ALRA Advisor

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ALRA Advisor

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

In this issue . . .

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Submit all material to the Editor:

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ON THE COVER: Image from the Parade of Sail which ended the Halifax visit of tall ships participating in the Nova Scotia Tall Ships 2009 Festival

From the President . . .

Pat Sims

Meet the ALRA President

Inspired by the Proust questionnaire, we asked ALRA President Patricia Sims to answer some questions about her life in labor relations and her involvement with ALRA.

What is your current position?

Since 2000, I have held the position of Senior Mediator at the National Mediation Board (NMB). I was hired at the NMB in 1997.

I joined the NMB when they were looking to hire a former flight attendant as a mediator, and a former teacher to expand the training department. I applied for both positions since my employment experience was a perfect fit. I had been both a flight attendant for a major airline and a former elementary school teacher. In addition I completed my mediation training at Harvard Law School and Duke University. I was the first former flight attendant hired at the NMB and I was thrilled to begin my next career as a mediator.

My responsibilities include labor-management mediation in the United States in two industries: airlines and railroads which involves a number of crafts including pilots, flight attendants, mechanics, customer service agents, conductors, engineers, signalman, maintenance of way employees , and dispatchers. Our mediations are unique in that the collective bargaining agreements do not expire, rather they become amendable or "open" for changes. This process can take some time to complete, anywhere from several months to several years. Often unions have an interest in a complete overhaul of the existing contract which contributes to the lengthy bargaining and mediation periods. Additionally, I provide strategic ideas to our Board on handling difficult cases, and work with other mediators from the agency to bring difficult cases to closure. Early in my career I developed the NMB ADR training department and created and presented training to our parties on interest-based problem solving.

When and where did you start working in labor relations?

My work in labor relations began when I went to work for a major airline as a flight attendant. I was curious about what a union was, what did they do, why do we have one, why do we pay a monthly fee to them? I had come from being a teacher where there were only "associations," not unions. While flying certain trips, the crew scheduling people would tell us we had to stay on duty longer than scheduled, or they changed the routes of our trips, having us arrive back much later than planned. We could not argue with them, we had to comply. "Fly now, grieve later" I was taught. I doubted we were being told the truth. This motivated me to understand the correctness of those rulings, or what the actual rules ▶

From the President . . .

Pat Sims

Meet the ALRA President, cont.

were. And what was a grievance? I began to attend union meetings to listen and learn.

Discovering that there was a labor-management relationship was fascinating to me. Learning we had a voice and we could speak up through our representatives. There were rules in the contract that were ironclad and binding. If management violated the contract there was a grievance procedure that provided a process towards resolution. After about four years of flying and attending union meetings, I volunteered to work for the Union and processed 2 contractual disputes to arbitration. I was hooked on the work. Each case was like a small mystery to be solved. Putting grievance cases together to be processed at arbitration was uniquely challenging. Within a year I was appointed as the system grievance chair to manage all grievances filed on the entire system that had 12,000 flight attendants in 12 domiciles all over the country. It was a tremendous challenge and one that I thoroughly enjoyed for 3 years. In that position I learned what real labor relations were all about, and prepared and attended approximately 60 arbitration hearings. And I was considered a subject matter expert on workers compensation, newly implemented drug testing laws and procedures, and later added alcohol testing laws and procedures.

During the next 3 years of my career with the airline, I was elected to be the President of the largest flight attendant base, representing 3000 flight attendants. This totally consumed my existence and I was submerged deeply into other facets of labor relations every day. Daily administration of the collective bargaining agreement, which meant interpretation disputes with those same crew scheduling people, and every other department that worked to administrate the contract. It was terrific experience as I worked with so many different departments, and all levels of management all the way up to the CEO of the Company. This experience provided me with a solid foundation in labor relations and was part of the NMB's requirement for mediator hiring in the late 1990's. This new crop of mediators was required to come from within the airline or railroad industries with strong labor relations experience.

What sparked your interest in labor relations?

The genesis of my interest probably started when I was a teenager in a discussion with my father. There had been a series of events in our southern city of Richmond, Virginia, and I wanted to know why people were not speaking out to the city/county governments due to their actions. My father had said to me, "you can't fight city hall" and he explained what he meant. My response was "why not, if they are wrong or misguided?" That discussion and my response arose again during my first career as an elementary school teacher in a very ►

From the President . . .

Pat Sims

Meet the ALRA President, cont.

conservative school system in Virginia which is a right to work state. We had associations, not unions. These associations did gather collectively for meetings to discuss issues and problems, but they had no power to change anything. The teachers working conditions including pay, were at the mercy of the school system. Each teacher had their own "contract of employment" with the school system. Included in this contract was a "morals clause", which specifically addressed forbidden activity such as co-habitation with a member of the opposite sex to whom you were not married. Being unmarried and pregnant was grounds for dismissal. You were on probation until you earned tenure, which for me fortunately, was only 3 years. It was 1980.

I joined the airline industry in 1984, and they were a bit more progressive. We were now called flight attendants, not stewardesses. We could be married, have children, own homes, and even had some form of retirement. However, we were still on "weight check" once a quarter. If you were deemed too heavy, by standards that had been created in the 1950's, you would be put on monthly weight check. Even subject to suspension from work, if you didn't lower your weight. This went on until 1993.

Which elements of your personality have been most helpful in your labor relations work?

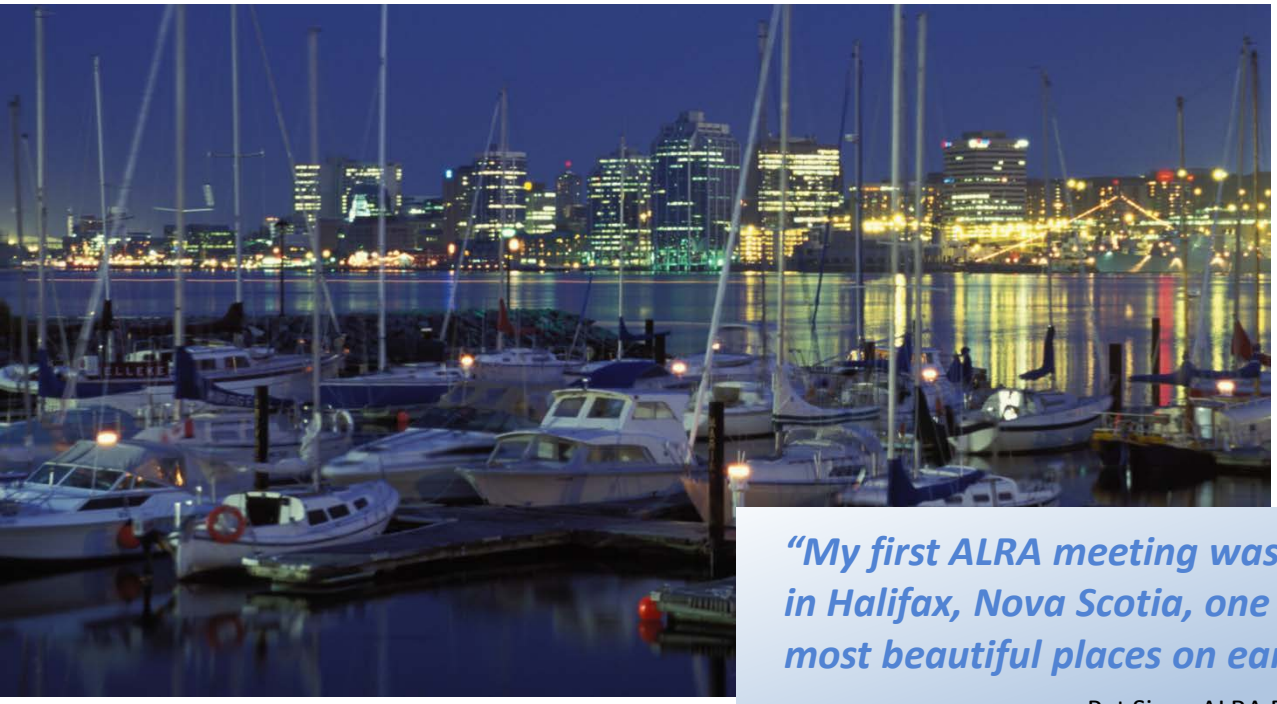
I think my curiosity has been very important, as it has led me to discover things, and to seek understanding about people and their issues. People want to be heard, and so many times there is so much talking and not much listening going on. Being willing to listen, learn and remaining open to new experiences has allowed me to connect with people in a meaningful way, which has allowed me to help the people and move the mediation process to successful conclusions. Problem solving has been one of my interests for years in every environment I have found myself in, both personally and professionally. I will rise to the challenge of trying to come up with a solution. Having confidence to solve problems is instrumental in my mediation practice as I help others to solve their own issues. My gentle persistence, enthusiasm and optimism in doing so helps to build confidence in others who do not believe they can solve their own problems. It makes me happy and gratified to assist others in finding their own solution, especially when they did not believe they could get there. I am fascinated with human behavior in group environments.

Being willing to be directive, confident, and a little "on the edge" with idea suggestion, has been helpful too. A good sense of humor is necessary in the stressful world of collective bargaining and labor relations. Timing is everything, and knowing when to use humor and lighten the mood has also been helpful. ►

From the President . . .

Pat Sims

Meet the ALRA President, cont.



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Downtown Halifax as seen from the Dartmouth waterfront

"My first ALRA meeting was … in Halifax, Nova Scotia, one of the most beautiful places on earth."

- Pat Sims, ALRA President

How and when did you first become involved with ALRA?

My first ALRA meeting was in 2004 in Halifax, Nova Scotia, one of the most beautiful places on earth. Now I return to this location as President of ALRA this year. It was a wonderful experience to meet professional peers from all over the world. We had participants from all over the US and Canada, and including Australia. The conference agenda was well planned and I found it very interesting to learn about conflict and dispute resolution happenings all over the globe. The people were equally interesting with entertaining stories. My supervisor at the time had volunteered me and another colleague to present a workshop at this conference. Having never been to ALRA before, we were not familiar with the experience level of our audience. Upon meeting this group of seasoned professionals, I went to my room and rearranged our entire presentation hoping they would find it interesting. These people were not only professionals, but kind in nature, and our presentation was well received. After that experience, I was invited to participate on an ALRA planning committee. Since 2005 I have participated in the ALRA annual conference planning. ►

From the President . . .

Pat Sims

Meet the ALRA President, cont.

What is your most lasting memory of ALRA?

The people of ALRA. The different people you meet at the conference, and the same ones that return year after year. It is and has been an honor to know and meet them. To learn that no matter what type of mediation people perform, the substance or the number of people involved, there are many commonalities in terms of situations, issues and problems that we all face as mediators. ALRA provides the opportunity to discuss and share ideas of how to handle common dilemmas we face. The ALRA conference each year is created by a group of dedicated professionals who volunteer their time to put together an interesting and informative agenda. I learn something every year from either the conference presentations, the participants, or both.

What do you most value in your ALRA experience?

The relationships and friendships I have made with colleagues from all over the world. ALRA is about the people, for the people and by the people, and the agencies that belong and hopefully can attend the conference each year. There is no office or annual staff to oversee and manage. It is the people involved that make this organization great! I most value the opportunity to be with and see my peers each year. It is the only conference I attend that is focused on being with peers, which adds great value to your professional existence.

In what ways would you like to see the organization grow? What do you envision for ALRA's future?

The last few years have been challenging for an organization such as ALRA where membership is spread throughout North America, and fiscal and political climates have provided further challenges for our members to attend conferences. We are hoping that some of these pressures are easing as we had record attendance at last year's conference in Minneapolis. This year's conference in Halifax should be outstanding and we hope to see you there.

Additionally, this past year we made significant steps to improve the ALRA.org web site. It has been totally remodeled, looks great and is very user friendly. We want to encourage ALRA members to frequent it We plan to provide articles of interest, training information, and more. and I am confident it will be a site that will be used more often, thereby enhancing the value of being an ALRA member. ►

From the President . . .

Pat Sims

Meet the ALRA President, cont.

I am seeing younger people join the ALRA organization as delegates. This is a very good thing. ALRA will benefit from their new ideas, perspectives, and knowledge of technology. All of the skills from younger generations blended with our experienced people can only serve to bring ALRA forward in a progressive way and its exciting to think about it as we celebrate ALRA's 65th anniversary at the Halifax conference.

What professional development activities do you recommend to people who are starting their careers in labor relations?

Come to ALRA every year. Learn at the professional development sessions. Meet and talk with your peers who will be happy to discuss anything with you. Find a mentor if possible who can help to guide you through at least the beginning stages of your career.

Network with other professionals who do what you do, and be curious of their experiences. Ask and they will share. Search for labor relations opportunities in your local area and ask if you could observe the process. Watching grievance arbitration or negotiations can teach you many things. You will need to emphasize your commitment to confidentiality of whatever you witness. Check for local mediation services offered at colleges. Volunteer to help, or organize career nights for networking opportunities.

Tell us about some of your activities outside of labor relations (hobbies, interests, etc.)

My main hobby is golf. I have been playing for 20 years, and I enjoy playing competitive golf as well as casual golf whenever I can. Being outdoors in warm weather and in beautiful places is wonderful. With golf, I have my good days and bad days at this fun and challenging sport. (I do have a full time job). Playing golf teaches you things about yourself, like what is your frustration tolerance, are you an honorable person who follows the rules, do you appreciate and respect the etiquette of the game, if you cannot pay well, do you give up or go practice. Playing with others can also teach you the same things listed above, about them. I have played golf with some of the parties throughout the years. Four or more hours on a golf course can teach you things about a person that might take you months to learn in another setting. Fascinating!

I also enjoy Pilates and walking, spending time with my cat (a Princess, of course), reading, movies, and working on my cooking skills when it is too cold to golf. ■

Federal – United States

National Labor Relations Board

A Flurry of Decisions in the Final Days of NLRB Board Member Johnson's Term

By Hank Breiteneicher, Associate Executive Secretary, NLRB

National Labor Relations Board Members pictured left to right: Member Philip A. Miscimarra, Member Lauren McFerran, Chairman Mark Gaston Pearce, Member Harry I. Johnson, III and Member Kent Y. Hirozawa

During the waning days of National Labor Relations Board Member Harry I. Johnson, III's term, which ended on August 27, 2015, the Board issued a number of significant decisions, including a much-anticipated decision involving whether certain college scholarship football players could organize under the National Labor Relations Act; a new standard for determining joint employer status; and a reversal of longstanding Board precedent regarding whether a dues-check off provision must be honored after contract expiration.

In ***Northwestern University***, 362 NLRB No. 167, the Regional Director for Region 13 in Chicago had issued a decision in which he found that all ▶

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football players at Northwestern who receive grant-in-aid scholarships are employees within the meaning of the Act and were entitled to vote as to whether they wished to be represented by a union. In its appeal to the Board, Northwestern and several of its supporting amici contended, among other things, that the Board should exercise its discretion to decline jurisdiction over this case. In its decision, the Board unanimously agreed. The Board noted that even when it has the statutory authority to act, it can properly decline to do so when it concludes that asserting jurisdiction over a particular case would not effectuate the purposes of the Act. The Board determined that, even if the scholarship players were statutory employees (an issue the Board emphasized it was not deciding), it would not effectuate the policies of the Act to assert jurisdiction.

In deciding that it should decline to assert jurisdiction, the Board principally focused on two factors. First, the Board observed that NCAA Division I Football Bowl Subdivision (FBS) football resembles a professional sport, given that the individual institutions jointly stage football contests, have formed the NCAA to set common rules and standards, and have given the NCAA the authority to police and enforce rules and regulations governing player eligibility, practices, and competitions. The Board explained that as in professional sports, there was a symbiotic relationship among the various teams, conferences, and the NCAA, and that accordingly labor issues directly involving an individual team and its players would also affect the NCAA, the Big Ten Conference (of which Northwestern is one of 14 members), and other member institutions. On this count, the Board noted that in previous cases involving professional sports, it has stated that it would be difficult to imagine any degree of stability in labor relations if the Board were to assert jurisdiction over only one team, and that in practice all previous Board cases involving professional sports involve league-wide bargaining units. Second, the Board noted that the structure of FBS football itself also strongly suggested that asserting jurisdiction in this case would not promote stability in labor relations. In this regard, the Board emphasized that of the approximately 125 colleges and universities that participate in FBS football, all but 17 are state-run institutions over which the Board cannot assert jurisdiction, and that Northwestern is the only private school that is a member of the Big Ten Conference. The Board stated that in ►

National Labor Relations Board, cont.

such a situation, asserting jurisdiction would not promote stability in labor relations due to the variety of state labor laws that would apply to football teams at state-run institutions. As an additional consideration, the Board noted that the terms and conditions of Northwestern's players have changed markedly in recent years, and that there have been calls for the NCAA to undertake further reforms that may result in additional changes to the circumstances of scholarship football players. The Board stated that subsequent changes in the treatment of scholarship players could outweigh the considerations that motivated its decision to decline jurisdiction.

Another Board decision that received extensive media coverage is ***Browning-Ferris Industries of California,*** *Inc., d/b/a Newby Island Recyclery & FRP-II, LLC, d/b/a Leadpoint Business Services*, 362 NLRB No. 186, which issued on August 27, 2015. In this decision, a majority of the full Board restated the Board's joint-employer standard to hold that two or more entities are joint employers of a single work force if they are both employers within the meaning of the common law, and if they share or codetermine those matters governing the essential terms and conditions of employment. If a common law employment relationship exists, the Board's inquiry turns to whether the putative joint employer possesses sufficient control over employees' essential terms and conditions of employment to permit meaningful collective bargaining. The Board majority stated that the Board will examine the existence, extent, and object of a putative joint employer's control. Significantly, the Board majority rejected the limiting requirements that the Board had imposed in the past. First, the majority held that the Board will no longer require that a joint employer not only possess the authority to control employees' terms and conditions of employment, but also must exercise that authority. Reserved authority to control terms and conditions of employment, even if not exercised, will now be relevant to the joint employer inquiry. The majority also held that the Board will no longer require that a statutory employer's control must be exercised directly and immediately. Control exercised indirectly–such as through an intermediary–may now establish joint employer status. The Board reasoned that these previous limiting requirements left the Board's joint employment jurisprudence increasingly out of step with changing economic circumstances, particularly the recent dramatic growth in ►

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contingent employment relationships.

Applying the new joint employer standard in this case, the Board majority reversed the Regional Director to find that the Union established that Browning Ferris and Leadpoint Business Services are joint-employers of the employees in the petitioned-for unit. In so finding, the Board relied on, among other things, Browning-Ferris' possession of control over who Leadpoint can hire to work at its facility; Browning-Ferris' direct and indirect control over work processes and task assignments; and Browning-Ferris' significant role in determining employees' wages.

In dissent, Members Phillip A. Miscimarra and Johnson argued that the majority improperly resurrected the Supreme Court's theory in *NLRB v. Hearst Publications* by reading the Act's classifications broadly and considering economic realities rather than using previously established common-law agency principles. They also contended that the majority's test does not comport with common-law agency principles, which require some evidence of direct and immediate control even where indirect factors are deemed probative. They asserted that the majority abandoned a longstanding test that provided certainty and predictability, and replaced it with an ambiguous standard that will impose unprecedented bargaining obligations on multiple entities in a wide variety of business relationships. Finally, they argued that the majority's test will undermine existing principles of sales and successorship, franchising arrangements, parent-subsidiary relationships, and secondary economic protest.

Also, on August 27, in ***Lincoln Lutheran of Racine***, 362 NLRB No. 188, a majority of the Board overruled the rule set forth in the Board's 1962 decision in *Bethlehem Steel*, and held that—like most other terms and conditions of employment — an employer's obligation to check off union dues from employees' wages continues after expiration of a collective-bargaining agreement that establishes the arrangement, and until a lawful bargaining impasse occurs or a new collective-bargaining agreement has been reached. The majority found that the Board had never provided a coherent explanation for the *Bethlehem Steel* rule, which held that the employer's obligation ceases when the contract expires. The Board majority concluded that requiring employers to honor dues-checkoff arrangements after contract expiration serves the Act's goal of promoting collective ▶

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bargaining, consistent with Board precedent proscribing post-contract unilateral changes in terms and conditions of employment. The Board majority found that nothing in federal labor law or policy suggests that dues-checkoff arrangements should be treated less favorably than other terms and conditions of employment for purposes of the status quo rule. The Board majority explained that an employer's unilateral change to end dues checkoff undermines collective bargaining no less than other unilateral changes that have been held unlawful. Dues checkoff, in turn, was unlike those few terms and conditions of employment held not to survive the expiration of an agreement.

Members Miscimarra and Johnson dissented. They found that the *Bethlehem Steel* exception to the rule requiring post-contract-expiration bargaining over terms and conditions of employment is justified by statutory and policy considerations that warrant its continuation. The dissenting Members asserted that the primary consequence of the majority's change is to substantially alter the current balance that exists between the interests of employers and unions upon contract expiration. In their view, this type of change should be the province of Congress, not the Board.

In addition, the Board issued noteworthy decisions in four cases involving application of the Board's decisions in *D.R. Horton, Inc.*, 357 NLRB No. 184 (2012), enf. denied in relevant part 727 F.3d 344 (5th Cir. 2013) and its 2014 decision in *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014), involving mandatory arbitration agreements (*Countrywide Financial Corporation, Countrywide Home Loans, Inc. and Bank of America Corporation*, 362 NLRB No. 165, *PJ Cheese, Inc.*, 362 NLRB No. 177, *Leslie's Poolmart, Inc.*, 362 NLRB No. 184, and *On Assignment Staffing Services, Inc.*, 362 NLRB No. 189); Weingarten rights (*Manhattan Beer Distributors*, 362 NLRB No. 192), confidentiality rules (*Caesars Entertainment d/b/a Rio All-Suites Hotel and Casino*, 362 NLRB No. 190), a successor employer's right to unilaterally set initial terms and conditions of employment (*GVS Properties, LLC*, 362 NLRB No. 194), and application of the unit determination standard of *Specialty Healthcare* (*DPI Secuprint, Inc.*, 362 NLRB No. 172). ▶

Federal – United States

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A New Day at the NLRB

Reported by James S. Cooper, Arbitrator, Attorney and former Chairman, Massachusetts Labor Relations Commission

The NLRB (or "the Board") came out in full force at the National Academy of Arbitrator's (NAA's) Denver Self Enhancement Workshop (SEW) and put on an outstanding performance designed to help arbitrators comply with the *Babcock & Wilcox Construction Company, Inc.* 361 NLRB No. 132 ("*Babcock & Wilcox")* case so that the purpose of the statute will be fulfilled. Present at the session were Jennifer Abruzzo, Deputy General Counsel, and John Doyle, Deputy Assistant General Counsel in the Division of Operations-Management of the General Counsel, and six staff members of the NLRB's Region 27 (Denver). The object of the Board's deferral policy is to allow the parties to litigate Section 8(a)(1) and/or Section 8(a)(3) charges before an arbitrator and have the Board accept the arbitrator's award as full resolution of the dispute. In order for the Board to accept the award, the parties must agree that the arbitrator has the authority to do so; that the parties presented sufficient facts to decide the statutory issue; that the arbitrator considered the issue and that the Board's law reasonably permits the award. *Babcock & Wilcox* is a stark departure from precedent and calls upon arbitrators to recognize potential violations of federal law; to make findings which find Section 8(a)(1) and/or (a)(3) violations (or not); and to issue an award with an eye as to what the Board would do.

While the Board's decision explicitly denied turning arbitrators into "mini" NLRB Administrative Law Judges ("ALJ"), the truth is that the arbitrators need to act more like ALJs and this workshop was designed to teach arbitrators what the Board expects in order to honor the parties' request to defer. The NLRB plans on taking this type of presentation on the road all around the country in hopes of spreading the word as to these expectations. The Board's desire is that the NLRB will do *less* work, the arbitrators can do *more* work and the parties will be *happy (or unhappy)* with a single bite at that old apple. The last thing the Board needs is to have to repeat the hearings on the statutory issue(s) *and* litigate whether the Board should have deferred to ▶

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the arbitrator's award. Thus, unless *we (the arbitrators, collectively)* get it, the Board's decision will more than double its workload on deferral and they will spend endless years litigating the deferral issues before the United States Courts of Appeal.

The General Counsel (who wanted a stricter standard for deferral) has taken on this task with gusto and top flight personnel, including a notebook prepared for this course by the NLRB personnel. The notebook was simply spectacular and, as the Board is wont to do, it overwhelms people who are not fully familiar with the Board's dedication to being thorough with lots of citations to Board decisions. Any arbitrator who can get a copy of the notebook would do themselves a huge favor. [Perhaps the National Academy of Arbitrators could replicate these notebooks and offer them at cost to members.]

Moving to the substance of the SEW discussion, the Board neatly divided the session into five segments: First, Deputy General Counsel Abruzzo carefully reviewed the Board's decision in *Babcock & Wilcox* indicating what changes the Board made and why [NAA members in the audience whined, just like they did after Member Miscimarra's keynote address in San Francisco; forget the whine, it's over]; second Deputy Assistant General Counsel Doyle explained the difference between deferral in Section 8(a)(5) charges and deferral under *Babcock & Wilcox* and the clear reasons for the distinction: (1) namely that a refusal to bargain charge may be defended by contract language, i.e., a unilateral change may be fully defensible based on contract language as interpreted by an arbitrator; (2) employer anti-union motivation is less likely to be an issue and (3) *Spielberg Mfg.* and *Olin Corp.* continue to apply.

The third segment dealt with whether deferral was appropriate. On this issue, the Board will consider deferral appropriate if the collective bargaining agreement contains language granting an arbitrator authority to apply Section 7 of the Act through Section 8(a)(1) and/or Section 8(a)(3). While the Board did not announce "safe harbor language" on this issue, contractual language which prohibits the employer from engaging in unlawful discriminatory conduct would probably pass muster, although the Deputy General Counsel carefully announced that this issue needed to be fully litigated before the Board, and that she could not issue any guarantee in this regard. Alternatively, the parties, on an *ad hoc* basis, could decide that they ►

National Labor Relations Board, cont.

were willing to litigate the unfair labor practice before an arbitrator and agree to be bound by that decision. In point of fact, for cases where there is a charge pending and one party seeks deferral, the Board's Regional Director will have made a decision that there is enough evidence to establish arguable merit to the charge and further decided whether the parties are bound by their contract or by an agreement to proceed before the arbitrator. In short, there will be no heavy lifting by arbitrators on this issue.

The fourth segment of the program examined the framework or theories the Board expects an arbitrator to apply in order for the Board to defer. On this subject, the Board's Region 27 staff led the discussion of what conduct is "protected" and "concerted" particularly in the context of discipline which the union alleges was unlawfully motivated by the employer. This was the "meat and potatoes" of the discussion including a thumbnail review of the Board's standards under *The Continental Group, Wright Line, Atlantic Steel, Clear Pine Mouldings* and *Burnup and Sims* [citations omitted]. Naturally the Board's notebook (Tab 3) includes about two hundred other cases and subjects for consideration. My take on this material is that the parties are going to have to do some homework and present cases to you because no arbitrator could be fully familiar with all these cases. On this issue, the Board clearly decided to give the arbitrators some leeway and the Board some fudge room by simply requiring that the Board's law "must reasonably permit" the arbitrator's decision. However, under this standard, the Board will be *less* likely to defer than under the "not repugnant standard" as currently applied under *Olin Corp.* and *Spielberg Mfg.*

There was a lively discussion about the arbitrator's obligation to impose Board remedies where the arbitrator finds a violation of the law. On this issue, the Board has specifically announced that counting unemployment compensation toward back pay (something the Board will not do) would not be grounds for refusing to defer. The issue of requiring an employer posting, something arbitrators are loathe to do, was discussed, without consensus except noting, in the Board's language, "[t]he absence of any effective remedy… would preclude deferral."

The fifth segment of the presentation consisted of a hypothetical with six parts. The facts of the hypothetical were simply too easy to test experienced arbitrators who are ▶

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certainly capable of recognizing unlawful conduct. It would take far more subtle and conflicting factual issues (like real life!) to really bring out the kinds of distinctions about which arbitrators (and even the Board) may sincerely disagree and the evidence needed to prove such violations. I am certain the Board will have opportunity to examine these difficult factual situations in the future.

One final note: the notebook included (at Tab 6) a handy, dandy flow chart which shows whether to apply *Babcock & Wilcox* or *Spielberg, Olin* and *Alpha Beta.* This is because the Board delayed implementation of the *Babcock & Wilcox* standards until the parties have an opportunity to negotiate a collective agreement after the Board's December 15, 2014 decision, unless their current agreement provides for arbitral decisions on Sections 8(a)(1) and (a)(3) or the parties specifically agree that the arbitrator should decide the Section 8(a)(1) and/or (a)(3) statutory issue. This chart will give you a headache, and everyone, including the Board, will be happy when there are no more pre-December 15, 2014 contracts to worry about.

To be sure, the Board compressed what should be a full day or perhaps two days of instruction into four hours. Lucky for the Board, the group attending this session included many, many very seasoned arbitrators, including former Board attorneys and field examiners, so this was about as learned a group as the Board is going to reach. If this show appears in your region, I suggest you attend because, as previously mentioned, the notebook alone is worth the price of admission.

Note: Representatives from the NLRB are available and more than willing to conduct similar training in any geographic area. If you are interested in arranging for training regarding arbitration deferral under *Babcock & Wilcox*, please contact Jennifer Abruzzo, NLRB Deputy General Counsel, at jennifer.abruzzo@nlrb.gov, or John Doyle, NLRB Deputy Assistant General Counsel, at john.doyle@nlrb.gov.

This article first appeared in The Chronicle, a publication of the National Academy of Arbitrators, 1 Main Street, Suite 410. Cortland, NY. ■

Federal – United States

Federal Mediation & Conciliation Service

FMCS Success: Swedish Medical Center-SEIU Settlement Reached Through Perseverance of Seattle Office

Intensive efforts by U.S. Federal Mediation and Conciliation Service (FMCS) mediators Ligia Velazquez, Rick Oglesby and FMCS Regional Director Beth Schindler over several months of contentious bargaining cleared the way for a resolution of the dispute between the Swedish Medical Center, a leading health care provider in Seattle WA, and SEIU 1199NW, covering 7,000 bargaining unit members.

The settlement package included five separate collective bargaining agreements, all of which expired on June 30, 2015, and with the encouragement of FMCS mediators, represents a step toward a labor-management rapprochement in the wake of difficult and sometimes adversarial negotiations.

Swedish health care is the premiere health care provider in the Pacific Northwest and is seen as a leader in medical care, innovative medical technology and employment policy.

After having negotiated unsuccessfully on their own for four months, the leadership of both the hospital and the union agreed to request assistance from the FMCS—with the expectation that FMCS mediators could help them reach an agreement within 60 days under an expedited process using FMCS mediation and facilitation.

FMCS Commissioners Oglesby, Velazquez and RD Schindler began meeting with the leadership teams of both labor and management in mid-July to work out details for an operating agreement the parties would follow in order to expedite negotiations, address their outstanding issues, improve their existing relationship and reach a settlement by Sept. 30. On Aug. 25, the parties finally signed off on a process.

The FMCS team utilized a full array of IBB-style mediation tools in negotiations to open lines of communication and initiate discussion. The union team consisted of about 110 members, and the employer's, 20-25. The FMCS mediators helped both sides categorize their proposals, prioritize the most important and divide the respective groups into sub-groups to take on the major contract issues. By ►

Federal Mediation & Conciliation Service, cont.

the end of August, the FMCS team was meeting nearly every day with the parties, and as negotiations intensified and the issues became more complex, the meetings routinely lasted until midnight.

"We were mediating and facilitating, but we were also providing some skill building and training as we went along," said Regional Director Schindler. "I know we gave hope to the parties that they could indeed get this contract wrapped up and have a better relationship in the long term if they kept at it."

The last two weeks of September featured marathon bargaining sessions with multiple groups meeting at a time. "These were 14-16 hour meetings most days until the final push," she said.

The end result, however, was worth the effort for the FMCS team. The parties concluded with a four- year agreement, including a groundbreaking medical plan, resolutions to nurse staffing issues, a solid economic package, and multiple agreements on joint projects for future work together.

Regional Director Schindler calculated that it required at least 1000 hours of mediator involvement to get there—surely one for the record books.

FMCS Mediators Achieve "Symphony of Success" in Orchestra Settlements

In a round of tough collective bargaining negotiations in September, affecting financially-strapped symphony orchestras around the U.S., mediators for the FMCS conducted talks with virtuoso skill and won rave reviews from musicians' representatives and orchestra management alike.

Javier Ramirez, FMCS Director of Field Programs and Innovation, brought welcomed harmony to collective bargaining talks between musicians and management of the Lyric Opera of Chicago Orchestra, helping the parties achieve a difficult settlement through his "tireless encouragement and creative insight," said Gary Matts, president of the Chicago Federation of Musicians. Commissioner Ramirez reprised the role later in the month with tough negotiations between the musicians and management of the Chicago Symphony Orchestra, one of the nation's premier classical music institutions.

"The Chicago Federation of Musicians and the members of the Lyric Opera and Chicago Symphony Orchestra negotiating teams are grateful to Mediator Ramirez for his noteworthy efforts," wrote Mattis. ►

Federal – United States

Federal Mediation & Conciliation Service, cont.

Similarly, musicians for the South Bend, IN symphony celebrated a settlement with orchestra management with highly positive reviews for the work of FMCS mediators David McIntosh, Tom Olson and Javier Ramirez. "David, Javier and Tom – thank all of you for your assistance and guidance on this contract. From where we were a year ago, we accomplished a lot," wrote Bill Olsen, president of Local 232-278 of the American Federation of Musicians, after the settlement.

A solo performance by FMCS Mediator Scott Montani in Rochester (NY) Philharmonic Orchestra negotiations with musicians won similar plaudits. "Scott has a most uncanny ability to identify a settlement that he believes he can sell to both sides, and yet again he picked that settlement beautifully…. All of the Rochester folks and I are most appreciative of his fine work that produced such a positive settlement," wrote AFM negotiator Nathan Kahn in a note of appreciation.

After lengthy negotiations assisted by Commissioner Rich Giacolone, the Virginia Symphony Orchestra announced Oct. 23 that it had reached a two-year contract with its musicians. Musicians agreed to participate in the costs of health care and agreed to a reduction of annual leave in exchange for wage considerations and additional personnel in the second year of the contract, according to a news release from the VSO.

A settlement mediated by Commissioners Ed Garrow and Scott Montani in Binghamton (NY) Symphony Orchestra talks was music to the ears of labor and management alike. Thanks to their efforts, local news media wrote, "For the Binghamton Philharmonic, the show will be going on." ►

FMCS Mediators Selected to Serve on United Nations Roster

FMCS Commissioners Edward Bantle, Eileen Hoffman, Javier Ramirez, and David Thaler have been accepted to serve on the international roster of mediators for the United Nations (UN) and United Nations Staff Management Committee (UN SMC) to provide mediation services for bargaining and UN employee workplace disputes. While acceptance does not guarantee that FMCS mediators will be utilized, selection by the UN Staff Management Committee reflects positively on the quality of experience and reputation of FMCS mediators.

Federal – United States

Federal Mediation & Conciliation Service, cont.

FMCS Ranked as

Best Place to Work

in Federal Government

Left to Right: Michael Colandria, Tammy Van Keuren, FMCS Drector Allison Beck, and Shakima Wright accepted the Partnership for Public Service Award for Best Small Agency

The FMCS marked a proud moment in December when the agency **was ranked as one of the best places to work in the Federal government** for the third time in a decade by the Partnership for Public Service. The FMCS was rated number one among Federal small agencies.

"We are delighted at this recognition of a very special workplace," said FMCS Director Allison Beck. "This result is proof, once again, of the strong commitment among FMCS employees to our standards of excellence and to our vital mission of helping to resolve workplace conflict."

The FMCS top ranking as one of the government's "Best Places to Work" in important respects represented the fruit of an effort begun under FMCS Director Beck— launched with the future very much in mind. Early in fiscal 2015, under her direction, the FMCS initiated a re-organization and re-structuring called "Securing the Future of FMCS Together," which emphasized employee engagement, inclusion, and news ways to inspire creativity, teamwork, innovation, and service delivery.

The "Securing the Future" initiative incorporated as **core principles the values that FMCS has espoused to labor and management** as a path to peaceful, productive workplaces. These are open communications, transparency, and joint problem-solving.

FMCS was recognized at a Partnership for Public Service news conference in ►

Federal – United States

Federal Mediation & Conciliation Service, cont.

December for its number one ranking in 2015, which also rated FMCS the highest in several individual categories, including "Employee Skills-Mission Match," "Empowerment," "Innovation," "Work-Life Balance," and "Support for Diversity." The agency achieved second-place rankings in "Leaders," "Supervisors," "Pay," and "Teamwork," based on employee responses to survey questions.

FMCS headed the list of small agencies in the 2015 rankings of the "Best Places to Work in the Federal Government" as rated by the nonprofit, nonpartisan group, which released its rankings of Federal workplaces today. The rankings are based on responses from more than 433,300 civil servants in 391 Federal organizations.

Produced by the Partnership and Deloitte, the *Best Places to Work* rankings provide critical information to help agencies, the Obama administration and Congress assess workplace health and performance. In addition to overall satisfaction and commitment, the rankings measure employee attitudes on 10 workplace categories, including effective leadership, innovation, support for diversity, work-life balance and pay.

Agencies are ranked based on the responses of their own employees to the government-wide, Federal Employee Viewpoint Survey conducted by the Office of Personnel Management.

Based on previous surveys, the FMCS was the top-ranked "best place to work" among small agencies in 2005 and 2007. The rankings began in 2003, and since 2007 have been conducted annually. The FMCS generally has scored among the top five for small agencies in every year that Agency results were available for comparison.

Complete 2015 rankings and information about the survey are available at the Partnership for Public Service website at http://bestplacestowork.org/BPTW/index.php.

Impact of Work by FMCS Mediators Felt in Local Communities

Successful efforts by FMCS mediators in establishing and nurturing labor-management committees in southern Maryland have attracted the attention of Maryland State Secretary of Labor Kelly Schulz.

FMCS mediators have played an important role in assisting labor-management committees in Maryland and many other locations build ►

Federal – United States

Federal Mediation & Conciliation Service, cont.

lasting and productive relationships.

Recently, FMCS Baltimore mediators Larry Passwaters and Gary Eder, who retired in December, earned attention for their success in helping to organize and support productive labor-management committees at the plant and company level in Maryland. These labor-management partnerships were so successful they attracted the attention of State Labor Secretary Schulz, who asked to meet with the members of several committees and the FMCS mediators.

Secretary Schulz wanted to inform herself about the FMCS efforts to promote good labor relations and she wanted to meet the people involved. Other meetings between the Maryland Labor Secretary and labor-management committees assisted by Commissioner Passwaters are scheduled over the next three to four months, including an upcoming meeting with Montgomery County public-sector employees.

The Secretary met previously with Howard County teachers and county employees and their management counterparts. The visits were inspired by the success of the labor-management committee at Vulcan-Hart, a Baltimore food service equipment company, that formed with the encouragement and help of Commissioner Eder. Of course, the FMCS mediators are hopeful that Secretary Schulz will help get the word out to other employers and unions in Maryland where they might be of help.

Separately, another FMCS "success story" gained media recognition in Allentown, PA, where in early January news coverage focused on a labor settlement between Phoebe Ministries, which operates elderly care facilities there, and about 400 union workers, represented by SEIU Healthcare Pennsylvania.

With a one-day strike in the offing, FMCS mediator Barbara Lichtman called the parties back to the table to continue bargaining, which led ultimately to a settlement after 17 hours of negotiations, averting a possible strike.

One of the features of the settlement, was a special letter of "Labor-Management Collaboration Initiative" that expressed a commitment by labor and management to improve communication, transparency and operational efficiencies at the two nursing homes in the community— a product of mediator Lichtman's efforts to help the parties through difficult negotiations and return their relationship to a positive one. ▶

Federal – United States

Federal Mediation & Conciliation Service, cont.

FMCS Leverages Technology and Innovation in Boosting Mediator Training

The FMCS has established what it is calling a "Virtual Academy" to improve mediator training.

"Virtual Academy" at the FMCS is a new, internal training platform the Agency has introduced for mediators that so far has been met with great success. By leveraging new Internet-based technologies in program training, such as webinars and on-demand programs, the FMCS has been able to develop and implement what the Agency is calling a "Virtual Academy," which uses on-demand programs and live webinars to allow FMCS mediators to sharpen their skills, develop expertise in complex bargaining and dispute resolution areas, and share success stories and experience with colleagues.

The "Virtual Academy" has become extremely popular with FMCS mediators who find it easy to fit into their schedules , and it is also extremely cost effective, reducing or limiting the need for FMCS mediators to travel to regional training sites. The FMCS "Virtual Academy" has provided recent trainings on health care bargaining and the affordable care act. Other training topics have related to "best practices" such as how to get the parties back to the bargaining table.

In a related internal FMCS training initiative, mediator working groups have been developed to share best practices as well as knowledge and expertise. Faced with a sizable number of recent and upcoming retirements at the FMCS, the Agency has sought ways to capture institutional knowledge and expertise from its senior mediators before they retire. For example, arising from recent FMCS cases, working groups of mediators have been asked to review labor dispute resolution practices for symphony orchestras and opera companies and to look at collective bargaining in the health care industry. The FMCS also has a group studying collective bargaining issues arising from health care benefits. Director of Field Programs and Innovation Javier Ramirez has been leading these particular efforts, which are proving to be effective in capturing and sharing knowledge among our mediators nationwide.

In a similar vein, the FMCS has implemented an innovative "flash mentoring" program that has been used successfully at several regional staff meetings. In these encounters, newer mediators quiz senior ▶

Federal – United States

Federal Mediation & Conciliation Service, cont.

mediators about best practices in service delivery areas. These quizzes and follow-up discussions provided the "mentors"—FMCS senior mediators—with some new ideas as well.

The sharing of ideas, information and knowledge was a foundation for the FMCS "employee engagement" initiative throughout FY 2015 and has carried over FY 2016 because of its success.

Save the Date!

FMCS Labor-Management Conference

Back by Popular Demand

The FMCS National Labor-Management Conference is back in 2016 due to popular demand!

What was once the nation's premier labor-management conference will return as big as ever on **August 17-19, 2016** in Chicago, Illinois, featuring a program theme— "**The Future @ Work: Trends, Tools, and Techniques for Partnering in the New Economy**"—focusing on the 21st century workplace.

Prompted by numerous queries from labor and management alike, the FMCS conducted an online survey last year to determine the interest among labor and management practitioners in reviving the national conference, which was last held in 2008.

The survey results were overwhelming. Hundreds of labor and management representatives voted to bring back what used to be the FMCS signature event. The conference theme — "The Future @ Work: Trends, Tools, and Techniques for Partnering in the New Economy"— will set the tone for the conference workshops and speakers.

The event will explore how labor and management can work together to better address the challenges of today's rapidly changing workplaces. With the resumption of the conference, hot new workplace topics will take the stage, including issues surrounding the new "sharing" economy, or what some people call the 'gig" economy.

The FMCS will have updates and news as conference planning proceeds, but for now, those who hope to attend should mark their calendars and save the dates: **August 17-19, 2016**! ►

Federal – United States

Federal Mediation & Conciliation Service, cont.

FMCS Reaches Out to Labor-Management Customers with Model "Success Stories"

FMCS outreach to current and prospective labor-management clients this year will provide inspirational "Success Stories" via webinar panels, to show what can be achieved with FMCS help through "best practices" in collective bargaining and relationship development.

Recent FMCS efforts to showcase "Success Stories" have been very popular, with programs often filling to capacity via registration within minutes of publicizing. One of the FMCS upcoming Success Stories will highlight the experience of the South Bend Orchestra and the American Federation of Musicians in utilizing the innovative FMCS Affinity Approach to Economic Bargaining. This process allowed these labor-management partners to complete complex economic bargaining in hours versus days or weeks. The upcoming online "Success Story" event is scheduled for March 3, 2016.

An outreach webinar last year highlighted the journey of the Southern Nevada Health District and SEIU Local 1107 from adversaries to allies through the use of interest-based bargaining.

Representatives from labor and management and the FMCS mediator who assisted in the bargaining reviewed their roles and the process. Presenters detailed the parties' background, the decision to utilize interest-based bargaining, and the methodology employed to reach agreement on economic issues. In addition, attendees heard how the process transformed what had been an adversarial relationship, as well as how others may achieve similar outcomes. Interested labor-management representatives can register to attend upcoming FMCS "Success Story" webinars at www.fmcs.gov,

FMCS Video Shows How to File Bargaining Notice

The FMCS released a video tutorial on Jan. 14 illustrating how to file the agency's Notice of Bargaining form online. Parties to collective bargaining agreements generally file Form F-7 to notify the agency that "written notice of proposed termination or modification of [an] existing collective bargaining contract was served upon the other party … and that no agreement was reached." The form can be completed and filed on the FMCS website, and the video shows how to do so. The video is available at https://youtu.be/ptT-MNiarzY. ►

Federal – United States

Federal Mediation & Conciliation Service, cont.

FMCS Delivers Its First Spanish Language Outreach Webinar!

On January 26, 2016, the FMCS delivered its first-ever Spanish language webinar. To date, the Agency has delivered nearly 50 free live webinars for labor and employment practitioners. The webinars have been a big success, with hundreds of attendees benefiting from the extensive knowledge of FMCS mediators and ADR professionals.

This Spanish language webinar titled *Mediación Federal: Más que Solo Mediación* (Federal Mediation: More than Just Mediation) explained how FMCS is enhancing workplace collaboration and maintaining labor peace in the United States. The session included a summary of the various services offered by Federal mediators to strengthen workplace relations, including among others, training to form labor-management committees and build the skills of the members to resolve conflicts on a continuous basis.

FMCS hopes as a result of the free webinar about ADR for Spanish speakers in the labor-management community that they will become more aware of their options.

FMCS Director Outlines "New FMCS" for 2016

FMCS Director Allison Beck recently outlined a number of initiatives to better position the Agency to handle evolving workplace issues, such as younger workers and generational differences, and other labor-management dispute resolution needs in the Internet-enabled "shared economy" and work environment of the 21st century.

"Helping labor and management work together to find joint solutions to tough problems is exactly what we continue to do every day at FMCS," said Director Beck. "What is different is that today we can take advantage of new technological tools and new techniques to help them address the challenges of the workplaces in this century."

An expanded menu of services from FMCS will better help the parties achieve what they need most during difficult economic times—a strong labor-management relationship, Director Beck said. "Since our beginning in 1947, collective bargaining and good labor management relationships are the best ways to prevent labor disputes," she said. ►

Federal – United States

Federal Mediation & Conciliation Service, cont.

To better help labor and management navigate the complex issues confronting them in 2016, Director Beck said an Agency goal is to fully unveil what is being called the "New" FMCS or "FMCS 2.0."

New initiatives at FMCS will include:

- Developing a Young Leaders Academy within the FMCS Institute for Conflict Management to prepare the next generation of labor and management in the inclusive leadership skills they will need to create successful enterprises and decent, sustainable jobs;
- Helping labor and management leaders embrace, not fear, the massive generational shift underway in workplaces so *together* they can address issues of recruitment, retention, and job satisfaction among young workers;
- Incorporating cutting edge theory, such as conflict neuroscience, into communications, relationship and bargaining processes and training;
- Offering a variety of approaches to collective bargaining, from Traditional, to Modified Traditional, Expedited, Interest-Based and, what we call the Affinity Model of Economic Bargaining;
- Using remote collaborative technologies (Facilitate Pro and Adobe Connect) and social media (Facebook, Twitter, YouTube) to deliver web-based seminars, training and dynamic content on the platforms young workers use;
- Providing customer outreach opportunities via webinar panel "Success Stories." These programs have been particularly popular, often filling to capacity via registration within minutes of publicizing; and
- Leveraging FMCS mediators' unparalleled conflict resolution experience and skills, both nationally and internationally, across all sectors, industries, and dispute arenas, at the workplace and the bargaining table, in the public policy arena, and in skills development forums, to improve relationships and create the trust, respect and communications skills essential to job growth and economic security. ■

Federal – United States

National Mediation Board
PEB 248 and 249
New Jersey Transit Rail

New Jersey Transit Rail NJTRO is the third largest commuter rail system in the country. With a total of 223 million passenger trips in 2014, NJTRO operates a complex rail network of passenger rail operations in New Jersey, connecting major points in New Jersey, New York City and Philadelphia. The New Jersey Transit Rail Labor Coalition (Coalition) consists of 12 labor organizations representing 4,220 unionized rail employees at NJTRO.

The current collective bargaining agreements between NJTRO and the Coalition organizations became amendable on July 1, 2011 and the parties served formal notice for changes in current rates of pay, rules and working conditions. The parties were unable to resolve the issues in dispute in direct negotiations. Thereafter applications for mediation were filed with the National Mediation Board (NMB) by each of the individual labor organizations in 2014 and 2015. Following the applications for mediation, representatives of all parties worked with NMB mediators and with Members of the NMB in an effort to reach agreement.

On June 15, 2015 the NMB served notice that it had terminated its services under Section 5, First of the RLA. On June 30, 2015, in accordance with Section 9a of the RLA, the Coalition, on behalf of its labor organizations, requested that the President establish a Presidential Emergency Board (PEB) and the President created Presidential Emergency Board 248 (PEB 248) on July 16, 2015. In a historic first, PEB 248 was the first all-female Presidential Emergency Board (PEB) in the 78-year history of and consisted of: Elizabeth Wesman, Chair; Barbara Deinhardt, Member; and Ann Kenis, Member. PEB 248 issued its Report and Recommendations to the President on August 14, 2015.

When the recommendations of PEB 248 did not result in the prompt resolution of the disputes, the NMB conducted a public hearing on September 9, 2015 at which NJTRO discussed its willingness to accept the recommendations of PEB 248 and NJTRO discussed its reasons for not accepting the recommendations of PEB 248. ►

Federal – United States

National Mediation Board, cont.

(Continued from page 24)

Section 9a of the RLA provides that, in the case of commuter rail carriers, a second—"final offer"-- PEB can be created in the event the dispute is not resolved during the first PEB process. The President created this second PEB, PEB 249, on November 13, 2015, to make final offer sections in accordance with the RLA. The President appointed three distinguished arbitrators to serve on PEB 249: Joshua M. Javits, Chair; Elizabeth Neumeier, Member; and Nancy Peace, Member.

NJTRO and the Coalition filed briefs with the PEB on November 18, 2015.

The PEB met with the Parties jointly and individually on December 7, 2015. Hearings on the final offers were held on December 15, 16 and 17, 2015 in Newark, New Jersey. Following the close of the hearing, the PEB met informally with the parties in an attempt to facilitate the settlement of the disputes. There was no settlement and PEB 249 issued its Report and Recommendations to the

President on January 11, 2016 selecting "the Coalition's offer as the most reasonable." PEB' 249's Report can be found at:

https://storage.googleapis.com/dakota-dev-content/PEB-249-Report.pdf ■

HALIFAX 2016

ALRA

Setting a course for the future

Halifax Skyline

Federal Labor Relations Authority Eliminates Overage-Case Backlog, Issues Significant Decisions, and Scores Court Wins in Fiscal Year 2015

By FLRA Staff

In 2013, the Federal Labor Relations Authority's (FLRA's) three-Member, adjudicative body (the Authority) lacked a quorum – and, thus could not issue decisions – for nearly 11 months, extending into fiscal year (FY) 2014. During that time, a substantial case backlog developed, and the Authority spent the remainder of FY 2014, as well as FY 2015, working to eliminate that backlog. In FY 2015, the Authority issued merits decisions in 232 cases – the most since FY 2011 – and managed to completely eliminate its backlog of cases that were "overage" (in other words, cases that were still before the Authority more than 180 days after having been assigned to an Authority Member's staff).

And many of the Authority's decisions resolved significant, complex, or just-plain-interesting issues. Some highlights include cases regarding:

Time limits for appealing arbitration awards.

In one decision, the Authority overruled nearly 30 years of precedent and held that the 30-day time limit for appealing arbitration awards is *not* a limitation on the Authority's jurisdiction, but is, instead, a "claim-processing rule" that can be modified based on equitable considerations. In that decision, the Authority decided to "equitably toll" the time limit, and consider the appeal, because the normal due date for the appeal fell during the federal-government shutdown in 2013. *See United States Department of Veterans Affairs, Medical Center, Richmond, Virginia and American Federation of Government Employees, Local 2145*, 68 FLRA 231 (2015) (Member Pizzella dissenting).

However, in a later decision, the Authority declined to apply equitable tolling when an alleged (but unsubstantiated) computer error 5 minutes before the appealing party's midnight electronic-filing deadline resulted in the party's untimely filing. The Authority also reiterated that one of its regulations – specifically, ▶

Federal Labor Relations Authority, cont.

5 C.F.R. § 2429.23(d) – prohibits extension or waiver (as distinct from equitable tolling) of the deadline for appealing arbitration awards. Therefore, the Authority dismissed the appeal. *See American Federation of Government Employees, Local 3961 and United States Department of the Air Force, 502nd Force Support Squadron, Joint Base San Antonio, Fort Sam Houston, Texas*, 68 FLRA 443 (2015) (Member DuBester dissenting).

Agency interrogations of employees.

The Authority also resolved a complicated unfair-labor-practice case involving employees' right to union representation during agency investigatory interviews that may reasonably result in the employees' discipline – also known as "*Weingarten*" rights. In that case, an investigator from the Air Force Office of Special Investigations (AFOSI) denied an employee's request for union representation during an investigatory interview. After issuing a Federal Register notice soliciting briefs, the Authority interpreted a rarely invoked provision of the Federal Service Labor-Management Relations Statute (the Statute) – specifically, 5 U.S.C. § 7103(b)(1) – which authorizes the President of the United States to issue an order excluding any agency, or subdivision of any agency, "from coverage under this chapter [in other words, the Statute] if the President determines that—(A) the agency or subdivision has as a primary function intelligence, counterintelligence, investigative, or national[-]security work, and (B) the provisions of this chapter [again, the Statute] cannot be applied to that agency or subdivision in a manner consistent with national[-]security requirements and considerations." The Authority found that executive orders issued under § 7103(b)(1) remove agencies or subdivisions from *all* of the Statute, and thereby preclude those agencies' or subdivisions' investigators from being "representative[s] of the agency" within the meaning of the Statute's *Weingarten* provision, § 7114(a)(2)(B). Because Executive Order 12,171 removed AFOSI from coverage of the Statute, and there can be no violation of § 7114(a)(2)(B) unless there has been (among other things) action by a "representative of the agency," the Authority found that the agency could not be found to have violated the Statute when the AFOSI investigator interviewed the employee. *United States Department of the Air Force, Ogden Air Logistics Center, Hill Air* ▶

Federal Labor Relations Authority, cont.

Force Base, Utah and American Federation of Government Employees, Local 1592, 68 FLRA 460 (2015) (Member DuBester dissenting), *petition for review pending sub nom. American Federation of Government Employees, Local 1592 v. FLRA*, No. 15-9542 (10th Cir., oral argument scheduled for Mar. 9, 2016).

Retroactive payment of transit subsidies.

One issue that came up repeatedly in 2015 involved the question of whether agencies are authorized to retroactively reimburse employees for certain transit expenses. In the lead case on this issue, the parties had a collective-bargaining agreement that required the agency to pay employees transit subsidies in the amount of their actual, incurred commuting costs, up to the maximum non-taxable amounts set forth in 26 U.S.C. § 132(f)(2)(A), which is part of the Internal Revenue Code. In 2012, the maximum non-taxable amount was $125 per month. Then, Congress enacted the American Taxpayer Relief Act of 2012 (ATRA), which amended § 132(f)(2)(A) to retroactively increase the maximum amount of non-taxable transit benefits from $125 to $240 per month for 2012, and to increase the amount to $245 for January 2013. After ATRA's enactment, the agency did not retroactively reimburse employees for transit expenses over $125 that they had incurred in 2012 and January 2013. An arbitrator found that the agency violated the parties' agreement, and directed the agency to make affected employees whole. The Authority denied the agency's exceptions to the arbitrator's award, finding, among other things, that the Federal Employees Clean Air Incentives Act (the Incentives Act, 5 U.S.C. § 7905) authorized the agency to pay transit subsidies on an ongoing basis, and that the parties' agreement (as found by the arbitrator) required it to retroactively reimburse the employees. The Authority also found that the arbitrator's award of retroactive reimbursements satisfied the require-ments of the Back Pay Act, 5 U.S.C. § 5596. *See United States Department of Health and Human Services, Washington, D.C. and National Treasury Employees Union*, 68 FLRA 239 (2015); *see also United States Department of Homeland Security, U.S. Customs and Border Protection and National Treasury Employees Union*, 68 FLRA 276 (2015) (finding that the Incentives Act and the Back Pay Act supported a similar award); *United* ▶

Federal Labor Relations Authority, cont.

States Department of the Treasury, Internal Revenue Service and National Treasury Employees Union, 68 FLRA 810 (2015) (same).

Viability of grievance and arbitration procedures after union decertification and replacement; the First Amendment.

In one significant decision, the Authority addressed whether grievance and arbitration procedures of a collective-bargaining agreement – negotiated by an agency and a union that was later decertified and replaced by a different union (the second union) after an election – bound the second union. The Authority – distinguishing private-sector precedent and finding that different considerations apply in the federal sector – held that the agreement bound the second union until the parties negotiated new contract terms. Additionally, the Authority upheld the arbitrator's finding that a particular union newsletter threatened a particular employee and constituted an unfair labor practice under § 7116(b)(1) of the Statute. The Authority also rejected a claim that the arbitrator's award was inconsistent with the First Amendment to the United States Constitution. *See Independent Union of Pension Employees for Democracy and Justice and Pension Benefit Guaranty Corporation*, 68 FLRA 999 (2015), *reconsideration denied*, 69 FLRA 158 (2016).

Another Authority decision resolved First Amendment issues as well. In that decision, the Authority found that a union committed an unfair labor practice under § 7116(c) of the Statute by denying initial union membership to an individual employee because he had posted, on his private Facebook page, comments that were critical of the union. The Authority stated that, under § 7116(c)(1), unions may deny an employee's *initial* application for membership only for "failure to meet occupational standards uniformly required to admission or failure to tender dues." The Authority noted, however, that once an employee has been admitted to membership, the union may discipline him or her for misconduct, consistent with the requirements of § 7116(c). The Authority also rejected the union's claim that requiring it to admit the employee into the union would violate its freedom of association under the First Amendment. *See National Federation of Federal Employees, Local 2189 and Jonathan Jarman*, 68 FLRA ►

Federal Labor Relations Authority, cont.

374 (2015) (Member Pizzella concurring).

Additionally, the courts of appeals handed the FLRA two significant wins in 2015, both of which confirmed the Statute's grant of exclusive authority to the Authority and the FLRA's General Counsel.

First, in *United States Department of Homeland Security, United States Customs and Border Protection, Scobey, Montana v. FLRA*, 784 F.3d 821 (D.C. Cir. May 5, 2015), the D.C. Circuit rejected the Government's attempt to expand appellate jurisdiction over arbitration decisions involving backpay. Although Authority decisions in arbitration cases that do not concern unfair labor practices are virtually unreviewable under § 7123(a) of the Statute, the Government contended that an improper award of backpay would implicate the United States' sovereign immunity and thus justify judicial review. The Court, however, rejected this argument, explaining that "[r]outine statutory and regulatory questions" concerning backpay awards "are not transformed into constitutional or jurisdictional issues merely because a statute waives sovereign immunity." *Id.* at 823. "Otherwise," the Court continued, "Congress's creation of a mostly unreviewable system of arbitration would be eviscerated, as every Authority decision involving an arbitral award arguably in excess of what [the law] authorizes would be reviewable." *Id.*

Second, in *Clark v. Federal Labor Relations Authority*, 782 F.3d 701 (D.C. Cir. Apr. 7, 2015), *petition for cert. filed,* No. 15-5115 (Jul. 2, 2015), the D.C. Circuit agreed with the Authority that the FLRA's GC enjoys exclusive discretion to settle a case, even (1) after a complaint issues and (2) over a charging party's objections. Relying on the Statute, the FLRA's implementing regulations, and prior decisions, the Court concluded that, because "the General Counsel of the [FLRA] has the unreviewable discretion to file and withdraw a complaint" as prosecutor before the Authority, she also has "'final authority to dismiss a complaint in favor of an informal settlement' prior to hearing." 782 F.3d at 705 (quoting *NLRB v. United Food & Commercial Workers Union, Local 23,* 484 U.S. 112, 126 (1987)).

Together, these cases affirm the FLRA's important and expert role in deciding significant questions facing the federal government's labor-management relations program. ■

Federal – United States

Congressional Office of Compliance turns 20

By Paula Sumberg, Deputy Executive Director, Office of Compliance

For twenty years, a little known independent agency in the Legislative Branch called the Office of Compliance (OOC) has advanced workplace rights for congressional staff and helped make offices on Capitol Hill safer places to work and visit. These achievements were made possible by a Congress sharply divided along partisan lines on most issues, but surprisingly bipartisan when it came to answering one important question: Should Congress and legislative branch agencies finally be subject to the same workplace rules that lawmakers had imposed on private and executive branch employers?

The Congressional Accountability Act of 1995 – passed nearly unanimously – placed 30,000 congressional workers and their offices under important workplace laws that in some cases had been around for decades, but had never been extended to the very offices from where these laws emerged. Beginning in 1995, congressional workers were covered by anti-discrimination and harassment laws, workplace safety and health protections, overtime and labor laws, and public access rights under the Americans with Disabilities Act.

Congress created the OOC to administer the Act, educate and train Members and staff on their rights and obligations, and safeguard the Act's protections through independent investigations and enforcement. The OOC carries out its broad legislative mandate with a small staff and a part-time Board of Directors. Before the OOC opened its doors in 1996, Capitol Hill buildings had not been subject to even the most basic building codes or regulations. The first inspections led to the discovery of serious fire and other safety hazards in House and Senate buildings and around the Capitol. Each year since, at the urging of the OOC, Congress has abated thousands of serious hazards, reduced numerous barriers to access for individuals with disabilities, and thus dramatically improved the overall safety and accessibility of the Capitol Hill campus. In a post-9/11 world, the OOC's focus has expanded to promoting safe emergency evacuation plans, ensuring adequate alarm and warning systems, and promoting staff training.

While far from perfect, the Congressional Accountability Act of 1995 and establishment of the Office of Compliance has presented Congress with the opportunity to lead by example and not by edict. ►

Congressional Office of Compliance, cont.

John D. Uelmen was appointed as General Counsel to the OOC on December 14, 2015. Mr. Uelmen, who had been serving as acting General Counsel since the former General Counsel Amy Dunning's retirement in late October 2015, previously served as Deputy General Counsel and has more than seven years of experience with the Office of Compliance.

As General Counsel, Mr. Uleman supervises a staff of attorneys and safety and health inspectors who administer labor-management, safety & health and public access programs for the legislative branch employees in the Capitol Hill complex and district offices.

For 20 years prior to joining the Office of Compliance, Mr. Uleman prosecuted labor and employment cases before administrative tribunals, trial courts, and courts of appeal as the principal attorney for the Fair Employment Legal Services based in Milwaukee, Wisconsin. Mr. Uleman received his bachelor's degree with honors from the University of Wisconsin at Madison and graduated with honors from the University of Wisconsin Law School.

Mr. Uleman looks forward to sustaining OOC's efforts at promoting safety and successful labor-management relations throughout the legislative branch.

Paula Sumberg was appointed as Deputy Executive Director (House of Representatives) in October 2015. Ms. Sumberg brings ten years of experience as a labor attorney and legislative counsel working with the executive and legislative branches of government. Prior to joining OOC, Ms. Sumberg was Counsel in the Litigation Department for the National Treasury Employees Union (NTEU), where she represented the nation's largest independent federal union in the federal appellate courts and before administrative agencies in a variety of matters involving the rights of federal workers. Ms. Sumberg also trained the union and its leaders on complex legal issues under federal civil service laws and other labor and employment statutes.

Before that, Ms. Sumberg was Legislative Counsel for NTEU, where she was responsible for implementing NTEU's legislative efforts in Congress and helping to shape the laws, policies and regulations that affect the interests of the union's 150,000 represented workers. Ms. Sumberg has a JD with honors from the George Washington University School of Law and a BA with honors in political science from Middlebury College.

OOC website is www.compliance.gov ■

The States

New England Consortium of State Labor Relations Agencies Offers Training Session and Conference

By Tim Noonan, Executive Director, Vermont Labor Relations Board

The New England Consortium of State Labor Relations Agencies, the only regional consortium of labor relations agencies in the United States, conducted a two-day training session in late April 2015 and a one-day labor relations conference in July 2015. The Consortium origins date back to 1978 when New England state labor relations agencies founded the organization for the sharing of resources and the training of its members and professional staff. The Consortium is currently comprised of the Connecticut State Board of Labor Relations, Connecticut State Board of Mediation and Arbitration, Maine Labor Relations Board, Massachusetts Department of Labor Relations and Employment Relations Board, Massachusetts Joint Labor-Management Committee For Municipal Police and Fire, New Hampshire Public Employee Labor Relations Board, New York State Public Employment Relations Board, Rhode Island Labor Relations Board and the Vermont Labor Relations Board.

The Consortium has offered regular training sessions for member agencies and staff since its inception. Most recently, the Consortium has conducted two-days training sessions every two years. The subjects covered at the training sessions are designed to cover the wide range of areas of expertise necessary for member agencies to function effectively. A public sector labor relations conference serves the dual purpose of providing continuing educational opportunities to the New England and New York labor-management community and generating sufficient operating funds for the Consortium to conduct training for members and staff. The Consortium has sponsored 24 regional conferences. The Consortium generally has managed to derive sufficient monies from modest conference registration fees to act as seed money for future conferences and cover the entire food, lodging and meeting room costs of training sessions.

The 2015 training session for 43 staff and member of Consortium agencies was held April 16 and 17 at Wachusett Village Inn and Conference Center in central Massachusetts. The training session was designed to be highly interactive with minimal lecture. ►

The States

New England Consortium, cont.

The training session began with a plenary session on "Hot Topics". It was followed by two related concurrent sessions, one for mediators and the other for board members and staff adjudicators/administrators, each entitled "Diving Deeper into Hot Topics". The first day of training concluded with two concurrent sessions: one with a panel of mediators addressing the topic "A Contract Negotiations Primer to Enlighten Adjudicators of Unfair Labor Practice Cases and Grievances", and the second was a showing of the movie "The Art and Science of Arbitration" followed by a facilitated discussion.

The second day of training began with two concurrent sessions on dealing with difficult issues and persons, one directed to mediators and the other targeted to board members and staff adjudicators/administrators. These were followed by two additional concurrent sessions on ethics and impartiality considerations, one for mediators and the other for board members, ALJ's and hearing officers. The training session concluded with an entertaining and anecdotal historical perspective from James Cooper, Chairperson of the Massachusetts Labor Relations Commission from 1975 – 1980.

The training session was well-received by training session participants. Most attendees completing evaluations rated each of the sessions "very good" or "excellent".

The Consortium also sponsored a conference on July 24 in Sturbridge, Massachusetts, which attracted 185 labor, management and neutral participants. Joseph Slater, University of Toledo College of Law Professor and noted author of books and numerous articles on public sector labor law, provided the keynote address on "Challenges to Public Sector Labor Laws from State Legislatures in the Heartland to the U.S. Supreme Court".

A plenary session followed on the Lawrence, Massachusetts, experience of teacher negotiations under receivership. Three concurrent workshops then were offered on: 1) ethical issues in pro se matters, 2) an updated forecast on mandatory, permissive and prohibited subjects of bargaining; and 3) the thought process of arbitrators. The conference concluded with a plenary session on medical marijuana.

The conference received positive evaluations from conference participants. Each of the sessions received "very good" or "excellent" evaluations from most of those completing evaluations. ■

Michigan Employment Relations Commission: Summaries of Noteworthy Decisions

By Lynn Morison, Ashley M. Olszewski and Seth Filthaut

Saginaw Education Association –and Michigan Education Association –and- Kathy Eady-Miskiewicz –and- Matt Knapp –and- Jason LaPorte –and- Susan Romska

Case Nos. CU13 I-054, CU13 I-055, CU13 I-056, CU13 I-057, CU13 I-058, CU13 I-059, CU13 I-060, CU13 I-061, issued September 23, 2015

Issues: Right to Refrain; Window Periods for Union Resignations; Commission Jurisdiction; Impairment of Contractual Rights

The Commission affirmed the ALJ's Decision and Recommended Order finding that Respondents violated § 10(2)(a) of PERA by refusing to accept Charging Parties' union resignations outside of Respondents' August window period.

Charging Parties were employed as teachers by the Saginaw Public Schools. At the time of their hire, each of the Charging Parties signed a "Continuing Membership Application" agreeing to join the Michigan Education Association and its local affiliate, the Saginaw Education Association. By signing the Continuing Membership Applications, Charging Parties authorized dues deductions and acknowledged that in order to resign their membership or revoke their dues deduction authorization, they must do so in writing between August 1 and August 31 of any year.

On March 16, 2012, 2012 PA 53 (Act 53), became effective. That amendment to PERA prohibited public school employers from deducting union dues or fees from employee wages. At that point, Respondents established an e-dues program to allow members to pay their union dues electronically.

On March 28, 2013, Michigan's right to work statute, 2012 PA 349 (Act 349), took effect. It expressly provided that public employees have a right to refrain from union activity and made agency shop illegal for most public employees.

In September 2013, Charging Parties Eady-Miskiewicz, LaPorte, and Romska sent letters to Respondents to resign from the Unions and revoke their dues deduction authorizations. In October 2013, Charging Party Knapp orally informed Respondents that he was not interested in continuing to pay dues. Charging Party Knapp also sent an ▶

Michigan Employment Relations Commission, cont.

email to Respondent explaining that he assumed that he was no longer a union member when he did not sign up for the e-dues program. Respondents notified Charging Parties of the August window period and did not accept their resignations. As a result, Charging Parties filed unfair labor practice charges.

On exceptions from the ALJ's decision, Respondents questioned the Commission's jurisdiction over the matter. Section 10(2)(a) prohibits labor organizations from restraining or coercing public employees in the exercise of their rights under PERA. Accordingly, the Commission has jurisdiction over matters in which a public employee chooses to refrain from engaging in supporting a labor organization, but is unlawfully restrained from doing so.

The Commission reasoned that because Charging Parties now have the right to refrain pursuant to Act 349, and because they were not subject to a union security agreement, their union memberships were voluntary and could be revoked any time after the effective date of Act 349 (March 28, 2013). The Commission agreed that Respondents have legitimate business reasons for maintaining their August window periods. However, it found that Respondents' reasons do not take precedence over public employees' right to refrain from union membership. The Commission found that any union rule, such as Respondents' August window period, that restricts a public employee's right to refrain from union activity is a violation of § 10(2)(a).

Respondents also took exception to the ALJ's recommendation that the Commission order Respondents to cease and desist from enforcing their August window period, and to remove language regarding the window period from their bylaws. Respondents contended that such an order would "unconstitutionally impair Respondents' existing contractual relationship with its members." The Commission disagreed, and found that there is a significant and legitimate public purpose in requiring Respondents to eliminate the policy restricting membership resignations to the month of August. The Commission went on to explain that the language of the ALJ's recommended order is reasonably related to protecting public employees' right to refrain from union activity. Therefore, the Commission concluded that the ALJ's recommendation that Respondents be required to amend their bylaws by removing the language that restricts ▶

Michigan Employment Relations Commission, cont.

public employees' right to refrain from union activity did not create an unconstitutional impairment of Respondents' contractual rights.

The Commission did not find merit to either of Charging Parties' exceptions. The Commission disagreed with Charging Parties' contention that the ALJ erred by finding that Respondents did not have a duty to provide Union members with more information on how to resign from membership than what had been provided. The Commission determined that Respondents did not violate their duty of fair representation because they provided sufficient information to their members about the resignation process, and provided the necessary information to any requesting member.

The Commission also found that a member's failure to pay dues is not sufficient to provide the Unions with notice of resignation because an individual can fail to pay dues for any number of reasons; negligence, inability to pay, a desire not to pay, etc. A union's requirement that the notice of resignation be in writing is not unreasonable and does not unreasonably restrict an individual's right to refrain from union activity.

Wayne County -and- Michigan AFSCME Council, AFL-CIO

Case No. C10 J-266, issued May 19, 2015

Issues: Duty to Bargain; Repudiation; Good Faith Dispute; Past Practice; Mandatory Subjects of Bargaining; Fact Finding; Absence of Mandatory Binding Dispute Resolution Procedure

The Commission concluded that the Union failed to establish that the Employer repudiated the collective bargaining agreements (cbas) with two of the three units the Union represented. The Commission dismissed the charge to the extent that it applied to the those two bargaining units, but found the Employer breached its duty to bargain by making unilateral changes to a mandatory subject of bargaining without giving notice and an opportunity to bargain to the Union while the parties were in mandatory negotiations following fact finding with regard to the third unit.

The Union represented the supervisory unit, the nonsupervisory unit, and the sergeants and lieutenants unit employed by the County. At the time of the actions leading to the charge, the supervisory unit and the sergeants and lieutenants unit had cbas with the Employer covering the years of 2008 ►

Michigan Employment Relations Commission, cont.

through 2011. The most recent cba between the Employer and the nonsupervisory unit covered the years 2004 through 2008 and the parties were unable to reach a subsequent agreement until December 2011.

In 1986, the Employer established the Inflation Equity Reserve Fund (IEF), which provided funding for a "thirteenth check" to replace cost of living payments that the Employer had occasionally given to retirees prior to 1984. The County's Retirement Commission would annually determine whether a distribution would be made to retirees and the percentage of the IEF's balance that would be distributed. Unlike payments made under a defined benefit pension plan, the amount of the thirteenth check was not based on the amount of wages earned during employment. The Employer and the Union never negotiated the amount of the thirteenth check, its funding, or the formula by which it would be calculated. Nothing guaranteed that retirees would receive a thirteenth check.

After the amendment to the Retirement Ordinance in 1986 that created the IEF and the thirteenth check, the Ordinance was amended in 1994 and 2000. The Union supported the amendment in 2000, but there is no evidence that the parties negotiated over any of the amendments that applied to the IEF and the thirteenth check.

On September 30, 2010, less than two weeks after the parties received the fact finder's report for the non-supervisory unit, the Employer enacted Ordinance No. 2010-514, which would allow the Employer to substantially reduce the funding for the thirteenth check. The following day, the Union filed the unfair labor practice charge.

The Union alleged that the Employer violated its duty to bargain in good faith by seeking to amend the Retirement Ordinance to eliminate the thirteenth check. The Employer contended that the Commission had no jurisdiction because the matter involved retirement benefits. The Commission explained that it has no jurisdiction over issues regarding retirees' claims with respect to the thirteenth check, since retirees are no longer public employees. However, the Commission does have jurisdiction over benefits that have been promised to active employees as a term or condition of employment. The Commission's findings were, therefore, limited to review of the effects of the 2010 amendment to the Retirement Ordinance on active employees.

The Commission explained that ▶

Michigan Employment Relations Commission, cont.

where retirement benefits have been promised to active employees, those benefits are mandatory subjects of bargaining. A public employer, generally, may not lawfully make a unilateral change to a mandatory subject of bargaining during the term of the cba.

The Commission has repeatedly held that it will not exercise jurisdiction over a good faith dispute over contract interpretation where the parties' contract provides a mandatory binding procedure for dispute resolution. It is only where the parties have not agreed to a mandatory binding procedure that the Commission would exercise jurisdiction over such a dispute.

The Union argued that the parties' past practice amended the contract to prohibit the Employer from amending the Retirement Ordinance. However, the Commission found that the Union failed to demonstrate a meeting of the minds where both parties agreed that the Employer would not amend or change the Retirement Ordinance. Because the Union did not show that the parties' dispute was anything more than a difference in contract interpretation, the Commission held that the Union failed to establish that the Employer repudiated the parties' cba with respect to the supervisory unit or the sergeants and lieutenants unit and that the charge should be dismissed to the extent that it applied to those two units.

With respect to the nonsupervisory bargaining unit, since the parties cba had expired, the parties had no binding arbitration procedure in effect. Therefore, even though the matter involved a good faith dispute over contract interpretation, the Commission examined the Employer's actions with respect to the nonsupervisory unit to determine whether the Employer breached its statutory duty to bargain.

Before making a unilateral change in a mandatory subject of bargaining, an employer must give the union notice and an opportunity to bargain. The Commission concluded that the Employer had a duty to give notice to the Union of its intention to change the funding for the thirteenth check by amending the Retirement Ordinance. The Employer's failure to give that notice during the post-fact finding mandatory negotiations period was a breach of the Employer's duty to bargain.

Where an employer has a duty to bargain, the employer is not required to initiate bargaining. An employer's ►

The States

Michigan Employment Relations Commission, cont.

duty to bargain is conditioned upon there being a demand for bargaining by the union, unless such a demand would have been futile. The Commission found that the Union offered no evidence to show that a bargaining demand would have been futile. Although the Employer did not give notice to the Union of its plan to change the Retirement Ordinance, evidence in the record established that the Union was aware of the Employer's efforts to amend the Ordinance. Therefore, the Commission noted that while the Employer had a duty to give the Union notice of the amendment to the Retirement Ordinance before its enactment, the Employer's failure did not entitle the Union to remain idle after it learned of the amendment.

Despite finding that the Employer breached its duty to bargain with respect to the nonsupervisory bargaining unit by amending the Retirement Ordinance during fact finding without giving notice to the Union, the Commission refused to issue a bargaining order in this matter due to the discretionary nature of the thirteenth check and the Union's failure to demand bargaining over the amendment or its effects. ■

ALRA Members' comments

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

" . . . the ability for our staff to receive other perspectives on the work that we do from other states, FMCS and our colleagues in Canada."

- Mike Cormack, Board Chair, Iowa PERB

The States

Iowa Public Employment Relations Board (PERB)

Amber DeSmet has been recently hired as an Administrative Law Judge (ALJ) at Iowa PERB. She joins ALJs Jan Berry, Susan Bolte and Diana Machir, who have served the agency in experienced roles, and **Jasmina Sarajlija** who was hired in the past calendar year. DeSmet previously worked at the Legislative Service Agency in Iowa, where she helped with the formation of legislative proposals. Sarajlija joined Iowa PERB from the Department of Administrative Services, where she had served as part of their legal team. "We are pleased to have quality Administrative Law Judges on our staff at PERB who serve the citizens of our state in a truly professional manner," said Mike Cormack, Board Chair, Iowa PERB.

Mary Gannon, an attorney who had previously served as the in that role for the Iowa Association for School Boards for the past 24 years, has been appointed by Governor Terry Branstad as the third member of the PERB Board. She fills a vacancy that was created when former member Janelle Niebuhr left that position to become the Chief Law Clerk for a federal judge in Missouri. She began her service on January 4. ■

Save the Date!

Iowa PERB – Upcoming Conference

Iowa PERB will host a two-day biennial training conference for mediators, arbitrators, and employee and employer representatives. The training conference will be held on

September 22-23, 2016 at the Airport Holiday Inn in Des Moines, Iowa

Additional details will be available in the near future at https://iowaperb.iowa.gov

Contact Mike Cormack, Board Chair, at mike.cormack@iowa.gov or 515-281-4046 with any questions.

Ohio State Employment Relations Board Update

By Donald M. Collins, SERB General Counsel

N. Eugene (Gene) Brundige's Tenure at SERB Ends

N. Eugene Brundige's term as a member of the Ohio State Employment Relations Board (SERB) came to an end when he retired December 6, 2015. Since the inception of collective bargaining in Ohio in 1984, Gene has had a guiding hand in Ohio Public Sector Labor Relations. At SERB he has been Chairman, Vice Chairman or Board member since 2008. Prior to SERB he was an Arbitrator and Fact Finder and is a member of the National Academy of Arbitrators.

Mr. Brundige's long career includes serving the Ohio Education Association in a number of capacities. He has been the Chief Negotiator for the City of Columbus and the Director of the Office of Collective Bargaining representing the State Of Ohio in negotiations with its various unions. At his last day in office, he was presented with a Resolution recognizing his long service to Ohio. He looks forward to working with the church and community center he founded and continuing his involvement in labor issues.

DECISIONS OF INTEREST

1. <u>Union Elections – Misleading Statements</u>

Washington-Centerville Public Library v. Washington-Centerville Public Library Staff Ass'n, et al., 10th Dist. Court of App. (Franklin Cty. Case No. 13AP-657) (May 15, 2014)

The union distributed flyers during a union election campaign that the employer claimed contained false and misleading statements regarding membership, dues, picket lines, strikes, and rates. The employer filed a charge with SERB which was dismissed. The Common Pleas Court likewise dismissed the claim. The Tenth District Court of Appeals held, that while the flyer may have contained misleading statements, the library did not show that the misstatements influenced the employees who voted by "instilling fear or otherwise restraining or coercing them concerning their vote." The court quoted SERB by saying, "voters possess basic intelligence and the ability to recognize and understand campaign literature for what it is." ▶

Ohio State Employment Relations Board, cont.

Citing *NLRB v. Hub Plastics, Inc*. 52 F.3d 608 (6th Cir. 1995) , the court continued the standard under the NLRB is whether the "misrepresentation was so artful in its manner and so persuasive in its effect that it affected the employee's free speech and fair choice to such an extent as to necessitate setting aside the election." The court held the trial court did not abuse its discretion when it affirmed SERB's order dismissing the appeal.

2. Picketing – Innocent Party

Harrison Hills City School District BOE v. Harrison Hills Teachers Association, OEA/NEA. SERB 2010-007, Harrison County Court of Common Pleas. Case No. CVH 2010-0052

Here, the Union picketed the private employer of a School Board member after giving the required 10 day strike notice. The picketing took place at the private employer located 30 miles away from the school district. The union gave the Notice of Intent to Strike September 12, 2007, picketed private employment September 26, 2007, went on strike October 02, 2007. (*yes, this decision took a long time.*)

SERB found the picket to be a violation of R.C. 4117.11(B) which prohibits picketing at the place of employment of public officials involved in a labor dispute. On appeal, the Common Pleas Court declined to follow *United Electric Radio and Machine Workers v. SERB* 126 Ohio App. 3d. 345 (8th Dist. 1998). In that case, the Cuyahoga County Court of Appeals found a similar restriction, that barred picketing at the private residence of a public official involved a labor dispute, to be unconstitutional. In Cuyahoga County, the Court held that under strict scrutiny, the statute did not provide a compelling interest nor was it narrowly tailored.

The Harrison County Common Pleas Court found the law constitutional as it was content neutral and narrowly tailored as it provided avenues of protest. The law prevents picketing that targets the homes and places of employment of public officials involved in the labor dispute.

This matter is now being briefed to the Court of Appeals.

3. Voting – Rejection of Report

SEIU, District 1199 (Cleveland Metropolitan School District Board of Education) SERB 2014-002 (2-20-14)

In trying to reject a fact finder report by a 3/5th majority, the union announced a voting period. After realizing it didn't have enough votes to reject the Fact ▶

Ohio State Employment Relations Board, cont.

Finding Report, the union announced a second voting period which included electronic voting. After counting the votes cast and realizing there still weren't sufficient votes to reject, electronic voting reopened the next day. This time notices were sent to specific members who had not voted.

The Board also held that multiple additional voting periods after the close of the announced voting is improper. At least in Ohio, you can't add more periods once you realize you don't have enough votes to reject a Report and Recommendation. Similarly, the Board has yet to recognize electronic voting as a means to reject a Fact Finder Recommendation.

4. Bargaining Unit Work – Erosion

City of Green–SERB 2-14-001 (2-20-14)

The Employer hired non-union part-time firefighters. Since 2001 the city used full-time firefighters; the city started using part-time firefighters without negotiating. Reassignment of bargaining unit work to outside the bargaining unit is mandatory topic of bargaining. The issue presented in this case surrounds union security and the erosion of the bargaining unit. The Board found that the employer failed to negotiate with the union.

5. Protected Activity – Speech

SEIU v. SERB (14CVF-5444, Opinion, Frye J., November 03, 2014)

The Common Pleas Court reversed a Board decision that found the SEIU committed an Unfair Labor Practice when 4 members of the union negotiating team spoke at a school board meeting criticizing the school board's chief negotiator. Negotiations had been ongoing. The court noted there was no negative impact of these comments. The court held given these facts, the Board misapplied the law. The court discussed the free speech rights of unions when making statements in a public forum, about a matter of public concern.

6. Replacement Workers – Public Records

The State Ex Rel. Quolke v. Strongsville City School District Board of Education 2015-OHIO –1083

A public records request was made for the names, home addresses, home telephone numbers, cell-phone numbers, and employee identification and payroll information for replacement workers. The court found these to be public records. The court noted that once the strike was over, there was no threat to employees. ►

The States

Ohio State Employment Relations Board, cont.

The Strongsville teacher strike in the spring of 2013 was a bitter 6 week strike that saw the hiring of replacement workers.

7. <u>Collective Bargaining – Mid Term Modification – Exigent Circumstances</u>

Toledo Police Command Officer's Association v. State Employment Relations Board, (6th District, Case No. L-13-1074, September 26, 2014)

Here the City of Toledo, faced with a precipitous shortfall in the General fund, approached the City's various unions and requested mid-term concessions to help meet the budget shortfall. 7 unions agreed to the requested concessions while the Toledo Police Command Officers Association (TPCOA) did not. The City declared it was faced with "Exigent Circumstances" and unilaterally took the requested concessions from the TPCOA. The union filed a charge with SERB. The Board held in favor of the City under the doctrine of "Exigent Circumstances". The Court of Common Pleas found the City did not bargain to impasse the requested concessions. The Sixth District Court of Appeals held the budget shortfall was foreseeable and under Ohio law, the City was required to bargain to impasse. ■

Save the Dates!

Ohio SERB Upcoming Conferences

State Personnel Board of Review Academy
March 10, 2016
Register online http://www.serb.state.oh.us/index.html

SERB Academy May 19-20, 2016 Online Registration not yet available

SERB Fact-Finding Conference August 19, 2016 Online Registration not yet available

The States

Vermont Labor Relations Board and FMCS Jointly Sponsor Labor Relations Conference

By Tim Noonan, Executive Director, Vermont Labor Relations Board

124 people registered for a labor relations conference on October 9, 2015 jointly sponsored by the Vermont Labor Relations Board and the Federal Mediation and Conciliation Service. The conference had two plenary sessions: one on "Affordable Care Act and Vermont Health Connect: Current and Future Impacts on Health Care Cost Containment Efforts in Public Sector Collective Bargaining," and the other on "Using Employee Assistance Services to Address Drug, Alcohol, Mental Health and Other Issues in the Union-Represented Workplace".

Conference participants also had six workshops to choose from: 1) Chittenden County Transportation Authority and Teamsters Local 597: Transformation of a Relationship; 2) Ethical Issues in Negotiations, Grievances and Unfair Labor Practice Cases; 3) Emerging Issues in Public Sector Contract Negotiations; 4) Using Mediation to Resolve Grievances Before Decision by Arbitrator or Labor Relations Board; 5) Case Study of a School Merger and its Labor Relations Impacts: Chittenden East Supervisory Union; and 6) Preparing and Presenting Cases Before the Vermont Labor Relations Board.

The conference was well-received by participants; 79 percent of attendees who completed the evaluation forms rated the overall program as either excellent or very good. ■

The States

WASHINGTON STATE
PUBLIC EMPLOYMENT
RELATIONS COMMISSION

PERC Implements New Case Management System

Deep in the annals of the ALRA archives is an old presentation by Washington PERC on its cutting edge case management system. That legacy system did represent one of the first that was an all-electronic case management system. Fast forward to 2015 and that cutting edge system was limited in capability, prevented the agency from making certain process efficiencies, and based upon on technology that was no longer supported. In the spring that system seriously began its demise and was literally running a server with harvested parts. Capitalizing on that crisis, the agency received an exemption from the state IT oversight agency regarding IT procurement processes and contracted to implement Salesforce, a cloud based case management platform. In seven week and for $100,000, excluding licenses, the new system was implemented and 40 years of data was exported to the new system. We are in the midst of a follow-up project to fine tune how the system works for us. The capabilities of the new system are quite robust and position us well for the future. We have only scratched the surface of the possibilities with the system, including the app for mobile devices. Our staff are quickly learning how to maximize those capabilities.

PERC Updates Website

2015 was a technology year for Washington PERC. In addition to implementing a new case management system, PERC also launched an updated website. PERC's prior website was based upon a technology that limited our ability to make changes. The website was not user friendly to visitors and limited in its usefulness. The content was dense and not very proactively helpful. In the fall, we launched a new website. The website is built on a platform that makes it easier for us to make changes and less reliant on IT resources. We also strived to update the content to make it more useful and understandable as well. Finally, we have enabled RSS feeds for our decisions and will be launching an email subscription service. We are still in the process of enhancing our decision search tool. Check out the new site at www.perc.wa.gov. ►

The States

Washington Public Employment Relations Commission, cont.

PERC Has Active Teacher Mediation Season

Among the laws administered by PERC is the collective bargaining law for K-12 teachers. While none of our laws provide a right to strike, the teachers are historically the one public sector group that will strike in Washington. This year was the most active season for teacher mediations for PERC in several years. Each of the 295 school districts in the state bargain individually with union representing the teachers from that district. Thankfully they are not all on the same bargaining cycle. This year, we mediated teacher negotiations in twelve districts. There were four teacher strikes in 2015. This was the most since 1994. The strikes occurred in very different districts throughout the state, including the Seattle School District. The longest of the strikes was over two weeks. In two of the strikes, the employer went to court and obtained an order enjoining the strike. Eventually, with the perseverance of our mediators, these disputes and the other teacher disputes were resolved.

PERC Implements Clientele Consultation Committee

In 2015, Washington PERC implemented a Clientele Consultation Committee. The Committee, comprised of representatives from labor and management, will help foster dialogue between PERC and its clientele that will help to better fulfill our statutory mission and better serve the clientele. We conducted our first meeting in August and our second in October. These first two meetings involved a productive dialogue about our services, changes we are contemplating, changes the parties would like us to contemplate, and issues on the horizon. These meetings have already helped us prioritize and implement certain process changes that will help us better serve our clientele. This committee is the direct product of Washington PERC's participation in ALRA because the idea for this committee and guidance on how best to utilize such a committee came from our ALRA colleagues at the Canada Industrial Relations Board and the former Public Service Labour Relations Board. ■

Provinces & Territories

Ontario

Ontario Labour Relations Board

New Members, Important Rulings and Legislative Update

The Board welcomed **Yvon Seveny** and **Paula Turtle** as new full-time Vice-Chairs, and **C. Michael Mitchell** as a part-timer. The Board also welcomed a number of new part-time Members representative of both management and union-side labour relations.

Additionally, and significantly, the Board was able to retain several of its senior adjudicators who had served for ten years, in the face of a government directive that appointments were not to exceed a ten-year period, absent exceptional circumstances. The Board is grateful to the labour bar for its efforts in having the directive relaxed.

On the adjudicative front, the Board issued a number of decisions revolving around the education sector, including a declaration that one of the teachers' unions had engaged in an illegal strike at three district school boards when it had its members withhold services, ostensibly over "local" issues when in fact the subject matter of the withdrawal clearly pointed toward a "central" issue in dispute. The recent school board labour relations legislation differentiated between local and central issues, and provided that the withdrawal of services had to be unassailably directed at one type of issue and not the other (*Durham District School Board* et al., May 26, 2015)

In another significant ruling, the Board determined that replacement workers filling the positions of striking workers had no right to vote in an application to terminate the bargaining rights of the striking union. The Board held that the "purpose of a termination application is to evaluate the representational efforts and performance of the union and this evaluative tool would be considerably diluted if employees with no connection to the union were entitled to vote (*WHL Management Limited Partnership*, April 2, 2015)

On the legislative front, amendments to the *Labour Relations Act, 1995* will shorten the "open period" for construction industry raiding in late winter 2016 (for one union to displace another) from 90 days to 60 days. Changes were implemented or passed (for future implementation) to the *Employment Standards Act, 2000* ▶

Ontario Labour Relations Board, cont.

that: removed the wage entitlement cap of $10,000 per employee; extended the claim time from 6 months to 2 years; protecting child performers; and prohibiting employers from withholding or redistributing employee gratuities. Finally, the definition of "worker" in the *Occupational Health and Safety Act* was expanded to capture unpaid work performed by interns and similarly situated individuals.

Amendments to other legislation over which the OLRB has jurisdiction change the way public sector mergers may occur (*Public Sector Labour Relations Transition Act, 1997*), and provide protection from discharge for so-called "double-hatter" firefighters (those who work in more than one municipality or jurisdiction (*Fire Prevention and Protection Act, 1997*). ■

Inverness Beach, Nova Scotia

ALRA 65th Annual Conference Halifax, Nova Scotia

Please join us for ALRA's 65th Annual Conference in beautiful Halifax, Nova Scotia

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Conference Schedule

The 2016 ALRA Conference will be held in Halifax, Nova Scotia, **July 16 – 19, 2016**.

The ALRA Conference planning committee has been working diligently to put together a diverse and stimulating program. The full conference schedule will be posted on www.alra.org in the near future.

Conference Registration

Online registration for the 2016 ALRA Conference will be accessible at www.alra.org once registration opens.

Hotel Registration

The 2016 ALRA Conference will be held at the Westin Nova Scotian in Halifax, Nova Scotia

The Westin Nova Scotian
1181 Hollis Street, Halifax NS B3H 2P6, Canada
www.thewestinnovascotian.com

A block of rooms is available for the ALRA Conference at the Westin Nova Scotian hotel in Halifax, Nova Scotia at the group rate of $159 Canadian per night (approximately $115 US). Hotel reservations for the Conference may be made online at www.alra.org. Reservations will be accepted until June 14, 2016, or until the room block has been exhausted.

Travel Grants

Information about travel grants for the 2016 ALRA Conference will be available at www.alra.org when registration opens for the conference.

ALRA ASSOCIATION of LABOR RELATIONS AGENCIES

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