ALRA advisor....

Association Of
Labour Relations Agencies

July 2002

ALRA 2002 SAN DIEGO — 51ST ANNUAL CONFERENCE

Highlights of the Executive Board Meeting

October 28, 2001

1) Finances – The Board delegated authority to the Vice President Finance to review investment options and to make appropriate investments of ALRA funds. ALRA's liability coverage has been cancelled in that the current insurance company has discontinued such policies. Replacement coverage will be sought.
2) Membership – There are 67 member agencies (a new record).
3) 50th Anniversary – A special program is planned for the conference's Sunday Brunch to honor Past Board Members and Presidents of ALRA.
4) Training Grants – The Board approved a $5000 joint grant request from the Iowa, Minnesota, and Wisconsin agencies.
5) Mediation Liaison Committee – The committee will review the Code of Professional Conduct for Labor Mediators for the purpose of recommending changes in outdated language.
6) ALRA Web Page – Minutes of Executive Board Meetings and Annual Meetings will be added to the web page.

Note: Each year the ALRA Executive Board meets in October to hear committee reports and take action on various initiatives. On the day prior to the Board meeting, the Arrangements Committee and the Program Committee meet to begin plans for the upcoming annual conference.

March 10, 2002

1) Finances – The 2001 Montreal Conference made a profit exceeding $12,000.
2) Membership - ALRA has a new record of 72 member agencies.
3) Conference - The plans for the 2002 San Diego Conference are exciting (check the conference web page for latest details).
4) 50th Anniversary – Invitations have been sent to Past Presidents and other ALRA alumni asking them to join us on Saturday evening and Sunday of the conference to help celebrate our 50th anniversary.
5) Training Grants - The Board approved a $1500 joint grant request for a legal writing workshop for the Illinois Labor Relations Board and the Illinois Education Labor Relations Board.
6) Constitution – The Board is recommending two changes of the constitution related to honorary memberships, and the voting privileges of the Immediate Past President as a member of the Executive Board.
7) ALRA Advisor – There will be three editions of the Advisor this year.
8) Site Committee – 2003 is Detroit. The committee is looking for suggestions for 2004.

Note: Each year the ALRA Executive Board meets in October and March to hear committee reports and take action on various initiatives. On the day prior to the Board meeting, the Arrangements Committee and the Program Committee meet to complete plans for the upcoming annual conference. For a detailed look of the work of the Executive Board, please go to www.alra.org and review the draft and approved minutes of its meetings.

Candidates for Election to Board Positions in ALRA

Two Officer positions – President-Elect and Vice President – Finance — and three at large Executive Board seats will be filled at the conference in San Diego. Per Article VI, Section 4 of the ALRA Constitution, nominations may be made in writing prior to May 15th, and additional nominations may be made from the floor at the Annual Meeting:

> The President, prior to March 1, shall appoint a Nominating Committee. Prior to April 15, the President shall notify each member agency of the Officer and Board Member positions which are to be filled at the next Annual Meeting, together with a description of the duties of each position, the requirements for eligibility to hold each position, and a list of the incumbent Officers and/or at-large Board Members who have informed the President of their intent to seek reelection or election to any other position to be filled at the Annual Meeting. Incumbent Officers or Board Members must notify the President by April 1 of their intent to seek such reelection or election. Failure of an incumbent to so notify the President will preclude nomination of the incumbent, except from the floor of the Annual Meeting.
>
> An agency wishing to make a nomination or nominations shall do so in writing to the President not later than May 15, together with a statement by the nominees of their willingness to accept nomination. A nominee may submit in 300 words or less a biography and statement to be included with the list to be mailed by the President to the membership. The President will submit all nominations to the Nominating Committee. The Nominating Committee shall ensure that there is at least one nominee for each position to be filled at the Annual Meeting. Prior to June 15, the President shall mail to each member agency a list of the candidates for offices to be filled at the Annual Meeting. Additional nominations may also be made by a member agency from the floor of the Annual Meeting. [Article VI, Section 4, amended July 1995 and July 1998.]

President-Elect

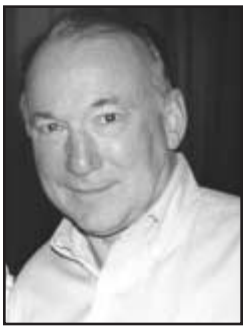
Dan Nielsen of the Wisconsin Employment Relations Commission has been nominated for the position of President-Elect. Dan is currently the Vice President-Finance and membership chair. He formerly served as a member of the Executive Board and as Program Chair for the St. Louis conference in 1998. He is a former professor of Labor and Industrial Relations, and is a member of the National Academy of Arbitrators. He was nominated by FMCS Canada.

Vice President-Finance

John Toner, the Executive Secretary of the National Labor Relations Board, has been nominated to the open position of Vice President – Finance. John has been active on many ALRA Committees over the years, and co-chaired the Program Committee for the Philadelphia conference in 2000. He was nominated by the Illinois Labor Relations Board.

Executive Board Member

Two incumbent Executive Board members, Scot Beckenbaugh, Regional Director of FMCS-U.S. and Warren Edmondson, Head of FMCS Canada have announced their intentions of seeking re-election. Warren has served in the past as Vice President – Administration, Co-Chair of the Program Committee for the 1999 conference in Phoenix, and is currently Chair of the Mediation Liaison Committee. Scot, who is also a former Member of the Iowa PERB, has served as Co-Chair of the Professional Development Committee's Program Subcommittee for the past two years, developing the Wednesday afternoon skills building sessions for the conferences in Montreal and San Diego. He has also served on the Program Committees for many conferences and had been a frequent presenter.



Philip Hanley, a Member of the Phoenix Employment Relations Board, has been nominated for the third Executive Board position. Phil has been active in the Program and Professional Development Committees of ALRA, and was a presenter at last year's conference in Montreal. Phil was nominated by former ALRA President John Higgins on behalf of the National Labor Relations Board.

President

New Jersey PERC General Counsel Robert Anderson, currently the President-Elect, will automatically assume the presidency of ALRA at the close of the Annual Business meeting on Wednesday morning of the San Diego conference, and will preside over next year's conference in Detroit.

A desperate man
For desperate times

BOB ANDERSON

FOR

PRESIDENT-ELECT

Mediation Liaison Committee to Present

Revised Code of Conduct to the Annual Business Meeting

The ALRA Mediation Liaison Committee will present a revised version of the Mediator's Code of Conduct to the ALRA Annual Business Meeting in San Diego. The Code was written in a series of meetings by a Liaison Committee consisting of representatives of the FMCS and ALRA. Work was begun in 1963 and the final version was adopted by both organizations at a meeting in Minneapolis in September of 1964. The Code sets forth principles to guide the conduct of individual mediators, and relations between mediation agencies.

The proposed revision is not substantive. It is intended simply to remove the gender specific terms from the Code. The operating version of the code used by FMCS – U.S. already has the terminology corrected, but the official version adopted by ALRA has yet to be corrected.

The Mediation Liaison Committee is comprised of Scot Beckenbaugh and Sergio Delgado of FMCS – U.S., Lance Teachworth of the Minnesota Bureau of Mediation Services and Marilyn Sayan of the Washington PERC, and is chaired by Warren Edmondson, Head of FMCS Canada. It was formed in 2001 to foster better communications between mediation agencies, and to provide a forum for discussing both points of common interest and any disputes that might arise concerning the Code.

The full text of the revised Code follows:

Code of Professional Conduct for LABOR MEDIATORS

1. The Responsibility of Mediators Toward the Parties

The primary responsibility for the resolution of a labor dispute rests upon the parties themselves. Mediators at all times should recognize that the agreements reached in collective bargaining are voluntarily made by the parties. It is the mediator's responsibility to assist the parties in reaching a settlement.

It is desirable that agreement be reached by collective bargaining without mediation assistance. However, public policy and applicable statutes recognize that mediation is the appropriate form of governmental participation in cases where it is required. Whether and when mediators should intercede will normally be influenced by the desires of the parties. Intercession by mediators on their own motion should be limited to exceptional cases.

The mediators must not consider themselves limited to keeping peace at the bargaining table. Their role should be one of being a resource upon which the parties may draw and, when appropriate, they should be prepared to provide both procedural and substantive suggestions and alternatives which will assist the parties in successful negotiations.

Since mediation is essentially a voluntary process, the acceptability of the mediator by the parties as a person of integrity, objectivity, and fairness is absolutely essential to the effective performance of the duties of the mediator. The manner in which mediators carry out their professional duties and responsibilities will measure their usefulness as a mediator. The quality of their character as well as their intellectual, emotional, social, and technical attributes will be revealed by the conduct of the mediators and their oral and written communications with the parties, other mediators, and the public.

2. The Responsibility of Mediators Toward Other Mediators

Mediators should not enter any dispute which is being mediated by another mediator or mediators without first conferring with the person or persons conducting such mediation. The mediator should not intercede in a dispute merely because another mediator may also be participating. Conversely, it should not be assumed that the lack of mediation participation by one mediator indicates a need for participation by another mediator.

In those situations where more than one mediator is participating in a particular case, each mediator has a responsibility to keep the others informed of developments essential to a cooperative effort and should extend every possible courtesy to fellow mediators.

The mediators should carefully avoid any appearance of disagreement with or criticism of their mediator colleagues. Discussions as to what positions and actions me-

diators should take in particular cases should be carried on solely between or among the mediators.

3. The Responsibility of Mediators Toward Their Agency and Their Profession

Agencies responsible for providing mediation assistance to parties engaged in collective bargaining are a part of government. Mediators must recognize that, as such, they are part of government. Mediators should constantly bear in mind that they and their work are not judged solely on an individual basis but they are also judged as representatives of their agency. Any improper conduct or professional shortcoming, therefore, reflects not only on the individual mediator but also upon the employer and, as such, jeopardizes the effectiveness of the agency, other government agencies, and the acceptability of the mediation process.

Mediators should not use their position for private gain or advantage, nor should they engage in any employment activity, or enterprise which will conflict with their work as mediators, nor should they accept any money or thing of value for the performance of their duties - other than their regular salary - or incur obligations to any party which might interfere with the impartial performance of their duties.

4. The Responsibility of Mediators Toward the Public

Collective bargaining is in essence a private, voluntary process. The primary purpose of mediation is to assist the parties to achieve a settlement. Such assistance does not abrogate the rights of the parties to resort to economic and legal sanctions. However, the mediation process may include a responsibility to assert the interest of the public that a particular dispute be settled; that a work stoppage be ended; and that normal operations be resumed. It should be understood, however, that the mediators do not regulate or control any of the content of a collective bargaining agreement.

It is conceivable that mediators might find it necessary to withdraw from a negotiation, if it is patently clear that the parties intend to use their presence as implied governmental sanction for an agreement obviously contrary to public policy.

It is recognized that labor disputes are settled at the bargaining table; however, mediators may release appropriate information with due regard (1) to the desires of the parties, (2) to whether that information will assist or impede the settlement of the dispute, and (3) to the needs of an informed public.

Publicity shall not be used by mediators to enhance their own position or that of their agency. Where two or more mediators are mediating a dispute, public information should be handled through a mutually agreeable procedure.

5. The Responsibility of Mediators Toward the Mediation Process

Collective bargaining is an established institution in our economic way of life. The practice of mediation requires the development of alternatives which the parties will voluntarily accept as a basis for settling their problems. Improper pressures which jeopardize voluntary action by the parties should not be a part of mediation.

Since the status, experience, and ability of mediators lend weight to their suggestions and recommendations, they should evaluate carefully the effect of their suggestions and recommendations and accept full responsibility for their honesty and merit.

Mediators have a continuing responsibility to study industrial relations and conflict resolution techniques to improve their skills and upgrade their abilities.

Suggestions by individual mediators or agencies to parties, which give the implication that transfer of a case from one mediation “forum” to another will produce better results, are unprofessional and are to be condemned.

Confidential information acquired by mediators should not be disclosed to others for any purpose or in a legal proceeding or be used directly or indirectly for the personal benefit or profit of the mediator.

Bargaining positions, proposals, or suggestions given to mediators in confidence during the course of bargaining for their sole information should not be disclosed to the other party without first securing permission from the party or person who gave it to them.

Dan Nielsen

Coming Soon to a Legislature Near You:

The Uniform Mediation Act

The ABA House of Delegates approved the Uniform Mediation Act at the beginning of February. As the title suggests, the Act seeks to bring uniformity to the laws regulating mediations, principally in the areas of what is and is not privileged against disclosure.

In 2000 and 2001, the Executive Board of ALRA contacted the UMA Drafting Committee, raising concerns that the attempt to create a system for family mediations, environmental mediation, etc., not disrupt the existing privileges and customs that have developed in labor mediation over time. Other interested parties, including most vocally the Labor Law Section of the New York Bar Association, raised similar concerns. The Drafting Committee thereafter included an exemption for most labor mediations in Section 3 of the Act. In the final process of drafting, however the broad exemption was seemingly narrowed by two provisions not found in earlier versions. One of these appears in the text of the Uniform Act, and the other is in the Reporter's Notes accompanying the Act.

Problems with the UMA as Drafted

Section 3 defines the scope of the Act. Subsection 3(b) exempts collective bargaining disputes:

> **SECTION 3. SCOPE.**
>
> ***
>
> (b) The [Act] does not apply to a mediation:
>
> (1) relating to the establishment, negotiation, administration, or termination of a collective bargaining relationship;
>
> (2) relating to a dispute that is pending under or is part of the processes established by a collective bargaining agreement, *except that the [Act] applies to a mediation arising out of a dispute that has been filed with an administrative agency or court*; (Emphasis added).

This italicized portion seemingly says that grievance mediations and conciliation of unfair labor practices would not be excluded from the Act's coverage, since they would be "filed with an administrative agency" in order to trigger the mediation or conciliation effort. Several inquiries to the Drafting Committee produced only the explanation that this was aimed at EEO style disputes. This explanation is repeated in the Reporter's Notes. This makes relatively little sense, since EEO claims do not arise out of the collective bargaining agreement. In any event, this language seems to reflect a basic misperception about how cases are processed in labor relations agencies, and could prove troublesome for ALRA agencies that offer mediation and conciliation services for grievances and complaints.

Even more problematic are the Reporter's Notes attempting to explain the collective bargaining exclusion:

> **3. Section 3(b)(1) and (2). Exclusion of collective bargaining disputes.**
>
> Collective bargaining disputes are excluded because of the longstanding, solidified, and substantially uniform mediation systems that already are in place in the collective bargaining context. See Memorandum from ABA Section of Labor and Employment Law of the American Bar Association to Uniform Mediation Act Reporters 2 (Jan. 23, 2000) (on file with UMA Drafting Committees); Letter from New York State Bar Association Labor and Employment Law Section to Reporters, Uniform Mediation Act 2-4 (Jan. 21, 2000) (on file with UMA Drafting Committees). This exclusion includes the mediation of disputes arising under the terms of a collective bargaining agreement, as well as mediations relating to the formation of a collective bargaining agreement. *By contrast, the exclusion does not include employment discrimination disputes not arising under the collective bargaining agreement as well as employment disputes arising after the expiration of the collective bargaining agreement. Mediations of disputes in these contexts remain within the protections and responsibilities of the Act*. (Emphasis added)

The statement that disputes arising after expiration of a collective bargaining agreement are subject to the Act does not seem to track any language actually contained in the Act. It would also seem to open many interest case mediations to coverage (depending on when the request for mediation was made), as well as any complaints brought to an agency during the contract hiatus. Again,

repeated inquiries have not produced any explanation of what this note means.

All of that being said, the Act has far less impact on ALRA member agencies than it did when originally drafted, with no exclusion for collective bargaining.

Act Pending in Five States

As of June 14th, the Uniform Mediation Act has been introduced in the legislatures of five states:

New York – Introduced as SB 6842;

Nebraska – Introduced as LB 1190;

Oklahoma – Introduced as SB 1557;

South Carolina – Introduced as HB 4499; and

Vermont – Introduced as HB 595.

ALRA has contacted the agencies in these states to advise them of the Act and the potential problems with it. Whether the Act is a good thing or a bad thing probably depends upon the strength of the mediator's privileges against disclosures in the specific jurisdictions. In some states, where no mediator's privilege has been recognized for labor cases, it may be to benefit of the agency to seek coverage for its mediators and/or cases under the Act, meaning the collective bargaining exemption should be removed from Section 3. In other states, the agency may wish to seek language in the Act referencing specific privileges for collective bargaining disputes under existing statutes. Most state mediation agencies would presumably have an interest in having the problematic "filed with an administrative agency" language clarified, and to influence the legislative history so that cryptic reference to expiration of the contract in the Reporter's Notes does not later confuse the judges who attempt to interpret the Act,

The text and background information on the Uniform Mediation Act can be obtained at www.nccusl.org, the website for the Commissioners of Uniform State Laws. The specific address for the Uniform Mediation Act section of that website is: www.nccusl.org/nccusl/pubndrafts.asp.

Here comes the ABA

On a related note, ALRA Agencies may also wish to monitor the progress of the ABA's efforts to produce an ethics code covering attorneys acting as mediators and arbitrators. As with the UMA, the principal purpose is to try to bring order to the new fields of ADR, but there is a danger that the established fields of labor relations arbitration and mediation, which have long had published ethical standards for practitioners, will be adversely affected by the effort.

Dan Nielsen

SPOTLIGHT

California State Mediation & Conciliation Service (SMCS)

The State Mediation and Conciliation Service, a division of the California Department of Industrial Relations, mediates labor-management disputes throughout California, primarily in the public sector. Skilled mediators assist labor and management in settling contract disputes in public schools, higher education, cities, counties, special districts, agriculture, public transit and state service. The Service maintains a headquarters office in San Francisco, and a regional office in Los Angeles. There are 15 professional mediators on the staff.

Contract Disputes

During fiscal years 1999-00 and 2000-01 state mediators helped settle nearly 900 contract disputes statewide. State mediators assisted the parties in achieving settlements at many agencies with significant impacts on the public, including the Bay Area Rapid Transit District, Los Angeles County, and hundreds of school districts.

Grievance Mediation

SMCS provides grievance mediation services to labor and management organizations. Grievance mediation allows disputants to resolve their grievances quickly and inexpensively in mediation, thereby avoiding the uncertain outcomes associated with arbitration or litigation.

In fiscal years 1999-2000 and 2000-2001, SMCS handled over 1,200 grievance disputes, the vast majority of which were settled during the mediation process.

Arbitration Program

SMCS maintains a panel of neutrals for referral to labor and management practitioners proceeding to arbitration. In fiscal years 1999-2000 and 2000-2001, SMCS referred arbitrators for 1,421disputes. Effective July 1, 2000, SMCS implemented a new computer program, the Panel of Arbitrators Selection System (PASS). PASS has improved the Service's ability to generate arbitration lists and to track the relative acceptability of various arbitrators. The system also allows the parties to request arbitrators with specific types of experience or qualifications.

Representation and Election Services

SMCS has historically conducted representation, agency shop and other elections for public agencies and employee organizations on a voluntary basis. The implementation of SB 739 on January 1, 2001, gave the Service the responsibility to conduct agency shop elections in cities, counties and special districts even in the absence of a negotiated agreement. Effective January 1, 2002, the Service became responsible for the conduct of representation elections for backstretch workers at horse racing tracks, and for the conduct of mandatory "card checks" for union recognition at local public agencies.

Preventive Services

SMCS is mandated to promote sound union-employer relationships throughout the state. In the interest of achieving that objective, SMCS mediators frequently present labor relations and collective bargaining training programs. Training programs may cover introductory collective bargaining and interest-based bargaining methods. Mediators are also available to facilitate negotiations when the parties encounter difficulties using interest-bases processes.

Internet connection:

www.dir.ca.gov—select Mediation & Conciliation

CALIFORNIA AGRICULTURAL

by Norma Turner

California's Agricultural Labor Relations Act (ALRA) was enacted in 1975 to provide farm workers with the same protections afforded their counterparts in the industrial sector under the National Labor Relations Act. Similarly, the Agency's authority is divided between a Board, comprised of five members, and a General Counsel, all of whom are appointed by the Governor subject to confirmation by the State Senate. As a matter of legislative intent, it is an independent agency which, in virtually all respects, mirrors the national act, including provisions for the establishment of regional offices and a bifurcated liability/compliance process for unfair labor practices.

Limited exceptions to the national act were designed to accomodate a seasonal and migratory work force. For example, elections are the only means by which bargaining rights may be conferred and all elections are statutorily required to be held within seven days of the filing of the representation petition. Organizational access to the work site is based on the irrefutable presumption that there are no adequate alternative means by which to communicate with farm workers. Thus, nonemployee organizers are automatically entitled to take access to an employer's premises, albeit under time, manner and number limitations. There is only one unit of employees and it is comprised of all of the agricultural employees of an employer in the State unless they are employed in widely separated geographical areas. With regard to good standing, the Act endorses agreements between employers and their employees' representative calling for membership in the labor organization within five days of employment as a condition of employment. In general, standard NLRB remedies are followed, as well as the NLRB's procedures, but with one notable exception. The Board may "make employees whole" for the loss of pay resulting from the employer's refusal to bargain. In measuring monetary liability, the ALRB looks to "comparable" contracts (that is, contracts between other employers and unions covering similar operations and time periods) between

other unions and employers for the difference between what the employer actually paid and what the employer likely would have paid had good faith bargaining resulted in a comprehensive collective bargainin agreement. The rationale is that employers rather than employees should pay for the delay in bargaining.

CALIFORNIA PERB

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The current members of the Board are *Member Richard T. Baker, Member Theodore G. Neima* and *Member Alfred K. Whitehead*. The Board itself has two vacancies.

General Information

The Public Employment Relations Board (PERB) is a quasi-judicial agency which oversees public sector collective bargaining in California for over 7000 public employers and 1.5 million public employees. PERB administers four collective bargaining statutes, ensures their consistent implementation and application, and adjudicates disputes between the parties subject to them. The statutes administered by PERB include the Educational Employment Relations Act (*EERA*) of 1976 establishing collective bargaining in California's public schools (K-12) and community colleges; the State Employer-Employee Relations Act of 1978, known as the Ralph C. Dills Act (*Dills Act*), establishing collective bargaining for state government employees; and the Higher Education Employer-Employee Relations Act (*HEERA*) of 1979 extending the same coverage to the California State University System, the University of California System and Hastings College of Law. In addition, the Meyers-Milias-Brown Act (*MMBA*) of 1968 establishing collective bargaining for California's municipal, county, and local special district employers and employees was brought under PERB's jurisdiction pursuant to Senate Bill 739 (Chapter 901, Statutes of 2000), effective July 1, 2001. PERB's jurisdiction over the MMBA excludes peace officers, management employees and the City and County of Los Angeles.

The Public Employment Relations Board itself is composed of five members appointed by the Governor and subject to confirmation by the State Senate. Board members are appointed to five-year terms, with the term of one member expiring at the end of each calendar year. In addition to the overall responsibility for administering the *MMBA*, *EERA*, *HEERA*, and *Ralph C. Dills Act*, the Board itself acts as an appellate body to hear challenges to proposed decisions that are issued by PERB staff. Decisions of the Board itself may be appealed under certain circumstances, and then only to the state appellate courts. The Board, through its actions and those of its staff, is empowered to:

Gerald James, Legal Advisor — State of California Public Employment Relations Board

- conduct secret ballot elections to determine whether or not employees wish to have an employee organization exclusively represent them in their labor relations with their employer;
- prevent and remedy unfair labor practices and interpret and protect the rights and responsibilities of employers, employees and employee organizations under the Acts;
- bring action in a court of competent jurisdiction to enforce PERB's decisions and rulings;
- take such other action as the Board deems necessary to effectuate the purposes of the Acts it administers.

SPOTLIGHT

Budget and Staffing 4.6 million 45 FTE

The Board staff consists of approximately 40 employees. PERB is headquartered in *Sacramento* and maintains regional offices in *Los Angeles* and *Oakland*. The major organizational elements of PERB, in addition to the Board itself, are the Office of the General Counsel, the Division of Administrative Law, the Representation Section, and the Administration Section.

The **Office of the General Counsel** includes PERB's chief legal officer and regional attorneys. The office is responsible for managing the processing of unfair practice charges, and for providing legal representation to PERB in all court proceedings. The **Representation Section** oversees the statutory process through which employees come to form a bargaining unit and select an organization to represent them in their labor relations with their employer.

The **Division of Administrative Law** houses PERB's Administrative Law Judges (ALJ), who serve as impartial judges of the labor disputes which fall under PERB's jurisdiction. PERB ALJs conduct informal conferences with the parties to unfair practice cases in an effort to settle disputes before proceeding to formal hearing. If no settlement is reached, PERB ALJs conduct adjudicative proceedings complete with the presentation of evidence and examination of witnesses under oath. The ALJs then issue proposed decisions consisting of written findings of fact and legal conclusions.

FEDERAL

Ottawa to fight NAFTA ruling in Federal Court

OTTAWA:— The federal government is heading to court to challenge a recent NAFTA tribunal order that Ottawa suggests could undermine Canadian sovereignty by overriding this country's laws.

A tribunal hearing a NAFTA Chapter 11 claim against Canada by Portland, Ore.-based forest giant **Pope & Talbot Inc.** ruled March 11 that Ottawa cannot release documents concerning the dispute that were requested by a member of the public under Canadian access to information law. It cited confidentiality rules.

The federal government has decided to fight this and filed an appeal in the Federal Court of Canada on June 7, saying the North American free-trade agreement can't take precedence over its own disclosure law.

"Canada's position is that a confidentiality order should not be read to amend or modify domestic law," said André Lemay, spokesman for the Department of Foreign Affairs and International Trade.

The Canadian government says the decision conflicts with national policy and it wants the Federal Court to set it aside.

"Questions of access to government information engage basic and fundamental principles of public policy that cannot be abrogated by an arbitral tribunal," Ottawa says in its Federal Court filing.

"The [decision] subordinates Canada's public law duty of disclosure to the tribunal's confidentiality order, thereby preventing the principled disclosure of information in the control of government institutions."

Chapter 11 in the early 1990s NAFTA trade deal between Canada, the United States and Mexico allows companies to sue each other's governments for actions that hurt their investments in those countries. Arbitration tribunals set up to handle cases operate largely in secret for the sake of expediency, according to supporters of the process.

The NAFTA tribunals have become a major target of criticism for nationalists and antiglobalization groups, who believe these new bodies give companies more power than citizens to pressure North American governments.

Pope & Talbot won a victory this May against Canada in its continuing NAFTA Chapter 11 case. It was awarded $705,000 in damages and interest after its mistreatment at the hands of the Canadian government that the tribunal said should "shock and outrage every reasonable citizen of Canada."

The Oregon company opposes the release of the confidential documents ands its Toronto lawyer Barry Appleton called the Canadian appeal "vindictive."

"This is bad losers. Canada had a very bad decision rendered against it and its reaction is to try to add to the harassment against Pope & Talbot," Mr. Appleton said.

He said there's no legal basis for Canada's application for review.

"The black letter of the NAFTA says specifically that hearings and submissions are confidential."

— The Globe and Mail

WASHINGTON

Submitted by Joy K. Reynolds

Department of Labor

The Department of Labor has announced the availability on line of annual financial reports filed by labor organizations. The reports have always been considered public information, but previously could be inspected only at the Office of Labor-Management Standards in Washington DC or at OLMS field offices for organizations within the office's geographic area. Reports for the year 2000 and later are on line. The web site is www.union-reports.dol.gov.

Unions required to report include private sector unions subject to the Labor-Management Reporting and Disclosure Act of 1959, unions of postal workers made subject to the LMRDA by the Postal Reorganization Act of 1970, and unions of other federal workers required to report pursuant to the Civil Service Reform Act of 1978. In addition, unions including members employed in the state and local sector may be subject to the LMRDA's jurisdiction if they also include private sector members.

The Labor Department's Office of the 21st Century Workforce has launched a new magazine, "XXI." The publication, available in hard copy and on line (www.dol.gov) is anticipated to appear quarterly. The first issue includes a message from Secretary of Labor Elaine Chao and Teamsters' President James P. Hoffa and articles including "Rising to the Occasion: The Department of Labor Goes to War," and "Brave New World: Keeping Workers Safe in the Age of Anthrax." Other areas addressed are Americans with disabilities and one-stop career centers.

Federal Labor Relations Authority — Federal Service Impasses Panel

In April President Bush announced the appointment of three more members to fill the complement of seven members of the Federal Service Impasses Panel, which resolves collective bargaining impasses between unions of federal workers and federal agencies. Joining the four members named in March (see Advisor of March 2002) are Mark Carter of West Virginia, a practicing attorney and management chair of the annual meetings subcommittee of the section of labor and employment law of the ABA; John Cruz, a California lawyer focussing on business, commercial corporate and environmental issues, and active in Hispanic groups; and Grace Flores-Hughes of Virginia, a former appointee of Presidents Reagan and George Bush, with expertise in community conflict resolution, managing a culturally-diverse workforce, and Hispanic affairs.

FSIP members serve on a part-time basis and hence may retain their current employment.

Federal Mediation and Conciliation Service

In May President Bush announced his intention to nominate NLRB Chairman Peter Hurtgen as Director of the Federal Mediation and Conciliation Service. Mr. Hurtgen has been a member of the NLRB since 1997 and was designated chairman in May 2001.

FEDERAL

National Labor Relations Board

President Bush has announced his intention to nominate two members to the NLRB. Robert Battista is an attorney practicing employment and labor relations law and has represented clients before the Board and the Michigan Employment Relations Commission. The President indicated that he will name Battista Chairman of the NLRB upon his confirmation.

Peter Schauber, a labor arbitrator in Washington DC, is also expected to be nominated to the Board. He is a member or major arbitration panels including the AAA, NMB and FMCS.

National Mediation Board

The NMB's FY 2001 Annual Performance Report is now available on line at www.nmb.gov. The Adobe Acrobat Reader is required.

Monsignor George G. Higgins

American labor and all other people of good will mourned the death May 1 of Monsignor George G. Higgins, often known as the "labor priest." Over a period of 60-plus years Msgr. Higgins fought for the rights of working people and for social justice around the world, stressing the inescapable connection between Christian doctrine and the value to be accorded to work and workers. He was noted for his association with the organizing struggles of Cesar Chavez and the United Farm Workers in California in the 1960s and 1970s, efforts which eventually led to the enactment of the California Agricultural Labor Relations Act. Monsignor Higgins, revered by many of us in Washington, including ALRA's own John Higgins (no kin), was inducted into the Department of Labor's Hall of Fame, and received the Presidential Medal of Freedom in 2000. He was 86.

Collective Bargaining in new Homeland Security Agency

A columnist for the Washington Post reported on June 19 that it was possible that the federal employees to be moved from other agencies into the proposed Department of Homeland Security might lose organizing and bargaining rights granted to other employees by the Civil Service Reform Act of 1978. Some 170,000 current employees would be included in the new agency. During the transition they would reportedly retain pay, benefits and rights under civil service laws, but the Homeland secretary in conjunction with the Office of Personnel Management could issue rules removing workers from the civil service. Representatives of unions representing federal employees decried the reintroduction of the spoils system and noted the irony of removing the freedoms of association and collective bargaining from workers charged with maintaining everyone else's freedoms.

AROUND THE STATES AND PROVINCES

FLORIDA

UNFAIR LABOR PRACTICE CASES

***Professional Tradesmen Union v. Duval County School District v. Florida Public Employees Council 79, AFSCME*, Case No. AF-2001-018 (February 6, 2002).**

AFSCME was awarded appellate attorney's fees plus interest at the lawful rate.

***Professional Firefighters of Tallahassee, Local 2339, IAFF v. City of Tallahassee*, Case No. CA-2001-029 (February 7, 2002).**

Union filed an unfair labor practice charge alleging that the city refused to process to arbitration a fire lieutenant's grievance which alleged that he was unlawfully denied a promotion to captain in violation of contract articles relating to discrimination and promotion procedures. Union also alleged that the city's refusal to arbitrate the arbitrability of the alleged contractual violations was an unfair labor practice. Commission con-

cluded that the city's failure to proceed to arbitration was not an unfair labor practice because union did not fulfill the contractual requirements for it to request arbitration on the arbitrability issue. Commission stated, however, that it believed the union could still make a request for arbitration under the contract to allow an arbitrator to decide arbitrability and timeliness issues.

***Florida Public Employees Council 79, AFSCME, v. State of Florida, John Ellis "Jeb" Bush as Governor*, Case No. CA-2001-042 (February 13, 2002).**

In August 2001, AFSCME filed an unfair labor practice charge against the state alleging that it violated collective bargaining laws by implementing the recent "Service First" legislation. At that time, General Counsel issued a stay of the proceeding based upon a circuit court action initiated by AFSCME challenging the constitutionality of the Service First legislation. AFSCME filed a motion requesting that Commission vacate its stay based upon the circuit court's dismissal of two counts of the complaint. Commission concluded that the stay remained viable because the remaining counts of the circuit court complaint contained AFSCME's request that the state action, via legislation and rule, which is the subject of the present unfair labor practice charge be declared unconstitutional.

***Federation of Public Employees, A Division of the National Federation of Public and Private Employees, AFL-CIO v. Florida Department of Lottery*, Case No. CA-2001-070 (February 25, 2002).**

Commission denied the lottery's request to overrule the hearing officer's decision to deny its motion to defer the case to arbitration. Commission determined that, assuming it could properly consider an interlocutory appeal of a hearing officer's refusal to grant the lottery's motion, under criteria previously applied when considering motions to defer to arbitration, the lottery did not show that the hearing officer improperly denied the motion.

***Professional Association of City Employees, Inc. v. City of Jacksonville*, Case Nos. CA-2001-077, CA-2001-078 (February 25, 2002).**

Commission affirmed General Counsel's dismissal of unfair labor practice charges which alleged that the city unilaterally revoked the union's right to post information on the city's bulletin boards, and unlawfully refused to allow elected employee officers or stewards paid leave time to conduct union business. Commission determined that the newsletter the union sought to place on bulletin boards contained statements "which would adversely reflect upon the Employer" in violation of the expired collective bargaining agreement. Commission further concluded that the city was not required to grant paid leave time to employees engaged in official union business in the absence of a collective bargaining agreement requiring such payments.

***International Union of Police Associations, AFL-CIO v. State of Florida, Department of Management Services*, Case No. CA-2001-033 (March 20, 2002).**

Commission concluded that the State's unilateral change of its prior work schedules affecting Florida Fish and Wildlife Conservation Commission officers without negotiating this change was an unfair labor practice. Commission further concluded that the union failed to prove that it did not receive a reasonable opportunity to bargain over the impact of new work assignments before the new schedules were implemented.

REPRESENTATION CASES

***In re Petition of United Academic Association of North Florida Community College To Disclaim Interest in Certification 1330*, 28 FPER ¶ 33066 (2002).**

Petition to disclaim interest granted and union's certification revoked where the union satisfied the Commission's requirements for disclaiming interest, i.e., there was no existing bargaining agreement between the union and college, and no outstanding financial obligations related to election costs or special master proceedings.

***Avon Park Professional Fire Fighters, Local 3132, IAFF v. City of Avon Park*, 28 FPER ¶ 33067 (2002).**

Unit clarification petition seeking to include newly created positions of fire marshal and senior firefighter, and substantially altered position of code enforcement officer, in bargaining unit of fire suppression personnel granted.

***Ponce Inlet Professional Firefighters Association Local 4140 v. Town of Ponce Inlet*, 28 FPER ¶ 33068 (2002).**

Representation-certification petition dismissed where the petitioner was not registered with Commission and petition was unsigned.

***Suncoast Professional Fire Fighters and Paramedics, Local 2546, IAFF v. Charlotte County Fire and EMS*, 28 FPER ¶ 33073 (2002).**

Petition dismissed where union's registration had expired at time petition was filed and bargaining unit certification needed to be amended to reflect new name of petitioning union.

***Manatee County and Municipal Employees, Local 1584, AFSCME, AFL-CIO v. Manatee County School Board*, 28 FPER ¶ 33074 (2002).**

Representation-certification opt-in petition dismissed as untimely because it was not filed within the statutory 60-day window period, that is, 150 to 90 days prior to the expiration of the contract.

G*overnment Supervisors Association of Florida/Office & Professional Employees International Union Local 100 v. Miami-Dade County*, Case No. UC-2001-056 (Jan. 29, 2002).

Unit clarification petition seeking to included 43 classifications in a bargaining unit of professional, non-supervisory employees granted.

***Teamsters Local Union No. 385 v. Town of Oakland*, Case No. RC-2001-055 (Feb. 4, 2002).**

Consent election agreement in unit of sworn police officers approved.

***Pinellas Lodge No. 43, Fraternal Order of Police v. Town of Indian Shores v. Pinellas County Police Benevolent Association, Inc.*, Case No. RC-2001-063 (Feb. 4, 2002).**

Consent election agreement in unit of rank-and-file police officers approved.

***Charles E. Brookfield Lodge #86, Fraternal Order of Police v. Orange County Board of County Commissioners*, Case No. RC-2001-045 (Feb. 4, 2002).**

Petitioner sought to create a supervisory bargaining unit comprised of police lieutenants. County contended that the unit was inappropriate because all the lieutenants were managerial employees. The Commission concluded that one lieutenant performed managerial job duties and the remaining 16 lieutenants were appropriate for inclusion in a supervisory unit.

***Government Supervisors Association of Florida Office & Professional Employees, International Union, Local 100 v. Miami-Dade County*, Case No. UC-2001-053 (Feb. 4, 2002).**

Unit clarification petition seeking to include numerous classifications in a supervisory bargaining unit granted.

***Space Coast Police Benevolent Association, Inc. v. Town of Melbourne Village*, Case No. RC-2001-051 (Feb. 6, 2002).**

Consent election agreement for unit of police officers and sergeants approved.

***Florida State Lodge, Fraternal Order of Police, Inc. v. City of Kissimmee*, Case No. RC-2001-058 (Feb. 7, 2002).**

Consent election agreement in a unit of police sergeants approved.

***International Brotherhood of Teamsters Local 385 v. City of Palm Coast*, Case No. RC-2002-006 (Feb. 7, 2002).**

Representation-certification petition dismissed where the petitioner was not registered with Commission, the petition failed to list the job classifications sought for inclusion by title, and it appeared the proposed unit may result in over-fragmentation.

***Florida Public Employees Council 79, AFSCME, AFL-CIO v. Hialeah Housing Authority*, Case No. RC-2001-046 (Feb. 13, 2002).**

AFSCME's request to withdraw its representation-certification petition granted.

***Teamsters Local Union No. 385 v. City of Deland (Deland Police Department)*, Case Nos. EL-2002-001, EL-2002-002 (Feb. 14, 2002).**

The Commission denied the City's objection to conducting elections by mail ballot. City's contention that a

mail ballot election could result in voting irregularities and the disruption of police services was speculative.

***Florida Community College Faculty Federation v. Florida Community College at Jacksonville*, Case No. RC-2001-061 (Feb. 14, 2001).**

Consent election agreement for a unit of professional employees paid on an instructional salary scale approved.

***Manatee County Professional Firefighters and Paramedics, Local 4074, IAFF v. Braden River Fire Control and Rescue District*, Case No. UC-2001-055 (Feb. 14, 2002).**

Unit clarification petition seeking to include the classification of battalion chief/shift commander in a bargaining unit comprised of firefighters, lieutenants, and captains granted.

***In Re Petition of National Conference of Firemen & Oilers, Local 1220, NCFO, SEIU, AFL-CIO, CLC To Amend Certification No. 1255*, Case No. AC-2002-005 (Feb. 19, 2002).**

Certification 1255 amended to reflect the petitioner as the certified bargaining agent.

***Professional Managers and Supervisors Association, A Division of Federation of Physicians and Dentists/Alliance of Healthcare and Professional Employees, NUHHCE, AFSCME, AFL-CIO v. Jeb Bush, Governor of the State of Florida*, Case No. RC-2002-007 (Feb. 22, 2002).**

The Commission dismissed a representation-certification petition because the petitioner was not registered as an employee organization, the showing of interest statements did not meet the 30% requirement, and the petition failed to list all classifications to be included in the proposed unit.

***Maxwell v. Florida Public Employees Council 79, AFSCME, AFL-CIO v. The Housing Authority of the City of Miami Beach*, Case No. RD-2002-001 (Feb. 22, 2002).**

Where a petition to revoke AFSCME's certification was filed and, shortly thereafter, AFSCME filed a petition to disclaim interest in further representation of the bargaining unit, the Commission granted AFSCME's petition to disclaim interest and dismissed the decertification petition as moot.

***In Re Petition of National Conference of Firemen and Oilers, Local 1220, NCFO, SEIU, AFL-CIO, CLC, To Amend Certification*, Case Nos. AC-2002-001, 002, 003, 004, 006, 007 (Feb. 25, 2002).**

Petitions to amend certifications to reflect the name change of the certified bargaining agent granted.

***Cocoa Fire Fighters Association, Local 2416, IAFF v. City of Cocoa*, Case No. RC-2001-059 (Feb. 28, 2002).**

Consent election agreement for unit of firefighters in the classification of battalion chief approved.

***Walton County Education Association v. Walton County School Board*, Case No. RC-2001-060 (Mar. 5, 2002).**

Consent election agreement in unit of rank-and-file non-instructional employees approved.

***Burney v. DeFuniak Springs Professional Firefighters Association, Local 3557 v. City of DeFuniak Springs*, Case No. RD-2002-002 (Mar. 5, 2002).**

The Commission concluded that the certified bargaining agent's disclaimer of interest was sufficient and revoked the certification.

***Professional Managers & Supervisors Association, A Division of Federation of Physicians and Dentists/Alliance of Healthcare and Professional Employees, NUHHCE, AFSCME, AFL-CIO*, Case No. RC-2002-011 (Mar. 5, 2002).**

Representation-certification petition dismissed where the named petitioner was not properly registered with Commission and the showing of interest failed to meet the 30% requirement because many of the statements were either copies or not personally signed and dated.

***National Conference of Firemen & Oilers, SEIU, Local 1227 v. City of Boynton Beach*, Case No. UC-2002-001 (Mar. 6, 2002).**

Unit clarification petition seeking to include seven new classifications into a bargaining unit of non-supervisory operational services employees granted.

***Lee County Public Employees Association v. Lee County Board of County Commissioners*, Case No. RC-2002-012 (Mar. 11, 2002).**

Representation-certification petition filed less than twelve months from the date an election was conducted in the same bargaining unit in contravention of Section 447.307(3)(d), Florida Statutes, dismissed.

***National Conference of Firemen & Oilers/SEIU, Local 1227, AFL-CIO v. Palm Tran, Inc. and Palm Beach County*, Case No. RC-2002-015 (Mar. 21, 2002).**

Representation-certification petition which failed to indicate that the petitioned-for unit conformed to the one previously defined, or if the union sought a different unit, failed to explain why a different unit was warranted, dismissed.

Constitutionality of Bargaining Statute Challenged

On March 6, 2002, the United Teachers of Dade, the Dade County School Administrators Association, and the Dade County School Maintenance Employee Committee (Plaintiffs) filed civil action 1001-CA-000621 in the Second Judicial Circuit, Leon County Circuit Court, against the Commission and the School Board of Miami-Dade County (School Board), challenging the constitutionality of Section 447.4095, Florida Statutes. Section 447.4095, Florida Statutes, allows a collective bargaining agreement to be modified if the public employer has a "financial urgency." The statute allows for a period of collective bargaining of up to fourteen days, after which an impasse may be declared. Following the declaration of impasse, the parties are to proceed under the impasse procedures of Section 447.403, Florida Statutes. The statute also permits the filing of an unfair labor practice charge with the Commission after the expiration of the fourteen-day negotiations period.

The history of the current lawsuit began with the reduction in state legislative funds based on anticipated shortfalls addressed in the special legislative session. This caused the Miami-Dade School Board to employ Section 447.4095, Florida Statutes, to reopen the collective bargaining agreement. After declaring impasse, the School Board sought the appointment of a special master by the Commission to hold a hearing and recommend a resolution of the impasse. The Plaintiffs filed suit and sought the circuit court to restrain the appointment of the special master and implementation of the impasse procedure on the ground that Section 447.4095 is facially unconstitutional as violative of Article I, Sections 6 and 10, of the Florida Constitution, which prohibit the impairment of collective bargaining agreements.

Both the School Board and the Commission moved to dismiss the circuit court action. Among the bases for dismissal were the arguments that the statute is not facially unconstitutional and that the Commission, pursuant to the criteria established in the *Chiles v. United Faculty of Florida*, 615 So. 2d 671 (Fla. 1993), could interpret the statute in a constitutional manner. Therefore, the defendants contend that the case was properly addressed by the Commission rather than the circuit court. The Commission and the School Board argued that the legislature had apparently envisioned a Commission review of the invocation of Section 447.4095, Florida Statutes, as indicated by the provision allowing an unfair labor practice to be filed fourteen days after the invocation of the bargaining process. The Plaintiffs have not filed unfair labor practice charges with the Commission.

In a hearing on March 21, 2002, Circuit Judge Janet Ferris heard the Plaintiffs' motion for a temporary injunction restraining the special master process and motions to dismiss filed by the School Board and the Commission. The motion for an injunction to stop the special master process was denied. The motions to dismiss are still pending at this time. The special master conducted a hearing after Judge Ferris' denial of the injunction and has issued an impasse resolution recommendation. We will keep you updated.


EXIT
NORM

AROUND THE STATES AND PROVINCES

OHIO

In re Toledo City School District Board of Education, SERB 2001-005 (10-1-2001)

The issue presented for the state Employment Relations Board in this unfair labor practice case was whether the Employer engaged in bad-faith bargaining when it implemented its final proposal and modified a provision in the existing collective bargaining agreement. SERB held that where the parties have not adopted procedures in their CBA to deal with midterm bargaining disputes, it will apply the following standard to determine whether a ULP has been committed when a party unilaterally modifies a provision in an existing collective bargaining agreement after bargaining the subject to ultimate impasse:

A party cannot modify an existing collective bargaining agreement without the negotiation by an agreement of both parties unless immediate action is required due to (1) exigent circumstances that were unforeseen at the time of negotiations or (2) legislative action taken by a higher-level legislative body after the agreement became effective that requires a change to conform to the statute.

SERB also noted that it would apply the same two-part test in future cases involving issues not covered in the provisions of a collective bargaining agreement, but which are mandatory subjects of bargaining.

Russ Keith

ONTARIO

CAW and The Big Three

Negotiations between the Canadian Auto Workers (CAW) and the big three – General Motors, Ford and the Chrysler Group of Daimler-Chrysler AG — will begin this month. National Union representatives will meet in Toronto with the bargaining teams of the Big Three to set the broad framework for negotiations. And for the first time the Canadian Union will be bargaining alone with the Big Three. Since the CAW separated from the United Auto Workers (UAW) in 1985 contracts for both unions have always expired at the same time. However, during he last round of bargaining the UAW signed a four year agreement while the CAW stayed with traditional three-year-deal, which expires in September.

According to a CAW spokesperson this marks the first time the CAW will have "all the attention and access to the top of the house in each of the corporations, if that becomes necessary". "The UAW, being larger and more visible, at least in Detroit, put them ahead of us in line."

Meanwhile the UAW will closely follow the CAW talks in preparation for its own bargaining next year. In May a special UAW bargaining convention considered the CAW negotiations in plotting its own negotiation strategy.

UAW spokesperson, Roger Kerson, said, "We always communicate closely with the CAW. They have challenges to deal with the companies and so do we. We'll certainly be observing with great interest."

Generally the two unions have the same goals – negotiating raises and improving job security.

Unions Block Sale of Hydro One

An Ontario Court ruling that blocked the sale of **Hydro One Inc.** has given unions a potent tool to challenge other government policy, according to labour law experts.

The ruling released in April, by Mr Justice Arthur Gans, of the Ontario Supreme Court, found that legislation creating **Hydro One** – the 1998 Electricity Act — did not give the province the authority to sell the utility.

The ruling involved a challenge by the Canadian Union of Public Employees (CUPE) and the Communication and Energy and Paperworkers' Union of Canada (CEP). Neither union directly represents **Hydro One** workers and, therefore, lawyers for the Province argued that CUPE and CEP should not be allowed to sue. "Unions have a capacity to sue solely for purposes of matters relating to labour relations,"

Hydro One employees are directly represented by the Power Workers Union (PWU) which supports the priva-

tization. The PWU is affiliated with CUPE but it opposed CUPE and CEP in Court.

Judge Gans ruled that unions have interests that go beyond "mere economic gain for workers. I do not accept the suggestion that the applicants are mere busybodies or officious intermeddlers. They are neither."

Lawyers for the unions argued that the Government's plan to sell **Hydro One** – the publicly owned power grid – is illegal under the 1998 Electricity Act introduced and passed by the same government. Union lawyers argued that while this Act allows the province to hold shares in **Hydro One** it does not permit their sale.

. . . . .

The 1998 Electricity Act broke up Ontario Hydro the 95 year old provincially owned utility into two units: Ontario Power Generation and **Hydro One** with the stated purpose of privatizing and deregulating Ontario Power Generation which became effective May 1st 2002. The government declared its intention of selling **Hydro One** in December of 2001 much to the surprise of the populace but to the delight of the financial community that saw significant fees for an Initial Public Offering involving the second largest electrical grid in North America.

Following the Gans decision, the government held public hearing in six Ontario cities. On June 27th, the final day of the legislative session the government passed a bill giving it the legal right to sell Hydro one. The sale may be limited to 49 percent.

Government Workers Ratify Three Year Deal

Ontario's public service – 45,000 members of the Ontario Public Service Employees Union – returned to work on May 5th, thus ending a 54-day strike that began March 13. According to the union 78 percent of all employees who cast ballots voted to accept the deal, although indications are that corrections employees were less enthusiastic.

The settlement includes an 8.35 percent wage increase over 3 years, plus 1 percent for everyone at the top of the pay scale, except for jail workers. Corrections workers will receive 8.45 percent over three years, plus an immediate 5 percent. The parties negotiated changes to the benefit package and the union maintained control of the 2 billion dollar pension surplus that can be use for early retirement or for contribution holidays.

The main problems associated with the return to work centred around getting the information technology functional and dealing with the accumulation of mail.

Michigan Employment Relation Commission (MERC)

by Ruthanne Okun

Significant Court Orders and Opinions

St. Clair County ISD and Academy for Plastics Manufacturing Technology v St. Clair County Education Association, MEA
1999 MERC Lab Op 38, issued February 25, 1999
COA No. 218135, issued May 1, 2001

In a published decision, the Court of Appeals affirmed MERC's ruling to dismiss one of two unfair labor practice charges brought by the union, the St. Clair County Education Association, along with its petition for unit

Ruthanne Okun

clarification and its motion to reopen the record. The Commission had determined that the ISD violated PERA when it told a nurse employed by the school district that she would be laid off if she continued to seek to be included in a bargaining unit represented by the union. The ISD's director of special education told the nurse that it would be a "misperception" for her to think that union membership would bring her teachers' pay, and that her position might be terminated if she were to seek such compensation because her pay would be disproportionate to other nurses in the county. The union alleged that the ISD violated Section 10(1)(a) of PERA by making this statement. The union also alleged that the ISD and the Academy were joint employers, or that the Academy was an alter ego of the ISD, and that they, therefore, were in violation of Section 10(1)(e) of PERA when they unilaterally removed a postion from the bargaining unit and placed it into the Academy. The union further sought to reopen the record to introduce evidence that the ISD moved a program to the Academy after the initial charge had been filed.

MERC held that the totality of the evidence supported the conclusion that the statement made by the supervisor to the employee constituted a threat in violation of Section 10(1)(a). MERC dismissed the charge alleging that the ISD violated its duty to bargain by removing a position from its bargaining unit and transferring it to the Academy. The Commission held that the oversight responsibilities of the ISD did not constitute sufficient independent control over the employees of the Academy to support a finding that the ISD and the Academy are joint employers under PERA. Finally, the union's motion to reopen the record was denied by MERC on the basis that the evidence would be insufficient to establish that the ISD and the Academy were joint employers.

In affirming MERC's decision, the Court of Appeals found no merit to the contention of the ISD that it did not interfere with the employee's right to join the union and seek union assistance for a salary increase. The Court determined that although the supervisor did not expressly state that the ISD would discharge the employee if she joined the union, the supervisor's meaning was clear that the employee could either stop here effort to join the bargaining unit or she could lose her job. In light of the fact that the supervisor made no effort to distinguish between the threat to eliminate the employee's position if she sought teacher's pay, and the threat to eliminate her position if she continued to seek to be included in the unit, the Court found that interpreted reasonably, this threat related to the employee's desire to be represented by the union. The Court also determined that the ISD and the Academy did not violate 10(1)(e) of PERA by refusing to bargain with the union concerning the transfer of a teaching position because the ISD and the Academy did not jointly employ the Academy employees. The Court of Appeals determined that the ISD did not exercise independent control over Academy employees on a daily basis and to such a pervasive extent that it could reasonably be considered their employer, whether independently or jointly with the Academy. The Court noted that there is no conflict between the Revised School Code and PERA, and even though the ISD retains a supervisory role over the Academy, it nevertheless gave up a significant amount of control and authority by transferring the program in question. The Court concluded that because the ISD did not employ the Academy's instructional staff, MERC correctly dismissed the union's unit clarification petition.

Finally, the Court determined that MERC did not abuse its discretion in denying the union's request to reopen the record because the additional evidence would not be enough to prove that the ISD and the Academy were joint employers, not would it have any effect on the administrative proceedings.

Gogebic Community College, Michigan Educational Support Personnel Association v Gogebic Community College
1999 MERC Lab Op 28, issued February 25, 1999
246 Mich App 342, issued June 8, 2001

In a published opinion, the Court of Appeals affirmed MERC's dismissal of an unfair labor practice charge alleging that Gogebic Community College unilaterally altered the parties' dental benefits without bargaining when it changed from a specific dental insurance carrier to a self-insured program for dental coverage. The contract provided for limits of dental coverage, deductibles, and copays, but it did not set forth any specific dental insurance carrier. In contrast, the contract did name a particular insurance carrier for health and

vision benefits. MERC held that because the parties' collective bargaining agreement permitted the employer to unilaterally change the dental insurance program, the employer did not violate PERA. In so holding, the Commission found that the union failed to establish that the employer's past practice of using a specific dental carrier for years prior to changing to a self-insured program constituted an agreement that its use of the former dental carrier would continue. MERC also held that the change in dental carriers did not materially alter the limits of dental coverage provided to unit employees.

On appeal, the Union asserted that even if the labor agreement unambiguously gave the employer the authority to choose or change the dental carrier, the employer's conduct of utilizing a specific carrier for years established an enforceable past practice that could not be altered without bargaining. The Court of Appeals held that the practice here was not mutually understood, accepted, or agreed to by the employer as is necessary to supersede the express contractual language to the contrary. Moreover, the Court agreed with the Commission's conclusion that the employer's change to a self-funded dental plan did not materially alter the employees' existing benefits. The Court noted that the record clearly established that no changes occurred regarding benefits, coverage, or administration of the dental plan. Accordingly, the Court concluded that the employer had no duty to bargain regarding this matter and that MERC did not err in dismissing the union's unfair labor practice charge.

MINNESOTA, WISCONSIN AND IOWA HOLD JOINT STAFF TRAINING

A $5,000 training grant from ALRA provide significant assistance to the staff of the Minnesota Bureau of Mediation Services, the Wisconsin Employee Relations Commission, and the Iowa Public Employment Relations Board, for their meeting in LaCrosse, Wisconsin, in May, 2002, for a two-day joint staff training program. A total of 29 participated, including the three commissioners of WERC, the chair of the Iowa PERB and the Commissioner of the Minnesota BMS.

The highlight of the training was a panel discussion led by two outside labor attorneys, Jim Franczek, representing employers, and Marvin Gittler, representing labor, both of whom office in Chicago, Illinois. The discussion focused on what the advocates at the bargaining table expect from the neutrals. The panel leaders, who frequently sit across the bargaining table from each other, sparked a lively discussion about how particular mediator styles can help or hinder the negotiations process. The discussion leaders talked about ways and techniques that mediators can effectively interact with chief negotiators and members of their bargaining committees, particularly when the parties are dug in on positions and settlements are hard to reach.

The training program also included updates of developments in each agency, such as current budget constraints, case loads, and current mediation/ representation issues common to the three agencies. Part of the discussion concentrated on how agencies can identify and measure factors related to agency overall performance in delivering mediation and representation services.

These three states have conducted several joint training seminars in the past, the first one in 1997. These programs have been highly successful in discussing agency program development, exchanging information, and reviewing different ways to deliver services. One of the best payoffs has been the interaction between the staff of the three agencies. Staff have gotten to know each other on a professional and personal level. This has fostered inter-agency communication that greatly benefits the agencies and their staff, and, therefore, their customers.

Lance Teachworth

We thank ALRA for their financial and professional support of our efforts in joint staff training.

Lance Teachworth

NEW JERSEY

A. Court Cases

The Appellate Division of the New Jersey Superior Court has upheld a decision of the Public Employment Relations Commission permitting staff attorneys to form a negotiations unit. *City of Newark and Association of Government Attorneys*, __ *N.J. Super*. ___ (App. Div. 2002). The Court agreed with the Commission that the city's low-level attorneys were not confidential employees or managerial executives and that the Commission's showing-of-interest rules and procedures were properly applied. Agreeing with the California and Florida Supreme Courts, the New Jersey Court also held that the Rules of Professional Conduct do not make it unethical for attorneys to join a union.

In *State of New Jersey v. Local 195, IFPTE*, 169 *N.J.* 505 (2001), the New Jersey Supreme Court abolished the common law "no-work, no-pay" doctrine in upholding a grievance arbitration award requiring the employer to pay an employee for overtime opportunities he lost when the employer did not rotate overtime assignments. (Former ALRA president Jeff Tener wrote the arbitration award). The Court's opinion strongly endorses the *Steelworkers' Trilogy* for reviewing public sector awards deferentially; heretofore the rule of deference to public sector awards has been honored more often in the breach than in the observance. In overturning the Dickensian "no-work, no-pay" doctrine and upholding the back pay award, the Court stated:

> Just as good labor management relations depend on collective negotiations agreements that contain effective arbitration provisions (in lieu of the right to strike), in turn the usefulness of the arbitration provisions depends on effective remedies when the contract is violated if the contract is to provide stability. If we prohibit an arbitrator from awarding back pay, we eviscerate the contract. Back pay is the lifeblood of any arbitration procedure because without back pay there is only a right without a remedy. In the context of labor relations, the lack of a remedy presents a substantial threat to a peaceful and productive workplace. Such protections are necessary if the "quality and morale of public officers and employees [is to] improve." *Id*. at 537-538.

In *Troy v. Rutgers*, 168 *N.J.* 354 (2001), the New Jersey Supreme Court held that faculty members could seek to enforce individual employment contracts allegedly entitling them to full year appointments rather than academic year appointments. The reduction of the work year was mandatorily negotiable, despite a claim that the employees' services were not needed during the summer. The Court's opinion extensively discusses the relationship between individual employment contracts and collective negotiations agreements and finds no conflict with the collective agreement in this case.

In *New Jersey State FMBA v. North Hudson Reg. Fire & Rescue*, 340 *N.J. Super.* 577 (App. Div. 2001), certif. den. 170 N.J. 88 (2001), the Court invalidated a statute entitling duly authorized representatives of various labor organizations to take paid leaves of absence to attend union conventions. The statute was held to be unconstitutional because it constituted special legislation (by choosing some unions and not others) and because it unduly delegated legislative authority (by allowing unions to determine how many officers were authorized to attend conventions).

B. Statutes and Regulations

The New Jersey Legislature recently enacted a statute requiring negotiations before any changes are made in the State Employee Compensation Plan. *N.J.S.A.* 11A:3-7. Previously the State had made all such determinations unilaterally.

In response to the anthrax attacks, which disrupted New Jersey mail deliveries, the Commission has temporarily relaxed its rules governing the filing and mailing of original documents. With narrow exceptions (e.g. representation petitions and interest arbitration appeals), the Commission has allowed the filing of other documents requiring an original signature by fax and e-mail. Parties, however, must keep the original documents on file in case a dispute over authenticity arises.

C. Commission Cases

In *State of New Jersey and State Troopers Fraternal Ass'n*, P.E.R.C. No. 2002-8, 27 *NJPER* 532 (¶32119 2001), the Commission applied the *Weingarten* doctrine

in two novel settings: (1) investigations of racial discrimination and harassment charges, and (2) investigations of rumored casino licensing infractions. In race-discrimination investigations, supervisors being questioned about their knowledge of racial incidents were entitled to union representation even though they were not the targets of the investigation; a superior officer in their position could reasonably expect that discipline might result if the investigation revealed that they knew about but did not report such incidents.

In the casino licensing investigation, an officer was not entitled to union representation even though he knew that the questioning would lead to the discovery that he had lied when first questioned; the questioning was part of an external investigation within the employer's mission and the employer had no reason to suspect that the officer's answers might lead to an internal investigation of misconduct.

Bob Anderson

NLRB

The National Labor Relations Board

The National Labor Relations Board has before it a number of cases, highlighted below, in which the Board majority has indicated its interest in examining or re-examining significant current precedent. Virtually all of this current precedent substantially clarified, modified or overruled prior Board case law. The Board currently is comprised of three recess appointees Chairman Peter J. Hurtgen, William B. Cowen, and Michael J. Bartlett. Member Wilma B. Liebman's full appointment is scheduled to expire this December. The Board's remaining fifth seat is vacant.

In the unfair labor practice area, two cases of note involve different aspects of Sec. 8(a)(5) of the NLRA, which imposes on employers the obligation to bargain in good faith with the labor organization representing its employees. In *Piggly Wiggly,* Case 30-CA-14738, the Board has sought additional briefs from the parties, and from any interested amici as well, on whether to overrule or modify *Love's Barbecue Restaurant No. 62*, 245 NLRB 78 (1979). The Board specifically limited briefing to the following question: "When an employer's unlawful refusal to hire the employees of the predecessor results in the employer having a successorship obligation under *NLRB v. Burns International Security Services*, 406 U.S. 272 (1972), is the successor employer entitled to unilaterally set initial terms and conditions of employment that differ from those of the predecessor employer?" The crux of the issue is one of remedy in this type of case, i.e., whether it is appropriate to use the predecessor employer's terms and conditions the measure for backpay for the employees unlawfully refused to hire and backpay or other monetary remedies for any unilateral changes the successor employer has made. *Bath Iron Works*, Case 1-CA-36658-S, presents the issue of the appropriate test to be applied by the Board in determining whether a union has waived its statutory right to bargain over a particular matter during the term of a contract based on the language of the contract. The Board traditionally has required the employer to establish a "clear and unmistakable" waiver by the union. Some circuit courts of appeals, however, have favored the less burdensome "contract coverage" test.

The Board has granted review in cases presenting important issues that affect determinations concerning the appropriateness of certain petitioned-for units and an employer's obligation to bargain as well. Several of these cases raise issues under *M.B. Sturgis, Inc. and Jeffboat Div., American Commercial Marine Service Co.*, 331 NLRB 173 (2000), involving whether to include in the same unit employees jointly employed by a "user" employer and one or more "supplier" employers with employees employed solely by the "user" employer. (*Massey Metals*, 27-RC-8142; *Solvay Advanced Polymers*, 8-RC-16369; *Valmont Microflect*, 36-RC-16369). Two cases, which have been extensively briefed by the parties and interested amici, present

issues under *New York University*, 332 No. 111 (2001), involving whether graduate student teaching assistants are employees within in the meaning of the NLRA. (*Brown University*, 1-RC-21368, and *Columbia University*, 2-RC-22358.)

The Board has issued a notice and invitation to the parties to file briefs on the standard applied in *Red Arrow Freight Lines,* 278 NLRB 965 (1986), in determining the voting eligibility of employees on sick leave, including disabled employees. (*Agar Supply*, 1-RC-214170.) In *Red Arrow*, the Board clarified prior case law and held that such employees are eligible to vote absent evidence that they have been terminated or have resigned. Additionally, the Board has before it several cases presenting issues under *San Diego Gas & Electric,* 325 NLRB 1143 (1998), involving circumstances in which a mail ballot or a mixed manual-mail ballot election may be warranted. Finally, the Board has granted review to consider whether to overrule or modify *St. Elizabeth's Manor*, *Inc*., 329 NLRB 341 (1999), in which the Board applied a "successor bar" precluding petitions challenging an incumbent union's majority status for a reasonable period after the successor employer's obligation to recognize the union arises. (*Aramark School Services*, 7-RC-22114; *International Security Services*, 29-RC-9730; *IT Corporation*, 15-RC-8386; *MV Transportation*, 33-RD-788.) These cases in which review has been granted could have an impact on unfair labor practice issues as well. Thus, in *Inn Credible Catering*, 333 NLRB No. 110 (2001), the reasoning of *St. Elizabeth's Manor* was applied to preclude, for a reasonable period after a successor's obligation to recognize a union arose, challenges to an incumbent union's majority status through a decertification efforts, election petitions, or the successor employers' claims of union loss of majority support.

The extent to which decisions in these pending cases will be issued by the current Board is far from certain. It has been well publicized that President Bush has submitted new nominations to the Senate for each of the seats currently held by the recess appointees and for the vacant seat. White House watchers believe that the President will relatively soon complete the package of nominees by indicating his intention to nominate as a new Board Member or submitting a nomination to the Senate for the remaining Board seat that expires in December and that the new complement of Board Members will be taking office this summer or in the fall.

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