NATIONAL ACADEMY OF ARBITRATORS

State and Local Public Sector Committee Report, National Academy of Arbitrators

2020 Annual Report

TABLE OF CONTENTS

INTRODUCTION

The State and Local Public Sector Committee was assembled and organized by the President of the National Academy of Arbitrators, Dan Nielsen, in April 2020, and, with the advice and consent of the Executive Committee, a number of Academy members were appointed to serve. While there had been Academy committees dedicated to public sector issues in the past, this committee was organized with a specific charge. That charge is as follows.

> The State and Local Public Sector Committee will prepare an annual report to be presented to the members at the time of the annual meeting and posted on the NAA web site and ArbInfo.com describing and analyzing significant events in each State and Local public sector jurisdiction—strikes, notable settlements, legislation, impactful awards, legislation, etc. during the calendar year. If there is a particularly significant development between the end of the year and the annual meeting, the Committee might decide to do a special interim report on that. The annual report for 2020 should be submitted by the end of January 2021. The Chair of the Committee may be called upon to coordinate with the DALC (US) and the Academy leadership on issues involving state and local designating agencies.

The following report is the first of its kind, and each report is unique in that it captures activity and issues for a number of states and public sector jurisdictions. This first attempt at capturing public sector issues is limited to nineteen states. A number of states do not have a public sector collective bargaining law, labor board, or designating agency. Over time, the committee will undoubtedly expand its range and the number of jurisdictions included in future reports. Please note that the Minnesota and Massachusetts reports include specific information regarding recent legislation impacting police labor arbitration since the murder of George Floyd. It is interesting reading and the reforms may become a trend to be monitored.

Committee members are as follows. The state listed next to each name indicates the primary business address of the member arbitrator.

Steven M. Bierig, Illinois
Brian Clauss, Illinois
Lawrence Coburn, Pennsylvania
James M. Darby, Pennsylvania
Jane Desimone, Pennsylvania
James B. Dworkin, Indiana
Howard Edelman, New York
Richard D. Fincher, Arizona
George R. Fleischli, Wisconsin
Richard M. Gaba, New York
Marc D. Greenbaum, Massachusetts
Patrick Halter, Montana
Catherine Harris, California
William E. Hartsfield, Texas
Joyce M. Klein, New Jersey
Andria S. Knapp, California
Charles W. Kohler, Ohio
Michael P. Long, Michigan
Sherwood Malamud, Minnesota
James Mastriani, New Jersey
Sidney S. Moreland, Louisiana
Ruth M. Moscovitch, New York
Peter Myers, Illinois
Thomas J. Nowel, Ohio
James P. O'Grady, Missouri
Susan Panepento, New York
Joan Parker, Pennsylvania
Kenneth A. Perea, California
David R. Reilly, New York
Arthur Riegel, New York
Haydee Rosario, New York
David W. Stanton, Kentucky
David N. Stein, New Jersey
Jan Stiglitz, California
Maretta Comfort Toedt, Texas
John M. True, California
Gerald E. Wallin, Nevada
Don E. Williams, Texas

Thank you to NAA President Daniel J. Nielsen for developing this committee. The information produced by this committee will be critically important to arbitrators, advocates, academics and others. Thank you to Jo Steigerwald for editing and publishing the comprehensive report. Thank you to all of the arbitrators who committed time and effort to make this first report of its kind an asset and resource for the National Academy of Arbitrators and others involved in public sector labor relations. Following the state reports contained in this document, I included a portion of President Nielsen's report as found in the Winter 2021 edition of "The Chronicle" regarding the media's responses to high profile police arbitration awards. It is pertinent and compelling.

Thomas J. Nowel, NAA
Chair

ARIZONA

State and Local Public Sector Report for the State of Arizona

National Academy of Arbitrators—November 2020
Richard Fincher, NAA

Table of Contents

1. History and Context

The State of Arizona has had an extensive history of anti-union animus at the corporate and legislative level. This social hostility to organized labor has taken the form of legislation and police repression, as well as unprecedented events (such as the Bisbee deportation of Industrial Workers of the World (IWW) miners). This history of animus has rippled into the public sector.

This social sentiment was shaped in part by the economic conditions within the state. Arizona's original economy had its foundation in the "5 C's" of industry: citrus, cattle, cotton, climate, and copper. Copper mining was by far the largest industry in the state when it was first discovered in 1854. With a booming copper industry that flourished in a wartime economy, southern European immigrant workers, (although receiving higher wages) faced arduous and terrible working conditions as miners.

The state's cash crop was cotton, used for clothing, fertilizer, and packing, as well as for tire manufacturing. Citrus became profitable when early irrigation efforts in the 1860s allowed citrus plants to grow in the state's harsh climates. Many of Arizona's foundational industries relied on agriculture because of its relatively predictable seasons and year-round farming, as there is no snow or frozen ground. Farmers make for highly conservative legislators.

Today, Arizona's major industries are hospitality (resorts), electronics (such as Intel), military and aviation (Honeywell and Raytheon), health sciences and hospitals (like Mayo Clinic), academia (Arizona State University and University of Arizona), and professional sports (the Cactus Baseball League). The two largest private sector unions are reportedly the United Food & Commercial Workers International Union (UFCW) and the Teamsters.

2. History of Anti-Union Animus

The Bisbee mass deportation of 1917

Many copper miners were attracted to the vision of the Industrial Workers of the World (IWW). With a more violent and revolutionary stance that stood in contrast to the conservative mainstream labor movement of the day, the IWW became the target of the Wilson Administration in 1917. This repression took the form of military authorization for troops, action by the Justice Department, and federal legislation. This national anti-IWW sentiment spurred companies and authorities in Arizona to take drastic action. Companies in Arizona used agent provocateurs to infiltrate IWW local chapters and paint them as violent radicals. This tension culminated in a dramatic scene on July 12, 1917. "Deputized" vigilantes seized 1,186 suspected union workers, forced them into freight cars, and left them on the border in New Mexico. Many of the miners never returned to the state. Today, an abandoned building in Clifton (the nearest village to the Morenci mine) bears the name of the IWW. In 2019, a movie was produced about the Bisbee deportation.

This police action was not an isolated incident; two days earlier, IWW miners in Jerome (another mining community in mid-Arizona) were stuffed in two cattle cars (at gunpoint) and deported to California. There were no legal consequences against the local authority and mining executives for either incident.

Mining strike and decertification of 1983 in Morenci

Hostility toward labor manifested itself again in 1983, at the Morenci copper mine owned by Phelps Dodge. This breakdown in labor relations originated in conservative politics coupled with economic interests. During negotiations, the Company refused the pattern that other mining companies agreed to, an end to all side agreements since the 1950s, and demanded additional concessions. The union went on strike. When the company brought in scabs, union workers

blocked the entrance to mine. A ten-day negotiation period followed, during which the Arizona Governor raised almost 1,000 National Guard, SWAT, and police officers to forcefully break up the strike. The strike ended with Phelps Dodge demanding and getting more concessions that they originally asked for. The strike was busted and the union was decertified, to this day. The mine is now owned by Freeport-McMoRan, which has global mining operations. Today, the mining corporation provides full labor arbitration of discipline cases to its non-union employees, with final and binding awards. The mine provides full-time advocates to represent workers with grievances. The majority of arbitration cases concern safety and attendance.

Right-to-Work State, as background

Prompted by the state's history of conservative politics, Arizona became a right-to-work state in 1947 for private sector workers. There has never been a serious movement to revoke the right to work status.

3. Statutory structure in the public sector

Absence of a public sector statute

Arizona does not have a statewide statute regulating labor relations in the public sector. Therefore, there is no Public Employment Relations Board (PERB) outlining the rights of public employees, especially concerning unfair labor practices (ULPS). The City of Phoenix is the only city within Arizona to have a permanent and functioning PERB. Without a state statute, any employee association (such as fire or police) must request recognition from their employer, often a City Council. With few exceptions (such as Phoenix), once recognized by a government entity, the association has no rights to allege ULPs, no protection against retaliation for union activity, and no statutory process for amending the unit or decertification.

Attorney General opinion on labor relations

Ariz. Att'y Gen'l Op. 74-11; Ariz. Att'l Gen'l Op. I06-004–A public employer cannot enter a binding agreement with an employee association because doing so would constitute a delegation of authority and violate elected officials' responsibility to make decisions. A public employer may not enter an agreement that would supersede or conflict with the county employee merit system. Public entities in Arizona may not recognize an association or "union" as the exclusive representative of any group of employees. A public employer has the right to enter

purely informational “meet and confer” arrangements with associations, as long as the results are not binding and there are alternative means for employees to communicate with management.

Arizona Agriculture Employment Relations Act

In 1993, the Arizona Agriculture Employment Relations Board was created to provide a means for collective bargaining between agricultural employers, labor organizations, and employees”. The Board administers a process, such as elections. Members of the agricultural community can use this process to declare that certain acts are unfair labor practices and therefore subject to legal intervention. The Board enforces the Agricultural Employment Relations Act. In theory, the law provides protections to Arizona agricultural workers outside the bounds of the National Labor Relations Act (NLRA), but in reality, there are few agricultural unions and the Board is essentially dormant. The statute is viewed as having no teeth to enforce rulings.

Arizonan nomenclature in labor relations

The legislature and government officials reject the terms “collective bargaining” and “unions.” Instead, Arizona uses the terms “memorandum of understanding” (MOU) and “association.” An MOU acts similar to a collective bargaining agreement (CBA). However, unlike a collective bargaining contract, MOUs have limited “legally enforceable promises.” Associations are very similar to unions: they are legal nonprofits, collect dues, and elect officers. However, unlike unions, employee associations do not have the legal rights to engage in collective bargaining, and, except in Phoenix, have few protections found in the NLRA.

Statute for public safety employees

Despite the absence of a state PERB, public safety employees have protection under Arizona law in a way that is distinct from other occupations in the state. Under Arizona Revised Statute 23-1411, public safety employees “have the right to join employee associations which comply with the laws of this state and have freedom to present proposals and testimony to the governing body of any city, town, county or fire district and their representatives” Finally, the statute prohibits discharge, discipline, or discrimination based on activities with these associations.

Examples of these associations include the Arizona Fraternal Order of Police (FOP) and the Arizona State Troopers Association. These organizations differ from the idea of conventional industrial unionism by initially taking the form of clubs. Despite these atypical origins, these public safety associations are considered to be some of the strongest labor organizations in the state. Moreover, these public safety groups have significant influence with state legislature. For example, police and fire have their own distinct retirement/pension fund, which has recently had continuing scandals with ethics and investments.

City of Phoenix Employment Relations Act

In the 1960s, Phoenix established a citywide statute for labor relations, with five bargaining units, including fire and police. The statute created the Public Employment Relations Board (PERB), composed of four citizens and a non-compensated Chair with significant experience in labor relations. The speed at which these units were formed and certified demonstrated a desire for public sector unionization that runs counter to the animus by political leaders. The PERB serves a similar function to the National Labor Relations Board (NLRB) and employs contractual Hearing Officers to hear cases and make recommendations to the Board. The PERB meets monthly if there is an agenda item, has an outside Counsel, and is a member of the Association of Labor Relations Agencies (ALRA).

Administrative, Supervisory, Professional, & Technical Employee Association (ASPTEA)—City of Phoenix

In 1975, the ASPTEA unit was created, but not under the PERB. Originally, the unit was strictly a meet and discuss group, which meant that it could discuss economic issues and grievances with the city manager. Subsequently, the unit was able to gain a Memorandum of Agreement (MOA), which resembled an MOU, but was still under the meet and discuss environment. Today, the unit represents the largest employee group within the city of Phoenix, with over 3,500 members.

City of Phoenix Civil Service Board (CSB)

The Phoenix Civil Service Board consists of five unpaid members, and handles employee appeals of disciplinary demotions, discharges, and the suspensions of City employees. The Board can also propose amendments to Personnel Rules. The CSB employs five contract Hearing

Officers, who issue recommendations to the CSB. Most employees appealing discipline have union representation, often by outside law firms. The CSB handles cases of discharged police and fire officers. This process is not labor arbitration, but applies the same concepts of just cause. Most appellants are represented by their union attorney. The decisions of the CSB are final and binding on the City.

4. Citizen Initiatives to bypass the legislature on labor issues

As described above, the legislature is very conservative and influenced by corporate interests. Upon statehood, the Arizona constitution allowed for citizen initiatives as a means to bypass the legislature and allow voting on proposed legislation. For example, citizen initiatives recently enacted reforms on minimum wage and approved medical marijuana. The governing party of the legislature has great hostility toward citizen initiatives and has made it harder for the initiatives to obtain the required signatures. Conservative nonprofit organizations now routinely sue in state court to keep the initiatives off the ballot.

In November 2020, citizens passed a citizen initiative that will generate revenue for public education through the imposition of a special income tax on extremely high earners.

5. Impact ligation by conservative nonprofits on labor issues

Historically, the only labor policy litigation in state courts would be based on anti-union animus. Recent anti-union litigation by the Goldwater Institute has targeted public sector unions for non-work time by the union officers and stewards. Specifically, the Goldwater Institute filed the case *Gilmore v. Gallego* in order to end "release time" for union activities. Release time allows employees to "engage in political activities, lobby the government, file grievances against their employer, and negotiate for higher wages and benefits, among other things". The Goldwater Institute argued that this release time is unlawful under state law. A compromise was reached reducing the scope of release time.

In April of 2018, Arizona public school teachers conducted a walkout to protest low pay and cuts to school funding imposed in 2008. The Goldwater Institute responded by sending a letter to those school superintendents who shut down due to the absence of teachers. This conservative nonprofit, named for former presidential candidate Barry Goldwater, alleged the

teachers' direct action was a strike, instead of a walkout. The Institute argued that school closures were a violation of the right of all Arizonans to a public education under the Arizona Constitution. The Institute argued that because of this violation, students and their parents had the right to sue respective school districts. Furthermore, the Institute sought teachers who would sue their respective school districts for the walkout; however, none volunteered.

This reluctance to oppose the walk out, coupled with broad support for the teacher walkout from parents, demonstrates a shifting political dynamic in the state of Arizona. With changing demographics, and a far less agricultural base of politicians, the state is becoming more progressive.

6. Updates by organizational units (state and local)

1. State level

- Generally, state employees are non-union. The only exception is the State Police, which is a unit allowed by legislative carve-out.
- There is no current state legislative activity to revise state labor law.
- There is no current state legislative activity to reform police departments.

2. State universities

- Generally, the three state universities are non-union. There is no apparent movement to start an organizing campaign.
- Traditionally, employees in state universities had the right to appeal discipline through Hearing Officers. However, the universities were allowed to obtain a waiver of such contractual rights in return for a salary increase. Most state employees are now employed at will. As a result, the contractual Hearing Officers no longer receive cases.

3. K-12 schools

- Arizona teachers are among the lowest paid in the nation. Twenty eight percent of Arizona teachers are employed on temporary certification. The conservative legislature openly disdains teacher unions and strongly favors charter schools, which

receive funding from the public school system and are far less supervised for fiscal stewardship.

- As described above, Arizona public school teachers conducted a walkout in 2018 to protest their low pay and cuts to school funding. Arizona has suffered severe school funding cuts with state lawmakers cutting funding per student by 36.6%. Not only is school funding below the national average, but the wages of Arizona public school teachers are even more so, with the average salary being a little more than $47,000 a year.
- The teacher strike resulted in Governor Ducey proposing a 20% increase in salaries by 2020. Many school boards supported the teachers' actions, with many more believing that the teachers were exercising their first amendment right of assembly as well as petitioning the government.
- Unlike other states, no charter schools (as private employers) are currently organized under the NLRA.
- As an example of history, in 1972, the Board of Education of Scottsdale agreed to a MOU with the teachers, but then unilaterally revoked the MOU. The teachers sued the school district. The case won in trial court, then lost in appeals court, and then finally resulted in a Supreme Court ruling that upheld the nature of the MOU/contract but allowed for the implementation of a new board-friendly contract. Similar revocations (prompted by changing school boards) have occurred in other districts.
- The Arizona Department of Education has a panel of Hearing Officers. The cases typically involve discipline matters, but may involve contractual issues.

4. Cities and counties

- Many cities have recognized various employee units for purposes of meet and confer bargaining. Typically, the first employee units to successfully achieve recognition are fire and police.
- School districts in Arizona are not organized by city, but rather by geography. Most large school districts have recognized their teacher units and engage in meet and confer bargaining. Most large districts have both certified (teacher) and classified

(food services, bus drivers, clerical, etc.) units. Many School Boards reject any notion of academic freedom.

- There are no recent City of Phoenix PERB decisions of note.
- Maricopa (Phoenix) and Pima (Tucson) counties have their own Civil Service Boards, with contract Hearing Officers.

5. *Public sector strikes*

- There were no public sector strikes in 2019 or 2020, to-date.
- The conservative legislature remains astonished that many teachers went on strike in 2018, were supported by parents, and achieved some financial goals.

6. *State appellate court decisions*

- There have been no relevant state court decisions of note.

7. *Recent published articles*

- There are no known articles published in the past two years.
- There are no longer business professors studying labor relations in the state. The labor professors were once well-known, but have retired and have not been replaced by the business schools. The law schools do not teach labor law.

8. *Special districts*

- The largest special district in the state is the Maricopa Community College District (MCCD).
- The faculty is highly organized and enters into meet and confer bargaining, resulting in a detailed MOU. Typically, the MOU must be approved by the Governing Board, but at time requires approval only of the Chancellor. Recently, the meet and confer process used the interest-based bargaining model (IBN), retaining an outside facilitator. The politics of the Governing Board has become difficult recently, and the Board rejected the MOU for a while.
- Most of the other community colleges in the state have a degree of employee recognition by faculty. Many (individual) Community College Board members reject

any notion of academic freedom for college faculty. Some Board members openly disdain faculty associations.

- Salt River Project is a hybrid private and public sector employer providing electric services. Their public sector employees are members of the IBEW.

9. Largest or most influential public sector unions

- The Phoenix Law Enforcement Association (PLEA) was established in 1975 and is a heavily organized organization recognized by the City of Phoenix.
- The American Federation of State, County, and Municipal Employees (AFSCME) are recognized by the City of Phoenix in two units: one for clerical workers and one for blue collar workers.
- The International Association of Firefighters (IAFF) is a heavily organized organization recognized by the City of Phoenix.
- The Arizona Education Association (AEA) is the federation of teacher association throughout the state, and has 20,000 members. There are a few residual AFT-affiliated associations.

10. Federal sector unions

- Although beyond the scope of this report, there is substantial labor activity and labor arbitrations with federal unions. Many local CBAs provide for permanent panels. The City of Phoenix is the fifth largest city in the country, and therefore has a large federal workforce across many agencies.
- For example, labor arbitrations are very common with the Postal Service, Customs & Border Patrol (CBP), Internal Revenue Service (IRS), Bureau of Prisons (BOP), Bureau of Indian Affairs (BIA), Social Security, and Treasury.

7. Impact of the *Janus* decision by USSC

In 2018, the *Janus v. American Federation of State, County, and Municipal Employees (AFSCME), Council 31* decision (with a 5-4 majority) deemed that *Abod* was unconstitutional on the basis of the First Amendment. In other states, this case was a blow to public sector labor. But in Arizona, the decision was anticipated and did not apply, as public sector employees were already allowed to not pay union dues. The fire and police associations are reportedly organized

at 95%, while the other public sector unions are organized at roughly 60%.

8. Conclusion

Despite a historically anti-union legislature, continuing pension scandals, and adverse court decisions, public sector workers in Arizona have found ways to enhance their influence. The recent resurgence of labor activism (including the teacher strike) in Arizona may suggest the beginning of a new chapter in the state's tumultuous labor history.

CALIFORNIA

2020 California Public Sector Cases and New Legislation[1]

Subcommittee members: Kenneth A. Perea (chair), Catherine Harris, Andria S. Knapp, Jan Stiglitz, John True

I. Law Enforcement

Law Enforcement Agency Permitted to Disclose Brady Alerts to Prosecutors

Association for Los Angeles Deputy Sheriffs vs. Superior Court, 8 Cal. 5th 28 (2019)

In *Association for Los Angeles Deputy Sheriffs v. Superior Court,* the California Supreme Court overturned a lower appellate court's decision and held the Los Angeles Sheriff's Department (LASD) could disclose to prosecutors the names of individual deputy sheriffs on LASD's internal "*Brady* list" without first initiating a *Pitchess* motion and receiving a court order, so long as it did so in the context of cases in which the deputy sheriffs might be witnesses.

The California Supreme Court concluded "the Department [LASD] may provide prosecutors with the *Brady* alerts at issue here without violating confidentiality."

It should be noted the California Supreme Court did not hold LASD could forward an entire *Brady* list to prosecutors. Rather, it was only held that a *Brady* alert was permissible on a case-by-case basis when there was a pending criminal case.

Police Officer Failed to Timely File Government Claim in Whistleblower Retaliation Case

Willis vs. City of Carlsbad, 48 Cal. App. 5th 1104 (2020)

James Willis began his employment with the City of Carlsbad's Police Department (Department) in 2008. In 2012, Willis created a fictitious email account under a pseudonym, wrote a critical email about another detective who worked in his unit, and sent the email to various news organizations and government entities. In 2013, Willis was reassigned from the crimes of violence unit to patrol. Thereafter, in 2014, Willis was promoted to corporal and elected president of the local police officer's association. In 2015, Willis complained that the Department's monthly performance review for patrol officers was an illegal quota under the

[1] California's reported labor-management cases in the public sector issued during calendar year 2020 have hereafter been organized in the following six categories: "Law Enforcement," "Community College Districts," "State," "Cities," "Counties," and "Higher Education." The area of Law Enforcement encompasses cases at the State, County, and State levels of government. The cases and legislation cited have been earlier reported in *California Labor & Employment Law Review,* Volume 34, Nos. 1-6.

Vehicle Code because it collected statistical data about arrests and citations. Later that year, Willis was not selected for a promotion to sergeant.

In December 2015, Willis filed a complaint with the California Department of Fair Employment and Housing (DFEH) and a government tort claim against the City of Carlsbad (City), alleging retaliation based on his reassignment to patrol in 2013 and failure to be promoted in 2015, among other allegations. The City deemed all acts occurring before June 2015—six months before the date it received Willis' claim—untimely because they occurred beyond the six-month period to present a claim under the Government Claims Act.

The following year, Willis brought a civil lawsuit against the City, alleging in part the City engaged in whistleblower retaliation in violation of Labor Code section 1102.5 by denying him promotions after he: (1) reported alleged misconduct by another officer in 2012; and (2) complained about a Department program he believed was an unlawful quota system in 2015.

While the City successfully moved to strike Willis' allegations regarding retaliatory acts that occurred before June 2015, the jury ultimately found that the City denied Willis a promotion in part because he reported that the City was violating the law. However, the jury also found that the City would have denied Willis the promotion anyway for legitimate independent reasons. Therefore, the court entered judgment for the City on the whistleblower retaliation claims.

Willis appealed, claiming the trial court erred by striking certain allegations within his lawsuit because of the Government Claims Act's six-month deadline.

First, the court of appeal determined that the doctrine of equitable tolling, which suspends a statute of limitations under certain circumstances to ensure fairness, cannot be invoked to suspend the six-month deadline under the Government Claims Act because the deadline is not a statute of limitations.

Second, the court concluded that the six-month deadline under the Government Claims Act could not be extended under a continuing violation theory. The court determined that Willis' allegations, including reassigning him and denying him promotions, were permanent at the time the personnel decisions were made, which precluded application of the continuing violation doctrine.

For these reasons, the court of appeal held the trial court did not abuse its discretion in striking allegations from Willis' complaint due to his failure to present a timely government claim.

Openly Gay CHP Officer Overcomes CHP's Stature of Limitations Defense to FEHA Lawsuit

Brome vs. California Highway Patrol, 44 Cal. App. 5th 786 (2020)

Jay Brome was an openly gay California Highway Patrol (CHP) officer. During his nearly 20-year career, other officers subjected Brome to derogatory, homophobic comments; singled him out for pranks; and repeatedly defaced his mailbox. While Brome transferred CHP offices seeking a better working environment, the offensive comments about his sexual orientation continued. Officers at Brome's new office also frequently refused to provide him with backup assistance during enforcement stops, including during high-risk situations that should be handled by at least two officers.

On September 15, 2016, Brome filed a complaint with the California Department of Fair Employment and Housing (DFEH) asserting discrimination and harassment based on his sexual orientation and other claims under the Fair Employment and Housing Act (FEHA). The next day, Brome filed a civil lawsuit against the CHP.

The CHP sought to dismiss the lawsuit as untimely. Because an employee's DFEH complaint must be filed within one year of the alleged discriminatory or harassing conduct, the CHP argued Brome could only sue based on acts occurring on or after September 15, 2015. The trial court agreed and dismissed Brome's lawsuit since the crux of his claims occurred before the commencement of his medical leave in January 2015. Brome appealed.

First, the court determined that Brome's workers' compensation claim could equitably toll the one-year deadline (which applied at that time) for filing his DFEH complaint. To use equitable tolling, the employee has to prove: (1) timely notice; (2) lack of prejudice to the employer; and (3) the employee's own good faith conduct. The court concluded that Brome could establish all three of the elements.

Second, the court determined that the statute of limitations could be extended as a continuing violation.

Finally, the court concluded that a constructive discharge theory potentially applied. To establish constructive discharge, an employee must show that working conditions were so intolerable that a reasonable employee would be forced to resign.

For these reasons, the court held that the trial court erred in dismissing Brome's lawsuit.

County's Decision to Reassign Deputies Did Not Violate MOU Where Management Rights Clause Granted the County the Right to Assign and Reassign Deputies

County of Fresno vs. Fresno Deputy Sheriff's Ass'n, 51 Cal. App. 5th 282 (2020)

The Fifth District Court of Appeal held that Fresno County's (County) decision to reassign deputies from special assignments to patrol units did not violate the express terms of the memorandum of understanding (MOU), which granted the County the right to assign and reassign deputies, and that consideration of past practice was not required to determine whether the County had violated its obligation to negotiate a change in practice when it reassigned deputies.

The Fresno Deputy Sheriff's Association (Association) filed a grievance challenging the involuntary reassignment of two sheriff's deputies from their specialty assignments to patrol assignments. The Association prevailed at the labor arbitration. The County filed a petition for an administrative writ of mandamas to reverse the decision, and the trial court granted the petition. The Association and the deputies appealed.

The court of appeal affirmed. The court held that the appellants did not establish that the County had violated the express terms of the MOU. According to the court, the management rights clause in the MOU granted the County the right to assign and reassign deputies without limiting the reassignment to cases of discipline, poor performance, and other similar issues. On this basis, the court found that the County did not violate the express written terms of the MOU by reassigning the deputies involuntarily, even in the absence of disciplinary issues, documented performance issues, layoffs, or pending disability retirement.

Civil Service Commission Abused Its Discretion by Overturing Deputy Sheriff's Discharge

County of Los Angeles vs. Civil Service Comm'n of Cty. of Los Angeles, 40 Cal. App. 5th 871 (2019)

In 2010, Los Angeles County Sheriff's Department (LASD) Deputies Mark Montez and Omar Lopez strip-searched an inmate who stole items from a commissary cart. During the search, Lopez struck the inmate multiple times with his fist. Montez was aware of the assault, but did not participate in it.

After the inmate threatened the commissary employee who reported the theft, Lopez took the inmate to a control booth and shoved his face into a wall, causing severe bleeding. Montez was not present during the second assault, but arrived shortly thereafter. Montez also stood in front of a bloody control booth wall, which led the Department to determine he was aware of the second assault. Montez did not report either assault. A custody assistant, a non-sworn employee working in the facility, also observed the second assault but did not report it.

In the subsequent internal affairs investigation, Montez denied hearing any indications of an assault during the first incident, and denied observing blood on the wall following the second incident. As a result, LASD terminated Montez's employment for failing to report the use of force and making false statements during its investigation.

Montez appealed his discharge to the County's Civil Service Commission (Commission). The Commission found LASD had proven the misconduct. The Commission, however, decided Montez's penalty of discharge was too severe because of a lesser penalty the non-sworn custody assistant received. The custody assistant received only a five-day retraining discipline with pay. The Commission thus reduced Montez's discharge to a 30-day suspension without pay.

LASD petitioned the trial court to overturn the Commission's penalty determination. The trial court agreed with LASD and issued an order directing the Commission to set aside its decision to reduce Montez's discipline. Montez in turn appealed.

On appeal, the court determined the Commission abused its discretion when it reduced Montez's discipline. According to the court, courts will not change the disciplinary penalty that an administrative body—such as the Commission—imposes, unless there has been an abuse of discretion. In public employee discipline cases, the primary consideration in assessing the disciplinary penalty is the extent to which the employee's conduct resulted in harm to the public service. Other relevant factors are the circumstances surrounding the misconduct and the

likelihood of its recurrence. If the administrative body's findings are not in dispute, however, an abuse of discretion occurs when the findings do not support its decision.

According to the court, peace officers are held to higher standards of conduct than non-sworn employees are. Courts consider peace officer dishonesty to be highly injurious to their employing agencies and the public service. The court concluded that Montez's failure to report two incidents of abuse of an inmate constituted an "inexcusable neglect of his duty to safeguard the jail population," and his lies during the subsequent investigation "brought discredit upon his position and department, and forever undermined his credibility."

Thus, the court found that the Commission's decision to reduce Montez's discharge to a 30-day suspension was unsupported by its own findings.

Union Not Required to Exhaust Administrative Remedies Because MOU Did Not Provide for Class Action Grievances

Association for Los Angeles Deputy Sheriffs vs. County of Los Angeles, 42 Cal. App. 5th 918 (2019)

In 2017, the memorandum of understanding (MOU) between Association for Los Angeles Deputy Sheriffs (ALADS) and the County of Los Angeles (County) contained provisions requiring the County to match compensation increases given to other safety employee unions. The MOU also contained a grievance procedure, which ended in binding arbitration, to resolve any alleged violations of the MOU's terms. However, the MOU did not provide for class action grievances.

During the MOU's effective period, the County approved a salary adjustment for another County safety employee union. ALADS thereafter initiated two grievances concerning the County's alleged failure to increase the salaries of ALADS' members to match the salary adjustment approved for other safety employees. As part of the grievance procedure, ALADS sent written requests for arbitration to the Employee Relations Commission (ERCOM). The County objected to the requests, contending ALADS could not initiate a grievance on behalf of the individuals it represents.

ALADS then sued the County; its lawsuit requested a writ of mandate requiring the County to comply with the MOU's compensation provisions. The County filed a demurrer on the

grounds that ALADS failed to exhaust the administrative remedies provided by the MOU. The trial court agreed and sustained the demurrer without leave to amend.

The court of appeal reversed and remanded the case back to the trial court for further proceedings.

There is no need to exhaust administrative remedies if the judicial action seeks relief on behalf of a class, and the available administrative procedures do not provide class-wide relief. Although ALADS' action against the County was a representative action on behalf of its members and not a class action, that distinction was immaterial because ALADS sought relief on behalf of a designated group of persons (its members), which was similar to a class action.

II. Community College Districts

Community College District Could Refuse to Provide Faculty Members with Written Complaints Before Their Investigatory Interviews

Contra Costa Community College Dist., PERB Decision No. 2652-E (2019)

The Public Employment Relations Board (PERB) held that Contra Costa Community College District (District) did not violate the Educational Employment Relations Act (EERA) when it withheld copies of written discrimination complaints made against two faculty members until after their investigatory interviews.

PERB explained that after an investigatory interview is conducted, the employer may not deny the union's request for information on the basis that a disciplinary meeting or proceeding falls outside the scope of the collective bargaining agreement or that the union has no duty of fair representation regarding disciplinary meetings.

Similarly, the District may not deny the union's request for information by simply asserting a third party's right to privacy. PERB reaffirmed its earlier ruling that after the employer raises the legitimate privacy rights of a third party, such as a student or other faculty member, the employer cannot simply refuse to provide any information. Rather, the District must meet and confer in good faith to reach an accommodation with the union regarding the accused employee's right to obtain the information and the third party's right to privacy. Such

accommodations could include redacting information that is not relevant, or entering into an agreement that limits the use of the information once obtained.

III. STATE

CalPERS Could Not Reinstate a Previously Terminated Employee to a Higher Classification

Byrd vs. State Personnel Bd., 36 Cal. App. 5th 899 (2019)

In December 2014, after 14 years of employment, San Diego State University dismissed Byrd. Byrd subsequently filed a retirement application with CalPERS, and CalPERS accepted her application.

Byrd also filed an appeal with the State Personnel Board (SPB) to challenge her dismissal. Byrd and California State University (CSU) ultimately agreed to settle the appeal concerning dismissal. One provision of their settlement agreement directed CSU to reinstate Byrd to a higher classification, which Byrd had not previously held, and pay Byrd the higher salary associated with that classification while CSU applied for medical retirement benefits on Byrd's behalf. The SPB approved the settlement agreement.

Following the settlement agreement, however, CalPERS refused to reinstate Byrd to the higher classification because Government Code § 21198, part of California's retirement law, only authorized Byrd's reinstatement to a job she previously held.

On appeal, the court of appeal considered whether Government Code § 21198 prevented CalPERS from reinstating Byrd to a classification she had not previously held. In the pertinent part, § 21198 reads, "[a] person who has been retired under this system for service following an involuntary termination of . . . employment, and who is subsequently reinstated to that employment . . . shall be reinstated from retirement." The court, relying on the plain meaning of the statute, determined that the term "reinstate" means that the employee is returning to the specific position or classification he or she previously held.

Psychologist Could Not Establish He Was Subjected to an Adverse Employment Action

Doe vs. Department of Corr. & Rehab., 46 Cal. App. 5th 721 (2019)

Doe sued the California Department of Corrections & Rehabilitation (CDCR) alleging discrimination, retaliation, and harassment based on disability in violation of the Fair

Employment and Housing Act (FEHA). Doe alleged that he had two disabilities: asthma and dyslexia. Doe furthermore alleged CDCR violated FEHA by failing to both accommodate his disabilities and engage in the interactive process.

The trial court granted summary judgment for CDCR and Doe appealed. The court of appeal affirmed.

The court held that Doe's discrimination and retaliation claims failed because he presented no evidence he was subjected to an adverse employment action—an essential element of both claims.

The court of appeal furthermore held CDCR's alleged actions were minor conduct that upset Doe, but did not threaten to materially affect the terms and conditions of his job. Therefore, according to the court, the actions did not reach the level of an adverse employment action. Furthermore, Doe's decision to take medical leave was not an adverse employment action because the leave was voluntary and Doe requested it. The court of appeal also affirmed that CDCR's failure to accommodate Doe's alleged disability did not qualify as an adverse employment action for purposes of a discrimination or retaliation claim.

As for Doe's harassment claim, the court held that none of the alleged conduct was subjectively severe enough to constitute harassment. Rather, each incident involved a personnel decision by Doe's supervisor within the scope of his supervisory duties. Simply because Doe felt his supervisor performed those duties in a negative or malicious way did not transform the conduct into disability harassment.

Finally, the court of appeal held that Doe's accommodation and interactive process claims failed because he presented insufficient evidence to show CDCR was on notice that he had a FEHA-covered disability.

Legislation

Home-Based Childcare Provider Organizing

Approximately 40,000 Californians (providers) earn a living by operating state-funded, licensed child care facilities in their homes.

On September 30, 2019, California passed A.B. 378—the Building a Better Early Care and Education System Act (Act). The Act allows providers to unionize and bargain collectively to improve their working conditions and the state-subsidized, home-based childcare system in general.

The Act affords providers the right to form a statewide bargaining unit and select a collective bargaining representative (a "certified provider organization") through a mail-ballot election process, occurring no sooner than June 1, 2020, which PERB would oversee. If the providers elect to be unionized, their certified provider organization will bargain with the State. The State sets the rates that providers are paid, as well as other conditions of their employment.

Ninth Circuit Rejects Plaintiff's Attempt to Expand Holding of *Janus* v. AFSCME Council 31

Belgau vs. Inslee, 975 F.3d 940 (9th Cir. 2020)

Seven state employees sued the State of Washington and a union under 42 U.S.C. § 1983, alleging that after the U.S. Supreme Court's decision in *Janus v. AFSCME Council* 31, deduction of union dues violates the First Amendment.

Since the *Janus* decision issued on June 27, 2018, litigation has ensued in California and many other states to test whether *Janus* impacts the relationship between public sector unions and employees who have voluntarily signed up to be members. Some plaintiffs have asserted in pending litigation, including the *Belgau* case, that authorizations signed prior to *Janus* are invalid because at the time employees gave their authorizations, the only alternative to membership was paying an agency fee, which the Court has since deemed unconstitutional.

In such litigation, defendants have presented the counter-argument that in *Janus*, the Court did not address existing practices for payment or remission of dues by or on behalf of voluntary union members.

The Ninth Circuit Court of Appeals disagreed with the plaintiffs and held that the suit was properly dismissed because there was no state action, which is a threshold § 1983 requirement.

IV. Cities

PERB Directs City to Reinstate Proposal It Withdrew Three Years Earlier

City of Palo Alto, PERB Decision No. 2664-M (2019)

Following the City of Palo Alto's (City) last, best, and final economic proposals, the City proposed the parties bifurcate economic issues from non-economic issues to allow the pay increases to go into effect while the parties continued to negotiate non-economic terms.

The union took the City's economic proposals to its members, who ratified them. After the union ratified the City's economic proposals, the City made a non-economic proposal seeking to include an "at-will" provision for eight management positions. After the union rejected that proposal, the City withdrew the bifurcation plan.

A PERB Administrative Law Judge (ALJ) concluded the City's action constituted bad faith bargaining in violation of the Meyer-Milias-Brown Act (MMBA). Neither party excepted to the ALJ's findings on liability.

On appeal, PERB noted that a properly designed remedial order seeks to restore the situation to what it would have been without the unfair labor practice. PERB thus directed the City to put the bifurcation proposal and the related last, best, and final economic proposals back on the bargaining table if requested by the Union. PERB reasoned that reinstating these proposals would restore the situation as nearly as possible to what would have existed but for the City's withdrawal of the bifurcation plan proposals.

PERB Safeguards Union Stickers on Public Employees' Hardhats

Stationary Eng'rs Local 39 vs. City of Sacramento, PERB Decision No. 2702-M (2020)

Employees in the City of Sacramento's Maintenance Services Division wear hardhats, which often bear union stickers and decals. The City of Sacramento (City) implemented a "safety" rule requiring employees to take the union stickers and decals off their hardhats. The exclusive representative of these employees, Stationary Engineers Local 39, filed an unfair practice charge. PERB found the rule unreasonable. There were no special circumstances justifying the City's rule declaring City-issued hardhats to "be free of stickers, decals, or any other markings (except for the city seal) and not be painted."

Agency Must Meet and Confer About Privacy in Response to Union's Request for Unredacted Investigation Report

City and County of San Francisco, PERB Dec. No. 2698-M (2020).

Employee A worked for the City and County of San Francisco and was the subject of a disciplinary investigation. As a result of the investigation, Employee A received a written warning regarding disruptive behavior.

The Service Employees International Union (SEIU) filed a grievance on Employee A's behalf. On November 9, 2018, an SEIU Field Representative requested "a copy of interview questions to all witnesses named in the written warning . . . a copy of the interview answers of all witnesses of [sic] the written warning . . . [and] [a]ny other evidence, such as notes, internal complaints, email communications, etc." The Field Representative noted that the information was needed so that SEIU could "investigate the grievance."

On November 20, 2018, the City and County of San Francisco sent the Field Representative a copy of the investigative report that had seven pages redacted. When the Field Representative requested a description of the redacted information, a City and County of San Francisco administrator noted that the redacted information was unrelated and not used to support Employee A's written warning.

At no time did the City and County of San Francisco offer to meet and confer about the redactions, or indicate its willingness to negotiate about them.

The Public Employment Relations Board (PERB) held that the Meyers-Milias-Brown Act's duty to meet and confer extends to union requests for information during a contractual grievance process. Although the City and County of San Francisco argued that it had no duty to meet and confer because SEIU never made such a request, PERB disagreed, noting that SEIU attempted to get clarification from the City and County of San Francisco about the redactions. Each time the City and County of San Francisco provided another copy of the investigation report, it decided unilaterally what to redact. PERB held that a union has no duty to request to meet and confer if the employer has unilaterally decided what to redact and has presented its decision as a fait accompli rather than a proposal.

V. Counties

County Lawfully Increased Its Fee for Copies of Records

California Public Records Research, Inc. vs. County of Alameda, 27 Cal. App. 5th 800 (2019)

The court noted that the case hinged on what the Legislature meant by "indirect costs" in Government Code § 27366. The court relied on the statute's legislative history and determined the Legislature intended to give county boards of supervisors flexibility and discretion to consider a wide range of indirect costs. Therefore, the court concluded that California Public Records Research, Inc. could not establish that the County had violated § 27366.

County Is a Joint Employer Where Medical Clinics are Owned by Private Corporations but Cunty Retains the Right to Control Work

County of Ventura vs. Public Employment Relations Board, 42 Cal. App. 5th 443 (2019)

The Second District Court of Appeal held that the County of Ventura (County) is a joint employer of clinic employees of satellite medical clinics owned by private corporations but under contract with the County to provide medical services.

Service Employees International Union, Local 721 (Union) sought to represent non-physician employees of satellite medical clinics owned by private corporations but under contract with Ventura County Medical Center to provide medical services. The County refused to process the Union's petition to represent clinic employees on the grounds that private corporations and not the County were the sole employers. The Union filed an unfair practice charge with the Public Employment Relations Board (PERB), alleging the County's refusal to process its petition violated the Meyers-Milias-Brown Act (MMBA). PERB reversed its ALJ's decision and found the County is a single employer, or, in the alternative, a joint employer of clinic employees. The County filed a petition for writ of extraordinary relief from PERB's decision.

The court of appeal affirmed PERB's decision. The court held that substantial evidence supported PERB's finding that the County was a joint employer of clinic employees because the County retained the right to control the "manner and method in which clinic employees' work is performed," citing *Service Employees International Union v. County of Los Angeles,* 225 Cal. App. 3d 761, 769 (1990). The court reasoned that, although the clinics' medical directors directly hire clinic employees and set their salaries, the County exercised control over compensation and staffing decisions because the County retained ultimate control over the clinics' financial resources that pay for compensation and staffing. According to the court, the clinics' "shared call" system, which required the clinics to share staff as needed with other County clinics and

hospitals to ensure minimal staffing levels are maintained, further showed the County exercised its right to control staffing decisions. The court further found that the County had a right to control the clinics' operations, patient care and personnel policies, training, and other conditions of employment at the clinics. The court concluded that because PERB properly found the County was an employer under the joint employer doctrine, it was not necessary to decide whether the single employer doctrine applies.

The Right to Strike

PERB issued three decisions explaining why, in each instance, it denied, in whole or in part, an employer's request to enjoin a labor strike. PERB's trilogy found either, in whole or in part, there was (1) no reasonable cause to believe an unfair practice has been or will be committed, and (2) that injunctive relief was not just or proper.

San Mateo County Superior Court, PERB Order No. IR-60-C (2019)

The Board clarified how it will treat a union's offer to exempt from a planned strike certain employees or positions that PERB has preliminarily found to be essential. PERB stated that such an exemption (i.e., the existence of a "line pass arrangement") will normally mean that there is no reasonable cause to believe that the union is threatening an unfair practice as to those positions, and that injunctive relief is not just and proper as to those positions. If a union has violated or threatened to violate its commitment to exempt certain positions from its strike, or if the union has offered an exemption from the strike that is insufficiently broad to protect public health and safety, then PERB may decide to grant the employer's request (in whole or in part) for injunctive relief.

County of San Mateo, PERB No. IR-61-M (2019)

This case involved two strike threats by AFSCME Local 829 (Union), which represents a large number of County of San Mateo (County) employees. The County filed two requests for injunctive relief with PERB. PERB preliminarily determined that the Union's threatened strike included certain "essential employees." The Union agreed to a "line pass arrangement" whereby it exempted those employees from its threatened strike.

It set forth its analysis regarding the "essentiality" of the employees in the following County departments: Public Safety Communications; Sheriff's Office and Probation; Coroner's Office; Department of Public Works; Human Services Agency; Health System-Behavioral Health & Recovery Services; Health System-Family Health Services Office; Health System-Public Health Policy and Planning Office; Health System-Environmental Health Services; Health System-Adult and Aging Services; and Health System-San Mateo Medical Center.

Whether County Could Have Accommodated Employee in a Different Work Location was Irrelevant to Her Entitlement to Disability Retirement
McCormick vs. Public Employees' Ret. Sys., 41 Cal. App. 5th 428 (2019)

The court analyzed what role, if any, the existence of a theoretical accommodation plays in determining a member's eligibility for disability retirement. The court thus concluded that CalPERS could not deny disability retirement under Government Code § 21156 when, due to a medical condition, employees can no longer perform their duties at the only location where their employer will allow them to work.

Civil Service Commission's Order Sustaining Termination Precludes County Employee's Retaliation Claims Under 42 U.S.C. § 1983 but not Under California Labr Code § 1102.5
Bahra vs. County of San Bernardino, 945 F.3d 1231 (9th Cir. 2019)

The Ninth Circuit Court of Appeals held that the San Bernardino County Civil Service Commission's (Commission) order sustaining Plaintiff's dismissal did not preclude his claim for retaliation under California Labor Code § 1102.5, but did preclude his claim for retaliation under 42 U.S.C. § 1983.

Plaintiff filed suit in federal court alleging that he was fired in retaliation for his whistleblowing activities in violation of Labor Code § 1102.5 and 42 U.S.C. § 1983.

With respect to Labor Code § 1102.5, the court reversed the district court and held that the Commission's order did not have a preclusive effect on his claim for retaliation. The court noted that in California, decisions issued by administrative agencies typically have preclusive effect. However, the court reasoned that the California Court of Appeal had recently applied a legislative-intent exception and held in *Taswell v. Regents of University of California*, 23 Cal.App.5th 343 (2018) ("Taswell"), that administrative findings by a state agency do not preclude claims for retaliation brought under Labor Code § 1102.5.

As to Plaintiff's 42 U.S.C § 1983 claim, the court affirmed the district court and held that the Commission's ruling had preclusive effect of this claim, which concerned retaliation related to a petition regarding a hostile work environment. According to the court, the remaining issue was, therefore, whether the administrative proceeding had sufficient judicial character and provided Plaintiff with an adequate opportunity to litigate his claims. The court concluded that Plaintiff had a full opportunity to litigate his termination before the Commission based on the comprehensive evidentiary record and the availability of judicial review.

PERB Allows Union Flexibility in Bargaining, Prohibits County's Wholesale Denial of Access to Information and Employer Areas

County of Tulare vs. SEIU Local 521, PERB Decision No. 2697-M (2020)

First, PERB held that making a proposal that appears to be a step back in contract negotiations does not always constitute regressive bargaining. In this case, SEIU Local 521 began including a separate bargaining unit in its proposals after the County recognized SEIU Local 521 as its representative. PERB held that this inclusion of a new bargaining unit in its proposals two months into negotiations was not regressive, because the recognition was a credible, reasonable justification of changed circumstances. Further, PERB held that withdrawing concessions is not bad faith bargaining if it is balanced by offering more favorable terms on other bargaining subjects, and if the overall conduct is not "net regressive."

Second, PERB held that engaging in direct or indirect advocacy for contract proposals with the employer is not always direct dealing. In this case, an SEIU representative sent several emails to the County's Board of Supervisors "to persuade them to direct the County to put money on the table." PERB said this was permissible, because the emails did not advocate for contract terms different from those that SEIU already sought at the table. The representative acted well within his "right to public advocacy."

Third, PERB affirmed that an employer cannot categorically deny requests for information on privacy grounds or duty of neutrality grounds. PERB held that the County improperly rejected the information request wholesale, noting that employers must specify their particular privacy concerns and negotiate over the private information at issue in the request.

Fourth, PERB reaffirmed that public employers cannot adopt access rules that single out unions or employees' protected activities, and that access rules must allow protected activities to occur in non-work times and in non-work areas.

Finally, PERB held that an employer's decision to litigate a claim against a union is generally not an unfair labor practice unless the union can show that the claim had no reasonable basis and was motivated by an unlawful purpose. In this case, SEIU Local 521 alleged that the County unlawfully dominated SEIU Local 521's internal administration or interfered with employees' protected rights when the County brought its bad-faith bargaining claim against SEIU Local 521. But PERB ruled that SEIU Local 521 did not apply PERB's case law to the instant facts of the case in its charge and thus did not show how the County's claim constituted unlawful domination or interference with protected rights.

PERB Clarifies Exceptions for Six-Month Deadline to File Challenges to Public Employers' Rules and Policies and Affirms Right of Unions and Employees to Petition Elected Officials

SEIU Local 221 vs. County of San Diego, PERB Decision No. 2721-M (2020)

Normally, PERB imposes a six-month deadline from the time a policy is implemented to file an unfair practice charge challenging it. But PERB recognizes three exceptions to this deadline: (1) when there is a "continuing violation"; (2) when the violation was revived by a "new wrongful act"; and (3) when the limitations period is tolled. Going forward, in cases where the union alleges that a policy interferes with protected rights or is discriminatory against unions or union activity, the charge is timely under the first exception, so long as the policy has remained in effect for six months prior to filing a charge against it. It is not necessary for the employer to have applied the policy against the union during those six months. Secondly, when the employer has committed a "new wrongful act" within the six-month limitations period, such as re-approving a prior policy prior to its expiration, the charge against the policy is timely filed under the second exception.

VI. Higher Education

Regents of the University of California, PERB Order No. IR-62-H (2019)

In its request for injunctive relief, the University of California (University) argued that the Unions' one-day strike on May 16, 2019 constituted an unlawful "intermittent strike"

because it was the fifth strike of short duration since May 2018. PERB held that the record of short duration strikes in evidence in the case did not create reasonable cause to believe the Unions' presumptively protected activities (i.e., the Unions' strikes, which the Unions declared to be unfair practice strikes) were in fact unlawfully intermittent.

Public Employer's Bulletin Attempted to Influence Public Employees' Decision about Union and Violated Government Code § 16645.6

Teamsters Local 2010 vs. Regents of Univ. of Cal., 40 Cal. App. 5th 659 (2019)

The First District Court of Appeal upheld the dismissal of the Regents of the University of California's (Regents) anti-SLAPP motion because Teamsters Local 2010 (Union) demonstrated that it had a reasonable probability of prevailing on its claim that the Regents' human resources bulletin violated Government Code § 16645.6.

During the Union's organizing campaign at the University of California, Davis (UCD), UCD's Employee and Labor Relations Department distributed a flier to employees discussing the employees' future decision about whether or not to be represented by a union and UCD's wages, salary increases, and complaint procedures. In response, the Union filed a complaint alleging that UCD's bulletin violated Government Code § 16645.6, which prohibits a public employer from using state funds to assist, promote, or deter union organizing. Regents filed an anti-SLAPP motion, which the trial court denied. The trial court found that while the claim arose from activity protected under Code of Civil Procedure § 425.16, the Union had a reasonable probability of prevailing on its claim.

The court held that the Union had shown it had a reasonable probability of prevailing on its claim. The court found that, although the bulletin was not coercive, it was an attempt to "influence" UCD employees' decision to join the Union, and, on this basis, violated Government Code § 16645.6.

The Regents also argued that the Union had no probability of prevailing on its claim because it was preempted, *i.e.,* that it was an unfair labor practice over which PERB had exclusive jurisdiction. Applying the principles of the *"Garmon* preemption" rule developed by the National Labor Relations Board, the court disagreed that the Union's claim was preempted. The court reasoned that there is no statutory provision granting PERB exclusive jurisdiction and that if the Legislature had intended PERB to have exclusive jurisdiction over claims under

Government Code § 16645.6, it would not have provided for a civil action and remedies, including damages and civil penalties, under that statute.

Systems Administrator Positions Permissibly Added to Bargaining Unit fr Technical Support Workers at University of California without Proof of Majority

Regents of Univ. of Cal. vs. PERB, 51 Cal. App. 5th 159 (2020)

The court of appeal held that: (1) systems administrators were permissibly added to the bargaining unit for tech support services at the University of California (UC) because they were not professionals within the meaning of the Higher Education Employer-Employee Relations Act (HEERA) and lacked a community of interest distinct from the technical support workers; and (2) PERB did not err in granting a petition for unit modification from University Professional and Technical Employees, CWA Local 9119 (UPTE) without proof of majority because the number of systems administrators on the day of the petition's filing was less than 10% of the existing bargaining unit size.

Unions Are Not Required to Refund Agency Fees Paid Prior to *Janus* Decision

Danielson vs. Inslee, 945 F.3d 1096 (9th Cir. 2019)

Following the *Janus* decision, three public sector employees who were not members of their employee organization filed a class action lawsuit against their union pursuant to 42 U.S.C. § 1983.

In affirming the district court's dismissal, the Ninth Circuit held that the union properly relied on both the state law and then-binding Supreme Court precedent. For that reason, the Ninth Circuit determined that the union could use a good faith defense. The court explained, "We hold that the Union is not retrospectively liable for doing exactly what we expect of private parties: adhering to the governing law of its state and deferring to the Supreme Court's interpretations of the Constitution. A contrary result would upend the very principles upon which our legal system depends. The good faith affirmative defense applies as a matter of law, and the district court was right to dismiss [the] claim for monetary relief."

State of California Bargaining Units

Catherine Harris

Composition of the State's Unionized Work Force

Unionized state workers in California are organized into 21 bargaining units pursuant to the State Employer-Employee Relations Act which is also known as the Ralph C. Dills Act (California Government Code section 3512 et seq). The State Employer is represented, for collective bargaining purposes, by the California Department of Human Resources Labor Relations Division (CalHR). Service Employees International Union Local 1000 (SEIU) represents employees in nine of the 21 bargaining units: Unit 1 (Professional, Administrative, Financial and Staff Services), Unit 3 (Professional Educators and Librarians), Unit 4 (Office and Allied), Unit 11 (Engineering and Scientific Technicians), Unit 14 (Printing and Allied Trades), Unit 15 (Allied Services), Unit 17 (Registered Nurses), Unit 20 (Medical and Social Services) and Unit 21 (Educational Consultants and Library).

The rest of California's unionized work force is comprised of 12 additional bargaining units as follows: Unit 2 (California Attorneys, Administrative Law Judges, and Hearing Officers in State Employment), Unit 5 (California Association of Highway Patrolmen), Unit 6 (California Correctional Peace Officers Association), Unit 7 (California Statewide Law Enforcement Association), Unit 8 (CAL FIRE Local 2881), Unit 9 (Professional Engineers in California Government), Unit 10 (California Association of Professional Scientists), Unit 12 (International Union of Operating Engineers Craft and Maintenance), Unit 13 (International Union of Operating Engineers, Locals 39 and 501; AFL-CIO/Stationary Engineers), Unit 16 (Union of American Physicians and Dentists), Unit 18 (California Association of Psychiatric Technicians) and Unit 19 (American Federation of State, County and Municipal Employees/Health and Social Services/Professional).

This report summarizes the major issues impacting union-represented employees in the California state service during calendar year 2020. The report was compiled with the assistance of both union and employer representatives in all 21 of the State's bargaining units.

The COVID-19-Related Budget Deficit

Due to the pandemic and the ensuing $54 billion state budget deficit, virtually all represented employees in the state service agreed to accept reduced compensation (9-10%) in

exchange for leave credits under the Personal Leave Program (PLP). The salary reductions in exchange for PLP were presented to the public sector unions as a means of avoiding furloughs. In some bargaining units, the employee portion of the pension contribution was suspended to ease the impact of reduced compensation.

While some of the agreements contain provisions which roll back salary reductions at the discretion of the Department of Finance in the event of federal assistance to state governments, none of these rollback provisions were triggered during calendar year 2020. Union leaders and CalHR, motivated by their common interest in preventing further reductions in compensation, are working collaboratively to explore mutually agreeable ways to achieve cost savings as exemplified by the SEIU Cost Savings Task Force.

At the end of the 2020 legislative session, Governor Newsom signed Senate Bill 973 (SB 973) which provides that, beginning in March of 2021, employers with 100 or more employees will be required to provide pay data information by race, ethnicity, and sex to the Department of Fair Employment and Housing. SB 973 also provides that California Equal Pay Act claims may be enforced by the Department of Fair Employment and Housing, in addition to the Labor Commissioner's Office. Consistent with the Newson administration's commitment to pay equity, this legislation may influence how continuing budget deficits, with a potential adverse impact on protected groups, are dealt with in future negotiations.

Other COVID-19-Related Issues

As the pandemic progressed during 2020, COVID-19-related issues in the California state service went far beyond the state budget. These issues, which in many cases may be interconnected, generally fall into five categories: 1) health and safety issues pertaining to essential workers serving on the front lines of the pandemic; 2) telework opportunities for employees able to work from home; 3) space planning issues created by the pandemic; 4) family medical leave issues; and 5) issues related to an eventual post-pandemic return to work.

Many state workers, including law enforcement, public safety, health care professionals, and consumer protection professionals, have been reporting to work throughout the pandemic, i.e., giving rise to a host of unprecedented issues pertaining to on-the-job health and safety during periods of high contagion. These health and safety issues are generally being resolved

through traditional mechanisms, such as frequent communications, joint committees and expedited arbitrations. As an example of labor-management cooperation, employee organizations and public employers throughout the state of California have been generally supportive of new recommendations from the Department of Public Health for weekly surveillance screening of frontline healthcare workers to keep them and their families safe from COVID-19.

Telework has been part of the State's transportation management system since 1990 but only recently has telework become a standard protocol for employees able to perform their duties from home. This development has created new issues such as whether state departments should be required to reimburse employees' telework expenses during the coronavirus outbreak; how to safeguard the state's cybersecurity systems while allowing access to teleworkers; and how to insure compliance with wage and hour laws. The parties are also engaged in discussions about whether the telework program has resulted in increased productivity and improved morale so as to justify its retention post-pandemic.

Whether or not the telework program becomes entrenched in the state service, the COVID-19 pandemic has also raised space planning issues, as many employees who formerly reported to a work location five times a week may now be physically present at an office location on a much more limited basis. Space planning professionals may now have to design work spaces that are adaptable for use by more than one employee on a scheduled basis, while still allowing for employees to gather for in-person meetings, mentoring, training, and direct supervision as needed.

Prior to the COVID-19 pandemic, family medical leave issues typically involved defining who is included within the definition of family and balancing work and family obligations. Federal and state law changes to family medical leave legislation have brought new issues to the forefront. For employers with 500 or more employees, the Families First Coronavirus Response Act (FFCRA) has expanded existing FMLA benefits to cover child care responsibilities such as the need to provide child care due to COVID 19-related school closures. On September 9, 2020, Governor Newsom signed into law Assembly Bill 1867 (AB 1867) which seeks to fill the gap left by the FFCRA and applies only to employers with fewer than 500 employees. A more recent bill passed by the California legislature grants additional sick leave to state firefighters and law enforcement officers, as well as state employees who work at prisons and state hospitals.

Administering these extensions of benefits under both federal and state law have resulted in new challenges for both union and employer representatives.

As we look ahead to nationwide administration of safe and effective vaccines, parties are beginning to engage on the issues that will almost certainly arise upon return to work. As a threshold matter, state departments and unions will have to develop a plan for how to safely and responsibly return employees to their pre-pandemic workplaces in accordance with state and local regulations. The plan may have to differentiate between employees who are at higher risk of infection due to age and/or underlying medical condition. This discussion may implicate disability laws regarding reasonable accommodation and the interactive process. Employees may be returning to work spaces with clear plastic barriers around their desks, requirements for face coverings, and accessible hand washing stations. Also under discussion are questions regarding testing and/or vaccination requirements prior to return to pre-pandemic work spaces, as well as the implications of any such requirements on individual privacy rights and religious freedom.

The Impact of *Janus v. AFSCME*

There can be no doubt that COVID-19-related issues have been of paramount concern for both the State employer and all of the unions representing state employees for most of calendar year 2020. While we began the year expecting significant changes following on the heels of the *Janus* decision, early projections regarding a mass exodus of members opting out of union membership and dues-paying simply did not materialize across the 21 bargaining units of the California state service. To the contrary, the public sector unions have met the challenge through operational changes inside the union structure and focused efforts at employee outreach. AB 119, enacted in response to *Janus*, requires public employers to provide contact information to the exclusive representative within 30 days of hire or by the first pay period of the month following their hire. There is also an ongoing obligation to provide the exclusive representative a list of contact information for all employees in the bargaining unit at least every 120 days.

Further contributing to the continued viability of public sector unions representing employees in the state service, California law (SB 866) still provides that deductions for union dues may be requested by employee organizations from salaries and wages of their members and public employers have a legal obligation to honor those requests. As part of the process,

employee organizations must now certify to the public employer in writing that the employee organization has and will maintain an authorization, signed by the individual from whose salary or wages the deduction is to be made. SB 866 also amends the new orientation process established by AB 119 to prohibit notice of the new employee orientation from being disclosed to anyone other than the employees, the exclusive representative, or a vendor that is contracted to provide a service for purposes of orientation.

While a number of lawsuits have been filed seeking refunds of dues collected prior to the *Janus* decision, these lawsuits have been unsuccessful. For example, the California Statewide Law Enforcement Association (CSLEA), the exclusive representative of peace officers in Unit 7, has successfully defended two lawsuits funded by right-to-work organizations seeking retroactive application of *Janus* and elimination of maintenance of membership. Cooley v. CSLEA, 385 F. Supp. 3d 1977 (2019) and Savas v. CSLEA (Southern Dist. 2020).

Summary: *Department of Human Resources v. IUOE* (CA5 F078825)

Ken Perea

On December 17, 2020, in *Department of Human Resources v. IUOE* (CA5 F078825), the California Court of Appeal, Fifth District, issued its opinion granting the State's petition to vacate an arbitration award on grounds the arbitrator's interpretation of the parties' MOU constituted a violation of public policy relating to constitutional merit principles applicable to all civil service employment.

This dispute began when the grievant requested his personnel file be purged of negative documents under terms of the parties' MOU which provides that materials of a negative nature placed in an employee's personnel file shall, at the request of the employee, be purged after one year with the exception of "formal adverse actions" as defined in external law and "material of a negative nature for which actions have occurred during the intervening one-year period." A number of months later, the State disciplined the grievant by reducing his salary for one year and attaching as its basis various negative counseling and corrective memos from several years past.

Following arbitration of the dispute under the MOU, the arbitrator's award sustained the Union's grievance and ordered the State to cease and desist from failing to follow the MOU. The

Superior Court thereafter denied the State's petition to vacate the Award and the matter was appealed to the Court of Appeal, Fifth District.

The Court of Appeal granted the State's petition to vacate on public policy grounds and held the Award was contrary to constitutional merit principles applicable to civil service employment.

COLORADO

State and Local Public Sector

Don E. Williams

Administrative Law Judges and Hearing Officers are full time state employees, so labor arbitrators do not get any of this sort of work. Governor Jared Polis signed into law House Bill 1153, a long-sought union priority permitting collective bargaining by unionized state employees. The bill will let state workers advocate for higher wages, better working conditions, and the well-being of them and their families through collective bargaining. State employees already had a special ability to petition government, under an executive order issued by Governor Bill Ritter in 2007 obligating the state to bargain with state employee unions over workplace matters.

Employees of the Colorado state government or subdivisions of the government, such as counties and cities, have benefits as government employees, with limitations on what actions they can bring, due to the Colorado Governmental Immunity Act. Under this Act, non-federal, public employees in Colorado are barred from bringing many basic tort claims against the state, county, or city for whom they work. Colorado state, county, and city employees also do not have the same rights under the Colorado Wage Act that private sector employees have.

Colorado state employees wishing to bring certain state legal claims against their employer must first exhaust their administrative remedies by filing a claim with the state personnel board. Colorado state employees who are certified, or no longer probationary, may only be disciplined or terminated for just cause. In other words, they are no longer at will employees. Because certified employees are not at will, they are entitled to a due process evidentiary hearing before the state, which can adversely affect their current base pay, status, or tenure.

Any adverse action taken against an employee can be reversed if the action was arbitrary or capricious. Certified employees have a right to:

- Have their case heard by an administrative law judge.
- Appeal to the Colorado State Personnel Board (“Board”) and then to the Colorado Court of Appeals.

- File whistle blowing complaints with the Board.

A more specific set of rules applies to Colorado public sector educators, pursuant to the Teacher Employment, Compensation, and Dismissal Act of 1990. Three of the five recent walkouts occurred in right-to-work states that do not authorize collective bargaining for teachers. Colorado and Oklahoma permit limited collective bargaining by teachers.

FLORIDA

2020 State and Local Public Sector Committee

The State and Local Public Sector Committee did not include an Academy member from Florida. Charles Kohler and I are Ohio arbitrators who also provide services in Florida. Arbitrator Kohler has an extensive practice in the state, and he has submitted a comprehensive report. William Nowel, a former AFSCME representative in Florida and the current Labor and Employee Relations Manager for Hillsborough County (Tampa) filed a report for the committee.

Thomas J. Nowel, NAA

Public Sector Labor Relations in Florida in 2020

Charles W. Kohler, Esq., member of the National Academy of Arbitrators

I am on a panel of arbitrators under a collective bargaining agreement between the Florida Police Benevolent Association and the State of Florida. The agreement covers a bargaining unit consisting of various employees who work for state correctional facilities. Bargaining unit members include corrections officers and corrections supervisors who are involved in the security and safety of incarcerated individuals. In addition, the bargaining unit includes employees such as parole officers and probation officers, who are involved in the control and surveillance of probationers and parolees within the community.

In response to the COVID-19 pandemic, the State of Florida imposed a travel ban that prohibited management representatives from traveling for in-person arbitration hearings. In order to avoid accumulating a backlog of arbitration cases, the parties quickly moved to use Zoom videoconferencing for hearings. From the perspective of this arbitrator, representatives of both management and the union have been very cooperative in adopting the videoconferencing format. Thus far, this arbitrator is of the opinion that the videoconferencing format has been a very satisfactory solution to the problems caused by the pandemic.

According to Maria S. Dinkins, Assistant General Counsel for the Florida Department of Corrections, as of November 2020, the travel limitations remain in place. Dinkins anticipates that Zoom video arbitrations will continue as long as the parties and the arbitrators agree to continue using this format.

In September 2020, this arbitrator conducted an in-person hearing with a city police department in Florida. Prior to the hearing, the parties agreed to use City Council chambers for the hearing. Tables and chairs were arranged to allow for social distancing. Arrangements were made for hand sanitizer to be readily accessible. All participants wore masks during the hearing. However, in some cases, a witness and the attorney eliciting testimony temporarily removed their masks in order to allow the arbitrator and the court reporter to hear the testimony more clearly.

In another case, an arbitration was set for an in-person hearing. Two days before the hearing, the grievant, who had an underlying medical condition, decided that he did not want to participate in an in- person hearing. Fortunately, the parties were able to quickly switch to a video hearing using the Zoom format. I generally tell parties that, even when a hearing is scheduled to be held in person, parties should be prepared to move to a video hearing if circumstances dictate.

Public sector collective bargaining in Florida is governed by the Florida Public Employees Relations Commission, generally referred to as PERC. Traditionally, PERC proceedings occurred either in Tallahassee or at a location convenient to the parties. In its June 2020 newsletter, PERC announced that it would begin to offer remote alternatives in order to minimize in-person contact.

PERC subscribes to a service through SunCom, which allows participants to call in to a conferencing number using a PIN unique to the presiding officer. This service minimizes the need for people to gather in an enclosed environment for long time.

At the request of the parties, PERC will schedule a hearing using the Zoom videoconferencing format. If the parties agree to proceed with this format, PERC will send a Zoom invitation to the parties within seven days of the hearing. For both telephone and video hearings, PERC will retain a court reporter to transcribe the hearing.

Once a hearing has been set in a particular format, a party can file a motion with PERC to convert the hearing to a different format. The motion must specify a justifiable reason for changing the format.

Following the February 2018 Parkland school shooting tragedy, the Broward County Sheriff's Office discharged four deputies for neglect of duty. In two widely publicized cases,

arbitrators reinstated two of the discharged deputy sheriffs. The arbitrators found that the Sheriff had not imposed discipline within the time limit set forth in the Florida Law Enforcement Officers' and Correction Officers' Bill of Rights. The law [FS §112.532 (6) (a)] provides that disciplinary action must be taken within 180 days after an agency receives notice of an allegation.

In May 2020, an arbitrator found that the Sheriff discharged Sergeant Brian Miller two days after the 180-day time limit. In September, a different arbitrator found that the Sheriff waited 193 days to discharge Deputy Joshua Stambaugh. Both arbitrators ordered the Sheriff to reinstate the deputies with seniority and back pay. Although the statute provides a number of exceptions to the 180-day rule, the arbitrators did not find that any of the exceptions were applicable in these cases.

Bargaining in The Time of COVID-19: A Perspective from Florida

William Nowel

Florida's Public Sector Labor Law is unique in many ways. Perhaps its largest departure from the National Labor Relations Act (NLRA) and many other states' collective bargaining laws is that collective bargaining sessions are open to the general public. Florida's broad set of transparency laws, which we refer to as our Sunshine Laws, designates that notice must be posted as to the date, time, and location of a session, and that the public be able to be present.

Imagine holding a bargaining session over economics and having a union's membership in attendance, or a few reporters, or anyone that fits the description of the general public. Regardless of whether this law helps, hurts, or leaves the bargaining process unchanged, it is the law that we live by in the Sunshine State. Public sector entities and unions have become used to this provision. Employers will make sure notice is posted and that bargaining sessions take place in locations which would allow for an audience if one shows up. Unions will sometimes bring one member to sit as an audience and livestream the bargaining session onto the union's Facebook page. This was all very status quo—and then COVID-19 came to America.

There is no doubt in my mind that every state update published in the NAA report this year will describe the struggle unions and employers went through in making the decision on whether to bargain remotely. Those choices had to be made here as well. In my little corner of

the state, we did make the decision to conduct a midterm bargaining session in April 2020 and that session was to be conducted virtually.

Deciding and agreeing to conduct a virtual session was only one-half of the equation. We had to make sure that we followed our Sunshine Laws as well. What is the best way to conduct a virtual meeting while also giving the public the ability to attend? When formulating an answer to this question, all I could think of were the horrors of large Zoom meetings, unmuted microphones, webcams turned off seemingly at random, accidental screensharing, and many, many more distractions. It turned the question of "What is the best way to conduct a virtual meeting while also giving the public the ability to attend?" to "Is it even possible?"

Luckily, I did not have to answer this question on my own. Through working with the IT department, we were able to conduct a virtual bargaining session which was live broadcast onto our YouTube channel. Notice of the date, time, and website URL was posted in advance. This way, the general public could attend and watch the bargaining session as it happened, while the virtual meeting itself had only the respective bargaining committee members in attendance. So, the unmuted microphones, webcam issues, and accidental screensharing, while present, were limited.

The mechanics of the bargaining session itself were different. How is a proposal traded across the table? Through multiple shared screens and saving and editing documents in real time, we were able to preserve the positions of the parties while reaching a tentative agreement. It did feel more along the lines of Interest Based Bargaining (IBB) rather than more traditional bargaining methods. If virtual bargaining sessions continue to be the norm going forward, I will be interested in whether they create more of an IBB atmosphere solely based upon the nature of their mechanics.

At the time of writing this article (October 2020) it seems likely that COVID-19 will continue to be a consideration here in Florida. As parties begin the collective bargaining process for full collective bargaining agreements, time will tell what creative solutions are found and if there are lasting efficiencies that we can carry with us into the future.

William Nowel

William Nowel is the Labor and Employee Relations Manager for a local government in Central Florida and was a Staff Representative with AFSCME in Ohio and Florida. Nowel received his

bachelor's degree in English from John Carroll University in Ohio and his Executive MBA at the University of South Florida.

ILLINOIS

Illinois Public Labor Relations Act Recent Developments

November 2019 – October 2020
Steven M. Bierig, Peter R. Myers, Brian Clauss

The material in this document was obtained from a presentation at the Chicago-Kent College of Law IIT—36th Annual Illinois Public Sector Labor Relations Law Conference. The individuals who prepared this presentation were: Helen Kim, General Counsel, Illinois Labor Relations Board; Gary Bailey, Attorney, Illinois Fraternal Order of Police Labor Council; and James Baird, Partner Clark Baird Smith, LLP

IPLRA Updates

Board and Court Decisions
November 2019 – September 2020

I. Representation Issues

12/11/2019 - ILRB SP
Bargaining Unit Appropriateness

In *Laborers' Int'l Union of North America and County of Clinton (Highway Dep't),* 36 PERI ¶ 88 (IL LRB-SP 2019) (Case No. S-RC-19-018), the Laborers' International Union of North America, Local 773 (Union) filed a majority interest petition seeking to represent two employees working as Engineering Technicians in the Clinton County (County) Highway Department in a stand-alone bargaining unit. The ALJ found the presumption of inappropriateness did not apply because the Union was seeking only a portion of employees who perform similar duties. The ALJ then found the petitioned-for stand-alone bargaining unit to be inappropriate under the factors set forth in Section 9(b) of the Act. The Board rejected the ALJ's recommendations with respect to the inappropriateness of the bargaining unit and granted the majority interest petition. The Board found the 9(b) factors supported the appropriateness of the petitioned for stand-alone unit, noting that the Act and precedent requires the Board to determine *an* appropriate unit for bargaining, not *a more* or *the most* appropriate one.

II. Employer Unfair Labor Practices

11/18/19 - ILRB LP
Amended Complaint/Weingarten Rights/Retaliation/Adverse Action/Motive

In *Isis Collins and Chicago Transit Authority*, 36 PERI ¶ 70 (ILRB-LP 2019), Charging Party, a bus operator with the CTA, alleged the CTA violated the Act when it continued to question Charging Party about her on-duty injury after she asked for union representation, threatened her with discipline for requesting union representation, and then harassed her by threatening to call the police in retaliation for requesting union representation. The ALJ amended the complaint to include allegations regarding Charging Party's Weingarten rights and then determined the CTA violated Section 10(a)(1) when it continued to question her after she invoked her Weingarten rights and then retaliated against her for invoking them. The ALJ determined the interview regarding Charging Party's injury on duty was investigatory in nature because her manager advised that false statements given during the interview could be used against the Charging Party and the hard drive would be reviewed. The ALJ concluded Charging Party's request for union representation during the interview amounted to her invocation of Weingarten rights. The ALJ next found that the CTA unlawfully harassed and intimidated Charging Party by threatening to call the police to have her arrested and documenting and reporting her unauthorized presence on CTA property. The Board rejected the ALJ's recommendations that the CTA violated the Act and dismissed the complaint for hearing in its entirety. The Board rejected the ALJ's recommendation to amend the complaint, reasoning the interview at issue was not investigatory in nature such that Charging Party's Weingarten rights were invoked. The Board then rejected the ALJ's recommendations with respect to retaliation, finding the complained-of actions did not constitute adverse employment actions and, even if they could be considered to be adverse actions, there was no causal connection between the alleged harassment and Charging Party's call for union's assistance.

12/11/2019 - ILRB SP
Timeliness/Submission of Permissive Subject/Interest Arbitration

In *Metropolitan Alliance of Police, Bolingbrook Chapter #3 and Village of Bolingbrook (Police Dep't),* 36 PERI ¶ 87 (ILRB-SP 2019) (Case No. S-CA-18-092), the Board rejected the ALJ's recommendation to dismiss the complaint for hearing as untimely and remanded the case to the ALJ to issue a supplemental recommended decision and order on the merits of complaint's allegations. The underlying charge alleged the Village engaged in unfair labor practices by submitting a permissive subject to an interest arbitrator who selected the Village's status quo proposal containing the permissive subject. The ALJ found the charge untimely based on his

determination that the parties' submission of final offers to the interest arbitrator triggered the Act's six-month limitations period rather than the date of the award as argued by Charging Party. The Board, however, relying on the First District's decision in *Skokie Firefighters Union, Local 3033 v. Illinois Labor Relations Board, State Panel, et al.,* 2016 IL App (1st) 152478, found the triggering event to be the date the arbitrator issued his award and found the charge timely filed.

12/11/2019 - ILRB SP
Repudiation/Employer Control/Jurisdiction

In *Laborers' Int'l Union of North America and Alexander County Housing Authority,* 36 PERI ¶ 85 (ILRB-SP 2019) (Case No. S-CA-18-007), the Board accepted the ALJ's Recommended Decision and Order dismissing the complaint for hearing that alleged the Employer repudiated its collective bargaining agreement with Charging Party in violation of Section 10(a)(4) of the Act. The ALJ found the Employer lacked the requisite control over the decision to abrogate the parties' collective bargaining agreement and decisions regarding the terms and conditions of employment due to the U.S. Department of Housing and Urban Development's (HUD's) takeover of the Employer's implementation of the HUD's Low Income Housing Program. The Board noted that it lacked authority to find HUD's actions to have violated the Act, for the Act's definition of "public employer" or "employer" does not include federal agencies. Charging Party petitioned for administrative review of the Board's decision. The petition is currently pending before the Illinois Appellate Court, Fourth District.

12/11/19 - ILRB LP
Executive Director Dismissal/Timeliness/Retaliation

In *Derek Webb and City of Chicago,* 36 PERI ¶ 86 (ILRB-LP 2019) (Case No. L-CA-19-110), Charging Party alleged the Employer engaged in unfair labor practices within the meaning of Section 10(a) of the Act by investigating him for providing his union with confidential information related to grievances and denying his requests for information under the Freedom of Information Act in retaliation for previously serving in union leadership roles. The Executive Director dismissed portions of the charge on timeliness grounds and the remainder of the allegations on grounds the available evidence failed to support a retaliation claim under either Section 10(a)(1) or Section 10(a)(2) of the Act. Upon Charging Party's appeal, the Board affirmed the Executive Director's dismissal.

12/11/19 - ILRB LP
Unilateral Change/Abeyance

In *Fraternal Order of Police, Lodge #7 and City of Chicago,* 36 PERI ¶ 84 (ILRB-LP 2019) (Case No. L-CA-17-034), FOP filed an unfair labor practice charge against the City of Chicago alleging the City unilaterally implemented its CR Matrix CR Guidelines in violation of Sections 10(a)(4) and 10(a)(1) of the Act. The ALJ found the City violated Sections 10(a)(4) and 10(a)(1) of the Act when it implemented the CR Matrix and Guidelines without first bargaining such with the Union. The Board, in consideration of the parties' ongoing negotiations for a successor agreement and at the parties' request, held the case in further abeyance with directions to the parties to report either the outcome, if any, or the status of negotiations on or before November 8, 2020.

12/17/19 - ILRB LP
Unilateral Change/Abeyance

In *Fraternal Order of Police, Lodge #7 and City of Chicago (Department of Police),* 36 PERI ¶ 91 (IL LRB-LP 2019) (Case No. L-CA-16-079), the ALJ found the City did not engage in unfair labor practices by unilaterally implementing a policy known as the "Transparency Policy" that provided for the release of video footage in connection with investigations into police officer misconduct. The Union filed exceptions and the City filed a response. In light of the parties continuing negotiations and at the request of the parties, the Board held the case in further abeyance and directed parties to report either the outcome, if any, or the status of negotiations on or before November 8, 2020.

02/6/20 - ILRB SP
Retaliatory Discharge/Reversal of Dismissal/Issuance of Complaint

In *American Federation of State, County, and Municipal Employees, Council 31, and County of DuPage (DuPage Care Center),* 36 PERI ¶ 114 (ILRB-SP 2020) (Case No. S-CA-19-121), the Board's Executive Director dismissed a charge alleging the Employer retaliated against one of its employees by discharging him for serving as a Union steward and for threatening to report a nursing supervisor to the Union regarding a dispute resulting from a voluntary overtime assignment. The Executive Director dismissed the charge for lack of evidence of the Employer's

unlawful motive. She found the Union failed to provide a nexus between the employee's threat to report the nursing supervisor to the Union and his discharge. She also found dismissal warranted because the evidence demonstrated that the employee had in fact engaged in the conduct for which the Employer claimed he was discharged, and that the Employer would have discharged the employee in the absence of the alleged protected activity. Moreover, the Executive Director observed that Charging Party did not allege an independent Section 10(a)(1) claim. Nevertheless, she determined that the evidence failed to indicate a violation under either Section 10(a)(1) or 10(a)(2). Upon appeal, the Board reversed the dismissal and directed issuance of a complaint for hearing. The Board found the Union raised issues of both fact and law as to the elements of a *prima facie* case on the ultimate issue of whether the employee was discharged because of his protected union and concerted activity in violation of Section 10(a)(1) and 10(a)(2) of the Act.

02/6/20 - ILRB SP
Unilateral Change/Mandatory Subject/Waiver/

In *Policemen's Benevolent and Protective Association, Unit #5 and Springfield Firefighters, IAFF Local 37, and City of Springfield,* 36 PERI ¶ 113 (ILRB-SP 2020) (Case Nos. S-CA-19-046, S-CA-19-066 *Consol.*), the Board adopted the ALJ's Recommended Decision and Order finding the City violated Sections 10(a)(4) and derivatively, 10(a)(1) of the Act when it implemented a rule change approved by the City's civil service commission which gave preference points to promotional candidates for City residency. Applying the Central City test, the ALJ found the use of residency preference points in the promotional process concerned a mandatory subject of bargaining and concluded the City was obligated to bargain the decision to change the rule. The ALJ further concluded the Charging Parties did not waive bargaining over residency preference points. Lastly, the ALJ determined the City unlawfully failed to maintain the status quo during the pendency of Section 14 interest arbitration with Charging Parties.

In adopting the ALJ's recommendations, the Board rejected the City's exceptions on both procedural and substantive grounds. Procedurally, the Board found one of the City's exceptions failed to comport with Section 1200.135(b)(2) of the Board's rules because the exception was not supported by citations to the record or authority. The Board also noted the City failed to contest many of the ALJ's findings and determinations forming the basis for his conclusion that the City engaged in unfair labor practices and thus, waived those exceptions. The Board then

rejected the City's reliance on the Board's decision in City of Springfield (IBEW *et al*.), 35 PERI ¶ 15 (IL LRB-SP 2018), in which the Board reversed the ALJ's finding that the City unlawfully changed its accrued vacation payout policy by adopting an ordinance. The Board distinguished that case, finding that the parties had the opportunity to bargain, and in some cases did so, before the effective date of the ordinance, whereas in the instant case, the rule change became effective upon approval by the Commission and there was no indication in the record that Charging Parties were given notice of or an opportunity to bargain, or bargained, the proposed change before it was approved by the Commission.

03/10/20
Illinois Appellate Court, First District Rule 23 Unpublished Order
Retaliation/Motive/Nexus

In *Travis Koester v. Illinois Labor Relations Board, County of Sangamon and Sheriff of Sangamon County,* 2020 IL App (4th) 180754-U, the Fourth District, in an unpublished order, affirmed the Board's decision in *Travis Koester and County of Sangamon and Sheriff of Sangamon County,* 35 PERI ¶ 70 (ILRB-SP 2018) (S-CA-16-133), dismissing the complaint for hearing. Charging Party, a member of the Sangamon County Sheriff's Tactical Response Unit (TRU), had alleged the Sangamon County Sheriff removed him from the TRU because he filed grievances in violation of Section 10(a)(1) of the Act. The grievances were filed over the promotion of three individuals, two of whom were fellow TRU members. Claiming trust among TRU members to be vital to the successful operation of the highly specialized law enforcement unit, Respondents removed Charging Party from the unit because the other TRU members expressed a lack of trust in the Charging Party due to the nature of the grievances filed. Charging Party's fellow TRU members requested his removal after a meeting with TRU members. The ALJ concluded the Respondent retaliated against Charging Party because he filed grievances in violation of Section 10(a)(1) of the Act. The Board rejected the ALJ's recommendation and dismissed the complaint, finding that the Charging Party had not established the requisite causation, i.e., that the Charging Party's filing of the two grievances was the motivating factor in the Sheriff's decision to remove him from the TRU, and finding instead, the evidence supported the conclusion that it was lack of trust in Charging Party by his fellow team members that caused his removal from the unit.

06/19/20 - ILRB LP
Dismissal/Retaliation

In *Carmen Rentas and County of Cook, Health and Hospital System*, 37 PERI ¶ 2 (ILRB-LP 2020) (Case No. L-CA-19-078), Charging Party, an Administrative Assistant IV at the County of Cook's Stroger Hospital, which is a title represented by the Retail, Wholesale, and Department Store, Local 200, filed an unfair labor practice charge which alleged that the County retaliated against her because of her race and/or national origin. The Executive Director dismissed the charge on grounds that Charging Party failed to allege the County took action against her for engaging in activity protected by the Act, noting that the charge appeared to claim the County took action against Charging Party because of her gender, national origin, and age. Upon appeal, the Board affirmed the dismissal.

07/14/20 - ILRB LP
Dismissal/Right to Counsel at Grievance Hearing/Causal Connection

In *Erma Lynette Sallis and County of Cook (Health Department)*, 37 PERI ¶ 7 (IL LRB-LP 2020) (Case No. L-CA-20-016), Charging Party, a Medical Laboratory Technician II, represented by the Service Employees International Union, Local 73, alleged the County violated Sections 10(a)(1), 10(a)(2), and 8 of the Act when it placed her on administrative leave and later refused to allow her attorney to represent her at the grievance meeting where she challenged that decision. 0(a)(2), and 8 of the Act. The Executive Director dismissed the charge's allegations regarding the right to private counsel at grievance meetings, noting that nothing in the Act or relevant caselaw provides such a right. The Executive Director then declined to consider the validity of the grievance provision contained in the collective bargaining agreement between SEIU and the County, noting that such review of collective bargaining agreements was within the jurisdiction of the circuit court, not the Board. Finally, the Executive Director dismissed the Section 10(a)(1) and 10(a)(2) allegations on the grounds that the Charging Party failed to present evidence of a causal connection between any protected, concerted activity by the Charging Party and the Respondent's decision to place her on administrative leave or exclude her private attorney from the grievance meeting. Upon appeal, the Board affirmed the dismissal.

07/14/20 - ILRB SP
Dismissal/Protected Activity/Variance

In *Sharon Gladney and State of Illinois, Department of Central Management Services (Commerce & Economic Development)*, 37 PERI ¶ 12 (IL LRB-SP 2020) (Case No. S-CA-20-018), Charging Party alleged her employer engaged in unfair labor practices when it temporarily assigned her to the front desk at her work location and gave her a negative performance evaluation after she voiced concerns over the negative effects of her front desk assignment. The Executive Director dismissed the charge on grounds the available evidence failed to indicate Charging Party engaged in any protected concerted activity. Citing Board and National Labor Relations Board (NLRB) precedent, the Executive Director determined Charging Party's complaints to management about the negative effects of working the front desk was not concerted activity, as Charging Party admittedly raised issues about her work assignment solely on her own behalf and explained how it affected her rather than raising issues on behalf of fellow employees or the effects on working conditions for other employees. On appeal, the Board found the appeal defective because it failed to comply with the Board's rules but granted a variance under Section 1200.160 of the Rules. Considering the appeal on the merits, the Board affirmed the dismissal for the reasons stated by the Executive Director. Member Willis concurring in part; dissenting on the grant of a variance, noting the instructions and time limitations were clearly laid out in the dismissal order.

08/19/094 - ILRB LP
Dismissal/Timeliness/Retaliation

In *Laura Wicik and County of Cook, Health and Hospital System (Oak Forest Health Clinic* 37 PERI ¶ 27 (IL LRB-LP 2020) (Case No. L-CA-19-094), Charging Party, an employee of the County of Cook's Oak Forest Health Clinic, alleges the County unlawfully disciplined her and other employees for tardiness and denied her request for a witness to attend her discipline hearing in addition to her union representative. The Executive Director dismissed several allegations of the charge on timeliness grounds and the remaining allegations on substantive grounds. The Executive Director determined the allegations pertaining to the denial of Charging Party's request to bring an additional witness in February 2018 and her May 2018 three-day suspension were untimely because they occurred more than six months before December 17, 2018, the date she filed her charge. The Executive Director then dismissed the remaining allegations on grounds the Charging Party failed to point to evidence indicating Respondent

acted with improper motives when it imposed a 10-day suspension in November 2018 and further, failed to provide evidence Respondent treated her more harshly than similarly situated employees. On appeal, the Board affirmed the dismissal.

08/18/20
ILRB LP
Dismissal/Concerted Activity/Variance

In *Calvin L. Fields and County of Cook and Sheriff of Cook County,* 37 PERI ¶ 28 (Case No. L-CA-19-108) (IL LRB-LP 2020), Charging Party, a deputy sheriff, alleged Respondents committed unfair labor practices when they disciplined Charging Party for failing his home checks after calling in sick. The Executive Director dismissed the charge on grounds the available evidence failed to indicate Charging Party engaged in any protected concerted activity and thus, failed to identify any evidence of the Employer's improper motives for the actions taken against him. On appeal, the Board found the appeal defective because it failed to comply with the Board's rules but granted a variance under Section 1200.160 of the Rules. Considering the appeal on the merits, the Board affirmed the dismissal for the reasons stated by the Executive Director.

08/18/20 - ILRB SP
Dismissal/Abeyance

In *Int'l Brotherhood of Teamsters, Local 700 and Clerk of the Circuit Court of Cook County,* 37 PERI ¶ 31 (IL LRB-SP 2020) (Case No. S-CA-20-050), Charging Party alleged the Clerk of the Circuit Court of Cook engaged in unfair labor practices within the meaning of Section 10(a) of the Act. The charge involved Charging Party's objections to the presence of a third-party Compliance Administrator at the parties' grievance proceedings. The Compliance Administrator was appointed by the United States District Court for the Northern District of Illinois pursuant to a Supplemental Relief Order (SRO) entered by United States Magistrate Judge Sydney Schenkier to ensure the Clerk of the Court's compliance with the 1972 Shakman consent decree and the 1983 order entered in settlement of a lawsuit filed in Shakman v. Democratic Organization of Cook County, *et al*., 596 F. Supp. 177 (N.D.Ill. 1983). The Executive Director dismissed the charge on procedural and substantive grounds. Procedurally, she found the charge was untimely, and substantively, she found the August 15, 2019 order issued by Judge Schenkier to be dispositive of the matter. Charging Party timely appealed the

dismissal, noting that it had appealed the August 15, 2019 order to the United States Court of Appeals for the Seventh Circuit. Due to the significance of the August 15 order on the grounds for dismissal, the Board held the case in abeyance for further consideration and directed the Charging Party to report to the Board the status or outcome of the appeal by or before the earlier of November 1, 2020, or within 14 days of the date the Seventh Circuit issues its decision on the appeal.

8/18/20 - ILRB SP
Transfer of Bargaining Unit Work/Forced Waiver of Statutory Rights/Permissive Subject/Status Quo Pending Interest Arbitration

In *Mattoon Firefighters Association, Local 691 and City of Mattoon*, 37 PERI ¶ 30 (IL LRB-SP 2020) (Case No. S-CA-18-138), the Board rejected an ALJ's recommendations to dismiss the complaint for hearing based on an unfair labor practice charge filed by Charging Party claiming the City failed to bargain the impact of its decision to eliminate City-operated ambulance services in violation of Sections 10(a)(4) and 10(a)(1) of the Act. ALJ Nagy denied Charging Party's motion to amend the complaint for hearing to include allegations that: (1) the City's decision to eliminate City-operated ambulance services involved the Union's rights under the Substitutes Act and thus, concerned a permissive subject of bargaining over which the Union cannot be compelled to bargain to impasse; and (2) in the alternative, the decision to eliminate City-operated ambulance services was a unilateral change to a mandatory subject of bargaining; but amended the complaint to include Charging Party's allegations that the City's actions changed the status quo after the Union invoked interest arbitration procedures in violation of Section 14(l) of the Act. He declined to amend the complaint to include the first two allegations because he determined those issues had been litigated in Case No. S-CA-18-084, in which the Board deferred to an arbitration award finding the City did not violate the parties' agreement when it adopted a resolution eliminating City-operated ambulance services and observing the Substitutes Act did not prohibit the City from do so. He then determined that the status quo was not altered because the findings of the award were binding on the parties. Finally, the ALJ determined the City was not obligated to bargain the impact of its decision to eliminate ambulance services.

The Board rejected the recommendations regarding the denial of the motion to amend the complaint, finding the award to which the Board deferred in Case No. S-CA-18-084 only

addressed the issue of whether the City was able to eliminate City-operated ambulance services and did not address the resultant bargaining issues presented by the instant case. Next, the Board, rejecting the City's interpretation of the Substitutes Act, found that the City was obligated under the Substitutes Act to obtain the Union's agreement before allowing the use of unqualified substitutes and such use amounted to a forced waiver of the Union's statutory rights. The Board also determined that notwithstanding the Substitutes Act, the City transfer of work out of the bargaining unit resulting from the elimination of City-operated ambulance services is a mandatory subject of bargaining over which the City was obligated to bargain to impasse before imposing terms. Lastly, the Board rejected the ALJ's recommendations with respect to the Section 14(l) allegations. The Board reasoned the arbitration award did not address the transfer of work and so, the resultant transfer of work changed the existing terms and conditions of employment pending interest arbitration. The City petitioned the Illinois Appellate Court, Fourth District, for administrative review of the Board's decision. On September 22, 2020, the court granted the City's motion to stay enforcement of the Board's order pending resolution of the review action.

09/11/20 - ILRB SP
Protected Activity/Nexus/Pre-hearing Orders

In *Marvin Perez and Chief Judge of the Circuit Court of Cook County*, 37 PERI ¶ 34 (IL LRB-LP 2020) (Case No. S-CA-19-047), the Board adopted the ALJ's Recommended Decision and Order dismissing the complaint for hearing which alleged Respondent suspended and terminated Charging Party in retaliation for his complaints against management and posting signs thanking a labor organization. The ALJ found Charging Party failed to establish a *prima facie* case for violations under Section 10(a)(1) of the Act. He determined there was no evidence that several of the incidents constituted protected concerted activity and even assuming those incidents could be considered protected activity, the ALJ found no evidence Respondent took action against Charging Party because of his participation in that protected activity. Notwithstanding the failure to demonstrate a *prima facie* case, the ALJ found Respondent established that it had legitimate reasons for suspending and terminating Charging Party's employment. Moreover, the ALJ found Charging Party was not treated disparately and concluded that Respondent would have both disciplined and discharged Charging Party absent the alleged protected activity. The Board, observing that Charging Party's exceptions focused on

the ALJ's pre-hearing orders and on his rulings at the hearing, and did not take issue with any of the ALJ's determinations in the RDO, found Charging Party waived objections to the ALJ's findings of fact and analysis.

09/11/20 - ILRB LP
Repudiation/Grievance Settlement/Meeting of Minds/Essential Terms

In *Amalgamated Transit Union, Local 308 and Chicago Transit Authority,* 37 PERI ¶ 32 (IL LRB-LP 2020) (Case No. L-CA-17-062), the Board rejected the ALJ's recommendations and dismissed the complaint for hearing in its entirety. The underlying charge alleged the CTA repudiated an agreement to settle a grievance filed by Charging Party over the discharge of Shawn Stanford, who had been employed by the CTA as a Full-Time Temporary Flagman (FTTF), until he was discharged for making a false statement about whether he had "ever been convicted of any offense other than a traffic violation" during the application process for a transfer to a full-time permanent Rail Transit Operator (RTO) position. The ALJ found the Board had subject matter jurisdiction and then determined the parties reached a meeting of minds on the essential terms of the agreement to settle the grievance, based in large part on Charging Party's account of a May 4, 2017 phone conversation between representatives of Charging Party and the CTA. The Board, however, found the parties had not reached a meeting of the minds on all the essential terms of the settlement, noting that the evidence demonstrated essential issues as work location, background checks, and the effect on Stanford's disciplinary record remained unsettled.

09/24/20
Illinois Appellate Court, Third District Rule 23 Unpublished Order
Retaliation/Motive

In *James Young v. Illinois Labor Relations Board and Village of University Park,* 2020 IL App (3rd) 180736-U, the Third District, in an unpublished order, affirmed the Board's decision in *James Young and Village of University Park (Police Department),* 35 PERI ¶ 52 (IL LRB-SP 2018) (Case Nos. S-CA-15-095 and S-CA-15-111), dismissing the complaint for hearing. The ALJ determined that Respondent violated Section 10(a)(1) and Sections 10(a)(2) and, derivatively, 10(a)(1), of the Act when it ordered Charging Party to surrender his department identification and badge, and when it discharged him in retaliation for engaging in protected activity but dismissed the remaining allegations in the complaint for hearing. The Board rejected the ALJ's findings and conclusions that the Employer violated the Act, finding

that the circumstantial evidence failed to show that the Employer acted with the requisite improper motive against Charging Party because of his protected activity. The Board found that the pattern of conduct and inconsistencies in the reasons for the Employer's actions did not demonstrate improper motive as there was no evidence of shifting explanations, suspicious timing, or expressed hostility.

10/9/20 - ILRB LP
Adverse Action/Motive

In *Timothy Parker and County of Cook and Sheriff of Cook County),* __ PERI ¶ __ (IL LRB-LP 2020) (Case No. L-CA-16-066), an ALJ issued a Recommended Decision and Order finding Respondents engaged in unfair labor practices in violation of Sections 10(a)(2) and 10(a)(1) of the Act. The ALJ amended the complaint for hearing to include allegations regarding an Article U transfer and found Respondents violated the Act when they changed Parker's work assignment to medical movement and subjected him to a higher performance standard, took disciplinary action against Parker on two occasions, and transferred him out his division under an Article U transfer. She determined Charging Party engaged in protected activity, that Respondents were aware of that activity, and took several adverse employment actions against Charging Party. She then concluded this protected activity was a substantial motivating factor in all of the alleged adverse employment actions. She found both direct and circumstantial evidence demonstrated unlawful motive by the Respondents, observing that expressions of hostility, timing, disparate treatment, and shifting explanations evidenced Respondents' unlawful motivation. The ALJ also determined the Respondents' claimed legitimate business reasons for the medical movement reassignment and discipline were pretextual but found Respondents had, at least in part, relied on Charging Party's involvement in a use-of-force incident in transferring Charging Party out of Division 6. The ALJ, however, found that Respondents failed to establish that Charging Party would have been moved out of Division 6 absent his protected concerted activity.

Respondents filed exceptions to the recommendations regarding the amendment of the complaint, the reassignment to medical movement, and the Article U transfer. The Board accepted the ALJ's recommendations regarding the amendment of the complaint and the reassignment to medical movement but rejected the ALJ's recommendations regarding the

Article U transfer. The Board found the gravity of excessive force incidents, together with the consistent application of the Article U transfer policy, demonstrated Respondents would have transferred Charging Party out of Division 6 even in the absence of protected concerted activity.

10/9/20 - ILRB SP
Dismissal/Reversal/Issuance of Complaint/Duty to Bargain/Information Requests

In *American Federation of State, County, and Municipal Employees, Council 31,* __ PERI ¶ __ (ILRB-SP 2020) (Case Nos. S-CA-20-099), Charging Party alleged Respondent violated Sections 10(a)(4) and (1) of the Act by refusing to bargain over the impact of the sale of Hope Creek Care Center (Center) and by agreeing to language in the sales agreement restricting changes to employment terms and conditions, and restricting the release of information to Charging Party in response to an information request. The charge also included allegations that Respondent failed to vest its bargaining representatives with authority to bargain. The Executive Director, relying on cases involving the National Labor Relations Act (NLRA) cited by the Respondent, dismissed the charge finding (1) Respondent was not obligated to bargain over the impact of the sale of the nursing home before completion of the sale; (2) the provision alleged to pose the greatest restriction, allowed for flexibility during bargaining, pointing to Respondent's proposals to increase compensation made during the parties' negotiations in April 2020; (3) the agreement's requirement to transfer all personnel records to the buyer on the date of the sale as permissible hard bargaining rather than an instance of bad faith bargaining; and (4) regarding the restriction on the release of information, that Respondent had not denied or refused to comply with Charging Party's information requests and that much of the information was publicly available. She concluded that Respondent was unable to and had no obligation to provide documents to Charging Party's information requests.

The Board reversed the dismissal and directed issuance of a complaint for hearing on the charge's allegations. They observed that the Executive Director relied almost exclusively on NLRB and federal cases cited by Respondent for the failure to bargain allegations which raised issues of law for hearing. The Board further found that the allegations regarding the restrictions on bargaining, information requests, and the Respondent's obligation to impact bargain raised issues of both fact and law for hearing.

10/9/20 - ILRB SP
Dismissal/Causal Connection

In *Jason Smith and the Clerk of the Circuit Court of Cook County*, __ PERI ¶ __ (IL LRB-SP 2020) (Case No. S-CA-19-011), Charging Party alleged Respondent engaged in unfair labor practices when it discharged Charging Party in retaliation for serving as a union leader and for previously filing charges with the Board. The Executive Director dismissed the charge because the available evidence failed to demonstrate a causal connection between his alleged protected concerted activity and his discharge and because the charge's allegations concerned the interpretation of a governing collective bargaining agreement. On appeal, the Board affirmed the dismissal for the reasons given by the Executive Director.

III. Union Unfair Labor Practices

11/18/2019 - ILRB LP
Dismissal/Breach of Duty of Fair Representation/Discrimination/Grievance Handling/Fair Share Status

In *Derek B. Webb and American Federation of State, County, and Municipal Employees, Council 31*, 36 PERI ¶ 71 (ILRB-LP 2019) (Case No. L-CB-19-038), Charging Party alleged his Union engaged in unfair labor practices within the meaning of Section 10(b) of the Act by failing to respond to Charging Party's inquiries regarding three previously filed grievances; refusing to file an unfair labor practice charge against his employer, the City of Chicago; and refusing to file additional grievances on his behalf, to retaliate against Charging Party for urging conversion to fair share membership instead of full-fledged membership with the Union. The Executive Director dismissed portions of the charge on timeliness grounds and the remainder of the allegations on grounds the available evidence failed to raise an issue of fact or law to warrant a hearing. Noting that under Board precedent a union is afforded substantial discretion in deciding to pursue grievances unless the union is motivated by vindictiveness, discrimination, or enmity, the Executive Director observed the Union provided evidence indicating it had "legitimate reasons" for the actions at issue and concluded the available evidence failed to indicate a causal connection between Charging Party's advocacy of fair share status. On appeal, the Board affirmed the dismissal.

01/9/20 - ILRB LP

Dismissal/Breach of Duty of Fair Representation/Grievance Handling

In *Anthony Weeden and Service Employees International Union, Local 73,* 36 PERI ¶ 99 (IL LRB-LP 2020) (Case No. L-CB-19-052), Charging Party, an employee of Cook County Facilities Management who is represented by Respondent, alleged Respondent engaged in unfair labor practices within the meaning of Section 10(b) of the Act when it failed to advance Charging Party's discharge grievance to arbitration. The Executive Director dismissed the charge on grounds the record contained insufficient evidence of Respondent's intentional misconduct as there was scant evidence that Respondent was biased against or harbored any hostility toward Charging Party. Furthermore, the Executive Director found Charging Party failed to establish the necessary causal connection between the alleged bias and Respondent's decision not to pursue the grievance. On appeal, the Board affirmed the dismissal. The Board declined to consider Charging Party's evidence of the Union's alleged animosity because he failed to submit such evidence during the investigation and then failed to include such materials along with his appeal, citing Sections 1220.40(a)(1) and 1200.135(a)(1) of the Board's rules.

01/9/20 - ILRB SP
Dismissal/Timeliness/Breach of Duty of Fair Representation

In *Tonette Elder and American Federation of State, County, and Municipal Employees, Council 31,* 36 PERI ¶ 101 (IL LRB-SP 2020) (Case No. S-CB-19-028), the charge alleged the Union engaged in unfair labor practices when it inadequately handled her discharge grievance due to the Union's bias against her. The Executive Director dismissed the charge as untimely and on grounds Charging Party failed to identify any Union bias, hostility, or motive against Charging Party when it failed to acknowledge or accept documentation of Charging Party's promotion in handling her discharge grievance. The Executive Director also determined Charging Party failed to raise an issue for hearing as to Union's abuse of its discretion in handling grievances. On appeal, the Board affirmed the dismissal for the reasons cited by the Executive Director.

01/9/20 - ILRB SP
Dismissal/Breach of Duty of Fair Representation/Dues Payment Status

In *James Cochran and American Federation of State, County, and Municipal Employees,*

Council 31, 36 PERI ¶ 102 (IL LRB-SP 2020) (Case No. S-CB-20-008), Charging Party alleged Respondent engaged in unfair labor practices when it failed to timely pursue his grievance because he was not a dues-paying member of the Respondent. The Executive Director dismissed the charge finding Charging Party failed to identify any evidence Respondent failed to pursue his grievance to discriminate against him. The Executive Director noted Charging Party failed to submit evidence that Respondent processed dues-paying members' grievances more efficiently than those of non-dues paying members and that Charging Party advised Respondent that he did not want the grievance filed when Respondent's steward attempted to file the grievance within the contractual time period. On appeal, the Board affirmed the dismissal for the reasons stated by the Executive Director, observing there was no material difference in the way the Executive Director construed the basis of the charge—discrimination based on dues payment status—and Charging Party's contention that his charge is based on the failure to fairly represent him due to his "non-paying member" status or his status as a "non-fair share paying member."

07/15/2020 - ILRB LP
Dismissal/Breach of Duty of Fair Representation/Adverse Representation Action

In *Erma Lynette Sallis and Service Employees International Union, Local 73*, 37 PERI ¶ 14 (IL LRB-LP 2020) (Case No. L-CB-20-016), Charging Party, employed by the County of Cook as a Medical Laboratory Technician II, a title represented by SEIU, alleged SEIU violated Section 10(b)(1) and (3) of the Act when it colluded with the County's hearing officer to obstruct her alleged right to be represented by her private attorney during her third step grievance hearing. The Executive Director found the Charging Party had not raised issues for hearing on the 10(b)(1) allegation because the Charging Party had not shown that she suffered an adverse representation action and did not provide evidence of SEIU's unlawful motive. Specifically, the Executive Director found that the Charging Party failed to establish that a union member has a right to representation from a personal/private attorney during all stages of the grievance process or that the refusal of a private attorney would qualify as an adverse representation action. The Executive Director further noted that the Charging Party failed to produce evidence to show that the Union acted with an unlawful motive when it informed her that she could not have a private attorney at the grievance hearing. The Executive Director likewise found that the Charging Party had not raised issues for hearing on the Section 10(b)(3) allegation. She reasoned that the Charging Party failed to show that the Union was illegally motivated to induce the Employer to

take an adverse action against her. The Executive Director concluded that the Charging Party also failed to show that the Board otherwise had jurisdiction over the allegation that the Union unlawfully denied her representation from her private attorney. Upon appeal, the Board affirmed the dismissal.

08/18/2020 - ILRB LP
Dismissal/Breach of Duty of Fair Representation

In *Laura Wicik and American Federation of State, County, and Municipal Employees,* 37 PERI ¶ 29 (IL LRB-LP 2020) (Case No. L-CB-19-035), Charging Party alleged Respondent violated Section 10(b) of the Act when it failed to properly represent her at a grievance hearing over a three-day suspension and failed to file a grievance over her subsequent ten-day suspension. Charging Party claimed the Union's failure to take such action was in retaliation for her previous unfair labor charge against Respondent. The Executive Director dismissed the charge on grounds Charging Party failed to provide evidence and, consequently, to establish that the Union engaged in intentional misconduct with regard to the Union's representation or failure to file a grievance over the ten-day suspension. The Executive Director observed that Charging Party was dissatisfied with the Union's representation but failed to point to any evidence the Union's actions, or lack thereof, were predicated on any hostility or animus against Charging Party due to her previous Board charge. Upon appeal, the Board affirmed the dismissal.

09/11/20 - ILRB LP
Dismissal/Breach of Duty of Fair Representation/Intentional Misconduct

In *Jaime Hurley and Service Employees International Union, Local 73,* 37 PERI ¶ 33 (IL LRB-LP 2020) (Case No. L-CB-19-048), Charging Party alleged Respondent engaged in unfair labor practices when it caused her transfer to Stroger Hospital due to a memorandum of understanding (MOU) the Respondent executed with her Employer reducing her seniority to reflect her years as a part-time employee. The Executive Director dismissed the charge on grounds the charge failed to raise an issue of law or fact for hearing because Charging Party failed to identify evidence that Respondent engaged in intentional misconduct or that she engaged in activity that engendered the Respondent's hostility towards her. The Executive Director found the MOU signed on June 28, 2019, reflected the Respondent and Employer's long-standing practice and without more, did not indicate Respondent entered into the agreement

because of any animus toward Charging Party. On appeal, Charging Party challenged the dismissal, contending Respondent caused her wrongful transfer because the June 28, 2019 MOU was signed *after* she was transferred in March 2019 and points to a portion of the Respondent and Employer's collective bargaining agreement (CBA) that counts seniority from the date of an employee's last hiring date. Charging Party claimed that the CBA's definition of seniority, which does not prorate for part-time years, governs and thus, the MOU signed after her transfer does not apply. The Board, however, determined that even if the MOU was incorrectly applied, such incorrect application without some evidence indicating Respondent applied the MOU incorrectly out of animus or hostility toward Charging Party was not enough to undermine the Executive Director's findings and affirmed the dismissal.

10/9/20 - ILRB LP
Dismissal/Breach of Duty of Representation/Intentional Misconduct

In *Debra Larkin and International Brotherhood of Teamsters, Local 700,* __ PERI ¶ __ (IL LRB-LP 2020) (Case No. L-CB-20-006), Charging Party alleged that Respondent engaged in unfair labor practices when it failed to resolve a grievance over her February 2017 discharge and for refusing to file a grievance challenging her March 2019 discharge. The Executive Director dismissed the charge on grounds Charging Party failed to provide evidence indicating the Union engaged in intentional misconduct with regard to the Union's failure to pursue her grievances over her discharges. The Executive Director observed there was no evidence the Union held any animosity toward Charging Party, much less failed to pursue grievances based on any improper motive, noting that under Section 6(d) of the Act and Board precedent, a labor organization is afforded considerable discretion in handling grievances, and a failure to achieve a desired result by a particular employee does not violate the Act. On appeal, the Board affirmed the dismissal on the grounds stated by the Executive Director.

IPLRA Updates: General Counsel's Declaratory Rulings
November 2019 – October 2020

L-DR-20-002 *Fraternal Order of Police, Lodge #7 and City of Chicago (Police Department) Illinois Fraternal Order of Police Labor Council*, __ PERI ¶ __ (IL LRB GC) (October 16, 2020)

The Union filed a petition seeking a determination on whether the City's proposal to

exclude terminations and early, low-level discipline from the grievance process and designate certain safety-related arbitration decisions as non-binding, concerned permissive subjects of bargaining. The General Counsel declined to defer the petition to the interest arbitration process as urged by the City and found the City's proposal to exclude terminations and early, low-level discipline from the grievance process to be permissive subjects of bargaining. The General Counsel also found the City's proposal to designate certain safety-related arbitration decisions as non-binding, to be a mandatory subject of bargaining.

L-DR-21-001 *Fraternal Order of Police, Lodge #7 and City of Chicago (Police Department) Illinois Fraternal Order of Police Labor Council*, __ PERI ¶ __ (IL LRB GC) (October 21, 2020)

The Petition sought a determination as to whether three proposals offered by the City concern permissive or mandatory subjects of bargaining. The City had proposed to remove the requirement that a complaint against an officer alleging non-criminal conduct be supported by a signed affidavit and instead allow for anonymous complaints and to remove the requirement that officers be advised of the identity of the complainants prior to officer interrogations/interviews. It also proposed to remove the time limits on retentions of officers' disciplinary record so that the City could retain them indefinitely. The General Counsel found the City's proposals to eliminate the affidavit requirement for complaint register investigations of non-criminal conduct and to eliminate the obligation to inform officers of the complainant's name prior to the investigation, to be permissive subjects of bargaining but found its proposal for the indefinite retention of disciplinary records to be a mandatory subject.

L-DR-20-001 *Fraternal Order of Police, Lodge #7 and City of Chicago (Police Department) Illinois Fraternal Order of Police Labor Council*, __ PERI ¶ __ (IL LRB GC) (October 30, 2020)

The Union filed a petition seeking a determination on whether its proposal to exclude terminations and early, low-level discipline from the grievance process and designate certain safety-related arbitration decisions as non-binding, concerned permissive subjects of bargaining. The General Counsel declined to defer the petition to the interest arbitration process as urged by the City and found the City's proposal to exclude terminations and early, low-level discipline from the grievance process to be permissive subjects of bargaining. The General Counsel also found the City's proposal to designate certain safety-related arbitration decisions as non-binding,

to be a mandatory subject of bargaining.

IPLRA Updates: Legislative Amendments
November 2019 – October 2020

Public Act 101-620

On December 20, 2019, Governor J.B. Pritzker signed into law Public Act 101-620, amending the Illinois Public Labor Relations Act (IPLRA) and the Illinois Educational Labor Relations Act (IELRA) in addition to the Illinois Freedom of Information Act. Public Act (FOIA). The IPLRA is amended as follows:

Section 6: • Requires, on a monthly basis, public employers to provide the exclusive representative of public employees, specific information regarding employees who are members of the represented bargaining unit represented by the respective union its represented employees within 10 days of hire of new employees. • Provides that an employer commits an unfair labor practice by improperly disclosing the required information. Public Act 101-620 made concurrent changes to FOIA. • Grants labor organizations reasonable access to represented employees for grievances and union business/meetings without loss of pay or charge to leave time; grants unions affirmative access to facility bulletin boards/mailboxes to communicate with represented employees. Employers and unions may agree to greater access through collective bargaining. • Eliminates the fair share provision. • Allows for a period of irrevocability of authorization of membership per agreement of the employer and labor organization. Deems the irrevocability period reasonable if period lasts one year, may be automatically renewed, and the authorization contains at least an annual 10-day period during which an employee may revoke authorization. These provisions apply retroactively and prospectively to claims regarding authorization periods.

Includes language governing timing and implementation of deductions by the employer. Employees no longer represented by a union may elect to continue deductions. • Provides all employee requests regarding deductions (authorize, revoke, cancel, change) to be made to the exclusive representative unless otherwise agreed by the parties, and requires the exclusive representative to transmit such information to the employer. In such cases, the employer shall rely on the

- provided information and process the deductions, and the union shall indemnify the employer.
- Provides an employer's failure to comply with dues deduction provisions to be a "violation of the duty to bargain and an unfair labor practice".
- Grants ILRB exclusive jurisdiction over dues disputes under the Act. Provides for the ILRB to escrow disputed dues where an exclusive representative does not have an account for the purpose of escrowing such disputed dues.

New Section 6.5:

- Provides statement of defense to liability claims regarding fair share fees collected prior to the United States Supreme Court decision in *Janus* v. AFSCME, Council 31 (June 27, 2018) that applies to existing and future claims. Indicates that it is a declaration of existing law.

Section 10:

- Under new Section 10(a)(8), an employer engages in an unfair labor practice when it interferes with, coerces, deters, or discourages public employees from becoming or remaining members of a union, authorizing representation by a union, or authorizing dues or fee deductions. This section further prohibits an employer from intentionally permitting outside third parties to use the employer's email/communication systems to engage in such conduct. Provides that an employer's good faith implementation of a policy to prohibit such use of communication/email systems is a defense to a ULP charge.
- Under new Section 10(a)(9), an employer's disclosure of employee information under Section 6 is an unfair labor practice if the employer knows or should know it will be used to interfere with, coerce, deter, or discourage public employees from becoming or remaining members of a union, authorizing representation by a union, or authorizing dues or fee deductions.
- Under new Section 10(d), an employer is prohibited from discouraging union membership or dues deductions or otherwise interfere with the relationship between employees and their unions. Employers are required to refer all inquiries about union

membership to the union, except that the employer may communicate with employees about payroll processes and procedures. Employers are also required to establish email policies in order to prohibit use of the employer's email system by outside sources.

Illinois Interest Arbitration Summary

The material in this portion of the document was obtained from a presentation at the Chicago-Kent College of Law IIT—36th Annual Illinois Public Sector Labor Relations Law Conference. The individuals who prepared this presentation were: Tamara Cummings, Illinois Fraternal Order of Police Labor Council; Brian Reynolds, Arbitrator; and Timothy E. Guare, Senior Counsel Hodges, Loizzi, Eisenhammer, Rodick & Kohn LLP.

751. City of Chicago and PBPA, (3 separate supervisor units) (Arb. Roumell, Neutral Chair of Tripartite Panel, 2020)
Last Hearing Day: January 21, 2020; Award: June 26, 2020

1. ANONYMOUS COMPLAINTS: Current language provides that no anonymous complaint shall be the subject of a CR investigation, unless there is a criminal allegation, or an anonymous complaint regarding residency or medical roll abuse is later verified. All other allegations must be supported by an affidavit by the complainant. A current side letter states that in instances where an affidavit is necessary, the PD will make a good faith attempt to secure an affidavit within a reasonable time and if one cannot be obtained, the head of the investigatory unit may sign an "appropriate affidavit." The City proposes that a CRI investigation based on an anonymous complaint can be commenced following information obtained in a preliminary investigation AND an affidavit override consistent with current language when complainants refuse to sign. Relying on a prior Interest Arbitration decision, the Neutral stated that the PD had a substantial burden of proof to change the anonymous complaint/affidavit language, due to the fact that the rationale of such language is to avoid "harassment" and is consistent with the right to confront one's accuser. The City's proof included comments of the Police Accountability Task Force report of the U.S. DOJ, the Federal Consent Decree, a trend in other Departments, the City OIG's rules, and the Illinois Association of Chiefs of Police "model policy." In a prior grievance arbitration award, Arbitrator Meyers, in dictum, suggested the issue of anonymous complaints should be addressed. The City is concerned with individuals who fear the police and retaliation for alleging misconduct, and coworkers who are reluctant to report other coworkers. The Union is concerned with false and vindictive complaints. The Union argues that elimination of the

prohibition against anonymous complaints is against public policy because it would be contrary to the mandates of the Uniform Peace Officers Disciplinary Act and the IPLRA. The Neutral recognizes the competing concerns. The final offer of the City is adopted, with the addition of Appendix O, created by the Panel, which gives members the right to challenge the signing of the override affidavit in an anonymous complaint situation. City wins with modifications.

2. REVEALING NAMES OF COMPLAINANTS: As long as the City agrees to continue the practice of notifying the member of the specific date, time, and relevant location of the incident several days before the interrogation, but intends to exercise the current language of Section 6.1G and not provide the names of the complainants until immediately prior to the interrogation, there is no need to make changes to Section 6.1G. Neither party wins.

3. WITNESS STATEMENTS IN DISCIPLINARY INVESTIGATIONS: The City seeks to add language that the investigative unit shall note on the record of the interrogation any time a member seeks or obtains information from counsel or a Union representative (there was a binding past practice where no reference was made on the record when the member conferred with counsel or a Union rep). New technology (audio interviews), the Federal Consent Decree, and the standard when taking depositions are "changed circumstances" supporting the new language. City wins.

4. DISCIPLINARY MATRIX: The current contract requires just cause for discipline. The City proposes that the Union drop their insistence on negotiating the terms of the Disciplinary Matrix that has been used by the PD when issuing discipline. When the City first adopted the Matrix, the Union filed a Demand to Bargain and the City filed a ULP. The Labor Board ruled that the City had to bargain with the Union. The Neutral adopts the City's proposed side letter with added language that the side letter does not change the fact that the City bears the burden to prove the charges and that the suspension is appropriate. City wins with modifications.

5. USE AND DESTRUCTION OF FILE MATERIAL: The current language requires the purging of disciplinary records after 5 years and limits the use of any not-sustained finding in future discipline. The City seeks to change the language, requiring that disciplinary records be maintained indefinitely and that not-sustained files alleging criminal conduct, excessive force, or verbal abuse may be used in future discipline for 7 years. Based on the recent Illinois Supreme

Court decision that found destroying disciplinary records is against public policy and for practical reasons, the City's proposal to retain disciplinary documents indefinitely is adopted. As for the City's proposal to use certain not-sustained discipline for 7 years, other than "verbal abuse," the language has been in the CBA for some time. The City's proposal is adopted with some amendments by the Panel (not sustained findings cannot be used in determining promotions or in making assignments). Like criminal conduct and excessive force, not-sustained violations of verbal abuse can help the Department identify a problem officer, and aid them in correcting the behavior by further training. City wins with modifications.

6. CHICAGO LABOR-MANAGEMENT TRUST (health care): The Union proposes withdrawing from the Coalition. All the Unions except Chicago Lodge 7 patrol unit became members and are bound by the Trust. The trustees adopted a wellness plan that provides that husbands and wives and partners participate. If members do not participate, they are fined $50 per paycheck. Lodge 7 patrol unit does not have a wellness program or a fine. The Union wants to leave the Coalition and accept the health plan of Lodge 7. The City makes a case that there should be one health plan for City employees. The Union is seeking the Lodge 7 plan, but also wants parity in pay with the firefighters who remain in the Trust. The Union can't have it both ways. The Union's proposal is rejected. However, the Neutral would have voted to remove the wellness plan if he had the authority to do so, due to there being a penalty rather than an incentive. The City should revisit the wellness plan. City wins.

7. SECONDARY EMPLOYMENT: The current language is the same as the Lodge 7 patrol contract and says that the number of hours worked can be restricted if it adversely affects a member's job performance. The City seeks to add language requiring members to submit request forms and restricting the number of hours that can be worked to 16 in a 24-hour period. In almost 40 years of bargaining, the City has not been able to obtain, in negotiations or in Interest Arbitration, the ability to require permission before engaging in secondary employment. Internals: the fact that other City employees must obtain permission is not controlling here. Externals: New York and Los Angeles require permission but that has been the case for the last 40 years. The change in circumstances warranting new language is the need of the PD to have knowledge of secondary employment and hours of secondary employment, so they can exercise the rights previously agreed upon. The 16-hour limitation is reasonable, taking into account fatigue factors. To address the potential problem of overzealous enforcement, the Neutral adds a

provision that for the first three alleged violations, the members shall be counselled before any discipline is issued. City wins with modifications.

8. RANK CREDIT: Currently, members receive 45 minutes per day worked in rank credit in the form of comp time if they work at least 4 hours. The Union asks for an increase to 60 minutes for Sergeants and Captains and 90 minutes for Watch Operation Lieutenants. Arbitrator Goldstein previously increased rank credit from 30 to 45 minutes as "rough justice," to address the salary differential between the patrol unit and the supervisors caused by the creation of a D-2A Detective classification in the Lodge 7 patrol unit. This history suggests absent such a factor, an increase would not have been awarded. The Union shows that due to the Federal Consent Decree and the issuance of a Special Order re: "Watch Operations Lieutenants," there have been increased duties in all ranks. These increased duties are not persuasive in light of the bargaining history. City wins.

9. UNIFORMS: The Union seeks an increase from $1,800 to $2,100. There was a 50% raise in the allowance in 2012, but no increases since. The evidence shows there are increased costs. Neutral awards an increase to $1,950. Union wins with modifications.

10. LEGAL REPRESENTATION: The current language requires the City to provide legal representation in any civil cause of action resulting from or arising out of the performance of duties. The Union seeks to add language "actual or alleged" performance of duties, citing an example of an off-duty sergeant who was sued and who had to pay for her own defense. Adding the language "alleged" could possibly expand the City's obligation to provide legal representation to private on-duty disputes (i.e., fight in the locker room) because it does not relieve the City from representation in such situations. Also, there are years of arbitration awards interpreting the current language. City wins.

11. PAYMENT OF WAGES: The City proposes changing pay dates from the 1st and the 16th of each month to the 7th and 22nd of each month. An updated payroll system cannot be reconciled with the current payroll process. Looking at comparables, the Neutral adopts the City's proposal. The proposed payroll system is the standard in private employment and has been adopted by Cook County. About 12,000 City employees are on the new system. There is no compelling reason to treat these members differently. There may be cost savings to the City but

that was not a factor in the proposed change. City wins.

12. PAYMENT OF TIME: The current language provides that a member who resigns or dies is entitled to be paid for all unused accumulated time. But a member who is separated for cause is only entitled to pay for unused comp time due to OT worked (FLSA time). The Union seeks to remove the requirement that separated members forfeit all but comp time. Members who are faced with suspensions are prone to resign in order to protect the accumulated comp time which could be substantial. The change would remove pressure from the member who chooses not to litigate discipline because of potential monetary loss. Also, it is unfair for the member to forfeit other types of comp time earned. The Neutral adopts the Union's proposal due to the equities. Union wins.

13. GREEN SLIPS: Currently, members receive their pay either via actual paycheck or direct deposit. The City seeks language requiring all to use direct deposit. Only 50 receive an actual check. The City wants to become paperless and provide deposit information in a more convenient and quicker way. This issue would not have formed the basis of a strike. City's language is adopted. City wins.

14. COMPENSATORY TIME EXCHANGE: Under the current language, members may cash in accumulated comp time up to 200 hours each year. The Union proposes increasing the number of hours to 300. The City claims that the additional 100 hours applied to 1,500 members would cost about $7,500,000.00 annually. But this figure may be inflated because it includes the current 200 hours and only about half of the members would be using the option. The Union points out the proposal helps the City because a member can sell back now at a cheaper rate then the rate he or she would cash out at retirement. The debt on the books is more costly if the individual earns at a lower rate but does not cash out until reaching a higher rate. The City says that this argument may be compelling in normal times but not now, due to COVID-19 and the economy being in a freefall. Taking a long-range view, the Neutral accepts the Union's proposal. Union wins.

15. FURLOUGH DAYS: The current language reads members shall receive 25 furlough days annually. However, there is confusion because the PD has 3 shifts (8 hours, 8.5 hours and 10 hours) and per the applicable General Order (GO), every member receives 200 hours of furlough time annually. The current practice creates an inequity, because the 8.5-hour schedule does not

provide for the final full day of furlough (200 hours divided by 8.5 hours equals approximately 24 days). But the Union's proposal means the members on the 8.5-hour schedule would now get 204 hours of furlough. Even though the GO says "hours," furloughs are taken in day segments. Union's offer is awarded. Union wins.

16. DISTRICT, UNIT AND WATCH BIDS FOR SERGEANTS: Under the Consent Decree, it is anticipated that additional Sergeants will be added. The number and circumstances are unknown at this time so the City proposes a Reopener. The City's offer is reasonable because it allows the Sergeants to demand to bargain with final resolution by binding arbitration. City wins.

17. CAPTAINS AND WATCH COMMANDER POSITIONS: There has been discussion but no decision on restoring the Watch Commander position with the rank of Captain. The parties and the Neutral agree to a side letter with a reopener if the position is restored. Both sides agree.

18. RETIREE MEDICAL CARE: Currently, supervisors who retire at 55 contribute 2% of their retirement toward medical insurance provided by the City, which is the same as the insurance for actives. Supervisors who retire at 60 or mandatorily at 63 make no contributions. Contributions cease upon Medicare eligibility. Both parties propose changes. The City's proposal does not address supervisors who retire between 50 and 55. The Union proposes higher contributions for members who retire before 55, so they can have retiree insurance which they currently do not. Officers' jobs are very stressful and they have a shorter life span, so they should be able to retire upon 29 years and 1 day. The proposal would benefit those who came on the job in their early 20s. The City objects to "subsidized" health care for members who retire between 50 and 55, due to the pension fund being seriously underfunded and the total cost of health care insurance versus the members' contribution to cost. Encouraging members to retire between 50 and 55 would put an additional strain on the pension fund. The Neutral finds that encouraging retirement before 55 and the strain on the pension fund outweighs the argument for providing City-paid insurance for those who retire before 55. Additionally, the Union offers to increase the contributions for retirees between 55 and 59 and between 60 and 63 by 1.5%. The City seeks increases in contributions of 2%. The City has set a pattern of 1.5% increases. Union's offer on this aspect of health insurance is accepted. City wins and Union wins.

19. RESIGNATIONS AND RETIREMENTS WHILE UNDER INVESTIGATION: The

Board accepts the parties' proposed letter of understanding. The Superintendent will have the discretion to decide whether the personnel file of someone who resigns/retires while under investigation should state that the member retired or resigned while under investigation, based on totality of circumstances. The Superintendent will use the same standard to determine whether or not the member will receive full retirement credentials or any other post-employment honorary benefits and emoluments. The member may grieve the decision and an Arbitrator can reverse if the decision was arbitrary. The parties agree.

750. Village of Dolton and FOPLC, SM-A-17-296 (Arb. Bierig 2020)
Last Hearing Day: February 5, 2020; Award: August 18, 2020

1. TERM OF AGREEMENT/WAGES and COVID-19: The parties' wage proposals for the first 3 years are identical (0, 2.5 and 2.5). Village wants a 3-year deal and the Union wants a 4th year increase of 2.5. Internals are very significant. The patrol unit's contract expired on April 30, 2020, so there is no internal wage data for year 4 (2020) of the Union's proposal here. The Union wants parity with the patrol unit so it is not reasonable for this command unit to set the wage rate for 2020. COVID-19 has created uncertainty but the economic ramifications to the Village will be significant. Recent unrest has also affected the Village's finances. The disbursement of state tax revenues will be delayed. Committing the Village to a 2.5% raise for 2020 which the other public safety units will want is not reasonable. The Union's argument that 4 years is needed for a break in negotiations between the parties is persuasive, but awarding a 2.5% wage increase as a starting point for other units is not wise under the circumstances. Village wins.

2. PAID TIME DUE: Both parties assert their proposals create parity with the patrol unit. Other than arguing parity, neither party offered significant evidence to support its proposal. Neither adopts the patrol language in its entirety. Based on internal comps, the Village offer of reducing the amount of hours an employee can accrue from unlimited to 250 is adopted and the issue of dealing with employees with more than 250 hours of accumulated paid time already is remanded. Village wins.

3. LONGEVITY: Both parties again assert their proposals create parity with the patrol unit. The Union's argument that an increase in longevity is a modest *quid pro quo* for a 0% wage increase in 2017 is compelling. Because a 3-year term was adopted, the contract has already expired, and

making the provision prospective only would be of limited value, so the Union's offer is selected, fully retro. Union wins.

4. INSURANCE COST: Internal comparability supports the Union's offer that employees receive 50% of cost savings when insurance premiums decrease, however, retroactivity would be cumbersome so prospective only. Union wins.

5. HEALTH INSURANCE OPT OUT: A new opt out provision can be considered a breakthrough. Considering the *de minimis* impact, it does not rise to the level of a breakthrough. Internals support the Union's offer. Because the opt out is exercised only once during enrollment, retroactivity is impractical and burdensome. Union wins, prospective only.

6. SUBSTANCE TESTING: Both parties address alcohol and drug testing required under new Illinois law after an officer discharges his or her firearm resulting in injury or death. The Union's proposal of new language is accepted; however, the economic component regarding compensation for time spent testing is rejected because such language is not in the patrol contract and there is insufficient evidence supporting the necessity of compensation. The Union's proposed language regarding testing to be conducted is reasonable update language and adopted even though it would lead to lack of parity with the patrol unit. Both parties also propose drastic reductions to the current .10 cutoff level for a positive alcohol test; therefore, both are breakthroughs. Since both are breakthroughs, no breakthrough analysis is necessary. The Union's .04 is closer to the status quo of .10 than the Village's .02. However, the Union's proposal of "stand down status" for employees who test between .02 and .04 is vague and cannot be accepted. The Union's .04 proposal is adopted and the matter is remanded for the parties to address the status of employees who test between .02 and .04. Union wins.

7. DISCIPLINE: Village seeks to add language to indicate that a request for voluntary assistance does not preclude disciplinary action for misconduct that occurs while under the influence. Both parties have emphasized parity with patrol and such language does not appear in the patrol contract. Union wins. (status quo).

8. RESIDENCY: The Union seeks to remove the residency requirement to achieve parity with patrol. Residency may be viewed as a breakthrough; however, considering the *de minimis* impact and internal comparability, the Union wins.

9. EXPUNGEMENT OF RECORDS: Although internal parity supports the Union's proposal, the interests and welfare of the public take precedence. On 6/18/20, Illinois Supreme Court ruled in City of Chicago v FOP Lodge 7, 2020 IL 124831, regarding the prevailing public policy of retaining disciplinary records under State Law. Adopting the Union's proposal requiring "expungement" may run afoul of that decision and public policy. The Village's offer balances the Union's concerns that there be time limits on the use of prior discipline with the Village's need to be transparent regarding disciplinary histories. Village wins.

10. EARLY RETIREMENT INCENTIVE: The Union's proposal is a breakthrough and the Union has not met its burden. While there have been early retirement agreements, there is insufficient evidence to show the Union's offer memorializes an offer already made by the Village. Village wins.

749. County of Sangamon and FOPLC, SM-A-20-057 (Arb. Reynolds 2020)
Last Hearing Day: June 18, 2020; Award: October 20, 2020

1. METHOD FOR CALCULATING COL: The Employer uses PTELL and the Union uses CPI-U. The Union's method is better but it supports the Employer's offer.

2. INTERNAL COMPARABLES: The only internal that is relevant is the other public safety unit, the corrections unit. There has been a lack of lockstep parity but the increases have been almost identical, except these deputies adopted a two-tier system the last contract. The FOPLC represents the corrections unit, and that unit will receive 2% wage increases in FY 20 and FY 21, the same as the Employer's offer here. The internals support the Employer's offer.

3. EXTERNAL COMPARABLES: The parties have agreed upon externals but there is minimal data for FY 21 and FY 22. The externals support the Employer's offer.

4. PUBLIC INTEREST/COVID-19: The Union presents evidence that there has been a decrease in applicants, which may be due to COVID-19 and the demonstrations which have created dangerous work for the deputies and an atmosphere of public antipathy towards the deputies which effects recruitment and morale. These factors and the fact that Unit members worked through such dangerous conditions, support a higher wage increase. Work was more "hazardous" during the demonstrations and pandemic. The Employer argues the salary increases

are permanent; what will happen when COVID-19 is over and work becomes less hazardous? The Arbitrator agrees that Unit members have faced increasingly difficult working conditions, but permanent extra wage increases is not the warranted response. If certain assignments involve especially hazardous work, some type of stipend or bonus would be more appropriate.

5. ABILITY TO PAY/COVID-19: The Employer argues the COVID-19 pandemic supports lower salary increases. Businesses have declined and restaurants have closed, which will lead to lower sales tax revenues and possible lower property tax revenues. Also, there is a "defund the police" movement which fosters the idea of spending less money on policing and more money on other methods of preventing crime, such as mental health professionals. The Union argues that the Employer may obtain federal or state COVID-19 fund subsidies. And the general fund is sufficient to fund the Union's proposed increases. There is uncertainty regarding the amount of future funds that will be available.

6. DECISION: COL and internals support the Employer's offer. The externals slightly support the Employer's offer. The public interest and ability to pay support both offers; however, the uncertainty of the pandemic warrants a careful approach to spending future funds. Employer wins.

748. County of Lake and Teamsters Local 700, S-MA-17-027 (Arb. Kohn 2020)
Last Hearing Day: August 11, 2020; Award: August 11, 2020
STIPULATED AWARD

747. City of Sycamore and FOPLC, S-MA-19-220 (Arb. Benn 2019)
Last Hearing Day: June 22, 2020; Award: June 22, 2020
STIPULATED AWARD

746. SUPPLEMENTAL AWARD City of Wood River and USW, Local 9189, S- MA-19-227 (Arb. Meyers 2020)
Oral Argument: June 12, 2020 Award: June 22, 2020

1. ISSUE: Health Insurance.

2. FRAMING OF PROPOSALS: Health Insurance was not at issue in the original hearing/award, but the parties had a dispute regarding whether current language re: "spousal exclusion rule" remained in the successor agreement. The City had drafted its final offer on insurance to keep the spousal exclusion rule, but accepted the Union's final offer which made no

mention of the rule. The Arbitrator rules the exclusion was continued in the new contract. Union wins.

745. County of Shelby and FOPLC, S-MA-18-345 and 346 (Arb. Szuter 2020)
Last Hearing Day: February 6, 2020 Award: May 11, 2020

1. ISSUES: Wages, Health Insurance Premium Contributions (2 units).

2. EXTERNAL COMPARABLES: Parties agree on five but could not agree on the remaining three possible comparables. "The Arbitrator is convinced that the process and selection used by the Parties is glaringly wrong." The Arbitrator "would have" selected a certain four, but because of "constraints of the record" the Arbitrator "had to use" six (five the parties agreed to, and one additional).

3. CHANGES IN CIRCUMSTANCES/COVID-19: No evidence was presented during the pendency of the proceedings, but the Arbitrator would be remiss not to take "arbitral notice" of COVID-19. All the factors, from family income to Employer revenue to insurance costs, are far from quantifiable now. The only certainty is the uncertainty, with bleak prospects.

4. AWARD ON WAGES AND HEALTH INSURANCE: The Arbitrator did his own analysis and awards Union's wage offer in one unit and Employer's wage offer in one unit. The breakthrough factor alone is enough to award the Union's proposal on health insurance. The Employer did not show the system is broken. The lack of retroactivity is a "token" hazard pay for first responders in light of COVID-19. Union and City win wages; Union wins health insurance.

744. City of Highland and FOP, S-MA-19-194 (Arb. Finkin 2020)
Last Hearing Day: February 21, 2020; Award: June ?, 2020

1. INTERNAL COMPARABLES: Union represents three bargaining units and Union agreed to 2% in the other two. (The Employer's offer here).

2. EXTERNAL COMPARABLES: Not much data available after year 1 and neither offer would alter standing with externals.

3. CPI and COVID-19: CPI is unreliable due to the impact of the pandemic and should not be given probative weight.

4. AWARD ON WAGES: The dispute turns on internal comparability. Not only did the Union agree to 2% in the other two units, "a differential between the rate of increase for officers vis a vis the sergeants in particular would have deleterious intramural consequences in terms of moral [sic]." Employer wins.

743. County of Williamson and FOP, S-MA-19-007 (Arb. Diekemper 2020)
Last Hearing Day: November 22, 2019; Award: April 3, 2020

1. ABILITY TO PAY: Employer's argument that the Union's wage offer would exceed its desired level of reserves and claiming cash flow problems is not persuasive. The County has a history of healthy year-end balances in its general fund and an expanding tax base. Employer has ability to pay Union's wage offer, but the Arbitrator views the ability to pay factor as one that would disqualify a demand that could not be met, but not as a factor that requires the adoption of a demand that can be met.

2. INTEREST AND WELFARE OF PUBLIC: Retaining good, well-trained and experienced employees is in the best interest of the public. The adoption of either final offer will not impact this criterion.

3. CPI and COVID-19: Both offers exceed CPI for 2018 and 2019, but the Employer's is closer. Because of the current COVID-19 pandemic, it is perilous to try to predict the cost of living for 2020.

4. COMPARABLES: Internals do not favor Employer and Externals favor Union.

5. BREAKTHROUGH: The Employer's wage offer is a breakthrough because it provides rank and title differential pay for six existing titles and adds four new titles not agreed to in bargaining. This offer was not addressed in bargaining and the Employer did not meet breakthrough standard. Union wins.

742. City of Wood River and USW, Local 9189, S-MA-19-227 (Arb. Meyers 2020)
Last Hearing Day: January 10, 2020; Award: April 16, 2020

1. EXTERNAL COMPARABLES: The Arbitrator accepts the agreed upon comparables and rejects the additional comparables proposed by both parties.

2. CHANGE IN FACTORS AND COVID-19: The Arbitrator is mindful of potential devastating financial consequences to local governments due to the pandemic. Not "make or break" here. Because of the absolute uncertainty about the ultimate impact, this factor cannot be used to resolve economic issues.

3. BREAKTHROUGH OFFER RE: VACATION CARRYOVER: Employer proposes limiting amount of vacation carryover from 124 hours to 42 hours. Union proposes *status quo*. The City bears the burden to change the existing language. The City argues that it would save significant money, but its proposal is to the detriment of police officers who need flexibility to manage their accrued time off. No *quid pro quo*. No justification for the change. Union wins.

4. BREAKTHROUGH OFFER RE: WORKERS COMP LEAVE/PREMIUM PAY: Employer proposes not counting time of workers' compensation as "hours worked" for purposes of calculating overtime. Union proposes *status quo*. The City bears the burden to change the existing language. Again, the City argues that it would save money, but its proposal is to the detriment of the police officers. No justification for the change. Union wins.

5. TWO TIER PROPOSAL RE: SICK LEAVE BUYBACK: Employer proposes to limit buyback to 42 hours (half of current amount) and eliminate it for new hires. Union proposes buyback based on last wage paid but require more years of service for eligibility for buyback to occur. Both parties propose changes. The City's proposal is more dramatic. Other unions have agreed to stop buyback for new hires, but it creates a two-tiered system which creates internal problems. No *quid pro quo* for City offer. Union wins.

6. WORK SCHEDULE: Employer proposes *status quo*. Union proposes to incorporate current side letter as to 12-hour shifts into the contract with change to the power shift. City argues there was an existing grievance over this issue, so matter should not be addressed. Arbitrator rejects this argument. Union's reasons are sensible, but not compelling enough to alter the *status quo*. Even if the current schedule is creating problems, scheduling problems should be addressed at the bargaining table. Employer wins.

741. City of Springfield and PBPA, S-MA-18-326 (Arb. Reynolds 2020)
Last Hearing Day: November 26, 2019; Award: February 24, 2020

1. BREAKTHROUGH TWO TIER RESIDENCY PROPOSAL: The Employer proposes restricting residency for new hires and the Union proposes *status quo*, no residency restriction. The current "no residency restriction" was the result of negotiations and has been in existence for over 20 years. Prior, there was a residency requirement for over 25 years but during those years the Union had no right to bargain over residency. The Employer's two-tier proposal is a breakthrough and the Employer did not meet its burden of showing the current system is broken and that the benefit to citizens rises to the level of proven need for a change. No need to address the adequacy of the *quid pro quo* offered by Employer. Internal consistency is not controlling. Externals do not support City. Union wins.

2. WAGES AND SICK LEAVE BUYBACK: While the annual sick leave buyback provides a gain to employees, it should not be considered in determining wages. It can be considered when looking at overall compensation. The externals favor Union. Cost of living and internal comparables favor the City. Ability to pay is not a factor. City wins.

3. BREAKTHROUGH ISSUE SICK LEAVE BONUS DAY USE: Employer proposed limiting eligibility for sick leave bonus day. Union proposed status quo. No evidence that the current system is creating hardships and does not rectify any issues. Union wins.

740. County of McLean and FOPLC, S-MA-18-084 (Arb. Murphy 2020)
Last Hearing Day: September 17, 2019; Award: February 14, 2020

1. CPI and COVID-19: With the volatile economy in 2020, it would be highly speculative to try to assign an annual increase to CPI for 2020.

2. WAGES and COMPARABLES: Each party analyzes externals differently and both methods show that both offers exceed the externals. Employees with less than 5 years and at top pay (23 years) are paid above average. Employees between 5 and 23 years are paid below average. Non-public safety internals are not relevant. No lockstep parity with the public safety internals.

3. ABILITY TO PAY: Employer has the ability to pay. Just because a government unit is able to pay a higher wage increase does not mean it should, unless the Union's proposed increases provide a benefit to the public beyond those proposed by the Employer.

4. BENEFIT TO THE PUBLIC: No evidence of a problem with hiring, retention, turnover,

morale, training, or competence of staff. The unusual number of new employees is due to staff expansion because of a new jail. No increased benefit to public to pay the Union proposal. Employer wins.

5. MANAGEMENT RIGHTS/DEMOTIONS: Union seeks to add the term "demotion" to the grievance and arbitration provisions regarding discipline. Employer argues that demotions can be for performance problems or discipline problems. Performance demotions can still go to the Merit Commission. Disciplinary demotions, like any other discipline, should be included in the choice of venue provisions. Union wins.

6. DRUG TESTING: Employer proposes *status quo*. The Union proposes a detailed drug testing provision, seeking language describing the reasons for testing, procedures for testing, and discipline for testing positive. Per the comparables, the Union's proposal is standard. Union wins.

7. SICK LEAVE: Employer proposes *status quo*. Union proposes a detailed sick leave policy into contract. No evidence the current policy has not worked over time. Employer wins.

739. City of Litchfield and FOP, S-MA-19-203 (Arb. Wojcik 2020)
Last Hearing Day: October 7, 2019; Award: January 6, 2020

1. EXTERNAL COMPS: The Parties are in agreement except the Union wants to add Jerseyville. Arbitrator surmised the only reason the Union wants to add Jerseyville is because the officers there were recently awarded large salary increases. The Jerseyville wage increases resulted from a unique set of circumstances. The Union has not tried to include the town before. Employer wins.

2. VACATION: Employer proposes changing vacation from "days" to hours. Union proposes *status quo*. Employer claims its proposal addresses an inequity that was not corrected last negotiations and the change would provide a more equitable arrangement for senior and junior officers to schedule vacations. But no officer has expressed any claim of inequity. No evidence of administrative issues regarding staffing or day to day operations. Union wins.

3. SICK DAYS: Employer proposes *status quo*. Union proposes increasing the amount of sick days that can be accumulated. Union argues its proposal has internal comparable support.

Internal equity not enough. The change is significant and costly. Employer wins.

4. PERSONAL DAYS: Employer proposes *status quo*. Union proposes language that would not allow Chief to deny a personal day requested with 14 days' notice. Union argues its proposal has internal comparable support (firefighters). The proposal would limit the Chief's authority to run the department effectively and efficiently. Firefighters' language allows some flexibility in emergencies. Employer wins.

5. WAGES: Both offers exceed the cost of living. The Union's offer in reliance on external comparability is no longer accurate without the inclusion of Jerseyville. Employer wins.

6. TAKE HOME CARS: Employer proposes *status quo*. Union proposes officers living in the zip code be given take-home cars. The Employer has a policy allowing take-home cars for officers who live in the city. The Arbitrator agrees with the Union's argument that shorter response times to call-outs would benefit the public as well as individual benefits (maintenance and cleanliness) of giving all officers take-home cars. However, the Union cannot establish a sufficient reason for the breakthrough. Employer wins.

INDIANA

State and Local Public Sector Committee
National Academy of Arbitrators
James B. Dworkin

The state of Indiana has only one law enabling public sector collective bargaining. Public Law 217, which established the framework for collective bargaining between teachers and school employers, was enacted in 1973. This law is also referred to as the Certified Educational Employee Bargaining Act (CEEBA), and as noted above, teachers are the only public employees in Indiana with statutory collective bargaining rights. There are some unionized police, firefighters, and other public employees in Indiana. However, these employees have no statutory right to demand collective bargaining. There is no statewide law in Indiana guaranteeing collective bargaining rights to all public sector employees.

Two unions represent teachers for the purpose of collective bargaining in Indiana. The smaller of these two unions, the American Federation of Teachers, is estimated to have 5,000 teacher members in Indiana. The larger union representing teachers is the Indiana State Teachers Association (ISTA), which has membership of close to 40,000 teachers. Note that strikes are illegal for all public sector employees in Indiana.

Public Law 217 has a narrow scope of mandatory bargaining issues which includes wages, salaries, and benefits. A recent action called "Red for Ed" took place on November 19, 2019. This was not technically a strike, but rather a walkout, so teachers could rally at the Indiana Statehouse to try to influence lawmakers to invest more money in schools and education. The most recent 2020 legislative session in Indiana did not address teacher pay. However, the governor of Indiana has promised to help put Indiana in the top three states in the region in the area of teacher pay. We will have to wait to see if this actually happens. The year 2021 will feature the so-called long legislative session, whereas 2020 was a short session. The longer session in 2021 is necessary as lawmakers draft a two-year budget scenario. It will be very interesting to see how teacher pay and education funding are handled in the 2021 long session.

Public Law 217 created the Indiana Education Employment Relations Board (IEERB) to administer the teacher collective bargaining law. As such, it holds certification and decertification elections, handles unfair labor practices, and administers impasse procedures

should contract talks break down. The two impasse procedures in the law are mediation and factfinding. IEERB has very precise regulations and time frames governing these two impasse procedures. For example, if parties are unable to reach agreement, it is well known that mediators will be appointed on a certain date (November 24th in 2020) and that mediation must end by December 24th of that year. Only three sessions with a mediator are allowed to be held. Things are quite a bit different in this year of the COVID-19 pandemic. Instead of in-person meetings with the parties as in years gone by, the parties are strongly urged this year to utilize virtual mediation.

The IEERB also requires that a Bargaining Revenue and Expense Document (BRED) be filed this year by December 1, 2020. BREDs are filed by the schools and are very helpful to mediators and fact finders alike.

If mediation is not successful, the parties must go to factfinding. IEERB rules state that a fact finder and a financial consultant must be appointed within 15 days of the last day of mediation. The financial consultant assists the mediator to understand fully the budget situation of the particular school corporation. Indiana law prohibits deficit financing by school corporations. A fact finder has 30 days to complete the process. Each party must submit a Last Best Offer (LBO) to the fact finder. If the fact finder ascertains that an LBO would require the school corporation to be in deficit financing, she or he must select the other LBO. While this process is referred to as factfinding, it has much similarity to final-offer interest arbitration, as the fact finder selects either the union or the school corporation LBO as the final contract terms. The IEERB has a simplified calculator which the parties use to determine if their LBOs are in line with statutory requirements.

Finally, the IEERB looks closely at every contract each year to make certain that it is in compliance with the rubric that is employed. For instance, discussion items cannot be included in collective bargaining agreements. Further, all salary increases must only be based on five statutory factors. This review of the entire collective bargaining contract under the compliance rubric is the final step before a contract can be fully implemented. It should also be mentioned that school corporations are shown model compensation plans that will allow them to construct their own plan with compliance in mind.

In summary, collective bargaining for teachers in Indiana has been established since the passage of Public Law 217 in 1973. Parties have a narrow scope of bargaining issues, and final

contracts are closely monitored for compliance with the law. Mediation and factfinding are the two main alternative dispute resolution techniques used to help the parties who have been unable to settle bilaterally. IEERB data shows that the vast majority of contracts are settled at the bargaining table. Very few cases require the intervention of a mediator and/or a factfinder. It remains to be seen if other public sector employees in Indiana will receive statutory collective bargaining rights like teachers have had since 1973.

LOUISIANA

NAA State and Local Public Sector Committee
The Status of Public Sector Collective Bargaining in State and Local Public Agencies in Louisiana 2020
Sidney Moreland, IV Arbitrator NAA

Population: 4,648,794

State Agency Collective Bargaining: Yes

Required: No

Permissive: Yes
Prohibited: No

Local Agency Collective Bargaining: Yes
Required: No

Permissive: Yes
Prohibited: No

While the unionization of most private sector workers is governed by the National Labor Relations Act (NLRA), the legal scope of collective bargaining for state and local agencies is left to the various states, and if allowed by the state, by the local agencies within said state.

In Louisiana, collective bargaining by state and parish agencies is neither required nor prohibited by state law, leaving it permissible on an agency-by-agency basis. If a state or local agency does choose to enter into a collective bargaining agreement, state law requires a 5-day pre-ratification public notice requirement. La. R.S. 44:67.1 states:

Acceptance of collective bargaining agreement

A. No collective bargaining agreement to which a public employer is a party shall be accepted or ratified by the public employer or its representative until the collective bargaining agreement has been made available to the public via the Internet website of the

public employer for at least five business days. The public employer shall issue a written public notice in the manner provided in R.S. 42:19(A)(2) informing the public of how such agreement may be accessed and the date, time, and place of the meeting at which the agreement will be considered by the public employer for acceptance or ratification.

B. For purposes of this Part, "public employer" means the state or a political subdivision thereof, or a department, agency, office, institution, or other organizational unit of state or local government that employs one or more individuals in any capacity.

Collective bargaining meetings involving state or local agencies are exempt from public meetings laws requiring public notice and access. (See, La. R.S. 42:17A. (2)). There is no prohibition against a state or local agency collecting union dues.

In *Davis v. Henry*, 555 So.2d 457, 459, 133 L.R.R.M. (BNA) 2271 (La., 1990), the Louisiana Supreme Court held: "A review of jurisprudence, statutes and constitution shows Louisiana public policy favors the organization of and collective bargaining for both public and private employees." The ruling has not led to discernible statutory changes favoring or disfavoring public sector collective bargaining.

It should be noted as a consequence of the minimal amount of statutory language addressing collective bargaining in Louisiana, there exists no legal exclusions upon any category of public employee, such as typically seen in public sector collective bargaining agreements (*i.e.*, elected officials, unclassified/civil service exempt employees, supervisors, managers, national guard members, etc.).

State civil service laws govern compensation and work rules for state employees. Local collective bargaining agreements may grant unions exclusive representative status and govern some working conditions. (See, http://www.civilservice.louisiana.gov/CSRules/Index.aspx)

According to state law, no person is required to remain a union member as a condition of employment, including public sector employees. Generally, this is referred to as right to work law. La. R.S. 23:981-983 states:

RIGHT TO WORK

§981. Declaration of public policy

It is hereby declared to be the public policy of Louisiana that all persons shall have, and shall be protected in the exercise of the right, freely and without fear of penalty or reprisal, to form, join and assist labor organizations or to refrain from any such activities.

§982. Labor organization

The term "labor organization" means any organization of any kind, or agency or employee representation committee, which exists for the purpose, in whole or in part, of dealing with employers concerning wages, rates of pay, hours of work or other conditions of employment.

§983. Freedom of choice

No person shall be required, as a condition of employment, to become or remain a member of any labor organization, or to pay any dues, fees, assessments, or other charges of any kind to a labor organization.

The Louisiana Appeals Court sanctioned collective bargaining in Louisiana for public school teachers conditioned upon the local governing authority's (School Board's) approval. The Court stated:

> We hold that a school board, incidental to its statutory duties above enumerated, has the power and authority to collectively bargain with an agent selected by the employees, if the Board determines in its discretion that implementation of collective bargaining will more effectively and efficiently accomplish its objects and purposes.

See *Louisiana Teacher's Association v. Orleans Parish School Board*, 303 So.2d 564, 567 (La. App. 1974).

Right to Wage Negotiate

In Louisiana, where public collective bargaining is permissive but not required, firefighters, police, and teachers have collective bargaining agreements in various locales in Louisiana, but it is by no means widespread. There are no Louisiana laws addressing wage negotiations between state and local employees and their public employers in Louisiana. In *Davis v. Henry*, *supra*, the Louisiana Supreme Court did not address the right to negotiate wages in public sector bargaining.

Right to Strike

Firefighters and Police and public employees deemed essential to public safety are prohibited from striking in Louisiana. Public school teachers are not legally prohibited from striking in Louisiana. *In Davis v. Henry*, *supra*, the Louisiana Supreme Court held: "Public employees, except for those essential to public safety, have the right to engage in peaceful picketing, work stoppage and other concerted activities is applicable to public school employees."

Public Sector Unions/Associations WITH Collective Bargaining Agreements

American Federation of State, County, and Municipal Employees / Louisiana Dept. of Health, Louisiana Dept. of Corrections, Lafayette, Bogalusa City School District, Monroe, Shreveport, Alexandria, Lake Charles, Calcasieu Parish, Southeastern Louisiana University
AFL-CIO affiliate

**has other chapters with no CBA*

Louisiana Association of Educators / St. Bernard, St. Helena, St. John the Baptist (*National Education Association affiliate)*, & Vermillion Parishes
**has other chapters with no CBA*

Louisiana Federation of Teachers / Jefferson, Orleans, & St. Tammany Parishes
AFL-CIO affiliate
**has other chapters with no CBA*

Public Sector Unions/Associations WITHOUT Collective Bargaining Agreements

American Association of University Professors / Louisiana State University, Bossier Parish Community College

American Federation of State, County, and Municipal Employees
AFL-CIO affiliate
**has other chapters with CBA*

American Nurses Association

Fraternal Order of Police* / St. Charles Sheriff's Dept., Southern Acadiana Law Enforcement Community
**Some FOP Locals may have specific names, such as Southern Acadiana Law Enforcement Community*

International Union of Police Associations* / Alexandria, Kenner, DeRidder, Baton Rouge, New Iberia
AFL-CIO affiliate
**Some IUPA Locals may have specific names, such as Police Association of New Orleans*

Louisiana Association of Educators

**has other chapters with CBA*

Louisiana Federation of Teachers

**has other chapters with CBA*

Louisiana State Troopers Association / Louisiana Dept. Pub. Safety & Corrections

National Association of Police Organizations / New Orleans

Professional Fire Fighters Assoc. of Louisiana* / Benton, Bossier City, Kenner *(International Assoc. of Fire Fighters affiliate)*, Bossier Parish, Caddo Parish, Carencro, Desoto Parish, Sulphur, Natchitoches, Shreveport, Bastrop, Monroe, Ouachita Parish, Baker, Ruston, West Monroe, Alexandria, Carlyss, Jennings, Leesville, Pineville, Pearl River, Hammond, Rapides Parish, Ville Platte, Lake Charles, New Orleans, Abbeville, Crowley Eunice, Lafayette, Morgan City, New Iberia, Youngsville, Baton Rouge, St. Tammany Parish, West Baton Rouge, Amite, Denham Springs, Prairieville, St. John Parish, St. George, Zachary, St. Bernard Parish, Bogalusa, Covington, Goodbee, St. Landry Parish, Madisonville, Mandeville, Slidell, Harahan, Houma, Jefferson Parish

**Some IAFF Locals may have other names, such as New Orleans Fire Fighters Association, Bossier City Fire Fighters Association, etc.*

Service Employees International Union

MASSACHUSETTS

Significant Developments in Massachusetts Public Sector Labor Arbitration and Collective Bargaining

Marc D. Greenbaum

Introduction

The past year in public sector labor arbitration and collective bargaining must be viewed in the context of two of the year's most important stories—the COVID-19 pandemic and the concerns about the relationship between the police and the country's minority population. Although those events did not produce significant developments for this year, future reports are likely to reflect their occurrence.

In late November, leaders from both houses of the Massachusetts Legislature reached a compromise agreement on police reform legislation. The bill, some 129 pages in length, would reportedly establish a Massachusetts Peace Officer Standards and Training Commission. The Commission would consist of nine members, three of whom would be law enforcement officers. The remaining civilian positions would include a social worker, a retired Superior Court judge and an attorney nominated by the Civil Rights and Social Justice Section of the Massachusetts Bar Association.

The Commission would have the authority to certify police officers, investigate allegations of misconduct and revoke an officer's certification. The grounds for revoking an officer's certification are reported to include the officer's conviction of a felony, the knowing filing of a false police report and the use of excessive force. At this point, the impact of these provisions on the arbitration of grievances contesting a police officer's discipline or discharge for engaging in the specified conduct cannot be determined.

The legislative compromise also reportedly bans the use of chokeholds and otherwise establishes standards for the use of force. It also reportedly changes the definition of "qualified immunity" and ties it into the new licensing process. It appears that the loss of an officer's license would deprive that officer of the ability to claim a qualified immunity.

https://www.bostonglobe.com/2020/11/30/metro/lawmakers-unveil-police-reform-compromise-after-months-secret-negotiations/

The bill was ultimately approved by both houses of the legislature. On December 31, 2020, after securing some amendments to the legislation that do not appear to impact the provisions described above, Governor Baker signed the bill. https://www.bostonglobe.com/2020/12/31/metro/governor-baker-signs-landmark-policing-reform-law/.

This report will first consider three decisions of the Massachusetts Appeals Court, the intermediate appellate court, further defining or confusing, depending upon one's perspective, the authority of labor arbitrators to resolve disputes under collective bargaining agreements. A fourth decision of that court, concerning the computation of back pay of police officers reinstated to employment by the Massachusetts Civil Service Commission, will be briefly noted.

The COVID-19 pandemic produced a significant decision of the Commonwealth Employee Relations Board (CERB) considering whether the refusal of public school teachers to perform certain duties in a school building due to their fear of contagion constituted a strike.

The pandemic prompted numerous school systems to engage in collective bargaining with their teachers concerning the circumstances under which public education would be conducted during the pandemic. In one case, involving the City of Boston, the agreement gave rise to a court proceeding effectively involving the interpretation of the parties' agreement.

In a potentially disturbing development, the CERB refused to quash a subpoena issued to an arbitrator who chaired a tripartite panel charged with resolving a bargaining impasse between a police union and a municipality.

Finally, although outside this reporter's jurisdiction, we will note a New Hampshire Supreme Court decision under its public records law. The decision concerns the public record status of an arbitration award concerning an employee's termination.

Significant Judicial Decisions

Town of Dracut v. Dracut Firefighters Union, 97 Mass. App. Ct. 374, 148 N.E.3d 389 (2020).

An arbitrator held that the local fire chief's issuance of an order prohibiting on-duty firefighters at outlying fire stations from attending union meetings at the central fire station violated the parties' collective bargaining agreement. A trial court vacated the award, but was reversed by the appellate court.

The evidence demonstrated that in 1986, the parties agreed to permit the holding of monthly union meetings at the central fire station, rather than off-premises venues, thus facilitating the attendance of on-duty firefighters. Unless barred from doing so for public safety reasons, the on-duty crews from the outlying stations would drive their apparatus to the central station from which they could be dispatched in the case the crew's services were required. A similar procedure was followed in cases of training, inspections, and other similar activities.

In 2016, the fire chief "informed the union" that the on-duty crews at the outlying fire stations could no longer attend the monthly union meetings in person. The chief cited his concerns over potential delays, undermining the goal of responding to all calls for service within a specified time period. The chief's directive did not apply to the other, non-union related activities the on-duty firefighters at the outlying stations attended at the central fire station.

The Appeals Court held that an arbitration award invalidating the chief's directive did not impermissibly undermine the chief's authority under a statute defining the scope of those powers. Thus, the court held the award did not violate the so-called non-delegability doctrine. The Massachusetts version of the doctrine is designed to "reserve certain personnel matters to [the public employer's] sole discretion in order to preserve accountability to the public in the performance of the essential functions of government." *Id.* According to the court, the doctrine should be applied only to the extent necessary to preserve the public employer's discretion, while respecting the public policy favoring collective bargaining.

The court first examined the terms of the statute on which the chief's claimed need for discretion was predicated. The court observed that the statute defining the fire chiefs' authority was broad, thus requiring a case-by-case analysis paying due regard to public safety considerations. The court ultimately reasoned that the critical provision of the collective agreement did not touch upon the fire chief's authority to make critical personnel decisions. Instead, it concluded, that relevant provision focused upon the chief's authority to determine whether employees could attend a union membership meeting. So viewed, the court held that the record failed to demonstrate that the challenged provision threatened public safety. It expressed concern that accepting the employer's position would put the court on a slippery slope.

At its core, the court appeared heavily influenced by two factors. The first was that the town's challenge was limited to the provision's impact upon firefighters attending union meetings. The town thus did not question the extent to which firefighters were permitted to follow the same procedures in the case of training and inspections, among other things. The court also observed that the controlling provision of the collective agreement did divest the chief's authority to refuse permission for firefighters at outlying stations to attend union meetings when required by public safety considerations.

State Police Association of Massachusetts v. Alben, 97 Mass. App. Ct. 366, 148 N.E.3d 1205 (2020).

This case was decided by the same Appeals Court panel that decided the *Dracut* case, *supra*. It concerned the relationship between a contract provision governing detail pay and a statute governing the payment of overtime. The union representing the state police instituted an action for damages under the statute, claiming that its members were entitled to overtime rates for working certain details, notwithstanding the collective agreement's providing a lower rate of pay for detail work. The case was initially dismissed without prejudice to permit an arbitrator to determine the result under the collective agreement. The arbitrator ruled that detail compensation was governed by the collective agreement, but did not determine whether the agreement could be enforced in the face of the statute. The union refiled the civil action only to have it dismissed by the trial court. The Appeals Court held that the collective bargaining agreement governed and thus affirmed the trial court's dismissal of the union's civil action.

The court first held that the statute on which the union's claim was predicated did not provide a private right of action. Nonetheless, it proceeded to consider the merits. Citing the strong public policy favoring collective bargaining, the court held that the case was governed by a specific provision of G.L. c. 150E, the commonwealth's public sector bargaining law. Under Section 7 (d) of that chapter, the terms of a collective bargaining agreement prevailed over the terms of certain cited statutes, one of which was the overtime statute relied upon by the union. Thus, the court reasoned, the arbitrator's determination that the contractual detail rate governed was controlling was correct, thus precluding the union's reliance on the statute. In so holding, the court rejected the claim that the contact prevailed only for the three-year period, the maximum period permitted for such agreements by statute.

City of New Bedford v. New Bedford Police Union, 97 Mass. App. Ct. 502, 149 N.E.3d. 790 (2020).

An arbitrator held that the city violated the applicable collective bargaining agreement by assigning police officers to perform background checks during their normal work hours as a component of their normal duties. The collective bargaining agreement specifically defined the conditions under which officers could be assigned to perform background checks. Among other things, the agreement provided that background checks could not be assigned to officers above the rank of sergeant or officers with less than three years of experience. It also provided that such assignments could not exceed one hundred days, during which assigned officers would work a certain work schedule.

To address a backlog in performing background checks for needed civilian personnel, the police chief issued an order directing police officers to perform background checks during their normal work hours in addition to the normal duties. The union grieved the order as being inconsistent with the collective agreement.

The arbitrator found that the order violated the agreement. The arbitrator recognized that the order permitted the department's chief to have background checks performed in the most efficient manner in the face of a documented need for more timely performance of background checks. The arbitrator also recognized that the challenged order permitted the department to avoid incurring an overtime expense to have the checks performed. The arbitrator did not, however, agree with the city's view that the grievance was not arbitrable because the challenged

order was essential for public safety. Instead, the arbitrator viewed the case as resting upon the city's desire to avoid incurring overtime expenses, rather than protecting the chief's inherent managerial prerogative.

The trial court, however, deemed the award to be an impermissible intrusion on the chief's management prerogative and vacated the award as contrary to public policy. The Appeals Court affirmed the trial court ruling.

The Appeals Court disagreed with the union's claim that the award did not interfere with the chief's power to assign officers to perform the background checks, but regulated only the method of implementing such assignments. The court concluded that the controlling provision was more than procedural because it dictated who might be assigned, the duration of the assignments, and the conditions under which such work should be performed. The court viewed a chief's power to assign officers to perform specific tasks as implicating public safety and was thus part of the chief's inherent management prerogative. In the court's view, the controlling provisions of the agreement "restrict the chief's ability to allocate and deploy officers to conduct background investigations as he sees fit." Thus viewed, the court held that the arbitrator was "substituting his or her judgment for that of a chief of police in assigning and deploying police officers." By doing so, the court concluded, the arbitrator exceeded their authority, thus compelling vacation of the award.

Boston Police Department v. Jones, 98 Mass. App. Ct. 762 (2020).

This case arose out of a two-decades old dispute challenging the termination of a number of Boston police officers who failed a hair test used to determine whether they had used controlled substances. The Civil Service Commission ultimately ordered a number of those officers to be reinstated "without loss of compensation." After protracted and prolonged negotiations to resolve the amount of back pay due some of those officers, a superior court action was pursued on their behalf. A trial court judgment on the disputed issues was affirmed by the Appeals Court.

The decision implicates issues that may be confronted by arbitrators in resolving back pay disputes under a collective bargaining agreement. Thus, a brief recitation of those principles seems in order.

In computing the back pay entitlement of the officers in question, the court established the following:

1. The computation of the back pay due the officers was to be based only upon their straight time earnings and should not include lost overtime and detail compensation. Based upon its prior decisional law, the court held that the amounts of such compensation were speculative and thus not properly considered as lost compensation.

2. Under the relevant state statutes, the officers were not entitled to post-judgment interest because the commonwealth was not deemed to have waived the city's sovereign immunity from the award of such interest

3. The officers' claim for the claimed additional tax burden arising out of their being awarded a lump sum was rejected. Once again, the court found that the commonwealth had not waived the city's sovereign immunity from such an award.

4. Under the relevant statutes, the commonwealth was deemed to have waived the city's sovereign immunity from an award of prejudgment interest. The relevant statute permitted an award of such interest in actions based upon contractual obligations.

5. Relying upon traditional contract law principles, the court held that the duty to mitigate damages required the city to demonstrate that comparable employment was available and that the officers could have obtained such employment.

6. The court held that overtime earnings on any interim employment and wages from second and third jobs held by the officers during their period of unemployment with the city should not be deducted from their back pay award. The court noted that such earnings resulted from the officers' sacrificing time outside of their regular work schedules. It also held that such a result was necessary, as a matter of fairness, given the exclusion of lost overtime and detail compensation from the back pay computation.

COVID-19 Developments

The COVID-19 pandemic has and will continue to generate legal disputes involving the rights of employees and employers. In Massachusetts, disputes arising in the context of public education generated at least two high visibility disputes. Both implicated the rights of teachers who sought to be able to perform their duties on a virtual basis, rather than in the public school buildings to which they were assigned.

1. Decision of the Commonwealth Employee Relations Board.

Andover Education Association, S.I. 20-1987 (September 8, 2020)

The Andover case arose when the Andover School Committee petitioned the Commonwealth Employee Relations Board (CERB) to commence a so-called strike investigation. The School Committee alleged that a strike encouraged and condoned by the Association was either occurring or about to occur. The petition alleged that teachers employed by the School Committee refused to enter their assigned school buildings to engage in professional development activities with the Association's encouragement.

The Andover schools had been operating on a remote basis since March 2020. This controversy arose over the plans for the beginning of the 2020-2021 school year. A multi-party negotiation between the commonwealth's Commissioner of Education and the three statewide teachers' unions produced an agreement to lower the number of pupil school days with a commensurate increase in the number of the days teachers would have to prepare to perform their duties during the school year.

The Andover School Committee's revised school calendar called for that additional training, considered to be professional development, to commence on August 31, 2020. It adopted a hybrid learning model consisting of both in-school and remote instruction, with a full remote instruction model at parental option. The School Committee engaged in bargaining with the Association over the return-to-work issues, but did not reach an agreement. The Committee unilaterally adopted a number of safety protocols to govern the school's opening, based upon governmental recommendations, without the parties reaching impasse.

At a general membership meeting held on August 26, 2020, the Association voted to conduct what it called a "Work Safety Action." It consisted of teachers reporting for work on the assigned days and performing their professional development without entering their assigned

school buildings. The Association did not deem this action to be a strike within the meaning of the statutory prohibition on strikes by public employees.

On August 27, 2020, the school administration directed teachers to report for work on August 31, 2020, sign in at their respective buildings, and report to specific locations for professional development activities. The directive stated that social distancing would be maintained.

The Association responded with a press release on August 28, 2020. The press release announced that Association members would report to work but remain outside their assigned buildings. The release stated that the Association questioned the safety of students and staff working together in the confines of school buildings. The release also criticized the School Committee's lack of transparency and its refusal to engage in public bargaining with the Association. On August 30, 2020, the Association voted to engage in the Work Safety Action on August 31, 2020 and voted no confidence in the school district's superintendent.

On August 31, 2020 the teachers reported to the assigned buildings and remained outside. There was evidence, ultimately not material, about the extent to which the scheduled professional development activities could be performed outside the building and the school district's claimed lack of effort in facilitating such performance. The CERB investigation concluded that certain of the scheduled professional development activities required the teachers' presence in their assigned locations. The evidence also demonstrated that at least four teachers were docked their pay for the day, with the attendance system showing "Work Action, No Pay."

On the evening of August 31, 2020, the School Committee voted to authorize the filing of the strike investigation petition. The union held a meeting at which it voted to suspend the Work Safety Action and reaffirmed its no-confidence vote in the superintendent. There appears to have been no discussion at that meeting about resuming the Work Safety Action and its members completed their professional development activities in their assigned school buildings on September 1, 2020 and thereafter. The School Committee permitted some teachers to work remotely upon the submission of evidence that those teachers required a reasonable accommodation.

The CERB concluded that the Association's actions constituted a strike within the meaning of Chapter 150E, the Massachusetts public sector collective bargaining law. The CERB

first observed that there was no statutory authority permitting teachers to decide where their assigned tasks should be performed. The CERB observed that the statute defined a strike as the concerted refusal to "report for duty" and that the employer had the power to define where those duties should be performed. It thus rejected the Association's claim that the critical phrase meant any location from which the assigned tasks could be performed. The CERB also found that certain of the assigned duties could not be performed outside of the teachers' assigned school buildings.

The CERB next rejected the Association's claim that it was not engaged in a strike because the duties in question were not "intrinsic" to their job performance. This is so, the CERB reasoned, because both the collective agreement and past practice recognized the teachers' obligations to perform professional development activities at the beginning of the school year. The CERB placed no weight on the fact that the professional development activities for the 2020-2021 school year were different because of the pandemic. Rather, it relied on the fact that the professional development obligations were required by, among other things, the statewide agreement between the Commissioner of Education and the three statewide teachers' unions.

The CERB rejected the Association's remaining claims. It found that the employer did not preclude the teachers from performing their duties, thus engaging in an unlawful lockout. Instead, the CERB held, the employer engaged in legitimate self-help in response to the Association's unlawful strike. It also rejected the Association's claim that the action was not unlawful because it was for the safety of its members. The CERB noted that Chapter 150E, unlike the National Labor Relations Act, does not contain a safety exception and the action was not safe harbored by any other applicable law.

The CERB also found that the Association has encouraged and condoned the unlawful strike, evidenced by the Association's August 28, 2020 press release. Along the same lines, it concluded that various Association officers induced and encouraged the teachers to engage in the work stoppage.

Although finding that Association members were found to have engaged in an unlawful strike, the CERB declined to find that a strike was imminent since the action had ceased after one day and there was no further discussion about its resumption. It did, however, issue a cease and

desist order because it concluded that the dispute was not moot since the parties had not reached agreement upon return to work issues.

2. Bargaining and litigation related to public education.

Numerous school systems and the labor organizations representing their employees bargained and reached agreement over return-to-work protocols for the 2020-2021 school year. The Boston Teachers Union and the Boston Public Schools were among those parties. https://btu.org/wp-content/uploads/2020/09/MOA-BPS-BTU-Reopening-Agreement-9-9-20.pdf.

The agreement, among other things, dealt with a transition to remote learning if the city's positivity rate on COVID-19 testing rose above four percent. It did so in the second week of October. The Boston Public Schools were claimed to have violated that provision with respect to certain numbers of special needs students in four schools by refusing to permit the teachers in those schools to work remotely. The union sought injunctive relief permitting those teachers to do so.

The union's civil action relied upon so much of the return-to-work agreement as provided:

> If the citywide COVID-19 positivity rate rises above 4% citywide, BPS will transition to full remote learning for all students and BTU bargaining unit members will have the option to be remote as well. When the Boston Public Health Commission or other City or State authority determines that the school district can reopen, BTU bargaining unit members will be expected to return to BPS buildings.

The union argued that this provision required the school system to afford teachers the option of working remotely once the four percent threshold had been reached. The Boston Public Schools argued that crossing the threshold empowered the Boston Public Health Commission to determine whether that option should be given.

The superior court judge, a former labor lawyer, denied the union's request for injunctive relief, effectively adopting the Boston Public School's interpretation of the agreement. During the course of the hearing, newspaper reports indicate that the judge questioned the court's jurisdiction to interpret the agreement, when the parties' collective agreement had a provision for arbitration. The union's attorney appears to have taken the position that the court's deferral to

arbitration was not appropriate, given the length of time that would have been required to get an arbitrator's decision.

https://www.bostonglobe.com/2020/10/14/metro/boston-teachers-union-city-leaders-go-court-over-requirement-some-educators-continue-working-person/

The court declined the request for injunctive relief, effectively deeming the employer's construction of the agreement to be plausible. The court expressed great concern about the impact of granting relief on a vulnerable student population.

An Arbitrator Subpoenaed

Town of Chelmsford and NEPBA, Local 20, MUP-19-7227, MUP-19-7313, MUP-19-736 (November 16, 2020).

This case arose out of an arbitration proceeding conducted under the auspices of the commonwealth's Joint Labor Management Committee (JLMC). The JLMC is charged with resolving bargaining impasses between municipalities and the labor organizations representing their police and firefighters. Its dispute resolution mechanisms include tripartite interest arbitration.

After a tripartite panel issued an award, the union filed prohibited practice charges alleging that the town violated the duty to bargain in good faith by having *ex parte* communications with the panel's management representative and authoring a dissenting opinion on that representative's behalf. After a complaint was issued, a hearing officer approved the union's request to subpoena to the neutral chair. The neutral unsuccessfully sought to have the hearing officer revoke the subpoena. The neutral took an interlocutory appeal to the CERB. The CERB held that the hearing officer's issuance of the subpoena was not an abuse of discretion.

The CERB first held that the hearing officer permissibly concluded that the subpoena related to certain allegations of the complaint. Some of those entailed the authentication of emails. One allegation, however, related to whether the chair was aware of the claimed improper ex parte communications. The CERB also rejected the neutral's claim that the subpoena was unreasonable "because it would require her to testify to her mental thoughts and impressions in violation of her ethical obligations as an arbitrator and applicable deliberative privileges."

Instead, despite the union's argument to the contrary, the CERB recognized a deliberative privilege akin to that accorded members of the judiciary. That privilege it held was not equivalent to conferring an absolute immunity to being subpoenaed, but extended only to the substance of the testimony.

The CERB sought to define the permissible areas of inquiry. It held that the neutral could permissibly testify to

> non-deliberative events, whether the judge was subjected to extraneous evidence or ex parte communications, and whether the judge was a witness to or personally involved in a circumstance that later became the focus of a legal proceeding, would not be covered by the privilege. (footnotes omitted).

In a footnote, the CERB drew an interesting distinction:

> We distinguish, however, between compelling [the chair] to testify as to whether she was subjected to ex parte communications or other extraneous influences, as opposed to testifying as to the effect of these communications on [the chair] and/or the panel's deliberative process. While the former would likely not be shielded from testimony under the precedent discussed above, the latter likely would.

The CERB thus concluded that the hearing officer did not abuse her discretion by refusing to revoke the subpoena because the neutral could answer questions that were not covered by the deliberative privilege.

A Detour to New Hampshire

Although this report is technically limited to Massachusetts, the author became aware of an interesting decision of the New Hampshire Supreme Court in *Seacoast Newspapers v. City of Portsmouth*, 2020 BL 200418, 2020 NH Lexis 103 (May 29, 2020). The newspaper sought to compel the production, as a public record, of an arbitration award resolving a grievance contesting the termination of a city employee. The circumstances leading to that termination received publicity. The union contested that request, claiming that the award was exempt from disclosure as an "internal personnel practice." The union's position was based on a prior holding

of the New Hampshire Supreme Court finding such a decision exempt from disclosure on that basis.

The Supreme Court repudiated its prior interpretation and held that the cited exemption applied only to internal policies. It did, however, remand the case to the trial court to consider whether it was exempt under the "personnel file" exemption and whether the decision's disclosure would be an invasion of privacy.

The case is, of course, dependent upon the specific provisions of the New Hampshire Right to Know Law and the relevant jurisprudential history. Because, however, this issue could arise in any jurisdiction, it is worthy of note.

MICHIGAN

Local Public Sector Committee Report

Michael P. Long

In April of 2020 the National Academy of Arbitrators established the State and Local Public Sector Committee whose general purpose is as follows:

> The State and Local Public Sector Committee will prepare an annual report to be presented to the members at the time of the annual meeting, and posted on the NAA web site and ArbInfo.com, describing and analyzing significant events in each State and Local public sector jurisdiction - strikes, notable settlements, legislation, impactful awards, significant developments, etc. during the calendar year.
>
> Also covered may be such areas as:

- COVID-19
- Public Budgets
- Fact finding and interest arbitration
- Work from home orders
- Mandated return from home work to the workplace

Public sector labor relations are authorized in Michigan by the Public Employment Relations Act known as PERA. The Act is administered by the Michigan Employment Relations Commission.

The Michigan Employment Relations Commission (MERC) is made up of three members with staggered three-year terms, who are appointed by the governor with the advice and consent of the State Senate.

MERC resolves labor disputes involving public and private sector employees by appointing mediators, arbitrators and fact finders, conducting union representation elections, determining appropriate bargaining units, and adjudicating unfair labor practice cases. MERC, supported by the staff of the Bureau of Employment Relations, administers three statutes:

- The Public Employment Relations Act (PERA), a labor relations statute which grants all public employees within the state of Michigan, excluding classified civil service

employees of the state and federal government, the right to organize and be represented by labor organizations of their choice.

- The Labor Relations and Mediation Act (LMA), a statute regulating collective bargaining relationships between private sector unions and small private sector employers not falling within the jurisdiction of the National Labor Relations Act.
- The Compulsory Arbitration Act (312), a statute providing for compulsory binding arbitration of labor-management disputes involving public safety employees.

The commission consists of three commissioners appointed by the governor, with the advice and consent of the senate. A commissioner shall be a citizen of the United States and a resident of the state, and shall have been a qualified elector in the state for a period of at least five years next preceding appointment. Members of the commission shall be selected so as to ensure that not more than two members represent any one political party. More information can be found at www.michigan.gov/merc.

Recent MERC Cases of Interest

Affirmation of the Union's Contractual Right to Communication with Bargaining Unit Employees
University of Michigan Health System and University of Michigan House Officers Association, Case No. C18 F-054 (August 12, 2019)

Prior to the March 2020 advent of the COVID-19 pandemic, MERC, on August 12, 2019, issued an order regarding how modernization and online spaces impact the traditional relationship between the employer and a union.

The University of Michigan House Officers Association ("the Association") filed an unfair labor practice alleging violations of PERA in connection with University of Michigan Health System's ("the University) decision to no longer allow the Association to present at a new-hire orientation, its recession of the Association's Executive Director's access to University intranet and email, its stated intent to modify the Family Medicine Program's holiday break period, and removal of positions that had been part of the Association's bargaining unit.

The University's decision to "no longer allow the Association to present at a new-hire orientation" was its switch to an online-only orientation. The problem was that the collective

bargaining agreement (CBA) between the parties specifically allowed for the Association to make a presentation at orientation.

The Association argued the switch to the totally online orientation constituted a repudiation of the parties' contract and, in addition, it was in retaliation in response to a prior unfair labor practice (ULP) proceeding and arbitration involving the orientation. There had been a lengthy history of disputes regarding the Association's right to be present at orientations.

The University argued that the ULP should be dismissed, as orientation was covered by the collective bargaining agreement; thus, the proper venue was grievance arbitration and that the Association had failed to establish that the transition was retaliatory or otherwise taken in response to protected activity.

The ALJ agreed with the University that issues concerning orientation should be resolved through grievance arbitration due to ambiguity in the contract, thereby rejecting the claim of repudiation; however, the ALJ said that the transition violated PERA because it was based on anti-union animus.

In reaching this conclusion, the ALJ noted that the parties had recently engaged in contract negotiations in which the union had requested additional time to present during orientation, at the same time the University allegedly had empaneled a task force to implement the online orientation.

The ALJ also found that a proper substitute was not provided to the Association, as the video that the Association would be allowed to provide would not have had the same impact as the orientation rights described and negotiated in the collective bargaining agreement.

The ALJ did not order the University to end video orientation, but required that the University "provide the Association to present in the same fashion it had done so prior to the change to the online orientation," a determination not based on a mandatory legal right, but on a contract provision. MERC upheld the ALJ's decision.

This case addresses what, because of the COVID-19 lockdowns, is becoming a recurring issue in the workplace as to contractual rights for the inclusion of a union presence in communications as the employer shifts to digital communication.

Reaffirmation of the Union's Right to Represent
City of Flint and AFSCME, Council 25 and its Affiliated Local 1600, Case No. C18 F-064 (August 20, 2019)

The American Federation of State, County and Municipal Employees (AFSCME) Council 25 and its affiliated Local 1600 filed an unfair labor practice (ULP) charge against the City of Flint (the Employer), alleging that the Employer violated its duty to bargain in good faith and engaged in unlawful direct bargaining and circumvention of the union by negotiating a settlement agreement with a unit member without the union's knowledge or participation. AFSCME, which represents the bargaining unit of city employees, further alleged that the Employer unlawfully refused its request for documents concerning the settlement agreement in question.

Article 27 of the current CBA provides a process for position reclassifications and reallocations, as well as the rights and responsibilities of the parties in that process. Reclassifications and reallocations affect employees' pay rates, job descriptions, and potentially their job titles. Under this Article, the president of the union may submit one reclassification or reallocation request per quarter. The Human Resources/Labor Relations Department for the City will then make a determination regarding whether to grant the request, and the union may grieve a denial.

In the Fall of 2015, the AFSCME president properly submitted a reclassification request on behalf of bargaining unit member Artisha Wallace (Wallace), whose job title at that time was Police Department Records Clerk. By November of 2017, the Employer still had not rendered a decision on the request. AFSCME filed a grievance on Wallace's behalf, asserting that the Employer's delay in making a decision adversely affected her rights.

On April 2, 2018, Wallace personally contacted the Human Resources/Labor Relations Director and asked to meet regarding her position. They met twice, on April 4, and May 17, 2018. Wallace signed a "Union Representative Waiver Form" on both occasions. On May 17, 2018, Wallace also signed a "Letter of Understanding Settlement Agreement" pertaining to the grievance, which purported to withdraw the grievance and any pending arbitrations. Wallace further signed a Letter of Understanding entitled "Reallocation of the Position of Artisha Wallace," which changed her job title to Police Records Coordinator and raised her pay.

The union local president was informed the following day that Wallace had entered into a settlement agreement and he immediately requested information regarding the settlement. The request was denied, and he was told that Wallace had waived her right to union representation.

Following several more requests for the documents, the Employer provided AFSCME a copy of the Letter of Understanding, and the Union Representation Waiver forms, as well as an authorization for release of employment records signed by Wallace.

The ALJ determined that the Employer had engaged in unlawful direct dealing and violated its duty to bargain in good faith under PERA by entering into an agreement with Wallace purporting to resolve the grievance without the union's knowledge or participation. The ALJ used the three-part test set forth by the National Labor Relations Board in Permanente Med Group, 332 NLRB 1143, 1144 (2000) for unlawful direct dealing and adopted by the Commission in City of Detroit (Housing Commission), 2002 MERC Lab Op 368, 376 (no exceptions).

Using that test, the ALJ determined that:

(1) the Employer communicated directly with Wallace;

(2) the facts supported that the purpose of the communication was to change her wages and the terms and conditions of her employment, thereby undercutting the union's role in bargaining and handling the grievance, and to undermine its status as the bargaining representative; and

(3) that the communication excluded the union.

The ALJ determined that the Employer gained an advantage by dealing directly with Wallace. Further, entering into an agreement solely with Wallace harmed AFSCME's position as the exclusive bargaining representative by demonstrating to others that employees could get what they want more quickly by circumventing the union and submitting requests directly to human resources. Therefore, the Employer's conduct violated Section 10(1)(a) and (e) of PERA. Further, the ALJ found that the Employer's failure to provide requested documentation concerning the settlement agreement to AFSCME in a timely manner violated the duty to bargain in good faith.

The ALJ examined a line of cases which held that to satisfy that obligation under Section 10(1)(e) of PERA, the Employer must timely supply requested relevant information, and that the

standard for determining relevancy is a liberal one. The ALJ stated that requested information must be disclosed when requested if it is reasonably likely to help the union enact its statutory duties. In this case, the information requested was relevant to AFSCME's duty to administer the collective bargaining agreement, including whether and how it would proceed in handling the original grievance. Failure to provide the agreement in a timely manner violated the duty to bargain in good faith.

The Commission adopted the Recommended Order of the ALJ.

Teaching and Coaching are Different Jobs

Marion Education Association and Michigan Education Association -and- Marion Public Schools, Case No. CU17 E-016 (September 16, 2019)

Marion Public Schools (the Employer) filed an unfair labor practice charge against the Marion Education Association and the Michigan Education Association (Unions) alleging that the Unions violated Section 10(2)(d) of PERA by filing a grievance regarding the Employer's decision not to renew a bargaining unit member's contract as a track coach and by advancing the grievance to arbitration. The Unions represent a bargaining unit of teachers employed by the Employer.

Bargaining unit member Timothy Michell (Michell) is a bargaining unit member and tenured teacher with the Employer, who, for a number of years, also coached the boys' varsity track team in addition to his regular teaching duties.

The coaching position was designated as a Schedule B position under the collective bargaining agreement between the parties. Schedule B positions are governed by separate employment contracts with the Employer. Individuals can be, but are not required to be, members of the bargaining unit in order to hold Schedule B positions.

During a track meet in 2016, a student collapsed and needed medical attention. Michell could not be located for a short period of time, nor did he know about the incident when he finally was located. As a result, the principal of the school to which Michell was assigned elected not to renew his coaching assignment for the following school year. Michell was not disciplined in his role as a teacher, but he filed a grievance regarding non-renewal of his coaching contract.

As the grievance was advanced through the procedure, the superintendent informed the union president that it was the Employer's position that the grievance concerned teacher discipline, a prohibited subject of bargaining under Section 15(3)(m) of PERA, and therefore could not be grieved. The arbitration concerning the grievance was stayed pending resolution of the unfair labor practice charge due to questions of arbitrability.

At MERC, the ALJ found that the Unions had not engaged in an unfair labor practice, concluding that the Employer's decision not to renew an employee's extra duty assignment is not a prohibited subject of bargaining. Therefore, the Unions' decision to file a grievance and advance it to arbitration is not a breach concerning the duty to bargain.

The Employer argued that the extracurricular coaching assignment was governed by the Teachers' Tenure Act and that consequently the grievance regarding Michell's discharge from that position actually pertained to teacher discipline, a prohibited subject of bargaining under Section 15(3)(m) of PERA. The ALJ disagreed, and found that Michell's coaching position was not employment regulated by the Teachers' Tenure Act for the purposes of Section 15(3)(m) and that, therefore, the Unions did not violate Section 10(2)(d) by challenging the discharge through the grievance procedure.

The ALJ found that Section 15(3)(m) of PERA clearly limits its applicability to public employees whose employment is regulated by 1937 PA 4, MCL 38.71 to 38.191; other provisions of the Act do not. The ALJ, therefore, found that the legislative intent to limit the applicability of that provision is clear. Further, the ALJ found that case law supports that teachers may be disciplined in their role as teachers for conduct which occurs outside of their employment, but that these cases are distinguishable in this instance because Michell was not disciplined in his role as a teacher.

The ALJ issued a Recommended Order, directing that the unfair labor practice charge against the Unions be dismissed. The Employer filed exceptions with the Commission. The Commission adopted the ALJ's analysis as being in keeping with the legislative intent of the provision. It found further that Michell was in fact employed in two separate capacities, as both a teacher and a coach. The Commission held that his discharge from that position is not "teacher discipline," a prohibited subject of bargaining, and is subject to the grievance process and arbitration.

Union Representation of Non-Dues Payers
Technical Professional and Office Workers Association of Michigan (TPOAM) and Daniel Lee Renner Case No. CU18 J-034

On December 10, 2019, the Commission released a Michigan landmark decision analyzing the recent U.S. Supreme Court decision *Janus v. American Federation of State, County and Municipal Employees*, 138 S. Ct. 2448 (2018), assessing whether the United States Supreme Court created a right for unions to charge nonmembers for the cost of union representation, such as filing and processing a grievance.

Janus was a landmark U.S. Supreme Court case which determined that public employee Unions were not able to charge nonmembers within the bargaining unit a base fee limited to the costs associated with representation, such as grievance procedures or bargaining a new contract. The Supreme Court found that such fees violated individuals' freedom of association as protected by the First Amendment. The Union was unable to force an individual to pay union dues if they did not want to associate with the union, even though the union was their exclusive collective bargaining representative.

This decision resulted in placing unions in a difficult position overall. The costs associated with the responsibilities to its members are very real. Bargaining, processing grievances, and arbitrations all cost significant time and money. In theory, a union could be underfunded and unable to effectively discharge its duties if too much of its bargaining unit were non-dues-paying members. This is typically referred to as a "free rider" problem.

The Supreme Court appeared to address this concern in several places, notably: In any event, whatever unwanted burden is imposed by the representation of nonmembers in disciplinary matters can be eliminated "through means significantly less restrictive of associational freedoms" than the imposition of agency fees. Individual nonmembers could be required to pay for that service or could be denied union representation altogether. *Janus*, at 2468-2469

There is precedent for such arrangements. Some states have laws providing that, if an employee with a religious objection to paying an agency fee "requests the [union] to use the grievance procedure or arbitration procedure on the employee's behalf, the [union] is authorized

to charge the employee for the reasonable cost of using such procedure…" This tailored alternative, if applied to other objectors, would prevent free ridership while imposing a lesser burden on First Amendment Rights. *Id*. at Footnote 6. This language in the Supreme Court case has been widely understood to indicate that this was giving permission to Unions to charge non-dues payers for the costs of representation.

In the facts of this MERC case, Mr. Renner, a non-paying bargaining unit member of the Technical Professional and Office Workers Association of Michigan ("TPOAM") was sent a bill to prepay for a grievance he wished to be filed on his behalf. Mr. Renner refused to pay. The TPOAM as a result did not file his grievance. In response, Mr. Renner filed an unfair labor practice against TPOAM alleging a breach of the duty of fair representation.

The matter came before MERC who ultimately ruled that the *Janus* decision did not create a right for public sector labor unions to charge for services related to filing a grievance and sustained the unfair labor practice against TPOAM. In reaching its determination, the Commission analyzed the duty of fair representation, which is focused around the concept that the union is the "exclusive bargaining representative" which carries with it an "obligation and duty to fairly represent all employees in the bargaining unit." MERC said that it is important to emphasize that this duty is to all employees in the bargaining unit which must extend to both payers and non-dues payers.

MERC indicated that it has consistently held the position that a union has a duty to properly represent non-paying bargaining unit members, see Government Employees Labor Council, 27 MPER 18 (2013).

MERC also looked to the [Right to Work] amendments to PERA enacted in 2012, which forbid labor unions from requiring nonmembers to pay any "dues, fees assessment or other charges or expenses of any kind" and prohibits any person from compelling someone to "financially support a labor organization" 2012 PA 349.

MERC stated that the real issue before it was whether the United States Supreme Court changed this standard in a meaningful way through the language quoted above in the *Janus* decision.

The approach taken by the Commission was that the *Janus* decision itself did not change a union's responsibilities, but rather, left open the door to state legislatures to add statutes that

would allow unions to recoup some of these fees. Moreover, in a footnote to its own decision, MERC noted that Rhode Island has recently enacted such bills authorizing public sector unions to charge fees to nonmembers who request union representation in grievance or arbitration proceedings.

Essentially, the Commission noted that until Michigan changes PERA to specifically allow for public sector unions to charge for representation service, unions have a duty to represent all bargaining unit employees regardless of whether they pay dues.

The Commission noted that the Supreme Court emphasized that the default position must be that these types of representation fees for non-dues payers cannot be

> justified on the ground that it would be otherwise unfair to require a union to bear the duty of fair representation. That duty is a necessary concomitant of the authority that a union seeks when it chooses to serve as the exclusive representative of all employees in a unit. *Janus* at 2485.

The Commission also rejected arguments made by the union that their own First Amendment rights to freedom of association were not violated by being forced to represent a non-dues payer. In making this determination, the Commission referred to recent federal case law on these issues in the time following *Janus*, such as the Ninth Circuit. The Commission found that representation was part of the responsibilities of being the exclusive bargaining representative, and being an exclusive bargaining representative did not, itself, violate the First Amendment.

The Commission also dismissed arguments that the decision to charge a nonmember was internal union business outside the scope of the Commission. In rejecting this argument, the Commission emphasized that charging nonmembers for representation services would interfere with employees' Section 9 rights to refrain from union activities.

This decision by MERC has been appealed and is currently pending before the Michigan Court of Appeals (Case No. 351991).

The Duty of Fair Representation

Schoolcraft Community College and Schoolcraft College Faculty Forum and Nicholas Marcelletti, an Individual Charging Party, Case Nos. C18 E-037, C18 I-090, CU18 F-017, and CU18 I-028 (March 13, 2020)

Charging Party, Nicholas Marcelletti, initiated four unfair labor practice charges against his former employer, Schoolcraft Community College (Employer), and his labor union, the Schoolcraft College Faculty Forum (Union), between May 8, 2018, and October 1, 2018. The Employer and the Union were parties to a CBA in effect from August 2015 through August 2018. The various charges were consolidated and assigned to the Administrative Law Judge (ALJ).

Marcelletti was employed by the Employer as a part-time probationary professor. On May 2, 2018, Marcelletti was notified by the Employer that it was discontinuing his services for poor performance. According to Marcelletti's account of events, on or about May 7, 2018, he spoke with Dean Cheryl Hawkins "regarding filing a grievance pertaining to his termination." Dean Hawkins allegedly told him the "decision was final" as to his termination. Thereafter, Marcelletti approached representatives from the Union to discuss filing a grievance over his termination. Marcelletti alleged he was told the Union did not grieve the termination of part-time probationary faculty members.

On May 8, 2018, Marcelletti filed his first charge (Case No. C18 E-037) against the Employer, alleging it had inter alia "unlawfully broke[n] the terms and conditions of [his] contract." Then on June 12, 2018, Marcelletti filed a charge (Case No. CU18 F-017) against the Union, alleging inter alia that the Union's failure to grieve his termination constituted a "breach of contract" and "taking fees under false pretenses."

On August 14, 2018, the Union grieved Marcelletti's termination. On August 20, 2018, the Employer denied the grievance on the basis that it was untimely since it was filed after the 15-day contractual grievance window had lapsed. The Employer further denied the Union's grievance on the basis that the CBA prohibited grievances over the discontinuation of the employment of a probationary part-time faculty member based on the member's poor work performance.

On September 7, 2018, Marcelletti filed another charge (Case No. C18 I-090) against the Employer alleging it had "failed in its contractual responsibility to inform [him] of his right to

file a grievance." Marcelletti based the charge on his conversation with Dean Hawkins, in which she told Marcelletti the Employer's "decision was final."

On or about September 10, 2018, Marcelletti filed another charge (Case No. CU18 I-028) against the Union. The final charge alleged the Union had admitted its prior position with respect to filing a grievance was based on a misinterpretation of the CBA.

The ALJ issued Marcelletti an order to show cause as to why Case Nos. C18 E-037 and CU18 F-017 should not be dismissed. The Employer and the Union filed separate motions to dismiss Marcelletti's remaining charges.

ALJ Calderwood reviewed Marcelletti's charges against the Employer under Sections 10(1)(a) and (c) of PERA. He noted that a public employer does not necessarily violate PERA every time it treats an employee unfairly, or even unlawfully. Accordingly, the ALJ recommended dismissal of the two charges against the Employer for failure to allege a PERA violation.

The ALJ reviewed Marcelletti's charges against the Union for breach of its duty of fair representation, and noted that to succeed on a claim that a union breached its duty of fair representation in its handling of a grievance, the charging party must establish not only that the union breached its duty but also that the employer breached the collective bargaining agreement. The ALJ found there was no articulated rationale in the record for how the Employer breached the CBA, and there was support for the position that the CBA precluded grievances challenging the termination of a probationary part-time professor based on poor performance. Accordingly, the ALJ also recommended dismissal of the two charges against the Union.

Marcelletti filed exceptions to the ALJ's Recommended Order dismissing all four charges. Marcelletti alleged that the ALJ's ruling had been biased in favor of the respondents.

The Commission noted that Marcelletti identified nothing in the record to establish any bias on the part of the ALJ. The Commission looked to the Michigan Court of Appeals ruling in *Armstrong v Ypsilanti Charter Twp, 248 Mich* App 573, 597; 640 NW2d 321 (2001), and held that to establish judicial bias, the party must establish that the trial court was actually biased against the party. Judicial rulings, in and of themselves, almost never constitute a valid basis for alleging bias. Since Marcelletti had not sufficiently established any judicial bias, the Commission found no merit to his exceptions and issued an order dismissing the charges.

An ALJ May Dismiss a Case on His or Her Own Motion

University of Michigan Health System and AFSCME Council 25, Local 1583 and Ronney M. Harrell, an Individual Charging Party, Case Nos. 19-H 1754-CE and 19-H-1762-CU (February 28, 2020)

Charging Party, Ronney M. Harrell, initiated unfair labor practice charges against his employer, the University of Michigan Health System (Employer), and his labor union, AFSCME Council 25, Local 1583 (AFSCME), on August 29, 2019. The charges were assigned to an ALJ.

Harrell had been employed by the Employer since February 2013. In his charge against the Employer (Case No. 19-H-1754-CE), Harrell initially alleged that beginning in October 2015, the Employer had committed "various unfair labor practices and contractual violations" which consisted of: discipline and intimidation for exercising the grievance process, harassment through job assignments, unfair overtime distribution, creating a hostile work environment, hazardous work assignments, and verbal abuse from management. While Harrell's charge did not provide further detail, it indicated that "[s]tatements with dates along with witness statements shall follow very shortly."

At the same time, Harrell filed a charge against AFSCME (Case No. 19-H-1762-CU), in which he alleged that he had requested AFSCME file grievances on his behalf in 2015, but allegedly AFSCME had not responded to his requests nor provided Harrell with information on the status of those disputes.

On September 30, 2019, the Employer filed a motion for a more definite statement. The Employer's motion alleged Harrell's charge did not comply with Rule 151(2), R 423.151(2) of the General Rules and Regulations of the Employment Relations Commission, which requires a charge to include a clear and complete statement of the facts which allege a violation of PERA.

On October 2, 2019, the ALJ directed Harrell to file a more definite statement as to both charges. Harrell responded on October 16, 2019, by filing separate numbered lists, but not providing much, if any, additional facts or detail. The ALJ reviewed Harrell's responses and determined that he had failed to comply with the order for a more definite statement.

Thereafter, on October 18, 2019, the ALJ issued Harrell an order to show cause why his charges should not be dismissed for failure to state a claim. Harrell responded on November 13,

2019, with four numbered paragraphs stating alleged additional facts against the Employer and AFSCME.

After reviewing Harrell's response to the order to show cause, the ALJ first recognized the power of an ALJ to order the dismissal of a charge upon the ALJ's own motion, including on grounds that the charge fails to state a claim upon which relief can be granted. The ALJ then recognized that Sections 10(1)(a) and (c) of PERA prohibit a public employer from interfering with an employee's Section 9 rights, but PERA does not prohibit all types of discrimination or unfair treatment by a public employer, nor does it provide a remedy for a breach of contract claim asserted by an individual employee.

The Commission's jurisdiction as to an individual is limited to determining whether his rights have been violated under PERA. The ALJ determined Harrell's charge against the Employer lacked the factual specificity required by the Commission's General Rules and Regulations. Accordingly, the ALJ determined that Harrell's charge against AFSCME did not specifically identify any conduct which violated PERA.

Accordingly, the ALJ issued a Recommended Order dismissing both charges. No exceptions were filed.

Prerogative of Management to Apply Technological Advances in the Public Sector Workplace and Such Application is Not a Mandatory Subject of Collective Bargaining.
City of Bay City & Utility Workers Union of America, AFL-CIO, Local 542, Case No. C18 G-067 (May 14, 2020)

The Utility Workers Union of America, AFL-CIO, Local 542 ("Union") filed an unfair labor practice charge against the City of Bay City ("Employer"), alleging that the Employer violated its duty to bargain. The Union asserted that the Employer had a duty to bargain with the Union prior to unilaterally eliminating the delivery of paper pay statements on payday to members of the Union's bargaining unit.

The Union represents a bargaining unit of clerical employees, customer service clerks, park maintenance employees, refuse collection workers, wastewater treatment plant employees, water distribution employees, sewer maintenance employees, street maintenance employees, and mechanics who repair and maintain trucks and heavy equipment. The matter was assigned to an

ALJ, who issued her Decision and Recommended Order, finding that the Employer violated PERA. The Employer filed exceptions with the Commission.

The parties were subject to a collective bargaining agreement which required that employees utilize direct deposit of their paychecks. As a matter of practice, the Employer distributed paper confirmation of the direct deposit of paychecks through its interoffice mail system. Following the expiration of the CBA and while the parties were in negotiations for a new one, the Employer implemented an electronic portal system that allowed employees to view information related to their employment, such as accrued leave balances, current benefit selections, and position and pay rate information. The electronic system could also be used to view and print copies of pay statements.

At first, the Employer continued to deliver paper pay statements to employees at their workplaces in addition to making the information available through the portal. Eventually, the Employer made the decision to stop distributing paper pay statements altogether and made the information exclusively available through the electronic portal.

When the Union's president learned of that decision, the Union made a demand to bargain, which the Employer refused on the basis that the distribution of paper pay statements was not a mandatory subject of bargaining. The Employer asserted that the change in its method of delivering pay statements was a permissive subject of bargaining. In its exceptions, the Employer argued that the ALJ had erred when she concluded that the elimination of paper pay statements had an impact on unit employees sufficient to give rise to a duty to bargain.

The Commission agreed with the employer. The Commission found that, here, the evidence supported that all clerical and code enforcement bargaining unit employees had computers and printers at their worksites. Employees in the waste water treatment plant had a computer terminal and printer in their facility that allowed them access to and the ability to print their pay statements. Employees at the Department of Public Works (DPW), if they did not have home computers, tablets, or smart phones, could view their pay statements on a computer terminal in their employee breakroom in the DPW, a supervisor's computer at the DPW, or at two locations at City Hall. Further, City Hall is less than a half mile away from the DPW building and is open for at least two hours after DPW employees' normal quitting time.

Additionally, witness testimony established that only one bargaining unit employee visited the Human Resources office regularly to print out an electronic pay statement. Requests for assistance regarding the electronic portal system were, by and large, pertaining to the resetting of passwords; there were no requests for additional training on the system or how to access the electronic pay statements.

MERC concluded that the transition to electronic paystubs did not have a "significant impact" on the bargaining unit because none of the employees seemed to have a problem utilizing it. Further, MERC examined longstanding Commission precedent which has held that it is a prerogative of management to apply technological advances in the public sector workplace and that such application is not a mandatory subject of collective bargaining. The Commission believed that the ALJ ignored that precedent. Based on precedent, MERC found that implementing a new system of distributing paystubs, and doing so electronically, did not constitute a substantial alteration to the duties or working conditions of the bargaining unit that would have given rise to the duty of advance notice to the Union and an opportunity to bargain prior to implementation of the new system.

In addition, MERC noted that after the ALJ's decision, the parties continued negotiations for a new CBA. MERC noted that, where a CBA covers the matters in dispute, the duty to bargain has been satisfied. MERC found that the new CBA contained language that all employees must utilize direct deposit, and although it failed to specify whether that meant there would be no more paper pay statements, the ability to provide paperless pay statements was allowed under the section regarding management rights. The Commission has held that to be covered by the CBA, a topic need not be specifically mentioned. Therefore, MERC believed that the provisions of the new CBA covered the subject matter in dispute, and as such the Employer had no duty to bargain further. The Commission did not adopt the decision and proposed order of the ALJ, and instead ordered that the Union's unfair labor practice charge be dismissed in its entirety.

Second Case with Same Parties Regarding Duty to Bargain
City of Bay City and Utility Workers Union of America, AFL-CIO, Local 542, Case No. C18 I-091 (May 14, 2020)

The Utility Workers Union of America, AFL-CIO, Local 542 ("Union") filed a second unfair labor practice charge against the City of Bay City ("Employer"), alleging that the

Employer violated its duty to bargain. The Union asserted that the Employer had a duty to bargain prior to installing cameras in its sanitation trucks that focus on the driver, and a duty to bargain regarding the effect the cameras would have on the bargaining unit members. The Union represents a bargaining unit of employees of the Employer's city, including clerical employees and customer service clerks, park maintenance employees, refuse collection workers, wastewater treatment plant employees, water distribution employees, sewer maintenance employees, street maintenance employees, and mechanics who repair and maintain trucks and heavy equipment.

The matter was assigned to an ALJ, who issued her Decision and Recommended Order, finding that the Employer violated PERA by refusing the Union's demand to bargain and by installing the cameras without first allowing for the opportunity to bargain. The Employer filed exceptions with the Commission.

The unfair labor practice charge arose based on the Employer's decision to install cameras in its sanitation trucks that were focused on the driver. The Employer asserted that it regularly receives complaints from citizens about property damage allegedly caused by the sanitation trucks and about missed pickups. To help address those types of complaints, the Employer purchased a new camera system for all 11 of the Department of Public Works' sanitation trucks around June 2018. In addition to the rear-facing, hopper, and curbside cameras, the trucks now had cameras installed at cab level on both sides of the truck to capture passing traffic and surrounding objects. There were also two cameras mounted inside the truck. One captured the driver's view through the windshield. The second, the only camera at issue in this case, was mounted to focus on the driver as he or she sits in the driver's seat. When the truck's ignition engages, so does the camera system, and all the cameras automatically turn on. The new system includes a screen permanently mounted in the cab. On the screen, drivers can shift their view from one camera to another or view more than one camera feed at the same time. They can also take still pictures from any of the cameras and use the screen to log on each day and to complete an inspection sheet before they leave the vehicle. Unlike the previous factory installed cameras, all the cameras on the trucks now record video. The camera feeds can also be viewed in real time in the DPW's fleet maintenance office.

In a bargaining session for a new collective bargaining agreement, the Union made the Employer aware of the position that it should have been notified about the new camera system prior to installation and that it constituted surveillance of employees. The Union demanded to

bargain about the cameras and their effect on employees. The Employer stated that the installation of the cameras was a management right and therefore not a mandatory subject of bargaining, and had no impact on employees because the CBA allowed discipline only for just cause. The Employer refused to bargain over the cameras, and the Union filed this unfair labor practice charge.

The Commission has recognized that certain types of employer decisions fall within the scope of its inherent managerial prerogative and are permissive subjects of bargaining. However, the Commission held that even where there is no bargaining obligation with respect to a particular decision, an employer may have a duty to give the union an opportunity for meaningful bargaining over the effects of that decision. Here, MERC decided that where a CBA covers a mandatory or permissive subject of bargaining, the parties have fulfilled their statutory duty to bargain and further bargaining regarding the decision or its effects is not required. As in the previous case, MERC stated that a particular subject need not be explicitly mentioned in an agreement in order for the subject to be "covered by" the agreement.

As stated in the previous (pay stub) case, the parties continued to negotiate a new CBA following the ALJ's decision. Here, as with the previous charge, MERC determined that the subject at issue, the decision to place cameras in the sanitation trucks, was covered by provisions of the new agreement addressing management rights and continuation of working conditions. Further, the agreement contained a provision for waiver, stating that the parties agreed that they are not obligated to further bargain collectively with respect to any subject or matter covered in the agreement. In light of these provisions, MERC found that the Employer cannot be required to bargain further regarding the matter. MERC further noted that the cameras were installed in the sanitation trucks as a safety measure and that the CBA requires bargaining unit employees to use prescribed safety equipment. Given that the parties entered into a subsequent agreement that did not alter the Employer's ability to install or utilize cameras inside sanitation trucks, MERC found that the parties included language in their CBA that set forth their resolution of the particular subject involved in the present dispute. Due to the foregoing reasons, MERC decided to overturn the proposed decision of the ALJ, and dismissed the Union's unfair labor practice charge.

Michigan Labor & Employment Arbitration – Case Law Update

Sexual Harassment Not Arbitrable

Lichon v. Morse, 327 Mich App 375, 339972 (March 14,2019) (currently on appeal to the Michigan Supreme Court

The allegation was that the employer sexually assaulted an employee. The employee sued for sexual harassment. The employment handbook had a provision that all claims against the employer must go to arbitration

In split decision, the Court of Appeals held that a sexual harassment claim was not covered by an arbitration provision in an employee handbook. Because arbitration provision limits scope of arbitration to only claims that are "related to" plaintiffs' employment, and because sexual assault by an employer or supervisor cannot be related to their employment, the arbitration provision is inapplicable to their claims against the employer, Morse, and the Morse firm.

The majority decision said "[C]entral to our conclusion in this matter is the strong public policy that no individual should be forced to arbitrate his or her claims of sexual assault."

The dissent said parties agreed to arbitrate "any claim against another employee" for "discriminatory conduct" and plaintiffs' claims arguably fall within scope of arbitration agreement.

The Supreme Court granted leave to appeal, stating, "The parties shall include among the issues to be briefed whether the claims set forth in the plaintiffs' complaints are subject to arbitration."

Order to Arbitrate Labor Case

Registered Nurses Union v. Hurley Medical Center, 328 Mich App 528, 343473 (2019).

The grievants were terminated for striking in violation of the CBA. Although the employer may present to the arbitrator undisputed evidence that plaintiffs were engaged in a strike, question of fact is for the arbitrator to decide.

The Court of Appeals said that any doubt regarding whether a question is arbitrable must be resolved in favor of arbitration. Therefore, the Circuit Court did not err in ruling that that CBA required arbitration. Denial of motion to vacate was affirmed.

Michigan Court of Appeals – Unpublished Decisions

COA Affirms Order to Arbitrate Labor Case

Senior Accountants, Analysts and Appraisers Association v. City of Detroit Water and Sewerage Department, 343498 (April 18, 2019).

The Court of Appeals held that issue of whether a union complied with procedural requirements to arbitration in CBA arbitration clause is a procedural question for arbitrator.

COA Affirms Confirmation of Employment Arbitration Award

Wolf Creek Productions, Inc v Gruber, 342146 (January 24, 2019).

The Court of Appeals affirmed confirmation of an employment arbitration award. The Court stated nothing on face of the award demonstrated that the arbitrators were precluded from deciding on the issue of whether just cause existed to terminate the defendant's employment. Courts are precluded from engaging in contract interpretation, which is a question for the arbitrator.

COA Affirms Confirmation of Award

Hunter v. DTE Services, LLC, 339138 (January 3, 2019).

In an employment discrimination case, the Court of Appeals affirmed confirmation of award. The arbitrator did not exceed authority by failing to provide citations to case law.

Judicial Review of Arbitration Awards is Limited

Konal v. Forlini, 235 Mich App 69, 74; 596 NW2d 630 (1999).

"A court may not review an arbitrator's factual findings or decision on the merits[,]" may not second guess the arbitrator's interpretation of the parties' contract, and may not "substitute its judgment for that of the arbitrator."

City of Ann Arbor v. [AFSCME], 284 Mich App 126, 144; 771 NW2d 843 (2009).

Instead, "[t]he inquiry for the reviewing court is merely whether the award was beyond the contractual authority of the arbitrator." *Id.* "[A]s long as the arbitrator is even arguably

construing or applying the contract and acting within the scope of his authority, a court may not overturn the decision even if convinced that the arbitrator committed serious error."

Demand for labor arbitration concerning prohibited subject of bargaining.
Ionia Co Intermediate Ed Assn v. Ionia Co Intermediate School Dist, 334573 (February 22, 2018).

The Court of Appeals affirmed the Michigan Employment Relations Commission (MERC) order granting summary disposition, where the Association engaged in ULP by demanding to arbitrate a grievance concerning prohibited subject of bargaining under the Public Employment Relations Act, MCL 423.201 *et seq*. MERC ordered the Association to withdraw its demand for arbitration and to cease and desist from demanding to arbitrate grievances concerning prohibited subjects of bargaining. See Mich Ed Ass'n v. Vassar Public Schs, 337899.

COVID-19 Observations

Over the past nine months, COVID-19 has had a substantial impact on Michigan Public Employee labor relations.

In early March, MERC in-person meeting,s including requests for mediation and arbitration, came almost to a standstill. It is evident that management and unions addressed more immediate issues such as facility closures, telecommunication and work at home arrangements, and essential employee attendance as presenting unique health and safety issues.

As contracts were scheduled to expire and grievance time limits were approaching, videoconferencing became the practical approach. This practical approach, however, came with many practical problems.

There is no need here to discuss the unavailability of equipment, WIFI availability, and other items necessary for rudimentary remote communication. Then, there is the fact that there is no standardized software or mode of communication. Zoom, Google Groups, Microsoft Teams, and other lesser known (or available) platforms, as well as proprietary software, were used. Arbitrators not only had to possess their arbitration skills, but also now had to become technicians to either facilitate online hearings or "police" them, if they were being controlled by

others. Many had to attend teleconferencing meetings to learn how to conduct a teleconferencing meeting. Parties had to learn to use tablets and electronic displays for exhibits; trial skills now involve media proficiency.

Other (Random) Covidial Thoughts:

Videoconferencing eliminates in-person contact, which decreases participation from some while increasing participation from others.

Remote working arrangements, along with decreased opportunities for out-of-workplace activities (closing of restaurants and other informal gathering places) have changed the environment not only for teamwork, but also for concerted activity.

Some formal, work-related officials have vied for a (hybrid) combination of videoconferencing and in-person meetings to get matters of labor relations accomplished. In-person meeting requires participants to be socially distanced in a large conference or board rooms on individual videoconferencing devices, while some parties, including perhaps the arbitrator, participate remotely. Collaboration seems to be suffering either way.

Simple things like muting and un-muting microphones have been the simple things to address, while caucusing (in separate virtual rooms) and the benefits of personal interaction are greatly impacted. Employers are faced with providing equipment and supplies for employees working remotely.

Long distance travel along with some of the difficulties of short distance travel, such as traffic and parking, are avoided, as is the associated cost and inconvenience.

The ability of parties to record videoconferencing meetings presents new rewards and challenges to the arbitration process. Videoing negotiations and grievance hearings/meetings using videoconferencing software (Zoom, Groups, Teams, etc.) may well lead to difficulties, after parties to the conferences record the conference.

Retirement savings are down, especially by younger workers who needed the funds to pay expenses while on lockdown or layoff.

Non-competition, non-disclosure, and secrecy agreements are ignored.

Witness testimony is impacted by the ability of parties, who are participating at a distance in an uncontrolled atmosphere, can have unseen people off-camera in the room with them or even another off-camera computer screen to supply a little assistance in presenting testimony and answering questions. How about interruptions from the kids, who are less than adapted to life as online learners?

We must all learn about and begin to practice a new work-life balance. But wait—everyone seems to have different responsibilities and values in terms of their professional and personal lives. "Balance" for one person may well be a "nightmare" to another. Maybe we need to think of it as juggling rather than balancing.

No longer sequestered in the workplace where attentions can be observed and directed, people naturally begin multitasking between employment and family (or other) pursuits, especially when there are children at home, remote learning. People can juggle only so many things, and tend to focus their attention on tasks that they believe are the most urgent, which may not fully be in the service of the employer.

Problems that are anticipated as employment transitions from the current conditions caused by the pandemic to post-pandemic life:

- "Forcing" employees back to work—even when they indicate that they have been exposed or are having symptoms.
- Re-outfitting the workplace after temporary shutdowns.
- Policing absences due to COVID-19 exposure.
- Use of masks and enforcing proper use.
- Increased AI-driven production of goods and services.
- Bargaining remotely, virtual mediation, and very few in-person meetings.
- What to do with back pay liability, which has increased because of COVID-19-induced postponements and delays.

MINNESOTA

State and Local Public Sector Report

Sherwood Malamud

The Monday of Memorial Day weekend, May 25, 2020, the killing of George Floyd profoundly impacted the City of Minneapolis and the State of Minnesota, as well as the rest of the world. The City and State erupted. This summary is limited to changes in State statutes concerning arbitration. This report makes limited reference to the activity of the Minneapolis City Council and its effort to "defund the police" or, more accurately stated, to reassign some police duties to other City employees such as mental health specialists and social workers.

This event impacted collective bargaining over a successor agreement for the City of Minneapolis police officers and the City's law enforcement budget for 2021. The chief of police withdrew from bargaining. As of this writing (December 2, 2020), negotiations have not proceeded to interest arbitration.

In May 2020, the legislature was called back into session because the governor extended his emergency powers to attempt to regulate state response to the COVID-19 pandemic. Each time the governor extends his emergency powers, the Legislature is called back. During the June call-back, the divided Legislature could not agree on how to respond legislatively to the police killing of Mr. Floyd.

During the July call-back, the divided Legislature could not agree on a bonding bill that would have provided funding for large and small infrastructure projects throughout the state and blunt the growing unemployment due to the pandemic. However, the divided Legislature passed by substantial margins, "The Minnesota Police Accountability Act." This legislation was wide-ranging. In addition to modification of the arbitration of police disciplinary actions, the legislation provided for:

> Critical incident stress management teams and public safety peer counseling; Investigatory reform of police incidents with the public such as, police shootings; Police residency reform to encourage police residency in the communities policed; Banning chokeholds and certain neck restraints; Use of force standards; The creation of a centralized database that stores public data related to officer misconduct; Use of force reporting procedures; Prohibition of warrior-style

> training; Mental health and crisis intervention training; Mandatory autism training; Mandating officer duty to intervene and report; Peace Officer training assistance funding and other changes to State statutes.

The changes to the arbitration of grievances over the discipline of police officer misconduct as legislated in July 2020, namely, "The Minnesota Police Accountability Act" are attached in Appendix A.

The substantially altered statutory scheme towards the regulation of law enforcement did not change "Immunity from Liability" under statute 169A.48, which provides in material part:

> The state or political subdivision by which a peace officer making an arrest for violation of sections 169A.20 to 169A.33 (impaired driving offenses), is employed has immunity from any liability, civil or criminal for the care or custody of the motor vehicle being driven by, operated by, or in the physical control of the person arrested if the peace officer acts in good faith and exercises due care.

The arbitration of the discipline of peace officers under the Police Accountability Act is meant to be the exclusive procedure employed in the determination of disciplinary disputes arising from the discipline of peace officer misconduct. The statutory procedure may not be altered by the employer and union representing the peace officers. Nonetheless, the legislature left intact the arbitration procedure found at Sec. 197.46, known as the Veterans Preference Act. This provision covers all veterans in an appointed position or employed in any position in public service.

Many peace officers enter law enforcement after military service. They are covered by this act. A veteran may choose the procedures afforded under this Act, if the veteran is to be removed or discharged from his/her position. The governmental subdivision bears the cost of the procedure which may include arbitration. If the discharge is not sustained, but set aside or reduced to a suspension, then the governmental subdivision is subject to pay the veteran's reasonable attorney fees. The preferred hearing forum under the statute is arbitration. The statute specifies that the arbitrator shall be selected from seven names provided from the panel of arbitrators maintained by the Minnesota Bureau of Mediation Services (BMS). Under case law, peace officer conduct and the disciplinary response is evaluated under the just cause standard.

The decision of the arbitrator is appealable to district court under the Veterans Preference Act.

As of this writing (December 2, 2020), the Commissioner of the BMS has appointed two individuals to fill two of the six arbitrator positions created under the Police Accountability Act (Appendix A). One arbitrator is the former County attorney for Ramsey County (St. Paul); the other is a retired Hennepin County (Minneapolis) judge. The Commissioner established $2,000 as the per diem rate. The BMS received six cases. Each of the two arbitrators has been assigned one discharge case. The other four cases are awaiting assignment. One of the six is a suspension which the parties have agreed to mediation before proceeding to arbitration.

An arbitrator from the BMS's regular panel of arbitrators, if selected to serve on the police panel, would not be permitted to resolve grievances of employees other than peace officers under the procedures of BMS, FMCS, the NMB during the term of appointment under the statute, Appendix A. So far, no arbitrator from the BMS's regular panel of arbitrators was appointed to the police panel created under the Police Accountability Act.

Other than the statutory changes impacting peace officers, the statutory structure that governs employment in Minnesota for all other public employees on January 1, 2020, remained unchanged. The right of public employees to organize and bargain collectively, the right to strike or to subject the dispute over wages, hours, and conditions of employment to final and binding interest arbitration for employees, other than police and fire, remained intact. The wages, hours, and conditions of employment of police and fire remained subject to collective bargaining ending in interest arbitration.

In March 2020, the St. Paul teachers did not accept the opportunity to settle their wage and contract dispute with the St. Paul School District through interest arbitration. Instead, the matter settled after a three-day strike.

APPENDIX A

626.892 PEACE OFFICER GRIEVANCE ARBITRATION SELECTION PROCEDURE.

Subdivision 1. Definitions. (a) For the purposes of this section, the terms defined in this section have the meanings given them.

(b) "Commissioner" means the commissioner of the Bureau of Mediation Services.

(c) "Employer" means a political subdivision or law enforcement agency employing a peace officer.

(d) "Grievance" means a dispute or disagreement regarding any written disciplinary action, discharge, or termination decision of a peace officer arising under a collective bargaining agreement covering peace officers.

(e) "Grievance arbitration" means binding arbitration of a grievance under the grievance procedure in a collective bargaining agreement covering peace officers, as required by this section or sections 179A.04, 179A.20, and 179A.21, subdivision 3, to the extent those sections are consistent with this section.

(f) "Grievance procedure" has the meaning given in section 179A.20, subdivision 4, except as otherwise provided in this section or to the extent inconsistent with this section.

(g) "Peace officer" means a licensed peace officer or part-time peace officer subject to licensure under sections 626.84 to 626.863.

Subd. 2. Applicability. (a) Notwithstanding any contrary provision of law, home rule charter, ordinance, or resolution, the arbitrator selection procedure established under this section shall apply to all peace officer grievance arbitrations for written disciplinary action, discharge, or termination heard on or after September 1, 2020.

(b) The grievance procedure for all collective bargaining agreements covering peace officers negotiated on or after July 22, 2020, must include the arbitrator selection procedure established in this section.

(c) This section does not authorize arbitrators appointed under this section to hear arbitrations of public employees who are not peace officers.

Subd. 3. Fees. All fees charged by arbitrators under this section shall be in accordance with a schedule of fees established by the commissioner on an annual basis.

Subd. 4. Roster of arbitrators. The commissioner, in consultation with community and law enforcement stakeholders, shall appoint a roster of six persons suited and qualified by training and experience to act as arbitrators for peace officer grievance arbitrations under this section. In making these appointments, and as applicable, the commissioner may consider the factors set forth in Minnesota Rules, parts 5530.0600 and 5530.0700, subpart 6, as well as a candidate's familiarity with labor law, the grievance process, and the law enforcement profession; or experience and training in cultural competency, racism, implicit bias, and recognizing and valuing community diversity and cultural differences. The appointments are effective

immediately upon filing with the secretary of state. Arbitrators on the roster created by this subdivision shall not serve as an arbitrator in a labor arbitration other than a grievance arbitration as defined in this section.

Subd. 5. Applications. The secretary of state shall solicit and accept applications in the same manner as for open appointments under section 15.0597.

Subd. 6. Terms. (a) Initial appointments to the roster of arbitrators shall be made as follows:

(1) two appointments to expire on the first Monday in January 2023;

(2) two appointments to expire on the first Monday in January 2024; and

(3) two appointments to expire on the first Monday in January 2025.

(b) Subsequent appointments to the roster of arbitrators shall be for three-year terms to expire on the first Monday in January, with the terms of no more than two arbitrators to expire in the same year.

(c) An arbitrator may be reappointed to the roster upon expiration of the arbitrator's term. If the arbitrator is not reappointed, the arbitrator may continue to serve until a successor is appointed, but in no case later than July 1 of the year in which the arbitrator's term expires.

Subd. 7. Applicability of Minnesota Rules, chapter 5530. To the extent consistent with this section, the following provisions of Minnesota Rules apply to arbitrators on the roster of arbitrators established under this section:

(1) Minnesota Rules, part 5530.0500 (status of arbitrators);

(2) Minnesota Rules, part 5530.0800 (arbitrator conduct and standards); and

(3) Minnesota Rules, part 5530.1000 (arbitration proceedings).

Subd. 8. Performance measures. To the extent applicable, the commissioner shall track the performance measures set forth in Minnesota Rules, part 5530.1200.

Subd. 9. Removal; vacancies. An arbitrator appointed to the roster of arbitrators may be removed from the roster only by the commissioner in accordance with the procedures set forth in Minnesota Rules, part 5530.1300. A vacancy on the roster caused by a removal, a resignation, or another reason shall be filled by the commissioner as necessary to fill the remainder of the arbitrator's term. A vacancy on the roster occurring with less than six months remaining in the arbitrator's term shall be filled for the existing term and the following three-year term.

Subd. 10. Training. (a) A person appointed to the arbitrator roster under this section must complete training as required by the commissioner during the person's appointment. At a minimum, an initial training must include:

(1) at least six hours on the topics of cultural competency, racism, implicit bias, and recognizing and valuing community diversity and cultural differences; and

(2) at least six hours on topics related to the daily experience of peace officers, which may include ride-alongs with on-duty officers or other activities that provide exposure to the environments, choices, and judgments required of officers in the field.

The commissioner may adopt rules establishing training requirements consistent with this subdivision.

(b) An arbitrator appointed to the roster of arbitrators in 2020 must complete the required initial training by July 1, 2021. An arbitrator appointed to the roster of arbitrators after 2020 must

complete the required initial training within six months of the arbitrator's appointment.

(c) All costs associated with the required training must be borne by the arbitrator.

Subd. 11. Selection of arbitrators. The commissioner shall assign or appoint an arbitrator or panel of arbitrators from the roster to a peace officer grievance arbitration under this section on rotation through the roster alphabetically ordered by last name. The parties shall not participate in, negotiate for, or agree to the selection of an arbitrator or arbitration panel under this section. The arbitrator or panel shall decide the grievance, and the decision is binding subject to the provisions of chapter 572B.

Subd. 12. Interaction with other laws. (a) Sections 179A.21, subdivision 2, and 572B.11, paragraph(a), and rules for arbitrator selection promulgated pursuant to section 179A.04 shall not apply to discipline-related grievance arbitrations involving peace officers governed under this section.

(b) Notwithstanding any contrary provision of law, home rule charter, ordinance, or resolution, peace officers, through their certified exclusive representatives, shall not have the right to negotiate for or agree to a collective bargaining agreement or a grievance arbitration selection procedure with their employers that is inconsistent with this section.

(c) The arbitrator selection procedure for peace officer grievance arbitrations established under this section supersedes any inconsistent provisions in chapter 179A or 572B or in Minnesota Rules, chapters 5500 to 5530 and 7315 to 7325. Other arbitration requirements in those chapters remain in full force and effect for peace officer grievance arbitrations, except as provided in this section or to the extent inconsistent with this section.

History: 2Sp2020 c 1 s 24

MONTANA

Board of Personnel Appeals

Patrick Halter

The Montana Board of Personnel Appeals (BOPA) is assigned, administratively, under the Employment Relations Division within the Department of Labor and Industry. BOPA is comprised of five members (two labor, two management, designated chair); each member is appointed to a four year term by the Governor and receives $50 for hearing preparation and $50 for the hearing. BOPA convenes as necessary and, due to COVID-19, meetings since 2019 have been virtual.

The Dispute Resolution Staff (three mediators) under the Employment Relations Division serve as BOPA agents and provide case-related support. Staff conduct unfair labor practice (ULP) investigations, process representation petitions and conduct elections, provide training in interest-based bargaining and facilitation as well as grievance mediation. Other than processing a request for a list of factfinders or arbitrators submitted by firefighters, law enforcement, nurses and public employees under Title 39 of the Montana Statutes, staff do not perform those services. Since 2019, staff have provided virtual support and limited on-site assistance.

BOPA's website provides an index to cases and decisions. Cases for the most recent fiscal years show a decrease in FY 2019—COVID-19 related—and a gradual increase, more in line with historical practices, in FY 2020.

	FY 2020	FY 2019
	7/1/19-6/30/20	7/1/18-6/30/19
Request for Arbitration	20	9
Request for Factfinding	5	0
Unit Determination (new unit)	6	4
Decertification	11	6
ULPs Processed	22	15
IBB Negotiation Facilitation	26	7
LMR Committee Facilitation	22	20

According to public sector unions and Dispute Resolution Staff, there have been no judicial cases of remarkable worth in recent years nor are there any in the legal pipeline.

As a result of the November 2020 election, the incumbent governor (Dem.) was term limited and will be succeeded in January 2021 by Mr. Greg Gianforte (Rep.), supported by a Republican majority in both chambers of the legislature. Governor-elect Gianforte did not offer any proposals to change public sector collective bargaining during his campaign other than a general reference to making it more difficult for unions to collect dues. According to the executive director of the 25,000 member Montana Federation of Public Employees (MFPE), the union expects "the worst-case scenario" from the incoming administration. In 2018, MFPE formed when MEA-MFT and the Montana Public Employees Association merged.

Aside from the public sector environment in Montana, the most noteworthy event occurred in July 2019, when nurses at Kalispell Regional Medical Center (and affiliated centers) voted 372-199 to organize with the Service Employees International Union (SEIU) Healthcare 1199 NW. The National Labor Relations Board conducted the election; no objections were filed. As of late 2020, negotiations for an initial contract continue. Signs in support of the nurses are appearing throughout the Kalispell regional area.

NEW JERSEY

Developments in the New Jersey Public Sector in 2020

Joyce M. Klein and James W. Mastriani

Principle developments in New Jersey in 2020 concern litigation arising out of *Janus v. AFSCME, Council 31, et. al.* 138 S. Ct. 2448 (2018) as well as implementation of the Workplace Democracy Enhancement Act, which was enacted shortly before the ruling in *Janus*.

In May of 2018, New Jersey enacted the Workplace Democracy Enhancement Act (WDEA) which was enacted in anticipation of the *Janus* decision. The WDEA addressed access of the majority representative to the bargaining unit members, and detailed a negotiations obligation for bargaining over access to bargaining unit members that culminates in binding arbitration and further defines bargaining unit work. The WDEA addressed dues deductions as follows:

> Whenever any person holding employment, whose compensation is paid by this State or by any county, municipality, board of education or authority in this State, or by any board, body, agency or commission thereof shall indicate in writing to the proper disbursing officer his desire to have any deductions made from his compensation, for the purpose of paying the employee's dues to a bona fide employee organization, designated by the employee in such request, and of which said employee is a member, such disbursing officer shall make such deduction from the compensation of such person and such disbursing officer shall transmit the sum so deducted to the employee organization designated by the employee in such request.
>
> Any such written authorization may be withdrawn by such person holding employment at any time by the filing of notice of such withdrawal with the above-mentioned disbursing officer. The filing of notice of withdrawal shall be effective to halt deductions as of the January 1 or July 1 next succeeding the date on which notice of withdrawal is filed.

On June 27, 2018, in *Janus v. AFSCME, Council 31, et. al.* 138 S. Ct. 2448, 2486 (2018), the U.S. Supreme Court held that, "[s]tates and public-sector unions may no longer extract agency fees from nonconsenting employees."

On November 27, 2019, the U.S. District Court dismissed two lawsuits challenging the validity of union authorization forms signed before the *Janus* decision as invalid because they were not "freely given" and because employees were not given the choice to refrain from paying dues. In *Smith, et. a. v. NJEA, et.al*., 425 F. Supp. 3d 366 (D. N.J. 2019) and *Thulen v. AFSCME,* 2019 U.S. Dist. LEXIS 221502, plaintiffs argued their choice between paying full union dues and an 85 percent fair share was illusory. The District Court found that *Janus* did not invalidate prior dues authorizations, reasoning that they had agreed to be bound by their authorizations and by the statutory opt-out procedure. The Court also ruled that *Janus* did not invalidate the dues authorizations of those plaintiffs who had been union members before *Janus* or those who had agency shop fees deducted from their salaries. The Court found that plaintiffs' resignations from union membership were processed under the terms of their collective negotiations agreements or terms that were more advantageous and were not entitled to reimbursement of union dues in the months before their resignations were effective. The unions permitted plaintiffs and other similarly affected employees to opt out without strict adherence to the deadlines in the WDEA, so the Court found no basis to find that plaintiffs' rights to no longer be union members were violated. Nor were non-members entitled to a refund of agency fees collected prior to the *Janus* decision because the unions relied in good faith upon the authorization of agency shop in the public sector in *Abood v. Detroit Bd. Of Ed.*, 431 U.S. 209 (1977). These cases are on appeal to the Third Circuit Court of Appeals.

Three recent opinions of the New Jersey Supreme Court are worthy of note:

1. *Paul Barila v. Board of Education of Cliffside Park, Bergen County*, 2020 N.J. LEXIS 500 (Dkt. No. A-39-18 April 20, 2020)

   For many years, the collective negotiations agreement provided that teachers retiring after ten years of service or separating from employment with at least 25 years of service would receive payment for accumulated unused sick leave to a maximum of $25,000. In the 2015-2018 collective negotiations agreement, the Board of Education and the Association agreed to lower the maximum payment to $15,000. Teachers who had

accumulated unused sick leave with a value in excess of $15,000 on July 1, 2015 claimed that the Board and Association could not enter into an agreement that retroactively diminished the value of accumulated, but unused, sick leave that employees would be eligible to receive on retirement or separation. The NJ Supreme Court found that a teacher's right to be compensated for unused sick leave at retirement derives from a collective negotiations agreement and that teacher's right to sick leave compensation does not vest until the teacher retires or separates from employment with unused accumulated sick leave. The Court noted that the Association agreed to the lower maximum payment as a concession during "bargaining." The Court also found that PERC did not have jurisdiction because its rules provide that only an employer or union, not individual employees, can seek a scope of negotiations determination.

2. *In the Matter of Ridgefield Park Board of Education and Ridgefield Park Education Association*, 2020 N.J. LEXIS 902 (Sup. Ct. Dkt No. A-2-19)

The Supreme Court of New Jersey upheld a PERC decision (P.E.R.C. No.2018-14) granting the Ridgefield Park Board of Education's request for a restraint of binding arbitration because it was preempted by a provision of a statute providing for health insurance contributions by public employees. N.J.S.A. 18A:16-17.2 (a provision of P.L. 2011, c. 78 (Chapter 78). The Court agreed with PERC's holding that Chapter 78 preempted negotiation over the health insurance premium contribution rate in the parties' 2014-2018 collective negotiations agreement. Specifically, full implementation of the four-tiered employee contributions required by Chapter 78 had been reached in the first year of a four-year contract. The Court found that Chapter 78 made the fourth tier of contributions the *status quo* for negotiating successor agreements and prohibited negotiation over contribution levels until the next collective negotiations agreement after full implementation is achieved.

3. *Fraternal Order of Police, Newark, Lodge 12 v. City of Newark*, __ N.J. __ (Sup. Ct. Dkt. No. A-15-19) (August 19, 2020.

The City of Newark created a Civilian Complaint Review Board (CCRB) housed in the Mayor's office. The CCRB was given both investigative and policy making authority including the authority to recommend to the Public Safety Director the discipline of individual officers. The FOP alleged this ordinance exceeded the City's authority.

The NJ Supreme Court found that the City of Newark had the power to create a civilian review board to investigate allegations of police misconduct consistent with the Attorney General's Guidelines. It held that the CCRB has the authority to investigate civilian complaints alleging police misconduct and those investigations may lead to the recommendations that the Public Safety Director pursue discipline against a police officer. The CCRB's authority is limited in that it may not investigate complaints alleging civilian misconduct where the Police Department's Internal Affairs unit is conducting a concurrent investigation, because those investigations are strictly regulated by State law and Attorney General's Guidelines, and the CCRB's investigation could interfere with the Police Chief's statutory authority over internal affairs investigations. The Supreme Court also rejected conferral of subpoena power on the CCRB.

NEW MEXICO

State and Local Public Sector

Don E. Williams

The New Mexico State and Local Public Sector has several statutes to administer labor justice. The Public Employee Bargaining Act (PEBA) is the primary law governing relations between unions and public employers, including regular non-probationary employees. It also includes state or political subdivision employers but not those of a government of Indian nation, tribe or pueblo, except state educational institutions as provided in Article 12, Section 11 of the constitution of New Mexico, by guaranteeing the right of employees to organize and to bargain collectively. The Public Employee Labor Relations Board (PELRB), similarly to the National Labor Relations Board, has jurisdiction over all general collective bargaining matters between employee organizations or individual public employees in either state agencies or units of local government that have not established a local labor board pursuant to PEBA. PEBA is to guarantee public employees the right to organize and bargain collectively and to protect the public interest.

A press release stated that the labor board system had led to inconsistent rulings and, in some cases, lengthy delays on petitions to unionize workplaces. To remedy the system, Governor Lujan Grisham signed House Bill 364 on March 5, 2020. It updates the New Mexico Public Employee Bargaining Act, providing restructuring and standardization of the state's unusual system of more than 50 local labor boards. Public employees, including teachers, sanitation workers, firefighters, and police officers, needed uniform rules and a uniform process to negotiate fair wages and safe working conditions. The bill requires local labor boards to adopt standardized rules or default their duties to the New Mexico Public Employee Labor Relations Board.

The New Mexico Public Employee Bargaining Act (PEBA), the primary law governing relations between unions and public employers, established the state board and gave authority to enforce the act and its rules and regulations with board authority over public employees' collective bargaining matters in any jurisdiction that did not have an active local labor board.

Bill 364 lays out a time line from December 2020 to December 2021 for local boards to prove that they have continued support of both public employers and employees and have

adopted standard rules. If local boards fail to meet the deadlines they will cease to exist, and the state board will assume responsibilities. The measure was thoroughly vetted by cities, counties, and school superintendents.

Bill 98 was also signed into law, which established a penalty for contractors who violate the Public Works Minimum Wage Act by paying workers less than the appropriated prevailing wages and fringe benefits. The bill increases the payback to three times what the worker was owed plus $100 per day the employee worked at the lower rate. It also established a mediation process to assure a speedy resolution to disputes between employee and employer.

The Farmington Daily Times reports that 87 out of 147 full-time faculty members at San Juan College have voted in favor of unionization, to begin the process of unionization and collective bargaining with administrative officials amid increasing faculty turnover.

New York

Report to the National Academy of Arbitrators on the State and Local Public Sectors

I. Public Sector Boards
   a. New York State Public Employment Relations Board (PERB) by Arthur Riegel
   b. New York City Office of Collective Bargaining (OCB) by David Stein
II. Legislative Update by Howard Edelman
III. Court Decisions by David Reilly

I. Public Sector Boards

A. New York Public Employment Relations Board

The New York State Public Employment Relations Board (PERB) is under the direction of a Board (the PERB Board). The two members of the board are appointed by the New York State Governor and confirmed by the New York State Senate. The chairman of the board, John Wirenius, Esq., is a specialist in the area of public sector labor relations.

In recent months, the PERB Board has striven to minimize the exposure to the COVID-19 virus. For example, its meetings have been virtual. PERB has significant responsibilities in the area of public sector labor relations. These include rule-making, conciliation and representation. Below I discuss the manner in which the pandemic is being addressed in each of these areas.

1. Rule-making.

After the implementation of rule-making procedures, rule-changed is under the purview of the PERB Board. There is a recognition of the need to revise existing rules while accommodating statutory mandates, particularly those of the State Public Employment Act and the Taylor Law, the statue that created PERB. It is clear that this area is one in which the PERB leadership is moving carefully and methodically. The complexity of the issues and the diversity of constituencies are central to the care taken in adapting the existing rules to the current health crisis.

Current activities in the rule-making area include consideration of changes in rules that will be forwarded to the PERB Board in the near future:

- There is a recognition that electronic filings are more efficient and are needed at this time. Rules and/or procedural changes need to be created to accommodate to the current health crisis.
- There is a need to be careful in an effort to address the needs of various PERB constituencies.

2. Conciliation.

The Office of Conciliation is directed by William Conley, Esq. This office is charged with the responsibility of administering impasse procedures under the Taylor Law. These procedures include, but are not limited to, mediation, mediation-arbitration, fact-finding, voluntary grievance arbitration and interest arbitration.

Mediation

- Full-time PERB staff mediators provide mediation and fact-finding services, though full-time PERB staff are involved in few fact-finding assignments. The full-time PERB staff is augmented by mediators/fact finders who are on the per diem panel. Such people are designated for specific cases by the Office of Conciliation.
- Since April 2020, initial mediation sessions are conducted virtually. If a recommendation is made that subsequent sessions need to be done face-to-face, authorization is required in order to do so.
- In the past seven months, 70-80% of the mediations are conducted virtually. There has been little resistance from the parties.

Fact Finding

- There is little difference between the approaches used in fact finding and mediation.
- The vast majority of fact-finding proceedings are conducted virtually, with little resistance from the parties.

Grievance Arbitrations

- It is anticipated that 100% of the filings relative to voluntary grievance arbitrations will be electronic.
- Upon receipt of electronically filed demands for arbitration and based on the responses of the parties to lists of possible arbitrators, a PERB administrative employee makes all of the assignments of arbitrators.
- It is expected that arbitrators will be required to file their decisions electronically with the Office of Conciliation. These changes will be reflected in the rules changes described above.
- At this time, practitioners and parties prefer virtual hearings.
- Virtual hearings in impassive proceedings may well be a tool used after the current COVID-19 crisis.

Interest Arbitration

- There have been few filings of request for interest arbitration since March 2019. As a consequence, the focus of the Office of Conciliation has been on other more pressing issues.

3. Representation

The Director of the Office of Representation is Melanie Wlasuk.

- All of the office's activities have been unchanged since March 2020. All hearing and pre-hearing procedures have been adapted since then. Most hearings are virtual. The Office of Representation is exploring platforms in addition to Zoom.
- Some hearings are face-to-face. However, there are strict protocols in place when such hearings are conducted.
- There is an exchange of documents in advance of the hearings. The parties are urged to arrive at stipulations in advance of the hearings. These procedures are in place in virtual and face-to-face hearings.
- The department is exploring ways and means of incorporating electronic fluency.

4. Conclusions

It appears that the leadership at PERB has addressed the implications of the current pandemic thoughtfully. They have considered the health needs of their staff as well as the parties who avail themselves of PERB's services. Rules changes evolve more slowly than procedural changes. However, the process of changing rules is in progress and it can be anticipated that the needed rules changes will be addressed in the near future.

B. Office of Collective Bargaining of the City of New York

This portion of the report is primarily addressed to issues surrounding subjects of negotiations in the City of New York which are expected to predominate in the near future. Thus, bargaining in a contracting economic environment, with which the City has a great deal of experience, and bargaining as it interfaces with public policy considerations, are a focus. The state of collective bargaining in New York City remains strong as the City and its unions work together to resolve major problems.

1. Description of the Agency

The Office of Collective Bargaining is the agency which administers and adjudicates disputes arising under the New York City Collective Bargaining Law. Its unique history and background are fully detailed in OCB's 2017 publication *New York City Collective Bargaining Law 50 years 1967-2017.* OCB and BB are unique to labor relations agencies because they are tripartite in nature and possess some aspects of labor boards generally, which follow the NLRB model, such as the New York State Public Employment Relations Board (PERB), and aspects of a permanent contract arbitration panel. The unique nature of the OCB/BCB model is attributable to its source in the Labor/Management Institute of the American Arbitration Association, *Id.,* at pp. 9-11. The chair of the BCB is the chief officer of OCB and the chair and neutral members are designated by the municipal unions, on one hand, and the City of New York, on the other. Many of the neutral members were prominent members of the NAA at the time of selection and others later became prominent members. This contrasts with members of other labor boards, many of whom were advocates or labor board officials at the time of appointment. The Board of Collective Bargaining also consists of two labor members and two management members.

OCB and BCB exist as so-called mini-PERBs under Section 212 of New York State's Taylor Law (Act) which permitted municipal jurisdictions, such as counties, to create agencies to adjudicate representation questions and to administer impasse provisions arising under Section 09 of the Act. However, OSC/BCB stands alone in that it has jurisdiction to adjudicate improper (unfair) labor practices, and, since, 1972, to render final and binding decisions of impasses concerning municipal employees, including so-called civilian or non-uniformed employees, in contrast to the advisory impasse procedures applicable to civilian personnel under the Act, *Id.*,49-50.

2. Impasse Panels

Impasse panels under the NYCCBL consist of one or more neutrals (usually three) who are selected from lists of neutrals, experienced in interest disputes, compiled by OCB. The recommendations of theses panels are binding unless appealed to the Board of Collective Bargaining. Appeals have been rare. Impasse procedures under the Act and the NYCCBL apply only to subjects which are all within the scope of bargaining, which are classically defined under private and public sector labor law as mandatory subjects. Under the Act, whether a subject of negotiations falls within the scope of bargaining is not statutorily defined but has been set forth in PERB decisions. While under Section 212 of the Act, OCB/BCB law must be applied consistently with the Act; the scope of bargaining is statutorily defined by Section 12-307(b) of the NYCCBL, which provides, in pertinent part, as follows:

> It is the right of the City . . . [to] direct its employees . . . determine the methods, means, and personnel by which government operations are to be conducted . . . and reserve complete control and discretion over technology of performing its work. Decisions of the City . . . in those matters are not within the scope of collective bargaining, but . . . questions concerning the impact that decisions on the above matters have on terms and conditions of employment . . .are within the scope of collective bargaining.

In addition, since the fiscal crisis experienced by the City in the mid-to-late seventies, pensions no longer fall within the scope of bargaining under both the Act and the NYCCBL.

3. Recent Developments

- **Pattern bargaining.** Recent developments in collective bargaining under the NYCCBL involve decisions of the BCB, impasse panel awards concerning pattern bargaining and voluntary collective bargaining agreements which have served or not served as pattern-setting in subsequent impasses. The application of pattern bargaining to municipal labor relations always existed to some degree, but the current discipline reflected in economic settlements between City agencies and unions representing their employees have their origin in the fiscal crisis which plagued the City in the mid-seventies. The initial agreements were reached by a coalition of unions and typically provided that the separate unit agreements negotiated by each member were limited to the present and future costs set forth in the coalition agreement. Subsequently, when individual unions like District Council 37, Local 237 of the Teamsters or the United Federation of Teachers set the pattern in a given round of bargaining, these costing principles continued to govern. The acceptability of pattern bargaining was signaled by the participation in it of unions not governed by the NYCCBL, such as the United Federation of Teachers. The Board of Collective Bargaining recently noted that pattern bargaining had come to govern municipal collective bargaining in *LEEBA,* 12 OCB2d 17 (2019), f.n. 2. A recent impasse panel wrote that pattern bargaining was a strong factor in ascertaining the "public interest" which is one of the criteria to be applied in reaching its recommendations for a settlement of an impasse, *Local 621, SEIU,* p.54, Docket 262-14 (March, 2017).

- The Board noted that there frequently had been two patterns: a civilian and a uniformed pattern, and determined that which pattern applied was a mandatory subject of bargaining that could be determined by an impasse panel. In one case, an impasse panel found that a unit of employees was subject to the civilian pattern, which was customarily provided a somewhat lower wage increase than the uniformed pattern, *Detective Investigators Association,* OCB I 2 46 06, and in another, entitled to the uniformed pattern, *LEEBA,* I 2 OCB 2d 09 , pp. 20-26 (January, 2012; amended on other grounds June, 2012).

- Due to the discipline imposed by adherence to pattern bargaining, unions have sought to avoid its strictures in several ways, some of which have been entertained by impasse panels, and others which the parties (including the City) to collective agreements have

recognized. These factors have included problems of recruitment and retention of in-demand employees, quantifiable productivity, and non-quantifiable productivity.

- **Quantifiable productivity.** With respect to quantifiable productivity, a veritable industry of consultants and actuarial analysts has evolved to advance arguments and methods to arrive at the value which should be applied. Disputes involved the use of concepts like net present value and the projection of expected rates of inflation to derive estimates of costs and savings. Quantifiable productivity itself may be further categorized. One type is the agreement to perform more work in the same period of time, and another is to trade or limit one form of compensation for another (so-called givebacks or concession bargaining).

- **Recruitment and retention.** The simplest form of compensation transfer can occur where an employee organization represents a broad array of titles in different bargaining units which are covered by the same negotiations. For example, District Council 37, AFSCME, represents over 100,000 municipal employees, some of whom are professional and others not professional. During certain periods, specific types of professional employees have been in short supply and the City salary has ceased to be competitive with the private sector, causing it a shortage in these titles.

    - Where DC 37 is the only group involved and DC 37 is the pattern setter, a limited percentage was reserved to address these recruitment and retention problems, which, when addressed to a narrow group of employees, has usually been sufficient to resolve the issue.

    - When this problem has arisen in coalition bargaining, the signatories have created tripartite equity panels which must rule unanimously to resolve a problem. A cost ceiling is customarily placed on the equity panel. Again, since the number of employees in these titles is relatively small, the sums set aside are usually more than sufficient to address the problem with little prejudice to the majority.

- When a unit consists of a more limited group of titles, such as registered nurses, the structure of such units precludes the exercise of flexibility to transfer compensation increases among titles, and has resulted in negotiated settlements involving nurses which exceeded the pattern. The State Nurses Association and the City, in the late eighties, agreed to a formula which would place registered nurses in City Hospital ninth on a list of compensation paid to RNs by voluntary hospitals in the City, the employers that set the going rate. In *Local 721, SEIU,* IA 195 89 (1990), the impasse panel similarly arrived at an increase for that round of bargaining which awarded licensed practical nurses entry at a rate which placed them ninth on a list of nurses employed by the same voluntary hospitals.

- In *Local 621,* Docket 262 14 (2017), the impasse panel noted that a recruitment and retention problem is not demonstrated by the retirement of employees in a unit, but when senior employees leave an employer for a new employer because the latter offers greater compensation, and they cannot be replaced (Opinion at 59, 60.) The panel further pointed out that when employees had retired due to reaching eligibility, and the employer had encountered difficulties in the recruitment of new employees, the City had increased the entry level rate beyond the pattern, but had not similarly spread the same increase throughout the bargaining unit, *United Federation of Teachers,* IA (1984). (This was a voluntary interest arbitration conducted before the three neutral members of the Board of Collective Bargaining, as the UFT is not governed by the NYCCBL.)

- **Altering salary progressions.** Another quantifiable form is surrendering or elongating the progression on salary steps or schedules of new employees, to provide savings for the benefit of increasing compensation to more senior employees above and beyond the increases these employees would receive from the application of the pattern agreement. These deals often involve competing actuarial projections of savings and increased costs from experts employed by the parties. For instance, there must be choices over what period of time to project savings by freezing starting salaries or stretching progressions, and the cost of transferring these savings to more senior employees who are more

"expensive" due to increased pension costs (they are closer to retirement) and higher wages (social security costs). The pressure to negotiate these "transfers" of compensation arises in police negotiations, due to the more generous compensation offered by suburban police departments in jurisdictions surrounding New York City.

  - These types of arrangements often have an unanticipated impact on other bargaining units in the uniformed forces which are vertically organized, because they lack the same flexibility to freeze starting pay or stretch progressions as the increases accorded to senior employees in lower ranks can overtake the pay for junior employees in higher ranks. There is a threat to morale in these supervisory units by the compression in compensation between employees in supervisory units and senior employees in entry-level units (patrolmen).

  - Similar pressures were asserted by a settlement which applied wage increases to base pay only and not to assignment differentials similar to, but not the same as, promotional titles. In that particular case, the impasse panel found that the cost of applying the increase could be easily funded by the savings calculated by the City in extending the Agreement (and thereby delaying a wage increase) for little more than a month, *Local 621, supra,* pp.58-59.

- **Lengthening agreements.** Stretching the length of an agreement has been a device to "fund" an agreement beyond its normal expiration, to limit the settlement within the cost parameters of the pattern.

- **Other forms of concessions.** A more classic form of productivity negotiations is found in the bargaining history between the City and the Uniformed Sanitation Association, which had a history of labor strife with notable work interruptions in 1968 and 1975, which have not been repeated. Instead, members of the bargaining unit have been able to increase their compensation beyond the municipal pattern settlements by reducing the manning of collection trucks from three to two men and reaching other measurable commitments to increase the collection of refuse and trash. Currently, there has been in place a productivity side letter covering the period from September 21, 2011 through

January 19, 2019 which was renewed on March 3, 2017 and is governed by a permanent tripartite panel, as well as labor/management committees.

- In *Local 621, supra,* at 61, the impasse panel found that the City could provide for additional pay above the pattern settlement without breaching the pattern, in return for concessions from a municipal union which could not be quantified. It cited the testimony of the City's Commissioner of Labor Relations that it had resolved litigation with the Uniformed Firefighters Association where the latter had attacked the closing of 60 companies as unlawful by restoring 20 companies. The City calculated that this resolution relieved it from financial exposure without arriving at a specific sum which had been saved, but nonetheless concluding that a substantial savings would be achieved.

    - Consistent with the concept inherent in the UFA Agreement, the PBA and the City reached agreement in January 2017 on a Memorandum of Understanding which provided for a 2.25% increase above the pattern, in return for concessions under Section 6 "Community Policing" which allowed the City to mandate that police wear body cameras. An MOU also required the PBA to withdraw related litigation.

- The practice of pattern bargaining within the City of New York had been so widely accepted by arbitrators, that the City PBA had not been able to persuade a tripartite panel convened pursuant to Section 209 of the Act that a legislative change in forum achieved by the PBA did not alter the predominance of the City pattern over the compensation paid to police in jurisdictions surrounding the City, such as the suburban counties surrounding it, *Patrolmen's Benevolent Association & City of New York,* IA 2014 009 (2016). This determination was consistent with the 1984 LOBA arbitration between the UFT and the City, cited above.

    - The amendment to Section 209 of the Act which allowed the City's police and fire unions to access PERB's impasse arbitration procedures (these unions are vertically organized for collective bargaining purposes by rank) resulted in

overlapping jurisdiction with the BCB, where the latter has jurisdiction to entertain whether a subject of bargaining was mandatory in the contest of an improper practice, but the PERB has jurisdiction to dispose of such issue in the context of a scope of bargaining petition filed after PERB issued a Declaration of Impasse, *PBA v. City of New York,* 37 N.Y. 2d 378 at 390, 391.

- **Mandatory v. Nonmandatory Subjects of Bargaining.** The January 2017 MOU reached by the PBA and the City may reflect the prominence of issues affecting the negotiability of public employers' perceived needs to regulate police conduct. One mode of ensuring that criminal suspects are interrogated in compliance with lawful constitutional standards is through the use of cameras. In *Detectives Endowment Association,* 12 OCB 2d 7 (2019), the Board of Collective Bargaining determined that the Police Department's installation of cameras in the work area of the Crime Scene Unit was not a mandatory subject of bargaining as it concerned the core mission of the employer—law enforcement. The Board found that detectives had no expectation of privacy where the performance of duty was executed.

    - Another instance where the City's decision to promulgate procedures relevant to its law enforcement obligations to afford individuals subject to its authority civil rights may conflict to some degree with its duty to negotiate with a labor organization representing law enforcement employees occurred in *Correction Officers Benevolent Association,* 12 OCB2d 31 (2017). The Board adhered to its traditional standards in determining whether the proposals the union sought to submit to impasse were within the scope of bargaining (i.e., mandatory) and was not persuaded by the fact that the DOC's actions were motivated by agreeing to the Consent Judgment it reached with the Department of Justice and plaintiffs. It held that proposals concerning guidelines whether to impose discipline, or factors to weigh in reaching that decision, or one by the Commissioner to depart from the guidelines, are non-mandatory. On the other hand, the Board held that a union proposal to negotiate over a schedule of penalties was mandatory and could be submitted to an impasse panel.

- In a companion case, *COBA*, 11 OCB 2d 33 (2018), the Board avoided reaching whether public policy as memorialized in a consent decree excused the City from bargaining over use-of-force criteria for promotion from Correction Officer to Correction Captain, when it found that the subject of the union's claim related to promotional criteria for a position outside the bargaining unit, a non-mandatory subject of negotiations under New York law.

- The Board found that the assignment of firefighters to counter terrorism task forces (CTTFs), which deal with active shooters and other aggressive deadly behavior, was not a mandatory subject of negotiations, but that the safety impact of such assignment was a *per se* mandatory subject of bargaining, L. 94 *UFA* 13 OCB 2d 9 (2020).

- In *District Council 37/AFSCME*, 12 OCB 2d 32 (2019), the Board held that the impact of new state regulations governing fees, education, and training requirements for alcohol and drug counselors was mandatorily negotiable.

- **Bargaining in Good Faith.** The Board of Collective Bargaining has found that the Human Resources Administration (HRA) failed to negotiate in good faith when it refused to respond to discovery demands by the New York State Nurses Association on behalf of nurses who had been charged pursuant to Section 75 of the *New York Civil Service Law*.

  - In affirming the Board's determination, the Court of Appeals pointed out that the parties' agreement prohibited the imposition of a wrongful disciplinary action. Thus, there was no guidance for a situation where the collective bargaining agreement is silent on discipline as to the public employer's obligation to respond to discovery demands of charged employees' union, *City of N.Y. (HRA) v. Board of Collective Bargaining & NYSNA* N.Y. 2d ( ). However, as Section 75 allows for a union representative to represent a charged employee, it would be consistent for the court to require the public employer to comply with discovery requests filed by the employee's union.

- In another case, the Board found that the City's fire department failed to bargain in good faith when it changed the value of a day's days for disciplinary purposes, *UFA* 10 OCB 2d 5 (2017).

II. Legislative Update

Recent significant changes (2019 and 2020) to the New York's Human Rights Law affect public employees. Those changes are:

1. Harassing behavior no longer need be "severe and pervasive," only that it leads to "inferior terms, conditions or privileges" of employment.

2. Eliminates the Farragher-Ellerth defense and now permits viable claims of discrimination even if employees do not follow internal protocols for processing complaints.

3. Eliminates requirements that complainants must cite to other non-protected employees who enjoy better terms and conditions of employment.

4. Applies the statute's protections to domestic workers and independent contractors.

5. Allows for uncapped punitive damages and reasonable attorney's fees.

6. Expands the prohibition of non-disclosure agreements to all discrimination and harassment claims.

7. Expands the scope of the Act to all employers, not just those with four or more employees.

III. Case Law:

A. Court Decisions

1. Janus-Related

a. *Wholean v. CSEA SEIU Local 2001, et al.,* 19-cv-1563 (2nd Cir. 2019). The Court affirmed dismissal of plaintiffs' §1983 claims seeking repayment of fair-share union fees collected pre-*Janus.* It reasoned that defendants had a "good faith" defense to these claims, as they collected such fees in reliance upon controlling Supreme Court precedent and then-valid state statutes and such reliance was objectively reasonable. It also noted that the Supreme Court's decision in *Janus* does not reflect that it should have retroactive effect.

b. *Pelligrino v. New York State United Teachers of Northport, et al.,* 18-cv-3439 (E.D.N.Y April 30, 2020). Plaintiffs filed their complaint on June 13, 2018 in advance of the Supreme Court's decision in *Janus*, seeking declarations that (1) they have a constitutional right not to join or financially support a union as a condition of employment; and (2) New York law allowing for collection of fair share agency fees is unconstitutional. In response to *Janus,* the union defendants terminated collection of agency fees and plaintiffs dismissed several of their claims, except for those related to payment of pre-*Janus* agency fees. The court dismissed this remaining claim holding "a party who complied with directly controlling Supreme Court precedent in collecting fair share fees cannot be held liable for monetary damages under §1983." (quoting *Wholean v. CSEA SEIU Local 2001,* 955 F.3d 332 (2nd Cir. 2020)).

2. Discipline & Termination

a. *Matter of Browne v. New York City Dept. of Educ.,* 2020 Slip Op. 02893 (05/14/20). First, the department reversed Supreme Court's decision vacating arbitration award terminating petitioner's employment as a teacher. Such penalty, the Court reasoned, was not so disproportionate to teacher's offense (i.e., striking a student while physically removing him from the classroom) so as to shock one's sense of fairness. *See Matter of Pell v. Board of Education of Scarsdale & Mamaroneck,* 34 N.Y. 2d 222,

233 (1974). It explained that notwithstanding the hearing officer's conclusion that petitioner's denial of striking the student precluded a finding of remorse, which stemmed from a lack of recall, the overall record supported dismissal due to the use of excessive force. It highlighted, in this regard, the student's injuries and the risk of serious harm posed by the teacher's actions.

b. *Matter of Hodge v. New York City Transit Auth.,* 2020 Slip Op. 01008 (02/13/20). First, department denied petition to vacate arbitration award upholding termination of petitioner's employment. The Court ruled that petitioner's discharge for conduct that, if proved, would have constituted a felony did not violate public policy, and was outside the scope of New York Correction Law §751, as it occurred during his employment. Further, New York City Human Rights Law was inapplicable given petitioner's guilty plea.

c. *Matter of Lopez v. City of New York,* 2020 Slip Op. 00976 (02/11/20). Arbitration award upholding petitioner's 15-day suspension for locking a 10-year-old student out of the classroom and leaving him unsupervised in the hallway enforced by first department. The decision, the court explained, had a rational basis and was supported by the evidence. Notwithstanding the petitioner's justification for removing student from the classroom, he violated school policy by leaving the student in the hallway without proper supervision.

d. *Matter of Levy v. SUNY Stony Brook,* 2020 Slip Op. 03784 (07/08/20). Article 78 proceeding seeking review of termination of petitioner's employment dismissed for failure to state a claim on which recovery could be granted. The second department reasoned that while petitioner's factual allegations must be deemed true for purposes of the motion to dismiss, "no such deference is given to 'the legal conclusions drawn by the pleader nor [its] interpretation of the statutes [or contracts] involved.'" *Matter of City of Albany v. McMorran,* 16 AD2d 1021, 1022 (1962). Likewise, "'factual claims either inherently incredible or flatly contradicted by documentary evidence' are not entitled to any presumption of truth." *Roberts v. Pollack,*

92 AD2d 440, 444 (1983). Here, the court found, petitioner's assertion that his termination violated lawful procedure was affected by error of law or was arbitrary and capricious, represented a "bare legal conclusion," which, without more, was insufficient to state a valid claim for relief.

3. Retirement

a. *Lynch v. City of New York,* 2020 Slip Op. 05841 (10/20/20). In reversing the appellate division's order, the court of appeals found defendants violated New York City Administrative Code §13-218 by excluding police officers in tier three of the state retirement system from retirement benefits conferred by that provision of the Code. Applying well-established principles of statutory construction, the court concluded that officers who are members of tier three are eligible per NYAC §13-218 to receive credit for certain periods of unpaid childcare leave. This section, it reasoned, extends this benefit to "any member" of the police pension fund without regard to the tier in which they participate and does not conflict with the state's Retirement and Social Security Law.

b. *Matter of Bohlen v. DiNapoli,* 2020 Slip Op. 00997 (02/13/20). Court of appeals affirmed comptroller's determination that the Port Authority of New York and New Jersey's compensation adjustment program artificially increased certain employees' final average salaries, and, in turn, their retirement benefits. As such, it ruled, payments per that program do not constitute compensation for benefits purposes under the State's Retirement and Social Security Law (RSSL). Under the RSSL, a member's pension benefit is based upon final average salary. The Authority adopted the compensation adjustment program at issue to allow certain of its executive employees to achieve the level of pension benefit that they would have received under its 2002 statutory retirement incentive program, but for their exemption as key executives. The comptroller's decision in this regard, the court said, was supported by "substantial evidence," and therefore must be upheld. It reasoned that the evidence confirmed that the salary adjustment at issue was designed to boost pension benefits, and therefore, was excludable under RSSL §431(3), regardless of whether it

was intended to encourage earlier or later retirement.

c. *Matter of Giuliano v. New York Fire Dept. Pension Fund***,** 2020 Slip Op. 03910 (07/15/20). Affirmed dismissal of Article 78 petition challenging fund's denial of accidental disability retirement benefits. The second department concluded that the fund's determination that petitioner's disabling condition was caused by a chronic condition, and not a work-related injury, was supported by credible medical evidence, and therefore was not "arbitrary and capricious." *Matter of Meyer v. Board of Trustees of New York City Fire Dept.*, 90 NY 2d 139, 147 (1996).

d. *Matter of Corbin v. DiNapoli*, 2020 Slip Op. 02523 (04/30/20). Affirmed comptroller's denial of petitioner's application for disability retirement benefits pursuant to Retirement and Social Security Law §§507-a and 507-b, as supported by substantial evidence. Petitioner, the third department ruled, failed to satisfy his burden of proving he was permanently incapacitated from performing his duties as a corrections officer. It rejected the petitioner's claim that the hearing officer, and, in turn, the comptroller, failed to consider the record as whole due to the failure to reference certain medical reports in the written decision. The hearing officer's decision, it highlighted, reflected the contrary by confirming review of the transcript, exhibits, and the parties' closing briefs, the latter of which referenced the medical reports.

4. Arbitration

a. *Matter of Findlay v. MTA Bus Co.,* 2020 Slip Op. 03611 (06/25/20). First department affirmed denial of Article 75 petition to vacate master arbitration award affirming lower arbitrator's award denying petitioner no-fault benefits. It reasoned master arbitrator reviewed the no-fault arbitrator's award, weighed parties' submission regarding petitioner's lost wage claim, and rendered a decision based upon the evidence that was not irrational. *See Matter of Kowaleski v. New York State Department of Correctional Servs.*, 16 NY 3d 85, 90-91 (2010).

b. *Matter of Stewart v. New York City Dept. of Education,* 2020 Slip Op. 02275 (04/16/20). First department affirmed dismissal of Article 78 petition contesting DOE's denial of petitioner's application for a cleaner position. The court reasoned that DOE rationally concluded that petitioner's past financial improprieties as a custodial engineer, which resulted in a criminal conspiracy conviction, justified denying him the subordinate position. Petitioner's prior conduct, the court said, reflected on his fitness for the job and presented an unreasonable financial risk for the DOE.

c. *Matter of Sambula v. Triborough Bridge & Tunnel Auth.,* Slip Op. 01240 (02/20/20). Affirmed Authority's denial of petitioner's request for a retiree service letter, which would have aided him in securing a special pistol carry permit. The first department explained that petitioner had no right to the letter because the Authority had rescinded his authority to carry a firearm preretirement. It also ruled that he lacked standing to assert a cause of action under the Law Enforcement Officers Safety Act of 2004 or the Americans with Disabilities Act.

d. *Matter of Jovasevic v. Mount Vernon City School Dist.,* 2020 Slip Op. 04839 (09/02/20). Affirmed dismissal of Article 78 petition seeking review of the board's termination of petitioner's employment as an architect. Petitioner, the court found, failed to comply with Education Law §3813(1)'s notice of claim requirement. The court highlighted: (1) "failure to present claim within statutory time limitation or notify correct party, is a fatal defect;" and (2) "statutory prerequisite is not satisfied by presentment to any other individual or body, and moreover, the statute permits no exception regardless of whether the Board had actual knowledge of the claim or failed to demonstrate actual prejudice." *Parochial Bus Sys v. Board of Educ. of City of New York,* 60 NY 2d 539, 547-548 (1983). Here, it said, petitioner's notice to the superintendent did not constitute the required service upon the board.

e. *Matter of Board of Education of Yonkers City School Dist. v. Yonkers Federation of Teachers,* 2020 Slip Op. 03909 (07/15/20). Confirmed

arbitration award finding board violated collective bargaining agreement by increasing class size of integrated co-teaching classes. Noting the limited judicial review of arbitration awards, the second department instructed: "An arbitration award may not be vacated unless it violates a strong public policy, is irrational, or clearly exceeds a specifically enumerated limitation on the arbitrators power." *Matter of Kowaleski v. New York State Department of Correctional Servs.*, 16 NY 3d 85, 90 (2010).

f. *Matter of Board of Educ. of the Yonkers City School Dist. v. Yonkers Federation of Teachers,* 2020 Slip Op. 01343 (02/26/20). Affirmed denial of board's petition to stay arbitration of grievance contesting board's failure to enforce parking space assignment agreement between YFT and another union. After noting "public policy in New York favors arbitral resolution of public sector labor disputes," the second department explained that the determination of arbitrability involves a two-prong test, which requires considering: (1) "whether there is any statutory, constitutional or public policy prohibition against arbitrating the grievance;" and (2) if not, whether the parties agreed to arbitrate the particular dispute per the terms of their collective bargaining agreement. Here, the court noted, the board conceded the first prong and the second prong were satisfied because there was "a reasonable relationship between the subject matter of the dispute and the general subject matter of the [collective bargaining agreement]."

5. Statute of Limitations

a. Matter of Thomas v. New York City Employees Retirement System, 2020 Slip Op. 03016 (05/27/20). Affirmed dismissal of Article 78 proceeding seeking payment of death benefit. The second department found that the petition, which was filed in December 2017, was untimely. It reasoned that the system's March 30, 2017 letter denying petitioner's request to halt payment of benefits to an alternate payee constituted a "final determination," which, in turn, caused the applicable six-month statute of limitations to begin running on her petition to contest that decision. *See Matter of Gopaul v. New York City Employees Retirement Sys.* 122 AD3d

848, 849 (2014).

6. *General Municipal Law Section 207*

a. *Matter of Borelli v. City of Yonkers,* 2020 Slip Op. 05744 (10/14/20). Second department affirmed city's decision to exclude certain compensation paid to active firefighters as night differential, check-in pay, and holiday pay from its calculation of supplemental benefits paid pursuant to General Municipal Law §207-a(2). The court stated that a disabled firefighter's regular salary or wages per §207-a(2) "is calculated based on the current salary of an active firefighter at the same grade the pensioner held upon retirement." *Matter of Farber v. City of Utica,* 97 NY 2d 476, 479 (2002). On the basis of established precedent construing the term "regular salary or wages," it concluded petitioners failed to demonstrate their entitlement to have such additional pay practices included as part of their disability benefits under §207-a(2). *Id.* It noted, however, that parties may agree per their collective bargaining agreement to include such additional amounts in the computation of "regular salary or wages" for this purpose. *See Matter of City of Yonkers v. Yonkers Fire Fighters Local 628,* 2020 Slip Op. 05745 (10/14/20).

b. *Matter of Sica v. City of Mount Vernon,* 2020 Slip Op. 00597 (01/29/20). Affirmed dismissal of petition challenging fire commissioner's decision denying petitioner supplemental benefits pursuant to General Municipal Law §207-a (2). The contested decision, the second department ruled, satisfied the "substantial evidence" standard. It explained that "substantial evidence means more than a 'mere scintilla of evidence,' and the test of whether substantial evidence exists in a record is one of rationality, taking into account all the evidence on both sides." *Matter of Solano v. City of Mount Vernon*, 108 AD3d 676, 677 (2013)

7. New York City Administrative Code

a. Matter of Correction Officers' Benevolent Association v. New York City Board of Collective Bargaining, 2020 Slip Op. 02549 (04/30/20). Denied Article 78 petition contesting New York City Board of Collective Bargaining's (BCB) dismissal of improper practice petition filed in

response to Department of Correction's adoption of an operations order for job assignments. According to the first department, the BCB's finding was rational; namely, although the order contained new training requirements, it did not impose a substantive change, and therefore, was not a mandatory subject of bargaining. Likewise, the court concluded that the BCB rationally determined that the order's inclusion of a use of force evaluation criteria was not a mandatory subject of bargaining, inasmuch as it did not concern performance evaluation procedures or require participation by officers.

8. *PERB*

a. *Matter of Mooney v. New York City Transit Auth.*, 2020 Slip Op. 00065 (01/07/20). Affirmed PERB's dismissal of petitioner's improper practice charge against the Authority and TWU Local 100 relative to processing grievances on his behalf. PERB, the first department explained, properly found petitioner failed to state a claim of improper practices, given his acknowledgement that TWU sought to schedule hearings on the grievances, and any delay by the Authority in processing those grievances does not support a finding that TWU breached its duty of fair representation. According to the court, absent proof TWU breached such duty, petitioner lacked any basis to charge the Authority with breaching Civil Service Law §209-a (1).

b. *Matter of the City of Long Beach v. New York State Pub. Empl. Relations Bd.*, 2020 Slip Op. 05504 (10/07/20). Reversed PERB's decision granting Long Beach Professional Firefighters Association's improper practice charge, alleging city violated Civil Service Law §209-a(1)(d) by failing to negotiate procedure for separating firefighters from service pursuant to Civil Service Law §71 in case of an absence of more than one year due to injury. The court acknowledged, "it is well settled that '[t]he Taylor Law requires collective bargaining over all terms and conditions of employment.'" *Matter of New York City Tr. Authority v. New York State Pub. Empl. Relations Bd.*, 19 NY 3d 876, 869 (2012) (citations omitted). Further, it pointed out that the court of appeals has "made clear that the presumption . . . that all terms and conditions of employment are subject to

mandatory bargaining cannot be easily overcome." *Id.* Doing so, it stated, requires showing: (1) clear and plain legislative intent to remove the issue from such bargaining obligation; (2) statutory directive "leaves no room for negotiation;" or (3) subject would result in employer's surrender of "non-delegable statutory responsibilities." *Matter of City of New York v. Patrolmen's Benevolent Assn.,* 14 NY 3d 46, 58 (2009); *Matter of City of Watertown v. New York State Pub. Empl. Relations Bd.,* 95 NY 2d 73, 78-79 (2000). Judged by this standard, the court concluded that Civil Service Law §71 and the related regulations, 4 NYCRR 5.9, "leave no room for negotiation of the procedures to be followed prior termination of an employee's employment" thereunder. As such, it determined the presumption in favor of collective bargaining was overcome.

c. *Matter of State of New York v. New York Public Empl. Relations Board,* 2020 Slip Op. 02963 (05/21/20). Affirmed PERB determination that state committed improper practice by unilaterally implementing a winter work schedule over the union's objection. As preliminary matter, the third department found that PERB had jurisdiction of the dispute, as it involved a breach of the statutory duty to bargain and was not "essentially contractual." Turning to the merits, it concluded that "substantial evidence," supports PERB's determination that the state failed to satisfy its bargaining obligation. In doing so, it rejected the state's claim that the union had waived its right to negotiate regarding scheduling, as the cited provisions of the collective bargaining agreement did not reflect a waiver that is "clear, unmistakable and without ambiguity." *Matter of Chenango Forks Central School Dist. v. New York State Public Empl. Relations Board,* 95 AD3d 1479, 1484 (2012). Further, it found PERB's determination that the parties had a past practice of reaching agreement on the schedule prior to its implementation was supported by substantial evidence.

d. *State of New York v. New York Public Empl. Relations Board,* 2020 Slip Op. 02839 (05/14/20). Applying substantial evidence standard of review, affirmed PERB decision that state committed an improper practice and violated Civil Service Law §209-1 (1)(d) by departing from a 10-year

practice and implementing a fee schedule for processing applications for promotional and transitional examinations. It reasoned the application fee schedule represented a term and condition of employment and rejected the claim that its establishment constituted a prohibited or permissive subject of bargaining. Further, it noted, the imposition of the fee schedule was not "an inherent or fundamental policy decision related to the petitioner's primary mission." *Matter of New York City Transit Authority v. New York State Pub. Empl. Relations Board,* 19 NY3d 876, 880 (2012).

e. *Matter of Sullivan County Patrolmen's Benevolent Assn., Inc. v. New York State Public Empl. Relations Board,* 2020 Slip Op. 00199 (01/09/20). Dismissed petition contesting PERB's denial of petitioner's improper practice charges against the county. The third department ruled that the amended petition, which added the county as a respondent, must be dismissed, as to the county, for being untimely. This holding, the court stated, was dictated by: (a) the amended petition having been filed more than 30 days after petitioner was served with PERB order; and (b) the petitioner's failure to demonstrate applicability of the "relation back doctrine," which requires a showing: "(1) that the claims arose out of the same occurrence; (2) that later-added respondent[s] [were] united in interest with a previously named respondent, and (3) that the later-added respondent[s] knew or should have known that, but for a mistake by petitioner[] as to the later-added respondent[s'] identity, the proceeding would have also been brought against [them]." *Matter of Sullivan v. Planning Board of the Town of Mamakating,* 151 AD3d 1518, 1520 (2017), *lv denied,* 30 NY3d 906 (2017). It stated further that with the county being a necessary party to the proceeding, the petition must also be dismissed as to PERB.

9. Miscellaneous

a. *Matter of Husamudeen v. DiBlasio,* 2020 Slip Op. (02/19/20). Affirmed dismissal of Article 78 proceeding seeking to prohibit the city from assigning employees to specialized juvenile detention facilities. The record, the second department found, demonstrated that the employees' expected duties at the specialized facilities "are related to, similar in nature to, or a

reasonable outgrowth of, their in-title work," and, as such, would not involve out-of-title work in violation of Civil Service Law §61(2).

b. *Matter of Buffalo Teachers Fedn., Inc. v. Elia*, 2020 Slip Op. 02304 (04/16/20). In affirming dismissal of Article 78 proceeding, the third department ruled that Commissioner of Education, which had previously imposed a receivership upon certain schools per Education Law §211-f, properly authorized the superintendent/receiver here to modify the collective bargaining agreement by changing start and end times of the school day. The court rejected petitioner's claim that the schedule change did not represent a measure designed to improve student achievement, but rather an effort to save money, rendering it arbitrary and capricious.

B. PERB Decisions

1. Duty to Bargain

a. *Matter of East Meadow Teachers Assn. and East Meadow Union Free School District*, 53 PERB ¶4507 (2020). Held district did not violate its bargaining obligations by refusing the association request to negotiate regarding supplemental health and disability insurance plans. The ALJ reasoned that the district had no obligation to honor this request, as the parties' existing collective bargaining agreement specifically addressed insurance, including, in particular, the coverages at issue. Further, the agreement did not contain a provision reserving the association's right to demand further negotiations on the subject during its term.

b. *Matter of Uniformed Fire Officers Association of City of Yonkers and City of Yonkers*, 53 PERB ¶3012 (2020). The board ruled that mayor's e-mail to unit employees regarding possible layoffs if the city was unable to address budget shortfalls in negotiations with the union constituted protected speech under Civil Service Law §209-a.1(a). It explained, "an employer may communicate directly with unit employees about unit issues so long as the communication does not contain threats of reprisals for their exercise of protected rights and does not promise them benefits for refraining from exercising those rights." In reaching its decision here, the Board

distinguished the situation in *Buffalo City School District,* 49 PERB ¶3028 (2016). It explained that in contrast to the communication found unlawful in that case, the e-mail here differed because it did not state layoffs were inevitable if the union did not agree to proposed financial terms.

2. *Unilateral Changes in Terms & Conditions of Employment*

a. *Matter of Civil Service Employees Assn., Local 1000 and County of Rockland,* 53 PERB ¶3008 (2020). County committed an improper practice by unilaterally terminating prescription drug program by which represented employees were able to receive medications from a specific pharmacy without a co-pay. The board found the county failed to satisfy its burden of establishing the "contract reversion" defense, (i.e., right to terminate an inconsistent past practice and revert back to the reasonably clear terms of the parties' collective bargaining agreement). Instead, it found the program constituted an enforceable past practice under the Act that could not be altered unilaterally. In support, it explained, the evidence demonstrated that "the practice at issue was unequivocal and continued uninterrupted for a period of time sufficient under the circumstances to give rise to a reasonable expectation among the affected unit members that the practice would continue."

b. *Matter of Albany Police Officers Union, Local 2841 and City of Albany,* 53 PERB ¶3009 (2020). On remand from appellate division, the board dismissed an improper practice charge concerning the city's cessation of indemnity health insurance plans or Medicare Part B reimbursement for retirees. It reasoned that the matter was governed by *Aeneas McDonald Police Benevolent Assn. v. City of Geneva,* 92 NY2d 326 (1998), which precludes upholding a claim that "a past practice concerning retirement [] benefits that were in place when an individual retired, in and of itself, prevents the City for unilaterally reducing those benefits for such person after cessation of public service."

c. *Matter of Middletown Police Benevolent Assn., Inc. and City of Middletown,* 53 PERB ¶4519 (2020). ALJ found city violated its bargaining obligation under Civil Service Law §209-a.1(d) by unilaterally

requiring two bargaining unit employees to undergo an independent medical examination (IME) as a condition of returning to work from sick leave. As a preliminary issue, the ALJ found PERB had jurisdiction of the matter because no term of the governing collective bargaining agreement was arguably violated by the contested action. *Matter of State of New York Office of Parks, Rec. & Hist. Pres.,* 51 PERB ¶3025, 3109 (2018). On the merits, the ALJ concluded that the subject matter of the charge is a mandatory subject of bargaining (i.e., procedures for terminating sick leave and returning to work), and the city offered no evidence of having previously required an IME in such circumstances. *Matter of the City of New Rochelle,* 47 PERB ¶3004, 3011 (2014). Finally, the city's statutory defense failed because neither GML §207-c nor the Workers' Compensation Law deprived the city of discretion relative to requiring an IME in this context.

3. *Representation*

a. *Matter of Raymond Lynch and Transport Workers Union, Local 100,* 53 PERB ¶4506 (2020). Denied charge alleging a breach of the duty of fair representation, per Civil Service Law §209-a.2(a) and (c), based on union representatives pressuring employee to accept a last chance agreement resolving a disciplinary matter for which the agency had sought his dismissal. The matter arose from a train incident causing injury and the employee's subsequent positive drug test result. The ALJ explained that notwithstanding the pressure exerted by the union representatives for the employee to sign the last chance agreement, their actions were not "arbitrary, discriminatory or in bad faith." The ALJ noted further that the evidence substantiated that the employee entered into the agreement knowingly and did so because he feared he would otherwise be discharged.

b. *Matter of Shah and Transportation Communications Union,* 53 PERB ¶4517 (2020). Dismissed improper practice charge alleging union breached duty of fair representation by failing to assist a probationary employee with resolution of expense payments and overtime requests. The charge, the ALJ found, did not state specific facts demonstrating that the union's alleged actions or omissions were "arbitrary, discriminatory or undertaken

in bad faith." To the contrary, the documentary evidence demonstrated that the union's representative responded to the charging party's inquiries and updated her on his progress.

4. *Interference & Discrimination*

a. *Matter of Civil Service Employees Assn., Local 100 and Sate of New York, Office of General Services,* 53 PERB ¶3007 (2020). Agency did not violate Civil Service Law §209-a.1(g) by interrogating employees regarding allegations of potential misconduct one day after learning of unavailability of employees' preferred union representative. In reaching this decision, the board cited: (1) agency's lack of knowledge that alternative representatives were unavailable to attend interrogations; and (2) agency representative's uncontroverted testimony that he would have rescheduled the interrogations if he had known of the union representatives' unavailability.

b. *Matter of Amadou Konteye and Board of Education of City of New York,* 53 PERB ¶3010 (2020). Dismissed charge of unlawful discrimination. Although the substitute teacher presented a *prima facie* case based on the timing of the discontinuance of his employment, the board determined that the city successfully rebutted, showing by substantiating a legitimate non-discriminatory reason for taking that action (i.e., loss of funding and directive to cease using all substitute teachers).

c. *Matter of Richard Yapchanyk, Archbishop Stepinac High School and Lay Faculty Association, Local 255,* 53 PERB ¶4401 (2020). Held that the employer did not interfere with administration of the association in violation of §704.3 of the State Employment Relations Act ("SERA") by failing to discharge certain employees pursuant to the security clause of the governing contract. It reasoned that the employer endeavored to comply with this clause and acted reasonably in awaiting further information from the union (i.e., confirmation of the accuracy of the employee list provided given identified errors) before discharging the listed employees.

d. *Matter of Civil Service Employees Assn., Local 1000 and State University of New York – Upstate Medical University,* 53 PERB ¶3013 (2020). The board reversed the ALJ's dismissal of the union's improper practice charge, finding the hospital had engaged in retaliation by replacing a paid lunch with an unpaid meal period and increasing the work day by a half hour. The evidence, the board explained, substantiated that a union official's protected activity during monthly labor/management meetings triggered the referenced adverse changes in working conditions. In particular, it concluded, the union satisfied its burden of proof as to the elements of a retaliation charge by showing: "(a) the affected individual engaged in protected activity under the Act; (b) such activity was known to the person or persons taking the employment action; and (c) the employment action would not have been taken 'but for' the protected activity."

e. *Matter of Civil Service Employees Assn., Local 1000 and State of New York Office of Children and Family Services,* 53 PERB ¶4518 (2020). ALJ held state interfered with local union president's protected activity by issuing a counseling memo for his directing shop stewards to cover security cameras during a union informational meeting. The ALJ concluded that the union established that the local union president would not have received the counseling memo "but for" his union role. This fact was clear from the face of the memo. Further, the state failed to present evidence substantiating its claim that a counseling memo would be issued to any employee conducting a meeting during which staff members covered a security camera. Also, the ALJ rejected, as pretextual, the state's claim that the memo was issued in response to the local union president's conduct during the counseling session, inasmuch as there is no reference to such conduct in the memo.

f. *Matter of Howard Wong and New York City Transit Authority,* 53 PERB ¶4523 (2020). Dismissed improper practice charge alleging charging party's reassignment constituted interference with his protected activity. Charging party, ALJ stated, failed present any evidence showing the authority's stated business reason for his reassignment was pretextual.

According to the ALJ, charging party's further claim that the authority violated §209-a.1(a) by failing to remedy the violation when raised had to be rejected because it was not stated in the charge, and, in any event, "does not state a cause of action under the Act." Likewise, the ALJ ruled, charging party's allegation that the authority did not respond to his attorney's request for information also fails to present a matter within PERB's jurisdiction. The statutory authority to make information requests rests with the union, and there was no evidence that it designated charging party or his attorney to do so on its behalf.

5. *Practice & Procedure*

a. *Matter of Larry Cross, Board of Education of the City of New York and United Federation of Teachers,* 53 PERB ¶4508 (2020). Dismissed, for deficiency reasons, employee's improper practice charge alleging the union had failed to provide adequate representation relative to his termination. In deference to the employee's *pro se* status, the ALJ treated his letter to PERB's chairperson as an amendment correcting certain procedural deficiencies in his original charge. Nonetheless, the ALJ concluded the charge had to be dismissed as untimely under §204.1(a)(1) of PERB's Rules of Procedure, which requires an improper practice charge to be filed within four months of the date on which the charging party has actual or constructive knowledge of the conduct constituting the improper practice. Here, all of the events referenced in the charge occurred seven years or more prior to its filing, thus, rendering it time-barred.

b. *Matter of Sharon Mosden and Arlington Teachers' Assn.,* 53 PERB ¶4510 (2020). Dismissed, as untimely, teacher's improper practice charge alleging a violation of Civil Service Law §209-a.2(c); namely, the association's February 2017 failure to grieve the district's refusal to hire a teacher for a coaching position during the 2016-2017 school year. The ALJ pointed out that the charge was not filed within four months of the events, giving rise to the improper practice (i.e., the failure to grieve). Further, the teacher's renewal of her grievance request in March 2019 did not change this outcome. The ALJ reasoned that the second request did not revive the

initial claim, which remained outside the established limitations period.

c. *Matter of Local 237, International Brotherhood of Teamsters and Elwood Union Free School District,* 53 PERB ¶4005 (2020). ALJ ruled timely a rival union's petition to decertify the incumbent union. The rival union, the ALJ said, properly calculated the "window period" for filing its petition based upon the parties' MOA ratified on January 25, 2018, as opposed to the collective bargaining agreement subsequently signed on August 28, 2018. Under PERB rules, the window period consists of the entire month immediately preceding the seventh month prior to the collective bargaining agreement's expiration date or the conclusion of the third year of its term for an agreement in excess of three years. On this basis, applying the MOA, the ALJ concluded that by operation of Civil Service Law §208.2(b), and for purposes of determining the appropriate window period, an agreement for a term of three years (i.e., January 25, 2018 – January 24, 2021) was created here, with the remainder, January 25, 2021 – June 30, 2022, comprising the second term of the agreement. Further, the ALJ stated, with the end of the initial three-year term (i.e., January 24, 2021) not being coterminous with the end of the District's fiscal year (June 30, 2021), then per §208.2(a), the agreement must be deemed to have expired with the end of the prior fiscal year (June 30, 2020). Therefore, the appropriate window period was the month of November 2019, and as such, the rival union's November 18, 2019 petition was timely.

d. *Matter of Pamela Rolle and Civil Service Employee's Association, Local 1000,* 53 PERB ¶4524 (2020). Dismissed as untimely, charging party's improper practice charge alleging union breached its duty of fair representation under Civil Service Law §209-a.2(c). The charge arose from the union's alleged failure to respond to charging party's August 2019 messages seeking assistance as to the employer's decision not to return her to work. The ALJ reasoned that liberally allowing the charging party to await until the end of September 2019 for a response from the union, she would have needed to file her charge by February 1, 2020 for it to comply with the four-month limitations period of PERB Rules §204.1(a)(1). As such, her charge filed more than four months later (i.e.,

June 9, 2020) was, no doubt, untimely.

e. *Matter of Guy Bailey, et al. and New York City Transit Authority*, 53 PERB ¶ 4526 (2020). Dismissed, for a failure to prosecute, improper practice charge alleging a refusal to process grievances. The ALJ explained that dismissal was appropriate due to parties' failure to appear for a scheduled hearing despite having received proper notice, and their subsequent inability to present good and sufficient reason to excuse their nonappearance.

6. Unit Clarification/Unit Placement

a. *Matter of International Longshoremen's Assn., Local 2028 and Niagara Frontier Transportation Authority,* 53 PERB ¶4003 (2020). ALJ held that newly created senior administrative assistant (SAA) position was properly encompassed within a unit of clerical and technical employees. The ALJ noted, however, that a clarification petition was not the appropriate vehicle for accomplishing this result, as the recognition clauses of the collective bargaining agreements in effect when the dispute was heard did not include the SAA position. Nonetheless, the unit placement was granted as an accretion because the position's primary functions, educational requirements, pay grade, benefits, and working conditions are comparable to those of the unit employees. In response to a second unit clarification/unit placement petition for the inclusion within the unit of another newly created position, senior administrator manager, the ALJ denied the request. This position, the ALJ reasoned, must be excluded because it satisfies the two-prong test of "confidential" status under *Town of Dewitt*, 32 PERB ¶3001, 3002 (1999).

OHIO

2020 State and Local Public Sector Committee
Thomas J. Nowel, NAA

Labor relations activities have been significantly influenced by the COVID-19 pandemic. Arbitration hearings have been delayed with few, if any, being conducted from mid-March until June. With the assistance of the National Academy of Arbitrators, the Federal Mediation and Conciliation Service and other entities, educational webinars have been available to arbitrators and advocates regarding the use of Zoom and other virtual platforms. Nevertheless, in Ohio, many parties have preferred in-person hearings while a smaller number opted for virtual engagements. In speaking with colleagues in other areas of the country, it appears that virtual hearings are more commonplace. Most arbitrators in Ohio are utilizing a series of COVID-19 protocols for in-person hearings. A number of Ohio neutrals have decided to withdraw from their practices for the time being. At least one has decided to retire.

Ohio's state employees are generally organized across the board. The Ohio Office of Collective Bargaining oversees labor relations for the State of Ohio among state departments and agencies including collective bargaining negotiations, grievance mediation, and arbitration. Kate Nicholson, the Director of the Office of Collective Bargaining, reports that arbitration hearings have been cancelled since March. The governor has closed most administrative offices but allows for work from home. Attempts may be made to conduct a limited number of arbitration hearings in the later part of the year. In an attempt to reduce the number of potential arbitration cases, the State and a number of its Unions are making an effort to settle outstanding grievances by utilizing the grievance mediation process which exists in a number of the collective bargaining agreements. The parties are using one or two video platforms to conduct the

mediation sessions. A number of the collective bargaining agreements provide for permanent panels of arbitrators who also engage the parties in grievance mediation by appointment. Ms. Nicholson reports that there have been agreements to relax the enforcement of timelines and deadlines regarding the grievance process. She also reports a large volume of grievances regarding health concerns related to COVID-19 which are pending grievance mediation and possibly arbitration. The prison system in Ohio was particularly impacted by COVID-19 cases among inmates and staff. The writer of this article is a member of a number of the State's permanent panels. When the pandemic is finally controlled, there will be a significant number of delayed arbitration cases to be heard. It will be a busy time for those neutrals who are on the various panels. This includes both members and non-members of the NAA. Ms. Nicholson reported further that the State and a number of its Unions are preparing for negotiations at the end of 2020 and going into 2021. The parties have been in the process of evaluating virtual platforms and protocols for in-person bargaining sessions. Ms. Nicholson's willingness to share this information is appreciated.

The Ohio Civil Service Employees Association, AFSCME Local 11, represents approximately 25,000 State of Ohio employees across most departments including the Department of Rehabilitation and Correction. Union representatives generally agree with Ms. Nicholson's assessment regarding COVID-19 issues. The Union also represents a number of county employee bargaining units in Ohio. The Union reports a contract settlement and ratification for one of its local jurisdictions using email and conference calls exclusively. The Union representative, Mike Duco, states that the parties have a 30-year history and "enlightened" representatives. Mr. Duco states that labor management meetings have moved to the Zoom platform across the state, and arbitration hearings have been delayed. Josh Norris, Executive

Vice President of SEIU District 1199 in Ohio, reports a number of contract negotiations using both Zoom and in-person sessions, and a small number of in-person arbitration hearings have been conducted "with distancing, masks and face shields, large plexiglass barriers." Mr. Norris states that some arbitration hearings are "best held in person due to a variety of reasons."

Other Unions have reported that arbitration hearings and negotiations have been delayed. The Ohio Patrolmen's Benevolent Association (OPBA) is one of a number of organizations which represent law enforcement officers, correction employees, dispatchers, and others across the state. The Union reported a resumption of collective bargaining negotiations in August with local jurisdictions with many issues regarding COVID-19 on the bargaining table.

Many arbitrators in Ohio, both NAA members and others, serve as neutrals for the State Employment Relations Board (SERB). State law provides for mediation, fact finding, and conciliation during the negotiations process. The parties also have the ability to devise their own resolution process by mutual written agreement. A majority of parties in Ohio follow the procedure which is outlined in state statute. The law provides for fact finding for all jurisdictions, which opt for the statutory process, when impasse occurs during bargaining. Fact finders are encouraged by SERB to mediate in an attempt to narrow the issues at impasse or settle the negotiations. At the end of the fact-finding process, the fact finder's report and recommendation may be rejected by a 60% vote of the Union membership and/or the local jurisdiction's legislative body. Law enforcement and related bargaining units are considered non-strike. Other bargaining units may strike following fact finding and with notice to the Employer and SERB. Non-strike bargaining units must proceed to conciliation in the event one party or the other

rejects the report of the fact finder. The conciliation process is very similar to fact finding, but the neutral's decision is final and binding on the parties, a true interest arbitration process.

A significant number of fact-finding and conciliation processes were underway in the early months of 2020. As the governor issued stay at home orders, negotiations, fact finding hearings, and conciliation processes were temporarily delayed. When negotiations, fact finding, and conciliation hearings resumed, public sector jurisdictions were faced with declining revenue due to the COVID-19 recession. Although it is expected that new contract proposals are not to be introduced at fact finding or conciliation, this has not been the case in 2020. A number of employers reduced wage proposals at fact finding and conciliation due to concerns over future revenues. Unions introduced new proposals at fact finding and conciliation regarding hazard pay, sick leave benefits, and personal leave in response to COVID-19 concerns for their members. This has been an unprecedented turn of events, making settlement of a number of negotiations difficult. In one fact finding case, the employer had floated three, 3% wage increases for a three-year agreement in January 2020 but reduced its official proposal at fact finding in June due to concerns of lost revenue. The Union in turn proposed a number of economic proposals related directly to the pandemic during the fact-finding process. This led to mistrust and bad feelings between the parties. The negotiations were settled during the conciliation process.

Neutrals have been faced with similar scenarios across the state. Some parties have worked hard to find ways to settle. The standard settlement in Ohio's public sector is three-year collective bargaining agreements. A number of one-year settlements have occurred due to the uncertainty of COVID-19 and the recession it has created. An official with the Ohio Patrolmen's

Benevolent Association, Chief of Staff Daniel Leffler, made this comment regarding the state of negotiations.

> Beginning on or around March 15, all previously scheduled negotiations, fact findings, and conciliations were suspended. The state agency responsible for making appointments was temporarily shut down. June was the first time that neutrals and the state agency resumed the process. Employers' proposals were all impacted by alleged budgetary constraints and offers that were on the table before March were now not. Wage raises were withdrawn. I would predict that by the end of 2020, neutrals will take a very conservative approach and the statewide average wage increase will decline by 1 – 1.5%.

This writer has conducted a number of fact-finding hearings since June. In two cases, the parties worked with the fact finder who mediated settlements. Nevertheless, the parties in both cases requested the fact finder to write a consent agreement decision due to the difficult issues on the table. The State Employment Relations Board tracks wage and benefit settlements across the state. Many wage settlements have been in the 1% to 1.5% range since March 2020.

A four-day strike of teachers at the Gahanna-Jefferson School Board in October occurred over COVID-19 concerns and issues. The new one-year agreement included nine pages of COVID-19 related provisions including a limit on the use of cameras for live streaming classes and the establishment of a dedicated group of teachers who will provide educational services for those families who wish to avoid any in-person classes. The Ohio Education Association reported a 2.25% wage increase in addition to new leave benefits to be available for teachers based on the pandemic.

A strike by the faculty of Youngstown State University in October ended in three days as the parties resolved issues at impasse following fact finding. The state appointed fact finder

recommended three, 2% wage increases based on a new three-year agreement, but the employer, citing lost revenue due to the COVID-19 pandemic, had rejected the recommendation. The settlement included a wage freeze in the first year of the new collective bargaining agreement and 2% wage increases in years two and three. A major sticking point during the negotiations involved faculty members' retention of intellectual property rights. The Union, the Ohio Education Association, was successful in retaining such rights.

The Supreme Court decision, *Janus v AFSCME,* eliminated fair share fee/agency shop in the public sector across the nation in 2018. Ohio's public sector is heavily organized and has been so for decades. The State's collective bargaining law was passed in 1983 and became effective on April 1, 1984. It allowed for fair share fee provisions in collective bargaining agreements. Although Unions engaged in significant organizing with the passage of the law, many local jurisdictions across the state were already organized and enjoyed collective bargaining agreements which included final and binding arbitration. The new law provided for recognition of existing bargaining units and their collective bargaining agreements.

There had been a great deal of labor relations history in Ohio's public sector going back into the 1960s. The AFSCME Local 7 collective bargaining agreement, which represented non-uniformed city employees in Toledo, even contained a provision for agency shop fees in the 1970s. In the late 1970s the courts struck down this provision. In 2011 the Ohio legislature passed a provision which weakened the bargaining and fact-finding process contained in the Ohio Revised Code, Section 4117, the state collective bargaining law. Unions gathered sufficient signatures to place the issue on the ballot, and Ohio's voters overwhelmingly overturned the action of the legislature and governor. This bit of history indicates the strength of public sector Unions in Ohio. A number of the larger Unions in Ohio were solicited to provide information

regarding *Janus* for this report. They were asked the number or percentage of bargaining unit members who no longer provide financial support to the Union following *Janus*. While some Unions declined to answer, a number were willing to share the information. One large statewide Union engaged in a concerted organizing campaign among fair share payers and lost less than one percent of its payers. Another Union, which represents public sector employees in local jurisdictions across the state, also suggested that it lost minimal payers. A statewide Union which represents workers in various public sector agencies including health care and whose members are, in many cases, professional employees, reported a loss of approximately five percent. The OPBA, the law enforcement Union referred to earlier in this report, stated that it lost less than 0.5% of its bargaining unit payers. Whether teachers, firefighters, law enforcement, non-uniformed city and county workers, or social workers, the loss of dues payers has been minimal in Ohio's public sector due, in part, to the long history of unionization and collective bargaining in the state. A number of top management officials at the State of Ohio even expressed their displeasure at the loss of fair share. And it should be mentioned that progressive Union/Employer relationships in Ohio span decades and have had an impact on minimal loss of payers/members. The City of Cincinnati and its AFSCME Ohio Council 8 Union, with the aid of the Federal Mediation and Conciliation Service, was the largest public sector bargaining unit in the U. S., at the time, to have engaged in interest-based bargaining on two occasions in the mid and late 1990s. OCSEA, Local 11 AFSCME, the state employee Union, also engaged in interest-based negotiations with the State approximately ten years ago and followed that up with an alternative and progressive approach to negotiations the following cycle. OCSEA reports that the Buckeye Institute, a right to work organization, and National Right to Work have made contact with many of its members in an attempt to dissuade Union membership. The Union says these efforts have "fallen flat."

The Service Employees International Union, District 1199 reports a number of contract settlements in the public sector which established $15.00 as a minimum wage in 2020. This has been a long-term goal of this Union. In the midst of the pandemic, the Ohio Federation of Teachers and the Franklin County Children Services Board established $15.00 as a minimum wage during contract negotiations which elevated wages for a number of its members. The negotiations were concluded in September 2020. The new collective bargaining agreement also provides for a detailed process which allows for work at home in response to COVID-19 and issues impacted by the pandemic. Many public sector settlements this year provide for benefits related directly to the COVID-19 crisis. One recent contract settlement for a law enforcement bargaining unit provides for a significant amount of personal leave to last during the pandemic in order to provide for potential family illness and child care. The OPBA recently negotiated a new hazard pay provision in response to COVID-19 for employees at the Cuyahoga County Sheriff's Department. The Federal Mediation and Conciliation Service reports 819 arbitration panel requests in Ohio for fiscal year 2020. This is the second highest number of requests among the fifty states, second to Illinois.

Labor relations professionals, Union and employer, were solicited for general comments for this report. Josh Norris, Executive Vice President for SEIU, District 1199 in Ohio, made the following comment.

> We rely on arbitrators to maintain and provide industrial justice and provide decisions and rulings that are consistent with the terms of the contract language in front of them but also to maintain the balance of power between the parties by effecting truly impactful decisions and rulings when and where appropriate to maintain and solidify the effectiveness of the contract and process. Weak decisions and baby-splitting to avoid

conflict or make both sides happy serve no purpose and just causes the parties to walk away trying to explain things to their constituents that they promised would be resolved by the arbitrator.

Finally, a law enforcement Union official suggests that the National Academy of Arbitrators publish data regarding arbitration awards which involve discharged police officers. In response to public criticism of arbitrators who reinstate officers whose employment has been terminated, his organization shows less than a 50% success rate in such cases. Such criticism of arbitrators has been consistent in Ohio. It has been difficult to educate the media and public regarding issues of just cause and other related contractual principles. When an Ohio arbitrator recently reinstated a law enforcement officer, who had engaged in a violent approach to an arrest, the media and public blamed the arbitrator for mishandling the case. Nevertheless, the arbitrator was bound by contractual provision to reinstate the officer based on the double jeopardy principle. These are issues which arbitrators and labor relations professionals face in Ohio and across the nation. The National Academy of Arbitrators is addressing these difficult concerns.

The year 2020 has been an interesting time. Arbitrators, advocates and labor relations professionals continue to work through these difficult times and are finding success in providing for stable labor relations in the public sector in Ohio.

OKLAHOMA

Public Sector Summary 2020

William E. Hartsfield, Maretta Comfort Toedt

Civil Service Reform in Oklahoma (House Bill 3094) was delayed in 2019 due to the COVID-19 pandemic until the next legislative session. (https://journalrecord.com/2020/05/20/action-on-civil-service-reform-delayed-until-next-session/).

As passed by the Oklahoma House of Representatives, the bill provides for employee complaints before an administrative law judge hired by the state agency as an independent contractor. Complaints are to be filed with the agency within five business days of when such action occurred, and hearings are to take place within 20 business days of the action. "Disciplinary actions" means termination, suspension, demotion, forced or politically motivated transfers, or other actions resulting in loss of pay or benefits. The law would apply to all new hire state employee positions and all unclassified state employee positions. Existing classified state employees may retain their current status.

PENNSYLVANIA

Recent Public Sector Labor Law Developments in Pennsylvania

James M. Darby, Joan Parker, Jane Desimone, Lawrie Coburn

A. Federal Post-*Janus* Cases

1. *Oliver v. Service Employees International Union, Local 668, et al., 2020 WL 5946727 (3d. Cir. October 7, 2020).*

Shalea Oliver, an employee of the PA Department of Human Services, filed a complaint against SEIU and Commonwealth officials, seeking monetary and injunctive relief which included a refund of the total amount of union dues deducted from her paycheck since 2014 and an end to exclusive collective bargaining. Oliver asserted that her First Amendment rights to free speech and freedom of association were violated through the collection of union membership dues and the system of exclusive representation under Public Employees Relations Act ("PERA") (requiring a single union representative to bargain on behalf of public sector employees).

The Third Circuit Court affirmed the District Court's grant of summary judgment and dismissal of Oliver's claims, concluding that Oliver voluntarily became a member of SEIU and, therefore, she was not entitled to a refund of her union dues. The Court further stated that the *Janus* decision protects the rights of nonmembers from being compelled to support the union and that Oliver did not have a constitutional right to join a union for free. The Court also noted that the *Janus* decision did not hold that the practice of choosing an exclusive bargaining representative pursuant to state law violates any constitutional rights. The Court further stated that Oliver's First Amendment rights to free speech and freedom of association were not violated because she is no longer a member of SEIU nor is she compelled to associate with SEIU.

2. *Diamond, et al. v. Pennsylvania State Education Association, et al., 972 F.3d 262 (3d. Cir. August 28, 2020).*

Arthur Diamond, along with six other public school teachers, filed a class action lawsuit pursuant to 42 U.S.C. § 1983 and the Declaratory Judgment Act, 28 U.S.C. § 2201, against the Pennsylvania State Education Association ("PSEA") and Commonwealth officials, seeking, among other things, reimbursement of their fair share fees paid to PSEA prior to the issuance of

the *Janus* decision. It also sought to enjoin the Commonwealth officials from enforcing the Fair Share Law, 71 P.S. § 575.

The District Court dismissed the claims against the Commonwealth, PA Attorney General, and the members of the PLRB pursuant to Eleventh Amendment immunity. Regarding the claim against PSEA for reimbursement of fair share fees, the Court held that PSEA was entitled to a good faith defense against §1983 claims because PSEA reasonably relied on the US Supreme Court decision in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977) and PA's Fair Share Law in collecting fair share fees. Therefore, PSEA's Motion to Dismiss was granted. The Third Circuit Court affirmed the District Court's dismissal of Appellants' claims, agreeing that PSEA was entitled to a good faith defense barring Appellants' claims for monetary liability under § 1983.

3. *Adams, et al. v. Teamsters Local 429, et al., 2019 WL 8331669 (Report and Recommendation, December 3, 2019), 2020 WL 1531019 (M.D. Pa. March 31, 2020).* Hollie Adams, along with three other employees of Lebanon County, filed suit against the County, the Teamsters, members of the PLRB, and the PA Attorney General pursuant to § 1983, asserting (1) that the County and the Teamsters violated their first amendment rights by compelling them to join the union or pay fair share fees; and (2) that PERA's provisions authorizing unions to operate as exclusive representatives of public employees violate their rights to free speech and freedom of association.

In resolving a motion for summary judgment filed by the members of the PLRB and the PA Attorney General, the District Court adopted the reasoning in the U.S. Magistrate Judge's Report and Recommendation, concluding that any requests for injunctive relief against the members of the PLRB and the Attorney General were moot and any claims for damages were barred by the Eleventh Amendment. An appeal of this decision is pending before the Third Circuit Court of Appeals.

4. *Adams, et al. v. Teamsters Local 429, et al., 2019 WL 8333531 (Report and Recommendation, December 5, 2019), 2020 WL 1558210 (M.D. Pa. March 31, 2020).* The Report and Recommendation of the U.S. Magistrate Judge held that the Plaintiffs' requests for injunctive and declaratory relief are moot, since they are no longer members of the

union, they received a refund of any union dues paid after their request to withdraw from the union, and the *Janus* decision struck down fair share fees as unconstitutional. The Magistrate Judge further held that the Plaintiffs' damages claim fails because the County and the Teamsters are entitled to a good faith defense against any such claims under § 1983.

Concerning the Plaintiffs' constitutional claims against exclusive representation, the Magistrate Judge concluded that the *Janus* decision did not abrogate the Supreme Court's prior holding in *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271 (1984), which held that exclusive representation does not violate First Amendment rights. The District Court adopted the Report and Recommendation of the Magistrate Judge, granted the motions for summary judgment filed by the County and the Teamsters, and dismissed the motion for summary judgment filed by the Plaintiffs. An appeal of this decision is pending before the Third Circuit Court of Appeals.

B. State Court Cases

1. *Association of Pennsylvania State College and University Faculties v. PLRB (Petition of the Pennsylvania State System of Higher Education), 226 A.3d 1229 (Pa. March 26, 2020).*

In 2014, the Pennsylvania legislature amended the Child Protective Services Law (CPSL), to require school employees and volunteers to notify their employer within 72 hours of certain arrests or convictions and any founded or indicated reports of child abuse. Shortly thereafter, the Pennsylvania State System of Higher Education (PASSHE) unilaterally implemented a background check policy requiring all State System employees to submit to criminal background clearances and report to their employing universities any arrests or convictions of certain serious criminal offenses, or founded or indicated reports of child abuse. In 2015, the legislature amended the CPSL again by excluding university employees from the background check and reporting requirements whose direct contact with minors was more limited. Nonetheless, PASSHE did not amend its policy to exclude such employees.

The Association of Pennsylvania State College and University Faculties (APSCUF) filed a Charge of Unfair Practices alleging that PASSHE violated its duty to bargain in good faith when it unilaterally implemented the background check policy. The Board held that PASSHE's background check policy was a matter of inherent managerial prerogative not subject to

mandatory bargaining. Relying on its previous decision in *State College & University Professional Association, PSEA/NEA v. Pennsylvania State System of Higher Education*, 48 PPER 88 (Final Order, 2017) ("*SCUPA*"), which concerned the same policy, the Board concluded that the policy was a matter of managerial prerogative because PASSHE's interest in protecting children outweighed the employees' interests with regard to terms and conditions of employment.

On appeal, the Commonwealth Court affirmed the Board's decision that PASSHE was not required to bargain over the policy with regard to its employees who were required under the CPSL to obtain background checks. However, the Court held that the policy's application to the statutorily excluded employees was a mandatory subject of bargaining. The Court reversed the Board's decision and applied the Act 111 "unduly infringe" test under *Borough of Ellwood City v. PLRB*, 998 A.2d 589 (Pa. 2010) instead of the balancing test under *PLRB v. State College Area School District,* 337 A.2d 262 (Pa. 1975). It concluded that collective bargaining over the background check policy with respect to the statutorily excluded employees would not unduly infringe upon PASSHE's purported essential managerial responsibility of protecting students and minors on its university premises.

PASSHE filed a petition for allowance of appeal, which was granted by the PA Supreme Court to address the issue of whether the Commonwealth Court erred in reversing the Board's ruling that the background check policy's requirements constituted a nonbargainable managerial prerogative. The Supreme Court initially concluded that the balancing test under *State College* was the proper test to apply under PERA to the facts presented in this case. In applying the balancing test under *State College*, the Court held that the impact of the background check policy on the faculty members' terms and conditions of employment did not outweigh PASSHE's interest in its foundational policy of protecting minors who are on campus and providing a safe educational environment for all students. Therefore, the Court concluded that the policy constituted an inherent managerial policy over which PASSHE was not required to bargain.

2. *Exeter Township v. PLRB, 211 A.3d 752 (Pa. July 17, 2019).*

The Township filed a Petition for Unit Clarification seeking to exclude the zoning officer position, along with two other positions, from the bargaining unit as management level employees under Section 301(16) of PERA. The Board held that the Township did not meet its

burden to prove that the statutory exclusion under Section 301(16) applied to the duties of the zoning officer position, because the Township did not present any witnesses with actual knowledge of the previous zoning officer's job duties. The Commonwealth Court reversed the Board's decision, concluding that the duties set forth in Section 614 of the Municipalities Planning Code (MPC), along with the Township's Zoning Ordinance, designated the job classification of zoning officer as a managerial position and that it was not necessary for the Township to present evidence of the actual duties of the position.

The PA Supreme Court agreed to hear the case on appeal. After reviewing Section 614 of the MPC, the Court concluded that that provision does not give the zoning officer any independent discretion to determine policy as required under Section 301(16) of PERA and *Horsham Township*, 9 PPER ¶ 9157 (Order and Notice of Election, 1978). The Court went on to state that, similarly, the Township Zoning Code is in essence a job description subject to change by the Township. Because Section 614 of the MPC did not specifically designate a zoning officer as a managerial position, evidence of the actual duties of the zoning officer position was required. Accordingly, the Court affirmed the decision of the Board dismissing the Township's UC Petition.

3. *Bristol Township v. PLRB, 230 A.3d 523 (Pa. Cmwlth. April 24, 2020*).

The Township filed a Petition for Decertification requesting that the Board decertify the bargaining unit as an inappropriate unit under PERA, because there was only one employee in the unit. In affirming the Secretary's dismissal of the Petition, the Board concluded that questions of unit appropriateness are not properly raised by way of a decertification petition where the election directed by the Board must be conducted in the unit previously certified or recognized. Because the Petition failed to allege any facts regarding the single employee's lack of support for representation by the union, the Township's exceptions were dismissed.

On appeal, the Commonwealth Court stated that Section 607 of PERA and Section 95.22 of the Board's regulations require a petition for decertification to contain a factual statement showing a good faith doubt of the majority status of the union. Because the Petition failed to allege any facts regarding a good faith doubt of the majority status of the union, the Court dismissed the Township's appeal and affirmed the Board's Final Order. No appeal to the Court's decision was filed.

4. *Grube v. PLRB, 212 A.3d 105 (Pa. Cmwlth. June 4, 2019).*

Keith Grube filed a Petition for Decertification, seeking to decertify a bargaining unit of state inspection, investigation, and safety services employees represented by AFSCME Council 13. Grube's contention that 30% of eligible employees desired to decertify AFSCME as their bargaining representative was based upon an employee list provided by the Commonwealth through a Right-to-Know Law request. After the filing of the Petition, the Commonwealth provided the Board with an employee list, which contained names that were not subject to disclosure on the list provided to Grube under the Right-to-Know Law. After a review of the authorization cards along with the employee list provided by the Commonwealth, the Secretary of the Board determined that Grube did not submit a sufficient number of cards to demonstrate the minimum 30% showing of interest and dismissed the Petition.

Grube filed exceptions and the Board remanded the matter for a hearing on the accuracy of the employee list provided by the Commonwealth. The Hearing Examiner found that the Commonwealth's list was accurate and that Grube failed to support his Petition with the requisite 30% showing of interest. On exceptions, the Board upheld the Hearing Examiner's decision, rejecting Grube's assertion that he reasonably relied on the list obtained through the Right-to-Know Law in determining the 30% showing of interest. The Board also rejected Grube's argument that he was entitled to know the precise number of authorization cards excluded from the showing of interest because the determination of the adequacy of a showing of interest is an administrative function not subject to collateral attack.

On appeal, Grube argued that the Board erred by including nonmembers of AFSCME in calculating the number of authorization cards needed for the showing of interest, by refusing to provide detailed information concerning the number of rejected authorization cards and the specific reason for rejecting each card, and by rejecting cards with electronic signatures. Grube further argued that the Board improperly calculated the number of authorization cards needed and that he filed the requisite number of cards for the 30% showing of interest.

In affirming the Board's order, the Commonwealth Court concluded that Section 603(a) of PERA and the Board's regulations state that the requisite 30% showing of interest is a percentage of the employees within a bargaining unit, not a percentage of union members, and

therefore, all employees in the bargaining unit are entitled to vote on decertification. The Court further concluded that Section 95.17 of the Board's regulations safeguards the secrecy of the authorization cards submitted in support of a decertification petition and expressly precludes collateral attacks on those decisions. Therefore, the Board did not err in declining to provide its reasons to Grube for rejecting individual cards. The Court additionally dismissed Grube's argument concerning the Board's alleged rejection of electronic signatures because he failed to raise that issue before the Board. The Court went on to state that the Board is not statutorily required to accept electronic signatures and that the Board's construction of its governing statute through its regulation requiring original signatures on authorization cards (43 Pa. Code § 95.1) is reasonable, within its discretion, and not subject to substitution of a reviewing court's interpretation. Finally, the Court rejected Grube's assertion that the Board improperly calculated the number of authorization cards required for the 30% showing of interest because his calculation would bring the number below the mandatory 30% threshold. No appeal was filed to the Court's decision.

5. *Angelucci v. PLRB, 210 A.3d 367 (Pa. Cmwlth. June 4, 2019).*

This case has identical facts as *Grube v. PLRB, supra*, with the exception that the Petition for Decertification was filed by Daniel Angelucci. The legal analysis in the Board's Final Order and the Commonwealth Court's Opinion are also the same as in *Grube*. However, Angelucci only argued before the Commonwealth Court that the Board erred by including nonmembers of AFSCME in calculating the number of authorization cards needed for the showing of interest and by refusing to provide detailed information concerning the number of rejected authorization cards and the specific reason for rejecting each card. No appeal was filed to the Court's decision.

6. *Lower Swatara Township v. PLRB, 208 A.3d 521 (Pa. Cmwlth. May 2, 2019).*

Teamsters Local 776 filed a Petition for Representation under the PLRB and Act 111, seeking to represent a unit of police officers employed by the Township. The Township argued that the Teamsters could not represent the police officers along with the non-security guard employees it currently represented because the police officers would act as security guards pursuant to Section 604(3) of PERA, which prohibits inclusion of any individuals employed as

guards in a unit with other public employees. The Hearing Examiner disagreed, holding that Act 111 police officers are not guards under PERA. Therefore, an election was held and a Nisi Order of Certification was issued certifying the Teamsters as the exclusive representative of the Township police officers. The Township filed exceptions to the Nisi Order of Certification, which were dismissed by the Board.

The Commonwealth Court affirmed the Board's interpretation of Section 604(3) of PERA with regard to Act 111 police officers and concluded that the General Assembly's reference in Section 604 of PERA to "individuals employed as guards" was intended to apply only to individuals who are "employees" as defined in Section 301(2) of PERA, and not to Act 111's police officers. No appeal was filed to the Court's decision.

7. *Community College of Philadelphia v. PLRB, 205 A.3d 436 (Pa. Cmwlth. March 13, 2019).*

The College filed a Charge of Unfair Practices against the faculty union, alleging that the faculty's refusal to perform assessment work constituted an unlawful strike (partial strike) in violation of Sections 1201(b)(3) and 1006 of PERA. The Secretary of the Board dismissed the Charge on the basis that the Board did not have the authority to enjoin a strike under PERA. In its Final Order, the Board dismissed the College's exceptions and held that the legality of the strike must be determined by the courts, and not the Board. The Board further stated that an alleged strike does not constitute an unfair practice where the strike has not been enjoined by the courts.

The Commonwealth Court agreed with the Board, stating that the courts have exclusive jurisdiction over strikes prohibited under Sections 1001, 1002 and 1003 of PERA. The Court further concluded that the College's allegations that the union was engaging in a partial strike which created a clear and present danger to its accreditation is within the jurisdiction of the courts to decide. Therefore, the College's appeal was dismissed. No appeal was filed to the Court's decision.

8. *Schuylkill County v. PLRB, 197 A.3d 1256 (Pa. Cmwlth. November 14, 2018), appeal denied, 216 A.3d 219 (Pa. 2019).*

In this case, the newly elected Clerk of Courts discharged two employees and the union filed grievances over the discharges. The County refused to proceed to arbitration over the grievances, arguing that the grievances were not arbitrable pursuant to Section 1620 of The County Code and *Troutman v. AFSCME, District Council 88, AFL-CIO,* 87 A.3d 954 (Pa. Cmwlth. 2014), *appeal denied,* 627 Pa. 761, 99 A.3d 927 (2014). The Board noted that Section 903 of PERA provides that arbitration of grievances arising out of interpretation of provisions of a collective bargaining agreement is mandatory. Citing *PLRB v. Bald Eagle Area School District*, 499 Pa. 62, 451 A.2d 671 (1982), the Board stated that all disputes concerning arbitrability of a grievance under a collective bargaining agreement must first be presented to an arbitrator for determination, even where the case involves a row officer's assertion of Section 1620 rights. Therefore, the Board concluded that the County's refusal to proceed to arbitration was a *per se* unfair practice and that the issue of arbitrability under Section 1620 must be raised before an arbitrator.

On appeal, the Commonwealth Court stated that its decision in *Troutman* established that once a row officer asserts Section 1620 rights, the county commissioners may not bargain them away. However, the Court further stated that *Troutman* did not hold that a county can refuse to follow the terms of an existing collective bargaining agreement, to which the row officer did not object at the time the contract was negotiated. The Court noted that the parties' 2011-2015 CBA was negotiated prior to the Clerk of Courts taking office in 2016 and that it remained in effect until a new CBA is reached. Thus, the Court concluded that, pursuant to *Bald Eagle,* the County must make its jurisdictional argument to the arbitrator and then seek judicial review if aggrieved by the arbitration award. The PA Supreme Court dismissed the petition for allowance of appeal filed by the County.

9. *Kiddo, et al. v. American Federation of State, County and Municipal Employees, Local 2206, et al., 2020 WL 4431793 (Pa. Cmwlth. August 3, 2020)(unreported opinion).*

This case stems from an Unfair Practice Charge filed by AFSCME alleging a failure to bargain in good faith by the Erie County Water Authority. AFSCME alleged that the Authority provided it with a contract proposal containing two options and that the bargaining team chose Option 2 to present to its members for a vote. Upon discovering that AFSCME did not present both options to its members, the Authority sent a letter to all its employees represented by

AFSCME attaching a summary of both options for their review. The Authority further refused to take a ratification vote on Option 2. In the PDO, the Hearing Examiner concluded that the Authority committed unfair practices by presenting both options to the bargaining unit members after AFSCME had rejected Option 1 and the members had voted to ratify Option 2. The Board upheld the Hearing Examiner's PDO.

Thereafter, Mark Kiddo and seven other employees filed a duty of fair representation claim against AFSCME. During this time, the Authority scheduled a meeting to hold a ratification vote on Option 2 in order to comply with the remedy in the Board's PDO. However, the Erie County Court of Common Pleas (CCP) enjoined the Authority from voting on or entering into a contract with AFSCME until the employees' duty of fair representation claim was resolved. AFSCME appealed and the Board filed an Amicus Brief with the Court, asserting that the CCP's Order precludes the Board's ability to enforce the PDO and PERA where the Authority was found to have committed multiple unfair practices.

On appeal, the Commonwealth Court determined that the employees' allegations of immediate and irreparable harm were speculative because they were based on what may happen when the Authority votes on whether to ratify Option 2 and that the Board's PDO did not require the Authority to ratify Option 2. Concerning the employees' assertion that the benefits and wages in Option 2 are less favorable than those in Option 1, the Court concluded that such harm is economic in nature and can be remedied by damages. Therefore, the Court reversed the CCP's order granting the employees' preliminary injunction request because there were no reasonable grounds in the record to support the conclusion that the employees would suffer from irreparable, immediate harm that was not speculative and could not be remedied by damages. No appeal from the Court's decision was filed.

C. PLRB Cases

1. *International Brotherhood of Teamsters, Local No. 8 v. Pennsylvania State University, 51 PPER 47 (Final Order, January 21, 2020).*

In this case, the parties' collective bargaining agreement (CBA) contained a provision (Article 21.6) permitting the Union to seek review of certain jobs it believed were misclassified

for coverage within the bargaining unit consisting of all regular technical service employees employed by the University. Any disputes between the parties concerning the proper classification of the contested jobs were to be settled through grievance arbitration. On September 21 and 25, 2018, the Union sent three letters to the University pursuant to Article 21.6 of the CBA, listing various job classifications that it believed should be in the bargaining unit, which totaled approximately 1,100 specific positions. On September 21, 2018, the Union also sent a letter to the Arbitrator delineating fifteen Article 21.6 grievances regarding alleged job misclassifications which had already been reviewed by the University and had been assigned to him for an arbitration hearing.

The University notified the Union that it would not proceed with further consideration of the 1,100 specific positions listed in the September 21 and 25 letters or process any grievances pursuant to Article 21.6 of the CBA. In doing so it relied upon a prior Proposed Order of Dismissal issued by a Board Hearing Examiner on August 27, 2018, holding that Article 21.6 could not be used by the Union as part of a systematic campaign to accrete a large number of job classifications into the unit by filing serial, piecemeal petitions so as to avoid giving the targeted employees a say in their representation in a proper election held pursuant to the requirements of *Westmoreland Intermediate Unit*, 12 PPER ¶12347 (Order and Notice of Election, 1981).

The Union filed a Charge of Unfair Practices alleging that the University violated Section 1201(a)(1), (5), and (8) of PERA by refusing to comply with Article 21.6 of the CBA and a grievance arbitration award upholding that provision. The Board found that arbitration of grievances arising under the provisions of a collective bargaining agreement is mandatory under Section 903 of PERA and that all disputes concerning arbitrability of a grievance must first be submitted to an arbitrator for determination, citing *PLRB v. Bald Eagle Area School District*, 499 Pa. 62 (1982) and *Chester Upland School District v. McLaughlin*, 655 A.2d 621 (Pa. Cmwlth. 1995), *aff'd per curiam,* 544 Pa. 199 (1996). Accordingly, the Board held that the University must make its jurisdictional argument to the arbitrator on the fifteen grievances that were pending in arbitration. However, the Board also concluded that the Union was utilizing Article 21.6 to accrete hundreds of job classifications into the unit through the grievance process, thereby bypassing the Board's jurisdiction to determine whether a class of employees share a community of interest and should be included in the unit. The Board went on to hold that the Union was required to accrete classifications of jobs through the Board's unit clarification

proceedings or, if necessary, a proper showing of interest and an election held pursuant to the requirements of *Westmoreland Intermediate Unit*.

2. *Fraternal Order of Police Lodge 5 v. City of Philadelphia, PF-C-15-42-E, PF-C-15-53-E (Final Order, July 16, 2019).*

The FOP filed a Charge of Unfair Labor Practices alleging the City violated Section 6(1)(a) and (e) of the PLRA by unilaterally implementing a policy concerning the use of force by police officers, under which the City would publicly release the names of police officers involved in officer-related shootings. The FOP then filed a second Charge alleging that the City violated Section 6(1)(a), (c), and (e) of the PLRA by refusing to provide protection for a police officer after releasing his name to the public following an officer-involved shooting.

On appeal from the Hearing Examiner's PDO, the Board agreed with the Hearing Examiner that the City had a non-discriminatory business reason why it was unable to provide 24/7 security detail for a police officer who lived outside the City limits. Therefore, it held that the FOP failed to establish an unlawful discriminatory motive under Section 6(1)(c) of the PLRA. The Board also determined that the original Charge and Amended Charge were premature, inasmuch as it was filed prior to actual implementation of the City's use of force directives and its protocol for releasing the names of officers involved in shootings. However, the Board went on to hold that, if the Charge had not been premature, it would find that the City's protocol for the release of police officer's names when they were involved in a shooting would be a mandatory subject of bargaining pursuant to the test announced in *Borough of Ellwood City v. PLRB*, 998 A.2d 589 (Pa. 2010) and *City of Philadelphia v. International Association of Firefighters, Local 22*, 999 A.2d 555 (Pa. 2010). Specifically, the Board found that the City's managerial interest involved in releasing the names of police officers within 72 hours of an officer-involved shooting would not be unduly burdened by the City having to bargain with the FOP over the policy and protocols for peremptorily releasing the names of officers involved in shootings.

3. *American Federation of State, County and Municipal Employees District Council 47, Local 2187, AFL-CIO v. City of Philadelphia*, *PERA-C-17-43-E (Final Order, July 16, 2019).*

This case stems from a previous Charge of Unfair Practices, where the Board had held that the City violated its duty to bargain under Section 1201(a)(1) and (5) of PERA when it unilaterally implemented changes to the DROP pension benefits for employees represented by District Council 47, Locals 810, 2186 and 2187. The City subsequently filed a Petition for Review with the Commonwealth Court, contesting the Board's finding of an unfair practice. The litigation was settled on November 2, 2016, and the appeal was withdrawn. Thereafter, the Local 2187 President sent a letter to the City informing it that the Local 2187 membership needed to ratify the DROP settlement agreement. After the City Council passed an ordinance implementing the DROP pension benefit changes consistent with the settlement agreement, Local 2187 filed a Charge of Unfair Practices alleging that the City violated Section 1201(a)(5) of PERA by unilaterally reducing the DROP pension benefits without the agreement of Local 2187 or ratification of the settlement agreement by its members.

In the PDO, the Hearing Examiner dismissed the charge, concluding that the District Council 47 President had apparent authority to bind Local 2187 to the terms of the settlement agreement. The Board, in affirming the Hearing Examiner's decision, found that there was ample evidence in the record to support the finding that the District Council 47 President possessed apparent authority to enter into the settlement agreement with the City on behalf of Local 2187 and that the City had no reason to doubt that authority. For example, the record showed that for nearly two decades the District Council 47 President was the chief negotiator for the locals, that counsel for District Council 47 indicated that the District Council 47 President had authority to sign the agreement in that it constituted settlement of litigation and that AFSCME's Region Director had sent a letter to the District Council 47 President detailing this authority.

The Board additionally found that at no time between August 2016, when District Council 47 and the City started settlement negotiations, and November 2, 2016, when the settlement agreement was executed by both parties, did Local 2187 notify the City of the alleged need for ratification of the settlement agreement. The Board further concluded that Local 2187's notification to the City of the alleged requirement for ratification after the City had withdrawn its appeal in the Commonwealth Court on November 17, 2016 was not sufficient to overcome the

binding effect of the settlement agreement on Local 2187. Therefore, the Board held that the City did not violate its duty to bargain in good faith under Section 1201(a)(5) of PERA, rescinded the complaint and dismissed the Charge. No appeal was filed to the Board's decision.

4. *Shamokin Area Education Association, PSEA/NEA v. Shamokin Area School District, 50 PPER 54 (Final Order, February 19, 2019).*

The Association filed a Charge of Unfair Practices, alleging that the District violated Section 1201(a)(1) and (5) of PERA when it dealt directly with a newly hired teacher (Mr. Kramer) by offering him additional compensation above that provided in the salary schedule in the parties' CBA. In the PDO, the Hearing Examiner concluded that the District violated its duty to bargain when it unilaterally offered Mr. Kramer an additional $2,000 yearly compensation contingent upon satisfactory annual evaluations. By way of remedy, the Hearing Examiner ordered the District to immediately rescind, on a prospective basis only, the unilateral agreement with Mr. Kramer for additional compensation and return Mr. Kramer to the salary and benefits he would be entitled to under the CBA.

On appeal to the Board, the District asserted that it was not required to bargain with the Association because the additional $2,000 yearly compensation offered to Mr. Kramer was consistent with the parties' past practice of providing incentive bonuses for high-need positions. The District further asserted that the current collective bargaining agreement (CBA) and salary schedule did not negate the parties' practice. The Board initially noted that the 2013-2018 CBA included the parties' first negotiated salary schedule, setting forth the salary steps for newly hired employees. The Board went on to state that to hold that the District could unilaterally exceed the contractual salary schedule would contradict both the general purpose of negotiating a salary schedule into the parties' CBA in the first instance, as well as the District's statutory obligation to bargain in good faith over employee wages. The Board further stated that even if the District had offered bonus compensation under prior contracts that did not contain a salary schedule, the Association was not prohibited from asserting its right to bargain over future changes to the bargaining unit members' wages.

5. *United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO-CLC v. University of Pittsburgh, PERA-R-17-355-W, PERA-C-19-95-W (Order Directing Remand to Hearing Examiner for Further Proceedings, August 18, 2020).*

The Union filed a Petition for Representation with the Board, seeking to represent a unit of graduate students on academic appointment who serve as teaching assistants, teaching fellows, graduate student assistants, and graduate student researchers. After a majority of the valid ballots cast in the election were for no representative, the Union filed a Charge of Unfair Practices pursuant to Section 95.58(a) of the Board's Rules and Regulations, requesting a new election on the alleged basis that the University violated Section 1201(a)(1) and (7) of PERA. It also filed an objection to the conduct of the election under Section 95.57 of the Board's Regulations.

Concerning the Union's objection to the conduct of the election, the Hearing Examiner concluded in the PDO that the Board did not engage in misconduct by allowing the University to maintain a list of voters, by permitting certain University clerical supervisory employees to be election watchers, or by its procedure in checking voter identification. The Hearing Examiner further concluded that the Union failed to present evidence that any eligible voter was interfered with by Board policies to such an extent as to materially affect the election results.

Exceptions to the Hearing Examiner's PDO were filed by both the Union and the University. Regarding the University's actions in keeping a voter list during the election, the Board found that the mere maintaining of a voter list during an election, in and of itself, is not *per se* coercive, in that it facilitates the watchers' responsibility to identify and challenge those voters that they believe to be ineligible to vote. The Board further concluded that the University could not be found to have committed an unfair practice where its conduct was in conformity with the Board's long-standing policy of permitting such conduct. The Board also noted that the record was devoid of substantial evidence to support a finding that under the totality of the circumstances, the mere maintenance of a list of voters, standing alone, would have a tendency to coerce a reasonable employee in violation of Section 1201(a)(1).

In dismissing the Union's exception concerning the University's election watchers, the Board stated that it was within its discretion to determine the appropriateness of the choice of election watchers by the parties and that the Board Election Officer did not err in permitting the University's employees to be watchers after a determination that they were senior clerical supervisors who did not supervise graduate assistants or interact with them. The Board further

concluded that the University did not violate Section 1201(a)(1) or (7) of PERA where the Board allowed the clerical supervisors to be watchers for the University during the election, and no evidence was presented to establish that the presence of the University's watchers had any effect on the voters, citing *Pittston Hospital v. PLRB*, 1 PPER 89 (Decision of PLRB, 1971).

Concerning the University's statement to graduate assistants that "under PA law, stipends would be frozen under 'status quo' and annual stipend increases would not occur," the Board concluded that the University's statement was not a threat or a substantial departure from the truth, but merely an accurate explanation of Board policy that maintenance of the status quo during contract negotiations does not include the continuation of periodic wage adjustments. Therefore, the University's statement was not a violation of Section 1201(a)(1) of PERA.

With regard to the University's exceptions, the Board vacated the Hearing Examiner's holding that the University's statement made on its web page that graduate assistants would lose the ability to have an individual say in their specific program and the University's chart indicating that specific topics could not be bargained violated Section 1201(a)(1) of PERA. The Board concluded that those statements by the University, while ambiguous and subject to differing interpretations, were not substantial departures from the truth as they were supported by statutory provisions under PERA and Board case law.

However, the Board agreed with the Hearing Examiner that Dr. Little's statement in his April 17, 2019 email that he was "surprised to see that only 81 students from the School of Engineering (whole school) have voted so far" made directly to the chemical engineering graduate assistants during the election would have the tendency to coerce the graduate assistants in going to the polls or for whom to cast their secret ballot in the election. The Board found that regardless of whether Dr. Little's intentions were pure or his information was inaccurate, when viewed in the totality of the circumstances, his statement would have a coercive effect on the chemical engineering graduate assistants that the voters were being surveilled at the polls by the Chair of their department and supervisors of their graduate program.

Because the Union only lost by 37 votes, the Board concluded that the 34 chemical engineering students who received Dr. Little's email, along with the 14 challenged ballots, could have materially affected the outcome of the election. Therefore, the Board remanded the matter

to the Hearing Examiner for a determination of the validity of 11 of the 14 challenged ballots cast during the election. This matter is currently pending before the Hearing Examiner.

6. *Faculty Federation of Community College of Phila., Local 2026, AFT v. Philadelphia Community College (Final Order, April 21, 2020)*

The Federation filed charges alleging a violation of PERA Section 1201 (a) (1), (3) and (5) stemming from the College's unilateral decision (after the current CBA expired and negotiations were underway) to hold a Winter Term for the 2017-2018 academic year. In the PDO, the Hearing Examiner concluded that the College did not commit an unfair labor practice, concluding it had the inherent managerial right to determine the academic programs it would offer pursuant to Section 702 of PERA.

On exceptions, the Board upheld the PDO, holding that the College's action did not violate the *status quo* after the CBA expired. Specifically, it found that the absence of a Winter Term contained within the expired CBA's attached school calendar did not constitute a waiver by the College of its managerial right to determine the programs it would offer students. It also relied on evidence showing that, at all times, the College made it clear that it was going to implement a Winter Term regardless of whether the Union agreed to the same. Chairman Darby dissented, based on evidence showing that although Winter Terms were offered in the past, the College had always sought the Federation's concurrence and had expressly included such a proposal in its list of contract demands for the new CBA.

D. Arbitration Awards

1. *Teamsters Local No. 776 and Borough of Gettysburg, Pa. Bureau of Mediation Case #2018-0010 (Darby, J., Arb., 2019)*

In Pennsylvania, as in other states, there has been an increase in criminal investigations of police officers for various types of alleged misconduct. Some of these investigations have spawned termination cases resulting from District Attorneys' Offices determining that such officers cannot be relied on to provide sworn testimony in future cases.

In the *Gettysburg* case, the Borough police department referred a matter involving one of its officers to the DA's Office for a criminal investigation. The officer was held out of service for

several months pending the investigation, at which time no charges were filed. The Borough returned the officer to work. Shortly thereafter, the DA sent the Borough a letter indicating that based on the investigation it "will not participate in any future cases which are based solely upon the uncorroborated observations and testimony of [the officer]." Relying upon this letter, the Borough charged the officer with neglect of duty and conduct unbecoming.

During the officer's Loudermill hearing, the Borough informed the officer of the letter it received from the DA. However, there was no evidence that it informed the officer of the contents of the DA's letter, nor shared with him the basis upon which the DA's office had deemed the officer to be untrustworthy. The Borough maintained that it had just cause to terminate the officer on the grounds he could no longer perform the primary duties of a police officer.

The arbitrator held that the Borough lacked just cause to terminate the officer since it failed to satisfy its due process obligations pursuant to Loudermill. Namely, the Borough never provided the officer with a copy of the DA's letter or a description of his alleged wrongdoing supporting the charges. While acknowledging the need for law enforcement to conduct confidential investigations, as well as the requirement for officers to be credible and trustworthy, the arbitrator found that "these interests cannot completely eviscerate the notice rights of a public employee prior to being terminated." Otherwise, "it would be akin to an employer telling an employee that he or she is being fired for being a liar, but 'we can't tell you why'." The arbitrator also rejected the Borough's claim it was simply separating the officer for being unqualified, inasmuch as the Borough brought formal discipline charges against the officer for neglect of duty and conduct unbecoming.

TEXAS

Public Sector Summary 2020

William E. Hartsfield, Maretta Comfort Toedt, Don E. Williams

Caution: Inclusion of a decision in the summary does not mean that it is an accurate application of the law to the facts.

Community College

A community college publicly censured a trustee for publicly criticizing other trustees and for suing the board. That public reprimand of an elected official for speech addressing a matter of public concern gave rise to a §1983 claim. *Wilson v. Houston Community College System*, 955 F.3d 490 (5th Cir. 2020).

City Employee

A city's on call policy was not a contract because the manual stated the policy was not a contract. *City of Denton v. Rushing*, 570 S.W.3d 708 (Tex. 2019).

Teachers (K-12)

A community's negative reaction to a gay teacher is not a basis for the school district to treat that teacher differently. *Bailey v. Mansfield Indep. School Dist.*, 425 F. Supp. 3d 696 (N.D. Tex. 2019).

"Good cause" to fire a teacher is the "failure to meet the accepted standards of conduct for the profession as generally recognized and applied in similarly situated school districts in this state." Not meeting a district policy implementing state law is "good cause." *North East Independent Sch. Dist. v. Riou*, 598 SW 3d 243 (Tex. 2020) (interpreting Tex. Educ. Code §21.156).

What happens if Texas teachers strike?

Public Employees

Protest and Right to Strike Rights in Texas

Pulliam v City of Austin, Cause No. D-1-GN-16-004307, (Travis County 419 Dist. Ct.) challenged the release time (time off for association work) for Austin firefighters. The trial court granted a motion to dismiss in 2017. But that order was not final. An amended petition and an amended answer were filed in late 2020. A bench trial is set for December 7, 2020.

Texas Whistleblower Act

Per the Texas Whistleblower Act, a public employer may not discipline an employee who in good faith reports a violation of law by the employer entity or another public employee to an appropriate law enforcement authority. Tex. Gov't Code Ann. § 554.002(a).

A nurse believed compulsory shifts violated a law prohibiting mandatory overtime. She complained to the human resources and legal departments. When fired later, the nurse asserted Whistleblower retaliation. She was not protected because neither department was a law enforcement authority. *Reding v. Lubbock Cty. Hosp. Dist.*, No. 07-18-00313-CV, 2020 WL 1294912 (Tex. App.—Amarillo Mar. 18, 2020) (mem. op.).

A public employee complained to a law enforcement agency that a county judge installed listening devices in areas used by criminal defense counsel to confer with clients. The Whistleblower Act protected her because she could reasonably have believed that the listening devices violated the law, i.e., a judge's statutory duty to protect the attorney-client privilege. *Galveston Cty v. Quiroga*, No. 14-18-00648-CV, 2020 WL 62504 (Tex. App.—Houston [14th Dist.] Jan. 7, 2020) (mem. op.).

Texas Civil Service for Firefighters and Police Officers

Texas does not have a public employment relations board. Instead, the Texas Local Government Code protects police and fire employees if the city adopts its Chapter 143 and/or Chapter 174.

Under Chapter 143, a firefighter or police officer may elect to have certain disciplinary matters heard by a hearing examiner, i.e., an arbitrator. Generally, hearing examiners are selected from lists of labor arbitrators provided by the American Arbitration Association (AAA) or the Federal Mediation and Conciliation Service (FMCS). Unless modified by bargaining, Chapter 143 limits the hearing examiner to sustaining the termination, reversing it, or reducing the discipline to a 15-day or less suspension. §§143.052 and 143.053.

Per Chapter 174, firefighter or police associations may bargain with cities, e.g., to alter Chapter 143 disciplinary procedures.

Court Decisions

A hearing examiner's decision is final unless "procured by fraud, collusion, or other unlawful means." Tex. Local Gov't Code § 143.057(c), (j). The hearing examiner must only consider evidence presented at the hearing. Tex. Local Gov't Code §143.010 (g).

A fact issue existed whether a hearing examiner relied on internet research outside of the hearing, causing the decision to be procured by lawful means. Still, the hearing examiner did not exceed her jurisdiction by reinstating the firefighter because the city had denied the firefighter due process. The civil service rules stated the hearing examiner was to decide whether the city afforded due process in the disciplinary process. *City of Fort Worth v. O'Neill*, No. 02-18-00131-CV, 2020 WL 370571 (Tex. App.—Fort Worth Jan. 23, 2020) (mem. op.).

Hearing Examiner Decisions

Implementing changes in discipline. Hearing examiners are keenly aware that police and fire chiefs, citizens, and the media criticize hearing examiners who overturn discipline based on existing discipline standards, i.e., disparate treatment. When cities tell firefighters and police officers of new discipline standards, hearing examiners apply them.

The Houston Police Department issued a new DWI policy. The police chief emailed two videos describing the new policy. The first told officers that "if Internal Affairs cites an employee for driving while intoxicated, then that employee should expect to be indefinitely suspended," i.e., fired. In the second, the chief said there was "no excuse for drunk driving," and encouraged employees to use Uber, Lyft, or a ride program offered by the officers' union. A

third email addressed the "DWI Scourge" after a drunk driver killed a Dallas police officer. The hearing officer held the city showed it had cause to indefinitely suspend, i.e., fire, an officer based on the new DWI policy. *Eason v. City of Houston* (Lori LaConta, March 25, 2019).

Due process requirements. Similarly, chiefs, citizens, and the media criticize hearing examiners who overturn discipline based on due process violations by the city.

An officer responded to a 911 call for a mentally disturbed citizen. After 23 minutes, the officer decided not to wait for the mental health representative. Believing the citizen was moving to kick his partner, the officer grabbed the citizen and twice applied a ceratoid restraint, causing the citizen to lose consciousness. The police chief suspended the officer for 120 hours.

The hearing examiner sustained the policy violation, but he found that the city did not provide the officer with adequate due process and reduced the suspension to 40 hours. The hearing examiner returned the officer to work based on due process flaws including: 1) the city did not give the officer notice of the charges before the *Loudermill* meeting; 2) the *Loudermill* meeting "was more of an extension of the investigation than an opportunity" for the officer to reply to the charges; 3) the city considered performance and conduct matters not in the suspension notice; and 4) the senior officer present during the incident received only a letter of reprimand for his part in the encounter. *Sumrall v. City of Abilene* (E. DeWayne Wicks, April 22, 2019). The city has challenged the decision, City of Abilene v. Patrick Sumrall; Cause No. 27,733-B, In the 104th Judicial District Court, Taylor County, Texas, filed May 28, 2019, and appears to have disciplined the officer a second time.

https://abilenetx.gov/DocumentCenter/View/10735/Notice-of-Appeal-PDF?bidId=

Collective Bargaining Public Employees

Texas local government Code Chapter 174 allows collective bargaining between a city and a firefighter or police association, i.e., a union.

The collective bargaining agreement (CBA) between the City of Houston and the Houston Professional Fire Fighters' Association, Local 341, included an agreement to arbitrate certain disputes. The local grieved firing firefighters who did not achieve paramedic certification. The city challenged the arbitration award reinstating three firefighters. It asserted the CBA did not grant the arbitrator that authority. Relying upon the common law, the court concluded an

arbitrator has broad discretion in fashioning an appropriate remedy, so the arbitrator did not exceed her authority by reinstating the terminated employees. City of Houston v. Houston Prof. Fire Fighters' Assoc., No. 14-18-00418-CV, 2020 WL 1528078 (Tex. App.—Houston [14th Dist.] Mar. 31, 2020) (mem. op.).

Municipalities

2019 Employment Law Manual for Texas Cities https://www.tml.org/DocumentCenter/View/1510/EMPLOYMENT_LAW_MANUAL_FOR_TEXAS_CITIES-2019_020620-UPDATE.

Legislation

The next Texas legislative session begins on January 12, 2021. Based on the recent election, Republicans appear to have retained control of both houses.

Some Texas lawmakers plan to push police reforms to address racial profiling during traffic stops, ban police from stopping drivers on traffic violations as a pretext to investigate other potential crimes, limit police searches of vehicles, and address other jail and policing reforms. In 2017, the Texas Legislature enacted a bill mandating county jails divert people with mental health and substance abuse issues toward treatment and requiring that independent law enforcement agencies investigate jail deaths.

In response to defunding the police efforts in Austin, Texas, Governor Abbott considered legislation for the Texas Department of Public Safety to take over the duties of the Austin Police Department. (https://www.texastribune.org/2020/09/03/texas-greg-abbott-austin-police/).

Also, Governor Abbott proposed legislation to punish a city that defunds the police. The proposal is for cities that defund their police departments to lose their annexation powers, and that any areas and any residents ever annexed by that city in the past will have the power to vote to de-annex them from the city. (https://www.statesman.com/news/20200910/abbott-unveils-new-plan-to-punish-cities-that-cut-police-spending). Earlier, the governor had proposed to withhold property tax revenue growth from such cities. (https://www.statesman.com/news/20200818/texas-gop-leaders-unveil-plan-to-freeze-property-tax-revenue-after-austin-vote-to-cut-police-spending).

Police Training

The Texas Commission on Law Enforcement has added implicit bias training to the Basic Peace Officer Training course following George Floyd's death.

Dues

Per Texas Attorney General Opinion, public employers must ensure that employees voluntarily consent to a union dues deduction. A one-time, perpetual consent to a payroll deduction for dues is inconsistent with *Janus*; however, consent for one year from the time given is likely valid. (https://www.texasattorneygeneral.gov/sites/default/files/opinion-files/opinion/2020/kp-0310.pdf).

WISCONSIN

2020 Report

George R. Fleischli

Legislation

In April of 2020, the Wisconsin Legislature passed legislation to take advantage of the availability of federal funds and otherwise provide relief from the economic impact of the COVID-19 pandemic on individuals and businesses. It was signed by the governor. Among other things, it liberalized the eligibility requirements for unemployment compensation. Due to that change, and the massive increase in the number of unemployed individuals, the Department of Workforce Development quickly fell behind in its processing of claims, and has not yet caught up on the backlog.

The Wisconsin Legislature has not met since passing the COVID-19 legislation. Both houses were, and continue to be, controlled by a Republican majority. The governor, who is finishing his second year in office, is a Democrat. Currently, there is some talk about convening in an effort to pass a bipartisan bill dealing with public safety and economic issues related to the COVID-19 pandemic. If that effort is successful, it will likely contain an extension and possibly an expansion of unemployment compensation benefits. However, there would appear to be little or no prospect of a change in the terms of Act 10, which severely restrict collective bargaining by all public employees except law enforcement and firefighting personnel. Public transportation workers were also excluded so that local governments would remain eligible, under UMTA, for federal funds.

State Labor Board Activity

Since the enactment of Act 10, the activities of the Wisconsin Employment Relations Commission (WERC) have changed dramatically. It continues to administer the private sector law (Wisconsin Employment Peace Act) and the provisions of the state and local collective bargaining laws (State Employment Labor Relations Act and Municipal Employment Relations Act), as modified by Act 10.

Prior to Act 10, the jurisdiction of the WERC had been expanded to include appeals by state employees under the provisions of the state's civil service laws. With the enactment of Act 10, the WERC acquired primary jurisdiction for appeals of many personnel actions previously subject to arbitration under the collective bargaining agreements covering state employees. It processed 94 of those cases in FY18–19. By legislative action the size of the commission has been reduced to one commissioner. There are four staff members—two attorneys, a paralegal and an office manager.

Those municipal employers who did not already have a policy in place prior to Act 10 to hear appeals of personnel actions have since adopted them. They often include a Hearing Officer (HO) procedure. The WERC offers a service providing HOs upon request for a flat fee of $800. It will also provide the parties to such proceedings with panels of outside arbitrators from which to select a HO. The WERC gets few requests of either type. Many municipal employers use local lawyers to serve as HOs, on an ad hoc basis.

Law enforcement and firefighting personnel continue to have most of the rights they had under the terms of the collective bargaining laws, as they existed before Act 10. However, there has been a significant curtailment in their right to bargain (or take to interest arbitration) proposals having to do with health insurance and retirement. They can no longer negotiate fair-share agreements, due to the Supreme Court's decision in the *Janus* case. However, for a variety of reasons unique to their working conditions, most law enforcement and firefighter unions continue to enjoy nearly100% membership.

The number of cases the WERC processes in a year has dropped dramatically. In FY18–19 it processed 100 cases, most of them dealing with mediation (30), grievance arbitration (27), and initial election petitions (18). It processed16 unfair labor practice complaints in FY18–19 and issued three decisions in calendar 2020.

The number of interest arbitration awards involving law enforcement personnel and firefighters that have been issued in the last five years has varied from a high of three in 2016 to a low of none in 2017. One award was issued in each of the last three years.

If general employees (non-law enforcement, firefighting, and public transport employees) wish to be represented by a labor organization for purposes of collective bargaining, they need to

seek certification or recertification every year. In order for a labor organization to be certified, 51% of the employees in the bargaining unit must participate and vote in favor of such representation. State and municipal employers are prohibited from bargaining with a labor organization except with regard to the enactment of an annual increase in the basic wage rate, not to exceed the cost of living. The negotiated increase can exceed the cost of living if it is approved by a referendum. Strikes are prohibited and interest arbitration is no longer available to resolve an impasse.

The WERC processes hundreds of election petitions every year, mostly involving teachers seeking certification or recertification. The commission resolves all legal questions and issues the certifications. It utilizes the services of the American Arbitration Association (AAA) to conduct the actual vote. Recently, the AAA conducted 251 votes covering 248 bargaining units of school district employees and the three remaining bargaining units of state employees (attorneys and two craft unions). The unions won in 246 or 98% of the elections.

It is not illegal for public employees to belong to a labor organization in Wisconsin. Many public employees are members of non-certified labor organizations, which provide them with various membership benefits and representation services. An uncertified labor organization can function as a lobbyist for general employees, provided it complies with the laws and rules applicable to lobbyists.

Strikes, Notable Settlements and Impactful Awards

There were no strikes, notable settlements or impactful awards in the public sector of Wisconsin in 2020. So far, only one interest arbitration award has been issued. At issue were wage increases sought by firefighters in Caledonia, Wisconsin. It reflects that prior to the COVID-19 pandemic, police and firefighters were reaching settlements in the range of two to three percent per year, often with the initial cost reduced by splitting the increases.

CLOSING COMMENT

I decided to close out the State and Local Public Sector Report by including a portion of the National Academy of Arbitrators President Dan Nielsen's "President's Corner" article which appeared in the Winter 2021 edition of the Chronicle. I believe the comments are pertinent, compelling, and they speak for themselves.

Tom Nowel, Committee Chair

President's Corner – Winter Edition

Other things have been unaffected by the pandemic. One of these is the persistent failure of the news media to understand even the basics of how arbitration works, particularly in high profile cases. The most recent example, of course, is the *New York Times* editorial "Ax the Arbitrators," which urged that arbitration be eliminated from police discipline cases. It follows in the footsteps of similar editorials and news stories from Washington, DC; Miami; Cleveland; Chicago; and Minnesota, among others, and it tracks their mistakes as well.

The general pattern of these stories is to recite a series of dramatic-sounding cases of egregious misconduct, and the explosive revelation that all of these cretins are still working as police officers, having been inexplicably reinstated by some arbitrator. There will generally be some quotes from outraged Chiefs or Superintendents about the impossibility of discharging police officers, and a citation of statistics about the number of officers reinstated through arbitration. This will be followed by the conclusion that arbitration is a rigged system, because the unions get to pick the arbitrators, the arbitrators want to get repeat business by ruling in favor of the unions, and then an observation that the arbitrators are unelected decision makers, usually from out of town.

There are multiple problems common to these would-be exposés, including shaky statistics and a failure to distinguish between levels of misconduct. The most serious difficulty is that the writers proceed from the assumption that the arbitrator is an all-powerful demigod, who can do whatever he or she likes with a case. They do not recognize, or do not take seriously, the notion that the arbitrator is constrained by the contract between the parties, and the statutory

framework in effect in that jurisdiction. They complain that arbitrators will reduce discipline against misbehaving employees simply because similar behavior in the past was treated more leniently. They will object to disturbing discipline just because the employer failed to meet clear deadlines in the contract or the statute for imposing that discipline. Or they will take issue with the arbitrator's judgment that the evidence does not really prove the misconduct. All of these are routine aspects of life under a just cause provision, or under a Law Officer's Bill of Rights, but are treated as evidence of gross partiality in the media.

It has long been a fact of life that one of the benefits of an arbitration clause is that it gives the losing party someone to blame. This is particularly the case in the public sector. And, by and large, that is part of our deal. We issue our awards, and keep our mouths shut when the decision is publicized, mischaracterized, or criticized. That is the professional thing to do, and that is the ethical thing to do. It is also, usually, the wise thing to do. Responding to reporting about a given case is not effective. It comes off as self-justifying and self-serving. No one is interested in listening to us explain that we are not bad people, and no one wants to hear that it is not our fault.

So, you may ask, how is it that your President sent a rebuttal to the *New York Times* editorial page in response to "Ax the Arbitrator"?

The important distinctions between the *Times* editorial and the run of the mill "Arbitrator Nielsen reinstates lunatic" type of story are: (1) the breadth of the allegations, (2) the scope of the errors, (3) the wrongheadedness of the conclusions, and (4) the prominence and presumed credibility of the publication. The *Times* editorial indicts the entire profession as one of the principal impediments to police reform, based on unreliable statistics and serial misstatements about how the arbitration system functions and how arbitrators do their work. It ignores the role of the parties in instructing the arbitrator through their contracts, and through their practices. It ignores the ability of public bodies to modify discipline procedures if that is in the public interest. And it does all of these things in a Sunday editorial in the supposed "newspaper of record" for the nation. In short, it is a perfect storm of misinformation, one which in my judgment required a measured response. It is my hope and expectation that the remainder of my term will pass without the need for any similar actions, but if the occasion arises, I will be guided by the idea that we are arbitrators, not pinatas.