NATIONAL LABOR RELATIONS BOARD

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

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

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

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

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

NLRB Returns to Long-Standing Independent Contractor Standard

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

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

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

employees under the Act. The decision affirms the Acting Regional Director's finding that the franchisees are independent contractors.
The Board's decision overrules FedEx Home Delivery, a 2014 NLRB decision that modified the applicable test for determining independent contractor status by severely limiting the significance of a worker's entrepreneurial opportunity for economic gain.
Chairman John F. Ring was joined by Members Marvin E. Kaplan and William J. Emanuel in the majority opinion. Member Lauren McFerran dissented.

Selected State Board Decisions
MASSACHUSETTS

Oral Argument Held in Post-*Janus* Appeal

***Branch et al. v. Commonwealth Employment Relations Board*, Docket No. SJC-12603**
As we announced in the last Advisor, the Massachusetts Supreme Judicial Court (SJC) will soon be deciding a case challenging exclusive representation rights under Massachusetts' public sector collective bargaining statute. The case is an appeal of a pre-*Janus*, unpublished Commonwealth Employment Relations Board (CERB) ruling that dismissed three separate prohibited practice charges relating to the compulsory payment of agency service fees for lack of probable cause. The SJC decided to hear the appeal in the first instance and solicited amicus briefs on three issues, including the following:

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

Oral argument was held on January 8, 2019. The parties' briefs may be viewed at http://www.maappellatecourts.org/search_number.php?dno=SJC-12603&get=Search and the oral argument at https://boston.suffolk.edu/_sjc/archive.php.
A decision is expected by May 2019.

***Board of Higher Education v. Commonwealth Employment Relations Board*, Docket No. SJC-12621**
As announced in the last Advisor, the SJC decided to hear a case challenging a CERB decision holding that the Board of Higher Education unlawfully repudiated a contract provision that established a percentage for the number of courses that adjunct professors could teach. When soliciting amicus briefs, the SJC framed the issue before it as follows:

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

Oral argument was held on February 7, 2019. You can view the briefs at http://www.ma-appellatecourts.org/search_number.php?dno=SJC-12621&get=Search and the oral argument at https://boston.suffolk.edu/sjc/_archive.php.
A decision is expected by June 2019

MICHIGAN

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

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

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

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

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

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

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

The Michigan Association of Fire Fighters sought to represent a bargaining unit consisting of all regular part-time firefighters employed by the Howell Area Fire Department. The employer employed approximately sixty part-time firefighters. That group included part-time firefighters who worked regularly scheduled weekday shifts of twenty or thirty hours per week on a continuous basis. Those employees must work their scheduled shifts unless excused by the employer and had the

option of working on call. Most of the part-time firefighters employed by the employer worked on call. They worked sporadically, they were called to work by the employer when needed, and they had the option of choosing whether to accept the work when called.

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

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

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

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

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

The union represents nurses and pharmacists employed by Hurley Medical Center (employer). On June 8, 2017, the employer's attorney sent an email to the union's attorney containing what the employer described as its "Last Best Offer" for a new collective bargaining agreement. The union's attorney wrote back suggesting that they meet to discuss and negotiate over the changes included in the employer's June 8 proposal. The employer's attorney requested that he be provided with a list of the union's questions before determining whether it was necessary for the parties to meet. Between then and June 27, 2017, the attorneys exchanged emails about the proposed meeting. In those emails, the employer's attorney insisted that any meeting would be limited to responding to the union's questions about the June 8 proposal and only the two attorneys, the employer's labor relations officer, and the union president were to attend the meeting. On the other hand, the union's attorney insisted that the meeting would include continuing their negotiations for a new contract and that the union's full bargaining team would attend. After several emails back and forth, the employer's attorney declared that the sole purpose of the meeting was limited to the employer

answering questions about its June 8 proposal and unless the union's attorney accepted that premise in writing, there would be no meeting. The union's attorney wrote back asking if the employer was refusing to negotiate. The employer's attorney responded by canceling the meeting.

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

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

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

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

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

The Commission rejected the employer's argument that "the introduction of new concepts only breaks an existing impasse if they constitute a 'substantial change' in the bargaining position of one party" citing *Kalkaska Co Rd Comm*, 29 MPER 65 (2016).The Commission explained that *Kalkaska* is not applicable to this case because it involved the question of whether an impasse had been broken by a change in the union's offer. In this case, it was the employer that changed the terms of its proposal from those that were in its prior offer. The Commission explained, "An employer cannot declare impasse indicating that it is in a position to impose its last best offer, then present a proposal that contains changes from the terms of its prior offer and, without further bargaining, declare that the parties are still at impasse. The employer must negotiate over the changes from its prior offer." The Commission found no merit to the employer's argument that the ALJ erred by not granting an evidentiary hearing, as Rule 165 of the General Rules of the Michigan Employment Relations Commission authorizes an ALJ to summarily dispose of a case when there is no material issue of fact. In this case, the undisputed facts established that the employer refused to negotiate with the union after the union demanded to bargain over the terms of the June 8 proposal.

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

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

In 2014, the employer became concerned with the achievement levels of alternative education students and decided to develop a new alternative education program which would emphasize the use of technology and eliminate all traditional classroom teaching, while still providing instruction from teachers as necessary. The employer also decided to staff the new alternative education program with members of the UFT bargaining unit. As a result, the UEA filed a grievance asserting that the removal of bargaining unit positions from the alternative education program violated the collective bargaining agreement. The employer denied the grievance noting that the matter involved a prohibited subject of bargaining that was excluded from the grievance process. As a result of the denial, the UEA filed its unfair labor practice charge. The employer filed a counter charge against the UEA asserting that it violated PERA by filing a grievance challenging the staffing of the new alternative education program and by advancing that grievance to arbitration.
The ALJ found that the employer did not violate PERA by creating the Alternative Learning Center and staffing the center with UFT members. However, the ALJ found that UEA violated § 15(3)(j) by demanding that the employer arbitrate its grievance challenging the staffing of the Alternative Learning Center.

According to the Commission, the ALJ properly concluded that the Employer did not violate § 10(1)(e) by unilaterally deciding to assign teaching duties to members of the UFT bargaining unit to the exclusion of UEA members. The Commission found that the evidence established that the teaching of alternative education was a responsibility which was shared by UEA and UFT members for more than twenty years until the school district made the decision to assign those duties to only UFT members in August 2015.The Commission also found that the case did not involve a question of unit placement because the UEA failed to prove that the employer transferred, or attempted to transfer, any UEA member or UEA represented position into the UFT bargaining unit.
Further, by filing its grievance seeking the recall of all teachers who were laid off, the Commission found that the UEA was effectively seeking to have an arbitrator make decisions with respect to teacher placement, a prohibited subject of bargaining. Consequently, the Commission found that the ALJ properly concluded that the UEA violated § 15(3)(j) when it attempted to process the grievance involved in this dispute to arbitration.
The Commission adopted the ALJ's recommended order which included a cease and desist order, a directive for the UEA to withdraw its grievance, and a directive for the UEA to refrain from enforcing any arbitration award that may have been issued.

WASHINGTON

Tacoma School District, **Decision 12975 (PECB, 2019)**

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

The school district previously armed the security officers. Concerns over liability, issues with adequate insurance coverage, and the larger philosophical issue of whether armed security officers fit within the district's educational mission prompted the employer to decide to disarm the security officers. However, it only provided nine days' notice to the union before removing the firearms. The union filed an unfair labor practice complaint alleging that the employer breached its good faith bargaining obligation by unilaterally disarming the security officers.

The examiner found that the decision to disarm (or arm) security officers was not a mandatory subject of bargaining. The school district's general managerial prerogative to determine how work is performed predominated over the union's interest in employee safety, particularly in light of the employer's interest in safety by preventing an accidental discharge of a weapon by an employee. However, the impacts to security officers' safety were significant because of the abrupt nature in which the firearms were recalled. The union had only nine days within which to attempt to bargain any effects of the recall on the employees' working conditions and to determine the protocols and performance expectations the security officers would then be under. Thus, the school district was required to bargain the effects of the firearm recall prior to implementing the change.