ALRA Advisor

January 2010

2009 ALRA Conference a BIG hit in Oakland !

ALRA Advisor

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

In this issue...

OAKLAND CONFERENCE

Images from the 58th Annual ALRA Conference held in July 2009.
Photos by Josée Dubois

www.alra.org

The *ALRA Advisor* is published bi-annually (January and July). On occasion, special issues are produced on an ad hoc basis.

DEADLINES:

January Issue: November 1st

July Issue: May 1st

ARTICLES:

Submit material as e-mail attachments (in MS Word or WordPerfect format)

PHOTOS:

Send photos as separate digital files (jpeg, bmp, tif) at 300 dpi. Please **do not** embed/insert photos in text document.

EDITING:

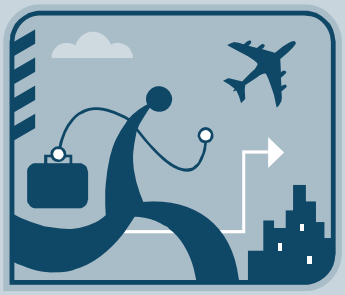
All articles are subject to editing for length and clarity.

SEND:

Material to the Editor:
josee.dubois@psst-tdfp.gc.ca

Ottawa Tourism photo

You too can paddle down the Rideau Canal during your stay in Ottawa during ALRA's 59th Annual Conference — July 24-28, 2010.



Travel Grants Available for ALRA Annual Conference

The ALRA Executive Board has agreed to run a pilot project this year to provide **first-time attendees** with the opportunity of obtaining a $500 grant to attend the 2010 Annual Conference to be held in Ottawa from July 17 to 21.

- If you have **never** attended an ALRA conference, make your request by writing to Josée Dubois, Vice-President Professional Development at josee.dubois@psst-tdfp.gc.ca.
- Provide your name, address and email address, the name of your agency and any information you feel would support your request.
- A decision on the recipients of the grant may be made on a first-come first-served basis.
- No applications will be considered after May 31, 2010.
- Up to 15 grants may be available.

Don't wait until the last minute!

Apply before May 31, 2010

From the President...

Dubois photo

I want to start by expressing my sincere thanks to my predecessor, Phil Hanley, and all the members of the ALRA Executive Board.

Thanks also to Paul Roose and his team at the California State Mediation and Conciliation Service who hosted a wonderful conference in Oakland, California in July of 2009.

By the time you read this, planning will be well underway for the 2010 ALRA Annual Conference, to be held at the historic Château Laurier in downtown Ottawa, the capital of Canada, July 24-28, 2010.

Building upon the work of previous Executive Boards, we hope to grow ALRA's membership. This will involve attracting new members, and encouraging existing members to send new people from their agencies to ALRA events.

Please give consideration to bringing some of your newer staff or appointees to the next ALRA Conference.

Our *Arrangements Committee*, co-chaired by Ginette Brazeau of the Canada Industrial Relations Board and Larry Gibbons of the National Mediation Board; our *Program Committee* co-chaired by Pierre Hamel of the Canada Public Service Labour Relations Board and Steve Hoffmeyer of the Minnesota Bureau of Mediation Services; and *Professional Development Committee*, co-chaired by Josée Dubois of the Canada Public Service Staffing Tribunal and Sue Bauman of the Wisconsin Employment Relations Commission met in October to commence planning for what is sure to be a memorable experience.

I look forward to seeing all of you in Ottawa.

—Mary Johnson

ALRA 2009 — 58th Annual Conference — Oakland

Conference Opening — July 19, 2009

ALRA President, **Phil Hanley**, welcomes attendees to the 2009 Annual Conference.

GUEST SPEAKER. Labor History in the Bay Area presented by **Fred Glass** (California Federation of Teachers). *(L-R)* **Phil Hanley** (PERB); **Paul Roose** (CSMCS); **Fred Glass**; and **Olivia Garcia** (NLRB).

CONCURRENT WORKSHOPS

I. BOARD MEMBER & COMMISSION MEMBERS. *What Does it Mean to be a Neutral?* **Daniel Charbonneau** (CIRB, Canada) and **Karen Neuwald** (California PERB)

II. MEDIATOR. *Mediating the Division of a Shrinking Pie. (L-R)* **Steve Pearl** (CSMCS) and **Jerry Allen** (FMCS, US)

III. GENERAL COUNSEL. *Current Legal Issues.* **Pierre Hamel** (PSLRB, Canada)

Boehmer © photo

IV. DIRECTORS & ADMINISTRATORS. ***Dealing with Shrinking Budgets.*** **Joseph P. Norelli** (NLRB, San Francisco) and **Alan Reichard** (NLRB, Oakland)

Photos by Josée Dubois

ALRA 2009 — 58th Annual Conference—Oakland

Advocates Day — July 20, 2009

CONCURRENT WORKSHOPS

I. The Canadian Experience with First Contract Arbitration and Card Check. Speakers: **Ginette Brazeau** (CIRB); **Pierre Flageole** (Quebec LRB); **Ken Love** (Saskatchewan LRB)

(L-R) Ginette Brazeau; Tim Parker (OLRB); Elizabeth MacPherson (CIRB); Kevin Love (SLRB); and Pierre Flageole (QLRB).

II. Effect of the Stock Market Collapse on Worker Pension. Speakers: **Jack Ehnes** (California State Teachers Retirement System); and other experts.

III. Labor Law Update. *Public Sector Update*— **Carol Vendrillo** (CA Public Employee Relations Journal) and *Private Sector Update*— **Joseph P. Norelli** (San Francisco, NLRB).

Photos by Josée Dubois

KEYNOTE SESSION. *The Impacts of Globalization on Labor Relations.* ALRA President, **Phil Hanley** (PERB) with Keynote Speaker, **Katie Quan** (UC Berkley).

PLENARY. *What Would the Employee Free Choice Act Mean in the Workplace? (L-R)* Employer Rep: **Greg McClune** (Attorney, Foley & Lardner); Union Rep: **Tho Thi Do** (Secretary-Treasurer, UNITE-HERE, Local 2) and moderator, **William Gould** (former Chair, NLRB).

LUNCHEON SPEAKERS. *The Republic Windows Story. (L-R)* **Mark Meinster** (UE) and **Kevin Surace** (CEO, Serious Materials)

The Role of Labor in the Economic Recovery. *(L-R)* **Kate Gordon** (Apollo Alliance); **Thomas Kochan** (Apollo Alliance); and **Barry Sedlik** (California Business Ventures).

ALRA 2009 — 58th Annual Conference—Oakland

Joint Professional Development Program & PROGRAM — July 21, 2009

CONCURRENT WORKSHOPS

I. ***Dealing with Diversity at a Hearing.*** *(L-R)* **Clifford Anderson** (NLRB, San Francisco); *Moderator* **Pierre Hamel** (PSLRB, Canada); and **Ian MacKenzie** (PSLRB, Canada)

PLENARY SESSION. ***Labour Relations and the Economic Crisis. What is Happening Outside of North America?***

(L-R) **Jan Sunoo** (FMCS) spoke on *The Asia/Pacific Situation*; moderator **Elizabeth MacPherso**n (CIRB); and **Kieran Mulvey** (Labour Relations Commission, Ireland) presented *The European Experience in a Global Economic Crisis.*

II. ***Emotions in Bargaining—Assets or Obstacles?*** **Seymour Kramer** (CSMCS) and **Pat Sims** (NMB)

III. ***Overview of the Effects of the Economic Crisis on Collective Bargaining to Date.*** *(L-R)* **Jacques Lessard** (FMCS, Canada); and **Scot Beckenbaugh** (FMCS, US)

ALRA 2009 — 58th Annual Conference—Oakland

Professional Development — July 22, 2009

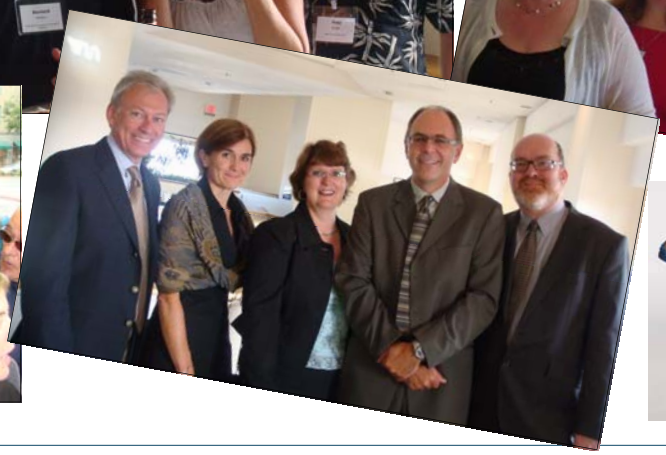
CONCURRENT WORKSHOPS

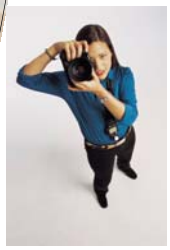
I. Legal Writing. *(L-R)* **Donn Ginoza** (California PERB) and **Mark McDonald** (CPSST)

PLENARY SESSION. Ethics. Facilitated discussion. Series of short, snappy ethics scenarios discussed by groups at round tables. Moderator—**Dan Nielson**

II. Mediation. Mediation training/exercises designed as a follow-up to the 2008 sessions.

CANDID CAMERA





Grievance Mediation 101— *Paul D. Roose*

Many books and articles have been written about labor-management grievance arbitration. But there are far fewer treatments of grievance mediation.

The purpose of this article is to give union and management advocates suggestions on how to better prepare for grievance mediation and how to make better use of the process.

Case Selection

While just about any grievance can be successfully mediated, there are some that lend themselves to the process more readily.

A. Exhaust the steps of the grievance procedure (except arbitration) prior to attempting mediation. A grievance mediator will be most helpful when the parties have gone through the initial steps of the grievance process and have been unable to settle. This will ensure that the mediator's and the parties' time is not spent on frivolous or obvious cases. And it will guarantee that multiple layers of the organizations, on both sides of the table, have had an opportunity to review the issue. Finally, it allows for the development of a case file that can be helpful in resolving the issue if it goes to mediation.

B. Bring cases that lend themselves to settlement. This may seem like a fine distinction to make, and often it is. But in many cases, one side or the other knows that for internal political reasons, arbitration will be necessary.

The grievant, the union leadership, the management team, or even the governing board may not be able to voluntarily compromise. In these cases, the parties may as well proceed directly to arbitration, or, in the case of a contract without arbitration, directly to the final step of the grievance procedure.

C. Focus on grievances in which a creative solution may be possible or necessary. Arbitrators are generally confined as to the remedies available to them. In a grievance mediation, the parties can get more inventive about solutions.

For example, the parties may arrange for the transfer of a grievant to another worksite, whereas that would be beyond the bounds of an arbitrator's authority as an imposed solution. Also, an arbitrator cannot rewrite the contract in his / her award. However, the parties, with the assistance of a mediator, can even do that by mutual agreement if it helps settle a major grievance or series of grievances.

Picking a Mediator

Securing the services of a knowledgeable and reputable mediator is an important first step.

A. The State and Federal Mediation Services both offer grievance mediation. Under their statutory mandates to promote labor-management harmony, neither organization charges a fee for this service. The grievance mediators assigned are generally the same ones who assist the parties in their contract negotiations mediation. They are generally knowledgeable individuals with many years of experience as advocates prior to becoming neutrals.

B. Most private arbitrators also offer mediation services. Arbitrators are another good choice to mediate a grievance dispute, due to their extensive knowledge of labor contracts and their personal experience with how cases play out in arbitration. Many arbitrators charge a higher fee for mediation than arbitration, presumably because the work is even more demanding than arbitration. Sometimes, the parties retain an arbitrator to arbitrate the case. Then, at some point during the hearing, they ask the arbitrator to act as a mediator. My personal view is that it is better to have a separate mediator and arbitrator. Parties generally feel more able to open up to a mediator about their underlying interests and settlement ideas if they are not later asking that same person to rule on the case.

Preparing for Grievance Mediation

Getting ready for grievance mediation is similar to preparing for arbitration, although less rigorous. Here are some steps for advocates to follow.

A. Prepare a well-organized case file. Collect all of the relevant contract provisions, grievance moving papers, witness statements, and documents. Have your notes of all settlement discussions. Be prepared to give the mediator copies of all pertinent documents. Have a copy of the contract to give (or loan) to the mediator. He/she may want to peruse other sections of the agreement that the parties may not have considered in their arguments.

B. Have the people available who must be present for the mediation. Generally, this includes the grievant and union shop steward on the labor side, and the grievant's supervisor on the management side. Make sure that any key decision-makers, who will have to approve of any settlement, are available for consultation. The mediator will probably not be interested in hearing from witnesses, except to the extent that witness credibility is a pivotal issue in the dispute. Written statements, and/or representations by the advocate that "were so and so here, he/she would testify to xyz" generally suffice for the purposes of grievance mediation. If you are the employer, make sure that the appropriate people requested by the union will be released from their regular duties for the meeting.

C. Explore possible settlement directions with decision-makers ahead of time. Test financial parameters and interests of organizational representatives prior to mediation.

The Mediation

Grievance mediation has many advantages over arbitration. Here are some basics of the process.

A. The process is informal. There are no court reporters or tape recorders. The mediator will not swear in witnesses. While attorneys often present cases in mediation, it has a much less legalistic tone than arbitration. Arbitrations are generally scheduled for all day. Usually, a half day will suffice for grievance mediation. An individual grievant should be present, as should a representative member(s) of a class of grievants.

B. The proceedings are confidential and off the record. The mediator generally points out to the parties at the outset the confidential nature of the mediation. Even if he or she does not do so, the established practice in labor-management dispute resolution is that mediation is confidential. This has the important effect of freeing the parties to make disclosures to the mediator and / or to the other side that cannot be cited in arbitration. Any settlement offers made or discussed in mediation are strictly off the record. No arbitrator in the business will admit into evidence any information from a mediation session.

C. The process usually includes face to face meetings and separate caucuses. Most grievance mediators like to start with the parties together. At this opening session, the mediator explains the mediation process, and will often inquire as

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Grievance Mediation 101*(continued)*

(Continued from page 9)

to whether the parties have any particular agreement as to how a grievance mediation is to be conducted. Then the mediator will often want an oral summary of the parties' positions. Personally, I prefer to go in the same order as arbitration, with the moving party going first. In a discipline case, that would be the employer. And in an allegation of a non-disciplinary contract violation, the union would start. Usually, witness testimony is not necessary, but the mediator may want to hear from a particular individual if he/she feels that the witness' credibility could make or break the outcome. The mediator will often inquire as to whether the parties have exchanged any settlement offers to date, and will want to know what those offers were. At this junction, the mediator will begin meeting separately with both sides to explore settlement options.

D. In a grievance mediation that is a step in a process that concludes in arbitration, the mediator plays a dual role in the caucus. Not only is the mediator a settlement broker, carrying offers and coaxing the parties to move their positions. The mediator also gives the parties a preview of how an arbitrator might rule. By informing the party of how their case might be viewed in arbitration, the mediator tries to nudge the party toward a compromise. Most grievance mediators are far from passive messengers. They will often make suggestions to both sides, based on their experience with other similar grievances, arbitration precedent and their reading of the contract.

Reaching Agreement – Or Not

The goal of the mediator and the parties in a grievance mediation is a signed agreement. Here are items to consider in closing a grievance mediation.

A. If the parties reach an agreement through the mediator, there should be a final face to face session. It is usually best to have one side or the other type up a settlement document for the parties to sign. In an individual grievance, the grievant will often sign as well. The mediator does not need to sign the agreement. If for any reason it is not practical to sign off, then at the least the parties should state to each other the terms of the agreement, or have the mediator recite the points of the settlement while both sides are present.

B. No ratification is necessary. Unlike collective bargaining agreements, grievance agreements are not generally subject to union membership ratification or governing board adoption. The principals have generally delegated this responsibility to their authorized representatives.

C. Once there is a signed agreement, then that agreement is binding on the parties. The parties often want to include a settlement point that the agreement does or does not set precedent for other grievances.

D. The mediator may be asked to render an off the record opinion in case the parties do not settle. In many cases, the parties do not settle but believe that it still may be possible to settle short of arbitration. In that case, they may need a mediator's opinion on how an arbitrator might rule in order to influence their decision-makers to modify their positions. Most mediators will give such an opinion.

Some mediators will agree to give a brief written opinion. In the latter case, the mediator should put a caveat on the document that it may not be cited in arbitration. There are even a few contracts that state that the parties agree to abide by the recommendation of the mediator in such cases. ⌘

Closing of Unionized Store Breached Labour Code, Arbitrator Finds

By closing its first unionized outlet in North America in 2005 and where some 190 employees were out of work less than a year after union certification was granted and before a first contract could be achieved, U.S.-based retail giant Walmart violated a prohibition in the Quebec *Labour Code* against changing "the conditions of employment" of employees after an application for certification had been filed, a Quebec arbitrator has found.

The arbitrator held that it did not suffice for Walmart to invoke unspecified "business reasons" for the store closing and the resulting layoffs, without explaining satisfactorily what those reasons were.

The complex and ongoing legal saga began in August 2004 when the Quebec Labour Relations Board certified Local 503 of the United Food and Commercial Workers Union as the bargaining agent for employees at the Walmart store in Jonquière, about 470 kilometres north of Montréal.

After trying unsuccessfully to negotiate a first contract with Walmart, the union applied to Quebec's Minister of Labour in February 2005 for appointment of an arbitrator.

On February 9, 2005, the same day that the Minister announced acceptance of the union's request, Walmart declared that it was closing the store effective May 6, 2005. The company informed the Quebec government that the closing was "for business reasons." Walmart subsequently closed the store ahead of schedule, on April 29, 2005, allegedly to head off anticipated labour protests.

Among other legal measures that it took in response, the union filed a grievance, claiming that closing the store and putting the employees out of work in the circumstances contravened s.59 of the Quebec *Labour Code*, which provides that "[f]rom the filing of a petition for certification and until the right to lock out or to strike is exercised or an arbitration award is handed down, no employer may change the conditions of employment of his employees without the written consent of the petitioning association and, where such is the case, certified association."

In an August 30, 2006 decision, Arbitrator Jean-Guy Ménard found that he did not have jurisdiction to hear the case because the real subject matter of the grievance was an allegation of reprisals for union activity contrary to sections 12, 13, and 14 of the *Code*, and this fell squarely within the jurisdiction of the Quebec Labour Relations Board.

However, this decision was overturned on judicial review in November 2007 by a Quebec Superior Court judge who ruled that Ménard could not determine without a hearing on the merits that closing the store and terminating the jobs of the affected employees did not in fact change their conditions of employment contrary to s.59.

In a September 18, 2009 decision on the merits, Arbitrator Ménard noted that "in practical terms, it is first incumbent on the union to show that there was a change in the conditions of employment by proving in principle the pre-existing conditions and the change that occurred following the filing of the request for certification.

Once this step is completed, the employer has the burden of establishing on a preponderance of the evidence that it did not contravene s.59 of the *Code* [because] the decision was made in the normal course of business." Ménard added that "it is now established in jurisprudence and in doctrine that a layoff or a dismissal can give rise to a change in the conditions of employment."

Consequently, the arbitrator held, "the employer must justify its decision by proving that it was made in the normal course of its operations and in the absence of any inequitable, abusive or discriminatory consideration."

Ménard found that, to the contrary, "the union has duly established that there was a change in the conditions of employment of the employees by means of the mass layoffs that were announced to them on February 9, 2005 and implemented effective

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Closing of Unionized Store Breached Labour Code

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April 29, 2005.... [Walmart] believes that it has viably invoked [the defence of "business as usual"] by suggesting that the layoffs are explained simply by the closing of its establishment. With all respect, I am not of this view."

The arbitrator reasoned that "s.59 of the *Labour Code* creates a particular period in the life of a business. From the time an application for certification was filed, the employer did not have full discretion.... It still had the power to manage the activities of its store, but it was required to explain decisions such as layoffs that constituted changes in the conditions of employment of the employees.... It did not suffice to say that it was a 'business decision' over which [Walmart] had exclusive power."

In the arbitrator's view, "the layoffs were not unrelated to [Walmart's] decision to close its books. There is in effect reason to believe that what explains the cessation of operations also explains the layoffs. But the fact that the reasons for the one may be related to those which support the other does not appear to me to block the recourse set out in s.59. And even if these reasons were identical, I do not see what could relieve [Walmart] from providing them with regard to the layoffs which are the focus of the present case."

Arbitrator Ménard determined that, "in the absence of [Walmart] having done this, I am obliged to conclude that there was an illegal change in the conditions of employment of the employees by means of the layoffs that they suffered as of April 29, 2005." Declaring the layoffs illegal, Ménard retained jurisdiction to impose remedies if the parties were unable to reach an agreement.

Walmart has already announced that it will apply for judicial review of the arbitrator's decision. Andrew Pelletier, Vice-President of Corporate Affairs, said that "[i]f Wal-Mart had just wanted to close the store ... that store would have closed from the moment that it became certified by the union – but that's not what happened." Pelletier maintained that the closing decision was made only after multiple bargaining sessions, because there was "no way" the store could afford to meet the union's demands.

Meanwhile, the Supreme Court of Canada is considering whether Walmart's closing of the Jonquière store was an unfair labour practice and a violation of the employees' *Charter* rights to freedom of association.

In January, the Court heard appeals from two Quebec Court of Appeal decisions favourable to Walmart on these issues, and reserved judgment. No date for a decision has been announced. ⌘

Read the full text of Arbitrator Jean-Guy Ménard's award in Travailleurs et travailleuses unis de l'alimentation et du commerce, section locale 503 v. La Compagnie Walmart du Canada

Supreme Court decides Walmart case on narrow grounds, Quebec law different from rest of Canada

By a 6-3 vote, a majority of the Supreme Court of Canada has held that, where a business in Quebec is closed, employees who are dismissed cannot seek reinstatement, a remedy that is normally available under section 15 of the Quebec *Labour Code*, even though the business is closed to avoid a union.

Moreover, the majority held, where a closing occurs, the "reverse onus" provision in section 17 of the *Code* – which presumes that dismissal of an employee engaged in union activity is the result of anti-union reprisal, unless the employer provides good and sufficient reason – does not apply, because closing of a business in itself constitutes good and sufficient reason for the dismissal.

The rest of this report is available at:

www.lancasterhouse.com/

The "end of the story"...?

Follow this link to a short article entitled, "*The Supreme Court of Canada concludes an important chapter in the Walmart Jonquière closing*":

http://www.cba.org/CBA/PracticeLink/12-09-bc/12-09-bc_8.aspx

NATIONAL LABOR RELATIONS BOARD (NLRB)

By Les Heltzer

NLRB Nominations

As of the time of this writing in late January 2010, the Board continues, as it has since January 2008, as a two-member Board comprised of Chairman Wilma B. Liebman and Member Peter C. Schaumber.

On October 21, 2009, the U.S. Senate Health, Education, Labor and Pensions Committee (HELP) approved, without hearings, President Obama's nominees for the three vacancies on the Board—Democrat Craig Becker, an associate general counsel of the Service Employees International Union, Democrat Mark G. Pearce, a private practitioner representing unions, and Brian E. Hayes, the Republican Labor Policy Director for the Senate HELP Committee.

The Committee's action was necessary to send the nominations to a floor vote by the full Senate. The following day Sen. John McCain (R-AZ) placed a "hold" on Becker's nomination precluding it from going to a floor vote and, since the three nominees have been considered together as a package, as a practical matter effectively precluding a floor vote on any of the nominations.

On December 24, 2009, the Senate sent the Becker nomination back to the President rather than holding the nomination over for consideration in 2010 as it did with the nominations of Pearce and Hayes.

On January 20, 2010, the President resubmitted the nomination of Becker to the Senate. Becker's second nomination would have to be approved by the Senate HELP Committee again to get to a floor vote.

If a hold is again placed on the nomination by any senator, 60 votes will be needed under cloture procedures to limit debate and to proceed with a floor vote. ⌘

Challenges to the Authority of the Two-member Board

The July 2009 issue of the *Advisor* included an article, *The Two-Member NLRB in Challenging Times*, which highlighted the challenges in the courts to the authority of the two-member Board to issue final orders.

At that time four circuit courts had ruled on the issue, with the First, Second, and Seventh Circuits upholding the two-member Board's authority under the language of Sec. 3(b) of the NLRA and the D.C. Circuit concluding that the two-member Board lacked authority under that language.

Since that article, further developments have occurred. Most significantly, on November 2, 2009, the U.S. Supreme Court granted *certiorari* in the 7th Circuit case, *New Process Steel, v. NLRB*, 564 F.3d 840 (7th Cir. 2009), cert. granted 130 S.Ct. 488 (2009).

Petitions for *certiorari* also have been filed in the 1st, 2nd, and D.C Circuit cases: *Northeastern Land Services v. NLRB*, 560 F.3d 36 (1st Cir. 2009), petition for cert. filed 78 U.S.L.W. 3098 (U.S. August 18, 2009) (No. 09-213); *Snell Island SNF LLC v. NLRB*, 568 F.3d 410 (2d Cir. 2009), petition for cert. filed 78 U.S.L.W. 3130 (U.S. Sept. 11, 2009) (No. 09-328); and *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469 (D.C. Cir. 2009), petition for cert. filed sub nom. *NLRB v. Laurel Baye Healthcare of Lake Lanier, Inc.*, 78 U.S.L.W.3185 (U.S. Sept. 29, 2009) (No. 09-377).

In addition, on November 20, 2009, the Fourth Circuit in *Narricot Industries, L.P. v. NLRB,* 587 F.3d 654 (4th Cir. 2009), joined the First, Second and Seventh Circuits in upholding the two-member Board's authority and specifically concluded in agreement with the First and Seventh Circuits that the language of Sec. 3(b) was "unambiguous."

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More recently, on December 22, 2009, the Tenth Circuit upheld the authority of the two-member Board in *Teamsters Local 523 v. NLRB*, __ F.3d __, 2009 WL 4912300, noting that it was "hard-pressed" in light of the split among its sister circuit courts to conclude that the language of Sec. 3(b) is clear on its face and concluding that the Board's interpretation of the ambiguous language was permissible and entitled to deferral.

Whether the Supreme Court will grant certiorari in the additional cases in which petitions have been filed, including the petition in *Laurel Baye* which was filed by the Solicitor General of the United States, remains to be seen.

A decision by the Supreme Court on the issue is anticipated during its current term which ends in June 2010. ⌘

New Office of Public Affairs

On October 14, 2009, the Board announced a new Office of Public Affairs replacing the former Division of Information.

The new Office will be developing a modern outreach and education strategy aligned with the contemporary workforce and workplace, and with new technologies. It will take a more active role in educating the general public and other interested parties – including public officials, journalists, academics and attorneys – in what the Board does and what rights it protects. It will also strive to reach new audiences, especially among workers and employers who may not realize that the Act applies to their workplaces, and to deliver news in a more timely and focused way.

The new Office is directed by **Nancy Cleeland**, who, among other things, covered major labor disputes and chronicled the underground economy at the Los Angeles Times for a decade, covered immigration and the U.S.-Mexico border, and served as Mexico City Bureau Chief for Copley News Service. In 2004, Cleeland shared a Pulitzer Prize for a series of stories that explored the labor and outsourcing policies of Walmart.

Tony Wagner joins the new Office as the NLRB's first New Media Specialist. As Director of Online and Web Communications at the National Association of Independent Colleges and Universities, he was the first public relations professional dedicated to the strategic development and use of new and social media at a major higher education association. ⌘

Further information on the Office of Public Affairs is available at the following link: www.nlrb.gov/shared_files/Press%20Releases/2009/R-2706.pdf

Third Circuit Denies Petition for Rehearing and Rehearing En Banc

At the General Counsel (GC) Roundtable at the Oakland ALRA conference, the participants engaged in an animated discussion about the intersection of privacy interests and the *Freedom of Information Act* (FOIA).

No one had any idea that corporate privacy interests might be protected by the FOIA. But on September 22, 2009, the Third Circuit issued a decision in *AT&T, Inc. v. FCC, (*No. 08-4024, 582 F.3d 490, 2009 WL 2998942) with the radical holding that a corporation is entitled to "personal privacy" protection under *Freedom of Information Act* Exemption 7(C), 5 U.S.C. 552(b)(7)(C).

The ruling stems from an appeal taken by AT&T to challenge an FCC decision that granted a FOIA request by CompTel, a trade association, for access to information in an FCC investigatory file concerning AT&T's overbilling of the government for work under a federal program.

The FCC agreed to withhold from disclosure under FOIA Exemption 4 (5 U.S.C. § 552(b)(4)) information from the file revealing sensitive AT&T commercial information and trade secrets, and withheld under Exemption 7(C) information from the file that infringed the personal

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FMCS Announces FY2009 Labor-Management Grants

The Federal Mediation and Conciliation Service (FMCS) has announced ten grants totaling approximately $650,000 to support cooperative initiatives by labor-management groups nationwide through recognition of innovative approaches to workplace issues as well as best practices in labor relations.

"The current, tough economic environment means that unions and employers are confronting difficult and complex issues. The FMCS grants program is an important effort to encourage innovative problem-solving and show the benefits of collaboration," said FMCS Director George H. Cohen. "This year's grantees have been selected to lead the way through creative, cooperative labor-management initiatives that may serve as models for other work places around the country."

Cohen said that because of limited funding, only one out of every five applications for FY2009 could be selected for a grant. Therefore, competition was intense. Applications were rated by an agency committee that included public members.

The grant recipients and amounts awarded are:

- Parkview Community Hospital Medical Center (Riverside) and United Nurses Associations of California, an affiliate of American Federation of State, County, and Municipal Employees, Los Angeles, $62,829;
- Dubuque Area Labor-Management Council, International Brotherhood of Teamsters Local 120, United Steelworkers Local 1861, International Association of Machinists Local 1238, and United Auto Workers Local 94, Dubuque, Iowa, $98,445;
- East Bay Innovation and Service Employees International Union Local 1221, San Leandro, Calif., $63,452;
- Oakton Community College and Cook County College Teachers' Union Local 1600, American Federation of Teachers, Des Plaines, Ill., $57,559;
- Idaho Education Association, Idaho School Board Association, and Idaho Association of School Administrators, Boise, Idaho, $31,316;
- National Union Insulation Contractors Alliance and International Association of Heat and Frost Insulators and Asbestos Workers, Lanham, Md., $95,876;
- ArcelorMittal USA Inc. and United Steelworkers, Chicago, $45,545;
- Greater Peoria Contractors & Suppliers Association and West Central Illinois Building Construction Trades Council, Plumbers and Pipe Fitters Local 353, Carpenters and Joiners of America Local 183, International Brotherhood of Electrical Workers Local 34, and Laborers' International Union Local 165, Peoria, Ill., $97,965;
- Cooperative Home Care Associates and SEIU 1199, New York, $65,000; and
- International Specialty Products, Calvert City, Ky., and IAM Local 1720, Calvert City, $47,205.

"The current, tough economic environment means that unions and employers are confronting difficult and complex issues."

Grantees in past years have received support for a broad range of projects, including outreach, communications, strategic planning, minority recruitment and process development.

A listing with full grant summaries is available at www.fmcs.gov.

Applicants wishing to learn more about the FMCS labor-management grants program may call the FMCS Grants Office at (202) 606-8181 or visit the agency's Web site. ⌘

CANADA INDUSTRIAL RELATIONS BOARD (CIRB)

Bell Canada, 2009 CIRB 458

This case dealt with an unfair labour practice complaint and an application for interim relief filed by the Communications, Energy and Paperworkers Union of Canada (CEP).

The union alleged a violation of section 50(*b*) (prohibition against changing terms and conditions or "statutory freeze") of the *Canada Labour Code* (the *Code*) by the employer, Bell Canada (Bell).

Following further action by the employer, the union amended its complaint to include an alleged violation of section 94(1)(*a*) (employer interference in formation or administration of a trade union) by Bell.

Prior to the CEP's complaint and application for interim relief, Bell, Bell West and the Canadian Telecommunications Employees Association (CTEA) entered into a Memorandum of Agreement (MOA) that voluntarily recognized the CTEA as the bargaining agent for Bell West clerical employees.

Bell West later became a division of Bell and the CTEA subsequently merged with the CEP. In 2008, the CEP advised Bell of its intention to honour the terms of the MOA and its desire to enter into negotiations for the Bell West bargaining unit "as soon as is practically possible."

In January 2009, Bell announced that it would be terminating the employment of 16 Operational Service Control Centre employees in Western Canada.

As a result, the CEP filed the above application and complaint under section 50(*b*).

Following the employer's subsequent announcement that it would be terminating an additional 42 employees, the CEP amended its initial complaint to include an allegation that the latest actions also violated section 94(1)(*a*).

The Board declined to grant the union interim relief under section 19.1 of the *Code*.

In arriving at this conclusion, the Board considered the criteria established by the Supreme Court of Canada in *RJR – MacDonald Inc.* v. *Canada (Attorney General)*, [1994] 1 S.C.R. 311, for injunctions, namely (a) whether there was a serious issue to be determined; (b) the possibility of irreparable harm; and (c) the balance of convenience, overlaid with broader considerations of constructive labour relations.

The Board found that the CTEA was not a bargaining agent under the *Code*, because it had not yet entered into a first collective agreement; therefore, Bell's workplace restructuring could not constitute a violation of the statutory freeze under section 50(*b*) of the *Code*.

Noting policy reasons for limiting the *Code* protections to bargaining agents, the Board determined that where a union was voluntarily recognized as the bargaining agent, but had not been certified as such by the Board, the union would only be formally recognized upon the successful negotiation and ratification of a first collective agreement.

Although the MOA was in writing, it was not a collective agreement under the *Code* as it did not contain terms and conditions relating to labour relations, a grievance procedure or any other hallmarks of a collective agreement.

Accordingly, the complaint alleging a violation of section 50(*b*) was dismissed.

The Board also found that Bell's decision to consolidate its control centres did not constitute an interference with the union.

Under section 94(1), the union was required to prove an interference with the union's formation, administration or representation of employees, which could be rebutted if the employer could show that its actions were taken for *bona fide* business reasons.

The Board determined that Bell's actions were not intended to interfere with the union, but were for the sufficient business justification of reducing the employer's cost structure and making the business more competitive.

The evidence indicated that the work that had been transferred would be performed by members of the CEP in other locations.

Therefore, the complaint alleging a violation of section 94(1)(*a*) was dismissed. ⌘

Canada Post Corporation, 2009 CIRB 450

This decision dealt with the preliminary question of whether the Board had the jurisdiction to determine a challenge under the *Canadian Charter of Rights and Freedoms* (part of Canada's Constitution since 1982) to a provision of an external statute.

This question arose in the course of dealing with various applications and complaints filed by the Canadian Union of Postal Workers (CUPW) concerning employees working under Combined Urban Services or Highway Services contracts with Canada Post Corporation for the processing, collection and delivery of mail.

Canada Post argued that employees under these contracts were "mail contractors," and that section 13(5) of the *Canada Post Corporation Act* (CPCA) deems mail contractors not to be dependant contractors or employees within the meaning of the *Code*.

Therefore, the employer contended the Board had no jurisdiction to hear the matters. CUPW submitted that section 13(5) of the CPCA violated these workers' guaranteed right to freedom of association under the *Charter* and was therefore of no force or effect on these proceedings.

Before the Board could proceed, it was asked to make a preliminary determination on whether the Board had the requisite authority to determine the constitutional validity of section 13(5) of the CPCA.

In the Board's reasons for determining that it had the necessary authority, the Board noted that the law concerning an administrative tribunal's power to apply external statutes and to consider the *Charter* has evolved significantly, as reflected in the Supreme Court of Canada decisions in *Martin* v. *Nova Scotia (Workers' Compensation Board)*, [2003] 2 S.C.R. 504, and *Tranchemontagne* v. *Ontario (Director, Disability Support Program)*, [2006] 1 S.C.R. 513.

The restated test provides that where an administrative tribunal has the power to decide questions of law arising under a legislative provision, such power will be presumed to include the jurisdiction to determine the constitutional validity of that provision under the *Charter*.

The Board pointed to section 16(*p*) of the *Code* as the source of its authority to decide questions relating to the interpretation and application of statutory provisions, including questions of law and questions of constitutional validity.

The Board went on to conclude that it has the jurisdiction to consider questions of law under section 13(5) of the CPCA, as the provision, even though contained in an external statute, is a labour relations provision that has a direct impact on the Board's jurisdiction under Part I of the *Code*.

Further, the Board found that, since section 13(5) of the CPCA impacts pending applications and complaints before the Board that are within its jurisdiction and area of expertise, it will be required to interpret and apply that provision and thus determine questions of law in relation to it.

Since the Board is being asked to apply a provision and make a determination that goes directly to the Board's jurisdiction over the applications and complaints, it has the obligation to ensure that the provisions it applies are consistent with the *Charter*.

Since the Board concluded it had the authority to consider questions of law under section 13(5) of the CPCA, it concluded that it also had the authority to subject the provision to *Charter* scrutiny.

This decision was upheld on reconsideration (*Canada Post Corporation*, 2009 CIRB LD 2133).

Important decisions

The Federal Court of Canada confirmed the decision of a Board adjudicator in *A.G. of Canada vs. King* (2009 FC 922).

As reported in the *Advisor* (January 2009), In ***King v. Treasury Board*** (***Border Services Agency***), a Board adjudicator had quashed a 30-day suspension imposed by the employer on Mr. King.

The suspension was imposed after the grievor, the First National Vice-President of Customs Excise Union, wrote a letter to the United States Secretary for Homeland Security, in which the grievor was critical of practices of the Canadian government as employer concerning the hiring and training of Canadian customs officers.

The employer considered the letter highly inappropriate, particularly in light of heightened border security sensitivities after the events of September 11, 2001.

The Court confirmed the adjudicator's decision to quash the disciplinary measure and held that his finding that the grievor was legitimately acting within the scope of his union duties was reasonable.

It was also reasonable for the adjudicator to find that Mr. King's statements were not reckless or false and that his actions were not malicious. ⌘

In ***Quadrini v. Canada Revenue Agency and Hillier*** (2009 PSLRB 104) the Board had to rule on its jurisdiction to inquire into the claim by the employer that a document requested by the complainant was protected by solicitor-client privilege.

The respondents objected that the Board did not have the authority to satisfy itself that the document was effectively subject to the claimed privilege.

The respondents' argument was based on the Supreme Court of Canada decision in *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, 2008 SCC 44 ("Blood Tribe").

After reviewing that decision, the Board concluded that, as a quasi-judicial tribunal, it had the power to determine whether a solicitor-client privilege applied to a particular document.

The Board ordered the respondents to produce an affidavit on the nature of the document and on the grounds for claiming solicitor-client privilege.

The matter is pending before the Federal Court of Appeal on judicial review. ⌘

Publication of Decisions and Privacy Issues

Concerns have been expressed by the Privacy Commissioner of Canada as to the ease with which Internet publication of decisions of tribunals resulted in the public disclosure of personal information of parties, and held the view that such a practice was in violation of the *Privacy Act*.

In response to those concerns, on May 27, 2009, the Heads of Federal Administrative Tribunals Forum, of which a number of ALRA member agencies are members, adopted a statement on the use of personal information in decisions of administrative tribunals carrying out quasi-judicial functions.

The Forum believes that it is good policy for tribunals to try to strike a balance between the open court principle, public access to their decisions and transparency of administrative justice on the one hand and the privacy concerns of individuals availing themselves of their rights before the tribunal on the other hand.

Tribunals may adopt measures related to such an objective, such as assessing the extent of personal information that is relevant and necessary to support the reasons for a decision.

The statement and other reference material can be found on the Forum's website:

http://www.hfatf-fptaf.gc.ca/news-nouvelles-06-26-2009-eng.php

CALIFORNIA

California State Mediation and Conciliation Service Authorized by the State Legislature to Charge Fees for Certain Services

For the first time in its 62-year history, the California State Mediation and Conciliation Service (CSMCS) has been authorized by the legislature to charge fees for certain of its services. The change, initiated by CSMCS and the Governor's office, was passed as part of a budget bill in late July 2009. The agency is in the process of writing regulations to implement the changes, which are targeted to go into effect in July 2010.

CSMCS may now charge for arbitration services (annual arbitrator fees to be on the panel and charges to the parties for lists of arbitrators), election services (administration and supervision of representation and agency shop elections) and training and facilitation. CSMCS' central work of mediation of contract disputes and mediation of grievance disputes will continue to be provided at no cost to the parties.

The agency sought the change as a way of allowing the program to become less dependent on California's highly volatile general fund. "Having alternative sources of revenue can help us weather the fiscal storms, maintaining an adequate level of staffing for our vital core mission of keeping the labor peace in California's public sector" said CSMCS Supervisor, Paul Roose.

CSMCS has also begun charging other California state agencies for certain services, such as mediation of interpersonal workplace disputes. Also under consideration is CSMCS charging for mediation of state employee disciplinary appeals prior to a formal hearing in front of the State Personnel Board. ⌘

IOWA

IOWA Public Employees Relations Board – Impact of 10% ATB Budget Cut on PERB/ Implementation of Fees and Unpaid Leave Day

In determining how to deal with the 10% ATB budget cut for fiscal year 2009,which for PERB amounts to $117,000, the Board has determined that further staff cuts are not a practical option.

PERB is one of the smallest state agencies and, due to previous budget cuts, the staff is currently smaller than at any time in the agency's 35-year history. (Administrative Law Judges have already been reduced from seven to four, and support staff from four to three.)

Accordingly, the Board has determined that it is necessary to address this budget crisis with a combination of unpaid leave days for all agency personnel (including the Board) and the immediate implementation of various fees to agency users. Assuming the plan submitted by PERB to the Governor will be approved, we intend to implement the following measures:

I. PERB will immediately implement the following fees pursuant to emergency rule-making procedures:

- $30 filing fee for all prohibited practice complaints (to be taxed as costs in those proceedings, as will the cost of the time of the statutorily-required court reporters).
- $30 service fee for all requests for lists of grievance arbitrators (including requests for second or third lists).
- Two-tiered administrative fee for impasse service requests:

  ⇒ $30 filing fee for initial requests for mediation (Those who have already filed early requests for the impasse season commencing November 15, 2009, will be billed.

IOWA *(CONTINUTED)*

⇒ $250 administrative processing fee, split between the parties and billed to them as soon as a mediation session is scheduled (not yet held).

The Board decided it would not implement a service fee for mediation sessions, because doing so could jeopardize PERB's long-standing agreement with FMCS to provide some of PERB's mediation services.

The two-tiered administrative fee system is intended to assist PERB in covering administrative costs associated with maintaining the mediation program and tracking impasse cases, while shifting the greater portion of the fee to a later time in the process when it will be borne by those most likely to use mediation services.

Parties will be limited to one mediation session only. Most mediations are completed in less than five hours, and the Board is encouraging mediators not to extend sessions beyond that time unless settlement is reasonably certain.

II. PERB will utilize normal (non-emergency) rulemaking procedures to:

- Implement a $50 late filing fee for annual reports untimely filed by certified employee organizations.
- Formalize the $150 annual neutral listing fee previously established by Board policy.

III. Unpaid Leave Days

It is anticipated that at least five unpaid leave days will be required of the Board and professional staff, and fewer of support staff.

If revenues are not as projected, additional unpaid leave days will be required. ⌘

MASSACHUSETTS

Division of Labor Relations Commonwealth Employment Relations Board

— Michael A. Byrnes, Director, Division of Labor Relations *and*

— Marjorie F. Wittner, Chair, Commonwealth Employment Relations Board

Introduction

Nearly two years ago, on November 14, 2007, the Commonwealth of Massachusetts Division of Labor Relations (DLR) came into existence pursuant to legislation that combined and reorganized the Commonwealth's neutral labor relations agencies.

The legislation merged the former Labor Relations Commission (LRC) and the Board of Conciliation and Arbitration (BCA) into the new DLR. The Joint Labor Management Committee for Municipal Police and Fire was also placed under the DLR's umbrella for administrative and budgetary purposes but retained its unique structure and jurisdiction.

At the time of the merger, the LRC and the BCA had experienced years of budgetary neglect and personnel shortages, resulting in significant caseload backlogs. Each agency operated independently with little or no structured interaction between them.

In September 2007, Governor Patrick filed legislation to reorganize all three agencies in order to address these inefficiencies and restore faith in the Commonwealth's public sector labor agencies.

The DLR is now celebrating the two-year anniversary of the reorganization and is pleased to announce that it has been a success.

DLR Structure

The reorganization created a new structure that has proven to be both efficient and effective.

The DLR is lead by a Director who is responsible for the administrative functions of the agency including rule-making, budget preparation and case management.

MASSACHUSETTS

The three-member Commonwealth Employment Relations Board (CERB), led by a full-time Chair and two *per diem* members, replaced the former LRC, which had consisted of three full-time commissioners, who issued all decisions in all cases and performed administrative functions.

Although the Director retains oversight over the performance of hearing officers, arbitrators, and other staff, the Director may not interfere with, influence, or overrule any written opinion issued by the division's staff or by the CERB. Any such decision may only be overruled by the members of the CERB or a court, in accordance with applicable law.

In addition to the Director and the CERB, the DLR continues to employ front-line personnel responsible for mediating and/or adjudicating various types of labor disputes.

Finally, a significant part of the new structure is a 13-member Advisory Council made up of five union, five management and three at-large members.

The role of the Advisory Council is "to advise the division concerning policies, practices, and specific actions that the division might implement to better discharge its labor relations duties."

In addition, the Advisory Council interviews and nominates candidates for gubernatorial appointment to the position of Director, CERB Member and CERB Chair.

Initial Challenges

Immediately, in November 2007, the new agency faced several significant challenges.

The first and most daunting challenge was that the DLR began its existence with a huge backlog of cases. Approximately 400 unfair labor practice charges (ULPs), or nearly 40% of the overall docket, were unassigned and awaiting initial investigation for probable cause determinations. This situation developed because the former LRC had only 3.6 FTEs working on such cases.

In addition to the backlog, the reorganization statute mandated that the new agency *promptly* conduct in-person investigations of all new ULPs filed after the effective date of the legislation. This requirement meant that DLR staff had to spend significant time investigating new charges while continuing to draft decisions and probable cause determinations for the backlog filed with the former LRC.

Just over one month into its existence, the DLR faced another significant test. The Massachusetts legislature passed, and Governor Patrick signed, the Written Majority Authorization (WMA) statute, or card check legislation, requiring employers to recognize unions that have received written authorizations from a majority of employees in an appropriate bargaining unit.

The WMA statute applies in situations where no other union has been or is currently lawfully recognized as the exclusive representative of the employees in the public sector unit. The new legislation required that the DLR draft new regulations and implement new procedures to process WMA petitions within thirty days from the date of filing.

Given all of the above, the fundamental challenge for the agency became the balance between affording fundamental fairness to the parties while achieving efficiency.

Strategies

In order to meet the above challenges, the DLR employed a variety of strategies.

First, the initial savings from the consolidation allowed the DLR to employ additional staff to work on the backlogged ULPs in order to allow the incumbent staff to focus on the new cases.

Second, the cross-utilization of personnel, in particular the use of former BCA mediators to mediate ULPs resulted in numerous settlements and

(Continued on page 22)

MASSACHUSETTS

(Continued from page 21)

voluntary withdrawals, as mediation became the hallmark of the agency.

As for ULPs that did not settle, in most cases, the parties have been able to get a probable cause determination within 90 days of the initial filing of the charge. Under the former LRC, the probable cause determination often took two to three years.

As the statistics below clearly demonstrate, the utilization of the above strategies has resulted in a steady and reliable system for the processing of cases. We are pleased to report that, overall, feedback from the parties has been positive.

CERB

As described above, an important component of the new structure is the CERB, the three-member body that has assumed the role of the former LRC with respect to cases filed prior to the reorganization and acts as an appellate body that reviews dismissals of charges and hearing officer decisions.

During FY2009, Governor Patrick appointed three new members from names submitted to him by the Advisory Council. These appointments enabled the CERB to function fully in the manner envisioned by the reorganization legislation.

In August 2008, the Governor appointed respected labor arbitrator Elizabeth Neumeier to serve as the first *per diem* CERB member. With the appointment in November 2008 of the full-time Chair Marjorie F. Wittner, who worked for the former Labor Relations Commission from 2001-2007, the CERB achieved a quorum for the first time in several months.

In 2009, the Governor filled the remaining *per diem* vacancy by appointing Professor Harris Freeman, who began serving in June.

The CERB appointments have had an immediate and significant impact on the development of public sector law in Massachusetts. During FY 2009, the CERB rendered probable cause determinations in over 250 cases. Despite having no quorum for several months, it also published 40 final decisions and rulings and decided 10 appeals of pre-hearing dismissals. This body of work represents a tremendous increase in output as compared to the former LRC, which published only 18 final decisions and rulings in FY 07 and just 23 in FY 08.

Combined with the hard work and dedication of the entire staff, the CERB has played a pivotal role in eliminating the DLR's backlog of cases.

Results

The following statistics demonstrate how the agency has reduced the overall docket by nearly 23% while continuing to process additional case filings since the reorganization.

Conclusion

The economic downturn, budget cuts and an increase in case filings have required the DLR to do more with less.

Nevertheless, the DLR's new structure and case-handling strategies have improved the agency's ability to handle these challenges and positioned it for continued success. ⌘

Case Type	Open Docket 11/15/2007	Cases Received 11/15/07 to 06/30/09	Cases Closed 11/15/07 to 06/30/09	Open Docket 06/30/09
Unfair Labor Practice	601	691	796	496
Representation Cases	43	126	131	38
Unit Clarification (CAS)	41	29	63	7
Other (SI, AO, RBA)	0	5	5	0
Grievance Arbitration	172	147	171	148
Grievance Mediation	85	117	147	55
Contract Mediation	95	169	210	54
EPRS, RA, CBT	22	9	11	20
TOTAL	1059	1293	1534	818

MICHIGAN

City of Grand Rapids -and- Grand Rapids Employees Independent Union

Case No. C05 K-283, issued July 23, 2009.

The Commission affirmed the ALJ's Decision and Recommended Order finding that Respondent, the City of Grand Rapids (the City), did not violate its duty to bargain by reassigning work from bargaining unit members represented by Charging Party, Grand Rapids Employees Independent Union (the Union), to unpaid volunteers.

The Commission also affirmed the ALJ's conclusion that Respondent's refusal to accommodate Charging Party's information requests regarding persons outside of the bargaining unit did not constitute a violation of its duty to bargain. Additionally, the Commission agreed with the ALJ's finding that Respondent's restructuring of one of its departments was a legitimate departmental reorganization, making the issue a matter of management prerogative beyond the scope of bargaining.

Lake County and Lake County Sheriff -and- Police Officers Association of Michigan

Case No. C07 A-011, issued June 25, 2009.

The Commission affirmed the ALJ's Decision and Recommended Order finding that Respondents, Lake County and Lake County Sheriff (collectively, the Employers), violated Section 10(1)(e) of PERA by refusing to arbitrate a grievance filed by Charging Party, Police Officers Association of Michigan (POAM).

Charging Party and Respondents were parties to a 2003-2005 collective bargaining agreement that contained a grievance procedure concluding in binding arbitration as well as a "just cause" termination clause. As of the contract's expiration in December 2005, the parties had not reached an agreement to extend the term or provisions of the contract.

On September 15, 2006, Respondents discharged a bargaining unit member. Charging Party filed a grievance over the discharge on September 20, 2006. Respondents denied the grievance, arguing that since the discharge occurred after the expiration of the 2003-2005 contract and prior to the execution of the 2006-2008 contract it was not covered by the "just cause" provisions of either collective bargaining agreement. Upon notification by the Union that it intended to pursue the matter to arbitration, Respondents refused to submit the grievance to arbitration.

The Commission agreed with the ALJ that the grievance in question was arguably arbitrable under the 2006-2008 contract. The Commission considered the contract provision stating an effective date of January 1, 2006 and evidence that Respondents had applied that effective date to other provisions of the contract, such as retroactive wage increases. Respondents argued that during the final phase of contract negotiations. Respondents' counsel sent communications to Charging Party asserting that grievances filed after the expiration of the 2003-2005 contract would not be arbitrated. Respondents contended that these communications became part of the parties' agreement. However, these communications were not expressly incorporated into the 2006-2008 contract.

Therefore, the Commission agreed with the ALJ that the grievances were arguably arbitrable under the new contract and therefore, Respondents violated their duty to bargain in good faith under Section 10(1)(e) by refusing to submit the grievance to arbitration. ⌘

WISCONSIN

Wisconsin Statutory Changes

There have been several recent changes in the labor relations statutes administered by the Wisconsin Employment Relations Commission (WERC).

Most significantly, the 2009 Wisconsin Act 28 (the budget act) repealed the qualified economic offer (QEO) which for the last 15 years has exempted public school district employers from economic issue interest arbitration regarding teacher units if the employer offered a 3.8% per year total compensation package.

For school district cases only, the budget act also increased from three to four years the maximum permissible length of a collective bargaining agreement; empowered existing bargaining units (within the same district or across district lines) to combine conditioned solely on WERC-conducted unit determination votes among the employees in each unit, without the consent of the employer(s) involved and without a WERC determination as to the appropriateness of the resultant combined unit; and eliminated requirements that arbitrators give "greatest weight" to State imposed limits on employer spending or revenue and "greater weight" to local economic conditions.

Act 28 also created the University of Wisconsin System Faculty and Academic Staff Labor Relations statute as a separate subsection of Chapter 111. That entirely new bargaining law authorizes collective bargaining for up to 15 faculty and 15 academic staff bargaining units within the System.

Act 28 also modified the existing State Employment Labor Relations Act (SELRA) by authorizing collective bargaining (and defining three statutory bargaining units) for University System research assistants employed by the University of Wisconsin System and by directing the WERC to establish a procedure (limited to research assistants units) for a selection of exclusive representative based on authorization cards.

Act 28 also authorized collective bargaining under SELRA for a state-wide bargaining unit of home care providers effective July 1, 2011, and it authorized collective bargaining under the (private sector) Wisconsin Employment Peace Act for day care providers for not more than 8 children with the employer being defined as the "state, counties, and other administrative entities involved in the regulation and subsidization" of the providers.

In other separate legislation, reversing contrary case law, 2009 Wisconsin Act 21, effective June 23, 009, makes it a prohibited practice for (1) a municipal employer to fail to follow a contractual fair -share provision during a contract hiatus; and (2) a municipal employer or union to fail to follow a contractual grievance arbitration provision during a contract hiatus.

Also reversing contrary case law, 2009 Wisconsin Act 34 makes teacher preparation time a mandatory subject of bargaining effective with contracts beginning July 1, 2011. ⌘

Additional information can be found online at the WERC website: http://www.werc.wi.gov/outline_of_recent_developments_october_2009.pdf

MORE
OAKLAND MEMORIES

SASKATCHEWAN

Abandonment

Abandonment of certification rights has been an issue in Saskatchewan for some time. Recently, the Saskatchewan Labour Relations Board and the Legislature have sought to provide some clarification in respect of the issue and its applicability in Saskatchewan.

The Court of Appeal for Saskatchewan dealt with a long outstanding decision of the Board with respect to abandonment in its decision in *United Brotherhood of Carpenters and Joiners, Local 1985 et al. v. Graham Construction and Engineering Ltd. et al.*[1]

Following that decision, the Board issued a decision in another case involving abandonment in *International Brotherhood of Electrical Workers, Local 529 v. Saunders Electric.*[2] In that decision, the Board determined, based upon its interpretation of the Court of Appeal decision in *Graham Construction*, that the doctrine of abandonment no longer was available to be utilized in Saskatchewan in the Construction Industry.

Saunders Electric applied to the Board for reconsideration of this decision. The Board determined to reconsider the application in a decision rendered April 27, 2009.[3] In its decision, the Board determined to reconsider the decision because of its precedential nature which was a significant policy adjudication which the Board felt required further clarification.

Shortly after the Board's original decision in Saunders Electric, Bill 80, an Act to amend the Construction Industry Labour Relations Act was introduced into the Saskatchewan legislature. That Bill, if passed would, among other things, have reinstated the doctrine of abandonment in Saskatchewan in the construction industry.

The Board reconsidered its decision in Saunders Electric in its decision dated Nov. 6, 2009.[4]

In its decision, the Board reviewed the Court of Appeal's decision in *Graham Construction*, its own jurisprudence, and jurisprudence from other provinces. It determined that the original panel had misconstrued the Court of Appeal decision in Graham Construction.

It held that the Court, rather than closing the door on abandonment in Saskatchewan, had confirmed that the doctrine of abandonment was available to be used. The Court had held that the Board in *Graham Construction* had misconstrued in an unreasonable fashion, the Board's earlier jurisprudence concerning abandonment.

Based upon its review of the Court of Appeal's decision in *Graham Construction*, its own jurisprudence, and jurisprudence from other provinces, the Board determined that the doctrine of abandonment remained available to be used in Saskatchewan, that the Saskatchewan jurisprudence was out of step with that in other jurisdictions, and established some overarching principles concerning abandonment.

It determined that the onus of proof that abandonment had occurred rested upon the person who wished to establish abandonment. It also determined that if abandonment was found, the inquiry would then shift to determine if there were any factors which would excuse the conduct which amounted to abandonment.

Significantly, as well, the Board determined that the focus of the inquiry should be upon the actions of the Union with respect to its utilization of its bargaining rights, not upon any actions of the employer.

As for Bill 80, it remains before the Saskatchewan Legislature. ⌘

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1 [2008] SKCA 67, 296 D.L.R. (4th) 622 [2008] 8 W.W.R. 421 71 Admin. L.R. (4th) 259 311 Sask. R. 1

2 [2008] CanLII 47057

3 [2009] CanLII 21773

4 [2009] CanLII 63147 2

Comings & Goings

CANADA INDUSTRIAL RELATIONS BOARD (CIRB)

Appointments

On January 15, 2010, the Honourable Rona Ambrose, Minister of Labour, announced three appointments to the Canada Industrial Relations Board (CIRB).

Mr. **Allan Hope** was appointed as a part-time Vice-Chairperson and Mr. **Terry Lineker** and Ms. **Cindy Oliver** were appointed as part-time Members representing Employers and Employees, respectively.

Mr. Hope's qualifications include 45 years as an arbitrator and mediator in several hundred labour, environmental and commercial disputes. He is named as sole arbitrator in a number of B.C. Rail and Alcan collective agreements, and chaired a provincially appointed commission that dealt with compensation of provincial court judges.

Mr. Lineker has over 42 years experience as a human resources manager at the divisional and corporate levels in areas including industrial and employee relations, and wage, salary and benefits administration. Since 1997, he has occupied the position of President and Chief Executive Officer of Forest Industrial Relations Ltd.

Ms. Oliver has over 25 years experience as a union leader. Since 2002, she has occupied the position of President of the Federation of Post-Secondary Educators of British Columbia. Her experience with the organization includes leading provincial bargaining in the post-secondary education sector, as well as leading public advocacy on post-secondary education issues and collaborative efforts with the broader labour movement. She also represents members and locals in the grievance and arbitration process. ⌘

On October 27, 2009, the Honourable Rona Ambrose, Minister of Labour, announced the appointment of **David Olsen** as a full-time employer representative member of the CIRB for a term of three years, effective November 9,2009.

Mr. Olsen brings considerable labour relations expertise to the Board, having not only represented Canada Post before both the CLRB and CIRB, but also serving as FETCO representative and spokesperson during the 1995 Review of Part I of the *Canada Labour Code* (the *Code*) conducted by Mr. Andrew Sims and the subsequent client consultations that led to the 1999 amendments to the *Code*.

Mr. Olsen holds an LL.M from McGill University and has over 35 years of experience in labour, employment and human rights law. He began his public service career in 1974 as Counsel for the Department of Justice.

Since 1983, Mr. Olsen held progressively senior positions within the Canada Post Corporation, including Assistant General Counsel, where he had overall national responsibility for the legal practice. ⌘

David Demirkan joined the CIRB on May 25, 2009, as the Board's new General Counsel and Director of Legal Services.

He previously worked for the Canadian Transportation Agency's Legal Services Branch. He has previous government experience as a lawyer with the Department of Justice Canada and the Nova Scotia Department of Justice.

Prior to moving to Ottawa, Mr. Demirkan lived in Halifax, Nova Scotia, where he spent six years in private practice as a litigator with McInnes Cooper, a large regional law firm. His clients included businesses, individuals, insurance companies, ship owners, and banks.

Mr. Demirkan holds a B.A. (Honours) from St. Thomas University and an LL.B. from the University of New Brunswick. ⌘

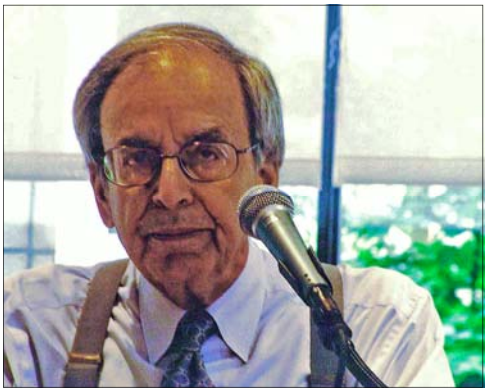
Departure

Herman Champagne, full-time employer representative member of the CIRB, left the Board on November 6, 2009, to take on new challenges at Morneau Sobeco in Montréal, Quebec.

Mr. Champagne was appointed to the Board in July 2007. We wish him every success in his new endeavours. ⌘

Comings & Goings

FEDERAL MEDIATION and CONCILIATION SERVICE (FMCS)



George H. Cohen Takes Office as 17th Director of FMCS

Confirmed by the unanimous consent of the U.S. Senate on October 5, 2009, **George H. Cohen** was sworn in as Director of the Federal Mediation and Conciliation Service on October 8, 2009. He was nominated by President Barack Obama on July 6, 2009.

Director Cohen has had an extensive and distinguished career as a labor lawyer, negotiator, and mediator.

During the period 1966-2005 he was a senior partner at Bredhoff & Kaiser, a Washington, D.C. law firm with a national practice, specializing in representing private and public sector labor organizations in collective bargaining involving a wide variety of industries and government entities.

Prior to entering into private practice, the Director served as an appellate court attorney with the National Labor Relations Board.

Director Cohen is a graduate of Cornell University and its Law School and earned a LLM degree from Georgetown Law. In the past three years he has been engaged in a solo practice as a mediator.

He is a member of the prestigious Mediation Panel of the U.S. Circuit Court of Appeals for the D.C. Circuit and has successfully mediated numerous, complex, high-profile disputes. From the mid 1970's through 2005, the Director was an Adjunct Professor at Georgetown Law School where he taught the Art of Collective Bargaining and other labor courses. ⌘

Canada's New Minister of Labour

On January 19, 2010, the Prime Minister of Canada appointed the Honourable **Lisa Raitt** as Minister of Labour for Canada, replacing the Honourable Rona Ambrose, who became Minister of Public Works and Government Services.

Ms. Raitt was first elected to the House of Commons in 2008. She has been Minister of Natural Resources in October 2008.

Prior to her election to the House of Commons, Ms. Raitt was the president and chief executive officer of the Toronto Port Authority (TPA). She had previously served as the TPA's general counsel and harbourmaster. As a lawyer, Ms. Raitt specialized in the areas of intellectual property, commercial litigation and shipping arbitration.

Ms. Raitt is a graduate of St. Francis Xavier University and holds a Master of Science from the University of Guelph. She earned her law degree from Osgoode Hall at York University. ⌘

Comings & Goings

ILLINOIS LABOR RELATIONS BOARD

Jacalyn Zimmerman, well known to ALRA delegates over the years as a Past President and the Dean of the ALRA Academy, was appointed in September as the Chairman of the Illinois Labor Relations Board by Governor Patrick Quinn. Her appointment was unanimously confirmed by the Illinois State Senate in October.

Ms. Zimmerman began her career as a labor relations neutral with seven years as a trial attorney for the National Labor Relations Board in Chicago. When Illinois passed its public sector labor relations statute in 1984, she was recruited by labor and management to join the agency as its first General Counsel, a position she held for 22 years, under four different Governors.

Jackie left the Board in December of 2006, and quickly established a successful practice as a labor arbitrator. She remained active in ALRA during her time in private practice, continuing to coordinate the Academy and team teach the representation portion of the program with her longtime friend and colleague John Higgins. ⌘

FEDERAL SERVICE IMPASSES PANEL

CHICAGO–September 18, 2009– **Professor Martin H. Malin**, director of Chicago-Kent's Institute for Law and the Workplace, has been appointed by President Barack Obama as a member of the Federal Services Impasses Panel (FSIP).

The Federal Service Impasses Panel is the agency that intervenes when an agency of the federal government and a union representing that agency's employees are unable to reach agreement on the terms of their new collective bargaining agreement under the Federal Service Labor-Management Relations Statute and the *Federal Employees Flexible and Compressed Work Schedules Act*.

If bargaining between the parties, followed by mediation assistance, is unsuccessful, the FSIP has the authority to recommend procedures and to take whatever action it deems necessary to resolve the impasse.

The seven FSIP members are presidential appointees who serve on a part-time basis.

A member of the Chicago-Kent faculty since 1980, Professor Malin teaches courses in labor law, collective bargaining, arbitration, public sector labor law, employment law, contracts and jurisprudence.

He has published five books, including *Public Sector Employment: Cases and Materials* (West 2004), the leading law school casebook on public sector labor law. Professor Malin has also written more than 60 articles on labor law and dispute resolution.

During the mid 1980s, Professor Malin served as a consultant to Illinois' public employment labor boards and drafted the regulations implementing Illinois' newly-enacted public sector labor relations acts. From 2004 to 2008, he served as reporter for the Association of Labor Relations Agencies' Neutrality Project.

Professor Malin was the principal drafter of the association's Neutrality Report, a mini-treatise on labor board and mediation agency impartiality. ⌘

Awards

FMCS COMMISSIONER GARY LISIECKI RECEIVES PRESTIGIOUS AWARD FROM UNIVERSITY OF WISCONSIN

FMCS Commissioner **Gary Lisiecki** recently was honored with the Melvin Lurie Labor-Management Cooperation Prize by the University of Wisconsin-Milwaukee (UWM) for his contributions to the Wisconsin Labor and Employment Relations Association and the UWM Master's in human resources and labor relations program.

The Melvin Lurie Labor-Management Cooperation Award was created in 1998 to honor the memory of Melvin Lurie, a Professor of Economics at the university and founder of its Masters in Human Resources and Labor Relations program.

The prize was awarded to Commissioner Lisiecki in recognition of his "exemplary service in the cause of promoting, creating or researching labor-management cooperation."

Gary currently is a mediator in the FMCS Milwaukee, Wisconsin field office. He began his career as a Mediator for the Federal Mediation and Conciliation Service 15 years ago, and according to his peers, has developed a reputation as a no-nonsense mediator. In the words of one local labor official, "you go to Gary when you want the job done."

Ron Sweet, a long-time colleague recently retired from FMCS in Milwaukee stated, "Gary is defined by incredibly hard work and a great deal of respect for the parties."

During his tenure with FMCS, Gary has participated in dozens of important settlements searching for common ground and helping facilitate both cooperation and innovation.

The Melvin Lurie Labor-Management Cooperation Award is intended to continue and enhance Professor Lurie's legacy of promoting the practice and furthering the development of cooperation between labor and management.

The prize is open to individuals in the private or public sector, and to unionists, managers, neutrals, academics and public officials.

Nominations for the prize are sought from members of the Labor-Management Cooperation Committee at UWM as well as from relevant organizations such as the Industrial Relations Research Association, the Milwaukee Labor Council, the Southeastern Wisconsin Labor-Management Council, and from previous award winners and the community at large. ⌘

Third Circuit Denies Petition

(Continued from page 14)

privacy of AT&T individual employees and customers.

But the FCC rejected AT&T's argument that all of the information about the investigation was protected from disclosure under Exemption 7(C), reasoning that corporations do not have "personal privacy" protection under that exemption. On appeal, a panel of the Third Circuit disagreed.

The court rested its holding principally on the *Administrative Procedure Act*'s general definition of the word "person," which includes corporations, and inferred from this definition that Congress intended Exemption 7(C) of FOIA to confer "personal privacy" rights on corporations and other business associations.

The court declined to consider the parties' arguments concerning statutory purpose, relevant (but non-binding) case law, and legislative history, and simply stated that to the extent that this case law was in conflict with the court's textual analysis, it declined to follow them.

The US Department of Justice, following numerous comments from the NLRB and other agencies, filed a petition for rehearing en banc on November 6, 2009.

The en banc brief argues that the court's holding is based on a basic misreading of FOIA, and is in considerable tension with four decades of precedent and government practice rejecting the concept that corporate business or commercial interests qualify for "personal privacy" protection under FOIA's exemptions. On November 23, 2009, the petition was denied.

The US Department of Justice will now decide whether or not to seek Supreme Court review. If the court's decision is not reversed, it may well revolutionize the manner in which the federal government processes the hundreds of thousands of FOIA requests it receives each year and shields from public scrutiny information concerning corporate malfeasance that the public has a right to know.

—Abby Propis Simms.

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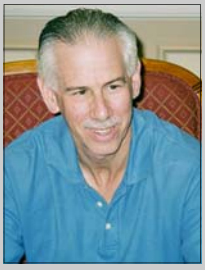

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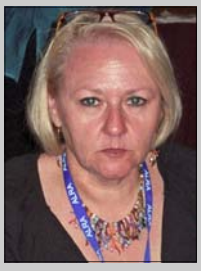

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59th Annual Conference — OTTAWA, Canada

July 24-28, 2010

Tandem biking near the Rideau Canal locks

Sound and light show on Parliament Hill

National Gallery of Canada

Descending the locks of the Rideau canal

Come and discover OTTAWA — the Nation's capital

All photos courtesy of Ottawa Tourism

Ottawa's Byward Market, *minutes from the Chateau Laurier, is one of the trendiest places to live, shop and go out. Nightlife includes live music bars, cafés, discotheques and taverns serving just about every segment of the market from jazz to rock to dance music. (Source: About the Byward Market http://www.byward-market.com/about/history.htm)*