ASSOCIATION of LABOR RELATIONS AGENCIES

ALRA Advisor

May 2019

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ASSOCIATION of LABOR RELATIONS AGENCIES

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Articles and Photos

All articles are subject to editing for length and clarity. Images should be high resolution.

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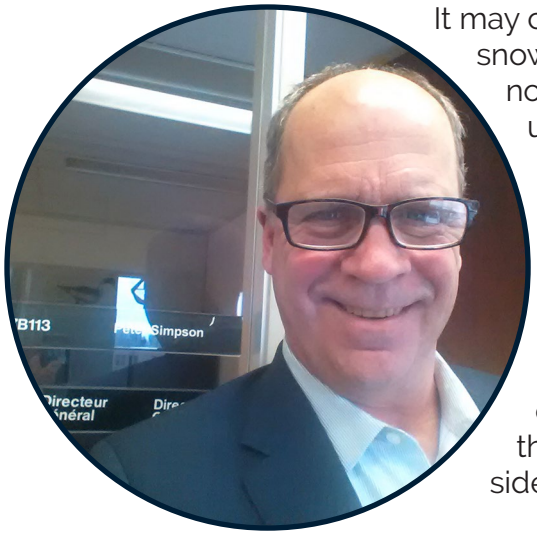
On the Cover: Sunrise over Cincinnati Skyline / Photo Credit: Glenn Hartong (https://www.barberstock.com/cincinnatiusa)

alra.org

FROM THE PRESIDENT



It may come as no surprise that, after complaining of the heavy snow and cold in Canada's national capital region, we are now preoccupied with flood mitigation. We have endured unprecedented flood waters, which appear now to have peaked, and the days of sandbagging were a worthy investment in time and energy.

All of which makes the ALRA conference this summer, Labour Agencies: Bridging Workplace Divides, a welcome focus of energy and attention. The conference registration is now online at alra.org, and one can also find there the current articulation of the two distinct agendas: one for the conference proper and the other for our Advocate's Day, which draws advocates on all sides of the workplace from around the Cincinnati area.

The conference took firm shape after a robust planning session in March, held on site at the Westin in Cincinnati. The meeting was packed with planning discussions, with a short break to tour the amazing facilities at the Westin. I am always amazed at the energy and professional resources our committee members and e-board bring to these planning sessions, and as you can see from the agendas, this is going to be a great conference. Many thanks to everyone who took the time out from professional commitments to their agencies to attend a busy weekend meeting.

As always, there will be some interesting and entertaining options for people keen to explore the area and its attractions, including tickets for a Reds game. Please be sure to sign up early for these, as they are often booked pretty quickly.

A final word here about the person who has taken the lead on this conference in so many ways: Sarah Cudahy, the Executive Director of the Indiana Education Employment Relations Board. Without wanting to downplay the work of all our colleagues serving on committees and the e-board, I would like to thank Sarah for never letting go of any detail, no matter how small, and for maintaining at the same time the larger vision we all share for the conference. Planning a conference takes a village, but even a village needs a leader, and Sarah has jumped into that role in a collegial and selfless way. Thanks Sarah!

I look forward to seeing you at the conference, and to sharing stories and wise counsel with and from our professional colleagues in all capacities at our member agencies.

To Cincinnati!

—Peter Simpson

The Professional Development, Program, and Arrangements committees met in Cincinnati on March 9 to plan the annual conference—and to eat some delicious BBQ from Montgomery Inn!

Photo Credit: 3CDC

68TH ANNUAL CONFERENCE

Labor Agencies: Bridging Workplace Divides

WHEN

July 20–23, 2019

WHERE

Cincinnati, Ohio
Westin Cincinnati
21 E. 5th St., $141/night

Education grants available!

Register at alra.org.

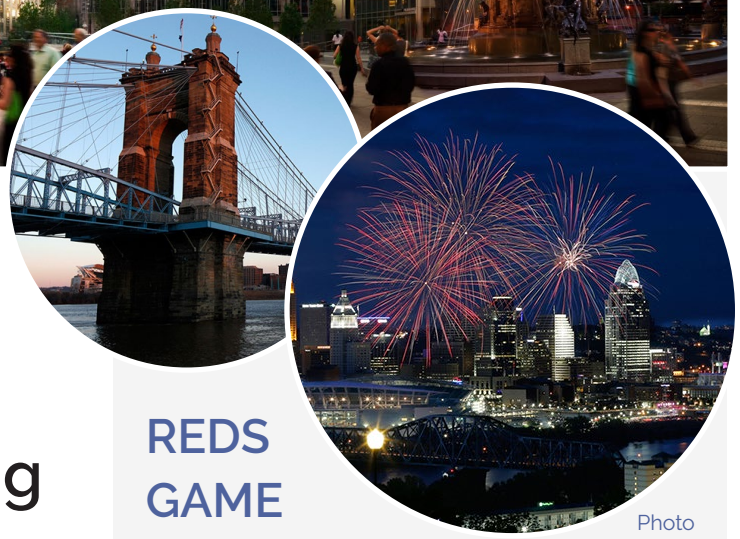


Photo Credits: Amanda Rossmann (left) and Jeff Swinger (right)

REDS GAME

$29

ADVOCATE'S DAY

- Keynote Steven Greenhouse
- Reception at the National Underground Railroad Freedom Center
- Bias training from the Kirwan Institute
- Topics include *Janus*, strikes, and workplace violence

NEW!

Neutrality Buffet – choose professional development topics

RETURNING FAVORITES

- ALRAcademy
- Debaters-Style Ethics
- Roundtables
- Tuesday Banquet

ALRA WEBSITE UPDATED!

You may not have noticed, but the ALRA website was updated very recently. The website is now built on a platform that allows ALRA to make content changes rather than requiring an outside webmaster to do so. These changes will allow the website, and the members-only section in particular, to become a more robust tool to member agencies.

One new feature in the members-only section is that member agencies can directly ask questions of the ALRA membership. Member agency contacts will be notified via email of the new inquiry or post and may post responses. This will facilitate greater and better resource sharing among member agencies—long a hallmark of ALRA.

To access the members-only section, you will need the username and password for your agency. Each agency contact on file should have this information. If that information has been misplaced or the contact on file is no longer with your agency, contact Mike Sellars at mike.sellars@perc.wa.gov.

Since making changes on the old website was an arduous process, there is plenty of member agency information that needs updated. If you have updates for your agency, please send them to Mike Sellars at mike.sellars@perc.wa.gov.

MEMBERSHIP NOTICES MAILED

Membership dues notices were recently mailed to all ALRA members and potential ALRA members. The annual dues allow ALRA to distribute two newsletters, maintain a website, plan for annual conferences, and offer education and training grants to member agencies.

As the only organization consisting solely of neutral agencies responsible for administering labor relations laws or services, ALRA provides unique opportunities for professional development, the sharing of best practices, and learning how trends in labor relations are impacting member agencies.

If your agency did not receive a notice or if you have questions about agency membership, contact Mike Sellars, ALRA Vice President for Finance, at mike.sellars@perc.wa.gov.

ALRA IS ON TWITTER?!

@laboragencies

Follow, like, retweet!

GOT BOOKS?

Has there been a book about the labor movement, labor relations, or dispute resolution that has inspired, influenced, or enlightened you?

If so, please join the **ALRA Book Club**, which will be making its debut at the Cincinnati conference on Tuesday, July 23, 2019.

Marjorie Wittner will be the moderator and she has already started compiling a list of delegates' favorites. Even if you cannot make it to Cincinnati, if there is a book you would like to recommend for the discussion, please email Marjorie at marjorie.wittner@mass.gov. We will publish a full list of recommendations in the post-conference ALRA Advisor.

Thanks, and happy reading!

LABOUR RELATIONS AND DISPUTE RESOLUTION: A TRAUMA-INFORMED APPROACH

Submitted by Virginia Adamson, Executive Director and General Counsel, Federal Public Sector Labour Relations and Employment Board, with special thanks to Marjorie Wittner, Chair, Massachusetts Commonwealth Employment Relations Board, and Susan Atwater, Chief Hearing Officer, Massachusetts Department of Labor Relations

At last year's ALRA conference, a half day of professional development was dedicated to issues of mental health and wellness in the context of dispute resolution and labour relations. This highly educational session started with an excellent presentation by Dr. Kathy Sanders, State Medical Director, and Deputy Commissioner for Clinical and Professional Services, Massachusetts Department of Mental Health. It was followed by breakout sessions by adjudicators and mediators.

The plenary and subsequent workshops offered a discussion on how to better address issues of mental health as a neutral decision maker, mediator, or administrator. Dr. Sanders' comprehensive presentation (available on the ALRA website in the members-only section) started out on the premise that a trauma-informed approach to mental health can assist in addressing mental health issues in an adjudicative or conflict setting.

Dr. Sanders referred to the SAMSHA (Substance Abuse and Mental Health Services Association), which has stated,

> **"Individual trauma results from an event, series of events or set of circumstances that is experienced by an individual as physically or emotionally harmful or life threatening and that has lasting adverse effects on the individual's functioning and mental, physical, social, emotional, or spiritual well-being."**

This often occurs as a result of an adverse childhood event.

The morning training neither offered nor recommended that neutral agency professionals become experts in psychiatric diagnostics to better address mental health issues. Rather, the thrust of Dr. Sanders' presentation was that adjudicators, mediators, lawyers, and administrators must use their existing expertise and tools as a springboard for addressing mental illness. She emphasized the importance of recognizing the high proportion of people who are actually dealing with trauma (sometimes not knowing that they are), the role of trauma in mental health, the fact that mental issues are part of the human experience, and how symptoms of trauma may be identified. She also provided some preliminary and general observations on managing a hearing to minimize re-traumatization.

Noting that high-conflict personalities are often attracted to court-related proceedings, she offered strategies to assist in the adjudicative context. These include using our abilities to calm and ground individuals in a difficult adjudicative context, such as the application of empathy to the condition or problem at hand; reflecting back what is observed to the person; minimizing direct confrontation; expressing concern to support the individual's need to be understood; and acknowledging the person's power to make decisions while at the same time setting boundaries and limitations as needed.

After the plenary, a series of discussions on several scenarios concluded with

these observations from the adjudicators' breakout workshop.

First, a common response raised by adjudicators and others who are professionally trained is that they are not therapists and do not need to learn about mental health issues to do their work. A hearing is a hearing, and its success is rooted in large part to its neutrality. Hearings are intrinsically anxiety producing but this reality cannot become a deterrent to a neutral and impartial process. It is critical nonetheless, that labour relations neutrals keep an open mind about building capacity in the area of mental health. Importantly, this will also allow adjudicators to sharpen their skills.

For example, there are many tools in the adjudicator toolbox that both advance neutrality and assist all those within a hearing to trust the process:

- preparation and, if possible, familiarity with the hearing environment;
- understanding hearing-room protocols; levelling the playing field through a neutral and impartial process;
- active listening;
- ensuring balance by following—and sometimes explaining—the rules of process for the hearing;
- demonstrating objectivity and impartiality;
- ensuring respect in the process to minimize potential shame or embarrassment;
- taking breaks through adjournments or through adjournments with conditions;
- the effective use of paper-based hearings, rather than oral hearings;
- using case conferences as needed to ensure that matters do not languish;
- judicious postponements;
- implementing checks and balances to ensure ethical behaviour at the hearing;
- ensuring the transparency of a hearing process while issuing measured confidentiality orders when they are needed; and
- ensuring the delivery of the decision is understood, for example, by highlighting important facts, law, and argument so that the parties know they were heard.

Second, in conducting a hearing, adjudicators are never expected to be psychological or psychiatric clinicians, nor should they conduct a hearing with a view to diagnosing an individual who is appearing before them. Above all else, the adjudicator will need to protect the mandate of the agency they represent. However, this does not preclude the use of a variety of tools to conduct a fair hearing for the parties, including those who may be vulnerable due to a mental health issue. Protecting the mandate is important in any and every hearing, and empathetic processes are not mutually exclusive in the world of neutral decision-making.

Third, it is not unusual for a neutral decision-maker to encounter areas and facts in any hearing that are not necessarily within their personal expertise or experience. In the domain of mental illness, capacity building is ongoing and, when it comes to learning new areas, capacity building is part of the work of any adjudicator.

Taking courses and gaining knowledge about mental health and wellness may help an adjudicator to manage individuals who are experiencing mental health challenges. But one's neutral empathetic stance before the parties is perhaps even more central to dissolving barriers caused by gaps in understanding or knowledge. Rather than becoming preoccupied with gaps in mental health knowledge during a hearing, it may be much more important to invest in curiosity about the parties and witnesses,

and to leverage that curiosity to examine how empathetic tools may be woven into the toolbox of an adjudicator and the adjudication process.

Fourth, though diagnostic understandings of a mental illness may eventually lead to a better understanding of the nature of specific psychological illnesses, it may not permit a broader understanding of what it means to live with a mental illness. Attempting to diagnose without the expertise to do so may create a situation where the individual suffering from a mental health issue is distanced or stereotyped.

On the other hand, a trauma-informed approach may facilitate a less categorical approach to dealing with mental health and wellness. A trauma-informed approach provides a lens through which mental health issues can be understood within everyday life as commonplace and pervasive. This allows professionals supporting labour relations dispute resolution processes to appreciate that there may only be 'six degrees of separation' from this reality, or they may objectively appreciate that they have experienced trauma themselves. In turn, this understanding of the ordinariness of mental health issues may enhance the ability of adjudicators to manage their personal triggers or any unconscious bias about people with mental illnesses.

Finally, administrators and lawyers in neutral agencies can play an important role in removing barriers around mental illness. By identifying barriers to parties, witnesses, and representatives (as well as the general public observing a hearing), they can advance the vision of accessible processes, without reducing fairness. By becoming aware of the complexity that comes with mental health issues, they can ensure that neutrals have access to processes, resources, people, and other help, including sounding boards and challenge functions. ■

ALRA MEMBER UPDATES

CANADA

CANADA INDUSTRIAL RELATIONS BOARD

Since its creation two decades ago, the Canada Industrial Relations Board (CIRB) has been an independent, representational, quasi-judicial tribunal responsible for the interpretation and administration of Part I (Industrial Relations) and some provisions of Part II of the Canada Labour Code (Code). Its mandate is to support constructive labour-management relations in the federal private sector in Canada. More recently, it was also given responsibility for the interpretation and administration of Part II (Professional Relations) of the Status of the Artist Act.

It is anticipated that in June 2019, a number of existing and new adjudicative functions under the Code and the Wage Earner Protection Program Act (WEPPA) will be transferred to the CIRB pursuant to Bill C-44. These transfers and amendments to the Code and the WEPPA aim to simplify employment-related recourse for federally regulated employees and employers by creating a single access point to adjudicate certain employment disputes.

Consolidation of Mandates

Previously, there were five distinct adjudication mechanisms under Part II (Occupational Health

and Safety) and Part III (Labour Standards) of the Code:

1. If an employer or employee disagreed with a decision or a direction from a Health and Safety Officer, they could appeal it to an Appeals Officer of the Occupational Health and Safety Tribunal, an administrative arm of the Labour Program;

2. Employees in the federally regulated private sector could—and still can—file a complaint with the CIRB if they believe that they have suffered a reprisal for having raised concerns about occupational health and safety matters;

3. Non-unionized employees subject to Part III of the Code could ask the Minister of Labour to appoint an adjudicator to hear their unjust dismissal complaint;

4. Employees could also ask the Minister to appoint an adjudicator to hear a genetic testing complaint; and

5. Employers or employees who disagreed with the decision of a Labour Standards Officer regarding the outcome of a complaint on the non-payment of wages or other amounts owing could request a ministerial review and, in some cases, the appointment of a referee to review the decision.

In addition, the Wage Earner Protection Program (WEPP) provides for the payment of outstanding eligible wages to individuals whose employer is bankrupt or subject to a receivership under the Bankruptcy and Insolvency Act. The payment covers eligible wages (wages, vacation pay, disbursements of a travelling salesperson, termination pay, severance pay) up to an amount equal to seven times the maximum weekly insurable earnings under the Employment Insurance Act ($3,977 for 2018). When an individual receives a WEPP payment, they sign over their wage claim to the Government of Canada, up to the amount of the WEPP payment that they received. The Government of Canada then attempts to recover the amount paid from the employer through the bankruptcy or receivership proceedings. Under the WEPPA, appeals of administrative review decisions concerning eligibility or overpayments were heard by an adjudicator appointed by the Minister of Labour.

With so many bodies responsible for adjudicating employment-related matters, there was at times confusion for federally regulated employers and employees. In addition, when appeals were received, managed, and decided by different bodies or persons, the resulting variation in expertise or procedures could lead to inconsistent outcomes and conflicting or contradictory results. Furthermore, the previous system could cause unnecessary delays between the moment an appeal or complaint was filed and the date on which a final decision was rendered.

Bill C-44 transfers to the CIRB the adjudicative functions of appeals officers under Part II and of wage referees and unjust dismissal adjudicators under Part III of the Code, as well as the functions of adjudicators under the WEPPA. The Code has also been amended to adjust the CIRB's powers, duties, and functions to reflect the expansion of its new adjudicative functions.

New Reprisals Protection

In addition, Bill C-44 will provide employees with a new recourse against reprisals for availing themselves of their labour standards rights and provides a complaint mechanism for employees whose employer has retaliated against them for exercising their rights under Part III of the Code. This recourse is similar to existing provisions in Part II (Occupational Health and Safety) of the Code for which the CIRB is already responsible.

In the past, there were limited redress mechanisms for employees who were the victims of reprisals for exercising their labour standards rights under the Code. Certain employees facing a reprisal in the form of a dismissal could file an unjust complaint, subject to a number of conditions. However, while the unjust dismissal process could address certain cases of reprisal through reinstatement and compensation orders, it was of limited application. It is important to note that the unjust dismissal process is not available to employees who are managers, are

covered by a collective agreement, or have not completed at least 12 consecutive months of service. Moreover, it does not address forms of reprisal that fall short of a dismissal (e.g., demotions, reductions in wages and work hours, or other changes to working conditions).

Pursuant to Bill C-44, the new recourse covers several forms of reprisal, such as dismissals, suspensions, layoffs, demotions, financial or other penalties, refusals to provide training or a promotion, disciplinary actions or threats to take any such action because the employee

- is pregnant;
- has taken a leave covered by labour standards (e.g., parental leave);
- is subject to garnishment proceedings;
- has filed a labour standards complaint;
- has testified or is about to testify in a proceeding taken or an inquiry held under the labour standards provisions of the Code;
- has given information or provided assistance to the Minister or an inspector; or
- has exercised or tried to exercise a right under the Code, including new rights once they come into force (e.g., right to request flexible work arrangements, new leaves).

An employee who believes that he or she is the victim of an act of reprisal will now be able to file a complaint with the CIRB within 90 days from the date on which the employee knew (or ought to have known, in the view of the CIRB) of the action or circumstances that led to the complaint. If successful, the employee may be entitled to certain remedies such as financial compensation, reinstatement, and the rescinding of disciplinary action. The CIRB will also have the power to order the employer "to do any other thing that the Board considers equitable for the employer to do to remedy or counteract any consequence of the reprisal." The employer will have the onus of proving that the actions taken against the employee are not in contravention of the Code.

Giving the CIRB the power to receive, manage, and decide on all adjudication under Part II and Part III of the Code as well as under WEPPA leverages the existing national infrastructure and expertise of the CIRB. It is hoped that it will also ensure consistent and timely resolution of issues by increasing efficiency. The CIRB looks forward to receiving these new mandates and continuing to serve Canadian employees, employers, and unions. ■

SAVE THE DATE!

2019 National Industrial Relations Conference

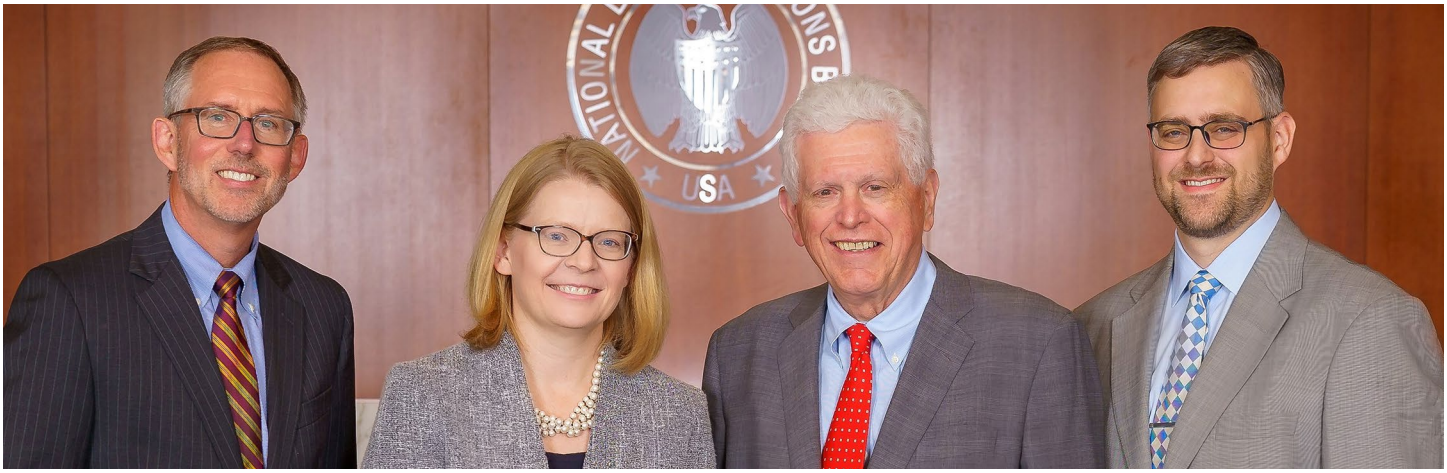
The Canada Industrial Relations Board is pleased to be partnering with the Canadian Federal Mediation and Conciliation Service again this year to host the 2019 National Industrial Relations Conference. The Conference will be held in the great Ottawa Region, September 18 to 20, 2019, at the DoubleTree by Hilton Hotel in Gatineau, Quebec, Canada.

This biannual conference offers a unique program which brings together representatives from labour and management from across Canada to discuss the latest trends, legislative changes, and developments affecting the federal labour relations scene.

Registration details will be made available soon. For more details, please visit the CIRB's website at http://www.cirb-ccri.gc.ca.

UNITED STATES

NATIONAL LABOR RELATIONS BOARD



National Labor Relations Board Members: Chairman John F. Ring, Lauren McFerran, William J. Emanuel, and Marvin E. Kaplan

NLRB Sets Standards Affecting Nonmember Objectors, Union Lobbying Expenses Are Not Chargeable

On March 1, 2019, the National Labor Relations Board (NLRB or Board) ruled that nonmember objectors cannot be compelled to pay for union lobbying expenses. The Board majority held that lobbying activity, although sometimes relating to terms of employment or incidentally affecting collective bargaining, is not part of the union's representational function, and therefore lobbying expenses are not chargeable to "*Beck*" objectors. The ruling relies on relevant judicial precedent holding that a union violates its duty of fair representation if it charges agency fees that include expenses other than those necessary to perform its statutory representative functions.

The Board majority also held that it is not enough for a union to provide objecting nonmembers with assurances that its compilation of chargeable and nonchargeable expenses has been appropriately audited. Citing the "basic considerations of fairness" standard adopted by the Supreme Court, the Board held that a union must provide independent verification that the audit had been performed. Failure to do so violates the union's duty of fair representation.

The case, *United Nurses & Allied Professionals (Kent Hospital)*, is the Board's long-awaited decision affecting certain rights of nonmember objectors under the Supreme Court's decision in *Communications Workers of America v. Beck*, 487 U.S. 735 (1988). In that decision, the Supreme Court held that private-sector nonmember employees subject to union security who object to the expenditure of their agency fees for activities other than collective bargaining, contract administration, or grievance adjustment can only be compelled to pay that portion of the agency fee necessary to the union's performance of "the duties of an exclusive representative of employees in dealing with the employer on labor-management issues."

Chairman John F. Ring was joined by Members Marvin E. Kaplan and William J. Emanuel in the majority opinion. Member Lauren McFerran dissented.

NLRB Returns to Long-Standing Independent-Contractor Standard

On January 25, 2019, the NLRB issued a decision that returned to its long-standing independent-contractor standard, reaffirming the Board's adherence to the traditional common-law test. In doing so, the Board clarified the role entrepreneurial opportunity plays in its determination of independent-contractor status, as the D.C. Circuit has recognized.

The case, *SuperShuttle DFW, Inc.*, involved shuttle-van-driver franchisees of SuperShuttle at Dallas-Fort Worth Airport. Applying its clarified standard, the Board concluded that the franchisees are not statutory employees under the National Labor Relations Act (NLRA or the Act), but rather independent contractors excluded from the Act's coverage.

The Board found that the franchisees' leasing or ownership of their work vans, their method of compensation, and their nearly unfettered control over their daily work schedules and working conditions provided the franchisees with significant entrepreneurial opportunity for economic gain. These factors, along with the absence of supervision and the parties' understanding that the franchisees are independent contractors, resulted in the Board's finding that the franchisees are not employees under the Act. The decision affirms the Acting Regional Director's finding that the franchisees are independent contractors.

The Board's decision overrules *FedEx Home Delivery*, a 2014 NLRB decision that modified the applicable test for determining independent-contractor status by severely limiting the significance of a worker's entrepreneurial opportunity for economic gain.

Chairman John F. Ring was joined by Members Marvin E. Kaplan and William J. Emanuel in the majority opinion. Member Lauren McFerran dissented.

Board Granted Review and Invited Briefs Regarding Jurisdiction Over Charter Schools

On February 4, 2019, the NLRB issued an Order in KIPP Academy Charter School, 02-RD-191760, granting review in part and inviting the filing of briefs regarding whether the Board should exercise its discretion to decline jurisdiction over charter schools as a class under Section 14(c)(1) of the NLRA and, therefore, modify or overrule the 2016 *Hyde Leadership Charter School—Brooklyn* and *Pennsylvania Virtual Charter School* decisions. NLRA section 14(c)(1) provides that the Board may decline to assert jurisdiction over labor disputes involving any class or category of employers where the effect of the dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction.

Chairman John F. Ring was joined by Members Marvin E. Kaplan and William J. Emanuel in granting review and inviting the filing of briefs. Member McFerran dissented. ■

MASSACHUSETTS COMMONWEALTH EMPLOYMENT RELATIONS BOARD

PERSONNEL CHANGES

The cross-pollination between federal and state labor relations agencies in Boston continues. As we mentioned in the last newsletter, Phil Roberts, the former Regional Director of the Boston Regional Office of the Federal Labor Relations Authority (FLRA) began serving as the Massachusetts Department of Labor Relations (DLR) director in August 2018. In March 2019, the DLR hired Gail Sorokoff, former Senior Attorney from the Boston FLRA as a hearing officer and mediator. Gail, a graduate of Tufts University and George Washington University Law School, has over twenty years of federal-sector labor

relations experience and is ready to hit the ground running.

In December 2018, former Executive Secretary and Acting Director Ed Srednicki and former Mediation Services Manager Heather Bevilacqua retired, and the DLR threw them a party to celebrate their many years of outstanding service. Happily, Ed has decided to return to the DLR as a part-time mediator, enabling the DLR to continue to reap the benefits of his many years of experience administering Massachusetts collective bargaining laws.

CASE DEVELOPMENTS

Oral Argument Held in Post-*Janus* Appeal

Branch et al. v. Commonwealth Employment Relations Board, Docket No. SJC-12603

As we announced in the last Advisor, the Massachusetts Supreme Judicial Court (SJC) will soon be deciding a case challenging exclusive representation rights under Massachusetts' public sector collective bargaining statute. The case is an appeal of a pre-*Janus*, unpublished Commonwealth Employment Relations Board (CERB) ruling that dismissed three separate prohibited practice charges relating to the compulsory payment of agency service fees for lack of probable cause. The SJC decided to hear the appeal in the first instance and solicited amicus briefs on three issues, including the following:

> *Whether, by permitting a union to be the exclusive employee representative with respect to bargaining on the terms and conditions of employment, but failing to require that non-union public employees have a voice and a vote with respect to those terms and conditions, G.L.c. 150E impermissibly coerces non-union member public employees to discontinue the free exercise of their First Amendment rights.*

Oral argument was held on January 8, 2019. Massachusetts Assistant Attorney General Tim Casey argued the case on behalf of the CERB. Bruce Cameron of the National Right to Work Legal Defense Foundation argued on behalf of the Appellants. Jeffrey Burritt, staff counsel at the NEA, represented the intervenor unions. You can view the parties' briefs at http://www.maappellatecourts.org/search_number.php?dno=SJC-12603&get=Search and the oral argument at https://boston.suffolk.edu/sjc/archive.php.

A decision is expected by May 2019.

Board of Higher Education v. Commonwealth Employment Relations Board, Docket No. SJC-12621

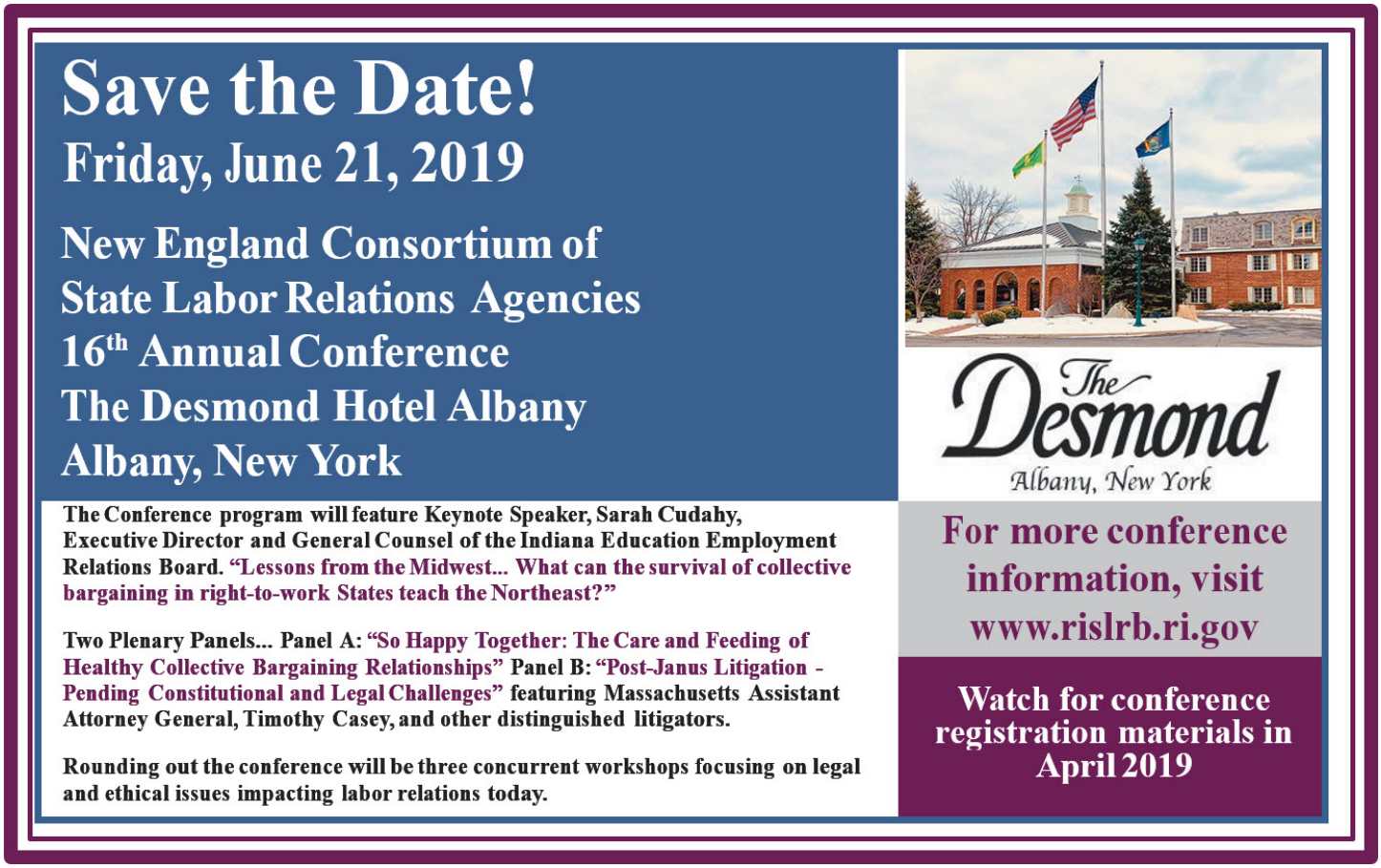
As announced in the last Advisor, the SJC decided to hear a case challenging a CERB decision holding that the Board of Higher Education unlawfully repudiated a contract provision that established a percentage for the number of courses that adjunct professors could teach. When soliciting amicus briefs, the SJC framed the issue before it as follows:

> *Where a provision in the collective bargaining agreement between the Board of Higher Education and the union representing faculty at certain Massachusetts State colleges and universities limits the percentage of courses that may be taught by part-time faculty, whether that provision impermissibly intrudes on the statutory authority under G.L.c. 15A, § 22, to appoint, transfer, dismiss, promote and award tenure to all personnel, or on the board's authority to determine and effectuate educational policy.*

Oral argument was held on February 7, 2019. James Cox, Esq., of Rubin and Rudman argued the case on behalf of the Board of Higher Education; DLR Chief Counsel T. Jane Gabriel argued on behalf of the CERB; and Laurie Houle, staff counsel at the Massachusetts Teachers Association, argued on behalf of the intervenor Massachusetts State College Association.

You can view the briefs at http://www.ma-appellatecourts.org/search_number.php?dno=SJC-12621&get=Search and the oral argument at https://boston.suffolk.edu/sjc/archive.php.

A decision is expected by June 2019. ■



MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Michigan Employment Relations Commission Launches its MERC e-File System

In late 2018, the Michigan Employment Relations Commission (MERC) launched its new, state-of-the-art case management system, MERC e-File, to process new cases filed on or after December 17, 2018. Two months later, the public-facing component of the system was made available on the agency's website, www.mi.gov/merc. For the first time, public

constituents could search and view limited information on any pending or disposed MERC case filed since late 2018. In addition, party representatives could "e-file" new cases or submit materials on existing cases with greater convenience and less formality. The MERC e-File system is available to the public 24 hours a day, seven days a week. The agency's shift to allow public e-filing of cases and e-access to case information is consistent with Michigan state government's continued commitment to making state agency information more accessible and convenient for those that seek it.

Highlights of the MERC e-File system and agency case processing enhancements include the following:

1. ***Dispute Category:*** Contract, Grievance, Unfair Labor Practice, Elections, and Work Stoppage.

2. ***Case Type:*** Exist among each Dispute Category:
   - *Contract*—CB (collective bargaining);
   - *Grievance*—GM (grievance mediation), GA (grievance arbitration);
   - *Unfair Labor Practice*—CE (charge against employer), CU (charge against Union);
   - *Elections*—RC (certification), RD (decertification), UC (unit clarification);
   - *Work Stoppage*—WS (private sector strike/lockout); SS/SL (public school strike/lockout).

3. ***Case Initiation:*** Requires at least 2 parties plus 1 filing party representative with a valid email address. No system login required to initiate a new case.

4. ***Case Number:*** 2-digit filing year, alpha filing month, chronological sequence for the year plus case type suffix (e.g., 19 B-0307-CB; 19 C-0667-UC).

5. ***Statement of Service:*** Variable options exist to upload a completed statement, create a statement within the system, or submit a document at a later time. By year end, MERC e-Serv will be added for system service.

6. ***Add Filings to Existing Cases:*** Requires login access via the "Case Access Request" button located at the top of each specific case or "Login" button at the top of the main search page.

7. ***Act 312 & Fact-Finding Petitions:*** Filed on existing CB cases to create the hearing stage.

8. ***Case Documents:*** MERC-issued orders are accessible to the public as an attachment to the specific filing event. Party representatives who are active on a pending case and logged into the system can view documents filed by the respective parties. Certain materials are internal to MERC only and not viewable outside of the agency (e.g., show of interest documents).

9. ***Party & Representative Info:*** Limited details are displayed. For entities or companies, the name, address, and phone display; for individuals/persons, the name only.

10. ***Union Audits:*** Search for the union account to view existing audits or to file a new audit.

Hopefully these highlights have sparked your desire to check out the MERC e-File system, if for no other reason than to explore case-related information that is now reachable to anyone through a PC, laptop, tablet, or smart phone.

MERC e-File does not replace traditional filing methods (e.g., mail, email, and fax) permitted by MERC policy.

More MERC e-File details are available on the agency's website at www.michigan.gov/merc.

Summaries of Recent Noteworthy Decisions

The full text of each of the decisions summarized here is available on MERC's website at www.Michigan.gov/MERC.

Wayne County -and- AFSCME Local 3317, Case No. D18 G-0877, issued November 14, 2018

The parties' last collective bargaining agreement was originally effective from October 1, 2011, through September 30, 2014. The union filed a petition for Act 312 arbitration on August 19, 2014. The parties entered into a memorandum of agreement (MOA) dated October 1, 2014, which provided that the Act 312 petition would be dismissed without prejudice but could be refiled on a date after the November 4, 2014, general election but no later than December 15, 2014. The agreement further provided that the collective bargaining agreement would be extended until the Act 312 petition was refiled or December 15, 2014, whichever occurred earlier. The parties amended the MOA several times, and each of the amendments extended the collective bargaining agreement and extended the deadline by which the Act 312 petition could be refiled. In June 2015, the union requested to reinstate the Act 312 petition, but the Commission dismissed the petition.

On August 21, 2015, Wayne County entered into a Consent Agreement with the State Treasurer pursuant to § 8 of the Local Financial Stability and Choice Act, 2012 PA 436 (Act 436). Since the parties' collective bargaining agreement had expired as of June 22, 2015, the County was authorized to impose new terms and conditions of employment (the County Employment Terms). The new County Employment Terms replaced the provisions of the expired collective bargaining agreement as of September 21, 2015.

In October 2018, the union filed a petition for Act 312 arbitration. The County argued that the petition for Act 312 arbitration was premature because the parties had not yet engaged in mediation. The union noted that the parties had met with mediators during the period between November 2017 and January 2018. Because those meetings occurred prior to the filing of the notice of status negotiations form on July 19, 2018, Bureau of Employment Relations Director Ruthanne Okun administratively dismissed the Act 312 petition. The chief question that remained for the Commission to resolve was which document provided the starting point for the parties' negotiations.

Although the union contended that the parties' 2011–2014 collective bargaining agreement was the starting point for the current negotiations, the Commission held that the County was authorized to impose the County Employment Terms by Act 436 and its Consent Agreement with the State Treasurer. The Commission also found that the union failed to point to any language in Act 312, Act 436, the Consent agreement, the parties' October 1, 2014, memorandum of agreement, or the subsequent amendments to the memorandum of agreement that would support its argument that the 2011–2014 collective bargaining agreement would "automatically be reinstated" when the suspension of the employer's duty to bargain was terminated. Finally, the Commission noted that the language of § 12(1)(k)(iv) of Act 436 did not apply to the situation before it because no emergency manager was appointed in this case.

Consequently, the Commission concluded that the document currently covering the parties' relationship was the document containing the County Employment Terms dated September 23, 2016, and that the terms and conditions of employment set forth in that document shall be the starting point for the parties' negotiations.

Macomb County -and- Michigan Fraternal Order of Police Labor Council, Case No. C16 K-125, issued November 14, 2018

Macomb County and the Police Officers Association of Michigan (POAM) were parties to a collective bargaining agreement that covered a bargaining unit comprised of the deputies and dispatchers employed by the Sherriff's Department of the County. On August 5, 2016, the Michigan Fraternal Order of Police Labor Council (charging party) filed a representation petition with the Commission and sought to replace the POAM. The charging party won the election and the Commission certified the charging party as

the authorized bargaining representative for the deputies and dispatchers.

The charging party filed its unfair labor practice charge alleging that the employer violated § 10(1)(a) and (e) of the Public Employment Relations Act (PERA) by failing to recognize it as the authorized bargaining representative under PERA and by failing to remit to the union all dues collected by the County and paid to the incumbent POAM after the charging party's certification by the Commission.

The Administrative Law Judge (ALJ) found that the County did recognize the charging party and allow it to act freely in representing the bargaining unit in various matters before the contract between POAM and the County expired. The ALJ also found that the County acted in accordance with established Commission precedent when it remitted dues to the POAM under the unexpired contract.

The Commission found that the charging party failed to cite any compelling reason that would require the Commission to overturn long-standing precedent that an employer must continue to deduct dues, pursuant to the dues check-off provision of a collective bargaining agreement, on behalf of a union after another union has been certified as the exclusive bargaining representative.

Although the charging party offered to assume the POAM's bargaining and representation duties in return for an agreement that would end the POAM's entitlement to dues, the POAM rejected the charging party's offer and never disclaimed interest in the unit. Therefore, the County chose to follow established Commission precedent and the Commission found that to now punish it for doing so would, as correctly noted by the ALJ, be manifestly unjust.

Howell Area Fire Department -and- Michigan Association of Fire Fighters, Case No. R18 H-065, issued January 22, 2019

The Michigan Association of Fire Fighters (petitioner) sought to represent a bargaining unit consisting of all regular part-time firefighters employed by the Howell Area Fire Department (employer). The employer employed approximately sixty part-time firefighters. That group included part-time firefighters who worked regularly scheduled weekday shifts of twenty or thirty hours per week on a continuous basis. Those employees must work their scheduled shifts unless excused by the employer and had the option of working on call. Most of the part-time firefighters employed by the employer worked on call. They worked sporadically, they were called to work by the employer when needed, and they had the option of choosing whether to accept the work when called.

The Commission found the part-time firefighters who worked regularly scheduled weekday shifts to be regular part-time employees who were entitled to organize. The Commission explained that unlike the part-time firefighters who worked on call, the regularly scheduled part-time firefighters had a sufficiently substantial and continuing interest in their employment to justify their inclusion in a collective bargaining unit.

The Commission did not find merit to the employer's argument that all regularly scheduled part-time firefighters and on-call firefighters shared a community of interest because they regularly worked together at the same fire scenes performing the same work. Unless the parties agree, the Commission does not include casual or irregular part-time employees in the same unit with regular part-time or full-time employees.

Further, the Commission rejected the employer's contention that the two regularly scheduled part-time employees who worked as assistant chief when working on call should be excluded from the bargaining unit as supervisors. The Commission noted that it normally would not include employees with supervisory authority in the same bargaining unit with employees whom they supervise. However, the Commission explained that § 13 of PERA provides an exception to that rule and prohibits excluding firefighters from a bargaining unit because they have supervisory authority if they are subordinate to a safety director or other similar fire department administrator. Although these employees had some supervisory authority

when working on call, they are subordinate to the employer's fire chief and deputy chief. Thus, the Commission found that the regularly scheduled firefighters who worked as assistant chief when working on call could not be excluded from the bargaining unit.

Accordingly, the Commission directed an election to determine whether all regular part-time firefighters employed by the Howell Area Fire Department would be represented by the Michigan Association of Fire Fighters.

Hurley Medical Center -and- Registered Nurses and Pharmacists Association, Case No. C17 G-066, issued January 2, 2019

The union represents nurses and pharmacists employed by Hurley Medical Center (employer). On June 8, 2017, the employer's attorney sent an email to the union's attorney containing what the employer described as its "Last Best Offer" for a new collective bargaining agreement. The union's attorney wrote back suggesting that they meet to discuss and negotiate over the changes included in the employer's June 8 proposal. The employer's attorney requested that he be provided with a list of the union's questions before determining whether it was necessary for the parties to meet. Between then and June 27, 2017, the attorneys exchanged emails about the proposed meeting. In those emails, the employer's attorney insisted that any meeting would be limited to responding to the union's questions about the June 8 proposal and only the two attorneys, the employer's labor relations officer, and the union president were to attend the meeting. On the other hand, the union's attorney insisted that the meeting would include continuing their negotiations for a new contract and that the union's full bargaining team would attend. After several emails back and forth, the employer's attorney declared that the sole purpose of the meeting was limited to the employer answering questions about its June 8 proposal and unless the union's attorney accepted that premise in writing, there would be no meeting. The union's attorney wrote back asking if the employer was refusing to negotiate. The employer's attorney responded by canceling the meeting.

The ALJ found that the employer's June 8 proposal contained changes from the employer's earlier offers. The ALJ, therefore, found that the employer had a duty to bargain with the union after the union requested to negotiate over the changes. Thus the ALJ concluded that the employer violated its duty to bargain when it refused to meet with the union for negotiations.

The Commission affirmed the ALJ's decision finding that the employer breached its duty to bargain in good faith by refusing to negotiate with the union after submitting the June 8 proposal to the union. The Commission agreed with the ALJ that the June 8 proposal contained several changes from the employer's prior offers. Inasmuch as the union had demanded bargaining after receiving the June 8 proposal, the employer had a duty to negotiate with the union.

The Commission also found that by repeatedly attempting to limit the union's choice of representatives with whom the employer would discuss the changes in the June 8 proposal, the employer violated its duty to bargain in good faith. The Commission explained that the employer must bargain with the union's chosen representatives and was not entitled to pick and choose from the members of the union's bargaining team.

Further, by insisting that the union take its June 8 proposal to union membership for a vote, before the parties could meet the Commission found that the employer was not approaching the bargaining process with an open mind and a sincere desire to reach an agreement.

The Commission found the employer failed to assert sufficient facts to establish that the parties were at impasse at the time the employer submitted the June 8 proposal to the union. However, the Commission concluded that the question of whether the parties were at impasse on or before June 8, 2017, was immaterial. The fact that the employer offered a new proposal containing language not previously discussed by the parties broke any impasse if one had existed. The fact that the union made a timely bargaining demand after receiving the June 8 proposal

required additional good-faith negotiations by the parties.

The Commission rejected the employer's argument that "the introduction of new concepts only breaks an existing impasse if they constitute a 'substantial change' in the bargaining position of one party" citing *Kalkaska Co Rd Comm*, 29 MPER 65 (2016). The Commission explained that *Kalkaska* is not applicable to this case because it involved the question of whether an impasse had been broken by a change in the union's offer. In this case, it was the employer that changed the terms of its proposal from those that were in its prior offer. The Commission explained, "An employer cannot declare impasse indicating that it is in a position to impose its last best offer, then present a proposal that contains changes from the terms of its prior offer and, without further bargaining, declare that the parties are still at impasse. The employer must negotiate over the changes from its prior offer."

The Commission found no merit to the employer's argument that the ALJ erred by not granting an evidentiary hearing, as Rule 165 of the General Rules of the Michigan Employment Relations Commission authorizes an ALJ to summarily dispose of a case when there is no material issue of fact. In this case, the undisputed facts established that the employer refused to negotiate with the union after the union demanded to bargain over the terms of the June 8 proposal.

Utica Community Schools -and- Utica Education Association -and- Utica Federation of Teachers, AFT Michigan, Case Nos. C15 J-131 & CU15 L-045, issued January 18, 2019

Prior to 2015, the Utica Community Schools (employer) operated two alternative education programs, one in the daytime and the other during the evening. The day program was staffed by teachers who were members of a bargaining unit represented by the Utica Education Association (UEA). Teachers assigned to the evening program were part of a bargaining unit represented by the Utica Federation of Teachers (UFT). Once the evening program was consolidated with the day program, both were renamed the Alternative Learning Center.

In 2014, the employer became concerned with the achievement levels of alternative education students and decided to develop a new alternative education program which would emphasize the use of technology and eliminate all traditional classroom teaching, while still providing instruction from teachers as necessary. The employer also decided to staff the new alternative education program with members of the UFT bargaining unit. As a result, the UEA filed a grievance asserting that the removal of bargaining unit positions from the alternative education program violated the collective bargaining agreement. The employer denied the grievance noting that the matter involved a prohibited subject of bargaining that was excluded from the grievance process. As a result of the denial, the UEA filed its unfair labor practice charge. The employer filed a counter charge against the UEA asserting that it violated PERA by filing a grievance challenging the staffing of the new alternative education program and by advancing that grievance to arbitration.

The ALJ found that the employer did not violate PERA by creating the Alternative Learning Center and staffing the center with UFT members. However, the ALJ found that UEA violated § 15(3)(j) by demanding that the employer arbitrate its grievance challenging the staffing of the Alternative Learning Center.

According to the Commission, the ALJ properly concluded that the Employer did not violate § 10(1)(e) by unilaterally deciding to assign teaching duties to members of the UFT bargaining unit to the exclusion of UEA members. The Commission found that the evidence established that the teaching of alternative education was a responsibility which was shared by UEA and UFT members for more than twenty years until the school district made the decision to assign those duties to only UFT members in August 2015. The Commission also found that the case did not involve a question of unit placement because the UEA failed to prove that the employer transferred, or attempted to

transfer, any UEA member or UEA represented position into the UFT bargaining unit.

Further, by filing its grievance seeking the recall of all teachers who were laid off, the Commission found that the UEA was effectively seeking to have an arbitrator make decisions with respect to teacher placement, a prohibited subject of bargaining. Consequently, the Commission found that the ALJ properly concluded that the UEA violated § 15(3)(j) when it attempted to process the grievance involved in this dispute to arbitration.

The Commission adopted the ALJ's recommended order which included a cease and desist order, a directive for the UEA to withdraw its grievance, and a directive for the UEA to refrain from enforcing any arbitration award that may have been issued. ■

OHIO STATE EMPLOYMENT RELATIONS BOARD

Upcoming Training and Conference Dates

- **SPBR Conference** was held on March 22, 2019, at the Crowne Plaza Dublin. The conference was sold out with a total of 150 people in attendance. CLE credits were approved for 5.5 units. Reviews were very positive; it was an excellent conference.
- **Advanced Negotiations Training** was held on April 16, 2019, at the State Library. The training was at maximum capacity of 70 registrations. The training is also scheduled for June 6, 2019; September 19, 2019, is set for overflow if needed.
- **Spring SERB Academy** was held on May 2 and 3, 2019, at the Crowne Plaza Dublin.
- **Ohio Ethics Law Training for Staff & Board:** Susan Willeke, Education & Communications Administrator for the Ohio Ethics Commission, will present the annual Ohio Ethics Law Training per Governor DeWine's Executive Order 2019-11D on Thursday, June 27, 2019, in Hearing Room 1 at 1:30 p.m.
- **Fact-Finding Conference** is scheduled for September 20, 2019, at the Crowne Plaza Dublin.

Planning for 2020:

- **SPBR Conference 2020** is tentatively scheduled for Friday, March 6, 2020, at the Crowne Plaza Columbus North- Worthington.
- **SERB Academy 2020** is tentatively scheduled for Thursday and Friday, May 7 and 8, 2020, at the Crowne Plaza Columbus North– Worthington.
- **Fact-Finding Conference 2020** is tentatively scheduled for Friday, August 28, 2020, at the Crowne Plaza Columbus North– Worthington. ■

WASHINGTON STATE PUBLIC EMPLOYMENT RELATIONS COMMISSION

PERC and the FMCS Host Another Successful Northwest Chapter LERA Conference

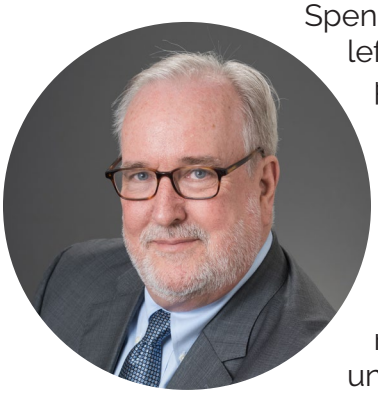
PERC and the FMCS once again teamed up to sponsor another successful Northwest Chapter Labor and Employment Relations Association (LERA) conference. The two-day conference drew over 450 attendees and is regularly one of the largest LERA chapter conferences each year.

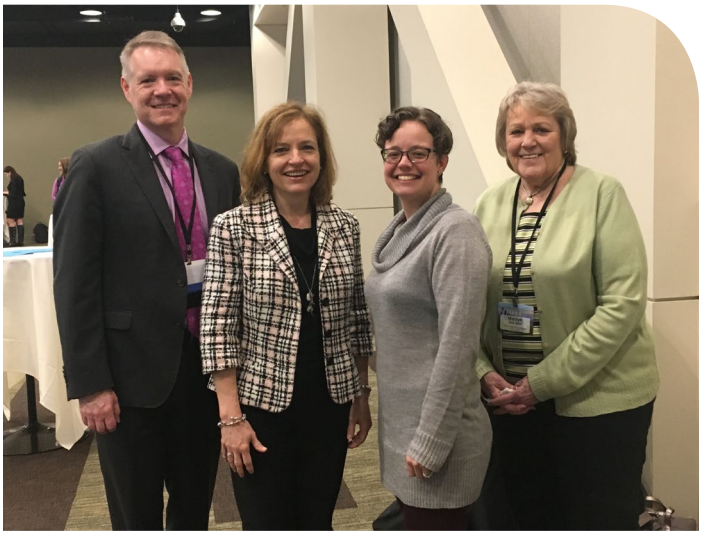
The sessions this year included presentations on civility programs, shop steward fundamentals, representation in the U.S. and Canada, how parties repaired and improved their labor management relationship, organizing teams for bargaining success, understanding biases, the future of labor relationships in Washington public schools, labor developments and case updates, and life after *Janus*.

Presenters included ALRA colleagues Ginette Brazeau of the Canada Industrial Relations Board and Sarah Cudahy of the Indiana Employment Relations Board. Ginette copresented on representation in the U.S. and Canada, and Sarah copresented on current labor law trends.

Commission Changes

In March, Governor Jay Inslee appointed Kenneth Pedersen to the Commission. Ken replaces Spencer Nathan Thal, who left to focus on his law practice. Ken has nearly forty years of labor relations experience as an advocate and a neutral. Ken spent thirty years representing labor unions in the public and private sectors in Washington, Oregon, and Alaska. For the last seven years, Ken has served as an arbitrator of labor relations disputes. Ken is a graduate of Gonzaga University and Seattle University School of Law. His appointment became effective March 21 and expires September 8, 2023.





Mike Sellars, Ginette Brazeau, Sarah Cudahy, and Marilyn Glenn Sayan at the Northwest Chapter LERA conference in Seattle.

Legislative Changes

The recently concluded legislative session resulted in some changes impacting the collective bargaining statutes PERC administers.

House Bill 1575 makes a number of changes around union security, authorization and revocation of payroll deductions for union dues, and the eligibility threshold for card checks.

First, the bill repeals all provisions in the state's collective bargaining statutes that authorized union security provisions. The bill also eliminates any liability for employers or unions for requiring or deducting agency fees prior to the date of the United States Supreme Court's decision in *Janus*.

The bill provides that employees may agree to the deduction of membership dues by written, electronic, or recorded voice authorization. The employee may revoke that authorization only in writing "in accordance with the terms of the authorization."

Finally, for employees who currently may organize via card check, the threshold to proceed to card check is reduced from 70 percent to 50 percent plus one.

Decisions of Interest

King County, Decision 12952 (PECB, 2018), *aff'd*, Decision 12952-A (PECB, 2019)

The county's Metro Transit Division (Metro) contracted with the King County Sheriff's Office for transit police services. The transit police needed a new facility from which to work and that would be a precinct of the Sheriff's Office.

County code established that the county's Facilities Management Division was responsible for acquiring, disposing, inventorying, leasing, and managing real property. The code also contained a provision addressing Metro's authority to acquire property necessary for metropolitan public transportation and water pollution abatement.

The union represents Metro employees who have experience securing leases for transportation projects. However, Metro did not own a property that would meet the transit police's needs. Thus, the employer determined it needed to enter a commercial lease. The employer assigned the work of acquiring a lease for the new transit police facility to employees in the Facilities Management Division.

The union alleged the employer skimmed bargaining unit work when the employer assigned the acquisition of property for the transit police precinct to employees outside of the bargaining unit. An examiner and the Commission, on appeal, found that the employer did not skim bargaining unit work.

The threshold question in a skimming case is whether the employer assigned bargaining unit work to non-bargaining unit employees. While the code gave Metro the authority to acquire and manage transit property, it also reserved the right for the county executive to direct the Facilities Management Division to acquire the property. Bargaining unit work is work that has historically been performed by bargaining unit employees. Both the examiner and Commission concluded that the Facilities Management Division was acquiring property that would not be used for a transportation function and, therefore, was not bargaining unit work.

Tacoma School District, Decision 12975 (PECB, 2019)

The Tacoma School District employs security officers who guard and patrol school district premises to maintain a safe environment and protect district property, staff, and students.

The school district previously armed the security officers. Concerns over liability, issues with adequate insurance coverage, and the larger philosophical issue of whether armed security officers fit within the district's educational mission prompted the employer to decide to disarm the security officers. However, it only provided nine days' notice to the union before removing the firearms.

The union filed an unfair labor practice complaint alleging that the employer breached its good faith bargaining obligation by unilaterally disarming the security officers.

The examiner found that the decision to disarm (or arm) security officers was not a mandatory subject of bargaining. The school district's general managerial prerogative to determine how work is performed predominated over the union's interest in employee safety, particularly in light of the employer's interest in safety by preventing an accidental discharge of a weapon by an employee.

However, the impacts to security officers' safety were significant because of the abrupt nature in which the firearms were recalled. The union had only nine days within which to attempt to bargain any effects of the recall on the employees' working conditions and to determine the protocols and performance expectations the security officers would then be under. Thus, the school district was required to bargain the effects of the firearm recall prior to implementing the change. ■