ALRA advisor....

Association Of
Labour Relations Agencies

JULY 2006

President's Column

Jaye Bailey

Jaye Bailey

Hello Baltimore! What a great place to spend ALRA 2006. Many thanks to our host agencies and all the staff members who have made this conference possible. We will begin again this year with the acclaimed ALRA Academy starting on July 21st. Once again the Program, Professional Development and Neutrality Committees have put together a great agenda that will be fun, interesting and informative. And of course, the Arrangements Committee has worked tirelessly to bring about this great event in a wonderful location and hotel.

As Reg Pearson noted last year in the conference edition of the Advisor, the year as ALRA president goes by all too quickly. It seems we were in Seattle yesterday. I have enjoyed every minute of this year due to the fun and dedicated people with whom I worked. I would be remiss if I didn't mention a few and ask that you take some time at the conference to thank these folks for all their hard work. First, many thanks to Jim Breckenridge for managing to get these editions of the Advisor organized and published. Mary Johnson and the staff at NMB along with Wayne Gold of the NLRB and Erica Lell Snipes of the Maryland Higher Education Board have done immeasurable work with arrangements, all with good humor (no easy task). Bob Hackel has served as our tireless back-up on all things related to contracts, negotiations and any number of other thankless tasks. Abby Simms, with the help of Arnie Powers, have put together a fabulous program with their committee and managed through incredible diligence to secure top notch speakers throughout. Les Heltzer, Liz Macpherson and the entire PD Committee have once again brought us fun and informative training sessions and Jackie Zimmerman repeats her performance as Academy guru. The Neutrality Committee headed by John Higgins will present the next section of their report and you will again find it to be thoughtful, concise and well-written. Tom Worley continues to be our diligent web master and Scot Beckenbaugh and the entire FMCS staff deserve a thanks for their ongoing administrative support of ALRA. And, as always, Dan Nielsen continues to be a valued advisor to all.

Many of our agencies have gone through changes this year, nothing new to labor relations organizations. Some of our colleagues throughout North America and beyond are again facing budget crises and administration changes that leave the future uncertain. While we are all used to dealing with these things, it is always comforting to have the ALRA community for support and guidance as change takes place. As we continue to try to carry out the missions of our agencies during times of flux, this organization is unparalleled in its resources. This year, two long time ALRA colleagues have retired or will do so soon. To Marv Schurke of the Washington PERC and Yvon Tarte of the PSSRB, we offer our thanks for your many years of friendship and all good wishes for happy retirement.

It has been a pleasure and a privilege to serve as ALRA president. I am looking forward to this conference and to many more years of friendship and learning.

Liz MacPherson

Bob Hackel

Wayne Gold

Mary Johnson

PROGRAM COMMITTEE REPORT

FINAL ALRA PROGRAM SCHEDULE—5/10/06

Sunday July 23, 2006

11:00 – 1:15 **Brunch and Welcome to new ALRA members: Foreign Service Grievance Board and Public Service Staffing Tribunal**

Jaye Bailey, ALRA President and General Counsel, Connecticut State Board of Labor Relations

Brunch Speakers – Professor John T. Willis , J.D., Senior Executive in Residence in the School of Public Affairs , University of Baltimore (Maryland Secretary of State 1995-2003) and Dr. Lenneal Henderson, Distinguished Professor of Government and Public Administration, University of Baltimore: ***Historical perspective of Baltimore's labor and civil rights movements*** *– Introduced by Karl K. Pence, Former Executive Director, Maryland HELRB*

1:30 – 3:00 **Neutrality Committee Report**

3:15 – 5:00 **Round Tables** (Topics listed below are among those that will be discussed. Participants will be contacted by the Facilitators prior to the conference to solicit additional topics.)

Mediators – generational issues/new issues at the bargaining table (*Arnold Powers, Regional Director Ontario, FMCS-Canada – Facilitator*)

Arnie Powers Co-Chair Program Committee

Abby Simms Co-Chair Program Committee

Board Members – Awareness of Legal Pitfalls (*Michael R. Cuevas, Chairman, NYS Public Employment Relations Board – Facilitator*)

Administrators – Technology issues/Managing Generational Issues – (*Timothy Noonan, Executive Director, Vermont Labor Relations Board – Facilitator*)

GCs/ALJs – Successfully interfacing with your Board (*Josee Dubois, Executive Director and General Counsel, Public Service Staffing Tribunal-Canada – Facilitator*)

Monday July 24, 2006

8:30 – 9:30 **Registration/Breakfast**

9:30 – 10:30 **Welcome** – *Jaye Bailey, ALRA President and General Counsel, Connecticut State Board of Labor Relations*

Keynote Address – **The Inside Story and Impact on Labor Relations of the PATCO strike on its 25th Anniversary**: Kenneth Moffett, former Director of FMCS and PATCO labor dispute mediator; Professor Michael J. Hayes, University of Baltimore School of Law

Introduction and moderated by – Elizabeth MacPherson, Director General, FMCS-Canada

10:45 – 12:15 **Changing Employers- Globalization, Bankruptcy/Mergers and Acquisitions and Implications for Labor Relations**

Panel:

Professor Samuel Estreicher, New York University School of Law and Special Counsel, Labor & Employment Practice, Jones, Day

John F. Blount, Vice President and Associate General Counsel, Allied Holdings, Inc.

Introduction and Moderated by: Wayne R. Gold, Regional Director, NLRB Region 5

12:30 – 2:15 **Lunch and Welcome to and introduction of various US Presidential appointees** – *Jaye Bailey, ALRA President and General Counsel, Connecticut State Board of Labor Relations*

Luncheon Speaker – Judge Rosemary M. Collyer, U.S. District Court for the District of Columbia (former General Counsel, NLRB)

Introduced by Ronald Meisburg, General Counsel, NLRB

2:30 – 4:00 **Changing Unions – Innovative Ways of Organizing Workers and Implications for Labor Relations, and How to respond to Globalization, Bankruptcy, Mergers and Acquisitions**

Panel:

Ernie Grecco, President, Metropolitan Baltimore Council AFL-CIO

Patrick J Szymanski, General Counsel, Change to Win
Hassan Yussuff, Secretary-Treasurer, Canadian Labour Congress

Introduction and Moderated by: Abby Propis Simms, Deputy Assistant General Counsel, NLRB, Special Litigation Branch

4:15 – 5:00 **Changing Role of Neutral – Ask the Neutral**

Panel:

Richard Curreri – Director of Conciliation, NYS PERB, NY Transit strike mediator

M. David Vaughn – Attorney and Arbitrator, MD/DC area

Commissioner Lynn Sylvester, FMCS, Washington, D.C.

Introduction and Moderated by: Arthur F. Rosenfeld, Director, FMCS

Tuesday July 25, 2006

8:30 – 10:00 **Roundtables** – Neutrality Project

10:15 – 11:45 **How do Generational Differences Impact Today's Workplace?**

Presenters: Eileen B. Hoffman, Commissioner and Project Director FMCS International and Dispute Resolution Services; Kimberly Y. Beg, Commissioner and Acting Director, FMCS Institute, ADR and International Affairs)

Introduction by: Arnold Powers, Regional Director Ontario, FMCS-Canada

Wednesday, July 26

9:00 – 10:15am **ALRA Annual Business Meeting**

10:15 – 10:30am **Break**

10:30 – 12:00 **Ethics: Mr. and Mrs. Wizard**

Presenters: Les Heltzer, Executive Secretary, NLRB; Elizabeth MacPherson, Director General, FMCS-Canada

12:00 – 1:30pm **Lunch**

1:30 – 3:00pm **Beyond Collision: High Integrity Labour Relations**

Presenter: Dr. Allen Ponak, Professor of Industrial Relations, Haskayne School of Business at the University of Calgary

Moderated by: Elizabeth MacPherson, Director General, FMCS-Canada

3:00 – 3:15pm **Break**

3:15 – 5:00pm **Concurrent Sessions**

Streamlining the Hearing Process: ***What streamlining measures have been taken by agencies, and what measures are clients looking for from agencies?***

Presenters: Tim Noonan, Executive Director, Vermont Labor Relations Board; Pierre Flageole, Vice-Chairperson, Quebec Labour Board; Susan Bauman, Commissioner, Wisconsin Employment Relations Commission

Moderated by: Akivah Starkman, Executive Director, Canadian Industrial Relations Board

3:15 – 5:00pm **Easing the Trauma:** ***What can agencies do in situations involving mergers, acquisitions, or bankruptcy?***

Presenters: James W. Mastriani, Arbitrator, and Chair, Port Authority of NY/NJ Employment Relations Panel; Suzanne Thérien, Director, Office of Mediation, Conciliation and Arbitration, Quebec Ministry of Labor

Moderated by: Larry Gibbons, Director, Office of Mediation Services, National Mediation Board

6:00 – 7:00pm **Reception**

7:00 – 9:00pm **Closing Banquet**

Les Heltzer
Vice-President
Professional Development

NOMINATIONS

Re: Report of the Nominations Committee for 2006

Based upon the pressure of his duties as he approaches the final year of his term as Chair of the Canada Industrial Relations Board, ALRA President-Elect Warren Edmondson has resigned from the Executive Board and will not take office as President at the close of the Baltimore Conference. Accordingly, the Nominations Committee report is revised as follows.

Akivah Starkman

The positions up for election at the Baltimore Conference are three Executive Board Members; Vice President – Finance; President-Elect; and President.

On behalf of the Nominating Committee, the Wisconsin Employment Relations Commission has made the following nominations:

- Incumbent Board Member Phil Hanley of the Phoenix PERB has accepted a nomination for re-election as a member of the Executive Board
- Incumbent Board Member Pierre Hamel of the Public Service Labour Relations Board has accepted a nomination for re-election as a member of the Executive Board
- Incumbent Board Member Michael Cuevas of the New York PERB has accepted a nomination for re-election as a member of the Executive Board
- Incumbent Vice President – Finance Scot Beckenbaugh of the FMCS – U.S. has accepted a nomination for re-election as Vice President – Finance

Sue Bauman

- Incumbent Board Member Marilyn Sayan of the Washington PERC has accepted a nomination for election to the position of President for a term beginning at the close of the Baltimore Conference
- Incumbent Board Member Elizabeth MacPherson of the FMCS-Canada has accepted a nomination for election to the position of President-Elect for a term beginning at the close of the Baltimore Conference.

If elected, she will serve as President for a one year term beginning at the close of the Toronto Conference in 2007.

Should Marilyn Sayan be elected President, Commissioner Susan Bauman of the Wisconsin Employment Relations Commission has stated her intention to seek election to the remainder of Marilyn Sayan's term.

Should Elizabeth MacPherson be elected President-Elect, Akivah Starkman, Executive Director of the Canada Industrial Relations Board has announced his intention to seek election to the remainder of Elizabeth MacPherson's term as a Member of the Executive Board.

There is a nominee for every position, and for each potential opening.

Because of the late news of Warren's resignation, the ALRA Executive Board has voted to extend the period of nominations. Any additional nominations should be forwarded to the Nominating Committee Chair at the address below by July 5th. Nominations may be submitted by any member agency. Additionally, nominations may be made by any member agency from the floor at the annual meeting.

Dan Nielsen, Chair
Nominations Committee
Post Office Box 1375
Racine, WI 53401-1375
e-mail: werc-djn@execpc.com
Fax: (262) 637-2043

BOOK TO READ

Differences that Matter: Social Policy and the Working Poor in the United States and Canada,

**by Dan Zuberi. Ithaca, N.Y. :
ILR Press, 2006. 230 p.
ISBN 978-0-8014-7312-8 (paperback)**

This book examines the causes and consequences of working poverty, revealing how the lives of low-wage workers are affected by differences in health care, labor, and social welfare policy in the United States and Canada. The research was carried out using survey data, participant observation, and interviews with hotel employees working in parallel jobs on both sides of the border: two hotel chains, each with one union and one non-union hotel in Seattle and Vancouver. The author demonstrates how labor, health, social welfare, and public investment policies affect these hotel workers and their families. He questions whether globalization necessarily means hospitality jobs must be insecure and pay poverty wages and makes clear the critical role played by government policy in the reduction of poverty and creation of economic equality.

About the Author:

Dan Zuberi is Assistant Professor of Sociology in the Department of Anthropology and Sociology at the University of British Columbia.

Weekly Work Report
June 26, 2006

HAROLD RAYMOND NEWMAN, 84, DIES

Former New York State PERB Chairman

Harold R. Newman, who served for thirteen years as the Chairman of the New York State Public Employment Relations Board (PERB), died on November 25, 2005 in Lake Worth, Florida, after a short illness. Mr. Newman had a long and distinguished career in public service and was widely regarded as an icon within the labor relations profession. On his retirement from PERB in 1990, Governor Mario Cuomo praised his "creative vision of progressive labor-management relations," adding that his "dedication has brought PERB recognition as one of the finest labor relations boards in the country." In 1967, after a series of work stoppages by New York public sector employees, including the previous year's devastating twelve-day strike by transit employees in New York City, the State Legislature passed, and Governor Rockefeller signed, the Taylor Law, which created PERB and gave public employees in the State the right to engage in collective bargaining. Mr. Newman was the first director of PERB's New York City office, and became its statewide Director of Conciliation in 1968, responsible in that capacity for the resolution of over 800 public sector bargaining impasses each year. As Director of Conciliation, he established a national reputation as a mediator, helping personally to resolve scores of disputes, including the bitter and much-publicized 1975 strike against the New York City Board of Education by Albert Shanker's United Federation of Teachers.

In 1976, Governor Hugh Carey nominated Mr. Newman to become Chairman of PERB, and the New York State Senate confirmed his nomination on January 24, 1977. As Chairman, he exercised a major influence on the evolution of public sector collective bargaining both in New York State and throughout the nation, providing expertise to fledgling labor boards in Connecticut, Ohio, Vermont, and at the federal level, among others. Widely acclaimed for his sharp wit, incisiveness, and engaging delivery, he became one of the most sought-after speakers in the labor relations and public administration communities, lecturing throughout the U.S. and in Canada, Europe, and Latin America on the role of the neutral in public sector bargaining. Richard A. Curreri, PERB's Director of Conciliation, stated that "Harold Newman's unique style and presence endeared him to the generation of labor relations practitioners he mentored. His contribution to PERB and public sector labor relations was both pioneering and indelible."

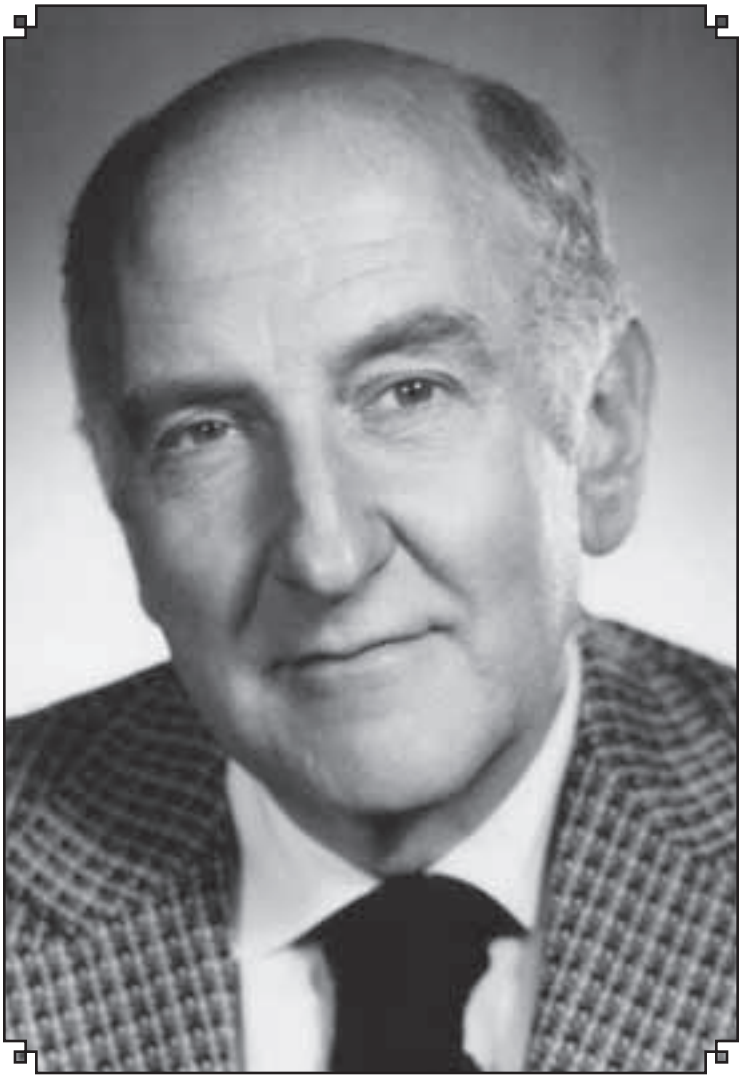
HAROLD RAYMOND NEWMAN – Cont'd

On leave from PERB in the academic year 1974-75, he served as a visiting lecturer at Cornell University's School of Industrial and Labor Relations (ILR) in Ithaca. According to Professor David B. Lipsky, former Dean of the ILR School, "Harold was not only the architect of public sector labor relations in New York, he was also an inspiring and popular member of the ILR School's faculty. He had a close relationship with the ILR School for over thirty years, lecturing frequently in courses and programs and serving for many years as a member of the School's Advisory Council."

Before joining PERB, Mr. Newman was a leader in the labor movement and a crusader for civil rights. He began his career in 1938 as an organizer, first for District 50 of the United Mine Workers and two years later for the United Office & Professional Workers Association. As an Army Air Force Corporal during World War II, he was an early champion of integration within the military service; as a Master Sergeant in Germany, he established a rehabilitation program for former concentration camp prisoners. On his return to civilian life, Mr. Newman joined the Division of Employment of the New York State Department of Labor, where he devised training programs to enable minority youth in New York City's Bedford-Stuyvesant and Williamsburg-Greenpoint neighborhoods to develop white-collar office skills. In 1958, he founded Local 1412 of the American Federation of State, County & Municipal Employees, serving as Vice President of both the Local and its parent organization, New York State Employees Council 50. A brief stint at the New York State Commission for Human Rights preceded his career with PERB.

Among his many professional association commitments over the years, he served as President of the Association of Labor Relations Agencies, regional Vice President of the Society of Professionals in Dispute Resolution, board member of the National Institute for Dispute Resolution, an active member of the Industrial Relations Research Association as well as chair of the Advisory Council of the New York State School of Industrial & Labor Relations at Cornell University. He also served on the Catherwood Library Advisory Council at Cornell. His honors include the New York State Civil Service Brotherhood Award and the American Arbitration Association's Distinguished Service Award.

Mr. Newman is survived by his wife of 35 years, Rita Newman of Lake Worth, Florida, a brother, Paul Newman of Walnut Creek, California, four nieces, six great nieces, one great nephew, one great great niece, one great great nephew, and one cousin. There will be no memorial service.



Harold Raymond Newman

Marv Schurke Announces his Retirement

Marvin L. Schurke recently announced his retirement from the post of Executive Director of the Washington Public Employment Relations Commission, effective September 1, 2006. Marv has been the only Executive Director PERC has ever known, and is currently in his 30th year of state service. Marv is also a long-time supporter and participant in ALRA, including serving as its President from 1987-1988.

An article in last summer's ALRA Advisor celebrated his achievements. Marv is the longest serving agency director in Washington State government and is the longest serving state labor relations agency director in the United States.

A native son of the Midwest, Marv was born and raised in Chicago. He graduated from the University of Chicago and completed law school at the University of Minnesota. After law school, Marv worked in private sector labor relations, first at Republic Steel, and then at International Harvester.

In 1970, Marv accepted a position with the Wisconsin Employment Relations Commission, working as a mediator and hearing examiner. Marv might well have spent his entire career in Wisconsin, but for events starting to take shape in Washington State. In 1975, the state legislature created a new labor relations agency, the Public Employment Relations Commission. After a nationwide search, the Commission selected Marv as its first Executive Director. Marv, his wife, Terry, and their young family moved to Olympia, Washington, where Marv began the job of creating a new agency.

Throughout the years that followed, Marv's leadership helped sculpt state labor law. His insight and reasoning assisted lawmakers as the legislature added more types of employment to PERC's jurisdiction. Marv's calm and steady presence also guided the agency through a number of difficult budgetary and policy issues. Today PERC covers over 330,000 employees, serving the citizens of the state by helping protect the delicate balance of labor relations.

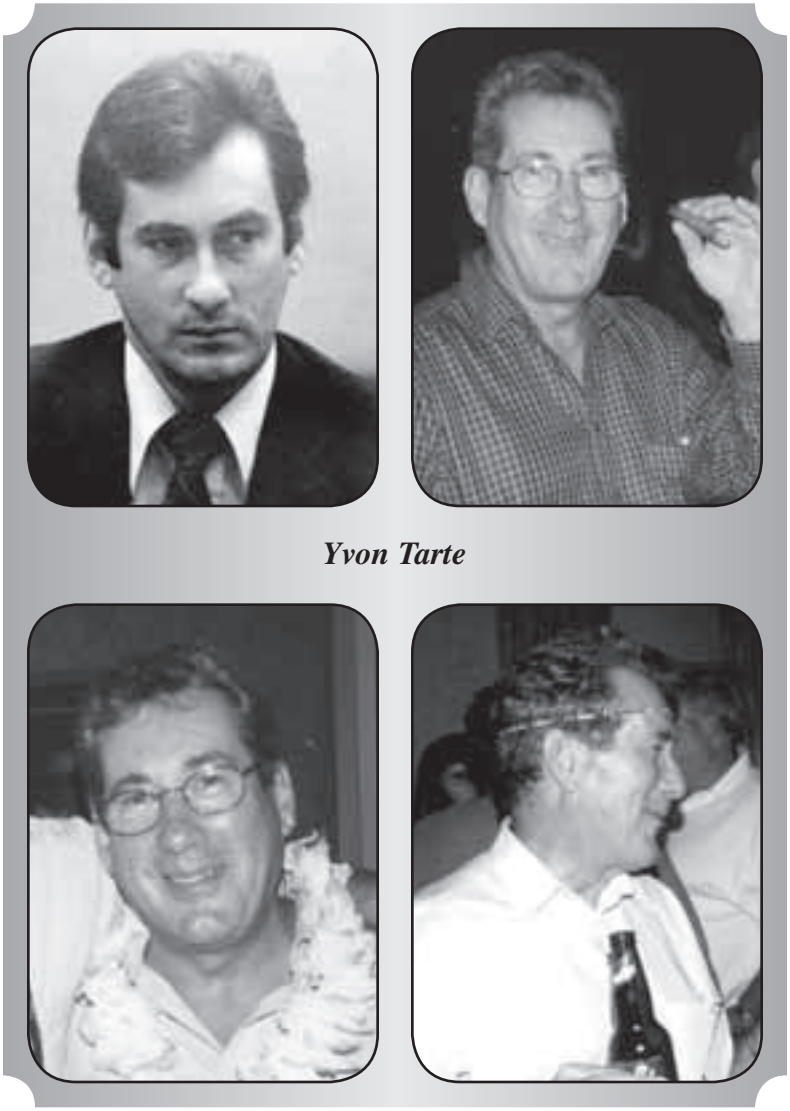
The Commission is beginning the search for a new Executive Director. Letters of inquiry may be submitted to the Public Employment Relations Commission, PO Box 40919, Olympia, WA 98504-0919.

Marv's public service career has been a reflection of his knowledge of labor law and his commitment to the process of collective bargaining. As for his next steps in life, Marv notes that Terry retired a couple of years ago, so he has some catching up to do.

Marv Schurke

Goodbye to a Good Friend of ALRA

On May 6, 2006, Yvon Tarte's term as Chairperson of the (Canada) Public Service Labour Relations Board ended and Yvon entered into a new and exciting chapter in his life: retirement. Mr. Tarte has been actively involved in ALRA's activities over the years and we will all miss him, whether as a participant to various ALRA committees, or as a delegate for his Board at the Annual Conference. His jovial presence and engaging personality have contributed to establish bonds of friendship with many colleagues of ALRA and we all keep happy memories of the time spent with Yvon over the years.



Yvon Tarte

Mr. Tarte is a graduate of the University of Ottawa (B.A., LL.B.) and has been a member of the Ontario Bar since 1973. From 1973 to 1975, he held the position of Assistant City Solicitor for the City of Ottawa. He was employed as an Appeals and Adjudication Officer with the Public Service Alliance of Canada from 1975 to 1978. He held the position of Counsel for the Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police from 1978 to 1981 and for the Canadian Human Rights Commission from April 1981 to January 1983. From February 1983 to his initial appointment with the Public Service Staff Relations Board, he was employed as Executive Director with the Office of the Commissioner of Canada Elections and as General Counsel to the Chief Electoral Officer of Canada.

Mr. Tarte was appointed Deputy Chairperson of the Public Service Staff Relations Board in January 1992 and Vice-Chairperson in May 1996. In December 1996, Mr. Tarte was appointed Chairperson of the Public Service Staff Relations Board. On April 1, 2005 Mr. Tarte became the Chairperson of the new Public Service Labour Relations Board. He continued to occupy this position until his retirement in May of 2006.

Mr. Tarte has been involved since 1989 in several international missions in Namibia, Benin, Burkina-Faso, Bulgaria, China (twice) and Mexico. He was a founding member of the Association of Professional Executives of the Public Service and sat on the Board of Directors of the Council of Canadian Administrative Tribunals (CCAT). He has also been an active member the Children's Hospital of Eastern Ontario Foundation (CHEO).

Yvon is the recent owner of a secondary residence in Port Charlotte, Fla. and is looking forward to many golfing opportunities and time with his family and friends. ALRA wishes to express its most sincere appreciation to Yvon for his contribution over the years and wish Yvon and Roberta a long, happy and healthy retirement.

FEDERAL

United States

Federal Mediation and Conciliation Service

Joy Reynolds

As noted in the November 2005 ALRA Advisor, the 13th National Labor-Management Conference will be held in Chicago, Illinois August 16-18, 2006. This year's conference is titled "Confronting Changing Times: Paths to Partnership" and will address vital issues in labor-management cooperation and "hot" topics in collective bargaining and arbitration. Further information can be obtained from the FMCS web site, www.fmcs.gov.

In February 2006 the FMCS announced grants to three organizations in Ohio, New York, and Iowa intended to improve labor-management relationships and build collaborative efforts to resolve workplace issues jointly. Among other activities, the organizations in question support employment diversity in the skilled building trades, boost labor-management team-building in the electrical trades, and improve the quality of health care and benefits provided to members of a labor-management coalition.

Grant applications for this year's funds, available under the Labor-Management Cooperation Act of 1978, may be filed until July 31, 2006. Recipients of such grants frequently are presenters at the biennial National Labor-Management Conferences, and by describing their programs they help to spread the word about the benefits of labor-management cooperation, as well as pitfalls in its implementation. More information on the grant program may be obtained from FMCS.

The November Advisor previewed findings of an independent study conducted by the Employment Policy Foundation that mediation of collective bargaining disputes saved US employers and workers approximately $9 billion between 1999 and 2004 by averting costly work stoppages. This report is now available in both full text and executive summary form on www.fmcs.gov.

Federal Labor Relations Authority

Tony Armendariz, the longest-serving member of the Federal Labor Relations Authority, died in March 2006. He had served under three presidents, from 1989 to 1997 and from 2001 until his death. He had served previously as general counsel of the University System of South Texas, in the office of the Texas Attorney General and the Equal Employment Opportunity Commission, and had practiced law in Caracas, Venezuela and represented US firms there. Mr. Armendariz was 81.

In October 2005 Colleen Duffy Kiko became general counsel of the FLRA. She had previously served as an appeals judge at the Department of Labor, had worked in Congress and with the Department of Justice, with the FLRA in its early incarnation in the Department of Labor, and had practiced law privately.

The future of the FLRA has been somewhat in doubt given the various proposals by the Bush administration to create separate labor relations frameworks for thousands of defense and homeland security workers. Such a change could radically reduce the jurisdiction of the FLRA, inasmuch as these special structures would be outside the Civil Service Reform Act of 1978, which created the FLRA and the statutory labor-management system. (Prior to 1978 labor relations in the federal sector had been governed by executive order.)

The November Advisor described developments in these areas, including a court decision blocking implementation of many aspects of the new personnel and labor relations system at the Department of Homeland Security. In February 2006 a federal judge blocked implementation of a similar program at the Department of Defense, stating that it would

"entirely eviscerate collective bargaining." The administration has appealed both decisions, and oral arguments in the Homeland Security case were held before a federal appeals court in April.

National Labor Relations Board

The National Labor Relations Board is again operating at full strength, thanks to three recess appointments by President Bush in January 2006. Members Ronald Meisburg, Peter Kirsanow and Dennis Walsh will serve

until the adjournment sine die of Congress in 2007 unless their appointments are confirmed by the Senate. They join Chairman Robert Battista and member Wilma Liebman. The use of recess appointments is indicative of how highly partisan and controversial the process of making appointments to the Board has become in recent years.

In December 2005 the NLRB announced a two-year pilot program for settling unfair labor practice cases through alternative dispute resolution.

The program was inspired by the successful use of ADR by other agencies and by the Board's own settlement judge program at the trial level. The program will be entirely voluntary and will involve appointment of an experienced neutral, usually an NLRB administrative law judge, to facilitate confidential settlement discussions in cases pending before the Board. In announcing the program Chairman Battista noted that settlement discussions "may broaden resolution options, often by going beyond the legal issues in controversy, and may be particularly useful where traditional settlement negotiations are likely to be unsuccessful or have already been unsuccessful." The neutral will have no authority to impose a settlement.

The Board invited additional interested persons to file briefs by April 27, 2006 in its pending case *Dana Corporation and Auto Workers*. The case involves issues of whether and to what extent an employer and a union can lawfully negotiate and reach an agreement which sets forth the conditions under which union organizing will occur, a provision for card-check recognition, and some of the terms and conditions to be included in any eventual collective bargaining agreement.

In late 2005, just prior to leaving the NLRB to become Director of the FMCS, the Board's acting general counsel Arthur F. Rosenfeld issued a report on case processing for the fiscal year ending in September. The report noted a 92.7 percent settlement rate in meritorious unfair labor practice cases, over $84 million recovered for employees as back pay or other payments, and reinstatement offered to nearly 3000 employees. (Back pay and reinstatement are the chief remedies available for employer unfair labor practices under the National Labor Relations Act. The paucity of remedies for unfair labor practices that the NLRB provides has been a topic of much criticism of the US statutory framework, and proposals for labor law reform have included additional remedies and less time-consuming procedures for implementing them.) The report is available at www.nlrb.gov.

Arthur F. Rosenfeld

National Mediation Board

The National Mediation Board has been conducting a survey of users of its web site, www.nmb.gov. The survey, which is scheduled to run at least through July 15, 2006, is aimed at parties subject to the Railway Labor Act (airlines and railroads) as well as academics and others who have occasion to consult the NMB web site. Survey results are sent directly to the Center for Information Technology and Dispute Resolution at the University of Massachusetts-Amherst. The Center studies the use of technology in all areas of dispute resolution.

Union Membership

In January 2006 the Department of Labor's Bureau of Labor Statistics reported that the proportion of workers in the United States who were union members in 2005 remained unchanged from the previous year at 12.5%. Nearly 15.7 million wage and salary workers were union members. Workers in the public sector had a rate of union membership (36.5%) over four times that of workers in the private sector (7.8%). Further information on this topic, including membership breakdowns by industry and occupation, state, and demographic characteristics, can be obtained from the BLS web site, www.bls.gov.

The Laborers' International Union of North America has left the AFL-CIO effective June 1, 2006. The union, which represents about 700,000 construction workers, had already joined forces with the "Change to Win" group of unions. The unions in this coalition, including the Teamsters, Service Employees, United Food and Commercial Workers, Carpenters, Unite Here and United Farm Workers, previously split with the Federation in order to place more emphasis on organizing the unorganized.

Work Stoppages

The BLS website, www.bls.gov, also contains a report on major lockouts and strikes in the US in 2005. The

Bureau defines a major work stoppage as one involving 1,000 or more workers and lasting at least one shift. Seventeen major private sector work stoppages and 5 in state and local government idled over 99,000 workers with 1.7 million workdays lost. There were more major work stoppages in 2005 than in the previous year (22 as compared to 17), but events in 2004 involved nearly twice as many workers and days lost as last year.

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WHITE COLLAR OFFSHORING

The Economic Policy Institute, a non-profit nonpartisan think tank in the U.S., has updated its *Issue Guide* on white collar offshoring. Using an FAQ format, the report provides an overview to the causes and impacts of offshoring, stating that the U.S. Bureau of Economic Analysis is "almost certainly" understating service imports to the economy. The report states that the economic impact is "potentially enormous" and "could place steady downward pressure on wages of U.S. workers". The EPI was established in 1986 "to broaden the discussion about economic policy to include the interests of low- and middle-income workers".

LINK: EPI Issue Guide: Offshoring (15 pages, PDF).

CANADA

The Canada Industrial Relations Board (CIRB)

New Duty of Fair Representation (DFR) Process – The CIRB implemented a new duty of fair representation process on January 1, 2006, to simplify the processing of DFR complaints and to shorten their disposition time. All cases will be reviewed early in the process to ensure that there **are** sufficient grounds to sustain a complaint. The CIRB's information circular on the duty of fair representation has been amended, and a form has been created to help complainants supply pertinent information in support of their claim. More information on the process can be found on the Board's Web site at http://cirb-ccri.gc.ca/whatsnew/index_e.asp.

Update on the New Expedited Certification Process – Just over a year ago, the CIRB adopted new procedures for handling certification applications. The intent of these changes was to permit the Board to deal with these matters in a more expedited manner. Evidence from an analysis of the experience over the past year indicates that the new measures have contributed to an overall reduction of more than 50 percent in the time that it takes to finalize certification applications. The CIRB will continue to monitor the effectiveness of these procedures and adjust them if necessary to maintain and improve on this level of performance.

CIRB Client Consultation Committee – Working Group – The CIRB Client Consultation Committee – established in 2005, and chaired by Mr. Michael McDermott – has drafted recommendations on the appointment process for Board members and has communicated those recommendations to Canada's new Minister of Labour, the Hon. Jean-Pierre Blackburn. The Committee has also reviewed and made recommendations on improving the efficiency of Board operations. Recently, the Committee has begun to assist the Board in reviewing a number of possible amendments to its *Regulations*.

Key Decisions – In a decision involving Air Canada, the Air Line Pilots Association and the Air Canada Pilots Association, the Board dismissed three applications regarding the seniority list. The fundamental issue was whether the seniority list was etched in stone or whether it could be changed by the parties to the pilots' collective agreement.The Board came to the conclusion in all three cases, although for different reasons, that the seniority list was final and binding. It stated that the seniority list could, some day, be modified if a significant corporate initiative or event occurred that necessitated making such changes.

In another decision, the Board dismissed a duty of fair representation complaint filed by Ms. Elizabeth Buchanan (the complainant) against her union in which she alleged that a comprehensive settlement negotiated by Bell Canada and her union, in regard to a pay equity case before the Canadian Human Rights Commission (the Commission), was against her best interests. In her view, the duty of fair representation found in the *Code* applied to the pay equity complaints that were filed before the Commission. The Board reviewed, in detail, the arguments for and against extending the application of section 37 to labour-related complaints filed before other tribunals and thought it preferable to "consider the merit of the complaint without placing any limitations on the scope of section 37 of

Michael McDermott

the *Code* in a definitive manner." As far as the merits of the section 37 complaint were concerned, the Board did not find evidence that the union had acted in a manner that was arbitrary, discriminatory or in bad faith when it negotiated the pay equity agreement with Bell and when it withdrew the systemic complaints before the Commission. Nor was the refusal of the union to represent the complainant's individual file in front of the Commission tainted by any improper motive.

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U.S. AND CANADIAN LABOUR LAW COMPARED

The Fraser Institute recently released a report comparing labour laws in Canada and the United States. The report, An Empirical Comparison of Labour Relations Laws in Canada and the United States, maintains that labour laws in the United States are more balanced – less biased towards unions – and provide greater labour market flexibility. The report gives an overall assessment of laws in the states and the provinces and then looks specifically at certification and decertification, union security, and the regulation of unionized firms.

LINKS: News release at the Fraser Institutes website at http://www.fraserinstitute.ca/shared/readmore.asp?sNav=nr&id=727 An Empirical Comparison of Labour Relations Laws in Canada and the United States (44 pages, PDF) at http://www.fraserinstitute.ca/admin/books/files/EmpCompLRL.pdf

AROUND THE STATES AND PROVINCES

FLORIDA

Commissioner Varn Reappointed

Chair Poole, Commissioner Kossuth, and the PERC staff are pleased to announce that Commissioner Jessica E. Varn has been reappointed a Commissioner by Governor Bush effective January 19, 2006 to January 1, 2010. This is Commissioner Varn's second four-year term. She was previously appointed by Governor Bush to the Commission in 2002. Over the past four years, the Commission has benefited greatly from Commissioner Varn's varied legal experience, which includes trial and appellate work at a Tallahassee law firm, serving as a judicial clerk at the First District Court of Appeal, and teaching at Florida State University School of Law. Congratulations, Commissioner Varn.

◇◇

Florida Supreme Court Blocks School Vouchers

In a ruling expected to reverberate through battles over school choice in many states, the Florida Supreme Court struck down a voucher program yesterday for students attending failing schools, saying the State Constitution bars Florida from using taxpayer money to finance a private alternative to the public system.

The 5-to-2 ruling orders state officials to end, at the close of this school year, a program that Gov. Jeb Bush has considered one of his chief accomplishments.

Known as the Opportunity Scholarship Program, it uses public money to pay tuition for 730 students who have left failing public schools and enrolled in private schools. But a prominent voucher proponent said yesterday's ruling could also endanger the state's charter school system and a voucher program for disabled students, which together serve nearly 100,000 students.

The United States Supreme Court has ruled that the federal Constitution does not prohibit vouchers, but it also held last year that states were not obliged to finance religious education as well as secular education. Those actions left it to state courts to decide whether voucher programs were legal, and focused national attention on the battle over vouchers in Florida, which teachers' unions first challenged in 1999.

The Florida ruling cannot be appealed to the United States Supreme Court because no federal issues are involved, lawyers on both sides of the litigation said.

In its ruling, the Florida court cited an article in the State Constitution that says, "Adequate provision shall be made by law for a uniform, efficient, safe, secure and high quality system of free public schools."

The Opportunity Scholarships Program "violates this language," the court said.

"It diverts public dollars into separate private systems parallel to and in competition with the free public schools that are the sole means set out in the Constitution for the state to provide for the education of Florida's children," the ruling said. "This diversion not only reduces money available to the free schools, but also funds private schools that are not 'uniform' when compared with each other or the public system."

Governor Bush called the ruling "a blow to educational reform."

"It temporarily removes a critical tool for improving Florida's public schools and it also challenges the power of the Florida Legislature to decide as a matter of public policy the best way to improve our educational system," Mr. Bush said.

He said the state would explore all legal options including amending the Florida Constitution.

Voucher proponents across the nation called the ruling a setback, just weeks after Congress enacted the nation's largest federally financed school choice program, which reimburses tuition for more than 350,000 students displaced by Hurricane Katrina, regardless of whether they enroll in public or private schools.

"We ended last year with a major victory and begin this year with a major setback," said Clint Bolick, a lawyer who was a participant in the Florida litigation on behalf of voucher supporters and is president of the Alliance For School Choice, a group based in Arizona.

— Sam Dillon
New York Times

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FAMU Case Resolved

On February 16, 2006, the Commission decided an unfair labor practice case filed by the United Faculty of Florida (UFF), a faculty union, against the Board of Trustees of Florida Agricultural and Mechanical University (FAMU). *United Faculty of Florida v. Florida Agricultural and Mechanical University Board of Trustees*, 32 FPER ¶ 34 (2006). The case had been stayed since 2003 to allow the First District Court of Appeal to resolve a precursor issue concerning the successor employer status of all the university boards of trustees following the statutory reorganization of the university governance hierarchy.

After the court decided that the boards of trustees were successor employers, the Commission lifted the stay, and ultimately concluded FAMU had violated the collective bargaining laws by refusing to maintain the status quo of the expired contract between the UFF and the Board of Governors/Board of Education pending contract negotiations. Despite various arguments by FAMU, vigorously presented, the Commission held that it "is not free to disregard the court's ruling." Accordingly, the Commission directed FAMU to restore the status quo, accept grievances in good faith, reinstate previously rejected grievances, reinstate released time for union stewards to the extent it is used in direct representation of employees, and bargain in good faith any necessary changes to conform the grievance procedure to the new administrative structure. The UFF has appealed the Commission's order to the First District Court of Appeal. Case No. 1D06-181.

— Jerry W. Chatham
Hearing Officer.

◇◇

FSU and UWF Successor Cases: Part II

In *Florida Public Employees Council 79, AFSCME and United Faculty of Florida v. Florida State University Board of Trustees* and *Florida Public Employees Council 79, AFSCME v. University of West Florida Board of Trustees*, 29 FPER ¶ 281 (2003), a Commission majority held that individual university boards of trustees are not successor employers to the Florida Board of Education (FBOE). As a result, in *FSU*, the Commission concluded that FSU did not commit an unfair labor practice by ceasing dues deduction and failing to process grievances, and in *UWF*, the Commission concluded that UWF did not unlawfully cease the collection of union dues for AFSCME. On February 14, 2005, the First District Court of Appeal reversed the Commission and held that the UWF and FSU boards of trustees are successor employers to the FBOE. *United Faulty of Florida and Florida Public Employees Council 79, AFSCME v. Public Employees Relations Commission, Florida State University Board of Trustees, and University of West Florida Board of Trustees*, 890 So. 2d 96 (Fla. 1st DCA 2005), *cert. denied*, SC05-813 (Fla. July 27, 2005). The case was returned to the Commission for further proceedings consistent with the First DCA's opinion.

The Commission then remanded the cases to the hearing officers to revisit their analyses in light of the court's determination that UWF and FSU are successor employers. The hearing officer in the UWF case issued a supplemental recommended order concluding that UWF committed an unfair labor practice by unilaterally ceasing dues deduction for AFSCME bargaining unit members. He further determined that AFSCME was not entitled to attorney's fees and costs. The hearing officer in the FSU case issued her supplemental recommended order concluding that FSU lawfully ceased deducting dues for UFF and AFSCME members, but committed an unfair labor practice by repudiating the grievance process. She also determined that AFSCME and UFF were not entitled to an award of attorney's fees and costs.

On December 23, 2005, the Commission issued its final order concluding that FSU and UWF committed unfair labor practices when they altered the status quo by ceasing dues deduction. In addition, FSU committed an unfair labor practice by failing to process UFF's grievance challenging the cessation of dues deduction. As a remedy, FSU had to process that grievance, but FSU did not have to accept and consider grievances which could have been filed, but were not. *Florida Public Employees Council 79, AFSCME v. University of West Florida Board of Trustees* and *Florida Public Employees Council 79, AFSCME and United Faculty of Florida v. Florida State University Board of Trustees*, 31 FPER ¶ 257 (2005).

In resolving the allegation that UWF and FSU illegally altered the status quo by ceasing dues deductions for union members, the Commission was mindful of the First DCA's admonition in its February 14 order that the Section 447.201, Florida Statutes, goal of promoting "harmonious and cooperative relationships between government and its employees" is not served by allowing an employer to unilaterally alter employees' terms and conditions of employment based solely upon a "reshuffling of the higher reaches of the bureaucracy" which had no effect on the employees. The First DCA recognized, consistent with the employees' Article I, Section 6, constitutional right to bargain collectively, that FSU and UWF were obligated to maintain the status quo of the employees' terms and conditions of employment.

The Commission noted that the hearing officers employed the traditional status quo analysis and initially examined the contractual dues deduction article. While this would normally have been the correct analytical approach, the Commission first considered how the determination of the status quo was affected by AFSCME's, UFF's, and the employees' statutory right to dues deduction. Pursuant to Section 447.303, Florida Statutes, the legislature has granted to certified bargaining agents the right to have its dues deducted and collected by the public employer for employees who authorized such deductions. This right is not dependent on the existence of a collective bargaining agreement and it is enforced as long the employee organization remains the certified bargaining agent.

The Commission rejected UWF and FSU's argument that the statutory provision was inapplicable because AFSCME and UFF were not the certified bargaining agents for any units of employees at the time they ceased deducting dues. The Commission determined that an employee organization which has not yet had its certification amended to reflect the name of the new successor employer retains the right to have its dues deducted pursuant to Section 447.303, Florida Statutes. But for completing the ministerial process of having their certifications amended, AFSCME and UFF were the putative certified bargaining agents for their respective units of employees when the FSU and UWF boards of trustees became the employers.

The decision ensured that labor stability would be maintained at a time when significant changes were occurring at the successor employer, and the important dues deduction right of employees and employee organizations would not be abridged by a mere "reshuffling in the higher reaches of the bureaucracy." Based on the foregoing, the Commission concluded that FSU and UFF unlawfully altered the status quo by ceasing dues deduction. As a remedy, FSU and UWF were directed to cease refusing to deduct dues for AFSCME and UFF bargaining unit members in the successorship situation.

The Commission also resolved the allegation by UFF that FSU committed an unfair labor practice by refusing to process a specific grievance regarding dues deduction and by repudiating the grievance process. In resolving this allegation, the Commission relied on its recent decision in *United Faculty of Florida v. Florida Agricultural and Mechanical University Board of Trustees*, Case No. CA-03-045 (Fla. PERC Dec. 12, 2005), vacated and reissued, 32 FPER ¶ 34 (2006), that the grievance procedure survived the expiration of the contract, and thus the employer's repudiation of the grievance procedure was unlawful. As a remedy in *FAMU*, the Commission

majority (Commissioner Kossuth dissenting) required the employer to process seven grievances which had been filed by the union. However, the Commission majority rejected the hearing officer's recommended remedy that employees be given thirty days to file grievances which could have been filed, but were not filed due to the apparent futility of filing grievances. The Commission majority reasoned those grievances had not been filed during the proceedings and were, therefore, not properly perfected.

Based upon the reasoning in *FAMU*, the Commission concluded that FSU committed an unfair labor practice by failing to process UFF's grievance challenging the cessation of dues deduction, and as a remedy FSU was required to process that grievance. However, as in *FAMU*, the Commission rejected the hearing officer's recommended remedy that FSU accept and consider grievances which could have been filed, but were not. No party was awarded attorney's fees.

As in *FAMU*, Commissioner Kossuth dissented in the UWF and FSU cases on the issue of attorney's fees for the dues deduction allegation and to the remedy for repudiating the grievance procedure. Commissioner Kossuth stated that the Commission should have accepted the remedy recommended by the hearing officer and directed FSU to accept grievances that were not filed due to the futility of doing so at the time. In addition, Commissioner Kossuth stated that AFSCME and UFF should have been awarded attorney's fees for the dues deduction claim because at least at the point when the Florida Supreme Court denied certiorari review of the First DCA's decision holding that FSU and UFF were successor employers to the FBOE, FSU and UFF knew or should have known that their unilateral decision to cease dues deduction was unlawful.

The Commission's final order was not appealed.

— John G. Showalter
Hearing Officer.

MICHIGAN

The appointment of Eugene (Gene) Lumberg – the third member of the Michigan Employment Relations Commission – was announced by Governor Jennifer M. Granholm on November 15, 2005.

Commissioner Lumberg, an attorney in private practice, has represented both labor organizations and employers in the public sector. He was also an assistant City Attorney in the City of Southfield, Michigan and worked in the Oakland County Prosecutor's office. Commissioner Lumberg has been the long-time City Prosecutor for Oak Park and Huntington Woods, Michigan. He has served on MERC's panel of neutrals and has worked as an arbitrator as well as a mediator and facilitator at County Circuit Courts. His experience in all of these venues promises to bode well for his service on the Michigan Employment Relations Commission.

Commissioner Lumberg's appointment is for a three-year term, which expires June 30, 2008. For more information about MERC, visit http://www.michigan.gov/merc.

NEW JERSEY

The New Jersey Public Employment Realtions Commission is sad to report that Tim Hundley, its Director of Conciliation and Arbitration, has retired after 31 years of dedicated public service. Tim will become an arbitrator.

The Commission is glad to report that Rick Gwin has been promoted from Chief Mediator to be the Acting Director of Conciliation and Arbitration.

Rick began his career at PERC in 1984 and served five years as a staff agent and hearing examiner in the Unfair Practice and Representation Section before becoming a mediator. As a staff mediator from 1988-2005, Rick mediated hundreds of impasse cases, including some of the most complex and difficult disputes and strike situations. As chief mediator, Rick administered the mediation docket and served as Tim Hundley's deputy.

Bob and Peggy Anderson

Rick received his B.S. in Industrial and Labor Relations from Cornell University, and his J.D. from the Temple Beasley School of Law.

The Commission is also glad to report that Lorraine H. Tesauro has been promoted to Acting Chief Mediator. Lorraine began her career at PERC in 1985 in the Unfair Practices & Representation Section as a staff representative and hearing officer and became a mediator in 1991. She has mediated hundreds of disputes in some of the most complex and difficult cases, including strike situations. Lorraine received her B.A. from Georgian Court College and her J.D. from Seton Hall University Law School.

OHIO

The New Ohio SERB

Although the Ohio labor relations statute hasn't changed recently, the leadership of the agency has gone through much change in the last year. The new leadership comes from both within and without. Several top positions have gone through transition in the last year. In addition, several staff positions have been affected by recent promotions, resignations, and retirements.

Our new Chairman is Craig R. Mayton (effective March 2006). At the time of his appointment, Mr. Mayton was serving as the Executive Director and Mediation Administrator for Ohio's State Employment Relations Board. He had joined the agency in October 2005 as its Executive Director. Prior to his employment with SERB, he served as Chief Legal Counsel for the Auditor of State and as First Assistant Attorney General for the Ohio Attorney General's Office.

Carol Nolan Drake
Chair - Resigned
March 2006

Tom Worley

On May 1, 2006, Arthur J. Marziale, Jr. became the Executive Director for SERB. The Executive Director is the Chief Operating Officer and oversees the Clerks Office, Administrative Services Section, and Research and Training Section and directly supervises the Hearings Section. Prior to his appointment as Executive Director, Mr. Marziale served as Senior Deputy Attorney General in the Constitutional Offices Section of the Ohio Attorney General's Office.

Also on May 1, 2006, Edward E. Turner was promoted to the position of Administrator of the Bureau of Mediation. Prior to his promotion, Mr. Turner served as a state mediator since 1998. The Mediation Administrator oversees the implementation of Ohio's statutory dispute settlement process of mediation, fact-finding, and binding arbitration.

On May 15, 2006, Dory A. McClendon was promoted to the position of Labor Relations Administrator. Prior to her promotion, Ms. McClendon served as the Labor Relations Specialist in charge of representation matters. The Labor Relations Administrator oversees the Investigations Section, which investigates unfair labor practice charges, and the Representation Section, which administers elections and other representation issues.

In the midst of all the change, Karen L. Gillmor and Michael G. Verich have continued their service as Vice-Chairman and Board Member, respectively, for SERB. In addition, J. Russell Keith rejoined the agency in October 2005 where he serves as SERB's General Counsel and Assistant Executive Director. In these roles, he provides legal support for the Board and its sections, and he oversees the Representation and Investigations Sections and the Bureau of Mediation.

ONTARIO

Following scathing report from independent arbitrator, Labourers' International Union of North America places Toronto Local 183 under trusteeship

Evidence produced during hearings confirms forgery, improper spending and failure to enforce agreements

The Labourers' International Union of North America has placed of Toronto construction Local 183 under

trusteeship now that distinguished labour arbitrator Brian Keller has found the local's leadership guilty of flagrant misconduct.

LIUNA General President Terence M. O'Sullivan's office faxed the Notice of Trusteeship, signed by O'Sullivan, to officials of Local 183 earlier this afternoon.

Mr. Keller handed down his decision to confirm the trusteeship yesterday (April 20, 2006) after supervising 44 days of hearings into the local's affairs. The hearings began December 16, 2004 and concluded March 4, 2006, during which time Keller heard from 32 witnesses testifying under oath. All hearings were open to members of Local 183. After reviewing more than 8,000 pages of testimony and thousands of pages of documents, Keller concluded that the Local executive's misconduct was so widespread and deep-rooted that trusteeship was the only recourse.

Among the findings described more completely in Keller's Decision are:

- Local 183's systemic failure in certain sectors to insure that workers covered by collective bargaining agreements receive wages, pension and benefits to which they are entitled. This failure has resulted in the ongoing exploitation of workers including undocumented workers;
- In particular, Local Union 183's failure to oversee the administration of pieceworker pension and benefit contributions and failure to ensure that members actually receive all of the benefits negotiated on their behalf;
- Local 183's improper expenditure of union funds and resources to spy on Local 183 Business Representatives and members who were exercising their acknowledged and basic constitutional rights;
- Local 183's forging of employer signatures on collective bargaining agreements at the instigation of an Assistant Business Manager and with the knowledge of the Business Manager. Mr. Keller found that "nothing could be more egregious than a breach of this type. It fundamentally upsets the trust that is inherent in any labour management relationship, the trust that is required if the Local is to successfully represent its members, advocate on their behalf and sign and enter into advantageous collective agreements. It is not hard to imagine the damage that has been caused by this act, and how difficult it will be for the Local to regain the trust and cooperation it needs with the employers with whom it does business."

Keller is a nationally recognized labour arbitrator and former Vice-Chair of the Ontario Labour Relations Board.

"In its history, LIUNA has never experienced such unconscionable misconduct by one of its local unions. Ethically and legally, the misdeeds and abuses of power confirmed by Keller go against everything the Labourers stand for," said Daniel Randazzo, LIUNA Legal Counsel for Central and Eastern Canada. "The trusteeship is the first step in the long overdue process of reform. The trusteeship is necessary to correct the previous executive's misconduct and to ensure that all individuals working within Local 183's jurisdiction are treated fairly and equally."

The investigation into Local 183's activities began in 2003, and was led by Ronald Pink, Q.C., chief managing partner of Halifax law firm Pink Breen Larkin. Pink, who serves in a watchdog capacity as independent Canadian legal counsel to the union's General Executive, conducted the initial investigation under the union's ethical practices code.

To investigate the allegations about the local's misconduct, Pink hired the respected Inkster Group, headed by Norm Inkster, former RCMP Commissioner. The lead investigator was the firm's senior vice-president, Doug Nash, a 25-year RCMP veteran and an expert on fraud and breach of trust investigations.

Pink and the Inkster Group interviewed several witnesses under oath and reviewed thousands of documents and computer files. Pink concluded the union should be placed into trusteeship.

Under the union's constitution, trusteeships are reviewed by a Canadian Independent Hearing Officer, in this case Brian Keller. "The independent hearing officer process is unprecedented in the trade union movement, and ensures that any proposed trusteeship is subjected to rigorous third-party review and confirmation," said Randazzo.

Under the terms of the trusteeship order, Local 183 will be managed by Timothy Armstrong Q.C. and Rick Weiss, Assistant Regional Manager for Central and

Eastern Canada. Mr. Armstrong is a former Chair of the Ontario Labour Relations Board, and served as Deputy Minister of Labour in Ontario for many years and later the Deputy Minister of Industry, Trade & Technology. Mr. Weiss is a well-respected union representative who has worked within the Labourers' Union at the local, provincial and national levels for over twenty years and has served as a part-time member of the Ontario Labour Relations Board.

— TORONTO
April 21 /CNW/

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OLRB Decision on Trusteeship

In April, following the release of the internal union findings and the news that the trusteeship was in force, the Local 183 executive called the process unfair and sought a ruling from the Ontario Labour Relations Board. A hearing was held June 7, 2006.

Norm Jesin, a Vice-Chair of the Board released his decision June 12, 2006.

DECISION OF THE BOARD:

Having regard to the materials filed, the representation of the parties, and the very apparent need for expedition in these matters, the Board provides the following "bottom line" decision. Reasons will follow.

Section 147

The Board finds that LIUNA has not breeched the provisions of section 147 of the *Labour Relations Act,1995,* S.O. 1995, c.1 as amended (the "Act"). The complaint by Local 183 pursuant to section 147 of the Act is dismissed.

Section 149

LIUNA has established just cause to place Local 183 under trusteeship in accordance with section 149 of the Act.

In the circumstances, the Board finds that it is appropriate to the exercise of its discretion to make orders and directions to the parties, pursuant to subsection149(4) of the Act.

The Board remains seized to deal with any difficulties which may arise in the implementation of this decision and to make such variations to this decision as circumstances may require. Particularly, the Board remains seized to make any further directions and/or remedial orders in the exercise of its discretion under subsection 149(4) of the Act.

Order

Pursuant to the Board's discretion and under subsection 149(4) of the Act, the board Orders and Directs:

> All officers and staff of Local 183 are directed to immediately take such action as is necessary to transfer control and authority of the assets of Local 183 to the appointed trustees in accordance with their lawful instructions;
>
> No action shall be taken by LIUNA to suspend or expel any of the present officers and/or staff of Local 183 from membership in Local 183 and LIUNA without leave of the Board;
>
> Within one month from the date of this order LIUNA shall file with the Board a plan, with timetables, for lifting the trusteeship and restoring Local 183 to the control of its members. LIUNA shall take steps to ensure that the members of Local 183 are informed of the details of that plan. In that regard LIUNA shall file with the plan, an account of the steps it has taken or intends to take to inform the members of the details of the plan;
>
> LIUNA shall ensure that any member of Local183 who has been nominated as a delegate to the upcoming LIUNA convention, shall be entitled to exercise the full rights accorded to any such nominated delegate under the LIUNA constitution, provided that the credentials of said delegate have not been challenged, or provided that any such challenge has been rejected by the independent officer responsible for considering such a challenge;
>
> LIUNA shall inform the Board within 3 days of any decision by an independent election officer upholding the challenge of the credentials of any delegate from Local 183 to the upcoming LIUNA convention. LIUNA shall at the same time inform the Board of any plan to replace such a delegate

— OLRB
The Toronto Star

Weekly Work Report
May 29, 2006

TORONTO TRANSIT STRIKE CREATES CHAOS AND FRUSTRATION: When 800 maintenance workers walked off the job in the early morning hours of May 28, their picket lines were honoured by bus and subway operators, leaving an estimated 700,000 Torontonians surprised and struggling to commute to work and school. At 7 a.m., the Ontario Labour Relations Board declared the stoppage an "unlawful strike" and ordered the union to cease and desist, but it was not until a subsequent OLRB order upheld the earlier declaration that Mayor David Miller could announce that transit service would resume, although too late for normal rush hour.

It is unclear why the wildcat strike occurred – media reports state that Bob Kinnear, president of Amalgamated Transit Union Local 113, initially labeled the job action a lockout, then advanced alternate reasons, including concerns for driver safety, management attitude, and new changes to the shift system. According to the OLRB order, "there is no doubt that either party could have had this matter considered prior to today through the grievance and arbitration procedure."

LINKS: "Workers slam on brakes" at the Toronto Star (May 30) at http://www.thestar.com/NASApp/cs/ContentServer?pagename=thestar/Layout/Article_Type1&c=Article&cid=1148939428750&call_pageid=968332188492

"What was all that about?" (1 pages, PDF) at the Toronto Star website at http://www.thestar.com/static/PDF/060530_key_issues.pdf

Service resumes slowly as TTC dispute ends at the CBC Toronto website at http://www.cbc.ca/toronto/story/ttc-walkout.html

OLRB Cease and Desist order (2 pages, PDF) (May 29, 2006) at http://www.ccnmatthews.com/docs/ttc529.pdf Amalgamated Transit Union Local 113 at http://www.atu113.org/, including the current collective agreement (258 pages, PDF) at http://www.atu113.org/pdf/atu-113agreement05.pdf

Amalgamated Transit Union Canada website at http://www.atucanada.ca/index.asp Toronto Transit Commission (TTC) website at http://www.toronto.ca/ttc/ and archive of TTC press releases at http://www.ccnmatthews.com/news/releases/search_comp2.jsp?compid=21804&pagesize=25&interval=

LHIN's AND COLLECTIVE BARGAINING IN ONTARIO'S HEALTH SECTOR: Bill 36, *The Local Health System Integration Act* was passed in March 2006; it establishes fourteen Local Health Integration Networks (LHIN's) to deliver health care in the province and sets out a framework for restructuring through amalgamations, transfers and closures. The initiative has been described by the Ministry of Health and Long term care as an evolution to "a true system that is patient-focused, results-driven, integrated, and sustainable. " According to the Ontario Nurses' Association (ONA) it "will diminish access to local health care services and threaten stability for thousands of health care workers, open the door for private, for-profit corporations, and reduce local control." The ONA is part of a coalition of four unions campaigning to stop LHIN's – others are the Canadian Union of Public Employees (CUPE), Ontario Public Service Employees Union (OPSEU) and the Service Employees International Union Local 1.

Law firm Cavalluzo Hayes Shilton and McIntyre this week published an article focusing on the labour relations aspects of the Bill 36- specifically, how it extends the life of the *Public Sector Labour Relations Transition Act*, 1997 (PSLRTA), making it permanent. Bill 36 also requires that parties develop human resources adjustment plans, but does not require that the plans be negotiated with relevant unions or representatives of non-unionized employees.

LINK: Ontario Nurses Association website on LHIN's; Stop LHIN's website; "Addressing the labour relations consequences of health integration" in the *Cavaluzzo Hayes Update for Professionals; Working Guide to the Local Health System Integration Act (Bill 36),* and Appendix B, *Working Guide to the Public Sector Labour Relations Transition Act* (37 pages, PDF) (March 2006) from a link under the heading "Labour Law"; Local Health Integration Networks website.

— Lancaster House
May 29/06

ONTARIO'S MINIMUM WAGE RISES

TORONTO – The Ontario government raised the minimum wage, February 1, 2006.

The general minimum wage will be $7.75 per hour on February 1, 2006, and there will be a further increase to $8 per hour on February 1, 2007. It is currently $7.45 per hour.

Other minimum wage rates will also increase. The minimum wage for:

- Students under 18 years old and employed for not more than 28 hours a week will rise from $6.95 to $7.25 per hour
- Liquor servers will increase from $6.50 to $6.75 per hour
- Hunting and fishing guides currently paid a minimum of $37.25 for less than five consecutive hours in a day and $74.50 for five or more hours in a day (whether or not the hours are consecutive) will also increase to $38.75 and $77.50 respectively.

QUEBEC

WAL-MART IN THE QUEBEC COURTS: In a decision released in early April, Judge Nicole Morneau of the Quebec Superior Court rejected a challenge by Wal-Mart and upheld the certification decision by the Quebec Labour Relations Commission for the Wal-Mart store in St-Hyacinthe, near Montreal. Wal-Mart had challenged the Commission's ruling, arguing that auto repair employees should have been included in the bargaining unit. Judge Morneau followed the precedent of a February 2006 Supreme Court of Canada decision in a similar case of a certification at a Wal-Mart in Gatineau Quebec, and said that the work done by store employees and auto repair shop workers differed to a degree that it was "not unreasonable" for the commission to exclude them.

On May 12, 2006, the Quebec Court of Appeal reaffirmed a November 2005 decision by the Quebec Superior Court and ruled that 182 former employees at a Wal-Mart store in Saguenay, Que., cannot launch a class-action lawsuit against Wal-Mart . The employees were seeking to claim $20,000 in damages for their lost jobs; the Saguenay store was closed in April 2005 after the store was unionized.

LINKS: Compagnie Wal-Mart du Canada c. Commission des relations du travail (Quebec Superior Court decision 2006 QCCS 1886) April 6, 2006 in French only (7 pages, HTML) at http://www.jugements.qc.ca/php/decision.php?liste=15721932&doc=03415802505A1D03

Court rejects Wal-Mart effort to block Quebec store unionization (3 pages, HTML) at the Lancaster House website at http://www.lancasterhouse.com/about/headlines_may_2.asp

Pednault c. Compagnie Wal-Mart du Canada (Quebec Court of Appeal decision 2006 QCCA 666) May 12, 2006, in French only (16 pages, HTML) at http://www.jugements.qc.ca/php/decision.php?liste=15712936&doc=535C025007001906

— Lancaster House
May 15/06

Peggy Anderson and Dan Nielsen
"Dealing for Big Pappi"

NEUTRALITY PROJECT

DRAFT — Chapter 3
(For consideration at the conference, Tuesday, July 25)

Conflicts and the Appearance of Conflicts of Interest

SECTION 1: ETHICS AND IMPARTIALITY ARE AFFIRMATIVE VALUES WHICH AGENCY PERSONNEL MUST COMMUNICATE IN EVERYTHING THEY DO. THE AFFIRMATIVE COMMUNICATION OF THESE VALUES, THE ON-GOING ACCEPTABILITY OF THE AGENCY AND ITS FULFILLMENT OF ITS MISSION CRITICALLY DEPEND ON AVOIDING CONFLICTS OF INTEREST AND THE APPEARANCE OF CONFLICTS OF INTEREST.

Commentary

The impartiality of the agency is greater than the sum of the individuals who serve as the agency's members and staff. Consequently, agency personnel should affirmatively communicate this value in all interactions with parties subject to the agency's jurisdiction and with the public.

Agency personnel should recognize that labor relations agencies differ from many other public bodies. Labor relations agencies deal with a limited clientele who frequently have on-going relationships with each other and with the agency. Positive on-going relationships serve agency missions which include promoting the peaceful settlement of labor-management disputes.

Consequently, agency personnel should always be mindful that little things potentially mean a great deal. Agency personnel must comply with the technical rules of their jurisdictions governing gifts and favors but must also recognize that even conduct that complies with the technical rules may give the appearance of partiality or otherwise impede agency acceptability. An agency's reputation for impartiality can be lost as easily in an advocate's hospitality suite as in an agency's hearing room.

John Higgins, Chair

Dan Nielsen

Warren Edmondson

Marlene Gold and Marty Malin, Reporter

John Truesdale

Even in ministerial matters, such as scheduling, communications should be addressed to both parties simultaneously. When engaging in activities which further the agency's mission outside the context of specific cases, agency personnel should always ensure that they communicate an ethic of impartiality. For example, agency personnel who agree to provide training or to speak at a function sponsored by one clientele group should offer to provide a similar service to constituents who sit on the opposite side of the bargaining table. When speaking at a clientele group's function, the agency representative should, where accurate, refer to having made or being scheduled to make a similar presentation to the opposing clientele group's meeting.

SECTION 2: AGENCY PERSONNEL MUST RECUSE THEMSELVES WHENEVER THEY ARE UNABLE TO SAY WITH CONFIDENCE THAT THEY CAN ACT FAIRLY AND IMPARTIALLY IN A PARTICULAR MATTER.

Commentary

A threshold question that all agency personnel must confront in every case is whether they can preside fairly and impartially. Having confidence in one's ability to be fair and impartial is essential. Even if the circumstances do not per se mandate recusal, an individual must remove himself or herself from any case where the individual does not feel confident that he or she can preside impartially. For example, as developed below, the involvement of an individual's former employer or law firm in a matter may not per se disqualify the individual. Nevertheless, in a particular case, an individual may consider the former relationship "too close for comfort." In such instances, agency personnel are obligated to step aside.

SECTION 3: AGENCY PERSONNEL MUST RECUSE THEMSELVES WHENEVER THEIR IMPARTIALITY MAY REASONABLY BE QUESTIONED.

Commentary

It is not sufficient that agency personnel have confidence in their own ability to preside impartially. They also must be perceived as impartial. Justice must not only be done but it must be seen as being done. The parties, as autonomous actors, are entitled to respect which includes a reasonable assurance that their disputes are resolved on the merits and not corrupted by irrelevant factors. Parties are denied that assurance when a reasonable person would question the impartiality of the agency personnel assigned to process a case.

Agency personnel also have a responsibility to safeguard the agency's reputation for integrity. Recusal when a party could have a reasonable basis to question their impartiality is essential to maintaining the agency's reputation.

Agency personnel must remove themselves from a case whenever there is bias or the appearance of bias regardless of whether the source of the bias arose out of the proceeding itself or was independent of the proceeding. Much information acquired in the course of a proceeding, however, will not provide a reasonable basis for questioning the impartiality of agency personnel. Opinions arising during the course of the proceeding serve as a basis for recusal only where they display such deep-seated antagonism or favoritism that a reasonable person would conclude that fair judgment is not possible. *See Liteky v. United States*, 510 U.S. 540 (1994).

SECTION 4: AGENCY PERSONNEL, OTHER THAN MEDIATORS, SHOULD REFRAIN FROM ENGAGING IN EX PARTE CONTACTS OR GIVING THE APPEARANCE OF EX PARTE CONTACTS CONCERNING MATTERS PENDING BEFORE THEM.

Commentary

An adjudicator's actual receipt of ex parte communications or the appearance of such undermines the perception of impartiality. The party excluded from the communication may reasonably question whether the recipient of the communication has been biased by it. Agency adjudicators must take care to avoid ex parte communications. Where such communications are inadvertently received, they should be shared with the excluded party. For example, when the representative of one party sends an e-mail to an agency adjudicator without copying the opposing representative, the adjudicator should respond to the e-mail with a copy to the opposing representative politely but firmly admonishing the sender to copy the opposing representative on all communications, including e-mails.

Even the appearance of ex parte contacts in seemingly innocuous settings may undermine the appearance of

impartiality. For example, if one representative offers an agency adjudicator a ride to the airport at the conclusion of a hearing, the adjudicator should not accept the ride unless the opposing representative consents to it after being assured that objection will not be held against her and the opposing representative is assured by the adjudicator and the representative offering the ride that there will be no discussion of the case. Similarly, if while a proceeding is pending, ad adjudicator is approached by one representative in a restaurant or airport snack bar, the adjudicator should politely but firmly ask the representative to sit elsewhere or should move himself.

Agency mediators, in distinct contrast to adjudicators, routinely and properly engage in private caucuses with parties or their representatives where substantive issues are discussed. Consequently, the concerns surrounding adjudicator involvement with ex parte communications discussed above do not apply to mediators. Indeed, a discussion with the representative of one party in an airport snack bar while waiting out a flight delay may assist in resolving the dispute before the mediator. Nevertheless, mediators' acceptability to both parties is crucial to their effectiveness. Mediators must therefore take care to ensure that their ex parte contacts with one party will not impair their acceptability with the other party. For example, mediators should explain to the parties at the outset of their involvement in a dispute that they will work the case at any time they believe doing so will aid in achieving resolution.

SECTION 5: AGENCY PERSONNEL MUST RECUSE THEMSELVES WHENEVER THEY, A CLOSE RELATIVE, A MEMBER OF THEIR HOUSEHOLD OR A CLOSE FRIEND HAVE OR COULD HAVE AN INTEREST THAT COULD BE DIRECTLY AFFECTED BY THE PROCEEDING.

Commentary

Even though agency personnel believe that they can discharge their responsibilities fairly or impartially, a reasonable person would question their impartiality where they, a close relative or a member of their household have an interest that could be directly affected by the proceeding. For example, an agency adjudicators should recuse themselves where a party is an entity of which the adjudicator, a close relative or a member of the adjudicator's household is a shareholder or other partial owner.

The appearance of a conflict of interest similarly arises where a close relative or member of an agency official or employee's household is an employee or representative of one of the parties. Thus, agency adjudicators should recuse themselves where their spouse is an officer of a union involved, a member of the bargaining unit involved, employed by a law firm representing one of the parties involved, or a manager of an employer involved in the proceeding.

Agency personnel must initiate their own exclusion, or at least make full disclosure and exclude themselves on the request of any party, whenever the appearance of a conflict of interest arises due to one of the employees or representatives in a dispute being a close friend or former adversary of the person assigned to conduct the proceedings.

On the other hand, agency personnel need not recuse themselves where their potential interests in the outcome of a proceeding are so indirect or attenuated that a reasonable person would not question their impartiality. For example, personnel of a public sector labor relations agency need not recuse themselves from hearing cases in which the state or province is a party merely because they are residents of that state or province. Agency personnel need not remove themselves from cases involving one or more parties that the individual has ruled for or against while serving as an impartial resolver of labor-management disputes.

SECTION 6: AGENCY PERSONNEL MUST RECUSE THEMSELVES FROM ANY CASE WHERE THEY HAVE APPLIED FOR OR ARE OTHERWISE BEING CONSIDERED FOR EMPLOYMENT WITH A PARTY OR THE LAW FIRM OR OTHER REPRESENTATIVE OF A PARTY IN THE PROCEEDING.

Commentary

When an agency member or agency employee has applied for or is being considered for any form of employment or consultancy with a party to a proceeding, the employee or board member must not participate in the proceeding. There is nothing short of complete isolation of the individual from the proceeding which

will preclude a reasonable person from questioning the individual's impartiality in such circumstances.

Illustrative is *Voeltz v. John Morrell & Co*., 564 N.W.2d 315 (S.D. 1997). An administrative law judge presided over an adjudication of a claim for workers compensation against Morrell. After the hearing concluded but before the decision was issued, the ALJ responded to a blind newspaper ad seeking a Director of Workers Compensation. A representative of Morrell responded, inviting the ALJ to apply for the position. Subsequently, the ALJ was interviewed for the job. Shortly after the interview, the ALJ informed Morrell that she did not wish to discuss the job further while the case was pending before her. After issuing her decision, which was favorable to Morrell, the ALJ advised Morrell that she was able to discuss the position. Morrell eventaully offered the position to the ALJ, who accepted it. The South Dakota Supreme Court observed that the ALJ "apparently believed forestalling an offer from Morrell was a sufficient, ethical course of action in this case." *Id.* at 319. The court rejected that notion, holding that "an unacceptable risk of bias . . . [was] clearly present when an ALJ is negotiating employment with a party to a pending case." *Id.* Thus, the concern ran deeper than the status of the transaction at any particular moment and the court ordered that the matter be remanded to the agency for a new hearing.

Similarly, in *Chicago, Milwaukee, St. Paul and Pacific RR Co. v. Washington State Human Rights Commission*, 557 P.2d 307 (Wash. 1997), the Washington Supreme Court held that the Railroad was denied due process when one member of a tribunal hearing a discrimination complaint against the Railroad simultaneously had an application for employment pending before the Commission which was prosecuting the complaint. The court reasoned:

> There is no direct evidenced that Ms. Ammeter was prejudiced or motivated in favor of the Commission and we do not suggest that she performed her duties as a tribunal member in less than an exemplary manner. It is the fact of her pending application for a job with the very Commission appearing before the tribunal as advocate that strips the proceeding of the appearance of fairness.

Id. at 313.

SECTION 7: AGENCY PERSONNEL MUST RECUSE THEMSELVES FROM ANY MATTER IN WHICH THEY WERE INVOLVED AS A PRINCIPAL, REPRESENTATIVE OR WITNESS PRIOR TO JOINING THE AGENCY, BUT AGENCY PERSONNEL ARE NOT AUTOMATICALLY OR PERMANENTLY DISQUALIFIED FROM ACTING IN MATTERS INVOLVING THE INDIVIDUAL'S FORMER EMPLOYER OR CLIENT OR BECAUSE A PARTY IS REPRESENTED BY THE INDIVIDUAL'S FORMER LAW FIRM.

Commentary

A reasonable person would justifiably question the fairness and impartiality of a person acting in a matter if that person was involved in the same matter prior to joining the agency. Such a change in roles is clearly distinguishable from prior involvement in the matter on behalf of the agency in a neutral capacity which does not automatically disqualify the individual from acting further in the matter.

Prior experience in labor-management relations and the dispute resolution mechanisms involving collective bargaining is an asset for agency personnel and should not be turned into a handicap by imposing a long-term exclusion of experienced personnel from serving in cases involving their former colleagues or adversaries. *Cf. FTC v. Cement Institute*, 333 U.S. 683, 702 (1948). Subject to specific rules that may apply in a particular jurisdiction (such as a rule precluding agency personnel for a specific period of time after joining the agency from involvement in matters in which their former employers, clients or law firms were involved) agency personnel should be permitted to bring their accumulated experience and expertise in resolving disputes involving their former employers, clients or law firms, so long as other concerns about ethics, fairness and impartiality are met. For example, the former chief labor lawyer for a state or province or the former in-house attorney for a union would not be permanently disqualified from involvement in a case before the agency in which their former employers were parties, provided that they had not been involved in the matter in their prior positions

SECTION 8: AGENCY PERSONNEL WHO CONCURRENTLY SERVE AS ADVOCATES MUST RECUSE THEMSELVES FROM ANY CASE IN WHICH THEIR EMPLOYER OR CLIENT IS A PARTY AS WELL AS FROM ANY CASE WHICH MAY HAVE A DIRECT EFFECT ON THEIR EMPLOYER OR CLIENT'S PENDING MATTERS. HOWEVER RECUSAL IS NOT MANDATED MERELY BECAUSE THEIR EMPLOYERS OR CLIENTS WILL BE BOUND BY THE PRECEDENT ESTABLISHED IN A CASE.

Commentary

Many labor relations agencies are established as tri-partite in nature, with specific board members or commissioners designated or recommended by labor or management. Agency members filling these positions often serve part-time while continuing to serve as advocates for employers or employee organizations subject to the agency's jurisdiction. Where their employers or clients are parties to an agency proceeding, such individuals have an interest that could be directly affected by the proceeding and should remove themselves from any participation in the proceeding.

Illustrative is *Central Missouri Plumbing Co. v. Plumbers Local 35*, 908 S.W.2d 366 (Mo. App. 1995), which concerned the Missouri Labor and Industrial Relations Commission's determination of the prevailing wage rate for plumbers in Cole County, Mo. The Missouri Division of Labor Standards issued an order setting the rate. Pursuant to the statutory procedure, Local 35 filed an objection to the rate with the Commission. The statute required that one member of the Commission be an individual "who on account of his previous vocation, employment, affiliation or interests shall be classified as a representative of employees." That member was the president of Local 35. The court held it was improper for him to participate in the agency's consideration or decision of the case. It observed:

> The Commissioners of the Labor and Industrial Relations Commission . . . occupy quasi-judicial positions. Each one is to bring a particular perspective, representative of a particular constituency, to the Commissioner's determination. But all of them must also, as quasi-judicial officers, strive to conscientiously apply the law.

Id. at 370. The court held that it was improper for the president of Local 35 to sit on the case and that he should have disclosed his union position and either recused himself or obtained from all parties consent to his participation. *Id.* at 371.

Agency personnel who concurrently serve as advocates must also recuse themselves when their employers or clients are not parties to a specific case but the outcome of the case will likely affect pending matters to which their employers or clients are parties. An analogous situation arose in *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986). Aetna refused to pay part of Lavoie's medical insurance claim and the Lavoies sued for breach of contract and for the tort of bad faith refusal to pay an insurance claim. After losing twice in the trial court and having both losses reversed by the Alabama Supreme Court, the Lavoies proceeded to a jury trial. The jury returned a verdict of $3.5 million in punitive damages which Aetna appealed to the Alabama Supreme Court. The Alabama Supreme Court affirmed by a vote of 5 to 4, in an unsigned per curium opinion.

While the case was pending in the Alabama Supreme Court, the justice who authored the per curiam opinion filed bad faith refusal to pay law suits against two other insurer: one for failure to pay for the loss of a mink coat and a class action on behalf of all Alabama state employees (including the other members of the Alabama Supreme Court) for an alleged intentional plan to withhold payment on valid health insurance claims. The U.S. Supreme Court Court held that the justice's failure to recuse himself from the *Lavoie* case violated Aetna's due process rights. The Court reasoned:

> When Justice Embry cast the deciding vote, he did not merely apply well-established law and in fact quite possibly made new law . . .
>
> > The decision under review firmly established that punitive damages could be obtained in Alabama in a situation where the insured's claim is not fully approved and only partial payment of the underlying claim had been made. Prior to the decision under review, the Alabama Supreme Court had not clearly recognized any claim for tortious injury in such circumstances; moreover, it had affirmatively recognized that partial payment was evidence of good faith on the part of the insurer.

> [citation omitted] The Alabama court also held that a bad-faith-refusal-to-pay cause of action will lie in Alabama even where the insured is not entitled to a directed verdict on the underlying claim, a conclusion that at least clarified the thrust of an earlier holding. [citation omitted] Finally, the court refused to set aside as excessive a punitive damages award of $3.5 million. The largest punitive award previously affirmed by that court was $100,000 . . . . [citation omitted].
>
> All of these issues were present in Justice Embry's lawsuit again Blue Cross. His complaint sought recovery for partial payment of claims. Also, the very nature of Justice Embry's suit placed in issue whether he would have to establish that he was entitled to a directed verdict on the underlying claims that he alleged Blue Cross refused to pay before gaining punitive damages. Finally, the affirmance of the largest punitive damages award ever (by a substantial margin) on precisely the type of claim raised in the Blue Cross suit undoubtedly "raised the stakes" for Blue Cross in that suit, to the benefit of Justice Embry. Thus, Justice Embry's opinion for the Alabama Supreme Court had the clear and immediate effect of enhancing both the legal status and the settlement value of his own case.

Id. at 823-24. Thus, adjudicators must remove themselves whenever a case will establish legal precedent that may directly impact pending litigation in which that adjudicator is a party. Similarly, adjudicators concurrently serving as advocates must recuse themselves where the case will establish legal precedent that may directly impact pending litigation involving their employer or client.

On the other hand, it must be recognized that agencies structured to have equal numbers of members designated by labor and management are intended to benefit from the expertise that those advocates bring to bear on agency decisions. Consequently, a requirement that such advocates disqualify themselves from any action that would set a precedent binding on their employers or clients could effectively disqualify them from all cases before the agency and undermine the rationale behind the tri-partite structure. The critical issue for agency personnel who also serve as advocates is whether the effect of a particular case on their employers or clients is so direct that their impartiality could reasonably be questioned or so attenuated or speculative that their participation would not be suspect.

SECTION 9: AGENCY PERSONNEL REQUIRED TO RECUSE THEMSELVES MUST DO SO AS SOON AS POSSIBLE AFTER THEY BECOME AWARE OF CIRCUMSTANCES THAT WOULD LEAD A REASONABLE PERSON TO QUESTION THEIR IMPARTIALITY, REGARDLESS OF THE STATE OF THE PROCEEDING AT ISSUE.

Commentary

Agency personnel usually will be aware of matters requiring their recusal from the outset of their involvement in a case. They should take action to remove themselves, or to at least make inquiry and offer to remove themselves, as soon as possible. It is not good practice for agency personnel to wait until one of the parties advances an inquiry or objection, as that type of conduct is capable of being misinterpreted as an attempt to slip one by the parties.

Where agency personnel. first become aware of disqualifying matters after the case has begun, they remain obligated to recuse themselves promptly, regardless of how far along the case has come. For example, in *Voeltz v. John Morrell & Co*., *supra*, the ALJ learned after the hearing had concluded but before she issued her decision that the company whose blind ad she had responded to was a party in a matter pending before her. Although her recusal probably would have disrupted the proceedings, her recusal was nonetheless required. *See also Teslaar v. Bender*, 365 F. Supp. 1007 (D. Md. 1973) (approving recusal of hearing examiner after one party completed its case).

In *Bd. of Educ. v. IELRB,* 518 N.E.2d 713 (Ill. App. Ct. 1987), during negotiations for a new collective bargaining agreement, an employer sought to exclude certain secretaries from the bargaining unit. The union opposed the proposal but the parties agreed to exclude the secretaries while the union filed a unit clarification petition with the Illinois Educational Labor Relations Board. The union did so and the hearing officer ordered the secretaries included in the unit. The employer filed exceptions and the IELRB, by 2 to 1 vote, reversed the hearing

officer and held that the secretaries were confidential employees. After the IELRB issued its decision, one of the Board members in the majority who had previously been a management advocate, moved to recuse himself because he had participated in the underlying collective bargaining negotiations; he further indicated that he had forgotten about this prior work and that it had been brought to his attention since the decision issued. The IELRB then vacated its prior decision and held that because the two remaining Board members were equally divided, the hearing officer's decision would stand but without precedential value. The Illinois Appellate Court upheld the IELRB's action. It is never too late to be concerned about the ethics of impartiality.

SECTION 10: EVEN IN SITUATIONS WHERE RECUSAL IS NOT REQUIRED, AGENCY PERSONNEL SHOULD DISCLOSE MATTERS THAT MIGHT LEAD A REASONABLE PERSON TO INQUIRE FURTHER.

Commentary

Disclosure furthers openness and transparency and protects an agency's reputation for impartiality and integrity. When matters which might lead a reasonable party to inquire further are not disclosed, a party which discovers the information later may infer nefariousness where none exists.

For example, an adjudicator's impartiality could not be reasonably questioned merely because the adjudicator and the advocate representing one of the parties have served together on the board of a charitable organization unrelated to labor relations. However, the party opposing the advocate's client would not be expected to know of such prior relationship but might reasonably want to inquire further into it. In such a situation, the prior relationship should be disclosed.

Disclosure by agency personnel serves a different function than disclosure by labor arbitrators. Arbitrators are selected by and accountable to the parties. They derive their authority from the parties' agreement to be bound by the decision of the arbitrator that the parties mutually selected. When arbitrators disclose additional information that was not generally known, parties may, in light of such disclosure, reconsider their decision to select the particular arbitrator. An arbitrator faced with a timely objection is obligated to step aside.

Agency personnel, however, are not selected by the parties and are not accountable to the parties. They are accountable to the statutes they administer and to the public at large. Disclosure furthers openness and transparency, rather than more informed selection by the parties. Consequently, post-disclosure objections to agency personnel's continued involvement in a case should not automatically result in recusal. The relevant inquiry remains whether an individual's impartiality may reasonably be questioned.

SECTION 11: WHERE DOUBTS EXIST CONCERNING WHETHER A PARTICULAR AGENCY EMPLOYEE OR OFFICIAL SHOULD RECUSE, THE MATTER SHOULD BE REFERRED TO AN AGENCY OFFICIAL OTHER THAN THE ONE WHOSE RECUSAL HAS BEEN SOUGHT.

Commentary

Referral of a question of recusal to a different agency official strengthens the credibility of the ultimate decision reached. Good agency practice would designate a specific agency official, such as a general counsel, as the person to handle all such referrals.

SECTION 12: THE DOCTRINE OF NECESSITY ALLOWS AGENCY PERSONNEL TO PARTICIPATE IN MATTERS IN WHICH THEY WOULD OTHERWISE BE RECUSED WHERE THERE IS NO OTHER CHOICE, BUT THE DOCTRINE SHOULD BE INVOKED SPARINGLY AND WITH SAFEGUARDS AGAINST BIAS OR THE APPEARANCE OF BIAS TO THE EXTENT AVAILABLE.

Commentary

The rule of necessity basically states that if all are disqualified, none are disqualified. The U.S. Supreme Court discussed the rule extensively in *United States v. Will*, 449 U.S. 200 (1980). The case involved a class action brought on behalf of all federal judges attacking the constitutionality of appropriation acts for four fiscal years, on the ground that the acts' taking away automatic cost of living salary adjustments violated the Constitution's prohibition on reducing the compensation of Article III judges. The Supreme Court character-

ized the rule of necessity as "a well-settled principle at common law that . . . 'although a judge had better not, if it can be avoided, take part in the decision of a case in which he has any personal interest, yet he not only may but must do so if the case cannot be heard otherwise.'" *Id.* at 213 (quoting F. Pollack, A First Book of Jurisprudence 270 (6th ed. 1929)).

Whether an agency should invoke the rule of necessity depends on the circumstances of a particular case. Often, the rule will be invoked as an added justification for agency personnel to preside where other justifications are primary. For example, the rule may justify an agency considering unfair labor practice charges against a state or province even though all board members or commissioners are residents of the state or province. However, the primary justification is the attenuated nature of their interest in the outcome of the proceeding by virtue of their residency.

Before invoking the rule of necessity, the agency should examine alternatives such as empaneling a substitute board. Even where there is no authority to empanel a substitute board, the agency should consider obtaining an advisory ruling from a special independent review officer. The utility of such a procedure in safeguarding the agency's reputation for integrity is illustrated by a comparison of several cases.

In *Gibson v. Berryhill,* 411 U.S. 564 (1973), members of the Alabama Optometric Association filed charges before the Alabama Board of Optometry seeking to revoke the licenses of optometrists employed by a corporation on the grounds, *inter alia*, that the optometrists were aiding and abetting the corporation in the unlawful practice of optometry. Two days later, the Board filed suit against the corporation to enjoin its alleged unlawful practice of optometry. The Board stayed its license revocation proceedings pending outcome of the law suit. The trial court agreed with the Board and enjoined the corporation from practicing optometry and from employing licensed optometrists. The Board then reactivated the license revocation proceedings. The charged optometrists sued to enjoin the license revocation hearings and a three-judge district court issued the injunction. The U.S. Supreme Court affirmed.

The Court expressly based its affirmance on the district court's finding of bias. The district court had found that the Board was comprised of only optometrists who were in private practice for their own accounts and that the license revocation proceedings were designed to revoke the licenses of all optometrists in the state who worked for corporations such as Lee Optical. "[S]uccess in the Board's efforts would possibly redound to the personal benefit of members of the Board, sufficiently so that in the opinion of the District Court the Board was constitutionally disqualified . . ."*Id.* at 578. The Supreme Court simply stated, "As remote as we are from the local realities underlying this case and it being very likely that the District Court has a firmer grip on the facts and of their significance to the issues presented, we have no good reason on this record to overturn its conclusion and we affirm it." *Id.* at 579.

In contrast, two courts have distinguished *Gibson* as not applying where the interested commissioners appointed an independent hearing officer to hear the case and where the commission's decision was subject to independent judicial review. *Massangale v. Okla. Bd. Of Examiners in Optometry*, 30 F.3d 1325 (10th Cir. 1994) (optometrists in practice for themselves sitting on case seeking to discipline optometrists working for corporations); *Ford Motor Co. v. Arkansas Motor Vehicle Commission*, 161 S.W.2d 788 (Ark. 2004) (automobile dealer members of the Motor Vehicle Commission sitting in a case challenging Ford's rejection of a Ford dealer's sale of its dealership to another party); *but see Yamaha Motor Corp. v. Riney*, 21 F.3d 793 (8th Cir. 1994) (holding commissioner of Arkansas Motor Vehicle Commission who was President of the Arkansas Motorcycle Dealers' Ass'n and a Harley Davidson dealer could not constitutionally sit on case concerning whether Yamaha violated a state statute in not compensating its dealer at the retail parts price for warranty work the dealer performed).

Jurisdictions differ over whether the doctrine of necessity allows an otherwise disqualified agency member to cast a tie-breaking vote. *Compare Bd. of Ed. v. IERLB, supra*, *with Barker v. Sec'y of State*, 752 S.W.2d 437 (Mo. App. 1988). The alternative is to affirm the ruling of the subordinate official by an equally-divided vote on a non-precedential basis. Even where legally permissible, the affected member must still decide whether to participate, taking into consideration whether the individual can decide the issue with integrity, and, if so, whether the degree and appearance of conflict, weighed against the importance of the issue to be decided, militates in favor of participation, notwithstanding the likelihood of lessened acceptability of the result.

SECTION 13: TO AVOID GIVING AN APPEARANCE OF PREJUDGMENT, AGENCY PERSONNEL SHOULD NOT MAKE PUBLIC STATEMENTS ABOUT MATTERS PENDING BEFORE THEM.

Commentary

Public statements about pending matters should be avoided because they can give the appearance of prejudgment and can lead to recusal in circumstances where recusal might otherwise not be required. For example, in *Cindarella Career and Finishing Schools, Inc. v. FTC*, 425 F.2d 583 (D.C. Cir. 1970), the FTC charged Cindarella with false advertising, including making false claims that it was a college and that its courses would qualify students for jobs as flight attendants. After a lengthy hearing, the hearing examiner dismissed the complaint and FTC complaint counsel appealed to the full Commission. With the appeal pending, the FTC Chairman gave a speech to the Government Relations Workshop of the National Newspaper Association in which he challenged newspapers to refuse to accept advertisements that appeared to be deceptive. Among the examples of clearly deceptive ads he cited were those offering college educations in five weeks and those promising prospective students that they could become flight attendants by attending charm school. The court held that the speech evidenced prejudgment of the case and that the FTC Chair should have recused himself.

Similarly, in *Charlotte County v. IMC-Phosphates Co.*, 824 So. 2d 298 (Fla. App. 2002), the Florida Court of Appeal issued a writ of prohibition disqualifying the Secretary of the Florida Department of Environmental Protection from ruling on the appeal of an ALJ's decision to grant a permit to conduct phosphate mining that the county had opposed. On the day the ALJ issued the decision, the Secretary issued a statement that provided:

> We have felt all along that our actions were fully consistent with state laws and Department rules. The public can feel comforted in the knowledge that a totally impartial arbiter has found that the will of their elected representatives is being carried out by the executive branch. The professionals at DEP have dedicated their careers to protecting the environment and their good-faith efforts have been affirmed. As the same time, we constantly look at ways to do better in all areas. As we pledged to the Chairman of the House Natural Resources and Environmental Protections Committee, Rep. Harrington, an internal review of the phosphate mining process is ongoing. With the guidance now provided by Judge Stampelos, that review can now be targeted and accelerated. In the end, we hope to have a process that will serve the public even better.

Id. at 300. The court ordered the Secretary disqualified from hearing the county's appeal from the ALJ's decision. The court reasoned:

> The timing and content of Secretary Stuhs' statements are of particular significance to our conclusion that Charlotte County is entitled to have the secretary recused. At the time the statements in question were made, the secretary was not acting in the role of investigator, prosecutor or a person responsible for determining probable cause. The statement was made on the day the ALJ issued the recommended order and the statement specifically addressed the merits of the ultimate decision whether the agency had followed the applicable law in granting the permit. The statement given at this time was not mandated as part of any of the secretary's statutory duties, but can only be classified as a statement made as part of his political duties. A gratuitous statement such as this is far different from an agency making a statutorily mandated preliminary determination involving different standards of proof and persuasion than those involved in the ultimate decision.

Id. at 301.

SECTION 14: AGENCY PERSONNEL INVOLVED IN NON-ADJUDICATING PROCEEDINGS SUCH AS RULEMAKING . . ..

This is an area which the Neutrality Committee decided to leave open for discussion without any recommended standard. There are competing views in the decisions and the scholarly literature as to whether the standards for participation and recusal in adjudications should apply with equal force in rulemaking or other non-adjudicative proceedings.

We will be soliciting members' comments at the Baltimore annual meeting.

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3. Banks of the Roses
4. Go Lassie Go
5. Irish Rover
6. Fox On The Run
7. The Beggarman
8. Medley: I'll tell My Ma/Mairi's Wedding
9. Red Is The Rose
10. My Johnny Lad
11. Streets of London
12. Nancy Whiskey
13. Bonnie Kellswater
14. The Wedding Gift
    Instrumental - Tin whistle solo
15. Dirty Old Town
16. Bluenose
17. Donald Where's Your Trousers
18. Mountain Dew
19. Mist Covered Mountains of Home

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