NATIONAL ACADEMY OF ARBITRATORS

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

2021 Annual Report

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INTRODUCTION

The State and Local Public Sector Committee was assembled and organized by the 2020 President of the National Academy of Arbitrators, Dan Nielsen, and, with the advice and consent of the Executive Committee, a number of Academy members were appointed to serve on the committee for the 2021 term by NAA President Susan Stewart. The charge of the committee 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 2021 should be submitted by the end of January 2022. The Chair of the Committee may be called upon to coordinate with the DALC (U.S.) and Academy leadership on issues involving state and local designating agencies.

This is the second annual report of the State and Local Public Sector Committee. The 2020 report was the first. Nineteen state reports were included in the 2020 report. A significant amount of information was included. Eleven state reports are included in the 2021 report. A number of committee members indicated that there were few new developments in 2021 in a number of jurisdictions. The 2021 report could be considered as a supplement to the 2020 report. Nevertheless, the 2021 report includes interesting and impactful developments. The evolution of Police discipline and arbitration continues to be of great interest in a number of jurisdictions. Those members who attended the NAA annual meeting in Los Angeles this past fall heard an intriguing and challenging session on this issue. This report also includes an interesting article regarding an arbitration award which was sustained by the Florida courts following an attempt to vacate.

The members of the State and Local Public Sector Committee who submitted reports for the 2021 edition are as follows.

Arizona: Richard Fincher
Colorado: Don Williams
Florida: Tom Nowel
Illinois: Steve Bierig, Peter Myers, Brian Claus
Massachusetts: Marc D. Greenbaum
Michigan: Michael Long
New York: Howard Edelman, David Stein, Arthur Riegel, David Reilly, Haydee Rosario, Ruth Moscovitch
Ohio: Tom Nowel
Pennsylvania: James M. Darby, Joan Parker, Lawrence Coburn
Texas: William Hartsfield, Maretta Comfort Toedt
Wisconsin: George Fleischli

Thank you to immediate past NAA President, Dan Nielsen, for creating this committee and current NAA President, Susan Stewart, for appointing 2021 members of the Committee. Thank you to all of the members of the Committee who submitted reports for the 2021 edition and who committed time and effort to make this an asset and resource for the National Academy of Arbitrators and many others involved in public sector labor relations.

Thomas J. Nowel, NAA
Committee Chair

ARIZONA

State and Local Public Sector Report for the State of Arizona

National Academy of Arbitrators—November 2021
Richard Fincher, NAA

1. History and Social Context

Unchanged from prior year

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 IWW miners). This history of animus has rippled into the public sector.

Today, the 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 (UFCWU) and the Teamsters.

2. History of Anti-Union Animus in Private Sector

Unchanged from prior year
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

Unchanged from prior year
Absence of a public sector statute

Arizona does not have a state-wide 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
Unchanged from prior year

Arizonan Nomenclature in Labor Relations
Unchanged from prior year

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 National Labor Relations Act (NLRA).

Statute for Public Safety Employees
Unchanged from prior year

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 differed 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 has their own distinct retirement/pension fund, which has recently had continuing scandals with ethics and investments.

Union Density in the Public Sector of Arizona

There are 86,000 public sector employees in Arizona. The percentage of union membership is 6.5%. Most rural public employees are non-union, as well as academic employees. Teachers, fire and police are the most unionized sectors.

City of Phoenix Employment Relations Act (PERB)
Unchanged from prior year

In the 1960s, the City established a city-wide statute for labor relations, with five bargaining units, (including Fire and Police). The statute created the Public Employment Relations Board, composed of four citizens and a non-compensated Chair with significant experience in labor relations. 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 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 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, Technical Employee Association (ASPTEA)—City of Phoenix
Unchanged from prior year

In 1975, the ASPTEA unit was created, but not under the PERB. Originally, the unit was strictly meet and discuss, 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, over 3,500 members.

City of Phoenix Civil Service Board (CSB)
Unchanged from prior year

The City created the Phoenix Civil Service Board, which 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.

City of Phoenix Labor Relations

In the police department, the city relies on the Disciplinary Review Board (DRB) to make recommendations to the Police Chief for the appropriate level of discipline for sustained violations of City or Police Department policies. There are two community members.

In 2019, Phoenix Police Chief Jeri Williams announced a new process for releasing information; audio and visuals tied to critical incidents. The Phoenix Police Department's website states:

> In keeping with a commitment to provide greater transparency and accountability, the Phoenix Police Department will release Critical Incident Briefing (CIB) videos following high-profile incidents such as officer involved shootings … The videos will be shared directly with the community through the phoenix.gov/police/oisinfo website and the official Phoenix Police Department social media channels.

In Arizona, all police officers have protection under the Peace Officer Bill of Rights contained in Arizona Revised Statutes 38-1101 through 38-1116, which includes:

- Officers are not subject to disciplinary actions except for just cause
- Officers may have representation during administrative investigations
- Officers must be notified in writing of the specific nature of the investigation

Sustained allegations of misconduct by Phoenix Police Officers are subject to disciplinary action which ranges from written reprimands to suspensions of up to 240 hours, and termination.

In June 2019, hundreds of offensive Facebook posts from Phoenix police officers were made public by the Plain View Project, a database created by a team of Philadelphia attorneys in an effort to catalog bigotry and racism among police officers nationwide. Posts from Phoenix police officers and sergeants joking about Muslim people using goats as sex slaves, shooting former President Obama in the face, and killing protesters ignited backlash and prompted Phoenix Police Chief Jeri Williams to launch an internal investigation into the posts. The Phoenix Police Department has completed its investigation into those posts and has referred two sergeants to the Disciplinary Review Board.

Alleged Misconduct from Challenge Coins of Shooting

Phoenix Police Chief Jeri Williams was suspended for one day, and three assistant police chiefs have been demoted following an investigation into gang charges filed against rioters, and an inappropriate challenge coin commemorating the police response to a 2017 protest. A local

law firm was also tasked with investigating an offensive challenge coin created to commemorate the Phoenix police shooting of a protester in the groin with a pepper ball during an anti-President Donald Trump protest in August of 2017. The challenge coin at the center of the controversy depicted a man being shot in the crotch and featured the phrase, "Good Night Left Nut" on one side, and "Making America Great Again One Nut at A Time," with the dateline "Phoenix, AZ, August 22, 2017." The Chief was disciplined for her lack of oversight.

Community Assistance Program (CAP)

The City Council expanded CAP, which responds to mental and behavioral health calls, sometimes along with police. CAP is designed to return police and fire to their core duties and reduce repeat calls to 911. There was vocal opposition that CAP is submarginal as an embedded program in the fire department and connected to immigration, and rather should be independent.

Office of Accountability and Transparency (OAT)

The City Council is hiring 75 employees in the police department to improve accountability, transparency, and relationships with the community. OAT will be able to conduct investigations into police conduct and includes public record requests sand data analytics. OAT will also monitor or investigate use of force, in-custody deaths, and other community complaints. This was opposed by various law enforcement groups.

Previously, the CBA of the Phoenix police department prevented other city entities to investigate police conduct. The CBA has been modified to allow any city entity to investigate officers.

Prevailing Wage Proposals in the City of Phoenix

The City Council is debating whether to implement a prevailing wage policy on government funded projects, which require private contractors on construction projects to pay the prevailing wages determined by the UU DOL survey.

Recent Activity with Public Safety

At the state level, there has been no proposed legislation by the Governor or legislature for reform after the George Floyd murder in Minneapolis, Minnesota.

State Police

The Department of Public Safety is the last major police force to embrace body cameras. In May 2021, a bill was proposed to provide more rights for the Department to deny public record requests for body camera footage from state troopers. The law requires redaction whenever the department believes the video may contain information of persons with a reasonable expectation of privacy. The bill is opposed by advocates of public transparency. The bill was not enacted.

Maricopa County Sheriff's Office

After huge litigation, the external monitor of the county department issued its latest findings of progress under the new Sheriff Penzone. Progress includes training for making traffic stops, identifying problematic behavior, body camera use, and intervention with deputies with statistical difference in interactions with Latino people.

Arizona Supreme Court

Governor Ducey has appointed an employment lawyer to the Supreme Court: Kathryn King. Previously, she served as deputy general counsel for the Governor from 2015 to 2017. The Court has never had a Justice who was Asian, Native American, or Black, in its history.

Other Proposed Legislation Concerning Police

A bill has been proposed for a hold harmless provision, in which cities would not lose their share of state income taxes if they promised to not cut police budgets.

Governor Ducey signed a bill to increase the requirements for residents serving on police review boards, such as eight hours of training, background checks, and citizenship.

4. Citizen Initiatives to Bypass the Legislature on Labor Issues

Unchanged from prior year

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 these citizen initiatives and has made it harder for the initiatives to obtain the required signatures. Conservative nonprofit organizations are now routinely suing in state court to keep the initiatives off the ballot.

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

5. Impact Ligation by Conservative Nonprofits on Labor Issues

Unchanged from prior year

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 is when employees are allowed 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. One response was a letter sent by the Goldwater Institute to 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 walkout, 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)

Unchanged from prior year

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. In 2021, there was a press release to start an organizing campaign, but nothing since.
- 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 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 traditional 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 times, requires approval only of the Chancellor. Recently, the meet and confer process has 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 awhile.
- 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.
- By state legislation, MCCD and other community colleges have been allowed to offer four-year degrees that are of an occupational nature, such as teaching, nursing, and police/fire. This will require at least two years to implement with credentialing.
- Salt River Project (SRP) is a hybrid private and public sector employer providing electric services. Their private 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 associations 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 Janus Decision by USSC

In 2018, the *Janus v. American Federation of State, County, and Municipal Employees (AFSCME)* 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.

COLORADO

Colorado remains to have Administrative Law Judges (ALJs) and Hearing Officers as full-time state employees. Colorado remains to have collective bargaining for state employees. The Colorado Immunity Act remains in effect. The state employees must continue to exhaust their administrative remedies before bring tort claims against their employer.

Colorado provides an example of the challenges involved in categorizing state collective bargaining regimes. Although it was not in 2021, for firefighters, rights were spelled out in a state statute giving firefighters the right to form unions, meet and confer, and bargain collectively. However, police (or peace officers) in Colorado have no state-level laws specifically addressing these rights. The Colorado Firefighter Safety Act, however, does mention other public employees:

> C.R.S. 29-5-212 (1) – The collective bargaining provisions of this part 2 do not apply to any home rule city that has language in its charter on June 5, 2013, that provides for a collective bargaining process for firefighters employed by the home rule city. This part 2 applies to all other public employers, including home rule cities without language in their charters that address a collective bargaining process for firefighters. Based on this language and the home rule regulations, some police officers have the right to bargain collectively depending on local determination. The Colorado State Lodge Fraternal Order of Police has several member lodges that represent these bargaining units. Meanwhile, teachers in Colorado have taken a different approach to their apparent exclusion from state law and have secured their collective bargaining through case law: *Littleton Educ. Ass'n v. Arapahoe County Sch. Dist.,* 191 Colo. 411, 553 P.2d 793 (1976) – School boards have the authority to enter into collective bargaining agreements with representatives of their employees provided that the agreements do not conflict with existing laws governing the conduct of the state school system. Other state employees that don't fall into one of the three categories have their collective bargaining rights granted through an executive order, Executive Order Authorizing Partnership Agreements with State Employees (12/28/2007).

Commencing in January 2021, Unemployment Compensation & Eligibility provides that employees forced to leave work for domestic violence-related safety reasons may still be eligible for unemployment benefits, expands definitions of family members, and permits severance pay to be deducted from unemployment compensation. The Pay Equity & Discrimination bill prohibits wage discrimination based on sex and gender identity, prohibits employers from seeking an applicant's salary history and from barring employees from disclosing or discussing their wages. It mandates transparency in wages and advancement and provides damages for non-compliance. The new law allows employees to accrue at least one hour of paid sick and safe time leave for every 30 hours they work, up to a maximum of 48 hours per year. The law will apply to employers with 16 or more employees starting January 1, 2021, and then apply to all employers on January 1, 2022.

Amended Wage Protection Rules: Beginning April 14, 2021, revisions apply to the parameters of employer requirements for public health emergency leave (PHEL) for employees. All Colorado employers are required to provide up to 80 hours of PHEL to full-time employees. Part-time employees receive PHEL in "the greater of the number of hours the employee (a) is scheduled for work or paid leave in the 14-day period after the leave request, or (b) actually worked in the 14-day period prior to the declaration of the public health emergency or the leave request, whichever is later." Lastly, new employees hired during a public health emergency are also entitled to PHEL.

Chance to Compete Act: Effective September 1, 2021, all employers are prohibited from: advertising that a person with a criminal history may not apply for a position; stating on an employment application, including an electronic application, that a person with a criminal history may not apply for a position; or inquiring into, or requiring disclosure of, an applicant's criminal history on an initial written or electronic application form.

Governor Jared Polis, Colorado Workers for Innovative and New Solutions (COWINS), and members of the legislature and members of the Service Employees International Union (SEIU) celebrated the signing of the first-ever partnership agreement between COWINS and the state, as well as a recently approved plan to raise the minimum wage for Colorado's direct care

workers to $15 an hour. State employees are public servants who provide critical services to Coloradans every day. With the Governor's signature, the historic agreement between the State of Colorado and COWINS is a huge victory that ensures that tens of thousands of state employees can continue their work and thrive in the communities they serve.

Members of SEIU and COWINS spoke at an event that included COWINS President Skip Miller, COWINS member and Colorado Department of Labor and Employment (CDLE) employee Jessica Mathis, and Colorado home care providers Charmayne Phillips and Michael Bardo.

A consensus agreement was signed with COWINS that ensures employees receive fair compensation for the services they provide Coloradans, a quality work-life balance, and a voice in decisions that affect their workplaces and career paths. Covered employees generally include those that are in the State personnel system, also known as classified employees. Exceptions include confidential employees, managerial employees, executive employees, administrative law judges, hearing officers, state troopers, employees in the legislative branch, and temporary employees.

Since January 2021, the State and COWINS have been negotiating in good faith on a Partnership Agreement that outlines wages, hours, and terms and conditions of employment on behalf of all covered employees.

For more information on the Colorado Partnership for Quality Jobs and Service Act, visit the State's FAQ site and the COWINS website. ALJ's 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 River 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 that 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 a public 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 Court of Appeals
- File a whistleblower complaint with the Board.

A more specific set of rules applies to Colorado 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 permits limited collective bargaining by teachers.

In summer 2021, the Colorado Supreme Court addressed whether employers may implement practices by which employees forfeit accrued, unused vacation pay upon the

termination of employment. In *Nieto v. Clark's Mkt., Inc.*, 2021 CO 48, 2021 Colo. LEXIS 423 (Colo. June 14, 2021), the Court held that the Colorado Wage Claim Act ("CWCA") requires employers to pay employees for earned but unused vacation upon the separation of their employment. The requirement applies irrespective of an employment agreement or policy forfeiting an employee's right to such payment.

In a fitting tribute to Juneteenth, Colorado Governor Jared Polis signed a sweeping law enforcement reform bill that marked one of the most significant changes to policing amidst the protests over the brutal killing of George Floyd. Among the new law's many reforms, which include banning chokeholds and the use of deadly force for nonviolent offenses, the Enhance Law Enforcement Integrity Act (SB20-217) allows plaintiffs to bypass "qualified immunity," one of the biggest barriers to holding government agents accountable in court.

Ever since Congress enacted the Civil Rights Act of 1871 to combat the Ku Klux Klan, people who have had their rights violated by local and state government officials could sue them for damages in federal court. But in 1982, the U.S. Supreme Court created qualified immunity, which shields officers from any legal liability, unless the rights they violated were "clearly established." Thanks to qualified immunity, countless victims have been unable to vindicate their civil rights in federal court.

Right now, Colorado law enforcement officers can use deadly force if they reasonably suspect that someone is a threat to themselves, other officers, or the public. Senate Bill 217 changes that standard to require that officers face an imminent threat before they use deadly force, a change lawmakers hope will remove some of the subjectivity from the decision-making process.

A new law expands the circumstances in which officers must turn on their body cameras and opens up the Colorado State Patrol to more potential lawsuits over officer misconduct, in the same way last year's bill added civil liability for local law enforcement agencies. Last year's police accountability law allowed people to sue over police misconduct in state court and precluded qualified immunity as a defense in those cases. A portion of the introduced bill that

sought to more clearly dictate when officers can use force was removed from the final bill. “I think there is still work to be done in the space around use of force, and a lot of that is not only in words, like in language, but in culture with law enforcement,” said state Representative Serena Gonzales-Gutierrez, a Denver Democrat who cosponsored the bill with Representative Leslie Herod.

Overview of new bill did include:

By July 1, 2023, all police and sheriff's departments are required to equip their officers with body cameras. Officers and deputies are required to record all traffic stops and most of their interactions with the public. If an investigation reveals that an officer tampered with or failed to activate their dashboard or body camera, the officer is subject to disciplinary action, including suspension, termination, or revoking of the officer's certification.

In most cases, if a complaint of officer misconduct is filed, the law enforcement agency must release to the public all unedited dash camera or body camera footage within 21 days. If a family member or legal guardian requests the footage, it must be released to them 72 hours before being released to the public. Any video that "would substantially interfere with or jeopardize an active or ongoing investigation" must be released no later than 45 days after the initial complaint is received. New Denver police body cameras would automatically start recording when officers draw their weapons.

Transparency in law enforcement reporting under the new law states that law enforcement agencies are required to collect and report to the state a lot more information about their operations. That includes demographic data on everyone officers pull over or stop on the street, detailed accounts of all use of force incidents by a police officer that result in death or serious bodily injury, and all instances in which an officer resigns while under investigation for misconduct.

By July 1, 2023, the state's Division of Criminal Justice must create an annual report and statewide database containing this information. The database must be searchable by the public, and must include information about officers whose certification has been revoked. Any law

enforcement agency that fails to participate in this reporting risks losing its funding.

When any officer who is found criminally liable, convicted of a crime, or pleads guilty to a crime involving the unlawful or threatened use of force—including failure to intervene when seeing another officer breaking the rules—will be stripped of their certification.

The Peace Officer Standards and Training board, (POST), which is responsible for certification, must develop a community outreach program that informs the public of its duties and practices. Additionally, by January 1, 2022, the POST must create and maintain a database with information related an officer's untruthfulness, failure to follow training, or disciplinary action.

These policies follow a 2019 law that allows the POST board to revoke an officer's certification if they're found to have lied in court or during an investigation.

Lying officers first to lose police certifications under new Colorado law include police actions during protests. Officers cannot:

- Discharge less-than-lethal projectiles (like rubber bullets) in a manner that targets anyone's head, hips, or back.
- Discharge less-than-lethal projectiles (like rubber bullets) randomly into a crowd.
- Use chemicals or irritants (like pepper spray or tear gas), without first clearly ordering people to disperse, and giving protesters enough time and space to do so.

The POST allows legal action against officers individually for misconduct—and will be on the hook for up to $25,000 or 5 percent of the judgment, whichever is less. In order to reach that judgment, a court has to find that the officer did not act in good faith. Officers also must have a legal basis for establishing contact with someone, including stopping them on the street or pulling over vehicles in traffic.

Additionally, the attorney general will have the power to investigate police departments for civil rights violations.

FLORIDA

There were no submissions from members of the State and Local Public Sector Committee for the Florida 2021 report. Nevertheless, the Labor and Employee Relations Manager for Hillsborough County, Florida (Tampa area) submitted this report regarding an impactful award which was appealed to the Florida courts by the Employer, State of Florida. The courts upheld the arbitrator's decision.
Thomas J. Nowel, NAA

What Shall the Remedy Be: Waivers of Language Restricting the Ability to Mitigate Penalties in Florida.

On November 5, 2021, the Second District of the State of Florida Court of Appeal affirmed an arbitration award issued in November of 2019 which returned a State of Florida employee to work after her employer, the Department of Children and Families, terminated her.

The Collective Bargaining Agreement between the State of Florida and The American Federation of State, County, and Municipal Employees, which was in place at the time (expired June 30, 2020), contained language governing the grievance arbitration process. That language covering arbitration related to discipline reads, in part:

> If the arbitrator finds that cause exists for discipline, the arbitrator shall affirm the decision of the agency. If the arbitrator finds that cause did not exist for discipline, the arbitrator shall reverse the decision of the agency and provide relief consistent with the provisions of the Contract and law. The arbitrator's discretion is limited to reversing or affirming the discipline at the level of discipline imposed. The arbitrator may not increase or reduce the penalty imposed by the agency.

This language appears clear on its face. If an Agency of the State is able to prove that an employee violated policies which generally lead to discipline, the arbitrator must uphold the Agency's penalty, regardless of severity. In this case, the State of Florida terminated an employee for poor performance. It proved its case by putting the employee on an improvement plan and showing that the employee did not improve enough to meet the standards of her job.

The Union grieved the termination, argued that the State's penalty was too severe, and requested that the employee be returned to work. Under the specific arbitration language in the Contract, this argument was sure to result in a denial of the grievance.

At the arbitration hearing, however, the parties made a very specific stipulation to the issue: Was the employee terminated for Just Cause, and if not, *what shall the remedy be?* This stipulation—*what shall the remedy be*—gave the arbitrator the explicit right to decide the remedy if they found that the State lacked Cause for termination, or so the Union argued.

The arbitrator found that the parties had agreed to set the restrictive contract language aside, and returned the employee to work with back pay, less a suspension period.

The State of Florida appealed this arbitration award and argued that the arbitrator superseded her authority under the contract when they ignored the contract language limiting their ability to mitigate a penalty. The State specifically cited language in the arbitration clause stating that the arbitrator "specifically shall not have the power to add to, subtract from, or alter the terms of this Contract." The State argued that the arbitrator did just that in issuing an award that changed the penalty from a Termination to a Suspension.

The Circuit Court of the 13th Circuit in Hillsborough County Florida assigned the appeal to case number 19-CA-12068. The assigned judge was tasked to weigh the State's argument, that the arbitrator cannot modify the language in the Contract, with the arbitrator's award, stating that the parties stipulated to allow the arbitrator to set language aside in determining a level of penalty.

On January13, 2021 the Honorable E. Lamar Battles made the following determination:

> The parties stipulated that the Arbitrator was to decide whether the employee was terminated for cause and if not, what shall be the remedy. Having directed the Arbitrator to resolve these inquires, the Department now complains that the Arbitrator exceeded her authority under the Agreement. The Court disagrees and finds that the Arbitrator did not

> exceed her authority granted by the parties or the operative document, nor did she decide an issue impertinent to the resolution of the issues submitted to arbitration. Having found that the Arbitrator did not exceed her authority, this Court has no authority to overturn the award.

On February 24, 2021 the same court submitted a final judgment, confirming the arbitration award. The State of Florida did not accept the 13th Circuit's determination and appealed the case to the Second District Court of Appeal. The appeal was assigned case number 2D21-0490.

On November 30, 2021, the Second District Court of Appeal again upheld the arbitration award. The State of Florida did not attempt to appeal the Court's Mandate to the State Supreme Court.

The decision by the arbitrator and the two Courts of Appeals will have a lasting impact upon employers and unions/employees in the State of Florida. Savvy Union Reps would be wise to ask arbitrators to decide the level of penalty in cases where the Contract does not allow mitigation. Arguably, a Union Rep and Employer Advocate could agree to set aside any language that they wanted in a Contract and ask the arbitrator to settle a dispute based upon an entirely different set of rules.

Likewise, employers will need to ensure that their advocates understand exactly what it is that they are stipulating to prior to an arbitration hearing, especially where they already have language which benefits them in the arbitration process.

William Nowel

William Nowel is the Labor and Employee Relations Manager for Hillsborough County, Florida. Prior to this role, he was a Staff Representative and Advocate for The American Federation of State, County, and Municipal Employees (AFSCME) in Florida.

ILLINOIS

Illinois Interest Arbitration Awards

November 15, 2020 – November 10, 2021 (12 total awards)

The material in this document was obtained from a presentation at the Chicago-Kent College of Law IIT—37th 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 John Kelly, Partner, Ottosen, DiNolfo, Hasenbalg & Castalado, Ltd.

November - December 2020: 3 Awards

#752 County of Cook, Cook County Sheriff & FOPLC, S-MA-19-001 (Benn, 11/20/20)
For a stipulated Award for the court services unit

1. Central Warrants 24-Hour Desk Officer—directs the parties to:
   a. Comply with a Side Letter concerning the Central Warrants 24-hour Desk transition; the letter is attached to the exiting Agreement;
   b. Be free to discuss the issue in negotiations for the successor Agreement;
   c. Benn retains jurisdiction to determine compliance with the Side Letter and the underlying dispute if the parties fail to resolve the issue in negotiations.

#753 Village of Skokie & FOPLC, S-MA-19-113 (Kossoff, 11/27/20)
For an Agreement in a Unit of police officers below the rank of sergeant;

1. Duration—adopts the Village's proposal of a 3-year term terminating on 4/30/22 over the Union's proposal to include a 4th year (FY22) ending on 4/30/23;
   a. Economic uncertainty due to pandemic is the determining factor;
   b. Comparables who have already settled for FY22 did so before the pandemic;
2. Holiday Pay—rejects Union's proposal for additional holiday pay on premium holidays and when off duty officers are called into work on a holiday. Union failed to propose it during negotiations so the issue was not properly before the arbitrator;
3. Number of Holidays—adopts Union proposal to add Christmas Eve and Thanksgiving Friday to the Unit's current seven holidays:
   a. The fact that the rejected TA contained the status quo did not require a burden of proof on the Union as the Village acted similarly with the wage proposal;
   b. Village contention that it allows more days off work than the comparables is inaccurate;
   c. External Comps—favors Union offer; while the Unit officers average slightly more vacation days per year, this is more than countered by their having five less annual holidays than the comparables;
4. Wages—adopts Village offer of:
   5/1/19 – 2.5%
   5/1/20 – 2.5%

5/1/21 – 1.5 % (Union's offer was the same for first two years but 2.4% in third year)

a. CPI—Village offer is above yet significantly closer to the CPI than Union's offer;
b. External Comps—most were negotiated before the pandemic; Village offer is above and closer to the average of the 10 of the 16 comps that negotiated for the three contract years applicable in this case;
c. Public Interest/Ability to Pay—favors the Village proposal as it provides a fair wage while allowing more funds for resuming normal activities that are on hold during the pandemic;

5. Longevity Pay—adopts Village proposal to retain the status quo over the Union's proposal to increase all levels by $20 month;
   a. Overall Compensation—the most important factor in determining this issue; favors the Village status quo proposal;
   b. External Comps—under Employer offer, top base pay plus longevity pay will be at the median level of all the comparables; thus, an increase is not justified;
   c. Other Factors— "depressed economy, Village's subpar financial condition and other contractual provisions that reward employees for their loyalty and long service;" favor the Village status quo proposal.

#754 County of Will, Will County Sheriff & FOPLC, S-MA-17-106 (O'Connor, 12/1/20)
For a five-year agreement for a unit of Corrections Management

1. Tentative Agreements—adopts the parties' TA on Fair Share, Bereavement Leave, and the Effective Period;
2. Group Insurance—adopts County proposal as most consistent with the Section 14 factors;
3. Wages—adopts Union proposal as most consistent with Section 14 factors, consisting of the following:
   a. Annual increases:
      FY17 – 1.5%
      FY18 – 1.5%
      FY19 – 2%
      FY20 – 2.5%
      FY21 – 3%;
   b. Equity Adjustments—$1,500 per year in FY20 and FY21 to Sergeants at the final Step.

2021: 9 Awards

#763 County of Marion, Marion County Sheriff & FOPLC, S-MA-18-050 (Stanley, 1/7/21)
For four years from 12/1/17 through 11/30/20:

1. Wages—adopts Employer proposal of:
   12/1/17 – 1% over Union's – 2%
   12/1/18 – 1% Union's – 2%
   12/1/19 – 2% Union's – 2%
   12/1/20 – 2% Union's – 3%;
   a. Internal Comps/Overall Compensation—compared to Laborer's unit, this Unit has step increases, better health insurance and, thus, lower turnover;
   b. Public Interest & Welfare/Ability to Pay—support Employer offer;

   i. State taxes and local property taxes have been negatively affected by COVID pandemic;
   ii. The General Fund had decreased by 30% in the five years pre-pandemic;
   iii. Non-recurring income is a dangerous method to finance pay increases;
2. Wage Retroactivity—adopts Union proposal;
   Employer Proposal—effective 12/1/20
   Union Proposal—fully retroactive to 12/1/17;
   a. Denying employees the benefit of increases for hours worked for several years does not make sense;
3. Command Pay Differentials—adopts Union proposal;
   Union Proposal—add $250/year to differential for Sergeant, Lieutenant and Corrections Sergeant;
   Employer Proposal—status quo
   a. Differentials had not increased since 2011;
   b. Differentials are very low considering the responsibility involved;
   c. Impact of increase is minimal;
4. Command Differentials Retroactivity—adopts Union proposal of full retroactivity;
   a. Impact of increase is minimal.

#756 County of Randolph, Randolph County Sheriff & AFSCME Council 31, S-MA-20-065 (Reynolds, 2/4/21)
For three years from 12/1/19 to 11/30/22; a stipulated Award in a unit of deputies

1. Duration—three-year Agreement;
2. Wages—annual increases of 1.5%, 2%, and 2%;
3. Longevity Bonus—establishes a longevity bonus for employees other than employees hired after 5/1/20; bonus is payable annually and based on percentage of annual salary and overtime and is capped in the 20th year at 5% of base pay;
4. Compensatory Time—adds language allowing scheduling at the employee's selection "as long as it does not adversely affect operations" and for the employer to require, when more than 120 comp hours accrue, that the excess amount be used within 30 days.

#755 County of McHenry, McHenry County Sheriff & FOPLC, S-MA-20-005 (Benn, 3/2/21)
For three years from 12/1/19 to 11/30/22; a stipulated Award

1. Wages—annual increases of 2.125% at beginning of each year;
2. Health Insurance—retain status quo;
3. Impasse Procedure—in bargaining impasse, agree to use FMCS mediation and, if no agreement, fact finding under IPLRA at the request of either party with requesting party paying the fees of the fact finder;
4. Compensatory Time Use—retain status quo;
5. Minimum Staffing-Communications and Court Security—retain status quo;
6. Weather Related Closure—requires employees, unless directed otherwise, to report to work when the Sheriff determines a weather-related closure of non-essential operations; that pay for work during the closure will be at time and a half; employees not reporting to work will not be paid, except that employees directed not to work by the Sheriff will be paid their regular rate and the excused hours counted as time worked for calculating overtime.

#757 Village of River Forest & FOPLC, S-MA-19-132 (Benn, 6/1/21)
For a unit of peace officers, including patrol, sergeants, and lieutenant, starting on 5/1/19

1. Arbitration of Discipline—adopts Union's proposal to allow employees the option of arbitrating discipline in addition to the existing procedure of review by the Village's Board of Fire and Police Commissioners (BFPC) and remands to parties for drafting language;
    a. Benn provides the following rationale:
        1. IPLRA mandates arbitration when parties no longer have "mutually agreed otherwise;"
        2. Benn has required arbitration in such situations for over 30 years;
        3. Other arbitrators have reached similar results;
        4. Arbitral review of discipline is the policy of the State as expressed in Section 2 of IPLRA;
    b. Rejects Village arguments against an arbitration provision, stating that:
        1. Due to mandate the existence of a historical relationship is not a factor;
        2. Due to mandate the Union does not need to show the current system is broken;
        3. Due to mandate the Union does not need to show bias by BFPC;
        4. Due to mandate the Union does not need to meet breakthrough standards;
        5. Due to mandate the traditional Section 14(h) factors are inapplicable;
    c. Agrees with the Village argument that external comparables should not be considered and then provides 11 reasons why external comparability should not be considered in any interest arbitration or negotiations.

#758 Cook County State's Attorney's Office & FOPLC, S-MA-17-285 (Reynolds, 6/4/21)
For a three-year agreement in a unit of investigators, 12/1/17 to 11/30/20

1. Wages—adopts Employer's proposal over Union's proposal of' 1%, 2%, and 2%, at the beginning of each contract year: (12/1/17, 12/1/18, 12/1/19); Employer proposal set the following wage increases:
    - $1,200 non-compounding bonus paid within thirty (30) days of Board ratification.
    - 6/1/19 – 2%
    - 6/1/20 – 2%
    a. CPI—supports the Union's proposal, but is a modest advantage:
        i. Union proposal is above and closer to almost all CPI-U and CPI-W indices;
        ii. CCSAO offer is below all CPI indices, but closer to the Chicago area CPI-U than Union's;
        iii. In terms of actual dollars received, while CCSAO's bonus provides money without improving the % increase for CPI purposes, its % increases provide fewer actual dollars than the Union's offer, as they come in the middle rather than the start of the contract year;
    b. Internal Comps—supports the CCSAO offer since the only truly internal comparable, the investigator sergeant unit, agreed to something similar: a non-compounding bonus in the first year and 2% increases in the second and third year that were pushed even further out in the contract year than proposed by CCSAO here;
    c. External Comps—the external units, which are all financed by Cook County, favor the CCSAO offer except that the Forest Preserve District Unit supports the Union offer;
    d. Public Interest and Welfare/Ability to Pay—not determining factors;

e. Overall—the internal and external comparable support for the CCSAO offer outweighs the CPI support for the Union's offer.

2. Health Insurance Opt-Out—adopts Union's proposal to retain the annual payment of $800 to Unit members who opt-out of the Employer's health benefit program;
   a. Breakthrough—the elimination in its entirety of a 20-year benefit of $800 a year is a significant change and therefore a breakthrough requiring application of the standard;
   b. The CCSAO failed to prove a need for the elimination of the opt-out payment;
      i. The opt-out payment is neither costly nor an administrative burden; administering the opt-out payment does not require the internal consistency between units as occurs with a variance in the actual plan;
      ii. Other units no longer having the Opt-out program negotiated the elimination.

#759 City of Geneva & IAFF Local 4287, FMCS 210120-03182 (Benn, 6/16/21)
For an agreement starting 5/1/20; stipulated Award in a unit of firefighters

1. Duration—four years from 5/1/20 to 4/30/24;
2. Wages—2.5% increase at the beginning of each contract year;
3. Drug & Alcohol Testing—adds provision that;
   a. Non-probationary employees are subject to the just cause provisions;
   b. The Union has right to request bargaining if reliable marijuana impairment testing becomes available;
4. Additional Holiday—adds President's Day starting in 2022;
5. Part Time & Paid On Call/Minimum Staffing;
   a. Qualified paid on call staff may be used to fill shifts open due to use of leave time;
   b. Use of such staff in this manner is a "supplement" rather than a "substitute" under The Firefighters Substitutes Act;
   c. As quid pro quo for the above use of part time and paid on call staff, the City agrees to certain minimum staffing levels.

#760 County of Cook, Cook County Sheriff & FOPLC, S-MA-19-001 (Benn, 7/15/21)
Supplemental Award issued via retained jurisdiction in Award #752. As the parties did not resolve the matter, based on hearing presentations, Benn finds:

1. Serving criminal fugitive warrants is dangerous, so this is a safety issue;
2. By requesting to include the Fugitive Warrants side letter in the Agreement, the Union is requesting that a manning provision be added to the Agreement;
3. IPLRA prohibits any interest arbitration award from including a manning provision for peace officers;
4. As there is no authority to add the manning provision, the Union's request is denied;
5. Sheriff shall give priority to officers assigned to Fugitive Warrants when assigning officers to serve criminal warrants but, if such officers are unavailable, may assign other qualified officers;
6. Within 30 days of filing any grievance on the assignment of fugitive warrants, the parties shall meet in Labor/Management to resolve the dispute;
7. If unresolved in Labor/Management, any arbitrator agreed upon by the parties shall have jurisdiction to resolve the dispute.

#761 City of East St. Louis & FOPLC, S-MA-16-068 (Zimmerman, 8/2/21)

For a four-year Agreement from 1/1/16 to 12/31/19 for a unit of peace officers with the rank of sergeant and below:

1. Wages—adopts the Union's Proposal of an annual 2% increase; City now offers 0% for all years although it had signed a TA agreeing to the Union's wage proposal;
    a. Binding Tentative Agreement—the TA was binding because:
        i. City was aware of any financial restraints when City Manager presented the offer and signed the TA; nothing changed between the time of the signature and when the City Manager recommended the City Council reject it;
        ii. TA must be enforced as City agreed to the terms and did not prove it could not pay for it;
    b. Section 14(h) factors—even if there was no TA, the Union's offer is more appropriate when considering the cost-of-living and the external comparable factors; the City may have fiscal problems but these are not sufficient to support a proposal of no wage increase for four more years.

#762 Tazwell County Consolidated Communications (TC3) & FOPLC, FMCS #210209-04156 (Tidwell, 10/27/21)

For an agreement from 8/9/18 to 4/30/23, for a unit of telecommunicators

1. External Comps—chooses Peoria, Bloomington and McLean County (METCOM);
    a. TC3 offered several counties including METCOM, Peoria, Bloomington and Galesburg;
    b. Union offered Bloomington, Peoria, METCAD (Champaign County) METCOM and Sangamon County;
    c. Arbitrator decided on the three comparables offered by both parties.
2. Wages & Retroactivity—selects the TC3 proposal which establishes a new pay scale for new hires and variable increases and lump sum payments to current employees depending on how their current salaries place them on the new scale; Union offer was 5/1 annual increases of 2.5%, 2%, 2%, and 2.25%;
    a. Public Interest and Welfare/Ability to Pay—favor TC3 proposal;
        i. TC3 does not have taxing ability nor can charge customers;
        ii. TC3 is appropriately managing its resources;
        iii. TC3 proposal would apply only to current employees which is a better use of resources than Union's offer to also apply the raises to former employees;
    b. External Comps—favors the TC3 proposal;
        i. TC3 offer has higher starting rate than Union's, which is higher at the top of the scale;
        ii. TC3's need to hire is more important than its need to retain so higher start pay is more important;
    c. CPI—favors the proposals equally;
        i. TC3 offer involves increases of 1.12%, 1.56%, and 1.65% in the first three years and a 1.75% increase in 2022 for the new hire pay scale; and moving employees up the pay scale and lump sum payments; award did not contain the average annual % increase for existing employees;
        ii. Union offer was 5/1 annual increases of 2.5%, 2%, 2%, and 2.25%.
    d. COVID Factor—favors Employer as TC3 is not eligible for any COVID relief funds;
3. Impasse Resolution—adopts TC3 proposal:

TC3 proposal—provides that at impasse the Employer to implement its last offer after a 14-day notice to Union and for the Union to exercise its right to strike;
Union proposal—provides for Section 14 interest arbitration procedures;

a. TA—declines to address issue that TC3 withdrew its TA agreeing to use interest arbitration when its counsel learned interest arbitration was not statutorily required; a possible unfair labor practice issue which is outside her role;
b. Legislative intent—is to retain right to strike for telecommunicators;
c. Public Interest & Welfare—not endangered by right to strike as IPLRA provides for notice and an injunctive relief procedure;
d. External Comps—only one of the comps had contractual interest arbitration;

4. Management Assistance—crafts own provision that is the TC3 offer with a sentence added from the Union's offer that "Management assistance shall not be utilized solely to avoid overtime" with arbitrator adding the word 'solely' and eliminating the phrase "if there is a bargaining unit member who will voluntarily work overtime.";
5. Residency—adopts Union proposal;
Union Proposal—no residency;
TC3 Proposal—Employees must live within 20 miles of Tazewell County;
   a. A municipality's reason to impose residency to shore up the municipal tax base and economy is inapplicable here;
   b. Public Safety reason to have employees closer to work in inclement weather is outweighed by employee's right to decide where to live; employees will have to leave home earlier or stay overnight closer to work in inclement weather;
6. Insurance Carrier Change—adopts TC3 proposal with minor wording change;
TC3 Proposal—can change with 60 days' notice if similar benefits are provided; Union rep will be consulted but TC3 has final, non-grievable determination;
Union Proposal—30-day notice to Union and if Union requests bargaining, then bargaining impasse resolved in arbitration; requires similar benefits;
   a. Flexibility—favors TC3 proposal as Union's arbitration process is too lengthy;
   b. External Comps—Union cites no comps with a similar provision; Employer cited various provisions with similarities, but no one type clearly similar to the TC3 proposal;
7. Insurance Premiums: Employee Contribution—adopts TC3 proposal;
TC3 Proposal—to increase employee contribution from 10% to 25%;
Union proposal—set amount based on 25% of premium in 1st K year;
   a. External Comps—proposed % is lower than in Fulton County and Bloomington;
   b. Other Statutory Factors—interest of public, financial ability to pay and need for conservative approach for initial Agreement favor TC3 proposal;
8. Overtime/Force-Ins—Arbitrator crafts own language tending more toward the TC3 proposal; both proposals allow mandatory OT but differ on manner offered;
TC3 Proposal—offered first to part-time if it wouldn't require overtime rate; all employees automatically on overtime list; mandatory not limited to before/after regular shift;
Union Proposal—offered first to full-time; silent on who is on overtime list; mandatory limited to before/after regular shift; requires interest arbitration of any impasse over changes in overtime procedure;
Arbitrator proposal—adopts:
   a. TC3 proposal to first offer to part-time;

b. TC3 proposal to have all employees on list;
c. Union proposal to mandate forced overtime to be before/after regular shift but adds "reasonable possible" provision and an emergency exception;

9. Comp Time—adopts Employer proposal;
   TC3 Proposal—may not bank overtime as comp time;
   Union Proposal—may bank up to 16 hours max as comp time;
   a. External Comps—only one of three provides for comp time;
   b. Initial Agreement—warrants a conservative approach especially as it is being resolved by interest arbitration rather than a voluntary agreement.

Illinois Public Labor Relations Act Recent Developments

November 2020 – October, 2021

The material in this document was obtained from a presentation at the Chicago-Kent College of Law IIT—37th Annual Illinois Public Sector Labor Relations Law Conference. The individuals who prepared this presentation were: Helen Kim, General Counsel, Illinois Labor Relations Board; Jerry Marzullo, Partner, Asher, Gittler & D'Alba; and Thomas Bradley, Partner Laner Muchin.

IPLRA Updates

Board and Court Decisions November 2020 – October 2021

I. Representation Issues

9/29/20
Illinois Appellate Court, First District Rule 23 Unpublished Summary Order
Majority Interest/Confidential Exclusion/Authorized Access

In *Am. Fed. of State Cnty. and Mun. Emps., Council 31 (AFSCME) v. Ill. Labor Relations Bd., et al.,* the First District dismissed AFSCME's appeal of the Board's Decision and Order in *AFSCME and Chief Judge of the Circuit Court of Cook County,* 36 PERI ¶ 42 (ILRB-SP 2019) (Case No. S-RC-18-003). In its Decision and Order, the Board adopted the Administrative Law Judge's (ALJ) Recommended Decision and Order dismissing the majority interest petition filed by Petitioner seeking to represent employees in the title Investigator III working in the Cook County Juvenile Temporary Detention Center. Following the Board's Decision and Order in *Ill. Dep't. of Central Mgmt. Servs. (Corrections)*, 33 PERI ¶ 121 (ILRB-SP 2017), *aff'd sub nom. Metro. Alliance of Police, Chapter 294 v. Ill. Labor Relations Bd., State Panel,* 2018 Il App (1st) 171322-U (unpublished order), the ALJ determined the Investigator IIIs, who substantiated or

unsubstantiated allegations of misconduct, were excluded from collective bargaining as confidential employees because they had advanced knowledge of discipline. Although the Board found some merit to the AFSCME's contention that the decision in relied on by the ALJ inappropriately expanded the authorized access test to include advanced knowledge of discipline, it adopted the Recommended Decision and Order (RDO) because that decision was affirmed by the Appellate Court in an unpublished order and to maintain consistency with the Board's Local Panel decision in *City of Chicago,* 36 PERI ¶ 12 (IL LRB-LP 2019).

The court noted in its summary order that AFSCME contended on appeal that the Board violated Rule 23 by relying on the court's unpublished order affirming the Board's Decision in *Ill. Dep't. of Central Mgmt. Servs. (Corrections)*. The court also noted that the Board contended it properly applied its precedent and narrowly construed that precedent by limiting the scope of the confidential employee exclusion only to those who have an active involvement in creating work product substantiating an advanced knowledge of potential employee discipline. After full briefing, the court granted AFSCME's motion for leave to voluntarily dismiss its appeal, stating that "the Union has accepted the Board's clarification that it narrowly construes its prior decision in moved to voluntary dismiss its appeal in [*Ill. Dep't. of Central Mgmt. Servs. (Corrections)*] as affirmed by our Court … and its direct relevance to the instant case."

3/15/21
ILRB SP
Decertification/Blocking Order

In *Michael Coutre and Village of Crestwood and Illinois Council of Police,* 37 PERI ¶ 85 (ILRB-SP 2021) (Case No. S-RD-21-002), Petitioner Michael Coutre, a member of a bargaining unit represented by the Incumbent Illinois Council of Police, filed a petition seeking an election to determine whether members of the bargaining unit desired continued representation by the Incumbent union. An administrative law judge investigated the petition, resulting in recommendations to block the election and hold the matter in abeyance until the outcome of two unfair labor practice charges filed by the Incumbent against the Employer Village of Crestwood in Case Nos. S-CA-20-057 and S-CA-20-114. Both charges involved allegations that the Employer interfered in the instant petition and engaged in conduct frustrating the collective

bargaining process. The Board accepted the ALJ's recommendations and held the matter in abeyance.

4/19/21
ILRB LP
Executive Director Order/Mail Ballot

In *Front Line Labor Alliance and County of Cook and Sheriff of Cook County, and International Brotherhood of Teamsters, Local 700,* 37 PERI ¶ 98 (ILRB-LP 2021) (Case No. L-RC-21-006), the Incumbent representative Teamsters appealed the Executive Director's order directing a mail ballot election over the Incumbent's objections, determining that under the circumstances—COVID-19 mitigation guidelines and safety concerns together with Board staffing issues—a mail ballot would allow for a timely and safe runoff election between Petitioner Front Line Labor Alliance and the Incumbent, and better assist the Board in effectuating the purposes of the Act in accordance with Section 1210.140 of the Board's rules. The Board rejected the Incumbent's contentions and affirmed the Executive Director's Order directing a mail ballot runoff election to determine the exclusive representative of the bargaining unit composed of correctional officers employed at the Cook County jail.

4/19/21
ILRB SP
Majority Interest Petition/Bargaining Unit Appropriateness/Community of Interest/Fraud and Coercion

In *American Federation of State, County, and Municipal Employees, Council 31 (AFSCME), and CGH Medical Center,* 37 PERI ¶ 100 (ILRB-SP 2021) (Case No. S-RC-20-030), AFSCME filed a majority interest petition seeking to represent certain professional and non-professional job titles and classifications employed by CGH Medical Center in a combined unit of approximately 800 employees. CGH Medical Center objected to the petition, claiming the petitioned-for RN-Specialty Unit and EMR Trainer positions lacked a community of interest with the petitioned-for bargaining unit. CGH also contended AFSCME obtained majority support through fraud and coercion. After an investigation and hearing, an ALJ issued an RDO finding the RN-Specialty Unit position appropriately included in the petitioned-for unit; the EMR Trainer position inappropriately included in the petitioned-for unit; and that CGH failed to

establish by clear and convincing evidence that AFSCME obtained its majority support by fraud and/or coercion. CGH filed 3 exceptions, and AFSCME filed cross-exceptions. The Board disregarded CGH's exceptions pursuant to Section 1200.135(b)(2) of the Board's rules and also noted that even if the Board considered the exceptions, they were meritless. The Board adopted the ALJ's RDO but with qualification on the issue of fraud and coercion, agreeing with AFSCME that under the Board's rules and caselaw, CGH was required to provide clear and convincing evidence that AFSCME obtained majority of support through fraud and coercion at the time it objected to the petition, and that the ALJ erred in setting the matter for hearing on the issue of fraud and coercion based on assertions rather than clear and convincing evidence.

6/14/21
ILRB SP
Unit Clarification/Contract Bar/Severance

In *Policemen's Benevolent and Protective Association-Labor Committee and County of Marion, et al., Laborers International Union of North America, Local 119,* __ PERI ¶ __ (ILRB-SP 2021) (Case Nos. S-RC-19-060, S-UC-21-018), the petitioning union filed a majority interest petition seeking to represent employees at various offices within the County of Marion in a bargaining unit previously certified by the Board. The County objected, contending the petition was barred by the existing collective bargaining agreement between the Incumbent union and the County covering the employees at the County's highway department. The Incumbent union and the County had bargained two separate collective bargaining agreements for the bargaining unit, one agreement for the highway department employees and another agreement for the rest of the employees at issue. The agreements, however, were scheduled to expire on dates that were two years apart. In its October 9, 2019 Decision and Order, 36 PERI ¶ 53 (IL LRB-SP 2019) (Case No. S-RC-19-060), the Board reversed the Executive Director's order directing an election, finding the circumstances presented novel issues and raised an issue of law regarding the effect of the "all or some" phrase in Section 1210.135(a)(1) of the Board's rules relating to the contract bar and remanded the case for hearing.

Prior to the hearing upon remand, the Incumbent union filed a unit clarification petition seeking to sever the existing unit into two separate units, Unit 1 for the highway department

employees and Unit 2 for the remaining employees. No objections to the Incumbent's petition were made. The ALJ consolidated the two cases and found that the Board's unit clarification procedures allowed the Incumbent to sever its singular unit. The ALJ also determined that the unit clarification petition rendered moot the issues outlined in the Board's October 9, 2019 Decision and Order and recommended the conduct of an election in Case No. S-RC-19-060 to determine the representative for Unit 2.

The County filed exceptions and the Petitioning union responded, moved to intervene in the unit clarification petition and requested to withdraw its majority interest petition. The Board denied the motion to intervene but allowed Petitioner's response to the exceptions, accepted the ALJ's recommendations relating to the Incumbent's unit clarification petition, and acknowledged Petitioner's withdrawal of its representation petition and its effect on the issues in Case No. S-RC-19-060.

6/14/21
ILRB LP
Executive Director Order/Mail Ballot

In *Metropolitan Alliance of Police, Cook County Sheriff's Fugitive Unit Investigators #255 (MAP) and County of Cook and Sheriff of Cook County and International Brotherhood of Teamsters Local 700,* 38 PERI ¶ 1 (ILRB-LP 2021) (Case No. L-RC-21-014), the Incumbent representative Teamsters appealed the Executive Director's order directing a mail ballot election over the Incumbent's objections, determining that under the circumstances—COVID-19 mitigation guidelines and safety concerns together with Board staffing issues—a mail ballot would allow for a timely and safe election between Petitioner MAP and the Incumbent union, Teamsters Local 700, and better assist the Board in effectuating the purposes of the Act in accordance with Section 1210.140 of the Board's rules. The Board rejected the Incumbent's contentions and affirmed the Executive Director's Order directing a mail ballot election to determine the exclusive representative of the bargaining unit composed of employees working in the title Investigator II Fugitive Unit employed by the County of Cook and the Sheriff of Cook County.

6/14/21

ILRB SP
Executive Director Order/Mail Ballot

In *Metropolitan Alliance of Police, Park Ridge Police Chapter #762 (MAP) and City of Park Ridge and International Brotherhood of Teamsters Local 700,* 38 PERI ¶ 4 (ILRB-SP 2021) (Case No. S-RC-21-035), the Incumbent representative Teamsters appealed the Executive Director's order directing a mail ballot election over the Incumbent's objections, determining that under the circumstances—COVID-19 mitigation guidelines and safety concerns together with Board staffing issues—a mail ballot would allow for a timely and safe election between Petitioner MAP and the Incumbent union, Teamsters Local 700, and better assist the Board in effectuating the purposes of the Act in accordance with Section 1210.140 of the Board's rules. The Board rejected the Incumbent's contentions and affirmed the Executive Director's Order directing a mail ballot election to determine the exclusive representative of the bargaining unit composed of Patrol Officers employed by the City of Park Ridge.

6/14/21
ILRB SP
Executive Director Order/Mail Ballot

In *Illinois Council of Police and City of Markham and International Brotherhood of Teamsters Local 700,* 38 PERI ¶ 5 (ILRB-SP 2021) (Case No. S-RC-21-036), the Incumbent representative Teamsters appealed the Executive Director's order directing a mail ballot election over the Incumbent's objections, determining that under the circumstances—COVID-19 mitigation guidelines and safety concerns together with Board staffing issues—a mail ballot would allow for a timely and safe election between Petitioner Illinois Council of Police and the Incumbent union, Teamsters Local 700, and better assist the Board in effectuating the purposes of the Act in accordance with Section 1210.140 of the Board's rules. The Board rejected the Incumbent's contentions and affirmed the Executive Director's Order directing a mail ballot election to determine the exclusive representative of the bargaining unit composed of all sworn full-time police officers in the rank of patrolman and sergeant employed by the City of Markham.

8/12/21
ILRB SP
Unit Clarification/Supervisory Authority/Preponderance of Time

In *International Union of Operating Engineers, Local 150 and Village of Winnetka,* 38 PERI ¶ 26 (ILRB-SP 2021) (Case No. S-UC-20-051), Local 150 filed a unit clarification petition seeking to include four job titles—Refuse Supervisor, Fleet Supervisor, Sewer Supervisor, and Street Supervisor—in the Village's Public Works Department. The Village objected, contending the employees are supervisory employees excluded from collective bargaining pursuant to Section 3(r) of the Act. After hearing, the ALJ found the petitioned-for employees did not satisfy the four-part supervisory test. Although the ALJ found the employees' principal work substantially differed from the work of their subordinates and exercised supervisory authority to discipline, she determined they did not spend a preponderance of their time, either quantitatively or qualitatively, on supervisory functions. The Board adopted the ALJ's RDO recommendations to grant the unit clarification petition.

9/24/21
ILRB SP
Bargaining Unit Appropriateness/Presumption of Inappropriateness

In *International Brotherhood of Teamsters, Local 325 and Reaching Across Illinois Library System (RAILS),* 38 PERI ¶ 41 (ILRB-SP 2021) (Case No. S-RC-21-003), Local 325 filed a majority interest petition seeking to represent five employees in the titles driver/sorter, sorter/driver, and floater (driver/sorter/floater) employed by RAILS at its Rockford facility in a new bargaining unit. RAILS objected to the petition asserting the petitioned-for bargaining unit was inappropriate because it sought only a portion of the employees, those working at the Rockford facility, working in driver/sorter/floater title rather than all the employees working in the title at RAILS's three other facilities. The ALJ found the presumption of inappropriateness applied but concluded the presumption was rebutted by the distinct and distant geographical locations of the Employer's Rockford, Bolingbrook, East Peoria, and Coal Valley facilities which allowed employees little contact with employees outside of their assigned facility and provided a rational basis for seeking a smaller unit of the drivers/sorters/floaters at the Rockford facility. The ALJ also determined finding the proposed unit inappropriate would deny the petitioned-for employees their rights under the Act and leave their representation dependent on the Union or another labor organization to file another petition seeking all of the Employer's drivers/sorters/floaters. Additionally, the ALJ found the petitioned-for unit was appropriate under Section 9(b) of the Act. The Board adopted the ALJ's RDO as a decision of the Board.

10/21/21
ILRB LP
Majority Interest/Managerial Employees/Authorized Access

In *American Federation of State, County, and Municipal Employees, Council 31, and City of Chicago,* __ PERI ¶ ___ (ILRB-LP 2021) (Case No. L-RC-19-024), the Board modified and accepted the ALJ's recommendations to grant the majority interest petition filed by AFSCME. AFSCME sought to represent in its existing bargaining unit, certain individuals employed by the City of Chicago working in the Attorney job classification at various departments and offices. The City opposed the petition contending that all the petitioned-for employees were managerial, that some of the employees were also confidential, and that the Attorney in the City's Department of Public Health was also supervisory under the Act. The ALJ found that the parties stipulated that certain Attorneys were managerial employees under the Act but determined that the remaining petitioned-for employees did not fall within any of the Act's exemptions claimed by the City.

The City filed exceptions to the ALJ's findings that the Attorneys in the City's Department of Business Affairs and Consumer Protection (BACP) and the Office of the City Clerk (OCC) were not managerial under the alternative managerial test, in addition to his findings that the COPA Attorneys do not fall under the confidential employee exclusion. The City contended that the same confidential attorney-client relationship the Board and court found conferred managerial status on the attorneys in the City's Law Department in Salaried Employees of North America (SENA) and City of Chicago (Department of Law), 4 PERI 3028, aff'd *sub nom.*, SENA, et al. v. Ill. Local Labor Relations Bd., et al., 202 Ill. App. 3d 1013 (1st Dist. 1990), existed between not only the in-house petitioned-for Attorneys at BACP and OCC and their respective departments but also between all of the petitioned-for Attorneys and their respective departments. Regarding confidential employee status, the City argued the COPA Attorneys' close collaboration with COPA investigators gave them comparable access to confidential information the Board found conferred confidential employee status in City of Chicago (Office of the Inspector General), 31 PERI6 (ILRB-LP 2014). The Board rejected the City's exceptions, noting the evidence did not support the City's arguments and distinguishing the cases relied upon by the City.

II. Employer Unfair Labor Practices

11/20/20
ILRB LP
Retaliation/Adverse Action/Motive

In *Illinois Fraternal Order of Police and County of Cook and Sheriff of Cook County*, 37 PERI ¶ 56 (ILRB-LP 2020) (Case No. L-CA-18-041), the Board rejected the ALJ's recommendations to dismiss the complaint for hearing alleging the Sheriff unlawfully retaliated against David Sheppard, a member of a bargaining unit represented by Charging Party, for engaging in protected activity by suspending him without pay pending investigation into allegations Sheppard improperly obtained information used at a grievance meeting and then filing a complaint against him before the Sheriff's Merit Board seeking his discharge. The Sheriff claimed he sought Sheppard's discharge because Sheppard retrieved and copied confidential documents without authorization against the Sheriff's rules. Sheppard claimed he had permission from his immediate supervisor to obtain those documents. The complaint alleged the Sheriff sought Sheppard's discharge because Sheppard was a union steward who retrieved and copied the documents for a pending grievance. Sheppard had served as a steward and a member of the prior representative's negotiating team as well as being elected to his local's Governing Board as Executive Secretary. Prior to his formal positions, Sheppard had been involved in union activity since at least 2006.

The ALJ recommended dismissal because he found Charging Party failed to establish a prima facie case for retaliation. The ALJ concluded Sheppard's accessing and copying documents for use in an upcoming grievance did not constitute protected activity because Sheppard's conduct was unreasonable under the circumstances and thus, unprotected by the Act. The ALJ also provided an alternative analysis under which he concluded the Sheriff violated Section 10(a)(1) but not Section 10(a)(2) of the Act. He found that although the Sheriff offered a legitimate, non-pretextual reason for seeking Sheppard's discharge, he found the Sheriff failed to establish that he would have sought Sheppard's termination regardless of his participation in protected activity. Regarding the 10(a)(2) violation, the ALJ found that Charging Party failed to present evidence of union animus.

The Board rejected the recommendations to dismiss the complaint, finding instead that Sheppard's conduct was "defensible in its context" and thus, enjoyed the Act's protections. The Board then accepted the ALJ's alternative analysis concerning the independent 10(a)(1) violation but rejected his findings and recommendations regarding the Section 10(a)(2) violation, noting that the record established Sheppard was a long-serving steward and active union member who had been involved in numerous grievances and attended six arbitrations. The Board concluded that the Sheriff based the disciplinary charges against Sheppard on the very same conduct that constituted protected union activity and found the Sheriff's conduct violated Section 10(a)(2). Respondents petitioned for administrative review, which is currently pending before the Illinois Appellate Court, First District. On January 14, 2021, the Board denied Respondents' motion for stay of enforcement pending administrative review.

11/23/20
ILRB SP
Submission of Permissive Subject/Interest Arbitration

In *Metropolitan Alliance of Police, Bolingbrook Chapter #3 and Village of Bolingbrook (Police Dep't),* 37 PERI ¶ 59 (ILRB-SP 2020) (Case No. S-CA-18-092), the Board adopted the ALJ's recommendations that the Village violated Sections 10(a)(4) and 10(a)(1) of the Act when it submitted, over the Union's objection, its status quo proposal that included language concerning a permissive subject of bargaining to interest arbitration. The language at issue concerned an interest arbitrator's authority over disputes relating to the Village's retiree health insurance fund. The Union's final offer proposed eliminating that language during the negotiations for a successor agreement. The ALJ determined the language concerned a permissive subject of bargaining because it restricted the scope of bargaining in negotiations for a future contract. The ALJ further determined that although the Union had previously agreed to the language at issue, the Union was not bound to continue to agree to include it in future contracts. Relying on Skokie Firefighters Union, Local 3033 v. Ill. Labor Relations Bd., 2016 Il App (1st) 152478 and Wheaton Firefighters Union, Local 3706 v. Ill. Labor Relations Bd., 2016 IL App (1st) 160105, the ALJ found the Village's submission and the arbitrator's selection of the status quo proposal which included a permissive subject of bargaining, resulted in a forced waiver of the Union's right to discontinue its agreement to include the language at issue and was severable from the rest of the agreement's language. The ALJ also concluded the Village

bargained over a permissive subject to impasse and waived any argument that the parties' pre-arbitration conduct demonstrated that no impasse was reached. Finally, the ALJ determined the Union's failure to challenge the arbitrator's award on the grounds that the arbitrator exceeded his authority does not preclude the Board from exercising its statutory duty to review the unfair labor practice charge.

11/23/20
ILRB SP
Executive Director Dismissal/Timeliness/Effects Bargaining/Reversal of Dismissal

In *International Brotherhood of Teamsters, Local 700 and Clerk of the Circuit Court of Cook County*, 37 PERI ¶ 60 (ILRB-SP 2020) (Case No. S-CA-20-050), Local 700 filed an unfair labor practice charge concerning its objections to the presence of a third-party Compliance Administrator at the parties' grievance proceedings. The Compliance Administrator was appointed by the federal court in a 2018 Supplemental Relief Order to ensure the Clerk of the Court's compliance with the 1972 Shakman consent decree. Upon learning of the Compliance Administrator's presence at the grievance proceedings, representatives of Local 700 sent a demand to bargain the effects of the Employer's practice of sharing employee and grievance information and to cease and desist sharing such information. The Executive Director dismissed the charge on grounds the charge was untimely, and that the available evidence failed to raise issues of law and/or fact warranting a hearing. On the timeliness issue, the Executive Director concluded the charge was untimely because she found the triggering event to have occurred on the date the Union emailed the Employer a demand to bargain shortly after it first learned of the Compliance Administrator's attendance at grievance proceedings in April 2019. Regarding the remaining basis for dismissal, the Executive Director found a Memorandum Opinion and Order issued by U.S. Magistrate Judge Schenkier on August 15, 2019, dispositive of the charge.

The Board reversed the dismissal and remanded the matter to the Executive Director to issue a complaint for hearing. The Board found the six-month filing period was triggered when the mandatory presence of the Compliance Administrator was "unambiguously announced" by the Employer. The Board then determined there were issues for hearing raised by Local 700's demand to bargain the effects of the Compliance Administrator's presence at grievance proceedings and information sharing.

12/1/20
ILRB SP
Executive Director Dismissal/Regressive Bargaining

In *Chicago News Guild and Chief Judge of the Circuit Court of Cook County,* __ PERI ¶ __ (ILRB-SP 2020) (Case No. S-CA-19-118), the Board affirmed the Executive Director's dismissal of the unfair labor practice charge filed by the Union, alleging the Chief Judge engaged in regressive bargaining on the issue of sick leave for unit members who work per diem. The Executive Director dismissed the charge on grounds the evidence failed to indicate the Employer withdrew its proposal on sick leave and replaced it with a less favorable one, and determined the Union failed to provide evidence on the remaining elements of regressive bargaining.

12/8/20
Illinois Appellate Court, Fourth District Rule 23 Unpublished Order
Public Employer/Repudiation/Authority to Abrogate CBA

In *Laborers Local 773 v. Ill. Labor Relations Bd., et al.,* the Fourth District, in an unpublished order, affirmed the Board's decision 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), in which the Board dismissed the complaint for hearing alleging the Employer repudiated its collective bargaining agreement with Charging Party in violation of Section 10(a)(4) of the Act. The Board 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) takeover of the Employer's implementation of the HUD's Low Income Housing Program. The Board also noted that it lacked authority to find that HUD's actions violated the Act for the Act's definition of "public employer" or "employer" does not include federal agencies.

12/14/20
ILRB LP
Executive Director's Dismissal/Unilateral Change/Refusal to Arbitrate

In *International Brotherhood of Teamsters, Local 700 and County of Cook and Sheriff of Cook County*, 37 PERI ¶ 67 (ILRB-LP 2020) (Case No. L-CA-20-018), the Board affirmed the Executive Director's partial dismissal of the Union's unfair labor practice charge, alleging the

Employers violated the Act when they took several actions related to the grievance process, and the Sheriff's home check procedures and Medical Call-In Policy. The Executive Director dismissed the portion of the charge related to the Employers' (1) requirement that unit members serve suspensions upon a Step 3 determination rather than after arbitration; (2) failure to assign grievance numbers; (3) refusal to arbitrate home check grievances; direct dealing; and maintenance of a Medical Call-In Policy that restricts concerted activity by discouraging bargaining unit members from using sick and FMLA leave. She dismissed some of the allegations as untimely and all of the aforementioned allegations on substantive grounds, noting the available evidence failed to raise issues warranting a hearing.

01/20/21
ILRB SP
Executive Director Dismissal/Retaliation

In *Allison Hinton and State of Illinois, Department of Central Services (IDHS Chester Mental Health Center),* 37 PERI ¶ 81 (ILRB-SP 2021) (Case No. S-CA-20-071), the Board affirmed the Executive Director's dismissal of a charge alleging the Employer retaliated against Charging Party by delaying her promotion, disciplining and discharging her, and failing to respond to her grievances and to provide her with her complete personnel file, because Charging Party filed a grievance. The charge was dismissed for lack of evidence of the Employer's unlawful motive. The Executive Director found the Union failed to provide evidence of a nexus between Charging Party's protected concerted activity and the alleged adverse actions. She also found dismissal warranted because the charge's allegations implicated mere contractual violations for which the Board has declined to police.

01/20/21
ILRB SP
Executive Director Dismissal/Retaliation/Motive

In *Maurice G. Miner and State of Illinois, Department of Central Management Services,*37 PERI ¶ 79 (ILRB-SP 2021) (Case No. S-CA-19-022), the Board affirmed the Executive Director's dismissal of a charge alleging the Employer changed Charging Party's 2018 Annual Review to retaliate against Charging Party for filing a grievance. The charge was dismissed for lack of evidence of the Employer's unlawful motive. The Executive Director found

the Union failed to provide evidence of a nexus between the filing of Charging Party's grievance the alleged alterations to Charging Party's performance evaluation.

02/17/21
ILRB LP
Executive Director Dismissal/Retaliation/Unilateral Changes/Timeliness

In *International Brotherhood of Teamsters, Local 700 and County of Cook and Sheriff of Cook County*, 37 PERI ¶ 82 (ILRB- LP 2021) (Case No. L-CA-20-038), the Board affirmed the Executive Director's dismissal of the Union's unfair labor practice charge alleging the Employers violated the Act when the Sheriff (1) filed a complaint with the Office of Professional Review to discharge Officer Allen Eason for violating the home check policy; (2) unilaterally implemented policies related to the home check provision of the parties' Collective Bargaining Agreement (CBA); and (3) attempted to circumvent the contractual grievance procedure. The Executive Director dismissed the charge on timeliness grounds and on grounds the allegations failed to raise issues warranting a hearing. The Executive Director concluded the charge was untimely because Local 700 became aware of the Sheriff's actions a year before filing its charge. She also concluded that even if the charge was timely filed, the available evidence indicated the allegations strictly involved matters of contract interpretation for which the Board has previously declined to resolve through its unfair labor practice proceedings.

03/15/21
ILRB LP
Executive Director Dismissal/Reversal/Retaliation/Causal Connection

In *David Evans, III and County of Cook and Sheriff of Cook County*, 37 PERI ¶ 90 (ILRB-LP 2021) (Case No. L-CA-20-044), the Board reversed the dismissal of an unfair labor practice charge alleging the Respondents violated Sections 10(a)(1) and 10(a)(2) of the Act when the Sheriff initiated disciplinary action against Charging Party for insubordination based on his participation in protected activity and on his status as the first Black person to serve as Chief Union Steward for the bargaining unit. The Executive Director dismissed the charge on grounds the evidence failed to indicate a causal connection between Charging Party's protected activity and the disciplinary charges leveled against him. Charging Party appealed the dismissal contending motive and causation can be inferred because the Sheriff based his actions on the

very same conduct that constituted protected activity. The Board found the events that took place after Charging Party attempted to meet Director Miller and led to the initiation of charges, were in dispute and thus, raised issues for hearing on causation. The Board reversed the dismissal and remanded the matter to the Executive Director to issue a complaint for hearing.

04/19/21
ILRB SP
Bargaining Pre and Post Initial CBA/Exercise of Discretion/Unilateral Change

In *American Federation of State, County, and Municipal Employees, Council 31 and County of DuPage (DuPage Care Center)*, 37 PERI ¶ 99 (ILRB-SP 2021) (Case No. S-CA- 19-116), AFSCME alleged the County refused to bargain over the discharge of a bargaining unit member, Janelle Gatson, shortly after AFSCME was certified as the exclusive representative of that unit but before the execution of the initial collective bargaining agreement. Following Illinois precedent and rejecting AFSCME's reliance on National Labor Relations Board (NLRB) precedent, the ALJ recommended dismissal of the complaint for hearing. He found that according to Illinois caselaw and Board precedent, Gatson's termination was consistent with the County's established practice and thus, did not alter the status quo triggering the County's bargaining obligations. The ALJ also found the County had no obligation to bargain over the effects of Gatson's termination because bargaining over the effects of terminating Gatson would be tantamount to bargaining over the termination. Finally, the ALJ determined the County did not condition bargaining on the provision of legal authority, but instead merely refused to bargain and stated that it could be persuaded otherwise.

Upon review of the RDO and AFSCME's exceptions, the Board rejected the ALJ's recommendations and found the County violated Sections 10(a)(4) and 10(a)(1) of the Act. The Board declined to follow its prior decision in County of Grundy because it did not directly address the exercise of discretion in an employer's decision-making during the period after the certification of an exclusive representative, but before the execution of the initial agreement, and found the NLRB's analysis set forth in Total Security Management, holding that an employer is obligated to bargain over the imposition of discipline regardless of pre-existing practices if the employer exercises discretion in disciplining employees, to be more closely aligned with the purposes and public policy of the Act under these circumstances. The Board also rejected the

ALJ's recommendations regarding the issue of post-termination bargaining upon AFSCME's demand, noting that discipline and discharge are mandatory subjects of bargaining and as such trigger decisional and effects bargaining upon demand. The County petitioned for administrative review of the Board's decision, which is currently pending before the Illinois Appellate Court, Second District. On July 22, 2021, the Board denied the County's motion for a limited stay of enforcement.

04/20/21
ILRB LP
Unilateral Change/Abeyance

In *Fraternal Order of Police, Lodge #7 and City of Chicago,* 37 PERI ¶ 102 (ILRB-LP 2021) (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 September 9, 2021.

04/20/21
ILRB LP
Unilateral Change/Abeyance

In *Fraternal Order of Police, Lodge #7 and City of Chicago (Department of Police),* 37 PERI ¶ 102 (ILRB-LP 2021) (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 September 9, 2021.

5/14/21
ILRB SP
Executive Director Dismissal/Reversal/Retaliation/Motive

In *American Federation of State, County, and Municipal Employees, Council 31 and CGH Medical Center,* 37 PERI ¶ 110 (ILRB-SP 2021) (Case No. S-CA-21-007), the Board reversed the dismissal of an unfair labor practice charge filed by AFSCME alleging the Respondent discharged Linda Bell, a Certified Nursing Assistant, in retaliation for Bell's support of AFSCME's organizing campaign. The Executive Director dismissed the charge on grounds the charge failed to raise issues for hearing because the evidence failed to show a causal connection between Bell's support of the organization campaign and Bell's discharge, and because Respondent provided legitimate business reasons for discharging Bell. The Board, however, found there was evidence raising issues for hearing on motive and on whether Respondent would have discharged Bell notwithstanding Bell's participation in protected activity. As a result, the Board reversed the dismissal and remanded the matter to the Executive Director to issues a complaint for hearing alleging Respondent engaged in unfair labor practices in violation of Sections 10(a)(1) and 10(a)(2) of the Act.

5/14/21
ILRB SP
Executive Director Dismissal/Retaliation

In *Amalgamated Transit Union, Local 1028 and PACE Fox Valley Division,* 37 PERI ¶ 109 (ILRB-SP 2021) (Case No. S-CA-20-126), the Board affirmed the Executive Director's dismissal of an unfair labor practice charge alleging the Employer violated Section 10(a) of the Act by charging a bargaining unit member for two unexcused absences in violation of the Employer's attendance policy. The charge was dismissed on grounds the available evidence failed to indicate that the Employer's actions constituted unlawful activity. She determined the charge's allegations involved breaches of the parties' collective bargaining agreement for which the Board has declined to police.

5/24/21
Illinois Appellate Court, Fourth District Rule 23 Unpublished Order
Unilateral Changes/Mandatory Subject

In the *City of Springfield v. Ill. Labor Relations Bd., et al.*, 2021 IL App (4th) 200164-U, the Fourth District, in an unpublished order, affirmed the Board's decision 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.*), finding the City violated Sections 10(a)(4) and 10(a)(1) of the Act when it implemented a rule change approved by the City's civil service commission giving preference points to promotional candidates for City residency. The Board 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 Board further concluded the Charging Parties did not waive bargaining over residency preference points. Lastly, the Board determined the City unlawfully failed to maintain the status quo during the pendency of Section 14 interest arbitration with Charging Parties. The court granted Local 37's motion to publish but has not yet issued its opinion.

7/22/21
ILRB LP
Effects Bargaining/Unilateral Changes/Mandatory Subjects/Mid-term Interest Arbitration

In *Fraternal Order of Police, Lodge #7 and City of Chicago (Department of Police),* 38 PERI ¶ 20 (ILRB-LP 2021) (Case Nos. L-CA-17-037 and L-CA-20-024, *consol. for decision*), the Board adopted the ALJ's Recommended Decision and Order finding the City of Chicago engaged in unfair labor practices relating to body worn cameras for bargaining unit members. In Case No. L-CA-17-037, the ALJ issued an RDO (RDO I) finding the City failed to bargain the effects of the 2017 expansion of its Body Worn Camera Pilot Program. Three years later, the same ALJ issued an RDO (RDO II), resolving the charge filed in Case No. L-CA-20-024 by finding that the City violated Sections 10(a)(4) and 10(a)(1) when it unilaterally implemented its Last, Best, Final Offer on the effects of the body worn camera policy, as well as when it unilaterally increased buffering times on the body worn cameras without first bargaining over the effects. For both cases, the ALJ recommended limited remedies. The cases were consolidated for the filing of exceptions at the parties' joint request.

The City filed exceptions contending the ALJ erred in determining the implementation of body worn cameras, resulting in bargainable effects with respect to the safety and discipline issues associated with the expansion of Body Worn Camera Pilot Program. The City also filed

exceptions contingent on the Board's acceptance of the ALJ's recommendations in RDO I and II. The City contended that in the event the Board accepted the ALJ's recommendations concerning bargaining violations as set forth in RDO I, then the Board should find that RDO II superseded RDO I with respect to "any arguably appropriate remedy arising from RDO I." The City then contended that should the Board decide RDO II did not supersede RDO I, and an independent obligation as to remedy remained, the City asserted that the ALJ's findings in RDO II that (1) the City is obligated to proceed to midterm interest arbitration over BWC effects due to the alleged inequity between Section 14 and non-Section 14 employees; and (2) the failure to find that the City bargained in good faith to impasse during the effects bargaining were in error. The Board disregarded the City's exceptions because they failed to comport with Section 1200.135(b)(2) of the Board's rules and on the merits, noting that regarding the issue of midterm interest arbitration, the City conceded the ALJ followed Board precedent but disagreed with the Board's decisions which were affirmed by the court.

07/22/21
ILRB SP
Executive Director Dismissal/Reversal/Retaliation/Causal Connection

In *Tammy Powell and Sangamon County Sheriff's Office,* 38 PERI ¶ 23 (ILRB-SP 2021) (Case No. S-CA-20-120), the Board reversed the dismissal of an unfair labor practice charge filed by Charging Party alleging Respondent took a series of employment actions against her because she prevailed in her grievance arbitration challenging her discharge. The Executive Director dismissed the charge on grounds the available evidence failed to demonstrate Respondent retaliated against Charging Party because she prevailed at arbitration. The Executive Director noted that the complained-of actions were the subject of a dispute over the terms of the arbitration award reinstating Charging Party, which the parties arbitrated and were waiting for a decision. She also found dismissal warranted because Respondent provided legitimate business reasons for its actions. The Board, however, found Charging Party provided enough evidence to raise issues for hearing on Respondent's motive for its actions and on whether Respondent's reasons are indeed legitimate and not pretextual. As a result, the Board reversed the dismissal and remanded the matter to the Executive Director to issue a complaint for hearing, alleging Respondent engaged in unfair labor practices in violation of Section 10(a)(1) of the Act.

09/24/21
ILRB SP
Executive Director Dismissal/Reversal/Protected Activity/Unilateral Changes/Causal Connection

In *Professional Fire Fighters of Elmhurst, Local 3541, IAFF, and City of Elmhurst,* 38 PERI ¶ 40 (ILRB- SP 2021) (Case No. S-CA-21-014), the Board affirmed the Executive Director's partial dismissal of the Union's unfair labor practice charge alleging the City of Elmhurst violated the Act when it implemented unilateral changes to return to work requirements and procedure for light duty assignments, fitness for duty, worker's compensation leave, and personnel investigation procedures and surveillance, during the pendency of interest arbitration proceedings. The charge also alleged the unilateral changes were made in retaliation for employees engaging in protected activity. The Executive Director issued a complaint for hearing on the allegations that the City made implied threats of discipline in violation of Section 10(a)(1) of the Act and violated Sections 10(a)(2) and (1) of the Act by discouraging employees from engaging in activities for mutual aid and protection.

The Executive Director, however, dismissed the remaining allegations on grounds the available evidence failed to raise issues of fact or law warranting a hearing. She dismissed the allegations that the City unilaterally implemented changes to unit members' terms and conditions of employment and repudiated the parties' collective bargaining agreement. She found that the alleged changes were not substantial enough to constitute repudiation of the parties' collective bargaining agreement or to trigger the Employer's statutory bargaining obligations. Regarding the allegations that the City violated certain unit members' rights under HIPPA, the Workers' Compensation Act, and the Fireman's Disciplinary Act, the Executive Director observed the Board lacked jurisdiction over those statutes and thus dismissed those allegations. The retaliation and discrimination allegations were dismissed because Charging Party failed to identify the protected concerted activity engaged in by the unit members in question and because the evidence failed to point to a causal connection between the alleged protected activity and adverse employment actions.

On appeal, the Board reversed the partial dismissal and directed the issuance of a complaint for hearing on the remaining allegations that the City violated Sections 10(a)(1), 10(a)(2), and 10(a)(4) of the Act. Viewing the allegations and evidence as whole, the Board

found that Charging Party submitted sufficient evidence to raise issues for hearing on whether the City unilaterally changed the status quo regarding the fitness for duty requirements and procedures, light duty assignments, employee investigatory methods and practices during the pendency of interest arbitration, and on the remaining retaliation and discrimination claims. The Board noted the protected, concerted activity in this case was the assertion of contractual rights by each unit member that there was sufficient evidence to warrant a hearing on the issue of causation.

10/21/21
ILRB LP
Unilateral Change/Abeyance

In *Fraternal Order of Police, Lodge #7 and City of Chicago,* __ PERI ¶ __ (ILRB-LP 2021) (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 March 9, 2022.

10/21/21
ILRB LP
Unilateral Change/Abeyance

In *Fraternal Order of Police, Lodge #7 and City of Chicago (Department of Police),* __ PERI ¶ __ (ILRB-LP 2021) (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 March 9, 2022.

10/26/21
Illinois Appellate Court, Fourth District Rule 23 Unpublished Order
Collateral Estoppel/Transfer of Work/Mandatory Subjects/Substitutes Act

In *City of Mattoon v. Ill. Labor Relations Bd., et al.,* 2021 IL App (4th) 200417-U, the Fourth District, in an unpublished order, affirmed the Board's decision in *Mattoon Firefighters Association, Local 691 and City of Mattoon*, 37 PERI ¶ 30 (ILRB-SP 2020) (Case No. S-CA-18-138). The Board found the City failed and refused 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. The Board determined that the issues presented by the charge were not previously litigated in Board Case No. S-CA-18-084, in which the Board affirmed the deferral of the charge in that case to an arbitration award finding the City did not violate the parties' collective bargaining agreement when it adopted a resolution to eliminate City-operated ambulance services. The Board noted the present case involved the use of unqualified substitutes and the transfer of bargaining unit work resulting from the City's elimination of ambulance services which were not at issue in the arbitration. The Board then concluded the City's use of unqualified substitutes constituted a forced waiver of the Union's rights under the Substitutes Act, rejecting the City's argument that the Substitutes Act applies only to hiring of firefighters. The Board also determined that notwithstanding the Substitutes Act, the 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 found the resultant transfer of work changed the existing terms and conditions of employment pending interest arbitration.

The Fourth District held that collateral estoppel did not apply and that the Board did not clearly err by failing to defer to the arbitration award. The court then concluded the Board did not clearly err by deciding the City committed an unfair labor practice based on its failure to bargain to impasse over the transfer of bargaining unit work, a mandatory subject of bargaining, and unilateral changes to the status quo pending interest arbitration but did not reach the Substitutes Act interpretation issues.

III. Union Unfair Labor Practices

11/23/20
ILRB LP
Executive Director Dismissal/Failure to Pursue Grievances/Intentional Misconduct

In *Jenise Givantt and Amalgamated Transit Union, Local 241,* 37 PERI ¶ 58 (ILRB-LP 2020) (Case No. L-CB-20-014), Charging Party, an employee of the Chicago Transit Authority, alleged Respondent engaged in unfair labor practices within the meaning of Section 10(b) of the Act when it failed to pursue Charging Party's grievance over her discharge. The Executive Director dismissed the charge on grounds the record contained insufficient evidence that Respondent engaged in intentional misconduct or discriminated against Charging Party in failing to pursue her grievance, noting that under Section 6(d) of the Act and Board precedent, a labor organization is afforded considerable discretion in handling grievances and that a failure to achieve a desired result of a particular employee does not violate the Act. On appeal, the Board granted a variance from its proof of service rules and considered the appeal but affirmed the dismissal on the merits.

12/14/20
ILRB LP
Executive Director Dismissal/Breach of Duty of Fair Representation/Intentional Misconduct

In *Tommy Sams, Jr., and Amalgamated Transit Union, Local 241,* 37 PERI ¶ 68 (ILRB-LP 2020) (Case No. L-CB-20-021), Charging Party, an employee of the Chicago Transit Authority, alleged Respondent engaged in unfair labor practices within the meaning of Section 10(b) of the Act when it delayed the arbitration of Charging Party's discharge grievance. Charging Party claimed Respondent delayed arbitration due to his negative standing with Respondent over financial matters and to ensure Charging Party would be ineligible to be elected to a union leadership role. The Executive Director dismissed the charge on grounds Charging Party failed to provide sufficient evidence indicating that Respondent engaged in intentional misconduct against Charging Party in delaying the arbitration of his discharge grievance, noting that under Section 6(d) of the Act and Board precedent, a labor organization is afforded considerable discretion in contract interpretation and grievance handling. She further observed the evidence indicated that the delay was attributable to Respondent's grievance backlog. On appeal, the Board affirmed the dismissal.

12/14/20
ILRB SP
Dismissal/Breach of Duty of Fair Representation/Discrimination

In *Gloria Marty and International Brotherhood of Teamsters, Local 700,* 37 PERI ¶ 69 (ILRB-SP 2020) (Case No. S-CB-19-011), Charging Party alleged the Union engaged in unfair labor practices when it refused to pursue to arbitration her grievance over her bid placement, contending that the Union did not want to pursue arbitration because if successful, the Chief Steward, who is male, as well as other male bargaining unit members and Union leaders would be adversely affected. The Executive Director dismissed the charge on grounds Charging Party failed to provide evidence indicating the Union engaged in intentional misconduct in failing to pursue her grievance to arbitration. She noted the Union treated Charging Party in the same manner as two other unit member grievances on the same issue and found the evidence indicated the Union based its decision on the merits of the grievance and the interests of the bargaining unit as a whole. On appeal, the Board affirmed the dismissal for the reasons given by the Executive Director.

01/20/21
ILRB LP
Dismissal/Reversal/Failure to Respond to Request for Information/Breach of Duty of Fair Representation

In *Frank Donis and International Brotherhood of Teamsters, Local 700,* 37 PERI ¶ 78 (ILRB-LP 2021) (Case No. L-CB-19-047), the charge alleged Local 700 engaged in unfair labor practices by failing to take any action against Charging Party's employer for discriminating against employees protected under the Americans with Disabilities Act (ADA). The Executive Director dismissed the charge on grounds Charging Party failed to respond to a request for information in support of the charge. Upon appeal, the Board noted the appeal was untimely but granted a variance from the Board's appeal timeframe rule. The Board found that the request for information was sent to Charging Party's attorney rather than to Charging Party due to a miscommunication about Charging Party's legal representation. The Board then reversed the dismissal and remanded to the Executive Director for investigation.

02/17/21
ILRB SP

Dismissal/Breach of Duty of Fair Representation

In *Debra Cole and Illinois Fraternal Order of Police,* 37 PERI ¶ 85 (ILRB-SP 2021) (Case No. S-CB-20-028), the charge alleged the Union engaged in unfair labor practices when it failed to properly represent Charging Party during arbitration proceedings. The Executive Director dismissed the charge as untimely and on grounds the evidence failed to indicate Respondent, or its representatives, failed to represent Charging Party due to any animus or hostility towards her. On appeal, the Board affirmed the dismissal for the reasons cited by the Executive Director.

05/14/21
ILRB LP
Dismissal/Breach of Duty of Fair Representation

In *Doris M. Smith and Amalgamated Transit Union, Local 214,* 37 PERI ¶ 108 (ILRB-LP 2021) (Case No. L-CB-20-028), Charging Party alleged the Union engaged in unfair labor practices when it refused to assist her and file a grievance over the employer's denial of her reasonable accommodation request. The Executive Director dismissed the charge on grounds there was no evidence indicating Respondent's actions constituted intentional misconduct. The Executive Director observed there was no evidence Respondent's refusal was due to any bias or hostility toward Charging Party or disparate treatment. Rather, the evidence indicated Respondent actions were consistent with its practice in reviewing the employer's accommodations.

07/22/21
ILRB SP
Dismissal/Breach of Duty of Fair Representation/Public Employee

In *Jonnie Bankston and American Federation of State, County, and Municipal Employees, Council 31,* 38 PERI ¶ 24 (ILRB-SP 2021) (Case No. S-CB-21-006), 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 follow COVID-19 mitigation mandates from the Governor of Illinois and the Center for Disease Control (CDC). The Executive Director dismissed the charge, observing the Board lacked jurisdiction over the Charging Party's claims which did not concern any matters falling within the Act's provisions.

She also noted that Charging Party is not a public employee as defined by the Act but an inmate in a State of Illinois correctional center who filed the charge to complain of conditions at the correctional facility due to the failure to follow COVID-19 related guidelines. Charging Party appealed, claiming that as an inmate of a State correctional facility he is a third-party beneficiary of contracts involving the Illinois Department of Corrections, including collective bargaining agreements. Citing 730 ILCS 5/3-2-2(1)(c), he claims he is entitled to a hearing before the Board. After considering the appeal, the Board affirmed the dismissal.

9/24/21
ILRB LP
Rule to Show Cause Remand

In *Carmelita Otis, et al., and Chicago Joint Board, Local 200,* 38 PERI ¶ 38 (ILRB-LP 2021) (Case No. L-CB-06-035-C), the Board adopted the ALJ's recommended findings concerning Respondent Chicago Joint Board, Local 200, Retail, Wholesale, Department Store Union (Local 200)'s ability to pay the restitution and/or distribution of the $375,000 settlement to the Charging Parties in accordance with the Board's May 19, 2010 Decision and Order plus interest accrued since the date that order was issued. The current matter came before the Board on remand from the Illinois Appellate Court's June 26, 2018 order, issued upon a rule to show cause action which was filed with the court and entered on March 23, 2017. Upon review of the recommended findings and Local 200's exceptions, the Board denied the request for oral argument and found that Local 200 failed to provide any compelling reason to reject the ALJ's recommendations.

IV. Strike Investigations

12/11/20
ILRB LP

In *County of Cook and Service Employees International Union, Local 73*, 37 PERI ¶ 65 (ILRB-LP 2020) (Case No. L-SI-21-001), the Cook County Health & Hospital System filed a petition for strike investigation pursuant to Section 18 of the Act, contending that a strike threatened by SEIU representing a bargaining unit composed of approximately 1,600 employees in nearly 50 different job tiles performing a range of duties related to the provision of medical services constituted a clear and present danger to the health and safety of the public. The County

sought to prevent approximately 300 of the 1,600 employees from striking. After an investigation and expedited hearing, the Board found SEIU intended to conduct a one-day strike and determined that a strike of 342 employees in specified numbers and job titles would pose a clear and present danger to the health and safety of the public. The Board further found that the strike of the remaining members of the bargaining unit would not pose a clear and present danger to the health and safety of the public.

12/13/20
ILRB LP

In *County of Cook and Sheriff of Cook County, and Service Employees International Union, Local 73*, 37 PERI ¶ 66 (ILRB-LP 2020) (Case No. L-SI-21-002), the Sheriff of Cook County filed a petition for strike investigation pursuant to Section 18 of the Act, contending that a strike threatened by SEIU representing a bargaining unit composed of non-sworn personnel working in certain departments within the Sheriff's Office posed a clear and present danger to the health and safety of the public. After an investigation and expedited hearing, the Board determined that a one-day strike of the Administrative Assistant IIIs and Administrative Assistant IIs/Leads Operators, and specified numbers of Administrative Assistant IIs/Records and Central Warrant Clerks in the Emergency 911 Center, would pose a clear and present danger to the health and safety of the public. The Board further determined that a one-day strike of Correctional Rehabilitation Worker I, II, and IIIs in the Inmate Services Department, Clerks/Records, and Quality Assurance Auditors would not pose a clear and present danger to the health and safety of the public.

06/22/21
ILRB LP

In *County of Cook and National Nurses Organizing Committee*, 38 PERI ¶ 7 (ILRB-LP 2021) (Case No. L-SI-21-003), the Cook County Health & Hospital System filed a petition for strike investigation pursuant to Section 18 of the Act, contending that a strike threatened by the National Nurses Organizing Committee (NNOC) representing a bargaining unit composed of nurses employed by the Cook County Health and Hospital System at Stroger Hospital, Provident Hospital, and CCH community care centers throughout Cook County. After an investigation and expedited hearing, the Board found NNOC intended to conduct a one-day strike and determined

that a strike of specified numbers of employees at specified locations and departments would pose a clear and present danger to the health and safety of the public. The Board further found that the strike of the remaining members of the bargaining unit would not pose a clear and present danger to the health and safety of the public.

06/23/21
ILRB LP

In *County of Cook and Service Employees International Union, Local 73*, 38 PERI ¶ 8 (ILRB-LP 2021) (Case No. L-SI-21-004), the Cook County Health & Hospital System filed a petition for strike investigation pursuant to Section 18 of the Act, contending that a strike threatened by SEIU representing a bargaining unit composed of approximately 1,600 employees performing a range of duties related to the provision of medical services constituted a clear and present danger to the health and safety of the public. The County sought to prevent more than 400 of the 1,600 employees from striking, contending that in addition to the 342 employees the Board determined were essential employees in its previous order, the strike of an additional 131 employees should be prevented from striking. After an investigation and expedited hearing, the Board determined that a clear and present danger to the health and safety of the public would continue to exist if the 342 employees previously prevented from striking were to conduct a strike of open-ended duration. The Board further determined that an open-ended strike of an additional 21 employees in titles that were previously found to be essential, and specified numbers of employees in titles not enjoined in December, would pose a clear and present danger to the health and safety of the public.

06/23/21
ILRB LP

In *County of Cook and Sheriff of Cook County, and Service Employees International Union, Local 73*, 37 PERI ¶ 9 (ILRB-LP 2021) (Case No. L-SI-21-005), the Sheriff of Cook County filed a petition for strike investigation pursuant to Section 18 of the Act, contending that a strike threatened by SEIU representing a bargaining unit composed of non-sworn personnel working in certain departments within the Sheriff's Office posed a clear and present danger to the health and safety of the public. After an investigation and upon stipulation of the parties, the Board determined that a strike of open-ended duration of the Administrative Assistant IIIs and

Administrative Assistant IIs/Leads Operators, and specified numbers of Administrative Assistant IIs/Records, Central Warrant Clerks in the Emergency 911 Center, and Quality Assurance Auditors would pose a clear and present danger to the health and safety of the public. The Board further determined that the remaining bargaining unit members should be permitted to exercise their rights to strike under the Act.

09/24/21
ILRB LP

In *County of Cook and Service Employees International Union, Local 73,* 38 PERI ¶ 39 (ILRB-LP 2021) (Case No. L-SI-22-001), the Cook County Health & Hospital System filed a petition for strike investigation pursuant to Section 18 of the Act, contending that a strike threatened by SEIU representing a bargaining unit composed of approximately 1,600 employees performing a range of duties related to the provision of medical services constituted a clear and present danger to the health and safety of the public. The County sought to prevent the strike of certain employees in addition to the more than 400 employees that the Board had found to be essential employees in its June 23, 2021 order. The Board conducted an investigation, and at the conclusion of the hearing, the parties advised that a tentative agreement had been reached and the striking employees were returning to work. The Board after holding the matter in abeyance, dismissed the petition as moot.

IPLRA UPDATES

Legislative Amendments
November 2020 – October 2021
Public Act 102-0151

On July 23, 2021, Governor J.B. Pritzker signed into law Public Act 102-0151, amending Sections 3, 9, and 21.5 of the Illinois Public Labor Relations Act (IPLRA). The amendments to Section 3 require consideration of a public employee's actual job duties in assessing whether the employee falls within the confidential, managerial, or supervisory exemptions. The amendments to Section 9 set forth the circumstances under which unit clarification petitions may be filed. The amendments to Section 21.5(a) prohibit collective bargaining agreements entered into by an executive branch constitutional officer and labor organizations to extend beyond 12 months after the date the term of executive officer begins. The amendments to Section 21.5(b) clarify that the

provisions of subsection b do not apply to salary, pay schedules, or benefits that would continue because of the duty to maintain the status quo and to bargain in good faith.

Public Act 102-0596

On August 27, 2021, Governor J.B. Pritzker signed into law Public Act 102-0596, amending Sections 9 and 10 of the Illinois Public Labor Relations Act (IPLRA) and Sections 7, 8, and 14 of the Illinois Educational Labor Relations Act (IELRA). The amendments to Section 9 of the IPLRA allow for the use of electronic signatures to evidence a showing of interest in support of representation petitions and also provide for electronic voting systems in addition to paper ballots. The amendments to Section 10 prohibit public employers from taking certain actions in response to a lawful strike.

MASSACHUSETTS

Significant Developments in Massachusetts Public Sector Labor Arbitration and Collective Bargaining

Marc D. Greenbaum

Introduction

This was a quiet year in the development of the law governing labor arbitration in Massachusetts. The reported appellate decisions only touch upon issues that may arise in the context of a public sector labor arbitration, but they did not shape the process.

The pandemic gave rise to state trial court litigation by labor organizations representing public safety employees seeking to enjoin the enforcement of COVID-19 vaccine mandates. To date, plaintiffs in those cases have been uniformly unsuccessful in securing relief. https://www.bostonglobe.com/2021/10/15/metro/judge-rules-against-prison-guards-challenging-vaccine-mandate/?p1=BGSearch_Advanced_Results; https://www.bostonglobe.com/2021/09/27/metro/state-police-union-claims-dozens-troopers-plan-resign-due-vaccine-mandate-police-spokesman-says-only-one-definitively-has/?p1=BGSearch_Advanced_Results; https://www.bostonglobe.com/2021/09/21/metro/state-police-union-sues-over-vaccination-mandate/?p1=BGSearch_Advanced_Results; These decisions are not reported. Thus, we cannot tell what role, if any, the presumed availability of an arbitral forum played a role in the trial courts declining to grant injunctive relief.

It has also been reported that a number of state employees have been suspended for failing to comply with the mandate. https://www.bostonglobe.com/2021/10/29/metro/hundreds-state-employees-serving-suspensions-not-complying-with-baker-vaccine-mandate/?p1=BGSearch_Advanced_Results. Some number of those cases are likely headed to arbitration. It will be interesting to see whether the Commonwealth seeks to vacate any arbitration awards deemed to undermine the vaccine mandate. As is often said in sports and other venues: “Wait until next year.”

There were no developments, significant or otherwise, impacting labor arbitration arising from the police reform legislation discussed in last year’s report. The Governor recently

announced appointments to the commission that will administer those provisions of the statute that might interact with the arbitration process. At the risk of being repetitive: "Wait until next year."

With these two issues off the table, this report will summarize significant judicial decisions and decisions from the Commonwealth Employment Relations Board addressing issues that may arise in or relate to the labor arbitration process.

Significant Judicial Decisions

Donahue v. Trial Court of the Commonwealth of Massachusetts, 99 Mass. App. Ct. 180 (2021).

This case arose out of a class action lawsuit filed on behalf of court officers and probation officers employed by the Massachusetts court system seeking unpaid wages and overtime. The civil action appears to have been prompted by provisions in the applicable collective bargaining agreement providing for employees to receive compensatory time in lieu of overtime for the first seventy-five hours of overtime work. The collective bargaining agreement also limits the number of overtime hours that may be accrued each year. Unused compensatory time is paid out upon an employee's terminating employment, although the collective bargaining agreement authorizes the parties to agree, subject to available funding, upon a mechanism for the annual payout of unused compensatory time. No such agreement appears to have been reached.

The civil action invoked the Fair Labor Standards Act and two Massachusetts statutes governing the payment of wages and overtime. The first question before the Court was whether the federal statutory claim was barred by principles of sovereign immunity. The Court answered that question in the affirmative.

The claim under the Fair Labor Standards Act (FLSA) was deemed governed by the Supreme Court decision in *Alden v. Maine,* 527 U.S. 706 (1999), holding that sovereign immunity principles barred pursuit of a claim under that statute against a state government. Because there was no evidence that the Trial Court had waived that immunity or consented to being sued under the statute, the FLSA claim was dismissed.

The state law claims required a separate analysis. The state statutes contained limited waivers of sovereign immunity for wage and overtime claims brought by certain blue-collar classifications and by employees of penal institutions.

The Appeals Court rejected plaintiff's efforts to come within these exemptions. Citing previous case law describing the duties of court officers, the Court held that their functions did not bring them within the blue-collar exemptions. It also rejected the claim that courthouses should be deemed penal institutions since they sometimes housed prisoners in holding cells.

Town of Brookline v. Alston, 481 Mass. 278 (2021).

This case arose out of Alston's termination from employment as a Town of Brookline firefighter. The dispute has its origins in a racially tinged voice mail inadvertently left by another firefighter cursing out a driver in racial terms, after mistakenly believing that he had terminated a phone call to Alston's voicemail. This prompted extensive litigation which was recently resolved with an eleven-million-dollar settlement between Alston and the Town. https://www.brooklinema.gov/DocumentCenter/View/25370/Brookline-Alston-Settlement-Agreement---Fully-Executed-9-15-21 This case also gave rise to a duty of fair claim discussed below.

This case concerns the Town's appeal of a ruling by the Civil Service Commission finding an absence of just cause for Alston's termination. Alston exercised his right to seek review of his termination before the Commission in lieu of utilizing the arbitration provisions of the collective bargaining agreement.

The critical holding in the case is that the merit principles utilized by the Commission encompass discriminatory or retaliatory conduct that would normally be resolved under the Commonwealth's statute providing remedies for class-based employment discrimination. The Court thus stated:

> A civil service employee whose unfitness is determined to be caused by racist remarks and retaliation in the workplace and the employer's arbitrary and capricious response to

such remarks and retaliation may not be terminated by the employer responsible for causing the unfitness.

The Court observed that the civil service law mandated that decisions "be consistent with 'basic merit principles'" and that the statute defined that term as requiring "fair treatment." Such treatment was defined to exclude class-based discrimination, specifically including race discrimination. The Court thus rejected the Town's claim that race discrimination claims were exclusively cognizable under the Massachusetts employment discrimination laws and described those laws and the civil service statute as overlapping remedial schemes.

The Court also observed that the employer's response to alleged acts of discrimination factored into the civil service proceedings in a way that might not be relevant under the employment discrimination statutory scheme. It thus considered a scenario under which an employer's action effectively preluded an employee from performing their job. That action, it said, would bar the employer from relying upon the employee's claimed unfitness as just cause for the employee's termination.

The Court ultimately affirmed the Civil Service Commission determination that the Town lacked just cause to terminate Alston. It held that the Town failed to deal appropriately with the discriminatory act of Alston's colleague. As an example, it cited the offending firefighter's subsequent promotion on two occasions despite having been disciplined for engaging in discriminatory conduct to Alston.

Alston v. International Association of Firefighters, Local 950, 998 F.3d 11 (1st Cir. 2021).

This case is related to the Supreme Judicial Court decision discussed above. It arose out of a claim filed by Alston against the labor organization representing the Town of Brookline's firefighters. Alston claimed that the Union breached its duty fairly to represent him on account of his race. The Court of Appeals for the First Circuit upheld the district court's grant of summary judgment in favor of the union.

The Court of Appeals first noted that Alston changed his theory of liability between the district court's consideration of the summary judgment motion and the prosecution of his appeal of that judgment. In the district court, the theory of liability was predicated upon the Union's acquiescing to the Town's discriminatory conduct and failing to act when it had a duty to do so. On appeal, the court tells us, Alston alleged the Union's active participation and condonation of the Town's alleged misconduct. The Court held it was too late to "switch horses" in midstream.

The court did find that aspects of his claim relying upon the Union's claimed failure to enforce the non-discrimination provision of the collective bargaining agreement by tacitly acquiescing to the Town's discriminatory conduct was properly before the court. However, that did not help Alston as the court, stressing the necessity of according some degree of deference to the Union, found that no jury could find that the Union acted in bad faith. Notably at issue was the Union's actions after Alston was quoted as making a reference to "going postal." The Court found that the Union's advocacy of safety measures following that conflict did not undermine the Union's satisfaction of its duty of fair representation in the subsequent disciplinary investigation. It also noted the Union's opposition to certain return to work measures the Town sought to impose upon Alston as a condition of his returning for work.

The Court also found the grant of summary judgment proper with respect to the claim of a discriminatory breach of the duty of fair representation. It found that Alston had not objected to certain steps taken by the Union in support of the firefighter who left the critical voice mail. It also cited the absence of any factual dispute that the Union lacked knowledge of certain Town actions claimed by Alston to have been discriminatory, thus explaining its failure to act. It also observed that Alston's failed to grieve an alleged discriminatory act by the Town. The Court also held that Alston could not rely upon a discriminatory blog posting by a fellow firefighter as evidence of the Union's breaching its duty of fair representation, because there was no evidence that the firefighter was acting in his capacity as a Union officer in making the blog post.

School Committee of Chelmsford v. Commonwealth Employment Relations Board, 99 Mass. App. Ct. 906 (2021).

A Commonwealth Employment Relations Board hearing officer dismissed a union's prohibited practice complaint after accepting the School Committee's unilateral settlement offer. The Board reversed that decision and remanded the matter for what became a multi-day hearing on the merits. The hearing on the merits proceeded while the School Committee appealed the Board's reversal of the hearing officer's decision. The Appeals Court granted the Board's motion to dismiss the School Committee's appeal on the grounds that the Board decision was not a final agency action. The Appeals Court rejected the School Committee's claim that appellate review was appropriate because it was the only way of assuring that its claim would be subject to such review. The Appeals Court deemed this irrelevant since the School Committee could not show that it was entitled to obtain judicial review of Board's rejection of the hearing officer's action.

Moore v. Executive Office of the Trial Court, 487 Mass. 839 (2021).

An Assistant Clerk of the Trial Court challenged her suspension from employment, without pay, following her indictment for various federal crimes. Her suspension was prompted by application of a Trial Court policy providing for the automatic suspension for employees indicted for or charged with felonies. Plaintiff alleged that the policy exceeded the Trial Court's statutory authority and denied the employee due process rights. The Supreme Judicial Court rejected both claims.

The Court held that the challenged policy was within the Trial Court's authority because its enabling statute vested the Trial Court with the authority to establish disciplinary standards for removal and suspension. It rejected the claim that the statute required an individualized determination of whether a suspension would be paid or unpaid. The Court held that the statute accorded the Trial Court discretion to determine that all suspensions occasioned by felony charges or indictments would be unpaid.

The due process claim fared no better. Effectively conceding that plaintiff had a property interest in her employment, the Court reasoned that the challenged policy afforded her notice of the consequences of her being indicted. It also afforded her the opportunity to be heard about any potential "misunderstanding or mistake" about the event triggering her suspension. Effectively, the Court held that the finding of probable cause for an indictment by a grand jury virtually

eliminated the chance of plaintiff being subject to an "arbitrary" suspension. It thus rejected the claim that due process principles entitled plaintiff to an individualized inquiry. It reasoned that such an inquiry would require consideration of the underlying allegations of the indictment. Due process principles, it held, did not require such an in-depth inquiry. Ultimately the Court stated that the suspension was necessary to assure public confidence in the judicial system.

Agency Decisions

City of Somerville and Somerville Police Employees Association, 47 MLC 59, MUP-17-5980 (October 2, 2020)

The Commonwealth Employment Relations Board held that the City committed a prohibited practice by requiring a former union vice president to disclose certain internal communications with the union president, and by prohibiting the president and former vice president from communicating with most other employees about an internal investigation. The City was also deemed to have committed a prohibited practice by questioning the former vice president and president about those union communications during investigatory interviews conducted in the course of that internal investigation.

The cited discussions concerned an upcoming training about which the union had demanded bargaining and was contemplating filing a grievance. The discussions were deemed to be concerted activities and were protected, notwithstanding the union president's unaccepted suggestion that the union vice president withdraw from the training. It thus upheld a hearing officer's finding that the cited conduct neither disrupted employer operations nor was impermissibly disloyal to the City.

*Commonwealth of Massachusetts/Secretary of Administration and Finance and SEIU, Local 509***,** 47 MLC 160, SUP-19-7352 (March 8, 2021)

A divided Commonwealth Employment Relations Board held that the Commonwealth unilaterally and impermissibly changed the terms and conditions of employment for bargaining unit employees, by commencing to utilize a previously dormant feature of the computer-based phone system of a social services agency to surreptitiously listen to phone calls between unit employees and members of the public. It did so, without affording the bargaining representative

prior notice or an opportunity to bargain about the impact of that change. The Board held that this telephone monitoring increased the amount and quality of information about employees' job performance and thus potentially increased the likelihood of those employees being subject to discipline. One Board member dissented, reasoning that the change was part of an investigation into specific employees' high-volume/short duration phone calls and thus only sought to enforce existing work rules in a more efficient manner.

MICHIGAN

Local Public Sector Committee Report

Michael P. Long

Currently, most Michigan statewide elective posts, including the governor, are held by Democrats, while both chambers of the house and senate of the bicameral legislature are dominated by Republicans. A 2020 ballot proposal that called for a special commission to be empaneled to end gerrymandering was successful. The commission has been empaneled and is working. It is expected to make recommendations no later than year-end 2021.

The political future of the state government is somewhat volatile. Courts, election officials, and the state senate all confirmed the current U.S. President's 2020 win, but the former president has endorsed Republican candidates for attorney general and secretary of state. Both of these statewide elected positions are crucial to election counting. The former president has also endorsed two congressional candidates and seven candidates for seats in the already Republican dominated state legislature. All of these candidates have called for investigations into the 2020 election and changes to election laws; one has said that anyone engaged in "election fraud" should face a firing squad. The former president has publicly stated, "Michigan needs a new legislature … The cowards there now are too spineless to investigate Election Fraud."

Public sector labor relations are statutorily authorized in Michigan by the Public Employment Relations Act known as PERA. The Act is administered by the Michigan Employment Relations Commission. Unlike the National Labor Relations Act, there is no General Counsel or Office of the General Counsel to investigate, conciliate, or file charges against those thought to be in violation of PERA. Charges must be filed by charging parties (unions, employers, or individuals) and then prosecuted by those parties. Administrative hearings are conducted by Administrative Law Judges who render a decision and opinion which is automatically appealable to the full Michigan Employment Relations Commission (MERC).

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 governments, 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.

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. A Commissioner must 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.

Right to Work

Officially titled in Michigan as "Freedom to Work"

Michigan's Freedom to Work (FTW) laws went into effect on March 28, 2013. Those laws amended two labor statutes: the Labor Mediation Act (LMA), governing the private sector, and the Public Employment Relations Act (PERA), applying to the public sector. Generally, the FTW laws prohibit union-security agreements, which require that private and/or public employees pay union dues or service fees as a condition of obtaining or continuing employment. Employees who choose to opt-out of union membership (they may not choose to opt-out of the bargaining unit represented by a union) are still afforded rights and benefits as members of the bargaining unit. Additionally, the FTW laws do not prohibit employees from joining or

financially assisting a labor organization or participating in collective bargaining with an employer.

> The statement provided by MERC states:
>
> In some of the Commission's freedom to work decisions issued prior to the U. S. Supreme Court's decision in *Janus v. AFSCME Council 31, et al*., 585 U.S. ___ (2018), there may be language that is not consistent with the decision in *Janus.* In *Janus*, the Court held that States and public-sector unions may no longer extract agency fees from nonconsenting employees because this is a violation of the employees' First Amendment rights.

The Michigan Public Employment Relations Act has not been amended since 2014. The full decisions of the Michigan Employment Relations Commission may be found at: www.michigan.gov/leo/0,5863,7-336-94422_17485_68147---,00.html.

2021 MERC Cases of Interest

Ypsilanti Community Schools -and- Teamsters Local 243 -and- Deanne Freeman -and- Leslie Harris

1/12/2021; 19-H-1710-CE & 20-A-0017-CE & 20-A-0016-CE; 10(1)(c); Commission Jurisdiction; Remedy; Anti-Union Animus

Unfair labor practice found: district violated section 10(1)(c) by failing to hire charging parties, who both served as shop stewards for teamsters local 243 which the public employer had hired to provide transportation services when it brought its transportation services back in house; the Commission determined that it had jurisdiction as the charging parties applied for employment directly with the school district, which is a public employer. The Commission, after finding that the charging parties were subject to anti-union animus, awarded an equitable make-whole remedy to provide charging parties an offer of instatement with back pay.

University of Michigan Health System and University of Michigan House Officers Association
2/9/2021; 19-H-1721-CE Mandatory Subject of Bargaining; Duty to Bargain; Dispute Not Covered by Contract

An unfair labor practice found: the employer violated PERA by unilaterally making parking changes by relocating blue parking spots; the changes were found to be substantial

changes in working conditions that had a material impact on unit employees and required the employer to bargain; by refusing to accede to the union's demand for bargaining, the employer violated PERA; collective bargaining agreement (CBA) contains no employee parking provisions related to the two parking lots to which the vast majority of changes were effectuated, and no contract language addressed the parking issues in dispute, therefore an arbitration of contractual rights would have been insufficient to remedy the failure to bargain.

Wayne County -and- AFSCME, Council 25, Local 2926.01
2/8/2021; 20-C-0490-CE; Statue of Limitations; Information Request; 10(1)(e)

Unfair labor practice found: the charging party's initial request for job descriptions was made outside of PERA's six-month statute of limitations period; respondent's delay of six months in providing the subsequently requested job descriptions violated section 10(1)(e); the circumstances argued by respondent do not excuse its significant and excessive delay in providing information relevant under PERA.

Wayne County Airport Authority -and- AFSCME Council 25, Local 1690 -and- POAM
2/2/2021 20-C-0596-CE-1 & 20-C-0596-CE-2 (no exceptions) Duty to Bargain; Transfer of Duties; Direct Dealing

Unfair Labor Practice Found in Case No. 20-C-0596-CE-1: Respondent Violated Sections 10(1)(a) and (e) by Circumventing Charging Party as Exclusive Bargaining Representative and Dealing Directly With its Members.

Unfair Labor Practice Not Found in Case No. 20-C-0596-CE-2: Record Does Not Support a Finding That Respondent Unlawfully Transferred the Duties and Responsibilities of the ARC Supervisor Position to Lead Communication Specialist; An Employer's Decision to Unilaterally Transfer Duties From One Unit to Another Constitutes a Violation of the Duty to Bargain Only if it Can Be Established That the Work was Exclusive to the Members of the Bargaining Unit Bringing the Unfair Labor Practice Charge. In this case it was not proven to be exclusive.

Wayne County Community College District -and- Jeffrey Brown

3/18/2021l 19-K-2166-CE (no exceptions)' Section 10(1)(c); Adverse Employment Action; Statute of Limitations

Unfair labor practice not found: the charging party failed to explain the connection between his protected activities and actions taken by the college; to find anti-union animus on the basis of this record would be to inappropriately engage in speculation; the record was devoid of evidence that charging party was subjected to any adverse employment action; charging party's contention that the college failed to hire him for a full-time faculty position was untimely; commission has strict six-month statute of limitations period.

City of Detroit Fire Department -and- Detroit Fire Fighters Association Local 344 -and- Bryan Clayborn

3/9/2021; 19-I-1907-CE & 19-I-1880-CU; Commission Jurisdiction; Failure to State Claim; Duty of Fair Representation

Unfair labor practice not found: the commission does not exercise jurisdiction over claims involving HIPPA rights; charging party failed to amend charge to allege that his discharge was in retaliation for filing a previous unfair labor practice (ULP); even assuming charging party had alleged discrimination in violation of section 10(1)(d) before the ALJ, none of his pleadings assert the requisite animus toward his protected activity necessary to survive summary disposition; charging party failed to make any specific claim as to what action or inaction by the union may have violated its duty of fair representation, therefore dismissal of the charge is appropriate.

Wayne State University -and- American Association of University Professors

6/1/2021; 20-G-1052-CE (no exceptions) Unilateral Change; Direct Dealing

Unfair labor practice not found: no duty to bargain further where matter 'covered by' the agreement; parties each articulated a credible interpretation of the relevant contract language and, therefore, no cognizable claim under PERA was stated; under such circumstances, charging party is left to its contractual remedies; given that the collective bargaining agreement authorized respondent to negotiate directly with individual employees, there can be no legitimate claim of direct dealing.

Wayne County -and- Michigan Association of Public Employees -and- American Federation of State, County & Municipal Employees, Michigan Council 25, Local 1456

6/8/2021; 20-L-1803-RC; Petition for Election; Contract Bar

Petition for election denied: a 30-day election bar existed when the employer and incumbent union reached a tentative agreement on contract negotiations on same day that a rival union filed a petition for representation election involving that same unit; due to processes used during the virtual bargaining setting caused by COVID-19, the parties' tentative agreement was complete and sufficient to trigger 30-day grace period; the tentative agreement was fully ratified and adopted by the parties prior to the expiration of the 30-day grace period; the dissent argued that the tentative agreement was not a complete written collective bargaining agreement or executed by the authorized representatives of the parties as required by longstanding commission precedent.

Detroit Public Schools Community District -and- Detroit Federation of Teachers -and- David Craig

7/30/2021; 21-C-0442-CE & 21-C-0440-CU (no exceptions); Failure to Respond to Show Cause; Failure to State Claim; Teacher Discipline is not a Subject of Bargaining

Unfair labor practice not found: the failure to respond to a show cause order may warrant dismissal of charge; charging party failed to state valid PERA claims against employer or union; union's failure to take action on charging party's behalf with respect to his request for transfer or discharge not a violation PERA because teacher discipline is a prohibited subject of bargaining.

Eastern Michigan University -and- UAW and its Technical, Office and Professional Local 1976

7/23/2021; 21-C-0697-CE (no exceptions) Duty to Bargain

Unfair labor practice not found: the duty to bargain in good faith does not require the parties reach agreement or make concessions; no requirement in the law for public employer to offer same benefits to each labor organization.

University of Michigan -and- AFSCME Council 25, Local 1583 -and- Adina Eddins

8/13/2021; 21-C-0693-CE & 20-C-0650-CU (no exceptions); Failure to Respond to Show Cause; Failure to State Claim

Unfair labor practice not found: the failure to respond to a show cause order may warrant dismissal of charge; the university's decision to not allow charging party or her fellow operators to telework during the pandemic not remedial under PERA; the commission will not find an unfair labor practice on the grounds that a member is dissatisfied with their union's efforts.

City of Detroit (Dept of Trans) -and- AFSCME Council 25 -and- Kelly Key
8/13/2021; 21-E-1017-CE & 21-E-1077-CU (no exceptions); Failure to State Claim; Commission Jurisdiction

Unfair labor practice not found: the charging party's filings do not contain any factual allegations to explain why he believes his employer or union committed an unfair labor practice in violation of PERA; charging party's allegations of an uncomfortable or hostile working environment are outside scope of commission jurisdiction.

Great Lakes Water Authority -and- Senior Water Systems Chemist Association
8/13/2021[21-J-1546-CE (no exceptions); Duty to Bargain; Tentative Agreement

Unfair labor practice not found: a tentative agreement reached by the parties explicitly provided that ratification by the governing board was a requirement; the record is devoid of evidence that the board's decision to reject the tentative agreement was in bad faith or in violation of its duty to bargain; it is rare for the commission to find a public employer to be bound by terms in a tentative agreement which its governing body never ratified.

City of Detroit (Law Department) -and- UAW 221, Public Attorneys Association
9/9/2021 20-D-0755-CE Repudiation

Unfair labor practice found: employer's admitted refusal to implement 2% contractual pay increase constitutes a repudiation of the contract in violation of section 10(1)(e); the commission agreed with ALJ’s dismissal of the union's allegation concerning the department's "reduction in force," concluding that those were matters covered by the contract, such that the dispute should be resolved through the parties' grievance procedure.

Chrysler Group LLC and Stellantis Group -and- Chidi Kingsley Onwuzulike
10/6/2021 21-G-1524-CE (no exceptions) Commission Jurisdiction; LMA

Unfair labor practice not found: commission does not exercise jurisdiction over private sector employers; charging party neither alleged nor provided any indication that the NLRB lacks or refused to exercise jurisdiction over the parties, as such, the commission lacks jurisdiction to address his allegations under the LMA.

Michigan Supreme Court

While this case does not address public employment specifically, it addresses issues which affect the employment of public employees as well as employment arbitration in Michigan.

The Court determined whether plaintiffs' claims fell within the scope of arbitration agreements limited to matters that are "relative to" plaintiffs' employment, and whether plaintiffs' allegations of sexual assault, and the multiple claims stemming from those allegations, are relative to plaintiffs' employment by asking whether the claims can be maintained without reference to the contract or relationship at issue.

Lichon v. Morse
Michigan Supreme Court

Plaintiffs sued defendant attorney and his firm alleging sexual assault and a variety of related claims. The trial court granted defendant's motion to dismiss and compel arbitration, finding the employer required as a condition of employment a Mandatory Dispute Resolution Procedure Agreement (MDRPA) which was a valid and enforceable arbitration agreement, and the claims were "inextricably intertwined" and thus, fell within the arbitration agreement and the workplace policies. The Court of Appeals reversed, holding that the sexual assault was not "related to" plaintiffs' employment.

The Michigan Supreme Court noted that the MDRPA "limits its scope from the outset to matters 'relative to … employment.'" It explained that, whether the claims are subject to

arbitration "depends on whether they are covered by the MDRPA, which, in turn, depends on whether the claims are relative to plaintiffs' employment." The court then held that

> a court answers that question by considering whether the claims could be maintained without reference to the contract or relationship at issue. To borrow the illustration from *Doe*, if [defendant] had groped or propositioned opposing counsel or a client while at [his] firm's office, or if [he] had grabbed the breasts of a server or other patron of the restaurant during the firm's Christmas party, could those individuals bring the same claims as plaintiffs?

Because neither "the Court of Appeals nor the circuit courts considered this standard when evaluating defendants' motions to compel arbitration," and rather than "apply this standard in the first instance," the Supreme Court vacated the decision of the Court of Appeals and remanded these matters to the circuit courts.

The Supreme Court vacated the judgment of the Court of Appeals and remanded these cases to their respective circuit courts, where the courts may analyze defendants' motions to compel arbitration by analyzing which of plaintiffs' claims can be maintained without reference to the contract or relationship at issue. It further stated that, "just as the lower courts did not have the benefit of this framing when evaluating defendants' motions, neither did plaintiffs have the benefit of this framing when formulating their complaints." Because of that, the Plaintiffs may seek to amend their complaints in light of this new direction. In addition, it reminded the circuit courts that leave to amend should be freely given.

The court declined to reach plaintiffs' argument that the MDRPA is unconscionable or illusory, or address plaintiffs' argument that defendant could not enforce the MDRPA because he did not sign it.

Justice Viviano, joined by Justice Zahra, dissented, opining that a "proper interpretation of the contract's language shows that plaintiffs' claims against defendant … are arbitrable under the contract." As such, he would reverse the Court of Appeals' decision to the contrary. He also believed the claims against defendant individually "are also arbitrable under the contract if he can invoke the arbitration clause." Because the Court of Appeals did not determine whether

defendant had "the authority to enforce the agreement, which he did not sign," he would remand on that issue.

6th Circuit Court of Appeals

Discrimination; Retaliation under Title VII of the Civil Rights Act & Michigan's Elliott-Larsen Civil Rights Act (ELCRA); Whether plaintiff engaged in "protected activity"; Wrongful termination in violation of public policy under Michigan law; Genesee County Road Commission (GCRC); Equal Employment Opportunity (EEO); Fair Labor Standards Act (FLSA)

MAKINI JACKSON, Plaintiff-Appellant, v. GENESEE COUNTY ROAD COMMISSION, Defendant-Appellee
May 27, 2021; No. 20-1334 Appeal from the United States District Court for the Eastern District of Michigan at Detroit. No. 2:18-cv-11199

The court reversed the district court's grant of summary judgment to employer-GCRC on plaintiff-Jackson's Title VII retaliation claim where she "engaged in protected activity" by investigating discrimination claims, even though these actions were part of her job as GCRC's HR director and the EEO Officer. Jackson is an African American woman. GCRC's chief administrative officer fired her, giving her no explanation other than her "at-will" status. Jackson filed a complaint with the EEOC, alleging that she was fired for handling previously ignored discrimination claims and for informing Board members that employees were violating EEO policies in hiring contractors. She sued under Title VII and under Michigan law. On appeal, the court first considered whether Jackson engaged in "protected activity" for purposes of her Title VII claim. The district court ruled that there was no protected activity because she was only doing her job. But the court agreed with Jackson and the United States as *amicus curiae* that under both the text of Title VII and circuit precedent, "a human resources employee does not have to prove that she engaged in conduct outside her job responsibilities to maintain a claim under Title VII's opposition clause." It rejected GCRC's request to apply the Fair Labor Standards Act's (FLSA) "manager rule" to Title VII claims and held that Jackson sufficiently alleged that she engaged in two types of protected activity for purposes of Title VII─ investigating discrimination complaints and ensuring EEO compliance. However, it also held that she did not establish that her conduct was protected activity under the "participation clause" of the Elliott-Larsen Civil Rights Act (ELCRA) where she "did not file an internal complaint with GCRC on behalf of herself and none of the complaints filed by GCRC employees specifically alleged ELCRA violations."

The court next held that there was a question of fact as to the causation element of her Title VII claim, noting that the "temporal proximity between Jackson's protected activities and her termination is strong circumstantial evidence." It concluded that a jury could find that GCRC's non-discriminatory reason for the termination, her communication style, was pretextual. Thus, this issue, along with her Michigan wrongful-termination, public-policy claim, should be decided by a jury.

Relevant Unpublished Opinions from the Michigan Court of Appeals

Age discrimination and retaliation claims under the ELCRA; MCL 37.2202(1)(a); MCL 37.2701(a); Adverse employment action; *Taylor Sch Dist v Rhatigan*; Whether a constructive discharge is an adverse employment action; *Champion v Nationwide Sec, Inc*; Genuine issue of material fact; *Cleveland Bd of Educ v Loudermill*.

Tudor v. County of Macomb
Michigan Court of Appeals

Holding that a genuine issue of material fact existed as to whether plaintiff Tudor suffered an adverse employment action in the form of a constructive discharge, the court concluded that the trial court erred in dismissing her ELCRA age discrimination and retaliation claims on the basis there was no adverse employment action. Thus, it reversed summary disposition for defendants-employer and supervisor (Caskey), and remanded. It first determined that plaintiff's "suspension or placement on administrative leave did not constitute an adverse employment action because she was paid during the suspension or leave." However, turning to her assertion she was constructively discharged, the Michigan Supreme Court noted in *Champion* that "the law does not differentiate between employees who are actually discharged and those who are constructively discharged." Further, there is no dispute that terminating employment "constitutes an adverse employment action." In addition, plaintiff's "deposition testimony revealed numerous instances where a reasonable juror could construe the conduct Caskey directed at Tudor as creating a difficult, unpleasant, and intolerable work environment for Tudor. Further, accepting Tudor's affidavit indicating "that Caskey's job-performance report was 'full of erroneous misstatements of fact and misstatements of policy and procedure'" as true

for purposes of the (C)(10) motion, "it would suggest that Caskey's investigation and the job-performance report were a sham intended to harm Tudor, and which would certainly support a conclusion that Tudor was trapped in and subject to a difficult, unpleasant, and intolerable work environment." She also submitted a former co-worker's affidavit stating "that Caskey 'treat[ed] older workers coldly' and 'was dismissive' of them. Additionally, Tudor's suspension, which could be viewed as an overreaction … "came the day after" she complained to a county HR consultant about Caskey. Finally, in an affidavit, another individual "averred that to the best of his recollection, an HR agent told him 'that no matter what happened in the *Loudermill* hearing, Ms. Tudor was likely to be fired from her job.'" Considering this statement for its effect on the hearer, the court agreed that "a reasonable person in Tudor's shoes may have felt compelled to resign to avoid being fired."

POLICE OFFICERS ASSOCIATION OF MICHIGAN, Respondent-Appellant v MERC & TODD E. HATFIELD, Charging Party-Appellee.

Michigan Court of Appeals, July 22, 2021

Charging party initiated unfair labor practices charges against his former employer, City of Grayling ("the City"), and respondent appellant, Police Officers Association of Michigan (POAM). The Fraternal Order of Police Labor Council (FOPLC), which was the successor union to the POAM due to a recertification petition, was also named in the petition, but charging party later withdrew these charges. The acts (termination of employment) giving rise to the grievances complained of occurred during the time between the selection of the new representative and the end of the contract between the employer and the exiting representative. The Administrative Law Judge (ALJ) issued an opinion and recommended order finding that the City did not commit unfair labor practices and that respondent did not violate its duty of fair representation by failing to file grievances regarding charging party's loss of seniority and termination. The Michigan Employment Relations Commission (MERC) issued an opinion and order adopting the ALJ's recommendation that the City did not commit unfair labor practices, but rejecting the ALJ's determination that respondent did not breach its duty of fair representation. MERC accordingly dismissed the charges against the City, but found that respondent breached its duty of fair representation by failing to file charging party's grievances. MERC further ordered the City and respondent to arbitrate the merits of charging party's termination, and ordered that if the City refused to consent to arbitration, respondent would pay charging party's damages. Respondent

appeals as of right MERC's order. We affirm MERC's finding that respondent breached its duty of fair representation, but vacate MERC's award of damages and remand for further proceedings.

Sexual discrimination, harassment & retaliation claims under the Michigan Elliott Larsen Civil Rights act; disparate treatment; hostile work environment; whether the conduct was severe or pervasive; whether the Michigan department of corrections (MDOC) could be held vicariously liable; retaliation; whether plaintiff showed she was subjected to an adverse employment action or established a causal connection; corrections officer (CO); personal protection order (PPO)

Turner v. Department of Corr.
Michigan Court of Appeals

According to plaintiff (a CO), a month after she began work, defendant Goudy "began asking her to go on dates with him and thereafter engaged in a pattern of harassment." The court held that the enforcement of a PPO Goudy obtained against plaintiff was not a material adverse employment action. Nonetheless "MDOC's failure to stop Goudy's alleged harassment could be considered an adverse employment action." However, plaintiff did

> not identify a similarly situated male employee that was treated differently than her regarding wages, hours or working conditions. Goudy also made a claim of discrimination against plaintiff and, like plaintiff's complaints, MDOC determined that it did not fall within its discriminatory harassment policy."

Thus, she failed to establish a prima facie case that "MDOC's alleged failure to take adequate remedial action against Goudy was because of plaintiff's sex."

> But the court held that she had a viable disparate treatment claim based on her transfer: MDOC offered a legitimate, nondiscriminatory reason for transferring plaintiff to the midnight shift. There was testimony that MDOC needed female staff on the midnight shift, and an internal e-mail shows that plaintiff was not the only female employee transferred to the midnight shift.

However, the trial court correctly found that she "provided evidence showing that this proffered reason was a pretext for discrimination on the basis of sex." Specifically, it determined she "had undermined MDOC's nondiscriminatory reason by testifying that MDOC had offered her the option of transferring facilities as an alternative to transferring shifts." When asked why she was transferred, the captain answered, "Because of her continued complaints to her shift commander."

The court held that this was sufficient evidence to show that MDOC's reason for the transfer was pretextual. As to plaintiff's hostile work environment claim, the court held that viewed "in context, Goudy's conduct and communication toward plaintiff was of a sexual nature."

The court held that the trial court correctly denied defendant MDOC's motion for summary disposition of plaintiff's hostile work environment claim. She had viable claims of disparate treatment and retaliation based on her transfer to the midnight shift. The Court of Appeals affirmed in part, reversed in part, and remanded. The court dismissed all her other claims of disparate treatment and retaliation.

New York State Report

Howard C. Edelman, David J. Reilly, David Stein

There was very little new legislation affecting public employees in New York State over the last twelve months, given the legislative and governor's preoccupation with other matters. In fact, except for the implementation date of January 21, 2021 for the sick leave provisions reported upon in 2020, no new laws were enacted.

There is now, however, one bill which has passed a State Senate Committee and which, given Democrats' majority in both houses, may well become law. S-2722 permits public employees to retire at age 55 with 25 years of service and to be given one month of retirement credit for each year of service up to three credit years, provided the public employer affirms that the title held by the employee would otherwise be subject to layoffs.

Also, of some note is S-1071, introduced in the State Senate, which grants unemployment insurance benefits over the age of 65 to those employees who voluntarily separate from service, provided they have a reasonable belief that continued employment would be unsafe due to work conditions related to COVID-19.

Public Sector Labor Law: Case Law Review

David J. Reilly

A. Court Decisions

1. Discipline & Terminations

a. *Matter of Pantaleo v. O'Neill,* 192 AD3d 598 (1st Dept. 2021). Petitioner's discharge for actions that would constitute assault in the third degree sustained. The finding of misconduct was supported by substantial evidence and the penalty was not "so disproportionate to the offense, in light of all the circumstances, as to be shocking to one's sense of fairness."

b. *Matter of Amanwah v. Department of Education of the City of New York,* 191 AD3d 420 (1st Dept. 2021). Ruled petitioner failed to demonstrate discontinuance of her probationary position as an assistant principal "was

for constitutionally impermissible purpose, violative of a statute or done in bad faith," given her unsupported allegations of retaliation for refusing to negatively evaluate two teachers.

c. *Matter of Lin v. New York City Department of Education,* 191 AD3d 431 (1st Dept. 2021). Affirmed dismissal of petitioner's action, finding she was not wrongfully denied an Education Law §3020-a hearing in connection with the termination of her probationary employment, despite claiming retaliatory discharge for reporting improper conduct by another teacher. In support, the Court cited the existence of sufficient evidence to conclude that the Department would have terminated her employment regardless of such reporting.

d. *Matter of Edwards v. City of Middletown,* 191 AD3d 668 (2nd Dept. 2021). In sustaining Police Department Board's termination of petitioner's employment, the Court cited its limited scope of review and noted, "the penalty must be upheld unless it shocks the judicial conscience, and therefore, constitutes an abuse of discretion as a matter of law … That reasonable minds might disagree over what the proper penalty should have been does not provide a basis for vacating the penalty." It instructed further, "in matters concerning police discipline great leeway must be accorded to the Commissioner's determinations concerning the appropriate punishment, for it is the Commissioner, not the courts, who is accountable to the public for the integrity of the Department.

e. *Matter of Sullivan v. County of Rockland,* 192 AD3d 895 (2nd Dept. 2021). Penalty of demotion of four salary grades for gross misconduct-falsification of business records, which was imposed upon remittitur after Court vacated original penalty of termination, voided in favor of 30-day unpaid suspension, as demotion was "shocking to one's sense of fairness."

f. *Matter of New York Office for People with Developmental Disabilities v. CSEA, Local 1000,* 193 AD3d 1305 (3d Dept. 2021). Vacated for public policy reasons arbitration award denying termination of employment despite sustaining four of thirteen charges of sexual harassment. In support, the Court cited the extremely inappropriate nature of the employee's conduct and noted, "the award fails to account for the rights of the other employees to a non-hostile work environment and conflicts with the employer's obligation to eliminate sexual harassment in the workplace."

g. *Matter of Grube v. Board of Education of Spencer Van Etten Central School District,* 194 AD3d 1222 (3rd Dept. 2021). District violated petitioner's recall rights under Education Law §2510 and interfered with his tenure rights by discharging him without a hearing, after he had been approved for disability retirement benefits, granted an extended leave of

absence, placed on a preferred eligible list for recall, and, subsequently, after his medical condition improved, recalled for probationary employment.

h. *Mater of Rochester Police Locust Club, Inc. v. City of Rochester,* 196 AD3d 74 (4th Dept. 2021). Held Local Law No. 2 invalid in excluding police discipline from collective bargaining.

2. Retirement

a. *Matter of Hadid v. City of New York,* 190 AD3d 642 (1st Dept. 2021). Affirmed determination that per Public Officers Law §30(1)(3), petitioner, a former police sergeant, lost entitlement to vested *retirement* benefits upon dismissal due to a felony conviction. The subsequent vacatur of the conviction did not change this outcome, as petitioner was denied reinstatement following a subsequent hearing due to other misconduct affecting his fitness to serve, which was not challenged. Refused to consider claim that penalty "shocks one's sense of fairness," as it was raised for the first time on appeal.

b. *Matter of Russell v. New York City Fire Pension Fund,* 192 AD3d 442 (1st Dept. 2021). Confirmed denial of application for accidental disability retirement benefits, as supported by credible evidence and not arbitrary and capricious, noting that any conflict in the medical evidence regarding cause of disability is within medical board's sole province to resolve.

c. *Matter of Bradley v. New York City Employees' Retirement System,* 193 AD3d 847 (2nd Dept. 2021). Reversed Supreme Court's decision annulling denial of petitioner's application for performance of duty disability retirement benefits, holding medial board's determination was supported by credible evidence, and thus, was conclusive. Appellate Division explained that in reaching contrary decision, the Supreme Court improperly substituted its judgment for that of the medical board.

d. *Matter of Hernandez v. Port Washington Union Free School District,* 193 AD3d 733 (2nd Dept. 2021). In affirming petitioner's termination for misconduct, the Court stated its "review of an administrative determination in an employee disciplinary proceeding made after a hearing pursuant to Civil Service Law §75 is limited to considering whether the determination was supported by substantial evidence." When there is conflicting evidence, "the duty of weighing the evidence and making the choice rests solely upon the [administrative agency]."

3. Statute of Limitations

a. *Matter of Tracie Goldman v. City of New York*, 190 AD3d 521 (1st Dept. 2021). Dismissed petition-challenging rejection of petitioner's application to work as a substitute teacher. The Court found her attempt to collaterally attack a prior U-rating and discontinuance was barred by both the governing four-month statute of limitations and res judicata, as her 2014 petition was dismissed as time-barred.

b. *Matter of Jones v. O'Neill,* 197 AD3d 1067 (1st Dept. 2021). Denied as time-barred petitioner's request to annul determinations that affected his ability to carry firearms after his retirement. Court determined that four-month statute limitation began running with petitioner's retirement, as the possibility of obtaining administrative relief was exhausted as of that date.

4. Arbitration

a. *Matter of McMikle v. Department of Education of the City of New York,* 192 AD3d 513 (1st Dept. 2021). Rejected due process challenge to medical arbitration determination sustaining partial denial of line of duty injury leave. The Court ruled petitioner waived the due process objection by participating fully in the review.

b. *Matter of Iorfida v. Department of Education of the City of New York,* 119 AD3d 647 (1st Dept. 2021). In refusing to vacate arbitration award, the Court cited, among other reasons, petitioner's waiver of challenges to the underlying observations by failing to raise them during the hearing.

c. *County of Nassau v. Civil Service Employees Association,* 192 AD3d 973 (2nd Dept. 2021). County's action for declaratory judgment invalidating collective bargaining agreement's longevity pay provision stayed pending arbitration based upon public policy favoring arbitral resolution of public sector labor disputes and satisfaction of two-prong test of arbitrability: (1) absence of a constitutional, statutory or public policy prohibition to arbitrating the grievance; and (2) an agreement by the parties to arbitrate the dispute. As to the second prong, the Court noted, "where the relevant arbitration provision of the CBA is broad … a court should merely determine whether there is a reasonable relationship between the subject matter of the dispute and the general subject matter of the CBA."

d. *Matter of the City of Troy v. Troy Police Benevolent & Protective Ass'n, Inc.*, 191 AD 3d 1203 (3rd Dept. 2021). In denying request to stay arbitration contesting failure to fill vacant position, the Court explained that its only concern is "with the threshold determination of arbitrability, and not with the merits of the underlying claim." It stated further that intervention on public policy grounds applies "only in cases in which public policy considerations, embodied in statute or decisional law,

prohibit, in an absolute sense, particular matters be decided or certain relief being granted by an arbitrator."

e. *Matter of City of Troy v. Troy Uniformed Firefighters Assn., Local 86,* 193 AD3d 1189 (3rd Dept. 2021). Denied petition to stay arbitration, which was based on timeliness claim. The Court stated, "any argument concerning compliance with the grievance process, including any time limitations thereunder, is likewise a matter for the arbitrator to decide."

f. *Matter of Tonawanda Police Club, Inc. v. Town of Tonawanda,* 194 AD3d 1462 (4th Department 2021). Vacated arbitration award, in part, insofar as it prohibited conducting disciplinary proceedings pursuant to Town Law §155 and directed respondent to abide by Civil Service Law §75 and the collective bargaining agreement in regard to disciplinary matters. The Court found that respondent adopted the police manual at issue pursuant to Town Law §155, despite the lack of a specific reference to the statute. With the police manual's disciplinary procedures controlling, the direction to comply instead with Civil Service Law §75 and the collective bargaining agreement was in error.

5. New York City Administrative Code

a. *Matter of Adrianna Medina v. Dermot Shea,* 119 AD3d 4751 (1st Dept. 2021). Rejected petitioner's application to annul denial by *Police* Pension Fund Board of Trustee ("PPF") of accidental disability retirement pension benefits per NYCAC §13-252. The Court explained, PPF decision by tie vote may not be set aside "unless it can be determined as a matter of law on the record that the disability was the natural and proximate result of a service-related accident."

6. PERB

a. *Matter of Swinton v. United Federation of Teachers, Local 2,* 197 AD 3d *1114* (2nd Dept. 2021). In affirming dismissal of improper practice charge alleging a violation of the duty of fair representation, the Court cited petitioner's failure to exhaust all administrative remedies, as review of the ALJ's decision was available, but not pursued. 4 NYCRR 213.2, 213.10.

b. *Matter of Uniformed Fire Officers Assn. of the City of Yonkers v. New York State Public Employment Relations Board,* 197 AD3d 1470 (3rd Dept. 2021). Reversed PERB dismissal of improper practice charge contesting the City's unilateral change to payment of supplemental wage benefits pursuant to General Municipal Law §207-a(2). PERB's finding that the City's unilateral actions did not impact current employees, as opposed to retirees, was contrary to the record.

7. Miscellaneous

a. *Union of Automotive Technicians v. Port Authority Employment Relations Panel,* 192 AD3d 445 (1st Dept. 2021). Affirmed dismissal of improper practice charge challenging Port Authority's expansion of its security disclosure requirements. The Court found disclosure requirements were not terms and conditions of employment that required collective bargaining, but instead an exercise of managerial prerogative to determine job qualifications.

b. *Matter of Mulgrew v. Board of Education of the City of New York,* 193 AD3d 656 (1st Dept. 2021). Rejected cause of action to enforce retroactive payment of wage increases per settlement agreement, as it was based on an interpretation that would inappropriately "add or excise terms or distort the meaning of … particular words or phrases."

c. *Matter of Morrison v. New York City Department of Corrections,* 198 AD3d 537 (1st Dept. 2021). Petitioner's challenge to discontinuance of her probationary employment rejected for failing to show such action was taken in "bad faith."

d. *Matter of Triumpho v. County of Schoharie,* 2021 NY Slip Op. 06727 (2nd Department December 2, 2021). Held petitioner satisfied burden of establishing termination of her probationary employment should be annulled as being for impermissible reasons. In support, Court cited satisfactory probationary reports and testimony confirming her acceptable work performance.

8. *Janus*-Related

a. *Bennett v. AFSCME,* U.S. No. 20-1603 (November 1, 2021). Court *denied* certiorari, leaving in place the Seventh Circuit's decision rejecting plaintiff's claims that her First Amendment rights were violated by: (1) the deduction of union dues from her paycheck pursuant to a voluntary written assignment; and (2) the Union's exclusive representation of her interests, even though she is no longer a Union member.

B. PERB Decisions

1. Duty to Bargain

a. *Matter of Local 456, International Brotherhood of Teamsters v. City of Mount Vernon,* 54 PERB ¶4548 (2021). Held employer violated bargaining obligation under the Act by failing to provide timely response to Union's request for information regarding unit members' enrollment in medical and dental insurance plans. Rejected employer's sole defense that

charge was untimely under PERB Rules of Procedure Section 204.1(a)(1), noting the Union filed the charge within less than four months of the date of its unanswered information request.

b. *Matter of New York State Correctional Officers and Police Benevolent Association v. New York State Department of Corrections,* 54 PERB ¶3025 (2021). Employer's failure to provide requested evidentiary material regarding disciplinary grievance breached its bargaining obligation. Opportunity to review documents did not substitute for production, notwithstanding Union's past acceptance of that alternative.

c. *Matter of Clarkstown Business Professional Association v. Clarkstown Central School District,* 54 PERB ¶4513 (2021). Employer breached bargaining obligation by entering into a parity agreement granting three bargaining units an enhanced retiree health insurance contribution if such term was negotiated with the bargaining unit represented by petitioner. ALJ found this parity provision, although not a per se violation, interfered with petitioner's right to negotiate for retention of the enhanced contribution rate for its members.

d. *Matter of Uniformed Fire Fighters Association, Inc. Local 107 v. City of Mount Vernon,* 54 PERB ¶3010 (2021). Dismissed improper practice charge alleging unilateral change in negotiated procedures for obtaining benefits under General Municipal Law §207-a(2), finding change applied only to retired employees, and, as such, was not a mandatory subject of bargaining. But see A.6.b, supra.

e. *Matter of Yonkers Uniformed Fire Officers Association v. City of Yonkers,* 54 PERB ¶4525 (2021). The employer's termination of assistant chief based on duration of his General Municipal Law §207-a injury/illness leave breached duty to bargain, as it constituted a unilateral implementation of a new procedure for termination pursuant to Civil Service Law §71. PERB had jurisdiction of this matter because the collective bargaining agreement then in effect did not contain "a provision that serve[d] as an arguable source of the right [at issue]."

2. Unilateral Changes in Terms & Conditions of Employment

a. *Matter of the United Steelworkers of America Local 9434 v. City of Niagara Falls,* 54 PERB ¶3003 (2021). The union was not required to make bargaining demand before filing improper practice *charge* contesting subcontracting of bargaining unit work. The Board explained that demand was not required because the charge concerned unilateral change in terms and conditions of employment, as opposed to a refusal to bargain.

3. Practice & Procedure

a. *Matter of Uniformed Firefighters Association, Inc., Local 107, City of Mount Vernon,* 54 PERB ¶4546 (2021). Employer's answer dismissed and allegations deemed admitted for not *appearing* at the hearing on the improper practice charge, which concerned its failure to submit successor collective bargaining agreements to its governing bodies for ratification. Grounds for default satisfied based upon the employer having notice of the hearing, failing to request an adjournment, and violating other procedural requirements.

b. *Civil Service Employee's Association, Local 1000 v. State of New York*, 53 PERB ¶4546 (2021). Employer waived timeliness issue by failing to plead it as an affirmative defense. In any event, improper practice charge was timely filed, as Union did so within four months of the date on which it knew or should have known of the circumstances constituting the alleged violation. Claim that Union had notice more than four months prior was unsupported by the evidence.

c. *Matter New York State Public Employees Federation v. State of New York,* 54 PERB ¶3013 (2021). Refused leave to file interlocutory exceptions to ALJ's interim award denying employer's subpoena request. The Board found that the employer had failed to make necessary showing of "extraordinary circumstances," which requires a demonstration of "severe prejudice" or that "failure to consider the appeal would result in harm to the party, which cannot be remedied by … review of the ALJ's final decision and order." The employer did not meet this standard here based upon prehearing denial of its subpoena request, despite claiming that absent interlocutory review the ALJ would be conducting a hearing based upon incomplete evidence.

d. *Matter of Coleman v. Board of Education of the City of New York,* 54 PERB ¶4515 (2021). Charging party, as an individual employee, lacked standing to bring an improper practice charge alleging employer violated §209-a 1(d) of the Act, by insisting she provide medical documentation and records after finding her unfit to work. Individuals do not have standing to assert a §209-a 1(d) violation, inasmuch as it involves the duty to negotiate in good faith, which runs strictly between the employee organization and the employer.

4. Representation

a. *Matter Drinks-Bruder v. Niagara Falls Police Club, Inc.,* 54 PERB ¶4508 (2021). Dismissed improper practice charge regarding Union's failure to represent petitioner at an employer-mandated meeting and related suspension meetings. In support, ALJ cited petitioner's failure to appear

for the hearing on the instant charge, including, in particular, her conditioning such appearance on the Union providing and paying for her to have outside legal representation. Her position in this regard, even if based on misunderstanding, did not mitigate or justify her failure to appear at the ALJ hearing or request an adjournment to retain counsel, particularly given that she was notified multiple times of the consequences of such failure.

b. *Matter of Cea v. Watervliet Teachers Association,* 54 PERB ¶4524 (2021). NYSUT, as agent for the teachers' association, did not breach its duty of fair representation by refusing charging party's request to appoint and pay for an attorney of his choosing, as its decision was not "arbitrary, discriminatory or founded in bad faith." NYSUT's practice of providing free legal representation to bargaining unit members in extra-contractual statutory disciplinary proceedings did not establish otherwise, as no showing was made that NYSUT allowed members to choose their own attorney.

5. Interference & Discrimination

a. *Matter of Modica v. Board of Education of the City of New York,* 54 PERB ¶4549 (2021). Dismissed improper practice charge based upon lack of evidence substantiating that the employer acted for improper motive in issuing counseling memoranda, disciplinary notices, and negative performance evaluation ratings to petitioner and eventually terminating her employment. The ALJ reasoned that the evidence presented did not support the inference that such actions would not have been taken but for petitioner's protected activity, which involved her participation in a mediation.

b. *Matter of Sarayli v. New York City Transit Authority,* 54 PERB ¶4514 (2021). In claiming unlawful discrimination under §§209-a 1(a) and (c) of the Act, charging party bears the burden of establishing by a preponderance of the credible evidence that: (1) he/she engaged in protected activity; (2) such activity was known to the persons taking the contested employment action; and (3) the contested employment action would not have been taken but for the protected activity. The third element is not satisfied where the employer demonstrates the contested action was taken for legitimate non-discriminatory business reasons, which are not shown to be pretextual.

c. *Matter of Rettino v. Board of Education of the City of New York,* 54 PERB ¶4537 (2021). Dismissed retaliation claim, which was premised upon issuance of disciplinary charges. Temporal proximity between the alleged protected activity (i.e., grievance filing and participation in union meetings) and the disciplinary charges was found insufficient to sustain

violation of §§209-a 1(a) and (c) of the Act, given charging party's failure to provide proof detailing the specifics of the protected activity or identifying the persons purportedly aware of that conduct.

6. Unit Clarification/Placement

a. *Matter of Valhalla Teachers' Association v. Valhalla Union Free School District,* 54 PERB ¶3023 (2021). Modified ALJ's decision by placing Daily Assignment Substitutes ("DAS"), who are employed by the District for more than forty days, into an existing unit of permanent teachers. Referencing that: (1) DAS are public employees pursuant to §201.7 of the Act by working more than forty days; (2) DAS work the same schedules as full-time teachers and perform the same tasks, except for parent-teacher conferences; and (3) there is an absence of any actual or potential conflict of interest between DAS and permanent teachers, the Board concluded DAS share a strong community of interest with permanent teachers, thereby supporting their inclusion in the same unit.

Collective Bargaining Under the NYCCBL

David Stein

Of primary significance during 2021 was collective bargaining about the impact of New York City agency mandates to its employees for vaccination against the COVID-19 coronavirus. The initial negotiations came to a resolution in November after extensive bargaining between the City and the United Federation of Teachers culminated in an interest arbitration award by NAA Arbitrator Martin Scheinman that also memorialized understandings reached during several mediation sessions. While the Award arose under New York State's Taylor Law, rather than the New York City Collective Bargaining Law (the New York City Education Department is under the jurisdiction of the Public Employment Relations Board), the Award set a pattern that was followed by the City with District Council 37 and the Uniformed Sanitation Association (L. 831, IBT), which negotiate for employees of the City's mayoral agencies that do fall under the New York City Collective Bargaining Law. Other unions that negotiate with the City quickly followed suit: Local 237; Teamsters Locals 1180, 1181 and 1182 of the CWA; Local 300; SEIU; Probation Officers Benevolent Association; Sanitation Officers and Sanitation Chiefs. The entire process represented an achievement for collective bargaining as a tool to resolve serious problems in a crisis as it had in the contest of the fiscal crisis of the mid-seventies and the Great Recession of 2008–09.

As completely treated in last year's report, since the fiscal crisis of the mid-seventies, the Teachers' negotiations have either followed, or set a pattern that has been followed by the municipal unions representing so-called civilian (non-uniformed) employees. Of course, these pattern setting negotiations have dealt with wage settlements, rather than public health issues. Yet, Arbitrator Scheinman's award appears to have triggered a round of resolutions. Moreover, these agreements were reached without any rulings from either PERB or the Board of Collective Bargaining as to whether vaccination mandates for City employees were mandatory, non-mandatory, or prohibited subjects of bargaining. Instead, all parties concerned appear to have reached a consensus to deal with the impact of the City's mandate. The City's firemen (represented by the UFA) and its police officers (represented by the PBA) were not part of this consensus. The former filed an improper practice which has not been scheduled for hearing, and the police proceeded in the courts with individual litigants.

The Scheinman Award and its progeny established both substantive and procedural benchmarks to resolve disputes arising under the City's vaccine mandates. Procedures, including the right to appeal to expedited binding arbitration, were designed to permit employees with medical and religious grounds to seek exemptions permanently or temporarily from the mandates. The procedures also included substantive rules to be applied by the parties, and, if necessary, an arbitrator. Employees were presented with an opportunity to separate from City service without sacrificing certain accruals, or to go on leave. Temporary reasons for avoiding deadlines for vaccination included pregnancy (depending on trimester), recent infection with COVID-19, and/or treatment with monoclonal antibodies.

Other developments in 2021 included Board decisions on scope of bargaining between the union representing the City's correction officers (COBA) and the City, in the context of rules changes stemming from civil liberties litigation over alleged inmate abuse between the City and organizations representing inmates.

In *COBA* v. *City of New York*, 14 OCB 2d 4 (BCB 2021), the Board of Collective Bargaining dismissed a refusal to bargain charge filed by the union over proposed changes in rules affecting punitive detention of inmates promulgated by the Board of Corrections. COBA

had maintained that the changes had an impact on the safety of correction officers and therefore was mandatorily negotiable. The Board held that no duty to bargain could arise until and unless the rules were formally adopted.

In a related case, *COBA v. City of New York,* 14 OCB 2d 10 (BCB 2021), the union sought to compel the City to bargain over implementation of the terms of a Consent Decree to which the City had agreed in federal litigation in the Southern District of New York concerning the deprivation of the constitutional rights of inmates under the 8th and 14th amendments to the Constitution. The Consent Decree obligated the City to promulgate new directives and rules regarding the use of excessive or impermissible force against inmates, as well as the appointment of a monitor to oversee the development of and compliance with the new directives and rules.

The Board held that, as with the enactment of a statute or regulation having the force and effect of law, PERB and the BCB cannot constrain judicial rulings arising out of the Constitution. In addition, the Board determined that the changes occasioned by the Consent Decree did not materially change the directives and policies on the use of force which had been in effect and therefore did not comprise a unilateral change in terms and conditions of employment affecting correction officers which would have required the City to negotiate with the union.

New York City Deputy Sheriffs Association, 14 OCB 2d 9 (BCB 2021) was yet another case concerning the City's obligation to negotiate with a union representing its employees, where a change in law had an arguable impact on the employees' terms and conditions of employment. In this case, changes dictated by the State's Bail Reform Law, which substantially decreased the requirements of posting bail before pretrial release, resulted in bargaining unit members to monitor released accused and to arrest accused defendants who failed to show for trial or proceedings. The union had alleged that this amounted to a unilateral change in terms and conditions and, alternatively, that there was an impact on safety which required negotiation.

The Board found that the assignment of the duties was not a mandatory subject of bargaining, as the job specifications for a Deputy Sheriff already included such duties as

monitoring and arrest of subjects of the new law. The Board added that the question of impact bargaining was premature, as the union had not presented objective proof that the changes in the bail law presented a practical impact on safety. The Board stressed that the obligation to bargain did not arise unless and until the Board determined that a practical impact and safety were shown.

In a case involving an alleged failure to bargain in good faith due to a unilateral change in terms and conditions of employment, the Board held that the alleged change did not comprise a change from the status quo. In *District Council 37,* 14 OCB 2d 16 (BCB2021), the Board found that an alteration in the iPad supplied to employees that allowed the City to track the whereabouts of employees during the workday was an update of existing equipment and did not comprise a new form of discipline.

OHIO

State and Local Public Sector Committee Report 2021

Thomas J. Nowel, NAA

The 2020 State and Local Public Sector Committee report for Ohio was comprehensive, including background history and activities which occurred during the year. Labor relations activities had been significantly impacted by the COVID-19 pandemic with many arbitration hearings and collective bargaining negotiations delayed. As activity resumed by midyear 2020, many arbitration, mediation, and bargaining sessions were held on video platforms. The Federal Mediation and Conciliation Service and National Academy of Arbitrators provided neutrals and advocates with assistance in adapting to the video platform approach to hearings and meetings. The American Arbitration Association reported that 58% of its scheduled hearings were conducted in person and 41% by way of video in 2020.

While the utilization of video platform hearings (primarily Zoom) continues into 2021, many neutrals are again convening in-person hearings. Most in-person hearings are conducted by utilizing various protocols to protect those involved including vaccinations of those present and the wearing of masks in certain circumstances.

State employees in Ohio are generally organized and represented by organized labor across the board. Represented employees are divided into five bargaining units, and there are five comprehensive collective bargaining agreements between the various Unions and the State. All five collective bargaining agreements expired on various dates during 2021. While Ohio law, Revised Code Section 4117, provides for specific impasse procedures in the event the parties are unable to resolve issues at the bargaining table, the statute also allows parties to develop their own process for resolving negotiations. The State and its five bargaining agents developed a unique approach to impasse resolution. For each set of negotiations, the parties obtained the services of a recognized arbitrator to act as a mediator prior to the commencement of bargaining. In the event the parties were unable to achieve a settlement following mediation, a second recognized arbitrator was selected, in advance, to act as a fact finder who would hear the arguments of the parties on each unresolved issue and issue a “fact finder’s recommendation” to

be submitted for ratification by each side. Most of the appointed arbitrators are members of the National Academy of Arbitrators.

The initial negotiations commenced in early 2021 between the Ohio Civil Service Employees Association (OCSEA), AFSCME Local 11, and the State. OCSEA represents approximately 25,000 employees across most state departments including the Department of Rehabilitation and Correction. With the assistance of the appointed mediator (arbitrator), the negotiations were concluded without the need for fact finding. As each set of negotiations concluded, the next commenced. The next negotiations between the Service Employees International Union (SEIU), District 1199 and the State were likewise settled following the assistance of the appointed mediator. SEIU District 1199 represents a bargaining unit which includes staff in numerous departments including the Department of Rehabilitation and Correction, the Department of Developmental Disabilities, Parole Officers, and numerous classifications including Registered Nurses and other professionals. Likewise, the negotiations between the State and Ohio Education Association were settled without impasse and the use of fact finding. The Unit 2 Association, an independent Union representing approximately 500 park rangers, law enforcement employees, and other security staff, settled with the State following two days of mediation. The Ohio State Troopers Association and the State Department of Safety (Highway Patrol) utilized the process, but, after four days of mediation, the parties were unable to resolve a number of issues at impasse. The unresolved issues were submitted to the fact finding process. The fact finding hearing lasted three long days, and a fact finding Report and Recommendation was issued by the arbitrator on December 17, 2021. The Report included the three 3% wage increases consistent with the settlements achieved by the other four Unions, along with a small number of adjustments in benefits. The collective bargaining statute provides guidance for fact finders, including the giving of significant weight to “internal comparables.” The Ohio State Troopers Association represents two bargaining units, Sergeants and Troopers. Following the issuance of the fact finder’s Report and Recommendation, the Sergeants’ unit did not produce sufficient votes to reject the Report (60% by statute). The Troopers’ bargaining unit rejected the Report. The final step in the process, by statute, is conciliation (final and binding arbitration). If the parties are unable to resolve the impasse, the arbitration process for the Troopers unit may continue well into 2022.

Four of the bargaining sessions between the parties, including mediation, were conducted remotely (Zoom). Negotiations between the State and Troopers Association, including mediation and fact finding, were conducted in-person.

The settlements between the State of Ohio and its Unions were notable in that the parties settled for three 3% wage increases over the life of the three-year Agreements: 3% in 2021, 3% in 2022, and 3% in 2023. Few public sector settlements in Ohio in 2020 and 2021 resulted in a 9% wage increase during the life of three-year collective bargaining agreements. The settlements were also notable in that health insurance provisions were unchanged from the previous Agreements, including no increase in the employee share of the premium and no reduction in benefits. Over 30,000 state employees are represented by the five labor organizations.

The progressive approach to grievance resolution, Alternate Dispute Resolution (ADR), was maintained during the State negotiations and, in a few cases, enhanced. Each of the collective bargaining agreements, with the exception of the Unit 2 Association Agreement, contain grievance mediation and streamlined resolution of disciplinary suspension appeals. The maximum suspension penalty, imposed by the Employer, is five days in the OCSEA and SEIU Agreements. Appeals are submitted to a streamlined process which results in an expedited hearing and bench decision by an arbitrator who is a member of a closed panel which is assembled by the parties. The parties also assemble subpanels of arbitrators who resolve appeals of discipline regarding client/patient abuse, and a subpanel which resolves working out of classification grievances. In this writer's view, the ADR process is progressive, highly effective and a model.

As mentioned above, the wage settlements achieved by the State and its Unions are notable. The following data regarding wage settlements in the public sector across the state is provided by the Ohio State Employment Relations Board (SERB). 747 collective bargaining agreements, which were negotiated in 2020, contained percentage wage increases for 2021. The state-wide average wage increase for 2021 was 2.32% and 2.35% in 2022. 88 Agreements provide for lump sum settlements for 2021 as opposed to percentage increases. The average lump sum settlement for 2021 was $708.00. The average negotiated wage increase bargained in

2020 for 2021 in cities was 2.49%; 2.18% in County jurisdictions; 1.99% in school districts, and 2.49% for Police jurisdictions. 66 Agreements bargained in 2020 provided, instead, for wage reopeners in 2021.

The State Employment Relations Board has provided the following data for collective bargaining agreements which have been bargained and settled between January 1, 2021 and October 1, 2021. The state-wide average wage increase in 2021, representing 595 Agreements, is 2.29%. The average increase in City jurisdictions is 2.01%; 2.35% in County jurisdictions; 2.36% in school districts; and 2.28% for Police Agreements.

The negotiated wage increases between the State of Ohio and its Unions exceeds state averages. The increases, combined with no increases in the employees' share in health care costs, make the settlements notable.

Following protests and civil unrest following the George Floyd incident and other issues in Columbus, Ohio, the Columbus Police Department, believing the public demanded external investigations of Officers accused of misconduct, hired a known management labor law firm to conduct the investigation process involving potential discipline of bargaining unit members represented by the Fraternal Order of Police. The Union grieved, citing provisions in the collective bargaining agreement which provide for said investigations to be conducted internally. The matter was appealed to arbitration. The dispute was heard by an Ohio arbitrator who determined that the grievance had merit, and a cease-and-desist order regarding use of external investigators was awarded in November 2021.

In Cleveland, Ohio, a citizen referendum was placed on the ballot which would create a citizen review commission empowered to review and initiate discipline of Police Officers. The issue passed overwhelmingly in November 2021 and is now incorporated in the City of Cleveland Charter. It is unclear at this time in what manner the initiative may be implemented by a newly elected mayor and his administration. It is also unclear at this time if the disciplinary process and arbitration provisions of the collective bargaining agreement will be impacted. Litigation is possible and there is legal precedence dating to the mid-1980s when the Ohio

Supreme Court ruled that provisions of the State's public sector collective bargaining law, Ohio Revised Code Section 4117, superseded the home rule charter of Ohio cities. Stay tuned on this one.

2021 has been a busy year for arbitrators, mediators, and advocates in Ohio, and 2022 schedules will be full.

PENNSYLVANIA

Recent Public Sector Cases – December 2021

James M. Darby, Joan Parker, Lawrence Coburn

I. Amalgamated Transit Union Local 1279 v. PLRB, 208 A.3d 220 (Pa. Cmwlth. April 30, 2019)

An employee of the Cambria County Transit Authority (CamTran), and Union officer for twenty years, was discharged following an incident in which she allegedly picked up a kitchen knife and made a confrontational remark to a management employee in the employee break room. A charge of unfair practices for discrimination under PERA was filed by the Union. After hearing, the Board found that the Union had not met its burden of establishing a discriminatory or anti-union motive for CamTran's decision to terminate her employment based on CamTran's literal application of its weapons policy.

The Union appealed to the Commonwealth Court, asserting that the employee at issue was terminated to preclude her involvement in upcoming contract negotiations. In support of this contention, the Union claimed, among other things, that CamTran's application of its weapons policy was pretextual, and that CamTran failed to implement progressive discipline and disparately discharged the employee. The Commonwealth Court affirmed the Board in an unreported decision agreeing with the Board that the Union had failed to refute CamTran's credible non-discriminatory application of its weapons policy.

II. Officers of Towamencin Township Police Department v. Towamencin Township, 52 PPER 75 (Final Order, 2020), appeal filed at No. 789 C.D. 2020 (decision pending in Commonwealth Court)

The Union filed a charge of unfair labor practices with the Board on behalf of a female officer, alleging that the Township breached its bargaining obligation when it changed its policy concerning employees' use of contractual paid leave and commencement of leave under the Family and Medical Leave Act (FMLA) for her second pregnancy in violation of Section 6(1)(a) and (e) of the PLRA, as read *in pari materia* with Act 111. After a hearing, the Hearing Examiner issued a PDO concluding that the Township violated its duty to bargain by commencing 12 weeks of FMLA-designated leave for the officer when she went out on leave, due to her own medical condition resulting from the pregnancy at approximately six weeks prior

to the birth of her second child. The Hearing Examiner reasoned that the FMLA and its implementing regulations do not require that an employer run FMLA-leave concurrently with other types of leave provided by the officers pursuant to a CBA, and therefore, the Township's policy regarding when FMLA-leave must commence is a subject over which bargaining is required.

The Township filed exceptions with the Board, which were dismissed. The Board found that the Township and the Union had a past practice consistent with the CBA that allowed a pregnant employee to use the unlimited contractual sick leave and disability benefits for her own medical conditions arising from a complication during pregnancy. Family sick leave was not covered in the CBA, but the Township's past practice was to allow officers to use the contractual leave for their own illnesses, and use statutory FMLA for family medical leave. Consistent therewith after her first childbirth, the employee was allowed to use the 12 weeks of noncontractual FMLA leave for the care of her newborn child. The Board concluded that the Township violated Section 6(1)(a) and (e) of the PLRA by failing to bargain changes made regarding employee contractual and FMLA leave entitlement and usage.

Thereafter, the Township filed a Petition for Review in the Commonwealth Court. The Township asserted to the Commonwealth Court that the FMLA's implementing regulations and interpretive caselaw require that, at the beginning of the time an employee is out for any of several qualifying events, the employer must designate that leave as FMLA regardless of what other contractual leave might be available to that employee.

The Board argued to the Commonwealth Court that the situation presented in this case is distinguishable from the cases cited by the Township in that they did not involve collective bargaining, and that a decision of the NLRB, Verizon North Inc. and International Brotherhood of Electrical Workers, Local 1637, 352 NLRB 1022 (2008), is on point. In that case, as in the instant one, the employer changed its policy from allowing the "stacking" of paid leave benefits with unpaid FMLA leave to requiring the concurrent use of both types of leave without bargaining. There, the NLRB held that the FMLA's language is permissive, rather than

mandatory, and therefore it does not override an employer's collective bargaining obligations. The matter was argued in June of 2021 and is still pending before the Court.

III. Abington Heights Education Association v. Abington Heights School District, 52 PPER 58 (Final Order, 2021), appeal filed at No. 404 C.D. 2021, (decision pending in Commonwealth Court)

The Union filed a Charge of Unfair Practices against the District alleging a violation of Section 1201(a)(1) and (5) of PERA for the unilateral transfer of bargaining unit work. After a hearing, the Hearing Examiner concluded that the District violated PERA when it utilized Johnson College employees to teach certain high school classes for the 2019-2020 academic year, thereby removing that work from the District's bargaining unit teachers. On exceptions, the District alleged that the Hearing Examiner erred in finding that it violated Section 1201(a)(1) and (5) of PERA because the Union failed to prove that the bargaining unit teachers exclusively performed the work. The District argued that the Union had permitted another institution, the Lackawanna Career Technology Center (CTC), to teach building trades classes to the District's high school students for numerous years, and therefore, it was not required to bargain over its agreement with Johnson College to teach similar courses. The District further argued that the courses being taught at Johnson College were part of a dual enrollment program pursuant to Act 46 of the Public School Code, or alternatively through Section 15-1525 of the Code, not subject to bargaining. The Board concluded that the District had not set up its dual enrollment program through Act 46 and that Section 15-1525 of the Public School Code did not preclude the District from bargaining over who would teach those courses to its students. Therefore, the Board dismissed the District's exceptions, and made the PDO final.

The District then filed an appeal with the Commonwealth Court, asserting that the District has an inherent managerial prerogative to determine the best kind of program to suit its public duty, *to wit*, the education of secondary students. The Board argued that the District's managerial prerogative to decide which course to offer does not trump its duty under Section 701 of PERA as to who will be teaching those classes. Because Section 15-1525 of the Public School Code does not prohibit the District from bargaining over who will teach dual enrollment classes, nor does it vest control over instructor selection for a dual enrollment course, the Board argued

that the District was required to bargain with the Union before transferring the work of teaching core high school curriculum courses to Johnson College employees. This matter was argued in September of 2021, and is pending before the Court.

IV. In the Matter of the Employes of East Stroudsburg Area School District, 52 PPER 51 (Final Order, February 16, 2021)

The Union filed a Petition for Unit Clarification with the Board seeking to include two Coordinator of Social Services positions in the professional bargaining unit certified under PERA. The Coordinators have myriad job duties including creating new programs, and altering others, to address the mental health crisis in the District. Following a hearing, the unit clarification was dismissed by the Hearing Examiner, with the result that the positions were excluded from the bargaining unit as "management level" pursuant to Section 301(16) of PERA. The Hearing Examiner concluded that the Coordinators were managers under the second prong of the statutory test because they responsibly direct implementation of the District's policies.

The Union excepted to this conclusion, maintaining that these positions should be included in the bargaining unit because their duties do not involve the independent exercise of discretion, but rather, are limited entirely to their professional expertise, which is that of "social worker." The Union's main argument was that, despite their titles, the duties of both positions were consistent with the routine tasks of a social worker, making their involvement in the District's policies and programs merely an exercise of their educational and professional expertise which does not stray into the realm of management under PERA.

In its Final Order, the Board noted that the determination of whether an employee should be excluded from the bargaining unit is fact driven and requires an inquiry into the actual job functions performed by the employee, as opposed to reliance on a job title, or written job description. The Board then went on to conclude that the record evidence showed that the Coordinators had independent authority to address noncompliance with District policies by creating programs or developing services to address deficiencies, and allocating District resources to improve the services offered by the District. As such, the Board concluded that the Coordinators were properly excluded from the unit as management level employees under the second prong of the statutory test. The mere fact that the primary focus of the Coordinators'

efforts was on the mental health and behavioral issues relative to the District's student body did not dilute their position as managers under Section 301(16) of PERA.

V. SEIU Local 668 PSSU v. York County and York County Court of Common Pleas, 52 PPER 73 (Final Order, April 20, 2021), appeal filed in the Commonwealth Court at No. 161 MD 2021

The Union filed a Charge of Unfair Practices against York County and the York County Court of Common Pleas pursuant to Section 1201(a)(1) and (3) of PERA, based on its claim both respondents retaliated against Adult Probation Officer Jason Walker for having the Union file a grievance on his behalf after he had received discipline resulting from an improper search. In particular, the Director of Probation Services responded to the grievance by asserting that the matter was not subject to the grievance process under the CBA, and increased Walker's discipline for the improper search, citing a "blatant disregard for so many policies which renders the court vulnerable to civil suit."

The County and the Court both filed Motions to Dismiss, arguing that the Board lacked jurisdiction to hear the matter. The Hearing Examiner deferred ruling on the motion, and in the Proposed Decision and Order concluded that the Board has jurisdiction over the joint public employers but ordered the rescission of the Complaint and dismissal of the Charge of Unfair Practices for failure to prove an unfair practice under Section 1201(a)(3) of PERA.

Despite prevailing before the Hearing Examiner, the Court excepted to the PDO concerning the Board's jurisdiction over the matter based on separation of powers principles. The Board ruled that the Court's jurisdictional challenge must fail based on binding precedent expressly holding that the Board has jurisdiction to hear unfair practice cases concerning the rights of court-appointed employees under PERA. Teamsters Local 115 v. PLRB, 619 A.2d 382 (Pa. Cmwlth. 1982), *appeal denied*, 634 A.2d 1119 (Pa. 1983).

Regarding the alleged unfair practice, the stipulated facts submitted by the parties to the Hearing Examiner reveal that the Union failed to meet its burden of proving a *prima facie* case of discrimination. In addition to the Court's assertion of the administration of justice, the stipulated record clearly indicated that the County and Court had legitimate reasons for the increase in Walker's discipline based on the number and severity of the violations occasioned by

his illegal search. Because the nondiscriminatory reasons for the actions of the County and the Court are a defense to the charge of discrimination, the Board concluded that the Hearing Examiner did not err in finding no violation of Section 1201(a)(1) or (3) of PERA. The matter is now on appeal in the Commonwealth Court.

VI. AFSCME District Council 47, Local 810 v. City of Philadelphia, 52 PPER 49 (Final Order, February 16, 2021)

Pursuant to Sections 805 and 806 of PERA, AFSCME filed a Request for Panel of Neutral Interest Arbitrators with the Board, alleging an impasse in contract negotiations with the City of Philadelphia for a bargaining unit of court-appointed employees necessary to the functioning of the Courts. The Secretary of the Board administratively declined to provide a panel because twenty days had not passed between the alleged commencement of mediation and the alleged demand for interest arbitration, stating that "the parties have a statutory obligation to bargain in good faith and follow the timelines related to mediation prior to requesting a list of neutral arbitrators from the Board."

AFSCME excepted to the Secretary's administrative decision, contending that it submitted it request prior to mediation in case the parties were unable to resolve their dispute, and that, as of the time of filing the exceptions, the parties were in the process of establishing a negotiation schedule with the assigned mediator. The Board rejected AFSCME's arguments and sustained the Secretary's decision because the procedures set forth in Article VIII of PERA are mandatory, and must be followed in the proper sequence. In so doing, the Board pointed out that "receiving the list of names of neutral arbitrators without prior notice and before mediation has commenced, or during the twenty days of mediation, causes confusion over the parties' positions in bargaining and frustrates the good faith collective bargaining required under Sections 1201(a)(5) and (b)(3) of PERA."

VII. In the Matter of the Employes of University of Pittsburgh, 53 PPER 25 (Final Order, September 21, 2021)

The Union filed a Petition for Representation pursuant to Section 603 of PERA seeking to represent a unit of all full-time and regular part-time workers of the University of Pittsburgh, including all salaried and hourly graduate teaching assistants, teaching fellows, graduate student assistants and graduate student researchers. Following hearing, and issuance of an ODSEL, an

onsite secret ballot election was held with the result of 675 votes for the Union, 712 votes for no representative.

The Union filed objections to the Board's conduct of the election pursuant to Sections 95.57 and 95.58(a) of the Board's Rules and Regulations, as well as a Charge of Unfair Practices pursuant to Section 1201(a)(1) and (7). Following a hearing, the Hearing Examiner issued a PDO concluding that the Board did not engage in misconduct during the election and the University did not commit an unfair practice under Section 1201(a)(7). However, the Hearing Examiner recommended a new election because the University did commit an unfair practice in violation of Section 1201(a)(1) of PERA by sending an email on the last day of the election to the graduate students in the chemical engineering department, which evidenced knowledge of the number of engineering students who had already voted and encouraging the chemical engineering students to go vote.

The University filed exceptions, which the Board dismissed in part and sustained in part. The Board concluded that the email sent by a faculty member amounted to an unfair practice which could have affected 34 graduate assistants in the chemical engineering department, and that, depending on the outstanding 14 challenged ballots, it could have affected the outcome of the election. The Board ordered the canvassing of the challenged ballots to determine whether the University met its burden of proving that the unfair practice did not affect the election. Further proceedings ensued in order for the Hearing Examiner to determine the validity of the outstanding 14 challenged votes. Six ballots were determined to be eligible and the matter was returned to the Board Representative for canvassing, with the result that two votes were for representation, and four votes were for No Representative. The final total was, therefore, 677 votes for the Union, and 716 votes for No Representative.

For purposes of assessing whether a new election would be held, the Board Representative determined that it was reasonable to assume that the 28 chemical engineering graduate assistants who voted after receiving the email were coerced into doing so such that their votes should be subtracted from the No Representative count, but that they should not be added to the Union's total because it was speculative to infer that those 28 voters would have voted for representation absent the University's email. As to the six voters who chose not to vote after

receiving the email, the Board Representative stated that it was reasonable to deduce that they would have voted for representation, such that those six non-voters should be added to the Union's tally. For purposes of whether the unfair practice could have affected the outcome of the election, the Board Representative determined that the final count would be 683 votes for the Union, and 688 votes for No Representative. Accordingly, a Nisi Order of Dismissal was issued by the Board Representative.

On exceptions to the Nisi Order of Dismissal, the Union argued that the Board should not only subtract 28 votes from the No Representative count, but also add them to the Union's tally. The Board concluded that the facts did not support a conclusion that all 28 graduate assistants would have voted for the Union, citing to the seminal case of Western Psychiatric Institute v. PLRB, 330 A.2d 257 (Pa. Cmwlth. 1974). The Board went on to agree with the Board Representative that adding the votes of the six graduate assistants who did not vote to the total of votes for the Union was appropriate under the circumstances. Thus, the Board dismissed the exceptions and made the Nisi Order of Dismissal final.

TEXAS

Texas Public Sector Report

Maretta Toedt and Will Hartsfield

Civil Service Commission Jurisdiction

City of Houston v. Reyes, 625 S.W.3d 563 (Tex. App.—Houston [14th Dist.] Apr. 29, 2021)—A civil service commission had jurisdiction over firefighters' complaints about the grading of civil service examinations even if the firefighters did not file a grievance. Per Tex. Local Gov't Code §143.009 the commission may investigate all matters relating to the enforcement of chapter 143 even if no Grievance is filed.

Public Whistleblower

City of Valley Mills v. Chrisman, No. 10-1800265-CV, 2021 WL 1807365 (Tex. App.—Waco, May 5, 2021)—When the government pleads sovereign immunity to a Whistleblower Act claim, employees must allege facts to show the honesty and the reasonableness of their beliefs (in view of their training and experience), that the conduct they reported was illegal, and that their report was to an appropriate law enforcement authority.

Public Interest Arbitration

City of Houston v. Houston Pro. Fire Fighters' Ass'n, Local 341, No. 14-18-00976-CV, 2021 WL 1807311 (Tex. App.—Houston [14th Dist.] May 6, 2021)—The court upheld the constitutionality of the Texas Fire and Police Employee Relations Act which creates a system for collective bargaining, ending with a judicial declaration of terms of employment if impasse occurs if either party refuses "interest" arbitration. Here, the parties did not agree, and the employer city refused to arbitrate, thus leaving the matter to judicial declaration. Tex. Local Gov't Code 174.252.

Information Exchange Unfair Labor Practice Charge

Oncor Elec. Delivery, L.L.C. v. NLRB, No. 20-60229, 2021 U.S. App. LEXIS 9534 (5th Cir. Apr. 1, 2021) (unpublished). The union accused the employer of violating the CBA by using

non-unit employees to perform bargaining unit work. During negotiations over this issue, the union asked for the names of the non-unit workers who performed the work. The employer refused, and the union filed an unfair labor practice charge. The NLRB agreed with the union, but the Fifth Circuit denied enforcement of the order. The court found that names of the non-unit workers were not relevant because the employer had admitted non-unit workers had performed certain services, and the only question was whether that service was bargaining unit work.

Enforcement of Electronically Signed Arbitration Agreements Public Hospital

CHG Hospital Bellaire, LLC v. Johnson, No. 01-20-00437-CV, 2021 WL 1537465 (Tex. App.—Houston [1st Dist.] Apr. 20, 2021)—State and federal courts in Texas have split over whether an employee's sworn denial of recollection of electronic signature regarding online arbitration agreements defeats a motion to compel arbitration. Some courts hold that an employee's denial of recollection, standing alone, cannot raise a fact issue in the face of the employer's detailed evidence of password-accessed document review and electronic signature. This court of appeals held the state district court did not abuse its discretion to credit the employee's testimony that she did not recall signing the agreement and affirmed the denial of the motion to compel arbitration.

Sexual Orientation Discrimination under State Law County College District

Tarrant Cnty. Coll. Dist. v. Sims, 621 S.W.3d 323 (Tex. App.—Dallas Mar. 10, 2021) While dismissing a Whistleblower suit, the court held the Texas discrimination act prohibited sexual orientation discrimination. The plaintiff alleged the employer retaliated when she complained about sexual orientation discrimination. But she filed her complaint under the Whistleblower Act rather than the discrimination statute. If the Texas discrimination statute applies, it preempts the Whistleblower Act. Noting the U. S. Supreme Court's decision in *Bostock v. Clayton Cnty, Georgia*, 140 S. Ct. 1731 (2020), the court held that the discrimination statute's parallel provisions should be interpreted to prohibit sexual orientation discrimination. The court remanded the case to allow the plaintiff to amend her pleadings to state a discrimination claim.

Civil Service Detainee Neglect
Multiple Fort Worth Officers

The Fort Worth Police Department disciplined seven Officers when a detained, handcuffed citizen died in the back of a police call. Initially, the City fired six Officers and suspended one for five days. The Officers said the detainee suffered from "jailitis"—falsely claiming he could not breathe and could not walk so they would take him to the hospital rather than jail.

Later, the City negotiated settlements with two Officers—one was suspended for 90 days, Officer Smith; and one for 15 days, Officer Miller.

Three of the four Hearing Examiners (HEs) who heard the cases compared the misconduct in the two settled cases to the proven misconduct in their cases to determine the discipline.

While the evidence presented to the HEs varied, there were common facts, e.g., (1) it was commonly taught to and accepted by Officers that detainees often suffered "jailitis;" (2) the City did not train Officers to recognize medical distress in detainees; (3) Officer Smith, an officer for ten years, was the most senior Officer, with the others having been employed for three or fewer years and was on the scene longer than any other Officer; heard the detainee repeatedly say he could not walk and could not breathe; saw the detainee repeatedly stumble and collapse; did not accurately relay to the other Officers what happened before their arrival; did not ask the detainee what was going on; did not check on the detainee; and did not call for an ambulance; and (4) Officer Miller heard the detainee say several times he could not walk and could not breathe; saw the detainee collapse several times; thought the detainee was on drugs but did not tell others of his suspicions; and did not call for an ambulance.

Based on the settlements and that evidence and the proven misconduct in their cases, three HEs reduced the terminations to suspensions ranging from 90 to 10 days. For example, one Officer arrived after Officer Smith and shortly before Officer Miller and engaged in misconduct similar to Officer Miller. Two other Officers arrived after Miller and engaged in less misconduct than Miller. For one of these Officers, the HE found the City did not conduct an adequate investigation.

The original five-day suspension for one Officer was overturned because he was the last to arrive, did not hear the detainee's complaints, did not see the detainee collapse or stumble, and called an ambulance when he saw the detainee unresponsive in the police car. The fourth HE found that Officer heard the detainee repeatedly say he could not walk and could not breathe; saw the detainee repeatedly stumble and collapse; and heard the detainee ask to be taken to the hospital and upheld the discharge.

Civil Service Excessive Force
Wright v. City of Fort Worth

The Fort Worth Police Department fired an Officer for using excessive force and cursing a detained elderly male of average size. The Officer admitted the charges but urged he should have been suspended for 15 days instead of being fired. The Hearing Examiner upheld the discharge, holding that Officer used unnecessary force multiple times on a compliant citizen, threatened that compliant citizen multiple times, cursed that compliant citizen multiple times and later failed to report his use of force, yelled at another Officer, and cursed another Officer. The Hearing Examiner noted that the mitigating circumstances of two ill close relatives and a toxic relationship which placed the Officer under stress did not justify or compel modifying the discipline.

Civil Service Timeliness of Discipline
Perrow v. City of Killeen

The Killeen Police Department recommended demoting a Sergeant to Officer because it lost confidence in his judgment and ability to serve as a supervisor based on his misconduct. That misconduct included (1) a false arrest; (2) excessive force; (3) rude and unprofessional conduct toward the Citizen's wife; (4) a report that lacked material detail, which did not support the arrest, and with inaccurate information; and (5) not activating his body camera as required. The Sergeant argued that the demotion occurred over 180 days after his misconduct and was untimely under the civil service statute. The Hearing Examiner held the demotion was not discipline and that the 180-day rule did not apply. Alternatively, the Hearing Examiner held that the statute did not require a specific remedy for violating the 180-day rule, and that the City offered a reasonable remedy when it offered to meet with the Sergeant late on the 180th day to issue the demotion, but the Sergeant declined because he was on personal time, out of town

fishing and drinking alcohol before 10 a.m. on that day. The Hearing Examiner noted the Sergeant did not testify that he could not arrive safely and timely, ready to soberly participate in that meeting.

Civil Service Domestic Violence and Dishonesty

Black v. City of Austin

The City fired an officer for two incidents of family violence and dishonesty. The Hearing Examiner concluded that the charges of family violence and dishonesty were so interrelated as to be virtually inseparable. The Hearing Examiner found that the City had not proved the truth of the family violence charge. Besides finding that both parties engaged in abusive behavior and that the officer's actions were defensive, the Hearing Examiner noted that the transcription of the officer's recounting of one incident was incorrect and had been relied upon by the Chief. The Hearing Examiner determined that had the Chief known that the officer acted defensively and the incorrect transcription, he might have concluded that the lesser charge of neglect of duty was supported by the evidence.

The Hearing Examiner found that the officer failed to report a prior incident that resulted in a police response and that the officer had not been forthcoming in his responses to the investigators. Based on these proven offenses, the officer's indefinite suspension was reduced to a 45-day suspension, permissible under the parties' Meet and Confer Agreement and in alignment with the chain of command's recommendation.

Civil Service Careless Discharge of Weapon and Failure to Report

Best v. City of Waxahachie

The Hearing Examiner upheld the discharge of a lieutenant who carelessly discharged his firearm during a classroom training session and did not report it until six days later. Other witnesses to the incident reported the firearm discharge. Department policy required the lieutenant to report the discharge immediately or the following morning; he did neither. The lieutenant left work sick after the incident but never reported it, even though he spoke to his supervisor daily while out on sick leave. The Hearing Examiner found that the lieutenant did not report the incident and that an aggravating factor was the lieutenant's extremely poor disciplinary record and work history. Although the lieutenant argued that he was treated

disparately, the Hearing Examiner concluded that a SWAT lieutenant who received a two-day suspension for a similar incident was not similarly situated in all material respects nor virtually identical.

Civil Service Grooming and Dishonesty
Constantine v. City of Arlington

The City discharged a Fire Lieutenant for acts showing lack of good moral character, conduct prejudicial to good order, use of official position, and violation of the Educator/Student Penal Code based on alleged sexual activity with a female student under 18 while the student was attending a program for high school juniors and seniors interested in a fire service career. The Hearing Examiner upheld the charges, noting that the student alleged that the relationship continued after she graduated from the program and included sexual activity with the Fire Lieutenant and his wife. Text messages exchanged during the period of the sexual relationship amongst the Fire Lieutenant, his wife, and the student had been deleted, leading the Hearing Examiner to draw a negative inference that the deleted texts supported the City's position. Although the lieutenant argued that the indefinite suspension was untimely as it was issued over 180 days after the alleged sexual contact, the Hearing Examiner ruled that the discovery of the misconduct and issuance of the discipline fell within the TX Local Government Code discovery provision and was timely. The Hearing Examiner upheld the discharge.

Civil Service Sexual Harassment and Dishonesty
Morrissey v. City of Killeen

A police sergeant became obsessed with a female subordinate and expressed his desires to other officers in texts. The female subordinate was younger, a new recruit, and less experienced. Not limiting himself to texting others, the sergeant also showed up at the female subordinate's calls, stared at her during briefings, and asked her to be his date at a Christmas party.

During the investigation, the sergeant did not fully describe or turn over his texts. The sergeant admitted his feelings for the female subordinate were inappropriate. The City fired the sergeant for sexual harassment and dishonesty. The Hearing Examiner upheld the discharge

because the sergeant was dishonest during the investigation, had a prior 10-day suspension for dishonesty, and his behavior affected the female subordinate and other officers.

Civil Service Falsification of Time Sheets

Van Orden v. City of Fort Worth

An officer falsely claimed at least seven times she was working when she was on leave, resulting in overpayments of at least $4,500. Her sergeant discovered the incorrect entries and ordered the officer to correct them. He noted the officer had submitted an incorrect time sheet before.

The officer admitted the mistakes and claimed they resulted from carelessness and forgetfulness. The officer's explanations, however, kept changing during the investigation, which led the chief to discharge the officer with charges of submitting false time sheets and being dishonest about it.

sThe officer contended she had numerous personal problems (depression, ADHD, suicidal thoughts) and professional issues (failure of her supervisor to properly supervise her) that caused her to submit the false time sheets. The Hearing Examiner upheld the discharge because this was not the first time the officer had submitted false time sheets and the officer had not told her supervisor of her personal problems. Further, her supervisor's alleged failure to properly supervise her did not justify theft.

Wisconsin Report – 2021

George R. Fleischli

The Committee report for 2020 described the impact Act 10 has had on collective bargaining and arbitration practice in the public sector in Wisconsin. The situation has not changed since that report was issued. Police and fire unions continue to have the right to bargain over most subjects combined with impasse procedures that end in binding interest arbitration if they are unable to reach a voluntary settlement. In a typical year, less than a handful of police and fire disputes are submitted to interest arbitration and the number has declined since the passage of Act 10.

The Wisconsin Employment Relations Commission continues to conduct annual elections to certify or recertify those unions that seek to bargain on behalf of "general employees," i.e., all public employees other than police and fire fighters or public transit workers. An increase in the basic wage rate is the only subject that is bargainable and any increase agreed to may not exceed the cost of living, unless authorized in a referendum among voters served by the public employer.

A significant number of public sector unions continue to seek annual certification or recertification, in spite of these severe restrictions on the scope of bargaining, and the unusual number of votes required to win certification. At least 51% of the employees in the bargaining unit must participate and vote in favor of representation by the union seeking certification.

In 2021, elections were conducted in bargaining units covering approximately 60,800 general employees. The petitioning unions lost a total 13, or approximately 4%, of the 335 elections conducted.