CHAPTER 5

APPOINTING AGENCIES

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For all those of you who are wondering at the choice of early June in New Orleans for a national conference, I wish to extend the Association of Labor Relation Agencies' (ALRA) "warmest" invitation to stop by at the 48th Annual ALRA Conference to be held in 5 weeks in Phoenix, Arizona. I am assured it is a dry heat, although much the same can be said of a microwave oven. The Phoenix meeting will doubtless be a worthy successor to our last two late-July sessions in Washington, D.C. and St. Louis.

As you may have gathered, ALRA is not an association of travel planners. The ALRA is an organization consisting of 70 federal, state, provincial, and local neutral agencies administering the labor laws of the United States and Canada. ALRA does not set policy for its members nor does it in any sense coordinate official actions between or among agencies. Instead, the value of ALRA is as a resource, linking people with similar programs and problems, bringing them together so that the director of a two-person agency can discuss emerging issues with the Chairman of the National Labor Relations Board or the Director General of the Federal Mediation and Conciliation Service (FMCS) Canada. Those exchanges take place constantly among the ALRA participants, and they take place as exchanges among equals. One of the beauties of the ALRA, and the thing that struck me at my first conference, is that there is very little consciousness of rank or relative standing. The heads of the most prominent agencies spend every bit as much time listening as they do talking. It is genuinely a collegial gathering.

ALRA, as an institution, has a rich history of involvement by members of the arbitral community. If you were to compare the

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membership directory of the Academy with the leadership of ALRA across the years, you would find in both names like Finkelstein, Anderson, Slavney, Helsby, Howlett, Rice, Tener, and Torosian. Within the past year, delegates to the ALRA conference have included its past presidents Parker Denaco and Doug Collins, current ALRA Board member Joel Weisblatt, and Will Weinberg, the reigning dean of ALRA and Chairman of the New York–New Jersey Port Authority Employment Relations Panel. Two of our featured speakers at this year's conference will be Tony Sinicropi of the Los Angeles Employee Relations Board and Bonnie Weinstock of the Port Authority Panel.

The relationship between ALRA and the arbitral community goes beyond an overlap of individual leaders. The bulk of the agencies that have unfair labor practice jurisdiction follow some form of deferral policy requiring certain disputes that mix contractual and statutory issues to be heard in the first instance by an arbitrator, with the agency retaining supervisory jurisdiction. Some smaller agencies use arbitrators as ad hoc hearing officers, and some larger agencies will supplement their staffs when there is an overload by hiring established neutrals to mediate or arbitrate.

Of greatest interest to our audience today is that, while ALRA agencies vary widely in structure and function, a great many of the member agencies provide panels of ad hoc arbitrators to the parties in their jurisdictions. Some administer panels as their primary function. Others, such as my home agency, the Wisconsin Employment Relations Commission (WERC), provide a full range of neutral services as well. Such services include mediation, arbitration, unfair labor practice hearings, and representation hearings. Since ALRA's members include the FMCS and the National Mediation Board, and since, by special provision of the bylaws, our sole nongovernmental member is the American Arbitration Association (AAA), it can honestly be said that ALRA incorporates virtually every designating agency in North America. The exact scope of these services will doubtless become more clear as Nels Nelson and Walt Gershenfeld complete their comprehensive survey of state designating agencies on the Academy's behalf. The ALRA Board has endorsed that effort, and is actively encouraging member agencies to cooperate.

As you might suspect, the challenges connected with administering ad hoc panels are a regular topic of conversation at ALRA. Every year at the conference, and during the year by telephone, the Board members, Directors, and Counsels for member agencies

compare notes and share ideas on panel administration and how to balance the interests of arbitrators, the parties, and public policymakers, all of whom are stakeholders in the process. The move to computer-generated random panels by many agencies in the 1990s was prompted in part by discussions of problems that emerged at several ALRA agencies in the late 1980s and early 1990s. That issue, of course, remains quite current. My informal survey of 20 of our larger nonfederal designating agencies shows that one-third use a computer to control panel generation, and another third use a strict rotation through the roster. One agency reported a random selection system involving a coffee can and slips of paper with names written on them. You may laugh, but at least we know that when they open for business on the morning of January 2, 2000, that system will still be working.

I understand that there are issues of interest to the audience, such as the use of a random or a handcrafted selection system, the adoption of residency restrictions, the enforcement of award timeliness, the availability of arbitration through nonpanel sources, the use of staff or pro bono arbitration, and the visibility of the whole system to arbitrators and the parties. In deference to my fellow panelists and to the audience, I will leave those issues to the question and answer period; others are discussed below.

I would only caution that I am here as a representative of ALRA, not of any specific agency. In responding to questions of the "Why do all you guys do this or that" variety, I can offer educated guesses based on my survey and personal opinions, but like the agent in "Mission Impossible," in the event of any controversy, the agencies will all deny any knowledge of me or my activities.

Panel Generation: Random, Modified Random, Handcrafted.

There are three choices as to how panels are compiled:

1. A purely random system gets rid of suspicions of favoritism, except among those who are suspicious about the blips inherent in a random system. Random does not mean equal, even over time. If you take a coin with George Nicolau's name of one side and George Fleischli's name on the other side, you can be sure it will come up 100 percent George. However, it is very unlikely it will come up 50–50 as between Nicolau and Fleischli. There will be variations, and they can be significant—particularly over short periods.

2. Modified random systems can be designed to erase the blips that will occur in a random system but are subject to the law of unintended consequences, depending on how many variables you are trying to include.
3. Handcrafted panels are appealing to administrators who are dealing with large and influential parties in a major dispute, but can become a liability when used extensively and administered by someone who does not keep a close watch on the equalizations of opportunities for panel members. There are variations on these themes, whereby some agencies attempt to equalize across regions within their jurisdictions. Doing so, however, can cause problems, depending on how the regions are defined and how many arbitrators there are in a given region.

Residency Limitations: In State, Out of State, Regional.

The choice is between complaints of "Who are these people?" and "Why do I always see the same names?"—there is no happy medium. It is also a choice between relatively small panels that generate a good deal of work for members and larger panels where the names do not go out as frequently. Another important factor is the size of the jurisdiction and whether it is possible to have both a residency restriction and a viable roster.

Where the arbitrator is making decisions affecting local tax rates, there is very likely to be political pressure to have a state resident making that decision. The midwestern panel administrator's nightmare is a boost in the levy dictated by someone from New York City, even though the administrator had nothing to do with picking the arbitrator or putting in the case.

As to grievance panels, the public policy arguments are not as clear-cut. Where you stand on that depends upon where you sit. If you qualify as a member of a panel that restricts membership, you are likely to feel that the restrictions are a reasonable reflection of public policy. If you do not qualify, you are likely to see them as a restraint of trade—at least until you do qualify. Probably the majority approach is a regional panel, which lists in-state residents and residents of contiguous states.

Staff Arbitrators.

Some agencies, notably the Wisconsin and Washington employment relations commissions, the New York State Employment

Relations Board, and the Massachusetts Board of Conciliation and Arbitration, provide grievance arbitration services through staff members. This is a service that the legislatures in those states have elected to offer. In Wisconsin, it is a service that has been offered for 60 years.

Unlike unfair labor practice cases, representation cases, and contract mediation, this is one of the areas in which public agencies compete with private providers. That is not unheard of—there are functions that can fit comfortably in either sector. Public transit competes with cab companies, Cook County Hospital competes with Rush Presbyterian, the Department of Sanitation competes with private waste haulers, and the FMCS competes with the AAA. It really is a question of how extensive the range of services will be, in the judgment of the legislature.

The direct provision of arbitration services is not a controversial point with the parties who have it available to them. There is no great public cry to curtail these services. Just the opposite—in order to take advantage of the service it must be specified in the contract or jointly requested. To the extent that it is controversial, it is with the arbitrators who see it as a source of work being funneled to other arbitrators. That is somewhat overstated since, as our experience in Wisconsin with filing fees has shown, the demand is fairly elastic. Many of the cases heard in these jurisdictions are not necessarily cases that would otherwise proceed to arbitration if the parties faced the prospect of paying $2,000 for the case. Nonetheless, there is no question that some of these cases would find their way into the hands of private arbitrators if the agencies did not provide this service.

For staff members at agencies like the Wisconsin and Washington employment relations commissions, where the same people do contract mediation, unfair labor practice hearings, grievance mediations, representation cases, and labor-management cooperation work, having a background as an arbitrator is absolutely invaluable. That is particularly true in the mediation context, where observations about the meaning and effect of different pieces of contract language carry a great deal more weight coming from someone who is also a grievance arbitrator. Thus, a strong argument can be made that staff arbitration represents much greater value to the agency and to the parties than just the value of the basic service itself.

One point that should be made about the provision of in-house arbitration services is that they provide consistent with the aims and

purposes of the National Academy, a training ground and a supply of new arbitrators. These are really the only venues for hands-on, systematic training of grievance arbitrators, and to my biased eye they turn out an exceptionally good product. This is not by and large a question of quality of services. If you look at the NAA directory for Wisconsin, you will see 20 names there. Three of those people are on the Wisconsin Employment Relations Commission (WERC) staff and nine others started in the business with the WERC. That does not include others, such as Bob Moberly and Arvid Anderson of Florida, and Byron Yaffe of Illinois, whose early careers led them through the WERC.

At base, this issue comes down to whether you want to privatize this particular public service. As with many other issues, where you stand depends on where you sit.

Pro Bono Arbitrators.

An interesting variation on the staff arbitrator is the pro bono arbitrator. The New York State Employment Relations Board (SERB) has a system whereby individuals who otherwise appear to be qualified, but who have not rendered the customary threshold of five awards, are given the opportunity to arbitrate cases without charge to parties who want that service. The SERB also offers staff arbitration, but there is considerable delay in obtaining that service. As a more expeditious alternative, parties can opt for a pro bono arbitrator instead.

In this way, the neophyte arbitrator is allowed to work toward the number of awards needed for the regular SERB panels, while simultaneously ascending to the caseload standards of the FMCS, the AAA, and other agencies; valuable exposure to the parties is garnered as well. Moreover, the parties get a quicker answer and, according to the Board's counsel, the frequency of complaints from pro bono cases is about the same as that from the regular panels.

SERB processes about 500 pro bono cases each year. There is relatively little regulation of this system. The Board reviews the decisions for quality and may exclude someone who does not seem to have an understanding of the process and the issues. The counsel's subjective impression is that the quality has been improving, in large part because many of these individuals are being mentored by Academy members and other established neutrals.

To an even greater extent than with staff arbitration, any impression of unfair competition in this system is going to be overstated. By definition, parties are not going to send a vitally important case to pro bono arbitration, unless they cannot afford to pay for conventional arbitration. Either way, you are looking at cases that would not make their way to any Academy member.

Interesting statistics about ALRA:

- Forty-four different people have been President of ALRA. The first female ALRA president was Mabel Leslie of New York in 1960. Since then, five other women have been elected president: Janet Caraway of California, Diane Zaar-Cochran of Massachusetts, Claire Manning of Illinois, Jackie Zimmerman of Illinois, and Pam Talkin of Washington, D.C. Claire Manning resigned before taking office, in order to accept an appointment to a different agency.
- At least one-quarter of the presidents of ALRA have also been members of the National Academy of Arbitrators.
- ALRA began as ASMA, the Association of State Mediation Agencies. ASMA became ALMA, the Association of Labor Mediation Agencies when it expanded beyond just state agencies. It then merged with the Association of State Labor Relations Agencies and became ALRA.