ASSOCIATION of LABOR RELATIONS AGENCIES

ALRA Advisor

May 2023

IN THIS ISSUE

ALRA NEWS

ALRA MEMBER UPDATES

ALRA ASSOCIATION of LABOR RELATIONS AGENCIES

The ALRA Advisor is published biannually (early spring and fall). On occasion, special issues are produced on an ad hoc basis.

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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: Aerial view of downtown Vancouver, British Columbia / Photo Credit: Destination Vancouver/Albert Normandin

FROM THE PRESIDENT

Mike Sellars

Here at the end of May, we are just about six weeks away from the 71st Annual ALRA Conference in Vancouver, BC. The conference is scheduled for July 15–18, 2023, at the Pinnacle Hotel Harbourfront. Registration information can be found at https://alra.org/registration. The theme for this year's conference is Labour Transformation in the New Era of Work. There will be panels looking at the new economic reality and issues important to workers at the bargaining table; shifts in organizing; post-pandemic issues in the transportation industry; diversity, equity, and inclusion at the bargaining table; and the use of new tools and techniques in dispute resolution. Among the featured participants are Jim Stanford, economist and director of the Centre for Future Work, and Jennifer Abruzzo, NLRB General Counsel.

The conference will be the first in-person ALRA event since the 2019 conference in Cincinnati, Ohio. It was three years ago in early March 2020—when the conference planning committee met in Vancouver to plan the 2020 conference—that the first deaths from COVID-19 occurred in North America. Within two weeks everything was shut down, and Vancouver 2020 became Vancouver 2021, then Vancouver 2022, and now Vancouver 2023. Much has changed in those three years.

What has not changed is the value and importance of ALRA. ALRA is unique in that it is the only organization comprised solely of neutral labor relations agencies whose role is to administer the laws and mandates of their respective jurisdictions. ALRA does not include advocates or for-hire neutrals.

This unique element is our strength. It allows member agencies to discuss issues facing neutral agencies, explore how other agencies have addressed issues, and share practices and tools. I know that my agency has "borrowed" many tools and processes from other agencies, which was only made possible by our participation in ALRA. This has allowed us to better meet our mandates and meet the needs of our stakeholders.

Like labor relations, ALRA succeeds and endures because of relationships. For the member agencies, those are relationships with one another. The conference this July will be an opportunity to foster and strengthen those relationships as well as develop and share ideas, practices, and tools. This ultimately benefits all member agencies, not just conference attendees.

ALRA continues to work to provide programming outside the annual conference. On June 9, there will be a webinar on developing the next generation of neutrals. This webinar is an opportunity for designating agencies and other interested agency staff to share ideas with colleagues across Canada and the U.S. on advocating for an inclusive and more representative group of ADR professionals that better reflect the communities we serve. Click here to register.

I hope to see you in Vancouver in the beautiful Pacific Northwest.

—Mike Sellars

SAVE THE DATES!

ALRA Roundtable
A Discussion on the Next Generation of Neutrals
Friday, June 9, 2023, at 1:30 – 3:00 p.m. EDT
by Zoom

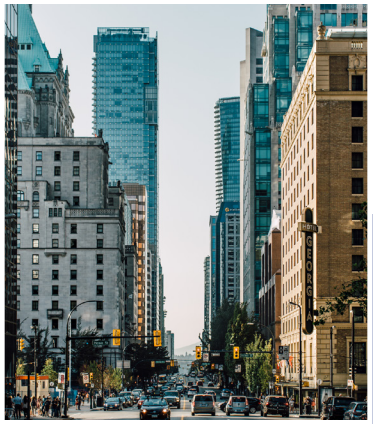
This webinar is an opportunity for designating agencies and other interested agency staff to share ideas with your colleagues across Canada and the U.S. on advocating for an inclusive and more representative group of ADR professionals.

Topics to be discussed will include: The demographics, size, and use of current agency panels; Application requirements/qualifications; Does your panel reflect the workforce they serve? Are you getting new qualified applicants? Do new applicants better reflect the workforce you serve? Are there existing barriers to ensuring a future qualified and diverse panel? What are the issues? What are the agencies doing to address these issues? Can we do things differently?

The webinar is open to employees of member-eligible agencies. Click here to register or email info@ALRA.org. A link for the session will be provided upon registration.

Destination Vancouver/Nelson Mouellic

Destination Vancouver/Albert Normandin



Destination BC/Tanya Goehring

71st Annual ALRA Conference
Labour Transformation in the New Era of Work
Vancouver, BC, Canada | July 15–18, 2023

The 71st annual conference will be held at the **Pinnacle Hotel Harbourfront** in the heart of downtown, Vancouver, in close proximity to Stanley Park and the shopping and entertainment districts. A block of city-view rooms is reserved for **$279 CAD/night** for ALRA conference delegates.

Register for the conference and book your hotel room at https://alra.org/registration.

Join Us in Beautiful British Columbia!

ONTARIO LABOUR RELATIONS BOARD

Recent Developments

After nearly three years of conducting hearings exclusively online, the Board has started its return to in-person hearings. As of this writing, all new applications filed with the Board will default to in-person hearings, with certain exceptions where matters will continue to be heard by video conference. The Board requested submissions and conducted a town hall to get input from its community to determine how to make the most of the technological innovations necessitated by the pandemic, while recognizing that in-person hearings are preferable for many types of proceedings.

The Board also introduced procedures for parties to use electronic, rather than paper, documents in in-person hearings which have been well-received by our community.

Important Decisions

There were two significant decisions from the Ontario Court of Appeal (ONCA) restoring Board decisions issued prior to the pandemic. These were the Board's first Court of Appeal decisions following the Supreme Court of Canada's revisiting of the standard of review applicable on a judicial review of administrative tribunal decisions in *Vavilov*. The Court of Appeal strongly endorsed the Board's expertise. These cases are summarized below.

Turkiewicz (Tomasz Turkiewicz Custom Masonry Homes) v. Bricklayers, Masons Independent Union of Canada, Local 1, 2022 ONCA 780, November 16, 2022; Panel: Gillese, Trotter, and Harvison Young JJ.A.

The ONCA set aside the Divisional Court decision and upheld the original Board decisions. The applicant unions filed a related employer application and a construction grievance against Turkiewicz, a sole proprietorship. The Board found that Turkiewicz and his former business were a single employer within the meaning of section 1(4) of the Labour Relations Act (the "Act") and that Turkiewicz was bound to a collective agreement with the unions. In a related grievance proceeding, the Board ordered *Blouin Drywall* damages in respect of Turkiewicz's violations of the collective agreement.

On judicial review, the Ontario Divisional Court quashed the Board's decision as unreasonable. The Divisional Court considered that there was no valid labour relations purpose to this related employer declaration: this was not a case where an employer intentionally repositioned its business to avoid its labour relations obligations. The Divisional Court also considered the awarding of *Blouin Drywall* damages to be punitive.

On appeal, the ONCA found that the Board decisions were reasonable, applying the considerations set out in *Vavilov*. The Board decisions properly assessed the evidence and the parties' submissions, and the potential impact on Turkiewicz. The ONCA considered that the relevant legal constraints reinforced the reasonableness of the decisions and also noted that section 1(4) of the Act confers a broad discretion on the Board. Where the preconditions under section 1(4) are met, the Board may make a related employer declaration, and section 1(4) does not expressly require other matters to be considered. The ONCA concluded that the Divisional Court erred in its application of the reasonableness standard as set out in *Vavilov* and failed to show the requisite restraint and respect for the specialized expertise of the Board. Contrary to the view of the Divisional

Court, the Board did consider whether there was a labour relations purpose for the single employer declaration, particularly the erosion of bargaining rights, and it was not open to the Divisional Court to substitute its own opinion that there was no labour relations purpose. The ONCA also concluded that the Divisional Court improperly made findings of fact that were not before the Board. The ONCA further concluded that the Board's damages award, which applied *Blouin Drywall*, was reasonable. Finally, the ONCA concluded that the Divisional Court erred in refusing to remit the matters to the Board and instead substituting its own decision. The ONCA allowed the appeal, set aside the Divisional Court's decision, and restored the Board's decisions.

Enercare Home & Commercial Services Limited Partnership v. Unifor Local 975, 2022 ONCA 779; Dated: November 16, 2022; Panel: Gillese J.A Trotter, and Harvison Young JJ.A.

The ONCA set aside the Divisional Court's decision and upheld the original Board decision. The union filed an application under section 1(4) of the Act in respect of the employer and three entities to which it subcontracted work. The Board found that the employer and two of the subcontractors were related and issued a declaration under section 1(4). The Board held the contracting-out provisions under the collective agreement and the sections 1(4) and 69 [successor employer] analyses were separate and distinct. The Board found the preconditions for a section 1(4) declaration were met and there was a valid labour relations reason to issue the declaration in respect of two of the subcontractors.

On judicial review, the Divisional Court quashed the Board decision, concluding that the Board's decision failed to take into account the parties' bargaining history, collective agreement, and the relevant letters of understanding which addressed contracting out.

On appeal, the ONCA disagreed with the Divisional Court and restored the Board's decision. The ONCA found that the Board's decision was rational and logical. The preconditions for a single employer declaration were met and there was a valid labour relations purpose and the decision was tenable in light of the factual and legal constraints. The Board clearly identified the evidence, the parties' submissions and labour relations concerns with the section 1(4) declaration. The ONCA noted that section 1(4) of the Act confers a broad discretion to the Board and that the Board was informed by a significant body of jurisprudence. The ONCA found that the Divisional Court did not properly apply *Vavilov* and instead substituted its own findings, that the Divisional Court should not have undertaken a de novo analysis, and that it did not properly assess the Board's reasons. Appeal allowed and Divisional Court decision set aside, restoring the Board's Decision.

Legislative Update

Since 2021, the Ontario Government has passed two "Working for Workers" statutes amending the Employment Protection for Foreign Nationals Act, 2009; the Employment Standards Act, 2000; and the Occupational Health and Safety Act to address "new" aspects of employment, including recruitment of workers, the right to "disconnect" from work, noncompete agreements, licencing of recruitment and temporary help agencies, electronic monitoring, and naloxone kits in the workplace. The Working for Workers Act, 2022 also creates the Digital Platform Workers' Rights Act, 2022 (not yet declared in force), which establishes certain minimum standards for workers in the "gig" economy. ■

UNITED STATES

BARGAINING AND OTHER ISSUES RELATING TO THE VACCINE MANDATE AND ITS IMPLEMENTATION IN NYC

By Kim Nosek-Henderson and Susan Panepento

In the June 2022 issue of the Advisor, we reported, along with our colleagues at the New York State Public Employment Relations Board, on lawsuits in New York to enjoin implementation of public employer COVID-19 vaccine mandates. At the time, most of those efforts were not successful. However, resolution of the labor relations issues raised by the pandemic lingered through 2022 and 2023 for the New York City Board of Collective Bargaining ("Board"). Vaccine mandates unilaterally implemented by New York City in fall 2021 caused the City unions to file several improper practice petitions and arbitration demands. Most of the Board's decisions on those cases were issued in 2022 and are summarized below.

As context, it is important to know that the employees of the City of New York are well organized into over 75 bargaining units. Under the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL"), most economic and common terms and conditions of employment for civilian employees are negotiated on a city-wide basis by a coalition of unions.[1] *See* NYCCBL § 12-307 (a)(2). Uniformed employees, and a few units of similar-to-uniformed employees, have the right to bargain their terms and conditions of employment at the bargaining unit level but will sometimes form bargaining coalitions with other unions to resolve economic terms. *See* NYCCBL § 12-307 (a)(4) and (5). The City engages in pattern bargaining and in each round of bargaining an economic pattern will often be set with one of the largest unions first.

Similar to many public and private sector labor laws, Section 12-306 (a)(4) of the NYCCBL requires an employer and union to bargain in good faith on matters within the scope of collective bargaining. The NYCCBL defines mandatory subjects of bargaining as "wages (including but not limited to wage rates, pensions, health and welfare benefits, uniform allowances and shift premiums), hours (including but not limited to overtime and time and leave benefits), working conditions and provisions for the deduction of dues from the wages or salaries of employees . . . ." NYCCBL § 12-307 (a). It also contains a management rights clause that expressly reserves to management the rights to "maintain the efficiency of governmental operations; determine the methods, means and personnel by which government operations are to be conducted;" "determine the standards of services to be offered by its agencies; determine

1 The statute and cases cited herein are available on the Office of Collective Bargaining's website, www.ocb-nyc.org.

the standards of selection for employment;" to "direct its employees;" and to "take disciplinary action." NYCCBL § 12-307 (b). This provision also notes that management has the right to "take all necessary actions to carry out its mission in emergencies." *Id.* However, the statute provides that "questions concerning the practical impact" of decisions that are reserved to management on terms and conditions of employment are mandatory subjects of bargaining, "including, but not limited to, questions of workload, staffing and employee safety." *Id.*

In the first vaccine mandate case to come before the Board, *MLC*, 15 OCB2d 34 (BCB 2022), the issue was limited to bargaining over the implementation of the mandate. The Board noted, and the parties did not dispute, that the courts had generally held that the vaccine mandate was a qualification or condition of employment. The Board found that the City violated the NYCCBL by failing to bargain over mandatory subjects contained in its implementation policies and procedures. Specifically, the Board found that "the use of paid leave for those who failed to comply" with the vaccine mandate and "the deadlines and appeals process for those employees whose requests for a reasonable accommodation are denied" are mandatory subjects of bargaining. *MLC*, 15 OCB2d 34, at 12, 14. Consequently, the City was directed to bargain with the petitioners over any remaining issues concerning terms and conditions of employment in implementation of the vaccine mandate.[2]

The next case concerned not only bargaining over implementation but also challenged the City's decision to require the vaccine. In *UFA*, 16 OCB2d 7 (BCB 2023), the Board found that under the extremely unique circumstances caused by the COVID-19 pandemic, the decision to impose the vaccine mandate fell within the City's express statutory authority under the NYCCBL to carry out its mission during an emergency and was not a mandatory subject of bargaining. In reaching this conclusion, the Board noted that it had previously held that new qualifications of employment for incumbent employees are mandatory subjects of bargaining. However, it declined to follow this precedent due to the extraordinary circumstances posed by the pandemic and the need to maintain the safety and efficiency of its operations. Additionally, the Board found that the petitioner unions did not allege facts sufficient to warrant a hearing on the practical impact of the vaccine mandate on employees' health and safety or workload. However, the Board found that the City had a duty to bargain over procedures related to proof of vaccination. Accordingly, like in *MLC*, the City was ordered to bargain in good faith over any remaining issues concerning terms and conditions of employment in implementation of the vaccine mandate.

2 The Board also noted that procedures and penalties relating to discipline against unvaccinated employees might be subject to bargaining; however, in the absence of evidence that the City initiated disciplinary proceedings against employees who chose not to vaccinate, the Board did not find that the City violated its duty to bargain in good faith. The Board also declined to order restoration of the *status quo ante* based on the relief sought by the petitioners and the emergency nature of the mandate.

The Board also considered a failure to bargain claim over the termination of employees who failed to comply with the vaccine mandate. In *LEEBA*, 16 OCB2d 8 (BCB 2023), a union claimed that the City violated NYCCBL § 12-306 (a)(5) when it terminated unvaccinated bargaining unit members and ceased their health benefits. The Board found that the City did not have a duty to bargain over the decision to terminate employees for failing to comply with the vaccine mandate because it was "a qualification of employment" that "'results in forfeiture of employment.'" *Id.* at 10 (quoting *Felix v. N.Y. City Dept. of Citywide Admin. Servs.*, 3 N.Y.3d 498, 501 (2004)). As the cessation of health benefits in this instance was a consequence of termination, the Board did not address it separately. Finally, the Board found that the City did not refuse to bargain over termination procedures.

None of the decisions described above were appealed.

The Board also resolved several cases that concerned other vaccine-related issues. In *UFA, Local 94*, 15 OCB2d 33 (BCB 2022), and *NYDCC*, 15 OCB2d 31 (BCB 2022), the City challenged the arbitrability of the unions' grievances relating to the vaccine mandate. In *UFA, Local 94*, the Board granted, in part, the City's petition challenging the arbitrability of a grievance alleging that the Fire Department of the City of New York ("FDNY") violated the parties' collective bargaining agreements, an FDNY regulation, and an FDNY policy by placing bargaining unit members on leave without pay ("LWOP") for refusing to comply with the City's vaccine mandate. The Board found that the portions of the grievance concerning extra-Departmental employment and use of certain accrued economic benefits were arbitrable but that the portions of the grievance challenging the placement of unit members on LWOP was not arbitrable.

In *NYDCC*, the Board granted the City's petition challenging the arbitrability of two grievances alleging that incentive payments granted by the City to encourage vaccination during a nine-day period in October 2021 were issued selectively and arbitrarily in violation of various economic agreements, which require uniform and equitable compensation for bargaining unit members. While the unions broadly asserted that there was a reasonable relationship between the City's incentive payments and the parties' economic agreements, they failed to support their assertion that the economic agreements require compensation to be applied uniformly to each bargaining unit member. They also failed to allege any specific provisions of the agreements that were inequitably applied. Accordingly, the Board found that the unions did not establish the requisite nexus.

Both *UFA, Local 94*, and *NYDCC* were appealed, and the Article 78 proceedings are currently pending before the Supreme Court, New York County.

Finally, the Board considered a matter concerning a union member's claim that her union breached its duty of fair representation in violation of NYCCBL § 12-306 (b)(3) when it refused to file grievances on her behalf, including grieving her termination for failing to comply with the vaccine mandate. *See Ibreus*, 15 OCB2d 30 (BCB 2022). The Board dismissed the petition, finding that certain allegations were time-barred and that the timely claims did not establish that the union breached its duty of fair representation. In particular, the Board found that petitioner had not shown a legal basis upon which the union could grieve the termination, noting that the vaccine mandate was issued pursuant to State regulations and petitioner did not dispute that her employer had notified her of the mandate. ■

FEDERAL MEDIATION AND CONCILIATION SERVICE

FMCS Realigns Agency to Meet Future Goals and Mission

The Federal Mediation and Conciliation Service (FMCS) initiated an organizational realignment beginning in mid-2022 to adjust operations to improve efficiency, effectiveness, and accountability. This decision was made based on client feedback, inconsistent application of administrative functions, and a variety of operational inefficiencies. The adjustments streamlined operations to optimize workload balance, service provision alignment, work direction, reporting, and case management. They will also provide additional opportunities for advancement while effectively meeting all statutory authorities. The realignment modified or merged 16 management positions (approximately two-thirds of all management positions) as well as the senior leadership structure.

Please join us in congratulating the following personnel on their new positions:

- Kevin Buffington – Client Services Manager
- Sarah Cudahy – Associate Deputy Director of Field Operations - National
- Walter Darr – Field Operations Manager
- Shane Davis – Field Operations Manager
- Jennifer Disotell – Field Operations Manager
- Peter Donatello – Field Operations Manager
- Joshua Flax – Deputy Director for Policy and Strategy
- Michael Franczak – National Projects Manager
- Kathy Hall – Field Operations Manager
- Charlene Kapp – Field Administration Manager
- Tammy Poole – Field Operations Manager
- Beth Schindler – Associate Deputy Director of Field Operations - Regional
- Peter Swanson – Manager of Conflict Management and Prevention Services - International

FMCS Creating New Client Services Access Portal

FMCS is creating a new online web portal to better coordinate its intake of work and improve the client experience. The web portal will offer clients the option to set up user accounts to simplify service requests and self-monitor the status of requests.

FMCS processes 14,000–15,000 notices of expiring labor contracts and hundreds of new bargaining unit certificates received each year. Additionally, the agency handles thousands of requests for services like mediation, facilitation, training, card checks, shared neutrals, and providing names from its arbitrator roster. All industrial labor relations services provided by FMCS are funded by Congress and there are no additional charges to the parties and clients.

The new web portal is yet another initiative FMCS is putting into place following the 2022 realignment and mission intention on client focus alongside a brand-new Office of Client Services.

Other items targeted for updating are the agency's website and an exploration of all the agency's client relationship management needs. If you want to know more about FMCS services, please visit www.fmcs.gov or email the Office of Client Services at clientservices@fmcs.gov.

FMCS Awaits Congressional Funding of 2024 Budget

FMCS is requesting $55,815,000 in its 2024 budget, which is $2,110,000 (3.9%) above its 2023 appropriation of $53,705,000. This request reflects a proposed 5.2% government-wide pay

increase and recognizes FMCS's significant role in carrying out more than 25 specific recommendations of the first and second White House Task Force Reports on Worker Organizing and Empowerment (Task Force).

Continuing the strategic realignment that it started in the fall of 2022, FMCS is realizing cost savings by reducing office space, outsourcing document printing, and moving many of its information technology systems into shared service (cloud) environments. FMCS is using some of these savings to fund positions that support its implementation of Task Force recommendations. ■

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Highlights of Cases Issued Awpril 2022 through March 2023

Duty to Bargain - Lifetime, Non-Modifiable Healthcare Stipend

Wayne Professional Fire Fighters Union, Local 1620, International Association of Fire Fighters -and- City of Wayne, Case No. 20-L-1801-CE issued May 10, 2022.

As part of an ongoing Act 312 arbitration proceeding, the parties submitted their Final Offers of Settlement to the 312 arbitrator. The union's offer included a vested, lifetime, non-modifiable healthcare "stipend" to any eligible current member who retires under the term of the new contract. The employer objected and sought outside action in Circuit Court to (i) stay the Act 312 proceeding and (ii) challenge the 312 arbitrator's authority to grant such a lifetime healthcare benefit. The union responded by filing the instant charge asserting that the city's filing in Circuit Court violated section 10(1) (a) and (e) of the Public Employment Relations Act (PERA). The charge asserts that the employer refused to bargain by seeking an outside remedy (Circuit Court) rather than participating in the Act 312 process authorized under the PERA and Act 312. The Administrative Law Judge (ALJ) concluded that the 312 arbitrator is authorized to consider the union's non-modifiable healthcare stipend proposal and that the employer violated its bargaining duty by initiating the legal action in Circuit Court. The Commission agreed with the ALJ's findings that the employer had violated its duty to bargain by frustrating the bargaining process. The Commission found that a collective bargaining agreement (CBA) may vest unalterable lifetime retirement healthcare benefits for employees retiring during the term of that agreement, provided that the agreement is explicit and unambiguous. (NOTE: Case is on appeal with the Michigan Court of Appeals, 8-14-2022.)

Community of Interest

Richmond Community Schools & Michigan Education Association, 21-D-0875-RC, issued June 15, 2022.

The district maintains and operates a series of preschool and childcare programs at its Lee Elementary School. The three programs operated by the district relevant to this petition are (1) a childcare program for before and after school care (Childcare Program); (2) the Great Start Readiness Program which serves three- and four-year-old students (GSRP); and, (3) a tuition-based preschool program which also serves three- and four-year-old students (Preschool Program).

The Michigan Education Association (MEA) filed a petition seeking to represent GSRP and Preschool Program lead teachers, aides, and childcare providers employed by the district. The district refused to consent to an election,

citing a lack of a community of interest and fragmentation concerns. The district also argued that the Lead Childcare Provider position should be excluded from the unit based on supervisory status. The Commission found that the positions possessed a sufficient community of interest to be placed in a single bargaining unit and directed an election in the matter. The record established that, for the majority of duties performed in the GSRP and Preschool Program, the lead teachers and support positions have large areas of overlap and that some individuals moved between the positions on a daily basis. Additionally, with respect to the Childcare Program, the Commission found evidence of both interaction and collaboration with the staff of the other two programs. The Commission also found that the district had failed to establish that the Lead Childcare Provider position qualified as a supervisor, as its supervisory authority primarily related to the routine direction of the daily work of other employees. In addressing the district's concern regarding fragmentation, the Commission found that due to the lack of interest from existing bargaining units in representing these positions, the placement of positions together satisfied the Commission's primary objective of advancing the right of public employees to be represented by representatives of their choosing.

Prohibited Subjects of Bargaining

***Van Buren Education Association MEA/NEA & Van Buren Public Schools*, Case No. 21-E-1225-CU, issued June 17, 2022.**

The parties' existing CBA provided for "overage" compensation to any teacher with a semester enrollment that exceeded 175 students as of the official count day. After the onset of the COVID-19 pandemic, an increased number of students in the district chose virtual instruction over in-person classes. As a result, the employer assigned many teachers to increased and even exclusive virtual classes during the school year. A teacher in the unit sought payment of the increased compensation based on their enrollment that exceeded the 175 threshold. The employer refused, asserting the overage compensation did not apply to virtual classes. The union filed a grievance seeking the extra compensation and asserting the threshold provision applied to semester enrollment regardless of in-person or virtual classes. The employer denied the grievance, indicating it involved a prohibitive subject, specifically its decision to implement a pilot program involving new technology. The union sought to advance the grievance to arbitration, to which the employer filed an unfair labor practice charge. The charge asserted that the union's arbitration intent implicated a prohibited subject as it related to the teacher's increased workload that was an impact of the decision to use technology to deliver educational programs and services. The ALJ disagreed, finding the grievance and arbitration attempt to arbitrate did not violate the PERA because the union's grievance did not challenge the district's implementation of the virtual teaching medium but only sought to enforce payment under the overage compensation provision in the CBA. Foremost, the Commission determined that any question on whether the overage compensation provision was intended to apply to virtual teaching assignments is a matter of contract interpretation to be resolved through grievance arbitration. The Commission also found that the employer had not established that this teacher's increased "workload" or the added wages due to the workload were the "impact" or "effect" of the virtual teaching program. The Commission noted no evidence existed that the higher enrollment assigned to this teacher was an "impact" or result of the virtual learning program versus some other factor such as teacher attrition. Consequently, the Commission adopted the ALJ's decision finding the union's enforcement of the "overage pay" provision through grievance arbitration was not violative as it did not implicate a prohibited subject of bargaining.

Confidential Exclusion

***Detroit Public Schools Community District -and- Detroit Association of Educational Office Employees*, 21-D-0915-UC-02, issued July 15, 2022.**

This action is a bifurcation of the parent case (21-D-0915-UC) for which the ALJ scheduled evidentiary proceedings as to the remaining positions related to the initial unit clarification

petition. The Detroit Association of Educational Office Employees (DAEOE) represents a bargaining unit consisting of clerical and technical employees of the Detroit Public Schools Community District (district). The DAEOE filed a unit clarification petition asking the Commission to determine the appropriate unit placement of the Executive Administrative Specialist (EAS) position, which was unrepresented for purposes of collective bargaining. The district contended that the petition was inappropriate because the EAS had been in existence since 2017 and had historically been excluded as confidential. The record reflected that the president of the DAEOE testified that she had knowledge of the EAS classification since 2018 but could not explain why the DAEOE did not file for unit clarification at that time. On that basis, the Commission dismissed the portion of the petition relating to the placement of the EAS position into the DAEOE as untimely and inappropriate.

Challenge to Tabulation of Election Results

***City of Richmond -and- Michigan Fraternal Order of Police -and- Police Officers Association of Michigan*, 22-C-0518-RC, issued August 9, 2022.**

The Michigan Fraternal Order of Police (petitioner) sought to replace the Police Officers Association of Michigan (incumbent union) as the certified exclusive bargaining representative of an existing bargaining unit comprised of all full- and part-time patrol officers employed by the City of Richmond. Following the deadline for returning the mail ballots in the election, the elections officer had received 12 of a total of 13 possible ballots. Of the received ballots, 11 had signatures on the return envelopes while the twelfth was unsigned. The elections officer deemed the twelfth ballot to be spoiled because its return envelope was unsigned and contrary to the warning in the agency's mail ballot instructions that accompanied each issued mail ballot. After tallying the 11 ballots, the petitioner had won the election by a single vote. Subsequently, the incumbent union objected to the exclusion of the twelfth ballot, arguing that neither the PERA nor the Commission's rules require a signature on a return envelope for validity and that the questionable ballot could be determinative of the election's outcome. The Commission agreed with the incumbent union that its administrative rules do not contain a signature requirement; however, neither do the rules of the National Labor Relations Board (NLRB). The NLRB, however, has long reasoned that the signature was necessary so the ballot could be identified as cast by an eligible voting employee. The Commission found the NLRB's rationale to be appropriate in ensuring the integrity of mail ballot elections and found no reason to deviate from its requirement that return ballot envelopes be signed. Thus, the Commission upheld the decision of its elections officer and ordered that the twelfth ballot remain unopened. As a result, the petitioner was certified as the exclusive bargaining agent.

Teacher Placement

***Kalamazoo Education Association, MEA/NEA -and- Kalamazoo Public Schools*, Case No. 21-G-1465-CU, issued October 11, 2022.**

The Kalamazoo Public Schools (district) notified an employee who had worked as a Guidance Counselor that upon her return from FMLA leave, she would be transferred to a classroom teaching position. The Kalamazoo Education Association (union) filed a grievance challenging the transfer, alleging that it violated the parties' agreement which permits individuals to return to their pre-leave positions. When the union demanded arbitration, the district filed its charge maintaining that the grievance involved "teacher placement," a prohibited subject of bargaining, and that the union's attempt to arbitrate the grievance therefore violated Section 10(2)(d). The Commission reversed the ALJ's findings that the union had violated 15(3)(j) and 10(2)(d) by advancing the grievance to arbitration and found that no "teacher placement" decision was implicated. The Commission concluded that a "teacher" within the phrase "teacher placement" under Section 15(3)(j) means a certificated individual employed by the involved school district as a teacher. Thus, the district's transfer of an individual who possessed a teaching certificate but was employed for the entirety of her employment as a Guidance Counselor and not as a teacher was not a "teacher placement" decision under Section 15(3)(j). Therefore, the

union did not violate Section 10(2)(d) by seeking to arbitrate the grievance.

Contract Bar

***Allegan County Road Commission -and- AFSCME Council 25*, 22-C-0591-RC, issued January 13, 2023.**

AFSCME Council 25 filed an RC petition seeking to represent various positions, including forepersons employed by the Allegan County Road Commission (employer). The unit sought by AFSCME was previously represented by the SEIU until it disclaimed interest in January 2022 and was covered by a CBA through December 31, 2022. The employer refused to consent to an election, citing the petition was filed prematurely and outside of the open window period. The employer further claimed that the petition sought to certify a unit that included both supervisory and nonsupervisory positions. The union asserted that no contract bar existed once the SEIU disclaimed interest and that all the positions were nonsupervisory and appropriate based on the unit's long-standing existence. The Commission found the "contract bar" provision under Section 14(1) of the PERA applied only if there was a valid CBA "in force and effect" when a representation petition was filed. However, since the CBA was nullified upon the disclaimer by the SEIU, there was no contract bar to an election on the date the AFSCME petition was filed. Lastly, the Commission found that the employer failed to establish that any of the three contested positions had supervisory authority and should remain included in the unit.

Remand to ALJ

***Detroit Public Schools Community District -and- LC Bulger*, 21-C-0538-CE, issued February 16, 2023.**

Charging party asserted that the employer had unlawfully interfered with his exercise of protected concerted activity through a series of actions that included denial of a medical leave and later termination in violation of Section 10(1)(a). The ALJ found no evidence of anti-union animus against charging party and no proof that his union activities were the cause of his termination or his FMLA denial. On that basis, the ALJ concluded that charging party failed to establish a prima facie case of discrimination under Section 10(1)(c) and recommended dismissal of the charge. The Commission found that the ALJ had failed to address charging party's retaliation claim under Section10(1)(a) and remanded the case for issuance of a supplemental decision and recommended order regarding this issue and for a determination as to whether a superintendent's arguable threat of adverse action constituted an additional violation of Section 10(1)(a).

Duty of Fair Representation

***Superior Township Fire Fighters Union, Local 3292, International Association of Fire Fighters -and- Lee Rudowski*, 21-I-1764-CU, issued March 17, 2023.**

Charging party was employed as a firefighter by Superior Charter Township and was a member of a bargaining unit represented by the respondent union. He was discharged for failing to notify the employer that he had been arrested and charged with drunk driving, and on the basis that restrictions had been placed on his driver's license as a result of the drunk driving incident. The union filed a grievance challenging the discharge for lack of good cause, but a majority of the union's members voted not to advance the grievance to arbitration. An unfair labor practice charge ensued, alleging a breach of the duty of fair representation. The ALJ found that charging party had failed to establish that the union did not properly represent him in connection with his grievance challenging the termination and that the record was devoid of evidence to suggest that the union had acted arbitrarily, discriminatorily, or in bad faith. The Commission agreed with the ALJ's findings and recommended dismissal of the charge. While charging party disagreed with the vote of union membership to not advance his grievance to arbitration, the Commission found no evidence to support a finding that the union had breached its duty of fair representation.

Concerted Activity

Detroit Public Schools Community District -and- Nicole Stuckey, Case Nos. 21-C-0580-CE, issued March 31, 2023 (no exceptions).

Charging party was employed by the Detroit Public Schools Community District (district) as a Spanish teacher and was a member of a bargaining unit represented by the Detroit Federation of Teachers. Charging party received a three-day unpaid suspension relating to an incident in which she discussed a student "sickout" with her class. A charge ensued alleging that the discipline that was issued by the district was in retaliation for her exercise of protected activity and participating in demonstrations and other actions related to the district's response to the COVID-19 pandemic. The ALJ found that charging party had failed to establish that she was disciplined for having engaged in protected activities and that the record overwhelmingly established that her communications were focused primarily on the well-being of her students and did not pertain to terms and conditions of employment for teachers and other staff. ■

NATIONAL LABOR RELATIONS BOARD

Member David M. Prouty, Member Marvin E. Kaplan, Chairman Lauren McFerran, and Member Gwynne A. Wilcox.

NLRB Modifies Framework for Appropriate Bargaining Unit Standard

American Steel Construction, Inc., 07-RC-269162; 372 NLRB No. 23 (12/14/2022)

The Board's decision in *American Steel Construction, Inc*. modified the test used to determine whether additional employees must be included in a petitioned-for unit in order to render it an appropriate bargaining unit. The decision returns the Board to its prior test governing such determinations, as set forth in *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB 934 (2011), overruling *PCC Structurals*, 365 NLRB No. 160 (2017), and *The Boeing Co*., 368 NLRB No. 67 (2019).

In its decision, the Board reaffirmed its long-standing principle that employees in the petitioned-for unit must be "readily identifiable as a group" and share a "community of interest." However, where a party argues that a proposed unit meeting these criteria must include additional employees, the Board reaffirmed that the burden is on that party to show that the excluded employees share an "overwhelming community of interest" to mandate their inclusion in the bargaining unit.

The decision follows the Board's Notice and Invitation to File Briefs asking parties and amici to submit briefs addressing whether the Board should reconsider its standard for determining if a petitioned-for bargaining unit is an appropriate unit.

Members Wilcox and Prouty joined Chairman McFerran in issuing the decision. Members Kaplan and Ring dissented.

Board Rules that Remedies Must Compensate Employees for All Direct or Foreseeable Financial Harms

Thryv, Inc., 20-CA-250250 & 20-CA-251105; 372 NLRB No. 22 (12/13/2022)

In *Thryv, Inc.*, the Board clarified its make-whole remedy to expressly ensure that workers who are victims of labor law violations are compensated for all "direct or foreseeable pecuniary harm" suffered as a result of those unfair labor practices. This decision follows the Board's Notice and Invitation to File Briefs asking parties to weigh in on whether the Board should modify its make-whole remedy.

The decision explains that, in addition to the loss of earnings and benefits, victims of unfair labor practices may incur significant financial costs, such as out-of-pocket medical expenses, credit card debt, or other costs that are a direct or foreseeable result of the unfair labor practices. The Board determined that compensation for those losses should be part of the standard make-whole remedy for labor law violations.

The Board explained that the General Counsel will be required to present evidence in the compliance proceeding proving the amount of the financial harm, that it was direct or foreseeable, and that it was due to the unfair labor practice. The respondent employer or union would then have the opportunity to rebut that evidence.

This clarification to the Board's remedy will apply in every case in which the Board's standard remedy would include make-whole relief for employees. The Board will apply this remedy retroactively to all cases currently pending.

Members Wilcox and Prouty joined Chairman McFerran in issuing the decision. Members Ring and Kaplan dissented.

Board Details Potential Remedies for Repeated or Egregious Misconduct

Noah's Ark Processors, LLC d/b/a WR Reserve, 372 NLRB No. 80 (4/20/2023)

In *Noah's Ark Processors*, the Board detailed potential remedies it will consider in cases involving respondents who have shown repeated or egregious disregard for employees' rights under the National Labor Relations Act (NLRA).

The Board determined that when the unfair labor practice violations found in a case justify a "broad" cease-and-desist order (traditionally ordered in cases where the respondent has shown a proclivity to violate the NLRA or has engaged in egregious or widespread misconduct), in addition to the cease-and-desist order, the Board should consider a non-exhaustive list of potential remedies, discussed in depth in the *Noah's Ark* decision and, depending on the circumstances of the case, apply some or all of those remedies. The Board's discussion of these potential remedies is part of an effort "to bring greater consistency to the Board's exercise of its remedial discretion, and to better ensure that all appropriate remedies are ordered in any given case." Such remedies may include:

- Adding an Explanation of Rights to the remedial order that informs employees of their rights in a more comprehensive manner;
- Requiring a reading and distribution of the Notice and any Explanation of Rights to employees, including potentially requiring supervisors or particular officials involved in the violations to participate in or be present for the reading and/or allowing presence of a union agent during the reading;
- Mailing the Notice and any Explanation of Rights to the employees' homes;
- Requiring a person who bears significant responsibility in the respondent's organization to sign the Notice;

- Publication of the Notice in local publications of broad circulation and local appeal;
- Requiring that the Notice/Explanation be posted for an extended period of time;
- Visitation requirement, permitting representatives of the Board to inspect the respondent's bulletin boards and records to determine and secure compliance with the Board's order;
- Reimbursement of union's bargaining expenses, including making whole any employees who lost wages by attending bargaining sessions.

Applying these principles to the facts of the case, the Board upheld the Administrative Law Judge's decision that the employer had bargained in bad faith with the union and determined that—because the employer had also previously been found in violation of the NLRA, as well as in contempt of a U.S. District Court injunction ordering it to bargain in good faith—the employer's open hostility toward its responsibilities under the NLRA warranted a broad order and appropriate remedies. In addition to traditional remedies for refusal to bargain, such as rescission of unilateral changes and make-whole relief, and in addition to additional remedies ordered by the judge—including reimbursement of bargaining expenses and a reading of the Board's notice to employees—the Board ordered the addition of an Explanation of Rights to the remedial order, a bargaining schedule with written progress reports, reimbursement of the union's bargaining expenses and earnings lost by individual employees while attending bargaining sessions, extended posting of the Notice and Explanation of Rights for one year, electronic distribution of the Notice and Explanation of Rights, mailing of the Notice and Explanation of Rights, reading of the Notice and Explanation of Rights in English and Spanish by the respondent's CEO or by a Board agent in the CEO's presence, union presence at the Notice reading upon request, distribution of the Notice and Explanation of Rights to employees at the reading, and authorizing a Board agent to enter the respondent's facility for a period of one year at reasonable times for the purpose of determining whether the respondent is in compliance with its posting and mailing requirements under the Board's order.

Member Prouty joined Chairman McFerran in the issuance of the decision. Member Kaplan concurred in part and dissented in part.

Board Modifies the Standard Governing Off-Duty Workplace Access for Employees of Contractors

***Bexar County Performing Arts Center Foundation d/b/a Tobin Center for the Performing Arts*, (16-CA-193636; 372 NLRB No. 28) (12/16/2022)**

In *Bexar County II*, the Board restored the rights of workers employed by a contractor to engage in protected concerted activity in their workplace.

The new decision overturns *Bexar County I*, 368 NLRB No. 46 (2019)—which was sent back to the Board for reconsideration by the D.C. Circuit Court of Appeals—and makes clear that a property owner may only exclude the employees of its contractors from engaging in protected activity on the worksite if such activity would significantly interfere with the use of the property or where exclusion is justified by another legitimate business reason. *Bexar County II* thus reestablishes the standard originally articulated by the Board in *New York New York Hotel & Casino*, 356 NLRB 907 (2011).

The Board reasoned—in line with the D.C. Circuit's concerns—that the *Bexar County I* standard undermined contractor employees' right to engage in protected concerted activity under Section 7 of the NLRA without rational justification. Returning to the *New York New York* standard properly accommodates contractor employees' rights under federal labor law with the property owner's legitimate interests and avoids creating incentives for employers to structure work relationships to avoid direct hiring.

Members Wilcox and Prouty joined Chairman McFerran in issuing the decision. Members Kaplan and Ring dissented.

NLRB Rules that Employers May Not Offer Severance Agreements Requiring Employees to Broadly Waive Labor Law Rights

McLaren Macomb, 07-CA-263041, 372 NLRB No. 58 (2/21/2023)

In *McLaren Macomb*, the Board returned to long-standing precedent holding that employers may not offer employees severance agreements that require employees to broadly waive their rights under the NLRA. The decision involved severance agreements offered to furloughed employees that prohibited them from making statements that could disparage the employer and from disclosing the terms of the agreement itself.

The decision reverses the previous Board's decisions in *Baylor University Medical Center* and *IGT d/b/a International Game Technology*, issued in 2020, which abandoned prior precedent in finding that offering similar severance agreements to employees was not unlawful, by itself.

The decision in *McLaren Macomb*, in contrast, explains that simply offering employees a severance agreement that requires them to broadly give up their rights under Section 7 of the NLRA violates Section 8(a)(1) of the NLRA. The Board observed that the employer's offer is itself an attempt to deter employees from exercising their statutory rights, at a time when employees may feel they must give up their rights in order to get the benefits provided in the agreement.

Members Wilcox and Prouty joined Chairman McFerran in issuing the decision. Member Kaplan dissented.

NLRB Protects Workers from Employer Coercion During Investigation of Unfair Labor Practice Complaints

Sunbelt Rentals, Inc., 18-CA-236643, et al., 372 NLRB No. 24 (12/15/2023)

The Board's decision in *Sunbelt Rentals, Inc.* reaffirmed its long-standing approach to protecting employees from coercion when they are interviewed by employers preparing for unfair labor practice proceedings before the Board. This decision follows the Board's Notice and Invitation to File Briefs seeking public input regarding whether or not to adhere to the standard first adopted in 1964 in *Johnnie's Poultry*, 146 NLRB 770 (1964), which found that such interviews violated the NLRA unless the employer gave the employee specific assurances.

After considering public comment, a Board majority consisting of Chairman McFerran and Members Wilcox and Prouty found that the *Johnnie's Poultry* standard effectively balances employers' legitimate need to prepare a defense to an unfair labor practice allegation with employees' statutory right to engage in protected concerted activity free from employer interference and decided to adhere to the *Johnnie's Poultry* standard in whole. The standard states,

> The employer must communicate to the employee the purpose of the questioning, assure him that no reprisal will take place, and obtain his participation on a voluntary basis; the questioning must occur in a context free from employer hostility to union organization and must not be itself coercive in nature; and the questions must not exceed the necessities of the legitimate purpose by prying into other union matters, eliciting information concerning an employee's subjective state of mind, or otherwise interfering with the statutory rights of employees.

Members Kaplan and Ring dissented. ■