ALRA Advisor
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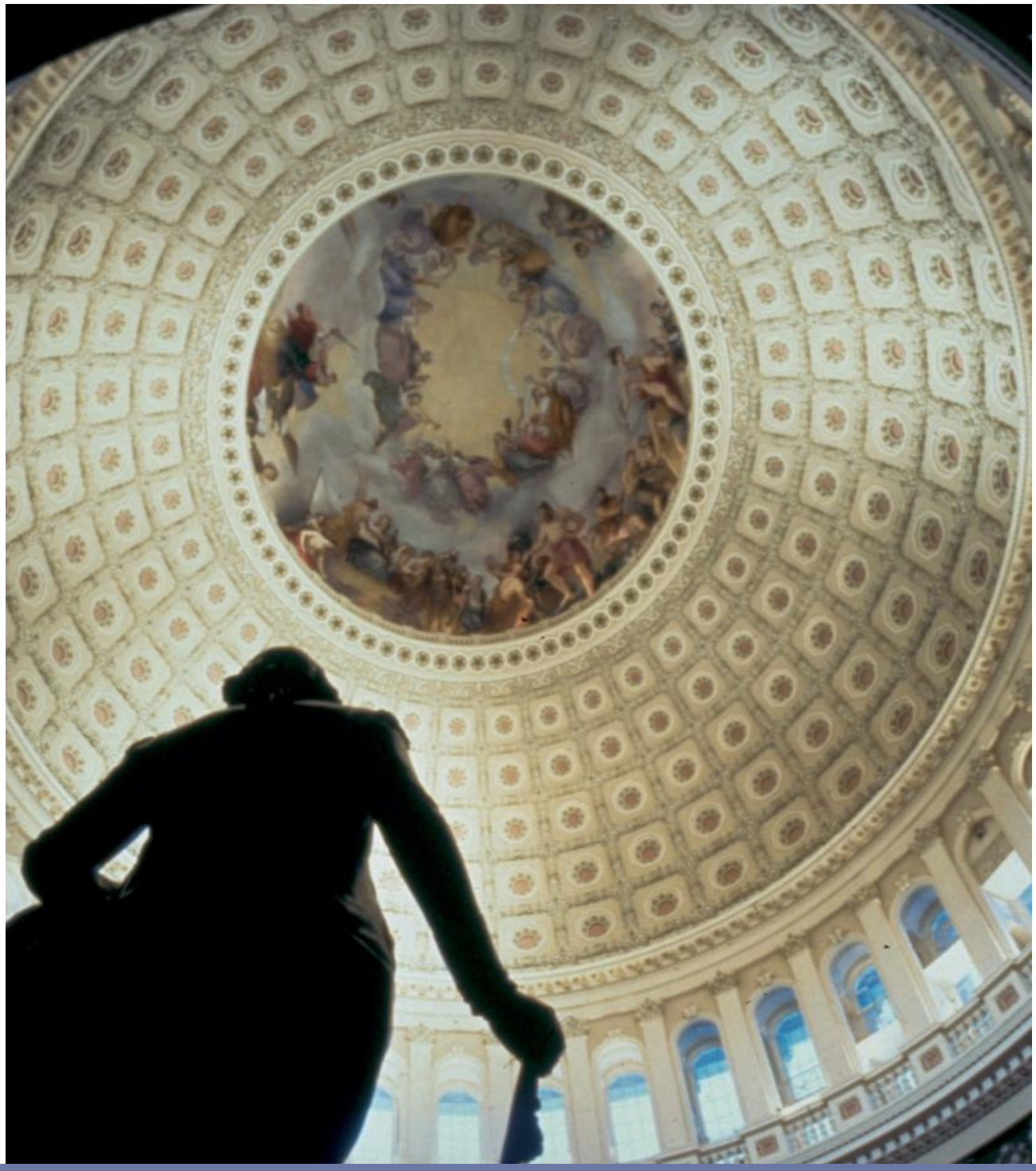
ALRA ASSOCIATION of LABOR RELATIONS AGENCIES



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ALRA 62nd Annual Conference — Washington, D.C.

July 20-24, 2013

ALRA Advisor

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

In this issue...

Mayflower Renaissance Hotel—the official site of ALRA's 62nd Annual Conference.

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DEADLINES:
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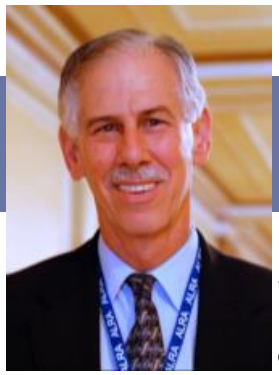
ARTICLES and **PHOTOS:**
All articles are subject to editing for length and clarity. Photos should be at a resolution of at least 72 jpg, preferably 500 jpg or greater.

Submit all material to the *Editor*:
Elizabeth MacPherson
ATTN: ALRA Advisor
el-macpherson@cirb-ccri.gc.ca
(613) 995-7046

Conference theme:

"Labor Relations in Transformational Times: Complex Issues – Best Practice Solutions".

From the President...



Robert Hackel

How quickly a year can seemingly pass. It feels like it was yesterday in beautiful Montreal. Now, here we are a year later poised for the exciting 62nd Annual ALRA Conference in dynamic Washington, D.C. This year's conference theme is "*Labor Relations in Transformational Times: Complex Issues – Best Practice Solutions*". Featured throughout the conference will be exceptional topics with distinguished speakers providing engaging presentations and panel discussions addressing the challenging issues facing labor, management, neutrals and neutral labor relations agencies.

The conference is structured for visiting delegates to experience the extraordinarily diverse attractions, activities and restaurants of Washington, D.C. Please don't miss these opportunities including some of the special events coordinated by the Arrangements Committee. Advocates' Day concludes with a reception at the National Geographic Museum that includes a special exhibit commemorating the 125th anniversary of the Society.

My first ALRA conference was 1984 in Kalispell, Montana. I have served on many ALRA committees, programs and special projects. Serving as President truly allows one to appreciate the incredible dedication of the many member agency board members and staff who willingly commit so many volunteer hours. Everyone's combined contributions serve as impetus toward ALRA's success in supporting the common mission of delivering quality neutral labor relations services. So without further ado, I would like to recognize the special effort during the past year of the Executive Board, Committee Chairs/Co-Chairs and several individuals who have made exceptional contributions toward the success of the organization and this year's annual conference.

Thanks to the following Executive Board members for their team work and guidance: *Kevin Flanigan, Sheri King, Gilles Grenier, Scot Beckenbaugh, Ginette Brazeau, Abby Propis Simms* and *Pat Sims.* A hearty thanks to Executive Board members *Danielle Carne, Diane Chartrand, Steve Hoffmeyer* and *Kirsten Watson* who resigned during the year or are leaving at the end of their term in July.

A big acknowledgement is due to the following committee chair/co-chairs for their amazing energy and contributions toward organizing this year's conference: Arrangements Co-Chairs *Mary Johnson* and *Gilles Grenier*, Professional Development Co-Chairs *Ginette Brazeau* and *Tim Noonan*, Program Co-Chairs *Scott Blake* and *Jennifer Webster* and Publications/ Communications/Technology Chair *Liz MacPherson.*

Special thanks to the following individuals for their beyond the usual ALRA volunteerism and achievements toward making the 62nd annual conference a success: *Ernie DuBester* for all his work on the Program Committee and *Fran Leonard* for all her "I'll get done" accomplishments on the Arrangements Committee.

I can't say enough about *Linda Lusignan's* (CIRB) stepping up to handle the online conference registration and her continuing administrative support of ALRA throughout the year.

Lastly, but surely not the least, thanks to *Marisa Gebhardt* for maintaining the ALRA website and keeping us electronically connected and informed. We all look forward to the rollout of the Members Only section of our website.

And we all look forward to twice a year reading the *ALRA Advisor* with its impressive layout and content…thanks *Janet Boehmer* for a great job.

For the many who have contributed to ALRA and are not mentioned above, I thank you on behalf of the organization.

I look forward to a successful 62nd Annual ALRA Conference where we can share our experience and vision and mold them into practical solutions for the many challenges all of us face as labor relations neutrals.

— Robert Hackel

— *by Ginette Brazeau*

Federal Court of Appeal Upholds the CIRB's Decision Regarding the Integrity of its Electronic Voting Process

On April 17, 2013, the Federal Court of Appeal (FCA) heard the Canadian Airport Workers Union's (CAWU) application for judicial review of the Canada Industrial Relations Board's (Board) reconsideration decision in *Garda Security Screening Inc*. 2013 CIRB 651 (Decision 651) and dismissed the application from the bench.

The issue originated in January 2012, when the International Association of Machinists and Aerospace Workers (IAMAW) filed an application to displace the CAWU as the certified bargaining agent for a unit of Garda employees providing pre-board security screening services at certain airports in Ontario. As is the Board's practice in such applications, a representation vote was ordered. As the Board had recently introduced an electronic voting process, the vote was conducted electronically in March 2012.

The results of the vote favoured the IAMAW and an order was issued certifying the IAMAW as the bargaining agent for this unit. At various stages of the proceedings before the Board, the CAWU opposed the original application, challenged the results of the vote, sought information from the Board pertaining to the vote and sought to obtain a list of those who had voted, implying that there had been voter fraud. Decision 651 dealt with each of the CAWU's allegations.

In Decision 651, the Board stated that the integrity and credibility of the voting process is of primary importance and that it therefore takes allegations of voting irregularities very seriously. While the CAWU had not provided any specific facts to support its allegations, the Board nonetheless undertook an in-depth review because the electronic voting technology and process had just recently been introduced.

Following the investigation, the Board was satisfied that the electronic voting process presented no greater issues with regard to voter fraud than did a regular mail ballot. The Board was also satisfied that appropriate safeguards were in place to ensure that only eligible voters were provided with the opportunity to vote electronically.

The CAWU brought an application for judicial review of Decision 651 on the basis that, *inter alia*, the Board erred by not disclosing the results of its confidential internal investigation into the electronic voting process.

The main issue for judicial review before the FCA was the Board's decision not to disclose the full details of the outcome of its confidential internal investigation into its electronic voting procedures. In a unanimous decision, the FCA upheld the Board's decision.

The Court found that the Board had disclosed some of the findings from its investigation and that its decision not to provide full details of all of the safeguards that were in place in order to prevent voter fraud in future electronic votes was squarely within its mandate and expertise and therefore deserved deference from the court.

The Court concluded that the Board's decision was reasonable because it fell within the range of acceptable outcomes based on the facts and the law and dismissed the application with costs. The Court also stated that, even on the higher correctness standard of review, it was not persuaded that the Board had erred. ■

The Canadian Artists and Producers Professional Relations Tribunal (CAPPRT) has closed its doors after 18 years

© Janet Boehmer

Diane Chartrand

CAPPRT came into being in 1995. Its role was to administer the *Status of the Artist Act,* which establishes a framework for the conduct of professional relations between independent professional artists and producers within the federal jurisdiction. Amendments to the *Status of the Artist Act* contained in the federal government's 2012 *Budget Implementation Act* abolished CAPPRT and made the Canada Industrial Relations Board (CIRB) responsible for the administration of that *Act*.

The main responsibilities of CAPPRT were to define sectors of cultural activity suitable for collective bargaining between artists' associations and producers within federal jurisdiction, to certify artists' associations to represent self-employed artists working in these sectors, and to deal with complaints of unfair labour practices and other matters brought forward by artists, artists' associations or producers, and prescribe appropriate remedies.

The *Act* guarantees the right of artists to join associations that can represent their professional interests and the right to bargain collectively with producers for the purpose of reaching a scale agreement establishing the minimum terms and conditions of engagement. Although scale agreements set the minimum terms and conditions of engagement applicable in a particular artistic sector, artists are free to negotiate individual contracts that provide more favourable rights and benefits.

(Continued on page 9)

— by Sylvie Guilbert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Can federal offenders working in a Canadian federal penitentiary unionize?

The PSLRB says no in the matter of Jolivet v. Treasury Board (Correctional Service of Canada), 2013 PSLRB 1.

Two offenders incarcerated in a federal penitentiary filed a complaint under paragraph 190(1)(g) of the *Public Service Labour Relations Act* ("the *Act*") alleging that the Correctional Service of Canada denied them and other organizers for the Canadian Prisoners' Labour Confederation (CPLC) the right to sign up members in the institution. They also claimed that the Correctional Service of Canada interfered with the inmates' right to organize a lawful employee organization. What led to the filing of the complaint was a decision by the warden of the institution to refuse the request for these individuals to visit other offenders incarcerated in the institution on the grounds that the CPLC was not a recognized bargaining organization. The Correctional Service of Canada objected to the jurisdiction of the Public Service Labour Relations Board ("the Board") to hear the complaint on the grounds that the complainants did not meet the statutory definition of "employee" in the public service under section 2 of the *Act* and that the CPLC could not be considered an employee organization.

Although some other Canadian jurisprudence indicated that, for some purposes and in some circumstances, offenders who participate in work programs could be found to be employees, there was not sufficient evidence in this case about the factors critical to such a determination. Furthermore, employee status in the federal public service could not be inferred from the facts or on the application of the traditional common law test. To be employed in the public service, a person must have been appointed by the Public Service Commission to a position created by the Treasury Board. As a consequence, the complaint was outside the Board's jurisdiction and the file was ordered closed. *An application for judicial review is currently pending before the Federal Court of Canada (Court file: T-278-13).*

Where is the line on freedom of expression?

The PSLRB provides clarifications in Mullins v. Deputy Head (Department of the Environment), 2013 PSLRB 21.

The grievor was a policy analyst working on aboriginal land claims issues. He was suspended for five days following his participation as a speaker in an anti-Olympic rally sponsored by the Olympic Resistance Network (ORN). The ORN contended that the 2012 Vancouver Winter Olympic Games were held on stolen aboriginal land. Before the incident, the employer had held three meetings with the grievor where he had been clearly told by his superiors to discontinue speaking publicly on the ORN's behalf and to stop participating at public protests where he could be identified. The employer felt such actions by the grievor were an apparent conflict of interest and a violation of the public service's requirement for neutrality.

The grievor argued that the discipline violated his freedom of expression. The adjudicator found that the grievor had engaged in deliberate misconduct dismissing the argument on the basis that a public service employee's freedom of expression is not absolute. Freedom of expression must be balanced against the employee's duty of loyalty to the employer, arising from the legitimate public interest in an impartial and effective public service. Any restriction on an employee's freedom of expression must be rationally linked to the employee's job and must not exceed what is required to achieve the objective of an impartial and effective public service. The adjudicator concluded that the grievor was in a conflict of interest since aboriginal treaty negotiations and land claims are sensitive issues and the grievor's public expression of a partisan opinion was inconsistent with his role as a public service employee. As a consequence, the grievance was denied.

Abby Propis Simms

Presidential Recess Appointments to the Board Found Unconstitutional

Noel Canning v. NLRB, 705 F.3d 490 (D.C.Cir.2013)

In a published opinion that issued on January 25, 2013, the D.C. Circuit granted the employer's petition for review, holding that the President's constitutional authority to make recess appointments extends only to appointments made during an intersession recess of the Senate to fill vacancies that first arise during such recess. Because it concluded that the appointments at issue here did not meet those criteria, it found the President's January 4, 2012 recess appointments to the Board invalid, granted the petition for review, and vacated the Board's order.

Noel Canning is a Washington state bottler with a long-time unionized workforce. In 2010, it began negotiations for a new collective-bargaining agreement, ultimately agreeing to a contract with wage and pension language dependent on a subsequent employee vote. Shortly after making this agreement, however, Noel balked and refused to sign the contract the employees selected. On February 8, 2012, the Board (Members Hayes, Flynn, and Block) found that Noel's refusal to execute an agreed-upon contract violated Section 8 (a)(5) and (1) of the Act. Noel petitioned for review of the Board's order, arguing both that the Board's order was not supported by substantial evidence and that the President's recess appointments of Members Flynn and Block to the Board were invalid because they occurred when the Senate was not in recess.

The D.C. Circuit agreed with Noel that the recess appointments were invalid. Initially, however, it addressed several preliminary matters. One, the Court held that reaching the constitutional issue was necessary, as Noel could not receive vindication on its statutory claims. The Court held that, contrary to Noel's argument, the Board's findings of unfair labor practices were reasonable. Two, the Court concluded that "we may exercise jurisdiction under section 10(e) because a constitutional challenge to the Board's composition creates 'extraordinary circumstances' excusing the failure to raise it below."

The Court then turned to Noel's constitutional challenge. Pursuant to the Constitution's recess appointments clause, the President had appointed Members Flynn, Griffin, and Block on January 4, 2012, one day after the Second Session of the 112th Congress began. That clause provides: "The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate by granting Commissions which shall expire at the End of their next Session." The Court interpreted that clause to permit only "intersession" appointments (those made between distinct sessions of the Senate) and not "intrasession" appointments during recesses in the midst of a session. Although the Eleventh Circuit had found intrasession recess appointments constitutional in *Evans v. Stephens*, 387 F.3d 1220 (2004), the Court found its reasoning "unconvincing."

Next, analyzing the language "[v]acancies that may happen during the Recess," the Court added that the clause limits the President's intersession recess appointment power to fill vacancies that first arise during the recess in which they are filled, which was not the case here. The Court rejected the Board's position, along with the Second, Ninth, and Eleventh Circuits' determinations to the contrary. It therefore found the Board's order invalid.

The court's ruling rejects Presidential practice of both parties dating back more than 150 years. The Court discounted the concern that the President's inability to fill vacancies could impair government functioning, suggesting that Congress enjoys the power to correct those problems by providing that an appointee serves until a successor is confirmed or empowering the appointment of acting officials to discharge duties pending confirmation of a presidential nominee.

Judge Griffith concurred in the opinion. He declined to address whether the clause's "happen during the Recess" language requires a vacancy to first arise during the recess in which it is filled because the Court's analysis of the intersession issue was sufficient to decide the case. Judge Griffith explained: "If we need not take up a constitutional issue, we should not."

NLRB v. New Vista Nursing and Rehabilitation,

--- F.3d ----, 2013 WL 2099742, C.A.3, May 16, 2013 (NO. 11-3440, 12-1027, 12-1936)

In a published opinion that issued on Thursday, May 16, the Third Circuit held that the Constitution only permits the President to make recess appointments during an intersession recess, and therefore found Member Becker's March 2010 recess appointment invalid. It accordingly vacated the Board's orders. Judge Greenaway offered a thorough dissent, and he would have held that the President's power to make recess appointments exists during both inter- and intra-session recesses, given that the Senate may be unable to offer advice and consent during both.

Update

Litigation Regarding States' Constitutional Amendments

***NLRB v. Arizona*, 2012 WL 3848400 (D. Ariz. Sept. 5, 2012) (No. CV 11–00913–PHX–FJM)**

This matter was discussed in the July 2011 and July 2012 *ALRA Advisors*, and there has now been a final resolution in the lawsuit the NLRB filed against the State of Arizona. (While the Board authorized the General Counsel to also file lawsuits against the states of South Carolina, South Dakota, and Utah, and against any other states where similarly worded Constitutional amendments or statutes become effective, no such actions have yet been filed.)

While on October 13, 2011, the District Court denied Arizona's motion to dismiss, finding that the complaint

llegations were sufficient on their face to establish that the Board had standing and that the case was ripe, the Board lost on summary judgment. On September 5, 2012, the District Court dismissed the Board's facial preemption challenge to the Arizona Constitution's new guarantee of secret ballot elections. The Arizona Amendment provides: "The right to vote by secret ballot for employee representation is fundamental and shall be guaranteed where local, state or federal law permits or requires elections, designations or authorizations for employee representation." Az. Const. Art. 2 § 37.

The Court found it was premature to decide the preemption claim before an as-applied challenge is brought. The Court ultimately concluded-- contrary to its initial conclusions at the motion to dismiss stage -- that the Board failed to establish that there were no circumstances in which Article 2 § 37 could be validly applied. The Court emphasized, however, that its ruling "should not be construed to foreclose as-applied challenges if and when they materialize." 2012 WL 3848400, *7.

The Board decided not to appeal. To date, the Agency is not aware of any instance of an individual bringing suit to enforce one of the state constitutional amendments.

Update:

NLRB Rulemaking Litigation Notice-Posting Rule

This matter was discussed in the July 2012 *ALRA Advisor*. The Final Rule requiring all employers covered by the NLRA to post a government-provided free notice of NLRA rights was published on August 30, 2011 (76 Fed. Reg. 54006). It was immediately challenged in two lawsuits — one in the U. S. District Court for the District of Columbia and the second lawsuit was filed in the U.S. District Court for the District of South Carolina.

Both lawsuits challenged, *inter alia*, the Board's authority to issue the Rule, the constitutionality of the Rule, its neutrality, the factual support for the Rule, and two of the enforcement mechanisms, one concerning unfair labor practice liability and one concerning equitably tolling the Act's 6 month statute of limitations. In addition, the South Carolina lawsuit questioned the Rule's compliance with the Regulatory Flexibility Act, 5 U.S.C. 611.

On March 2, 2012, in *National Association of Manufacturers, et al.*, *v. NLRB, et al,* 846 F.Supp.2d 34 (D.D.C. Mar. 2, 2012), the D.C. District Court upheld the Board's Notice-Posting Rule but enjoined the unfair labor practice and equitable tolling remedies.

In contrast, in *Chamber of Commerce, et al., v. NLRB, et al.,* 856 F.Supp.2d 778 (D.S.C. April 13, 2012), the District Court for the District of South Carolina rejected the D.C. District Court's approach and found that the Board lacked the requisite statutory authority to promulgate the rule. Thus, the court found the rule to be unlawful. Both decisions were appealed.

On May 7, 2013, the D.C. Circuit issued *National Association of Manufacturers v. NLRB*, — F.3d — 2013 WL 1876234, finding the NLRB's first substantive regulation in over two decades to be outside of its statutory authority. The opinion for the court found that First Amendment principles forbade the government from requiring that such a workplace notice be posted. *Id.* at **6-9. Consequently, it held that a refusal to post cannot be an unfair labor practice under Section 8(c) of the Act. *Id.* at *9. The court also found that the rule's equitable tolling mechanism was an impermissible interpretation of NLRA Section 10(b). *Id.* at **9-12. Although the court found it unnecessary to reach the question of the Board's statutory authority under Section 6 to issue the regulation, *id.* at *13, a two-judge concurrence opined that the notice-posting rule is also outside of Section 6, *id.* at **15-16. The Fourth Circuit has not yet issued its opinion.

Representation Procedures Rule

On December 22, 2011, the Board published a final rule amending its representation procedures. *Representation—Case Procedures*, 76 Fed. Reg. 80138. The details of the Rule were discussed in the July 2011 and July 2012 *ALRA Advisors*.

The U.S. Chamber of Commerce and the Coalition for a Democratic Workplace filed a lawsuit in the U. S. District Court for the District of Columbia challenging the rule (*Chamber of Commerce v. NLRB,* D.D.C., No. 1:11-cv-02262). The Plaintiffs argue, inter alia, that the Board lacked a quorum to issue the rule (based on Member Hayes' alleged failure to participate) and that its procedural changes violate the NLRA and the U.S. Constitution. The parties filed cross-motions for summary judgment and opposition pleadings.

On May 14, 2012, the District Court for the District of Columbia held that the Rule was invalid because only two members participated in final approval of the Rule and therefore the Rule had not been properly adopted by a quorum of three Board members. And on July 27, 2012, the district court denied the Board's motions to alter or amend judgment under FRCP 59(e) asking the Court to reconsider its ruling.

On August 7, 2012, the Board appealed to the D.C. Circuit (No. 12-5250). The appeal was fully briefed and awaiting argument, when on January 30, 2013, the Chamber of Commerce submitted a FRAP 28(j) letter citing *Noel Canning* (see discussion above) , to argue the invalidity of Member Becker's appointment as a separate ground for finding a lack of quorum. On February 19, 2013, the D.C. Circuit put the case into abeyance pending further order of the Court.

FMCS Mediators Credited for Help In Settling Several Recent Major Disputes

After working behind the scenes to help resolve a number of high-profile labor disputes around the U.S., FMCS mediators recently were gratified to be recognized for their efforts in comments made by labor and management representatives on the announcement of the respective settlements.

Earlier this month, members of the National Association of Broadcast Employees and Technicians-Communications Workers of America (NABET-CWA) voted to ratify a new collective bargaining agreement with ABC/Disney, reached with the help of FMCS Director George H. Cohen.

The FMCS Director was actively involved in personally mediating the difficult negotiations that led to an agreement, March 22, which was ultimately approved by the NABET-CWA membership. The previous master agreement between the network and the technicians and broadcast employees had expired nearly two years previously. Both sides in the negotiation communicated their appreciation to the FMCS Director for his efforts.

With help from FMCS Commissioner Kitty Simmons, Yellow Check Star Transportation and striking cab drivers—members of the Industrial Technical and Professional Employees Local 4873—approved a new collective bargaining agreement to end a lengthy strike that had impacted operations at Las Vegas' second largest taxi company.

Both sides credited Commissioner Simmons with helping them to find the common ground to end their long and contentious dispute, which began March 3.

Ending an eight-week strike, the Strongsville, OH city schools Board of Education and the members of the Strongsville Education Association (SEA) ratified a new collective bargaining agreement reached April 26 with the assistance of the Federal Mediation and Conciliation Service.

In remarks quoted in news reports about the settlement, Strongsville Board of Education President David Frazee thanked the FMCS for assisting in the negotiations. "The past eight weeks have been difficult, but the healing process begins today," Frazee said. "We want to thank the Federal Mediation and Conciliation Service regional office in Independence for their efforts."

For the past seven months, a team of FMCS mediators led by Director George H. Cohen and including Deputy Director Scot Beckenbaugh, Director of Mediation Services Jack Sweeney and Commissioner Pete Donatello mediated negotiations between the United States Maritime Alliance (USMX), representing employers, and the International Longshoremen's Association (ILA), representing dockworkers and other employees, at Atlantic and Gulf Coast ports. The FMCS mediators helped the parties successfully avert what could have been an economically disruptive work stoppage in ultimately achieving a mutually acceptable agreement, which was ratified by ILA members April 9 and by employers on April 17. The work of FMCS mediators and the leadership of Director Cohen in helping to resolve this lengthy dispute has been widely credited.

"The year-long dialogue between the ILA and the United States Maritime Alliance, the New York Shipping Association and the Metropolitan Marine Maintenance Contractor's Association with the assistance of George Cohen, Director of the Federal Mediation and Conciliation Service resulted in the successful completion of a collective bargaining agreement that was overwhelmingly approved by the membership," stated Harold Daggett, ILA President. "In the current world of problematic relationships between employers and employees, this settlement is no small task."

In a statement released by the employers, USMX chairman and CEO David F. Adam, also praised Federal Mediation and Conciliation Service Director Cohen and the FMCS team of mediators for helping keep the negotiations on track. "When the parties couldn't find solutions, Mr. Cohen came up with suggestions that kept us at the bargaining table, which in the end led to agreement on the Master Contract," Adam said.

The National Retail Federation also issued a statement praising the work of FMCS mediators. "The retail industry would also like to recognize the dedication of the Federal Mediation and Conciliation Service (FMCS) and the hard work of FMCS Director George Cohen and his team of negotiators, who managed to keep both sides at the table to hammer out this deal."

After two years of negotiation and a week of high-intensity, nearly nonstop mediation provided by FMCS mediator Carol Catanzariti, the Hawaii State Teachers Association (HSTA) and representatives of the Hawaiian state government announced that they had reached a new collective bargaining agreement, which was ratified by members of the teachers' union.

At a signing ceremony April 16, Hawaii Governor Neil Abercrombie credited the work of Commissioner Catanzariti and her assistance to the parties. "We are also grateful to the negotiating teams and to Carol Catanzariti of the Federal Mediation and Conciliation Services, who mediated the negotiations to reach the March 25 agreement," Governor Abercrombie stated.

Lastly, AT&T and the Communications Workers of America (CWA) approved a new collective bargaining agreement, reached with FMCS assistance, that covers 17,000 wireline workers in California and Nevada. FMCS Commissioner Erin Spalding helped both sides achieve their new four-year contract, which was announced May 1.

In noting the recognition of FMCS efforts, Director Cohen stated, "This is just a recent sampling of the public appreciation that FMCS mediators have earned in the course of doing their important work."

(Continued on page 9)

FMCS Again Ranked Among Best Places to Work in the Federal Government

The Partnership for Public Service recently released its 2012 Best Places to Work in the Federal Government rankings, based on responses from the Office of Personnel Management's Employee Viewpoint Survey. FMCS once again was ranked among the best small federal agencies, placing in the top five for 2012. The rankings have been compiled since 2003, and in every ranking in which FMCS results have been available for comparison, the Agency has ranked among the best small agencies at which to work.

The annual rankings, which reflect federal employees' perception of leadership, work-life balance and teamwork, are designed to help a broad audience of government leaders, employees and job seekers. Results are based on a survey of nearly 700,000 civil servants at 362 agencies and their subcomponents. The Best Places to Work rankings are an important tool for ensuring that employee satisfaction is a top priority for government managers and leaders. The rankings provide a mechanism to hold agency leaders accountable for the health of their organizations; serve as an early warning sign for agencies in trouble; offer a roadmap for improvement; and give job seekers insights into how federal employees view their agencies.

Results for 2012 at some agencies, however, show an across-the-board decline in employee satisfaction. Government-wide scores dropped from 64 out of 100 points in 2011 to 60.8 points for 2012 — a 3.2 point decline. That is the greatest change in the annual rankings since the Partnership began publishing them in 2003.

Max Stier, president and CEO of the Partnership for Public Service in a press release said he hoped that the numbers would serve as a wakeup call for policymakers to stop making cuts to the federal workforce and concentrate on pursuing better government by investing in the federal employees.

The survey also revealed good news for some agencies, with 32.5 percent improving their scores and 1.4 percent staying the same.

"The agencies that are doing better got the kudos that they deserved and need to increase and continue the investments they are making," Stier said. Among those agencies doing well, is FMCS, which has maintained its spot among the top five small agencies since the inception of the rankings. The overall index score for FMCS increased by a full point for 2012, while scores for employee skills and mission match, work/life balance and training and development were among the highest for small agencies. ■

(CAPPRT—Continued from page 4)

From the outset, the labour relations model set out in the *Act* was embraced by the Canadian cultural sector. The ability to bargain collectively is critical to artists and producers in the face of a continuously changing and challenging marketplace. The *Act* also permits producers to form associations for the purposes of bargaining and entering into scale agreements. The *Act* has helped to improve working conditions and compensation for artists, to provide stable and predictable professional relations, a qualified talent pool for producers, and to build a strong Canadian presence in international cultural markets.

Since the passage of the *Act*, CAPPRT defined 26 sectors of artistic activity and certified 24 artists' associations to represent these sectors. Over the years, artists and producers have gone on to conclude nearly 190 scale agreements.

As of April 1, 2013, the CIRB has taken on all the duties and responsibilities formerly performed by CAPPRT. All of CAPPRT's decisions, certification orders and other information on the *Status of the Artist Act* are now accessible through the CIRB's web site at: http://www.cirb-ccri.gc.ca

For the past 18 years, all members and staff of CAPPRT have been very proud to play a role in the evolution of professional relations between artists and producers. To ensure continuity, Diane Chartrand, former Executive Director and General Counsel of CAPPRT, has joined the staff of the CIRB. ■

— *by Ernest DuBester*

Credit: Unknown

Problem Resolution Subcommittee Develops Tools to Assist Labor-Management Forums

In December 2009, President Obama issued Executive Order 13522 "creating Labor-Management Forums", as complements to the existing collective bargaining process, "to establish a cooperative and productive form of labor-management relations" throughout the federal government. As part of this E.O., the President established a National Council on Federal Labor-Management Relations that includes the Chair of the FLRA, as well as the heads of various labor unions and agencies.

At the Council's May 15 meeting, the valuable work of the Problem Resolution Subcommittee was unveiled. Under the leadership of FLRA General Counsel, Julia Clark, partnering with the FMCS, the Subcommittee was created to assist labor-management forums, to provide a training and facilitation clearinghouse, to identify best practices, and to identify barriers and ideas to resolve them.

During its presentation to the Council, the Subcommittee demonstrated the first of what will soon be many practical educational resources that will be posted in an on-line Labor-Management Forum Toolkit of information resources geared toward a forum's program level. The Subcommittee aims to create a number information tools addressing key topics that are 6-10 minutes long, known as Quick Tips.

This first educational tool addresses "pre-decisional involvement" or "PDI", which is a process for involving front line employees, through their unions in management's decision-making early in the deliberative process.

A union-management team of highly experienced practitioners developed the program content and FMCS instructional design experts Lu-Ann Glaser (Acting Director ADR Services) and Heather Butler (Director Education and Training) created an accessible, engaging finished product, which is narrated by representatives of the largest U.S. federal union, the American Federation of Government Employees, AFL-CIO, and the largest U.S. federal employer, the Department of Defense.

FLRA Launches Arbitration & Negotiability Initiatives

Like the NLRB, the FLRA handles unfair labor practice complaints and issues arising from the filing of representation petitions. Unique among the American federal labor-management relations agencies, the FLRA also has jurisdiction over exceptions to (appeals of) arbitration awards and over negotiability disputes raised by the parties during collective bargaining.

In the federal sector, the FLRA handles appeals of arbitration awards as the surrogate for the federal courts in the private sector. However, the experience in the federal sector is quite different from the experience in the private sector. In contrast to the extremely low percentage of private-sector arbitration awards that are appealed to the courts, 20 to 25 percent of federal-sector awards are "appealed" to the FLRA. In large part, this is because a federal-sector award can be appealed not only on the basis of the commonly recognized private-sector grounds for appeal, but also based on the claim that the award is "contrary to law, rule, or regulation."

Negotiability disputes usually occur when unions and agencies disagree over the legality of specific contract proposals or provisions. When an agency refuses to bargain based on a claim that a proposal is not negotiable, specific regulations govern when such a claim triggers a union's right to appeal.

As part of its Arbitration Initiative, the FLRA revised its regulations to better facilitate the handling of arbitration cases by union and agency advocates. And both the Arbitration and Negotiability Initiatives have two additional elements: (1) training union and agency advocates, and, with the Arbitration Initiative, training arbitrators as well; and, (2) the online posting of instructive guides on negotiability disputes and the unique attributes of federal-sector arbitration.

The Arbitration Guide is already posted on the FLRA's website. And it is expected that the Negotiability Guide will be posted on the website sometime in July. Training in both areas will resume in late summer or early fall. ■

NTEU WINS HISTORIC ELECTION

The National Treasury Employees Union (NTEU) became the first Union elected to represent the approximately 800 employees of the Consumer Financial Protection Bureau (CFPB). In an election conducted by the FLRA between April 22 and May 9, about 81% of workers who participated voted in favor of NTEU representation.

Less than two years old, the CFPB was created by Congress and President Obama when they approved the *Dodd-Frank Financial Reform Act* in response to the financial crisis that began in 2008. The Agency oversees consumer protection regulations, including those involving mortgages, credit cards, and student loans.

FLRA Chairman Gives Keynote Address at SFLERP's 40th Anniversary Symposium

FLRA Chairman Ernie DuBester recently gave the keynote address at the 40th Anniversary Symposium on Federal Labor, Management, and Employee Relations presented by the Society of Federal Labor & Employment Relations Professionals.

Reprising the theme of "Collective Bargaining" as a critical value in a democracy, Chairman DuBester noted that, while collective bargaining evokes thoughts about the workplace and the relationship among workers, unions, and employers, it also has another aspect—namely, its broader and critical role as a reflection of values fundamental to civil societies.

Tracing the United States' longstanding and bipartisan support for workers' rights, including collective bargaining rights, from post-WW II Japan through the present day, Chairman DuBester referred to President Reagan's famous 1982 speech to a joint session of the British Parliament at Westminster Palace.

In that speech, Reagan predicted the demise of communism and described a "democratic revolution" gathering force around the globe. Going forward, Reagan said, the U.S. would seek to promote an "infrastructure of democracy," including a free press, independent unions, representative political parties, and universities which "allows a people to choose their own way, develop their own cultures, and reconcile differences through peaceful means."

A year later, President Reagan's words were a catalyst for congressional passage of the National Endowment for Democracy (NED). NED is dedicated to fostering growth of a wide range of democratic institutions abroad, including independent trade unions. Continuing to operate today, NED's website states that it has remained steadfastly bipartisan from its beginning.

The Chairman contrasted the nature of the U.S.' historical and bipartisan role in promoting civil societies abroad with recent experiences within the U.S. in which collective bargaining rights have been curtailed in many states. ■

Mary Johnson

The FAA Modernization and Reform Act of 2012—Revisions to the National Mediation Board Rules and Representation Manual

In response to amendments to the *Railway Labor Act* in the *Federal Aviation Administration Modernization Reform Act* of 2012, the Board amended its regulations pertaining to representation elections and run-off elections.

First, the NMB changed the showing of interest requirements for all representation applications. As reflected by its May 15, 2012 rulemaking and final rule effective December 21, 2012, all applicants must submit evidence of representation or showing of interest from at least fifty (50) percent of the employees in the craft or class. Organizations have additional time to submit evidence of or to supplement the showing of interest.

Second, the NMB changed the procedures for run-off elections. Third, the NMB amended its Representation Manual to require a carrier attestation of the accuracy of the List of Potential Eligible Voters.

Finally, the Board modified its Representation Manual to clarify the Board's preponderance procedures.

American/ CWA Passenger Service Election

In January 2013, the NMB closed a representation case involving the Passenger Service Employees on American Airlines, which challenged the Board's implementation of its showing of interest rules. In December 2011, the Communications Workers Union of America (CWA) filed an application seeking to represent the craft or class of Passenger Service Employees on American Airlines. At the time the application was filed, American's Passenger Service Employees were unrepresented. The Board issued a determination authorizing an election on April 19, 2012.

After filing an unsuccessful Motion for Reconsideration with the NMB, on May 2, 2012, American filed a complaint in the United States District Court for the Northern District of Texas, seeking a declaratory judgment. At issue was American's assertion that the NMB was required to impose the newly implemented 50 percent showing of interest requirement to the CWA's application. The NMB argued that the 2012 [*FAA Modernization and Reform] Act* does not provide that the Board must impose this standard, which marked a departure from the 35 percent showing-of-interest standard under the Board's rules for employees who were unrepresented, on applications that were previously received by the Board and remained pending at the time the statute was enacted.

(Continued on page 13)

—by Tim Noonan


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VERMONT LEGISLATURE ACTIVE ON LABOR RELATIONS BILLS

The recently concluded legislative session in Vermont was an unusually busy one for labor relations legislation. Four significant bills received considerable attention, and two of them were enacted into law. All four bills were supported by unions.

One of the passed bills amends the five existing Vermont labor relations statutes—the *State Employees Labor Relations Act*, the *Municipal Employee Relations Act*, the *Labor Relations for Teachers Act*, the *Judiciary Employees Labor Relations Act*, and the private sector *State Labor Relations Act*—to provide that employees in a bargaining unit represented by an employee organization as exclusive bargaining representative are required to pay agency fees to the representative.

The agency fee may not exceed 85 percent of the amount of union dues. The fee is to be deducted in the same manner as dues are deducted from the wages of members of the employee organization, and "shall be used to defray the costs of chargeable activities."

The agency fee legislation further provides that the employee organization shall indemnify and hold the employer harmless from any and all claims stemming from the implementation or administration of the agency fee. The legislation amends four of the applicable statutes to provide that "nothing . . . shall require an employer to discharge an employee" who does not pay the fee, while under the remaining statute, the *Municipal Act*, an employer is not required to discharge an employee who does not pay the fee unless the employer and exclusive bargaining agent have agreed to require the fee to be paid as a condition of employment.

An employee organization may not charge the fee unless it provides non-members with: 1) an audited financial statement that identifies and divides expenses into chargeable and non-chargeable activities; 2) an opportunity to object to the amount of the fee, with any amount reasonably in dispute to be placed in escrow; and 3) prompt arbitration by the Vermont Labor Relations Board or arbitrator (depending on the statute) to resolve any objection over the amount of the fee.

One late addition to the agency fee bill addresses the contract ratification process. It provides that "employees of the bargaining unit shall meet and discuss whether employees who have chosen not to join the employee organization shall be allowed to vote on the ratification of any collective bargaining agreement . . . After discussion, employees that are members of the employee organization shall vote on whether to allow employees who have chosen not to join the employee organization to vote on the ratification of any collective bargaining agreement." Another late addition to the bill provides that an "employee organization shall use any increased revenue resulting from the implementation of this act solely for the purpose of moderating its existing membership dues."

The act relating to payment of agency fees takes effect on June 30, 2013, and applies to employees on the date following the expiration date stated in the collective bargaining agreement in effect on June 30, 2013.

Prior to passage of this bill, the five Vermont labor relations statutes provided that agency fees constituted a mandatory subject of bargaining. Vermont joins a small number of states who require non-union members of represented bargaining units to pay an agency fee, rather than making agency fees a subject of bargaining.

The second bill enacted into law creates Vermont's sixth collective bargaining statute, an act relating to independent direct support providers. An independent direct support provider means: 1) any individual who provides home and community-based services to a service recipient who receives such services under the Choices for Care Medicaid waiver, the Attendant Services Program, the Children's Personal Care Service Program, the Developmental Disabilities Services Program, or any successor program or similar program subsequently established; and 2) the individual is employed by the service recipient, shared living provider (provides support for one or two people who live in his or her home), or surrogate. Testimony before the legislature indicated that there are approximately 7,000 independent direct support providers covered by the legislation.

The act grants independent direct support providers the right to bargain collectively with the State of Vermont through their chosen representative, pursue grievances through their exclusive bargaining representative, and to refrain from such activities. Petitions are filed with the Vermont Labor Relations Board for election of a collective bargaining representative. The statute provides that there shall only be one statewide bargaining unit for independent direct support providers, and that a representation election conducted by the Board shall be by mail ballot.

Mandatory bargaining subjects are limited to: 1) compensation rates, 2) workforce benefits, 3) payment methods and procedures, 4) professional development and training, 5) collection and disbursement of dues and fees to the exclusive representative, 6) procedures for resolving grievances against the State, provided that the final step of any negotiated grievance procedure, if

(Continued from page 12)

required, shall be determination by the Labor Relations Board, and 7) access to job referral opportunities within covered programs. The act states that "a collective bargaining agreement shall not infringe upon any rights of service recipients or their surrogates to hire, direct, supervise, or discontinue the employment of any particular independent direct support provider."

The act provides that independent direct support providers shall not be considered state employees for purposes other than collective bargaining. It further states they "shall not be eligible for participation in the State Employee Retirement System or health care plan solely by virtue of bargaining under this chapter."

If the parties reach an impasse in negotiations, the act provides successively if necessary for mediation, fact-finding, and selection by the Labor Relations Board between the parties' last best offers. The Board decision is subject to appropriations by the legislature.

The act specifies unfair labor practices of labor organizations and the State of Vermont, and provides for the Labor Relations Board adjudicating charges alleging such practices.

In addition to these two bills enacted into law, two other bills extending collective bargaining rights to individuals received considerable attention this legislative session. The Senate Economic Development and General Affairs Committee took three weeks of testimony on a bill which would have granted rights to child care home providers to collectively bargain with the State of Vermont, provided they decided to be represented by an exclusive bargaining representative, on child care subsidy reimbursement rates and payment procedures, professional development, the collection of dues or agency fees, and procedures for resolving grievances. The Economic Development Committee ultimately decided by a vote of 3 – 2 to not approve the bill.

Another Senate committee, the Education Committee, attached the childcare collective bargaining provisions to a miscellaneous education bill before approving it. However, when the education bill reached the full Senate for a vote, the childcare portion of the bill was ruled as not germane to the miscellaneous education bill and was stripped from it. Supporters of the childcare collective bargaining legislation have indicated that they will attempt to get it approved next year when the legislature reconvenes.

The Senate Economic Development Committee also took extensive testimony on, and approved, a bill which would grant collective bargaining rights to deputy state's attorneys, victims' advocates and administrative assistants working under state's attorneys elected on a countywide basis. If they select an employee organization to represent them, they would negotiate with the Department of State's Attorneys on wages and salaries, reimbursement practices, overtime compensation, compensation for on-call responsibilities, leave compensation, grievance procedure, terms of coverage and amount of employee participation in long-term disability insurance programs, and a collective bargaining service fee.

The Economic Development Committee unanimously passed out the bill. However, the bill stalled when it reached the full Senate, and the legislature adjourned for the year before the Senate took final action on the bill. Supporters of the bill have indicated that they will attempt to get it approved next year when the legislature reconvenes. ■

(NMB—Continued from page 11)

On June 22, 2012, the District Court issued an Opinion and Order granting American both declaratory relief and a permanent injunction barring the NMB from applying the 35 percent showing of interest standard in the instant case. The NMB appealed and on October 3, 2012, the Court of Appeals for the Fifth Circuit vacated the district court's order and remanded with instructions to dismiss American's complaint. The Fifth Circuit denied American's request for rehearing en banc and issued an order expediting mandate. The District Court implemented the Fifth Circuit's mandate and dismissed the action for lack of jurisdiction on November 6, 2012. The United States Supreme Court denied American's application to stay pending writ of certiorari on November 27, 2012.

In November 2012, the NMB set new election dates, ordered the Carrier to produce mailing labels and conducted an election by Telephone-Electronic Voting. After a six week voting period, on January 16, 2013, the Board issued a dismissal in the case because the majority of the valid votes cast were for no representation. ■

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¶ 447.403, Fla. Stat., and Finality in Bargaining

In *Daytona Beach Fire and Rescue Local 1162 of the International Association of Fire Fighters v. City of Daytona Beach*, 39 FPER ¶ 28, Case No. CA-2010-202 (2012), *appeal filed*, Case No. 5D12-2812 (Fla. 5th DCA July 11, 2012), the Commission provided guidance on Section 447.403, Florida Statutes, and the tension between reaching finality in impasse proceedings and the effect of failing to hold a ratification vote by a union. After the city implemented certain articles imposed by the city commission sitting as the legislative body, the union filed a charge alleging that the city violated collective bargaining law.

The alleged violations were based on a series of events and the procedural history of the case is as follows. The parties' collective bargaining agreement, which included step pay increases for employees, expired in October 2007. Negotiations in fiscal years 2007-2008 and 2008-2009 were unsuccessful and the parties maintained the status quo. In 2009, the city declared an impasse in negotiations for the 2009-2010 contract and a special magistrate was appointed to hear the controversy and report back to the city. In a case that proceeded the instant one, the union filed an unfair labor practice charge alleging that the city's declaration of impasse was premature and moved to stay the special magistrate hearing pending the outcome of the case before the Commission. The Commission granted the motion and later lifted the stay after entering a final order on the unfair labor practice charge. *See Daytona Beach Fire Rescue Local 1162 of the International Association of Fire Fighters v. City of Daytona Beach*, 36 FPER ¶ 23 (2010). The proceedings before the special magistrate resumed and in May 2010, the special magistrate issued his report and recommendations. The union accepted the special magistrate's recommendations, but the city rejected the recommendations on the articles relating to union business, transfers, pensions, and wages. At a meeting to hear the impasse issues, the city commission voted to accept the city's position on the contested articles.

Shortly after the city commission accepted the city's position, the city sent the contract containing the tentatively agreed upon issues along with the legislatively imposed issues to the union for a vote on ratification. The union responded that it reserved the right to file an unfair labor practice charge in lieu of submitting the contract for ratification. The city then implemented the provisions that had been decided by the city commission and maintained the status quo on the other issues. The union never permitted the employees to vote on the proposed agreement. After implementing the changes, the city retroactively recouped some of earlier step pay increases that had been awarded pursuant to the status quo.

The hearing officer determined that the city's remedy for the union's refusal to submit the contract to employees for a ratification vote was to file an unfair labor practice charge. Furthermore, he found that it was improper for the city to engage in "self help" by implementing the changes voted on by the city commission. The hearing officer ultimately concluded that the entire status quo, including the step pay increases, had to be maintained until the Commission determined that the union had violated collective bargaining law by failing to submit the proposed contract for ratification.

After initially remanding the case to the hearing officer to address additional issues, including the city's retroactive recoupment of the step pay increase, the Commission ultimately reversed the hearing officer's conclusion with regard to the city's remedy being limited to filing an unfair labor practice charge.

The Commission disagreed that the city's decision to implement the changes imposed by the city commission constituted self-help. The Commission noted that the status quo doctrine mandated that the city was obligated to keep paying step increases under the contract that expired in 2007 and that amount of revenue involved in continuing the automatic pay raises involved a significant expenditure of public tax funds. Making a vote for ratification by the union a condition precedent to the city implementing the changes approved by the city commission frustrated the legislative goal of bringing finality and resolution in the collective bargaining process, particularly where the union refused to submit the agreement to the employees for a vote on ratification. The Commission receded from its prior decision in *Communication Workers of America, Local 3170 v. City of Gainesville*, 20 FPER ¶ 25226 (1994), *aff'd*, 662 So. 2d 934 (Fla. 1st DCA 1995), to the extent that it suggested that a ratification vote is a condition precedent under facts similar to this case.

The Commission held that in future cases the failure to submit a tentative contract for ratification could be determined to be an unfair labor practice by a hearing officer after considering all the facts. In the instant case, the union expressly refused to submit the proposed agreement to its employees for a ratification vote and informed the city of decision. Under these circumstances, the city was entitled to interpret the union's action as a failure of ratification and to impose the articles that had been resolved by the city commission acting as the legislative body. Given the novel nature of the issue relating to ratification, the Commission elected not to award any attorney's fees on this issue. However, the union did prevail on the portion of its charge alleging that it was improper for the city to recoup the step pay increases that had been paid. Because the law on that issue is settled, the Commission awarded the union its attorney's fees on that issue and ordered the city to refund all retroactively recouped wages to the employees involved. ■

First DCA: Orders Awarding But Not Calculating Back Pay Are Not Final Orders

Pursuant to recent orders by the First District Court of Appeal, Commission orders which award back pay but do not calculate the amount of that back pay are not final appealable orders. *See Florida Department of Corrections v. Schwartz, et al.*, 37 Fla. L. Weekly D1378b, 37 Fla. L. Weekly D1926a (Fla. 1st DCA 2012). This change reverts the Commission to the practice initiated in 2003 when pursuant to an order of the First District Court of Appeal in *Florida Department of Corrections v. Chesnut*, 847 So. 2d 575 (Fla. 1st DCA 2003), the Commission began treating its orders reversing or mitigating discipline and ordering payment of back pay as non-final orders which could not be appealed until the amount of back pay was determined. In 2008, the First District Court of Appeal departed from *Chesnut* in *Department of Corrections v. Smith*, 980 So. 2d 606 (Fla. 1st DCA 2008). In *Smith*, the court held that Commission orders that reduce or vacate discipline and ordered payment of back pay are final, appealable orders. In response to *Smith*, the Commission again changed its procedure and began to treat all orders disposing of career service appeals on the merits as final orders, even where the amount of back pay remained to be determined.

In June 2011, the Commission issued an order in five consolidated career service appeals in which it overturned or mitigated the dismissals of five Department of Corrections employees. The Commission ordered that four of the employees be reinstated, one employee having retired. It further ordered that the Department of Corrections provide back pay to the employees, but it did not calculate the amount of back pay due. The order was entitled "Final Order" and advised the parties of their appeal rights.

On June 20, 2011, the Department of Corrections appealed the Commission's order to the First District Court of Appeal. On July 5, 2011, the court, on its own motion, directed the parties to show cause why the appeal should not be dismissed as premature "because the … order on appeal does not appear to be final." The Commission and the Department of Corrections responded to the show cause order. Thereafter, the parties filed briefs on the merits of the appeal.

On June 13, 2012, the court dismissed the case for lack of jurisdiction. On June 18, the Department of Corrections filed a motion for reconsideration of the court's order, pointing out that it had relied on the appeal language in the Commission's order and *Smith* in filing its appeal and that in the interim since the appeal was filed the Commission had opened back pay cases that resulted in final order calculating the amount of back pay due each employee. The employees filed a response agreeing with the Department of Corrections' position. On August 10, the court granted the motion for reconsideration noting that it had dismissed the appeal based on "overwhelming (if not wholly consistent) authority," and reiterating its view that an order deciding entitlement to, but not the amount of, back pay is not a final appealable order. The court determined, in light of the intervening resolution of the back pay cases, that the notice of appeal filed in June 2011 should be deemed to have been filed prematurely, but effectively, as to each of the final orders determining the amounts of back pay. One month later, the court entered per curiam affirmance on the merits. *Florida Department of Corrections v. Schwarz, et al.*, 37 Fla. L. Weekly D2216a (Fla. 1st DCA 2012).

Consistent with *Schwarz*, the Commission has altered its procedure again. Commission orders reversing or mitigating discipline and awarding, but not calculating, back pay are given a title descriptive of the action taken and are not titled as final orders. The concluding language in such orders advising that they are not final orders because the amount of back pay remains to be determined and that when the amount of back pay is determined the Commission will issue an order that will allow the parties to appeal either the order on the merits or the back pay order. ■

Commission Reiterates the Necessity of Expert Testimony to Support Attorney's Fees Claims

— by Hearing Officer Gregg R. Morton

In two separate cases the Commission recently addressed the issue of the evidence that is necessary to support claims for attorney's fees. *See Borges, et al v. City of Miami Beach and Miami Beach Fraternal Order of Police, William Nichols Lodge Number 8*, 38 FPER ¶ 374, AF-2011-014 (2012) (*Borges II*); *Landolfi v. City of Deland*, 39 FPER ¶ 4 (2012), AF-2011-013, *appeal docketed*, 1D12-3077 (Fla. 1st DCA June 20, 2012) (*Landolfi II*). In both cases, the Commission reiterated its previously declared requirement that expert testimony is necessary to support attorney's fees claims. In both *Borges II* and *Landolfi II*, the party asserting that fees were owed failed to introduce any expert testimony. Nevertheless, for reasons discussed further below, the Commission determined that fees could not be awarded in *Borges II* because of that failure, but allowed fees in *Landolfi II*.

The attorney's fee proceedings in *Borges II* and *Landolfi II* were before the Commission to address the appropriate amount of attorney's fees after the Commission had previously determined in the underlying cases that an award of a portion of their fees was appropriate. In *Borges II*, the underlying cases involved unfair labor practice charges filed by multiple bargaining unit members against both the City and the Union. The charge alleged, in part, that the Union had erroneously conducted a ratification vote on the incorrect version of the bargaining agreement and that the City had improperly implemented the erroneous contract. *Borges et al v. City of Miami Beach and Miami Beach Fraternal Order of Police, William Nichols Lodge No. 8*, 38 FPER ¶ 180, CA-2010-176 (2011) (*Borges I*). Following a hearing and finding by the hearing officer that the charge was meritorious, the Commission agreed that the ratification and implementation were improper. The Commission ordered the

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City and Union to each pay one half of the attorney's fees that were incurred for litigating the ratification and implementation issue. At the outset of the litigation over the fees, the Charging Parties' attorney filed an invoice alleging that $152,926.32 was a reasonable fee for litigating the portion of the charges related to just the ratification and implementation issue. At the hearing on fees, the Charging Parties' attorney did not introduce an expert to support the claim. Ultimately, the hearing officer discredited most of the attorney's testimony regarding the purported fees and noted that the failure to introduce expert testimony was a basis to refuse to award fees under Commission precedent.

In reiterating the need for expert testimony, the Commission relied on the precedent it had previously endorsed in 2007 in *In Re Petition of Collier County School Board*, 33 FPER ¶ 66 (2007). In that case, the Commission concluded that "[t]he case law is clear that fees cannot be assessed based solely on the testimony of the attorney claiming the fee, but rather expert testimony must be offered substantiating the fee." *Id.* at 142. The clear case law referenced by the Commission in *Collier County* stems from a long line of court cases, including cases decided by the Florida Supreme Court, which stand for the proposition that "it is well settled that the testimony of an expert witness concerning a reasonable attorney's fee is necessary to support the establishment of the fee." *Crittenden Orange Blossom Fruit v. Stone*, 514 So. 2d 351, 352-53 (Fla. 1987); *see also Borges II* (citing a string of cases dating back to 1964 that supported the need to call an expert witness when litigating attorney's fees claims). Indeed, the Commission noted that "[w]hen it comes to the evidence needed to support attorney's fees claims, '[c]ases are legion that expert testimony is required.'" *Borges II* (quoting *Markham v. Markham*, 485 So. 2d 1299, 1301 (Fla. 5th DCA 1986)).

The Commission recognized that the wisdom of the rule requiring expert testimony has been challenged. In recent years, for example, the rule has come under critique from the Fourth and Fifth District Courts of Appeal and, in certain types of cases, it is no longer being followed. *See, e.g.*, *Schwartz v. Bloch*, 88 So. 3d 1068 (Fla. 4th DCA 2012); *Sea World of Florida, Inc. v. Ace American Insurance Co.*, 28 So. 3d 158 (Fla. 5th DCA 2010); *Roshkind v. Machiela*, 45 So. 3d 480 (Fla. 4th DCA 2010); *Island Hoppers, Ltd. v. Keith*, 820 So. 2d 967 (Fla. 4th DCA 2002); *see also* Robert J. Hauser et al, *Is Expert Testimony Really Needed in Attorney's Fees Litigation?*, 77 Fla. B.J. 38 (Jan. 2003). The Commission expressly addressed these cases in *Borges II* explaining:

> *The Commission is cognizant of the line of district court decisions that have critiqued the court-created rule that expert testimony is needed to support an attorney's fee award and attempted to carve out certain exceptions when the rule would not apply. Nevertheless, the Commission does not believe that these decisions call for the rule to be jettisoned prematurely. Thus far, the Florida Supreme Court has declined to recede from the rule, even though it has had the opportunity to do so*.

The Commission also concluded that the facts in *Borges II* presented a counter-argument to the court decisions critiquing the rule. The Commission explained that if an expert had been engaged and asked to review the $152,926.32 claim, the expert may have advised that the request was not reasonable and needed more information to be credible.

Additionally, the Commission noted that the Charging Parties' attorney had to have been aware of the expert witness requirement because it had been specifically referenced in prehearing filings by the City and Union.

With regard to *Landolfi II*, the underlying case involved a veteran's preference action against the City for violating provisions of Chapter 295, Florida Statutes. The veteran, Dominick Landolfi, claimed that the City did not hire him even though he was the most qualified candidate and that the City did not accord him the preferences that veterans are entitled to during the application process. *Landolfi v. City of Deland*, 38 FPER ¶ 20, VP-2011-002 (2012), *aff'd in part and rev'd in part*, 39 FPER ¶ 66 (Fla. 1st DCA 2012) (*Landolfi I*). The Commission concluded that Landolfi proved that the City failed to provide the appropriate preferences in its application process, but the City prevailed on its ultimate hiring decision. The Commission agreed with the hearing officer's determination that it had hired the more qualified candidate. The Commission ordered the City to pay Landolfi the portion of his attorney's fees that could be attributed to litigating the issue of lack of special consideration in the application process.

A hearing was held to set the number of hours and a reasonable hourly rate to determine the total amount of attorney's fees owed. The City disputed the number of hours, rate, and the entitlement to any fees because Landolfi had not prevailed on the issue of being as qualified for the position as the successful applicant. Landolfi's attorney testified by telephone about the time he had spent litigating the case and the hourly rate he believed was reasonable for his work. Nevertheless, he did not provide any expert testimony to support the claim. Post-hearing, the hearing officer offered alternate recommendations, but his principal recommendation, based on Commission precedent, was that the failure to support the fee claim with expert testimony precluded the possibility of awarding fees.

While both *Landolfi II* and *Borges II* were similar in the failure to present expert testimony, there was a distinction in how the Commission applied the rule and ultimately resolved the claim for fees. In *Borges II*, the City

and Union jointly filed an exception to the award of any attorney's fees based on the failure to call an expert witness. The Commission granted the exception and awarded no fees, noting that the Charging Parties' attorney had specifically been placed on notice of the expert testimony requirement in filings by the City and Union. Notably, the City and Union had objected to the lack of any expert testimony throughout the proceedings, both at hearing and in their post-hearing filings with the hearing officer.

By comparison, in *Landolfi II* the City did not object to the lack of expert testimony either at the hearing or in its post-hearing filing. The Commission held that under these circumstances, the City had waived an objection to the requirement and could not bring it up for the first time in its appeal to the Commission. Therefore, the Commission awarded Landolfi the amount of fees that was attributable to the portion of the case on which he had prevailed. In the appeal of *Landolfi I*, the First District Court of Appeal affirmed the Commission's decision that the City had hired the most qualified candidate, but reversed on the issue of whether fees could be awarded for not providing a veteran special consideration in the application process, which in turn eviscerated the Commission's award of fees. The *Landolfi II* appeal is still pending, but regardless if the partial reversal of *Landolfi I*, the Commission's position requiring the party challenging the award of attorney's fees to object to the lack of expert testimony remains strong guidance as to the standard that the Commission would apply if it confronts this issue again.

Unless the Commission or the Florida Supreme Court changes its direction, practitioners before the Commission should keep the rule requiring expert testimony in mind when attempting to recover their fees. Documenting an attorney's hourly rate, the nature of work done, and the hours spent on the underlying case becomes critical when fees are awarded by the Commission and need to be proven up in a subsequent attorney's fees proceeding. If an attorney's claims are well-documented and reasonable, it may help reduce or eliminate the need to litigate the fee amount. Moreover, to the extent that the claim is litigated, providing the expert who will testify with accurate and complete records will make such testimony more credible in supporting the reasonableness of the fees and the hourly rate charged. ■

Showing of Interest Requirements

— by Hearing Officer Carlos R. Lopez

Heather Lucas filed a petition seeking to decertify the Communications Workers of America (CWA) as the certified bargaining agent for a nonsupervisory unit of City of Madeira Beach (City) employees. In support of the petition, Lucas filed a showing of interest containing original signatures that were undated. Lucas subsequently amended her petition by filing facsimile copies of dated signatures. The hearing officer provided Lucas with an opportunity to file a petition with original dated signatures. Lucas responded by filing a copy of the original petition on which ten of the original signers dated and initialed next to their signatures. Neither the CWA nor the City responded to the petition. The hearing officer concluded that the showing of interest was sufficient and recommended that a secret ballot election be conducted. No exceptions were filed to the hearing officer's recommended order.

In its final order, the Commission initially reviewed the requirements in Sections 447.307(3)(d) and 447.308(1), Florida Statutes (2012), for filing a decertification petition. It also reviewed the definition of a showing of interest found in Florida Administrative Code Rule 60CC-1.001(1). The Commission observed that it consistently dismissed decertification petitions where the showing of interest lacked a sufficient number of original signatures and/or because the original signatures were not personally dated. It further noted that requiring the original signature concurrently be personally dated maintains the integrity of the showing of interest by minimizing the possibility of manipulating either the signature, date, or both.

The Commission rejected the notion that an original undated showing of interest when supplemented by a copy of the original showing of interest which was initialed and dated was the equivalent of "original statements in the form of petitions or individual signature cards signed and personally dated by the employees." The Commission noted that it could not overlook that the petition was deficient even in the absence of exceptions to the hearing officer's recommended order. Therefore, Lucas's petition was dismissed with leave to file a new petition conforming with all applicable requirements. *Lucas v. Communications Workers of America, AFL-CIO, CLC v. City of Madeira Beach*, Case No. RD-2012-013 (Fla. PERC Feb. 13, 2013). ■

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See you in Washington

—by Lynn Morison, Staff Attorney

County of Wayne—and—Michigan AFSCME Council 25 and its Affiliated Locals 25, 101, 409, 1659,1862, 2057, 2926, and 3309
MERC Case No. C09 J-211, issued September 17, 2012

Unfair Labor Practice Found—*Retirement and Health Care Benefits are Mandatory Subjects of Bargaining; Employer Violated Duty to Bargain by Unilaterally Changing the Past Practice of Providing Health Care Benefits to Employees Who Retire on Duty or Non-Duty Disability Pensions; The Past Practice of the Parties Was Binding and Any Change Required Notice of and an Opportunity to Bargain.*

The Commission majority affirmed the ALJ's Decision and Recommended Order on Summary Disposition which found that Respondent, Wayne County (Employer), violated §10(1)(e) of PERA by eliminating the practice of not requiring retirees receiving pensions based on disability to meet age or service requirements for health care benefits, without first bargaining over the subject with Charging Parties, Michigan AFSCME Council 25 and its affiliated Locals 25, 101, 409, 1659, 1862, 2057, 2926, and 3317.

For over thirty years, Respondent consistently provided health care benefits to retirees receiving a duty disability pension without regard to age or years of service and to retirees receiving a non-duty disability pension with ten years of credited service. Since at least 2000, the parties' collective bargaining agreements have limited health care benefits to retirees who meet certain age and service requirements. However, none of the parties' agreements covering the years 2000-2004 expressly address health care benefits for those who retire on the basis of disability. In 2008, the parties executed collective bargaining agreements covering the years 2004-2008. Later in 2008, Respondent and bargaining units represented by several of the Charging Parties executed collective bargaining agreements covering 2008-2011. After 2008, Respondent continued to provide health care benefits to retirees receiving a disability pension without regard to age or years of service. In March 2010, Respondent issued an administrative order announcing that it would only provide health care benefits to recipients of disability pensions who met the age and years of service requirements for a standard pension.

In its exceptions, Respondent argued that it did not have a duty to bargain over the change because the past practice was superseded by collective bargaining agreements executed by the parties in 2008. Respondent pointed to language incorporated in the 2008 contracts which reserves the right of Respondent's benefit administrator to make final determinations as to all issues concerning eligibility for benefits. However, the language Respondent relied on was also incorporated in the 2000-2004 collective bargaining agreements. The Commission majority also found the parties' 2000-2004 collective bargaining agreements generally tied eligibility for health care benefits to eligibility for a pension and made no mention of health care benefits for those who retire on the basis of disability. On comparing the language of those contracts with that of the 2004-2008 and 2008-2011 collective bargaining agreements, the Commission found there was no appreciable difference with respect to with respect to the eligibility of disability pension recipients for health care benefits. In the absence of language specifically addressing disability pension recipients' eligibility for health care benefits, the Commission found no support for Respondent's contention that the past practice was superseded by the contracts executed in 2008.

Further, the Commission majority found that there was no evidence in the record indicating that Charging Parties were aware at the time the 2004-2008 and 2008 -2011 collective bargaining agreements were executed that retirees receiving disability pensions would no longer be eligible for health care benefits unless they met the age and years of service requirements for a standard pension. The Commission found that Respondent failed to show that Charging Parties waived their right to bargain over the termination of the past practice. Absent an explicit, clear, and unmistakable waiver of bargaining rights, Respondent was not relieved of its duty to give the unions notice and an opportunity to bargain before deciding to terminate the past practice.

The ALJ suggested that the Commission award attorney fees to Charging Parties in the light of four recent decisions in which Respondent was found to have violated its duty to bargain and based on Respondent's actions in eliminating the past practice. The ALJ urged the Commission to reconsider its interpretation of *Goolsby v Detroit*, 211 Mich App 214 (1995), and assess costs and attorney fees against Respondent. The Commission majority agreed with the conclusion in *Goolsby* finding that the language of § 16(b) of PERA is not sufficiently specific enough to authorize the Commission to a grant attorney fees. The concurring commissioner agreed that Respondent breached its duty to bargain. However, he found that, while this was not an appropriate case for an award of attorney fees, given the NLRB's precedent on assessing attorney fees, he is not willing to conclude that the Commission lacks the authority to award attorney fees in an appropriate case.

The third commissioner dissented in part and concurred in part. He agreed that the language of § 16(b) of PERA does not authorize the Commission to a grant attorney fees. However, he concluded that Respondent did not violate its duty to bargain in good faith under §10(1)(e) and determined that the charge should be dismissed. The dissenting commissioner disagreed with the majority's adoption of the ALJ's finding that the collective bargaining agreement was ambiguous and that Respondent gave "tacit approval" to the contracts modification by the past practice of providing health care benefits to retirees receiving disability pensions. The commissioner found Respondent's 2006 Health and Welfare Benefit Plan was fully incorporated into the collective bargaining agreements. Additionally, the Commissioner found that the contract language established that Charging Party and Respondent bargained over health care benefits and retirees' eligibility for

such benefits. He concluded that Respondent's past practice of not enforcing the age and service requirements for health care benefits with respect to recipients of disability pensions did not waive its right to do so. As a result, the dissenting commissioner held that Respondent had not committed an unfair labor practice by electing to enforce the terms of the contract.

In conclusion, the Commission majority affirmed the ALJ's finding that Respondent unlawfully made a unilateral change to terms and conditions of employment without first giving Charging Parties notice and an opportunity to bargain over whether the age and service requirements for health care benefits should begin to apply to recipients of disability pensions. The majority also found that § 16(b) of PERA does not authorize the Commission to award attorney fees. ■

City of Detroit -and- American Federation of State, County and Municipal Employees (AFSCME), Local 207

MERC Case No. C10 E-119, issued July 20, 2012

Unfair Labor Practice Found *– Employer Breached Duty to Bargain When it Unilaterally Decided to Transfer Work Exclusively Performed by Bargaining Unit Employees to a Different Bargaining Unit or to an Outside Contractor; Exclusivity of Bargaining Unit Work Not Destroyed by Prior De Minimis Transfer of that Work to Another Bargaining Unit. Omission of Details from Charge is Not Prejudicial When Underlying Facts are Fully Litigated; Failure to Object to Litigation of Issue Before ALJ Waives the Objection and Bars Filing Exceptions on that Issue.*

The Commission affirmed the ALJ's Decision and Recommended Order finding that Respondent, City of Detroit (Employer), violated §10(1)(e) of PERA when it unilaterally decided to lay off employees in the Street Lighting Maintenance Worker (SLMW) classification, which was represented by the Charging Party, American Federation of State, County and Municipal Employees, Local 207 (Union), and to replace them with line workers represented by the International Brotherhood of Electrical Workers (IBEW). Furthermore, the Commission agreed with the ALJ's finding that the Employer breached its duty to bargain when it laid off the sole employee in the AFSCME represented Public Lighting Department's repair mechanic classification and transferred the repair mechanic's work to a private contractor.

In its exceptions, the Employer alleged that the ALJ exceeded the scope of the charge when he made a decision regarding the repair mechanic. The Commission found that although the charge did not identify the job classifications of the affected employees, the record revealed that there were two classifications at issue, the SLMW and the repair mechanic. Furthermore, the Commission noted that at no point in the record, prior to filing its exceptions, did the Employer object to the Union raising, or the ALJ considering, the issue of the subcontracting of the work performed by the repair mechanic. Had the Employer objected while the matter was still before the ALJ, the Union could have timely moved to amend the charge to include the allegations regarding the repair mechanic and the issue could have been resolved by the ALJ. Instead, the Employer waited until it filed its exceptions to raise the issue. By that point, it was too late to raise the objection and the Commission determined that the Employer's failure to timely object constituted a waiver of its objection and barred the filing of an exception on that issue. The Commission agreed with the ALJ that the repair mechanic had exclusively performed the work of repairing traffic lights and affirmed the ALJ's conclusion that the Employer violated its duty to bargain under §10(1)(e) when it unilaterally decided to subcontract that work.

Next, the Employer argued that the ALJ erred by finding that SLMWs exclusively performed the street lighting repair work. Although the Employer argued that the IBEW line workers had also performed street lighting repair work, the record showed that the work performed by the line workers was distinctly different from the work performed by the SLMWs. For several decades, the SLMWs' essential functions had included the inspecting, repairing and replacing of light fixtures on street light poles. The Employer contended that the line workers had also performed these tasks since at least 2004.

The Commission noted that the Union had grieved the Employer's occasional assignments of these tasks to IBEW line workers and the grievances were still pending. Given the de minimis nature of these assignments of SLMW work outside the bargaining unit, they could not serve as the basis for a viable unfair labor practice charge. The Commission concluded that the contested and de minimis assignments of SLMW work did not destroy the exclusivity of the essential functions of the SLMWs' work. Thus, the Commission found that the Employer breached its duty to bargain when it transferred work that had been exclusively performed by the SLMWs. ■

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FMCS Canada

The Federal Mediation and Conciliation Service is delighted to introduce **Lyne Huneault** as its inaugural Director, Preventive Mediation. In this new role, Lyne will be responsible for providing leadership and strategic direction to FMCS's very popular Preventive Mediation Program. Lyne brings over thirty years of professional and managerial experience in labour relations, most recently as Senior Consultant, Labour Relations and Chief Negotiator for the City of Ottawa.

FMCS is pleased to announce the appointment of **Réjean Bercier** as Quebec Regional Director. Réjean has been with FMCS for over 12 years. Prior to his arrival, he acted as chief spokesperson as well as other roles within the Communications, Energy and Paperworkers Union of Canada.

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PSLRB

Mr. David P. Olsen, Vice-Chairperson of the Public Service Labour Relations Board (PSLRB) was appointed Acting Chairperson of the PSLRB on January 2, 2013. In the Acting Chairperson capacity, Mr. Olsen performs all of the powers granted to the Chairperson pursuant to the *Public Service Labour Relations Act.*

Canadian Industrial Relations Board (CIRB)

The Minister of Labour announced the appointment of **Richard Brabander** as a full-time member representing employers for a three-year term, effective May 6, 2013. He has over 30 years of experience as a prominent labour and employment lawyer. Prior to his appointment to the Board, Mr. Brabander had been a partner at Heenan Blaikie LLP for 10 years after serving as the Assistant General Counsel at Bell Canada for 21 years.

Judith MacPherson has been re-appointed as a full-time Vice-Chairperson of the CIRB for a three-year term, effective April 25, 2013.

Ms. MacPherson has been a Vice-Chairperson of the CIRB since 2007 and previously served in the same role on the New Brunswick Labour and Employment Board from 2000–06.

AWARDS

The Honourable Lisa Raitt, Minister of Labour for Canada, presents CIRB Chairperson, **Elizabeth MacPherson** with the *Queen Elizabeth II Diamond Jubilee Medal*.

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Jacques Lessard Retires from FMCS Canada

In April of this year, Jacques Lessard retired from his position as Director of the Quebec Region with FMCS Canada after a long and distinguished career in labour relations. He joined FMCS in 1997 following a 20-year career as negotiator and director with the largest trade union council in Quebec.

Jacques is well-known in ALRA circles for his many contributions to the Association and, particularly, for having brought the annual ALRA conference to Montreal twice, in 2001 and again in 2012. His organizational skills and graciousness as a host are perhaps only surpassed by his negotiation skills, which saved the day for ALRA when the staff at the conference hotel went on strike three days before the start of the 2012 conference. Due entirely to Jacques' foresight and negotiating prowess, within 24 hours the conference had been seamlessly transferred to another hotel that was able to accommodate every event and every guest in fine style at no additional cost to ALRA. This provision is now known as the "Lessard clause."

Jacques was one of FMCS's most dedicated and hard-working mediators. He was also a great team builder who often organized social gatherings for the FMCS mediators. He is greatly missed. We wish him a long and happy retirement. ■