insurance premium costs through the end of 2017. By substantially increasing the employees' share of health insurance premium costs, the employers repudiated the collective bargaining agreement and breached their duty to bargain.

Interurban Transit Partnership -and- Amalgamated Transit Union Local 836

Case No. C16 A-004, issued July 12, 2017

Issues: § 10(1)(a); § 10(1)(c); Protected Concerted Activity; Anti-Union Animus

Interurban Transit Partnership (employer) and the Amalgamated Transit Union (union) were parties to a collective bargaining agreement covering approximately 320 driver/operators and maintenance mechanics employed by the employer. A bargaining unit member, DeShane, attended a regularly scheduled public meeting of the employer's Board of Directors. During the public comment portion of the meeting, DeShane and other operators commented on the contract negotiations, and DeShane specifically accused the Board of not wanting to negotiate.

After hearing public comments, the Board voted to go into executive session to discuss the negotiations. DeShane and some other union supporters moved to the front of the room, sat down on the floor, and began loudly chanting slogans. DeShane refused to initially leave the room, until his union president suggested he leave, and he complied.

Initially, the employer indefinitely suspended DeShane, but the suspension was converted to a thirty day suspension for violating work rules prohibiting disruption in the workplace and insubordination. Subsequent to the meeting of the Board of Directors, the employer denied DeShane's request for union leave citing that he was not a union officer. As a result, the union filed an unfair labor practice charge.

The ALJ found that by issuing a thirty-day unpaid suspension to DeShane for his conduct at the Board of Directors meeting, and by denying him union leave, the employer violated § 10(1)(a) and (c) of PERA.

The Commission found that the ALJ properly concluded that the employer violated § 10(1)(a) by issuing DeShane a thirty-day unpaid suspension for his conduct at the ►

Michigan Employment Relations Commission

Summaries of Noteworthy Decisions, cont.

employer's Board meeting, and found that while his actions delayed the start of the meeting, it did not prevent the Board from holding its executive session. Had DeShane continued to refuse to leave the room after being instructed to do so, the Commission held that his activity would have been unprotected by PERA.

As to the employer's denial of DeShane's union leave request because he was not a union officer, the Commission agreed with the ALJ that the language of section 2.07 of the parties' collective bargaining agreement was ambiguous. The language of the provision referred to "Employees called upon to transact business of the Union or Authority" and, according to the Commission, did not unambiguously support the Employer's denial of DeShane's request for union leave. The Commission found that the employer provided no legitimate explanation for its sudden decision to change its interpretation and application of section 2.07 to permit union leave time to non-officer members, and coupled with the suspicious timing of the change, warranted a finding that the Employer's subsequent refusal to allow union leave to DeShane was motivated by anti-union animus. As such, the Commission agreed with the ALJ that the employer violated § 10(1)(a) and (c) by applying section 2.07 of the collective bargaining agreement to DeShane in a discriminatory manner.

In dissent, Commissioner LaBrant stated that he would reverse the finding of the ALJ that the Employer violated § 10(1)(a) by issuing DeShane a thirty-day unpaid suspension because he did not believe that the Commission should transform an employee's right to engage in "concerted activities for the purpose of collective negotiation or bargaining or other mutual aid and protection" into a license to engage in disorderly conduct.

Commissioner LaBrant stated that the sit-down demonstration by DeShane at the close of the Board meeting was planned and caused the employer to have to call the police. Commissioner LaBrant stated that he was not prepared to treat an act of civil disobedience, which could be classified as "exciting a disturbance at a public meeting" and punishable as a misdemeanor under MCL 750.170, as protected "concerted activity" under PERA. Commissioner LaBrant agreed with the majority that the employer violated § 10 by denying DeShane's request to use union leave.

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

Michigan Employment Relations Commission

Summaries of Noteworthy Decisions, cont.

Wayne County -and- AFSCME Local 3317

Case No. D16 K-0900, issued July 12, 2017

Issues: Motion for Reconsideration; Duty to Bargain; Consent Agreement; Commission Rule 161(7); Local Financial Stability and Choice Act (Act 436)

On May 12, 2017, the Commission issued its Decision and Order in the above case granting a motion by the employer, Wayne County, to dismiss the request of the Union, AFSCME Local 3317, for collective bargaining mediation services in Case No. D16 K-0900. The Commission agreed with the county that it had no duty to participate in collective bargaining mediation because the County's duty to bargain was suspended during the period between September 20, 2015, and October 1, 2018, under a Consent Agreement with the State of Michigan pursuant to the Local Financial Stability and Choice Act, 2012 PA 436, as amended, (Act 436), MCL 141.1541 – 141.1575.

Despite prevailing with the Commission, the County filed its motion for reconsideration asking the Commission to instruct ALJ Travis Calderwood to dismiss four unfair labor practice charge cases presently pending between the parties, and asserting that the ALJ has no jurisdiction over the charges because the County is not currently subject to the duty to bargain. In its motion, the County contended that Act 436, the 2012 amendments to PERA, and the Consent Agreement not only authorize the suspension of the County's duty to bargain, but also exempt it from responsibility for any alleged unfair labor practices that may have occurred prior to or during the term of the Consent Agreement.

The Commission found no merit to the County's assertions and ruled that the suspension of a public employer's duty to bargain does not affect the Commission's jurisdiction over unfair labor practice charges against that public employer. The Commission found that the County failed to identify any specific language in Act 436 or in PERA that provided the County with an exemption from unfair labor practice charges.

After reviewing § 10, § 15(1), and § 16 of PERA, the Commission found that the issue of whether an ALJ can adjudicate an unfair labor practice charge against the County is not determined by whether or not the County is subject to the duty to bargain. Whether an ALJ has the authority to hold a hearing on an unfair labor practice charge depends on whether the charge states a claim upon which relief can be granted under PERA. ►

Michigan Employment Relations Commission

Summaries of Noteworthy Decisions, cont.

Further, the Commission found that the County failed to indicate that any of the unfair labor practice charges failed to state a claim upon which relief can be granted under PERA. The Commission explained that if the charges before ALJ Calderwood allege that the County violated provisions of PERA other than § 10(1)(e) or § 15(1), those matters would be within the subject matter jurisdiction of the Commission and would be properly before ALJ Calderwood. Additionally, if the charges allege that the County violated § 10(1)(e) or § 15(1) of PERA before the suspension of its duty to bargain, those matters would also be within the subject matter jurisdiction of the Commission and would be properly before the ALJ. The Commission found nothing in the County's motion to indicate that the Union's allegations in the matters before ALJ Calderwood were limited to claims that the County breached its duty to bargain between September 20, 2015, and October 1, 2018.

Lastly, the Commission found that by asking it to instruct the ALJ to dismiss the unfair labor practice charges, the County was asking it to ignore Commission Rule 161(7), which is based on § 16 of PERA and provides that any review of an ALJ's ruling by the Commission must await the filing of exceptions to the ALJ's decision and recommended order. The Commission found the unfair labor practice charges to be properly before ALJ Calderwood to determine whether any alleged unfair labor practice has been committed by the County.

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

Interurban Transit Partnership -and- Amalgamated Transit Union Local 836

Case Nos. C15 H-105 & CU15 I-025, issued February 16, 2017

Issues: Duty to Bargain; Impasse; Regressive Bargaining; § 10(1)(a); Employee Solicitation and Distribution

Interurban Transit Partnership (employer) and the Amalgamated Transit Union (union) were parties to a collective bargaining agreement covering approximately 320 operators and maintenance mechanics employed by the employer. In December 2014, the parties began negotiations for a successor contract, but after numerous meetings, the parties failed to agree on 13 remaining issues. The Commission appointed a fact finder to resolve the issues, and the fact finder issued his recommendation. Both the employer and the ►

Michigan Employment Relations Commission

Summaries of Noteworthy Decisions, cont.

union issued public statements regarding the fact finder's recommendations. The employer accepted all of the fact finder's recommendations, and the union rejected the recommendations on all but the two issues on which the fact finder had recommended the Union's position.

Subsequent to the issuance of the fact finder's recommendations, two bargaining unit members stood on the platform at the employer's Central Station and distributed leaflets to passengers, accusing the employer of forcing workers to give up their retirement security. The employer forced the employees to halt the leafleting under threat of discipline. After this, both parties filed unfair labor practice charges.

The ALJ recommended dismissal of both charges as they related to alleged violations of the duty to bargain by both parties, and the Commission agreed. The Commission found that while the employer may have exhibited a tough bargaining position with the union, the employer did not evidence a fixed intent to not reach an agreement. The Commission also found that the employer did not violate its duty to bargain in good faith by bypassing the designated representative and attempting to negotiate directly with employees by holding meetings with employees to discuss the status of negotiations, by threatening to unilaterally terminate its pension plan, or by declaring impasse prior to bargaining to a good faith impasse. As the parties had reached a good faith impasse in their contract negotiations, the Commission stated that the employer was legally permitted to implement its last offer, and its communications were simply an indication of its intent to do so, not a threat to employees.

As it relates to the employer's position that the union violated its duty to bargain, the Commission found that the union did not commit an unfair labor practice by initially refusing to bargain over changes to the pension plan. The Commission found that the union did not refuse to bargain over changes to the pension, but initially only took the position that termination of the plan, or amendments to the plan, required the approval of the joint pension committee. Further, the Commission found that the union did not engage in regressive bargaining because the union did not present regressive proposals as a tactic to avoid reaching an agreement.

The Commission reversed the ALJ's finding that the employer violated § 10(1)(a) by banning off-duty employees from leafleting to publicize the parties' contract dispute on ▶

Michigan Employment Relations Commission

Summaries of Noteworthy Decisions, cont.

the platform of the employer's Central Station, and by threatening two employees with discipline for this activity. Since the Central Station platform was a work area akin to the selling areas involved in cases interpreting § 7 and § 8(a)(1) of the NLRA, the Commission found that the employer was permitted to prohibit all solicitation within the area during both working and non-working hours.

Although the ALJ found that the employer disparately enforced it's no solicitation policy, the Commission held that, even if certain organizations were allowed to solicit on the Central Station platform in the past, such would not be sufficient to preclude the employer from enforcing its policy. ■

Photo courtesy of www.pixabay.com

Save the Date!

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

Minnesota Bureau of Mediation Services

In Memoriam

Staff at the State of Minnesota Bureau of Mediation Services mourn the loss of Commissioner **Josh Tilsen** on April 18, 2017 at age 67 after a sudden and unexpected illness.

Josh Tilsen

Josh began his work at the Bureau in 1988 and served in the positions of Hearing Officer, Mediator and Manager of Administrative Hearings before being appointed Commissioner by Governor Mark Dayton in 2011. He was reappointed as Commissioner in 2015. Governor Dayton and Lt. Governor Smith recognized Josh as a strong, dedicated public servant who believed in public service and conflict resolution.

Prior to his work at the Bureau, Josh was an officer, organizer and business representative for HERE Local 17 (now UNITE HERE Local 17) representing hotel and restaurant employees in Minneapolis and the Twin Cities area where he advocated for fair workplaces for working people.

Josh was a strong advocate of the importance of being a member of ALRA and encouraged his staff to attend the annual ALRA conference. He believed in ALRA's mission, the importance of networking, and the exchange of information regarding the administration and improvement of agency services. Josh was honored to host the 2015 conference in Minnesota and to be elected to the ALRA Board that same year.

The Josh Tilsen Community Mediation Minnesota Memorial Fund has been established to honor Josh's vision to bring community mediation services and volunteer opportunities to all of Minnesota. At the conference in Portland, Oregon this past July, attendees celebrated Josh's life and honored his contributions to the field of mediation. This year, rather than providing gifts to conference speakers, the ALRA Executive Board decided to make a donation to the Josh Tilsen Community Mediation Minnesota Memorial Fund.

Since Josh's passing, Deputy Commissioner Todd Doncavage has been appointed by Governor Dayton to serve as Commissioner. ■

New York City Office of Collective Bargaining

Recent Decision – City cannot withhold information relevant to disciplinary proceedings

Submitted by Abigail R. Levy, Deputy General Counsel, NYC Office of Collective Bargaining

City of New York v. New York State Nurses Association

On June 8, 2017, New York State's highest court affirmed the New York City Office of Collective Bargaining's (OCB) decision holding that it was an improper practice for the City to refuse to provide information requested by the union in connection with disciplinary proceedings brought by the agency against two union-represented employees. In a matter of first impression, the Court of Appeals agreed with OCB's Board of Collective Bargaining that the language in OCB's enabling statute providing that parties "furnish to the other party, upon request, data normally maintained in the regular course of business, reasonably available and necessary for full and proper discussion, understanding and negotiation of subjects within the scope of collective bargaining," is not limited to contractual grievances nor is it restricted to information requested to facilitate collective bargaining negotiations.

The decision, *City of New York v. New York State Nurses Association*, affirms a decision issued by OCB's Board of Collective Bargaining, and can be found on Westlaw at 2017 WL 2466673, and on LEXIS at 2017 N.Y. LEXIS 1454. It can also be found on the State of New York Court of Appeals website at:

https://www.nycourts.gov/ctapps/Decisions/2017/Jun17/53opn17-Decision.pdf

The States

Ohio State Employment Relations Board

Save the Dates!

Upcoming Conference and Training dates for the Ohio State Employment Relations Board (SERB) & the Ohio State Personnel Board of Review (SPBR)

Fall/Winter SERB Academy is set for **December 6-7, 2017**; it will be held at the Crown Plaza Dublin, Dublin, Ohio.

SPBR Conference is set for **March 23, 2018**; it will be held at the Crown Plaza Dublin, Dublin, Ohio.

Advanced Negotiations Training is set for **April, 11, 2018** and will be held at the State Library, downtown Columbus, Ohio.

Spring SERB Academy is set for **May 17-18, 2018**; it will be held at the Crown Plaza Dublin, Dublin, Ohio.

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: Thomas Brady, Member and Lisa Addario, Member

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 and employers.

The Board is pleased to announce that the Governor-in-Council (GIC) has extended the appointment of Mr. Richard Brabander and Mr. Norman Rivard as full time members of the Board until December 22, 2017.

The Board also welcomes the appointment of two new members. The GIC has appointed Mr. Thomas Brady as a full-time employer-side member for a term of one year, effective May 29, 2017. The GIC has also appointed Ms. Lisa Addario as a full-time employee side member, also for a term of one year, effective June 19, 2017. Please join us in congratulating both Messrs. Brabander and Rivard and in welcoming Mr. Brady and Ms. Addario to the Board!

The Board is currently composed of **Ginette Brazeau**, Chairperson; **Louise Fecteau**, **Patric F. Whyte**, **Allison Smith** and **Annie G. Berthiaume**, Vice-Chairpersons; **André Lecavalier**, **Richard Brabander** and **Thomas Brady**, Members representing employers; **Gaétan Ménard**, **Norman Rivard** and **Lisa Addario**, 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). ■

Canada Industrial Relations Board, cont.

Case Summaries

Bell Canada, 2016 CIRB 823

Unifor filed an application for interim order and a complaint of unfair labour practice against Bell Canada, asking the Board to declare that Bell refused to respect the union's exclusive representation authority by offering a voluntary separation package (VSP) directly to its employees who were covered by Unifor's bargaining certificate. The employer operates in the telecommunications sector and provides telephone and television services to residential and business customers.

The union and the employer had a collective agreement in place and entered into a memorandum of agreement which had been renewed and amended since its inception in 1995. The parties also reached an agreement called the Red Book, for the administration of the memorandum. Bell advised Unifor that it had planned to offer a VSP to some Bell Business Customer Service staff but, after some discussion, the union believed that the VSP should be negotiated. Unifor sent employee members a letter which criticized the employer's attitude with respect to the VSP, and a few weeks later, Bell announced to that it planned to offer affected employees a VSP. The union asked the Board to order Bell not to set up VSPs and to refrain from offering them directly to employees without first obtaining the union's consent. Bell asked the Board to remove itself from hearing the complaint, and instead allow the issue to proceed to grievance arbitration.

The union took the position that Bell interfered with its exclusive right to represent the employees, and that VSPs were subject to negotiation when not expressly covered by the collective agreement. The union submitted that downsizing provisions in the collective agreement only applied in a context of a declaration of staff surplus, not staff shortage, which Bell was expecting. The union submitted that the Board must determine whether clear and compelling evidence that the collective agreement and past practice exempted Bell from negotiating the VSP with the union.

The employer submitted that at issue was a difference of interpretation and application of the collective agreement, and therefore the Board was without jurisdiction to determine the dispute without first conducting an analysis of the collective agreement. The employer stated it had no obligation to renegotiate the content of the VSP with the union as the Red Book agreement already had been established. The employer submitted that the Board should decline to deal with the complaint and refer it to arbitration. ▶

Canada Industrial Relations Board, cont.

Case Summaries, cont.

The Board determined that it had the jurisdiction to hear the ULP complaint to examine whether the collective agreement contained provisions to allow the employer to bypass the union's exclusive representation rights, without ruling on the application for interim order.

The Board found that the union's omission to object to previous voluntary termination or separation packages did not, alone, equate to bargaining away the union's exclusive bargaining right. Further, the Board found that a VSP concerns fundamental terms and conditions of employment which must be negotiated with the bargaining agent. Bell's view that it had a right to offer the VSP without negotiating with the union was not clearly demonstrated on the basis of the collective agreement, including the memorandum of agreement and Red Book. In the Board's view, the employer was applying a broad interpretation of these materials.

The Board found that the collective agreement was clear on the issue of the reduction of the workforce, and that Bell expected a staff shortage rather than a surplus, but did not provide for an agreement covering a VSP. The Board found that silence on the question of VSP offers without a declaration of a staff surplus obliges the employer to negotiate the VSP.

With respect to the union's past practice, the Board found that the lack of objection to VSPs in the past does not necessarily mean that a union has waived its exclusive bargaining right, nor its right to negotiate VSPs in the future in situations where no staff surplus is declared. The Board stated that an absence of an issue within a collective agreement does not allow the employer, through residual management rights, to freely negotiate with employees without regard to the continuing right of the exclusive bargaining agent.

The Board allowed the union's complaint and found that Bell interfered in the representation of the members by offering the VSP without obtaining Unifor's consent, despite the union's objection to it. The Board found that the provisions within the collective agreement and the evidence with respect to past practice did not provide clear and compelling evidence of the employer's right to offer employees the VSP without negotiating with the union. The Board issued a bare declaration to dispose of the matter, given the history of the parties' relationship. ►

Canada Industrial Relations Board, cont.

Case Summaries, cont.

***Société de transport de l'Outaouais*, 2017 CIRB 849**

The STO is a public transit service that makes over 70,000 trips each day of the week. It employs 760 employees, including drivers, office employees, and managers. Two applications were filed pursuant to section 87.4(4) of the *Canada Labour Code* (the *Code*) and raised a question about the application of section 87.4(1).

The first application was filed by the Amalgamated Transit Union, Local 0591 (ATU or the union). The union asked the Board to order a declaration that it is not necessary for the STO to continue the supply of services and operation of facilities to prevent an immediate and serious danger to the safety or health of the public within the meaning of 87.1(4) of the *Code*. The second application was filed by the STO. The employer asked the Board to order that activities during peak hours between Monday and Friday be maintained in the event of a strike, particularly regular services, integrated school services and bus maintenance services, to meet safety standards.

At hearing, the employer relied on the testimony of three experts, including a director of traffic management and transportation planning, a physician, and a psychologist. The union called the president of the Association des pompiers et pompières de Gatineau and two other witnesses to testify.

The union took the position that it was not necessary to maintain any service to prevent an immediate or serious risk to the health or safety of the public. The union argued that the Board must consider and give priority to the freedom of association pursuant to section 2(d) of the *Canadian Charter of Rights and Freedoms* over the protection of public health and safety. The union submitted that the employer did not discharge its burden of proof to show, with concrete evidence, a causal link between an interruption of STO transit services and a serious and immediate impact on public health. The union argued that the employer had failed to demonstrate, on the basis of expert testimony, that response times for ambulance and fire services would increase as a result of a strike.

The employer's position was that bus services are an essential service for the Outaouais public and must be maintained in the event of a strike. The employer asserted that in the absence of public transit services, longer travel time for the public would result, and the road network would be unable to absorb the increased number of vehicles within an acceptable timeframe. As a result, the employer's evidence was twofold: that the ►

Canada Industrial Relations Board, cont.

Case Summaries, cont.

response time for ambulance services and firefighters would be affected to the extent that public health and safety would be in danger and there would be consequences on the public's psychological and physical health, and that consequences included deteriorating air quality, increased stress levels, and increased response time for emergency vehicles that could lead to loss of life or property.

The Board stated that it must bear in mind its dual responsibilities when faced with a question pursuant to section 87.4 of the *Code* by considering the public's right to protection against a danger to its health or safety and Parliament's commitment to free collective bargaining. The Board found that any restriction of the right to strike must be limited to what is strictly necessary and only to ensure public health and safety.

The Board determined that there was no direct correlation to show that a strike without essential services would cause an immediate and serious danger to public health and safety. The Board was not satisfied that, if a strike was declared by the STO bus drivers and maintenance staff, ambulance and fire services would change to the extent that it would be necessary to prevent an immediate and serious risk to public health and safety. Moreover, the Board was not satisfied that travel times for making urgent transfers between hospitals would increase significantly, to the extent of endangering public health and safety.

Further, the expert testimony did not convince the Board that the absence of public transit would have consequences for the public's physical and psychological health. It did not provide data on the level of additional stress the public might suffer, take into account that roadways in the Outaouais area are already congested, or consider the number of individuals able to telework in case of transit interruption.

The Board dismissed the application. Although a strike would be inconvenient and cause individuals to reorganize their transportation arrangements, the Board was not satisfied that an interruption in STO public transit would generate an immediate and serious risk to public health and safety. The Board stated that maintaining full public transit services during peak hours from Monday to Friday, as sought by the employer, would render the exercise of the right to strike ineffective. ■

Federal - Canada

Federal Public Sector Labour Relations & Employment Board

Updates

With its recently expanded mandate, the Federal Public Sector Labour Relations and Employment Board (FPSLREB, the Board) has jurisdiction over several areas of federal public sector labour relations and staffing complaints.

Specifically, the Board:

- administers the public sector collective bargaining and grievance adjudication systems for the federal public service as well as for the institutions of Parliament;
- resolves complaints related to internal appointments, appointment revocations and lay-offs in the federal public service;
- resolves human rights issues in grievances and complaints that are already within its jurisdiction;
- resolves pay equity complaints in the federal public service;
- administers reprisal complaints of public servants under the *Canada Labour Code* (*CLC*); and
- administers the collective bargaining and grievance adjudication systems in its capacity as the Yukon Teachers Labour Relations Board and the Yukon Public Service Labour Relations Board.

Since the last update two years ago, the FPSLREB has continued to focus on delivering its service to stakeholders with labour relations, grievances, and staffing complaints.

With the merger of the two areas of labour relations and staffing, the Board has been engaged in many activities to synchronize aspects of its work. Since the last report in 2015, the Board has re-established its Client Consultation Committees for both staffing and labour relations matters. These Committees are comprised of representative stakeholders to discuss general issues and practices of the Board and to allow ▶

Federal - Canada

Federal Public Sector Labour Relations & Employment Board Updates, cont.

dialogue and feedback, with the objective of continuous improvement in areas such as expedited hearings, case management, and scheduling, among other initiatives. Within the FPSLREB Secretariat, which supports the work of the Board, operational teams were merged toward a more unified support service. Aspects of the services provided by the FPSLREB Secretariat are also in the process of being streamlined to facilitate its case management functions.

Waves of legislative changes continue for the Board. Most recently, legislative changes were brought about by Bill C-7, *An Act to amend the Public Service Labour Relations Act, the Public Service Labour Relations and Employment Board Act and other Acts and to provide for certain other measures* (S.C. 2017, c. 9). As a result of that *Act* coming into force on June 19, 2017, the name of the Public Service Labour Relations and Employment Board has been changed to the Federal Public Sector Labour Relations and Employment Board. It also changed the titles of the *Public Service Labour Relations Act* and the *Public Service Labour Relations and Employment Board Act* to, respectively, the *Federal Public Sector Labour Relations Act* and the *Federal Public Sector Labour Relations and Employment Board Act*.

The enactment of this new law also expanded the Board's mandate to provide a labour relations regime for members and reservists of the Royal Canadian Mounted Police. Consequently, the Chairperson, when making recommendations for Board member appointments, will need to take into account the need for two members to have knowledge of police organizations.

Bill C-4, *An Act to Amend the Canada Labour Code, the Parliamentary Employment and Staff Relations Act, the Public Service Labour Relations Act and the Income Tax Act*, also came into force on June 22, 2017. This legislation amends the *Canada Labour Code*, The *Parliamentary Employment Staff Relations Act* and the *Public Service Labour Relations Act* (now the *Federal Public Sector Labour Relations Act*) to restore the processes for the certification and the revocation of certification of bargaining agents that existed before the *Employees' Voting Rights Act*, S.C. 2014, c. 40, came into force on June 16, 2015. This will essentially restore the procedures that existed before June 16, 2015.

At this time, the Board is experiencing an overall increase in the filing of both staffing complaints and labour relations grievances. In addition, the past year has been very busy with respect to collective bargaining in the federal public service. Several mediation ▶

Federal - Canada

Federal Public Sector Labour Relations & Employment Board Updates, cont.

sessions have been conducted to assist the parties reaching tentative agreements covering approximately 105, 000 federal employees. Those agreements played a major role in establishing settlement trends in the federal public service.

In addition to many other areas of labour and employment law, the Board continues to have a large component of human rights related cases come before it. As of 2016-2017, an average of 20.9% of decisions issued by the Board addressed human rights issues in which one of the prohibited grounds was raised. As an example of a ruling involving human rights and prohibited grounds of discrimination, the Federal Court of Appeal dismissed an application for judicial review of a Board decision to allow the grievance in *Rahmani v. Deputy Head (Department of Transport)*, 2016 PSLREB 10. In that decision, the Board concluded that the grievor's disability was a factor in the decision to terminate him and that the decision was therefore discriminatory. The Federal Court of Appeal agreed with the Board, and further noted that only one factor is necessary to establish discrimination under the *Canadian Human Rights Act*.

The Board continues to ensure the continuity and development of its expertise in labour relations and employment law in the federal public sector and to pursue its commitment to resolving labour relations issues and staffing complaints in an impartial manner and according to the values of fairness and transparency and well-reasoned decision making. These and other principles that uphold access for its clients, as well as stakeholder engagement, continue to be a priority for the Board.

It is important to mention that this year contains many milestones with respect to the legislation administered by the Board, as it marks the 50th anniversary of the enactment of the *Public Service Staff Relations Act* in 1967, which provided collective bargaining rights to federal public service employees and allowed them to refer certain grievances to adjudication and granted them the right to strike to settle disputes. This coming year will also mark the 14th year of the passage of the *Public Service Modernization Act* and the consequent enactment of the *Public Service Employment Act* and the modernized *Public Service Labour Relations Act*. The legacy of the labour relations and staffing legislative frameworks persist in guiding the Board in the pursuit of its mandate to provide adjudication and mediation services. ■

Ontario Labour Relations Board

Recent Appointments, Important Decisions and Legislative Update

Recent Appointments

Since the Board's last update, the Board announced that **Matthew Wilson**, a full-time Vice-Chair of the Board for the past five years, has been appointed as the Alternate Chair. Additionally, the Board welcomed **Paula Pasieka**, **Graham J. Clarke, Harvey Beresford** and **Elizabeth McIntyre** as part-time Vice-Chairs.

Important Decisions

Unlawful Strike Application - *Heligear Canada Acquisition Corp d/b/a Northstar Aerospace Milton,* 2017 CanLII 56224 (ONLRB) Panel: Bernard Fishbein

In January, 2017, the employer announced that it would be closing its plant and relocating to Chicago and Windsor on September 30, 2017, the last day of the operation of their collective agreement. Following the announcement, the Parties' negotiations for a renewal collective agreement were supplanted by negotiations for a closure agreement wherein the Union sought to have the employer contribute to an apparent shortfall in its pension plan. The collective agreement provided that if the plant closed the employer would contribute up to $250,000 to assist in correcting any shortfall in the pension plan's benefit level (less than the apparent shortfall) as a result of the closure. When the employer refused to contribute more than what it was obliged to contribute to the pension plan pursuant to the collective agreement, the union stopped production at the plant and issued a press release and a facebook post indicating that they were occupying the plant and have stopped production. As a result, the employer sought a declaration that the employees engaged in an unlawful strike and that the union cease and desist from calling, authorizing, or threatening to call or authorize an unlawful strike.

The Board found that the union occupied the Milton location and stopped all production at that location and that this was an act in concert to reduce output and production which was not timely and therefore not lawful under the Act. The Board rejected the union's argument that it ought to exercise its discretion to decline the relief sought by ►

Ontario Labour Relations Board, cont.

the employer in these circumstances. The Board held that it could not characterize the employer's conduct in refusing to contribute to a short fall in the pension plan beyond their obligations previously negotiated in the collective agreement as so "reckless" or "excessive" as being unworthy of the statutory protection it otherwise enjoys. Finally, the Board considered the exercise of its discretion in light of the values set out in the *Charter of Rights and Freedoms*. In this instance the Board found that the havoc that the union's argument would lead to on any system of orderly collective bargaining or any stability in any peaceful labour relations regime outweighs the restriction on strikes in the midst of the collective agreement.

Remedial Certification - *Net Drywall & Acoustics Ltd.*, 2016 CanLII 67530 (ON LRB) Panel: Eli A. Gedalof

The union sought remedial certification for unfair labour practices by the employer during an organizing campaign. The union alleged that the employer required employees to sign an anti-union pledge, questioned employees about their support for the union, and terminated the employment of two employees who admitted to having signed membership cards for the union. The pledge was a card every new employee was expected to sign acknowledging that he or she was not a member of a trade union and had no intention of becoming a member. The Board found the document employees were required to sign sent a clear message that employees were expected to agree not to exercise their statutory right to seek union representation in order to work for the company. Additionally, the Board found one of the alleged terminated employees to have been discharged as a result of his expressed support for the union. The Board found that the combination of the pledge cards and the employee's termination had a causal link with the union's inability to obtain further membership evidence in support of its organizing campaign. The Board held that the actions of the employer were sufficiently divisive that no ancillary relief could remedy the damage done. As a result, the Board held that remedial certification was appropriate in these circumstances. ►

Legislative Update

The *Ontario College of Trades and Apprenticeship Act, 2009* (*OCOT*), provides that no individuals may perform the work of a compulsory trade or hold themselves out as being able to perform the work of a compulsory trade unless they have a certificate of qualification for that trade. Individuals who are suspected of violating these ►

Ontario Labour Relations Board, cont.

Legislative Update, cont.

requirements may be issued a Notice of Contravention which may include a requirement that those individuals pay an administrative penalty. The *OCOT* was amended in June 2017 to *inter alia* grant the Board jurisdiction to entertain applications for review of Notices of Contravention issued pursuant to that *Act.* If an individual or corporation receives a Notice of Contravention and requests a review, the Board is now required to review the Notice and upon conducting the review may resolve the notice of contravention in the manner consented to by the parties, rescind the notice of contravention, affirm the notice of contravention or amend the notice of contravention by reducing the amount of the penalty if it is excessive in the circumstances. To facilitate the Board's new authority, the Board adopted new forms and procedures. ■

ALRA Members' comments

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

"While the "keep it weird" theme was an undercurrent, I felt that the true theme was "keep it real" as the ALRA conference provided a comfortable space to delve into thorny issues without judgment and to deepen professional relationships. The Portland atmosphere was fantastic. The panel presentations were rich in content and extremely thought provoking. The participants during table exercises were candid and insightful. I always come away from the ALRA conferences feeling enriched in so many ways. I can't wait to incorporate some of the best practices discussed and to follow up with my colleagues."

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