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L&E Newsletter

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A Message from the Chair

Hello everyone and welcome to the Fall issue of the New York State Bar Association's Labor and Employment Law Section Newsletter. I hope that you enjoy reading it and perhaps even learn something you did not previously know.

As this is my first opportunity to write to all of you as Section Chair, let me take this opportunity to thank **Janet McEneaney**, our Newsletter Editor, for all of her hard work and dedication in putting this issue together. Thanks also go out to all of this issue's authors for their time and effort in preparing their written materials, as well as to former Section Chair **Pearl Zuchlewski** for all of her work over the past year on our collective behalf.

On behalf of us all, let me also acknowledge the contributions of outgoing Section Secretary **Michael Gold** and welcome aboard our new Secretary, PERB Administrative Law Judge **Elena Cacavas** and Chair-elect **Donald Oliver**. Also, before I go further, here is a very heartfelt thank you to the entire NYSBA staff, and in particular NYSBA Meetings Coordinator and Section liaison **Linda Castilla**, who always finds a way to say "yes" or "'here's how to do it," and who always does so with a kind word and a smile. Kudos also go out to **Alan Koral**, my successor as Continuing Legal Education Committee Chair and the person who somehow makes all of our terrific programs happen.

Now on to even more pressing business. For those of you who have heard me speak at Section (or other) events, you know that I like to begin my presentation with a trivia question. This gives the audience something to think about in case the speech goes on too long, isn't all that interesting or just plain "bombs."

Inside

With the same thought in mind, here is this Newsletter's trivia question: Name the active professional sports player (we'll limit it to baseball, basketball, football and hockey) who has played the most consecutive years on the only team for which he's ever played. In fact, since this is my first time writing one of these pieces, here is a bonus question (hint: this works because the answer to the first trivia question is not a football player): name the active professional football player who has played the most consecutive years on the only team for which he's ever played. (Both answers are found at the end of this article.)

While you are giving these questions much deserved thought, let me take this opportunity to bring you up to speed on some of our upcoming CLE programs. **Alan Koral** and his committee, as well as several of our other Section Committees and their Chairs, with the assistance of NYSBA Assistant Director of Continuing Legal Education **Jean E. Nelson**, have presented, and are busy preparing, a number of top-notch programs covering the gamut of the labor and employment law field. This is no easy task, as they must find the perfect balance between and among criteria including content (new ideas vs. previously successful programs that are ready for updating; traditional public or private sector vs. cross-practice issues such as those pertaining to the FLSA or discrimination law; case law and statutory updates vs. how to's), presenters (experienced vs. "new faces"), location (balancing among New York's four traditional geographic locations as well as deciding whether a program is appropriate for video and/or audio-conferencing), "bias" (ensuring a balance among labor, management, neutral and government agency speakers), and a whole host of related issues.

Our Section has presented some terrific programs over the past several months. They include: "Employment Law Essentials: What New York Practitioners Need to Know About Protected Classes, Leaves of Absence, Retaliation & More . . ." (co-sponsored by the New York City Bar), which took place on September 15, 2005 in New York City; "Labor and Employment Law for the General Practitioner and Corporate Counselor," held on June 15, 2005 in Rochester; "How Interest Arbitration Really Works" (co-sponsored by PERB and the Cornell University School of Industrial and Labor Relations), held on May 20, 2005 in Tarrytown; and "NLRB and the National Labor Relations Act" (co-sponsored by the Cornell University School of Industrial and Labor Relations), which took place on May 6, 2005 in Depew.

Fast forwarding from the past to the present, we are thrilled to be presenting what promises to be an extraordinary line-up of programs this Fall. As this issue goes to press, we are planning the Section's 30th Anniversary Fall Program, which will take place at the beautiful Long Boat Key Club in Long Boat Key, Florida on October 23 through 26, 2005. This stellar program will include topics such as "Overtime Payment Violations: The Practicalities of Enforcement, Correcting Errors and Recordkeeping," "Reporting a Client's or Colleague's Unlawful Conduct: New York Ethics Rules, ABA Proposals, Sarbanes-Oxley, and Common Sense," "Employee Privacy in the Workplace: The Impact of New Technologies," "Strategic Turning Points in EEO Litigation," "Fiduciary Issues in 401(k) Plans," "What Works and What Doesn't Work in the Mediation of Employment Cases, Parts I and II," "New Developments at the NLRB," "Statutory Preemption of Disciplinary Issues in the Public Sector," "Anticipating the Personal Disaster: Why You Should Have a Plan of Action for Your Practice, and How To Do It," "The Nuts and Bolts of International Labor and Employment Law: How New York Law Practice Is Affected," and "When Is a Contractor Not a Contractor? When (S)he's an Employee: The Ins and Outs of Employee Status." Our confirmed presenters and moderators include **Linda Bartlett, Jonathan Ben-Asher, Stefan Berg, Sharon Berlin, Michael Bernstein, Phil Berkowitz, Robert Boreanaz, John Canoni, Claudia Cohen, David M. Cohen, Michael Curley, Dan Driscoll, Jacquelin Drucker, Ronald Dunn, Sam Estreicher, David Fish, Matthew Fusco, John Gaal, Douglas Gerhardt, Mona Glanzer, Margery Gootnick, Gregory Jacob, Rochelle Kentov, Dennis Lalli, Wendi Lazar, Ira Lobel, Philip Maier, Bruce Millman, Rachel Minter, Leslie Canfield Perlman, Abigail Pessen, Ruth Raisfield, Eduardo Ramos-Gomez, James Sandner, Peter Shapiro, O. Peter Sherwood, Dan Silverman, Jules Smith, Sharon Stiller, Justin Swartz, Rosemary Townley, Pearl Zuchlewski and me (Rich Zuckerman).**

We will, in addition, be providing many exciting social and recreational programs for you and your families throughout our stay in Long Boat Key. A highlight should be our 30th Anniversary Celebration Banquet on Tuesday evening where, through **Margery Gootnick**'s efforts, we will be honored to have Arbitrator Emeritus **Richard Mittenthal** as our Keynote Speaker.

Moreover, since this is our Section's pearl anniversary year (I actually looked that up), I have decided to exercise the power of the Chair and hereby announce that we will be formally recognizing our past Section Chairs at the meeting. I urge you (you know who you are) to make a special effort to attend. In fact, as a first step towards that well-deserved and long overdue recognition, as well as for those of my predecessors who have chosen to forget their time in office, here is the list of our prior Section Chairs: **Frank A. Nemia (Chair Emeritus), Evan J. Spelfogel, Lester B. Lipkind, Stanley Schair, Bernard T. King, William L. Bergan, Irving Perlman, John D. Canoni, Jules L. Smith, Carl R. Krause, John E. Sands, Joel C. Glanstein,**

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From the Editor

The United States Supreme Court granted *certiorari* in several cases of interest to be heard in the coming term. The issue in *Arbaugh v. Y&H Corp.*,[1] No. 04-944, is whether the federal courts are deprived of subject matter jurisdiction in an employment discrimination suit when the plaintiff fails to qualify the defendant as an employer under Title VII.

Jenifer Arbaugh sued Y&H Corporation and one of its owners, alleging sexual harassment under Title VII and Louisiana tort law. After a two-day trial, the jury found for Ms. Arbaugh. The employer then moved to dismiss on the grounds that it did not employ enough people to be considered an employer for the purposes of the Civil Rights Act. Arbaugh argued that the issue of whether defendant is an employer under Title VII goes to the merits of the case and is not a question of subject matter jurisdiction; and that Y&H met the statutory threshold of 15 employees because its delivery drivers, the owners and the owners' wives should be counted as employees.

The District Court ordered post-trial discovery and learned that some of the employer's delivery drivers worked more than one job, the drivers owned their vehicles, controlled the manner and means of operation and chose their own routes Y&H did not withhold taxes from or contribute to social security for its drivers. The wives of the corporation's owners earned salaries for marketing but they could not be hired and fired. They were not supervised and did not report to anyone. Under these circumstances, and using the hybrid economic realities/common law control test, the court found that the drivers and owners' wives were not employees for the purposes of Title VII. It vacated the jury verdict for lack of subject matter jurisdiction and converted the employer's motion to a motion for summary judgment, which it granted. It also noted that it was by then too late for Arbaugh to bring her state tort claims.[2]

The Fifth Circuit Court of Appeals affirmed the lower court's decision, finding that the delivery drivers, restaurant owners and their wives were not employees of the restaurant.[3] It used the Supreme Court's six-factor test in the recent *Clackamas* decision, which resembles the common law test of control.[4] In addition to the factors cited by the lower court, mentioned above, the court noted that the owners and their wives shared Y&H's profits, losses, and liabilities. In the absence of a clearer statement by the Supreme Court or an *en banc* reconsideration of the issue, the court found it was bound by established precedents that employee census findings determine whether the courts have jurisdiction.

The Supreme Court granted *certiorari* to resolve a split among the Circuits on the issue of subject matter jurisdiction. The 4th, 6th, 9th, 10th, and 11th Circuits stand with the 5th Circuit in finding an employee census to be jurisdictional.[5] The 2nd, 7th, and Federal Circuits have found it to be a question that goes to the merits of the case.[6]

The Court will also decide a commercial arbitration case with significant implications for employment arbitration under the Federal Arbitration Act. In *Buckeye Cash Checking Inc. v. Cardegna*,[7] the Florida Supreme Court voided an arbitration agreement in a check-cashing contract because the terms of the contract were usurious. The court declined to follow the U.S. Supreme Court's decision in *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*,[8] distinguishing contracts that are voidable from contracts that are illegal.

The state court found that it is up to the court, not the arbitrator, to make the initial determination of whether the agreement is enforceable. It held:

> [T]here are no severable, or salvageable, parts of a contract found illegal and void under Florida law . . . We do not believe federal arbitration law was ever intended to be used as a means of overruling state substantive law on the legality of contracts.

Six federal Courts of Appeal have found that the arbitrator should make the initial decision as to whether an agreement is enforceable. Other state courts have found that the Federal Arbitration Act allows a party to avoid arbitration by claiming that the underlying contract containing an arbitration clause is void for illegality.[9]

The Equal Employment Opportunity Commission has taken on an "English only" workplace rule at a hospital in Rochester. Some Spanish-speaking housekeepers at Highland Hospital claim they were forced to follow an "English Only" rule or risk losing their jobs. The plaintiffs claim that they were ordered never to speak Spanish at work, even during lunch hours or breaks.

According to the plaintiffs, the hospital knew when they were hired that most of them did not speak Eng-

lish well and that they were expected to communicate within the department in Spanish. The hospital said it had developed an action plan specific to the housekeeping department, in response to complaints from other employees.

English-only rules are legal under some circumstances. EEOC officials said that in this case, Highland could enforce the rule for doctors and nurses who have direct contact with patients and whose jobs directly affect the business, but not for housekeepers who do not have direct contact with patients, or an effect on hospital business. Highland disagreed.

The EEOC first began investigating this complaint two years ago and has been working with Highland Hospital. A rule by Highland Hospital, which allegedly forbids housekeepers employed by the hospital to speak Spanish, is at the center of a federal lawsuit filed by the U.S. Equal Employment Opportunity Commission (EEOC) on July 13.

Language differences must not make employees the target of mean-spirited or restrictive blanket language policies when there is no real business necessity or justification for such policies, as in this case, said Chandy. At least five Hispanic employees were subject to disciplinary action merely for conversing with their coworkers in their native language, Spanish, which caused no harm to anyone.

Specifically, the EEOC argues the rule is not justified by business necessity since the ability to speak English is not related to the tasks involved in housekeeping. The EEOC also argues the rule is discriminatory since it is limited to the hospital's environmental services department. Employees in other departments at the hospital, including doctors and nurses, are allowed to speak in languages other than English and Spanish.

The suit seeks an order from the court requiring the hospital to change its language policy, as well as compensatory and punitive damages. The five plaintiffs are still employed by the hospital and the alleged English-only rule remains in effect.

Highland Hospital says that its position has been misunderstood and unfairly portrayed. In a statement, the hospital asserts that it does not have—and never has had—a policy that requires employees to speak only English.

Instead, the hospital explained that under an action plan it implemented, it asked its employees in the environmental services department to communicate in a common language when in the same room for the purpose of minimizing any mistrust and misunderstanding between co-workers who do not speak Spanish.

According to Highland Hospital, the issue began two years ago when some of its employees complained that certain employees would deliberately switch from speaking English to Spanish when non-Spanish speaking employees entered the room. Within the hospital's environmental services department, approximately 20 percent are Spanish-speaking. This was a limited measure—within a single department—in response to specific complaints from employees who felt discriminated against by co-workers, the hospital said in its issued statement.

Janet McEneaney

Endnotes

1. Docket No. 04-944, 125 S. Ct. 2246 (5/16/05).
2. In its decision, however, the Fifth Circuit noted that a recent U.S. Supreme Court decision would suggest otherwise. 380 F.3d 219 (5th Cir. 2004), *infra* note 3.
3. 380 F.3d 219 (5th Cir. 2004).
4. *Clackamas v. Gastroenterology Associates,* 538 U.S. 440, 123 S. Ct. 1673 (2003). The issue in *Clackamas* was whether physician-shareholders of a professional medical corporation were employees within the meaning of the Americans with Disabilities Act ("ADA") in order to determine whether the number of employees reached the statutory threshhold for jurisdiction. The court rejected the Ninth Circuit's finding that corporation status "precludes any examination designed to determine whether the entity is in fact a partnership." Instead, the Supreme Court followed the EEOC's position that the common law test of control determines the employment status of a worker. The six factors relevant in determining whether a shareholder-director is an employee are: (1) whether the organization can hire or fire the person or set rules and regulations for the person's work; (2) whether, and to what extent, the organization supervises the person's work; (3) whether the person reports to someone higher in the organization; (4) whether, and to what extent, the person is able to influence the organization; (5) whether the parties intended the person to be an employee, as evidenced in written agreements or contracts; and (6) whether the person shares in the profits, losses, and liabilities of the organization.
5. *See, e.g., Hukill v. Auto Care, Inc.*, 192 F.3d 437 (4th Cir. 1999); *Armbruster v. Quinn*, 711 F.2d 1332 (6th Cir. 1983); *Childs v. Local 18, Int'l Board of Elec. Workers*, 719 F.2d 1379 (9th Cir. 1983); *Owens v. Rush*, 636 F.2d 283 (10th Cir. 1980); *Scarfo v. Ginsberg*, 175 F.3d 957 (11th Cir. 1999).
6. *Da Silva v. Kinsho Int'l Corp.*, 229 F.3d 358 (2d Cir. 2000); *Sharpe v. Jefferson Distrib. Co.*, 148 F.3d 676 (7th Cir. 1998), abrogated on other grounds, *Papa v. Katy Indus., Inc.*, 166 F.3d 937 (7th Cir. 1999).
7. 894 So.2d 860 (Fla. 2005). The decision is unpublished; however, a transcript of the appellate arguments is *available at* http://www.wfsu.org/gavel2gavel/transcript/02-2161.htm.
8. 388 U.S. 395 (1967).
9. Compare a decision written by Judge John Roberts, in *Booker v. Robert Half International,* in which an unconscionable term was severed in a contract with a severability clause. 413 F.3d 77 (2005).

They're Still Here: Living with the Revised White Collar Exemptions

By Judith Moldover

Despite months of wrangling in Congress, the Department of Labor's ("DOL") revised regulations implementing the "white collar" exemptions[1] to the Fair Labor Standards Act ("FLSA")[2] have remained effective since August 23, 2004. Those familiar with the passionate attacks made by the AFL-CIO and other pro-labor organizations may be surprised to learn that the revised regulations, as a practical matter, may make few significant departures from prior law. Nevertheless, it is not too late for employers to study the revised regulations and consider whether they are in compliance and whether there are changes they must, or would choose to, implement.

Under the revised regulations, the "white collar" exemptions continue to be based on satisfaction of three separate tests: **Salary Level, Salary Basis,** and **Duties**. Moreover, employers should be mindful that the regulatory changes apply only to federal law. Individual state laws may provide different or greater protection. Additionally, although many states' laws mirror the federal law, at least one state (Illinois) has enacted legislation retaining, for the purposes of employment in Illinois, the pre-revision exemptions from overtime pay. Thus, employers need to be aware of state wage and hour laws as well as the federal laws.

Salary Level Test

Overhaul of the minimum salary levels used in determining exempt status is the most drastic change from the prior regulations. These levels, unchanged since 1975, had been used to determine whether the "long test" or the "short test" should be applied. The "long test" required employees to regularly perform a longer list of exempt duties than did the "short test," which applied to employees earning a higher salary. Under the "long test," the minimum salary was $155 per week ($170 for professionals), making the "long test" virtually useless.[3] The revised regulations create a single salary level for executive, administrative, and most professional employees: $455 per week ($23,660 annually).[4] To maintain the exemption, an employee must meet this salary level as well as all of the requirements of one of the duties tests described below, and be paid on a salary basis.

While claiming to have eliminated the old long and short tests, the DOL essentially retained them by creating a new test for certain "highly compensated employees."[5] Employees must receive total annual compensation of at least $100,000 (including $455 per week paid on a salary or fee basis), customarily and regularly perform **one** (or more) of the exempt duties of an executive, administrative, or professional employee, and be paid on a salary basis.[6] The $100,000 is prorated for employees who do not work a full year due to hire or termination. Note that this new test applies only to highly compensated executive, administrative, and professional employees.

What Employers Can Do

- Employers should review the job duties of employees earning at, or near, $455 per week to see if the duties test for any of the exemptions is met. While most employees at this salary level are unlikely to be exempt, consideration should be given to increasing salaries currently below the new minimum weekly salary level for those employees who otherwise qualify for exemption to ensure exempt status. A cost-benefit analysis that factors in employee relations issues as well as economic considerations should be made, and legal counsel obtained, before any review is conducted and before any employee is reclassified as exempt.
- Employers should perform a similar analysis for employees earning at, or close to, $100,000 per year. It is likely that these highly compensated employees are already performing all the duties of one or more of the exempt classifications. Because the qualifying compensation can be a combination of base salary and variable factors, such as profit sharing or non-discretionary bonus, in some years an employee may not reach the $100,000 threshold. Therefore, employers planning to rely on this provision are allowed to make one final payment if needed for the employee to qualify for the exemption. The payment must be made no later than one month after the end of the year (which can be any 52-week period). If paid after the end of the year, the payment counts toward only the prior year's annual total compensation.[7]

Salary Basis Test

Permissible Deductions

Generally, exempt employees must be paid a fixed salary regardless of the quantity or quality of work performed in a workweek. Although an exempt employee need not be paid for any week in which no work is performed, full salary must be paid for any week in which any work is performed. Under the revised regulations, a new exception has been added to the six current exceptions permitting deductions from an exempt employee's weekly salary.[8] The additional exception provides for

deductions for unpaid disciplinary suspensions of one or more full days for infractions of workplace conduct rules, such as those prohibiting sexual harassment and violence in the workplace.[9] These suspensions may not be used for routine performance or attendance issues and must be pursuant to a written policy applicable to all employees. This is a significant departure from prior law, under which suspensions of one or more full days, but less than one week, would run afoul of the salary basis standard and result in a loss of the exemption in all cases other than suspensions for safety rule infractions.

What Employers Can Do

Employers opting to use disciplinary suspensions should:

- Revise all written policy manuals to specify which workplace conduct rule violations may result in disciplinary suspensions of one or more full days. The policy should be applicable to all employees, and the written materials should so state.
- Monitor the use of disciplinary suspensions carefully to ensure that they comply with the law. The DOL has stated that the frequency of improper deductions, including deductions for disciplinary reasons, will be a factor in determining whether improper deductions from pay are intentional.

Safe Harbor Provision

The revised regulations create a safe harbor for situations where improper deductions from salary have been made.[10] Because exempt status is based on meeting each of three tests (salary level, salary basis, and duties), improper deductions from salary that negate the salary basis may destroy the exemption. While the revised regulations retain a "window of correction" for isolated and inadvertent deductions,[11] the safe harbor goes further. The revised regulations provide that the exemption will not be lost because of improper deductions, regardless of the cause of the deduction, as long as the employer:

- Has a "clearly communicated" policy prohibiting improper pay deductions, which includes a complaint mechanism;
- Reimburses employees for any improper deductions; and
- Makes a good faith effort to comply going forward. The exemption will be lost if improper deductions continue to be made.

Employers should note that reimbursing employees for improper deductions may amount to an admission that an improper deduction has been made. It is critical, therefore, that all employees affected by the improper deductions be identified and properly reimbursed. If not, there is still a risk that the exemption will be lost, making the employer liable for any overtime pay plus liquidated damages.

Regardless of whether a safe harbor is adopted, the revised rules state that if improper deductions have been made, the exemption is lost only for the time period during which the improper deductions were being made, and only as to those employees in the same job classification working for the same managers responsible for the improper deductions.[12] While it remains to be seen how far up the chain of command responsibility for improper deductions may reach, this is some relief for employers. Under prior caselaw, the exemption could be lost for all employees in the job classification in which improper deductions were made, or who were subject to a policy creating significant likelihood that improper deductions will be made.[13]

What Employers Can Do

Employers wishing to take advantage of the safe harbor provision should:

- Adopt a policy prohibiting improper deductions from the pay of salaried, exempt employees. The policy must establish a complaint mechanism. This can be part of any employee complaint mechanism currently in place. However, the person designated to receive complaints about improper pay deductions should be instructed to forward them to a knowledgeable compensation specialist. The policy should state that claims of improper deductions will be investigated promptly and, if valid, the employee will be reimbursed as soon as possible after the conclusion of the investigation. Finally, the policy should make clear that there will be no retaliation against any employee for filing a complaint.
- Make sure that the policy is communicated to all employees. Although the DOL states that the policy need not be written, as a practical matter a written document will be the best proof of communication. The policy should be given to new employees, either separately or as part of an employee manual. It should also be posted on the employer's Intranet, if there is one.
- Instruct managers that they are responsible for compliance with the policy, and for ensuring that, if a complaint is found valid, the improper deductions will cease. Managers who willfully make improper deductions should be subject to discipline.
- Conduct all investigations thoroughly to ensure that all employees who are subject to the improper deductions, not merely those who complained, are identified and properly reimbursed.
- Once the policy is in effect, employers should consider periodically reviewing pay policies and pro-

cedures to ensure that no improper deductions are being made, rather than wait for employee complaints.

Duties Test

The DOL has withdrawn the more far-reaching provisions of its proposed regulations. For the most part, the revised regulations merely clarify earlier regulations and adopt existing caselaw. This is especially true for the duties test for each of the five white collar exemptions. Most of the occupation-specific provisions of the final regulations are bulleted below. The DOL has stated that no occupation has received a blanket exemption and that each situation will be considered on a case-by-case basis. Nevertheless, the revised regulations provide examples of how several occupations should be classified and have eliminated many obsolete examples. Employers should remember that classification of any particular employee still depends on all of the facts unique to that individual, so the examples should serve only as guidelines.

Non-Exempt

- "Blue collar" workers always have been non-exempt no matter how much money they earn, but the regulations actually spell this out for the first time.[14]
- Law enforcement officers, such as police officers, state troopers, firefighters, paramedics and other "first responder" emergency workers generally, are non-exempt.[15]
- Trainees for "white collar" occupations are not exempt unless actually performing exempt work.[16]
- Persons doing ordinary inspection work, "graders," comparison shoppers, and public sector investigators, are non-exempt.[17]

Executive

An executive employee is one whose primary duty is management of the enterprise or a department, who regularly manages two or more employees and who has authority to hire or fire employees or whose recommendations concerning changes in the status of other employees is given particular weight (§ 541.100). This definition is a combination of elements from the old long and short tests.

- **A business owner** who has at least a *bona fide* 20% equity interest in the business and is actively employed in management is exempt regardless of salary.[18]
- **A manager** can perform exempt and non-exempt duties concurrently and not lose the exemption, as long the manager meets all requirements of the executive exemption. For instance, an assistant manager may serve customers, stock shelves, cook food, and clean the establishment, as long as the manager also regularly supervises other employees. However, an assistant manager who spends substantial amounts of time performing non-exempt work, is closely supervised, and earns little more than the non-exempt employees, is not primarily engaged in executive work and is non-exempt. The DOL states that an exempt manager will typically have discretion to decide when to perform non-exempt duties, and remains responsible for the operation even while performing non-exempt work.[19]

Administrative

Administrative employees, as under the prior regulations, must perform work directly related to management or general business operations of their employer or their employer's customers. In addition, this work must require the exercise of discretion and independent judgment The revised regulations specify that discretion and independent judgment must be exercised with respect to matters of significance.[20] The DOL's illustrative list of functional areas where such employees may be found includes: tax, finance, human resources, marketing, and other commonly recognized staff functions. Note that for the first time, the list includes computer network, Internet and database administration, legal and regulatory compliance, and similar activities.[21]

- **Insurance claims adjusters** who conduct interviews, perform damage inspections, prepare damage estimates, recommend coverage, negotiate settlements, and make litigation recommendations are exempt.[22]
- **Financial services** employees who analyze information concerning the customer's financial condition and advise the customer concerning various financial products are exempt, while employees who primarily sell financial products are not.[23]
- **Team leaders** of major projects are exempt.[24]
- **Executive assistants** to a business owner or senior executive who are delegated authority on significant matters are exempt.[25]
- **Human resources managers** who formulate, implement, or interpret policy are exempt, while resume screeners or other clerks are not.[26]
- **Purchasing agents** with "significant" authority (not defined) are exempt.[27]
- **Academic administrative functions,** including superintendents and assistants responsible for specific areas, such as curriculum, instruction, and testing, principals and vice principals, department heads and academic counselors, are exempt.[28]

Learned Professionals

A learned professional is an employee whose primary duty involves work requiring advanced knowledge in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction (§§ 541.300-301). This basic definition remains unchanged from the old regulations.

- **Registered or certified medical technologists** are exempt if they have completed three of years academic study plus a fourth year in an accredited school of medical technology.[29]
- **Registered nurses** are exempt; licensed practical nurses and other similar health care professionals are not exempt because, in general, a specialized advanced academic degree is not the standard prerequisite for the occupation.[30]
- **Dental hygienists** who have completed four years of pre-professional and professional study in an accredited institution generally are exempt.[31]
- **Physician assistants** who have completed four years of pre-professional and professional study, have graduated from an accredited physician assistant program and are certified generally are exempt.[32]
- **Physicians** (including osteopaths, podiatrists, dentists, and optometrists) are exempt if licensed or certified and actually practicing in their field. Interns and residents who have earned the required degree are exempt while participating in an internship or residency program, even if they do not have a license prior to the start of the program.[33]
- **Accountants** (CPAs and non-CPAs) who perform similar duties, are exempt, while accounting clerks, bookkeepers and others performing routine work are not.[34]
- **Chefs** who have graduated from a four-year culinary arts program are generally exempt, while cooks performing routine mental or physical work are not.[35]
- **Paralegals** are not exempt because no *specialized* academic degree is required.[36]
- **Athletic trainers** are generally exempt if they have completed four years of academic pre-professional and professional training in an accredited program and are certified.[37]
- **Funeral directors or embalmers** are exempt if working in a state requiring a license and four years of academic study, including graduation from a mortuary science school.[38]
- **Teachers** are exempt, even if they are not certified and even if they spend substantial time coaching or advising extracurricular activities.[39]
- The DOL will consider new fields of science or learning for the professional exemption as long as the entry requirements for the field include an advanced specialized degree.[40]

Although there are no generally applicable educational requirements for the professional exemption, it should be noted that all of the DOL's occupation-specific examples require a total of four years of academic training, and many require industry certification or state licensing.

Creative Professionals

A creative professional is an employee whose primary duty involves work requiring invention, imagination, or originality or talent in a recognized field of artistic or creative endeavor. This basic definition is the same as that under the prior regulations.[41]

- **Journalists** may qualify if their work primarily requires invention, originality, talent, or imagination, and they are not subject to substantial management control.[42]

Computer Employees

The revised regulations continue to adhere closely to the statutory language. The DOL has stated that computer job classifications created since the computer amendments were added to the FLSA in 1996 could still qualify for the exemption, but refuses to specify any specific job titles due to rapid changes in the industry.[43] A new provision states that employees who do not qualify for the computer employee exemption, as well as some who do, may qualify for exemption as administrative or executive employees.[44]

Outside Sales Employees

The revised regulations eliminate the current provision that no more than 20% of an outside sales employee's time may be spent performing non-exempt duties unrelated to the employee's own sales.[45] The DOL has stated that this is not a substantive change because outside sales must still be the employee's primary duty for the exemption to apply.

What Employers Can Do

- Employers can review the actual job duties performed by their exempt employees to make sure that they continue to meet the tests for exemption set forth by the DOL. However, employers are strongly cautioned that, if they fail to reclassify any employees found to be non-exempt, they risk being liable for willful violations in the event of a DOL audit or litigation. An employer who is found to

have willfully violated the law risks liability for double the unpaid overtime for up to three years retroactively. Any wage and hour review should be undertaken only with the prior advice of counsel.

- The DOL itself has listed legal ways to comply with the law while avoiding increased overtime payments.[46] These are: adhere to a 40-hour work week; raise the worker's salary to the new minimum level of $23,660; and make a **one-time** payroll adjustment by converting the salary into an hourly rate that, with anticipated overtime, yields the same total compensation. DOL points out that, absent a contract, employers may raise or lower employee compensation.

Of these three options, the third one may appeal to some, but it is problematic. Employers would have to consider the impact on morale and employee relations, as well as industry practice. Furthermore, this would almost certainly provoke legal challenge of both prospective and past practices.

Conclusion

Federal wage and hour class actions are now being filed more frequently than federal anti-discrimination class actions. It is not too late for employers to use the issuance of the revised regulations as an opportunity to review their current practices with regard to classification of their employees and payment of overtime. However, any such review should be conducted thoughtfully and only under the guidance of counsel.

Endnotes

1. The "white collar" exemptions cover executive, administrative, professional, computer, and outside sales employees.
2. 29 U.S.C. §§ 201-219. All remaining citations refer to the revised regulations, 29 C.F.R. part 541.
3. The "short test" set the minimum at an equally outdated $250 per week.
4. 29 C.F.R. § 541.600(a). There continues to be no salary level test for certain professionals (doctors and other medical professionals, lawyers, and teachers) (§ 541.600(e)) and outside sales persons (§ 541.500(c)). The minimum rate for hourly paid computer professionals is unchanged at $27.63, but salaried computer professionals must meet the new $455 weekly minimum (§ 541.600 (d)).
5. 29 C.F.R. § 541.601(a).
6. As originally proposed, the threshold for a "highly compensated employee" was an annual salary of at least $65,000. Because employee-interest groups complained that would result in many currently non-exempt employees being reclassified as exempt, the DOL raised the threshold to $100,000 in the final regulations. As a practical matter, this amount makes the "highly compensated employee" test as meaningless as the old "long test."
7. 29 C.F.R. § 541.601(b)(2).
8. The pre-revision exceptions, which remain unchanged, are: absences or one or more full days for personal reasons other than illness or disability; pay deductions for one or more full days in accordance with a bona fide sickness or disability plan; offsets for pay for jury duty, service as a witness, or military duty; pay deductions for penalties for infractions of safety rules of major significance; initial or terminal weeks of employment; and intermittent leave under the FMLA (§ 541.602(b)).
9. 29 C.F.R. § 541.602(b)(5).
10. 29 C.F.R. § 541.603(d).
11. 29 C.F.R. § 541.603(c).
12. 29 C.F.R. § 541.603(b).
13. *See* www.dol.gov/fairpay (Resources: Preamble pdf at 70).
14. 29 C.F.R. § 541.3(a).
15. 29 C.F.R. § 541.3(b).
16. 29 C.F.R. § 541.705.
17. 29 C.F.R. § 541.203(f-j).
18. 29 C.F.R. § 541.101.
19. 29 C.F.R. § 541.106.
20. 29 C.F.R. § 541.200.
21. 29 C.F.R. § 541.201(b).
22. 29 C.F.R. § 541.203(a).
23. 29 C.F.R. § 541.203(b).
24. 29 C.F.R. § 541.203(c).
25. 29 C.F.R. § 541.203(d).
26. 29 C.F.R. § 541.203(e).
27. 29 C.F.R. § 541.203(f).
28. 29 C.F.R. § 541.204(c)(1).
29. 29 C.F.R. § 541.301(e)(1).
30. 29 C.F.R. § 541.301(e)(2).
31. 29 C.F.R. § 541.301(e)(3).
32. 29 C.F.R. § 541.301(e)(4).
33. 29 C.F.R. § 541.304.
34. 29 C.F.R. § 541.301(e)(5).
35. 29 C.F.R. § 541.301(e)(6).
36. 29 C.F.R. § 541.301(e)(7).
37. 29 C.F.R. § 541.301(e)(8).
38. 29 C.F.R. § 541.301(e)(9).
39. 29 C.F.R. § 541.303.
40. 29 C.F.R. § 541.301(f).
41. 29 C.F.R. §§ 541.300 and 541.302.
42. 29 C.F.R. § 541.302(d).
43. 29 C.F.R. § 541.400.
44. 29 C.F.R. § 541.402.
45. 29 C.F.R. § 541.500 *et seq.*
46. Reported by AP in Findlaw.com on 1/5/04 as *US Offers Tips on Overtime Pay.*

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The Limitation on Undocumented Workers' Lost Earnings After *Balbuena* and *Sanango*: Crafting a Fair and Principled Balance of Immigration Policy and New York State Labor Law § 240 Safety Goals

By Meredith R. Miller

In December 2004, in a pair of cases, the Appellate Division, First Department, held that under state labor and tort laws, injured workers who are not legally permitted to be present or employed in the United States are only entitled to receive lost earnings reflecting what they could have earned in their country of origin.[1] This article explores these First Department decisions by first discussing the federal statutory and decisional backdrop against which the cases arose. This article then provides a discussion of the First Department cases and the competing economic incentives they implicate. Finally, this article posits that a more appropriate balance of federal immigration law and New York State Labor Law § 240 policy is a rule that holds an employer (or other party) liable for an undocumented worker's lost wages only when that employer (or other party) knew or should have known of the worker's immigration status.

The Federal Backdrop: The Immigration Reform and Control Act of 1986 and *Hoffman Plastics Compounds, Inc. v. NLRB*

In 1986, Congress enacted the Immigration Reform and Control Act ("IRCA")[2] as a comprehensive scheme to prohibit the employment of illegal immigrants in the United States who are either (1) not lawfully present in the United States or (2) not lawfully authorized to work in the United States (collectively, "undocumented workers").[3] Under this system, IRCA mandates that employers verify the identity and eligibility of all new employees by examining certain specified documentation before the employees begin to work.[4]

To enforce this scheme, the statute employs a two-prong approach that takes aim at the actions of both employer and employee.[5] IRCA makes it illegal for an employer to knowingly hire an individual that is unauthorized to work or cannot produce the required documentation. Similarly, an employer cannot continue to employ a worker upon discovery that the worker is undocumented or unauthorized to work in the United States.[6] IRCA also makes it a crime for a worker to tender fraudulent documentation to the employer.[7] As a result of IRCA, it is impossible for an undocumented worker to gain employment in the United States without either the employer or the worker violating the express prohibitions of the statute, which imposes both civil and criminal penalties.[8]

In 2002, *Hoffman Plastics Compounds, Inc. v. NLRB*[9] raised questions concerning the enforceability of federal labor laws in light of the IRCA scheme. In *Hoffman*, Jose Castro, an undocumented worker, operated blending machines that custom-formulated chemicals for Hoffman Plastic Compounds, Inc.[10] After Castro supported a union organizing campaign, Hoffman terminated Castro's employment in violation of the National Labor Relations Act ("NLRA").[11] To remedy the NLRA violation, the National Labor Relations Board ("NLRB"), among other things, awarded Castro back pay.[12] At the hearing to determine the amount of back pay, Castro testified that he was not lawfully entitled to be present or employed in the United States. He admitted that he gained employment with Hoffman after tendering false documentation in violation of IRCA.[13] Thus, the issue before the U.S. Supreme Court in *Hoffman* was whether Castro was entitled to back pay under the NLRA even though his employment was illegal under IRCA.

The Supreme Court held that because Castro was never lawfully entitled to be present or employed in the United States, he had no right to back pay.[14] The Court concluded that allowing the NLRB to award back pay to illegal immigrants would "run counter to policies underlying IRCA" and "unduly trench upon explicit statutory prohibitions critical to federal immigration policy."[15] The Court was particularly concerned that allowing back pay under the NLRA would encourage undocumented workers to violate IRCA—namely, that it would "encourage the successful evasion of apprehension by immigration authorities, condone prior violations of the immigration laws, and encourage future violations."[16]

The *Hoffman* Court did not have occasion to address the impact of its decision on an undocumented worker's right to back pay under state labor and tort laws.

Sanango and *Balbuena*: First Department Decisions Applying *Hoffman*

Until the recent duo of First Department decisions in *Sanango v. 200 East 16th Street Housing Corp.*[17] and *Balbuena v. IDR Realty LLC*,[18] no New York appellate

court had addressed whether, in light of IRCA and *Hoffman*, undocumented workers are precluded from recovering lost wages under New York labor and tort laws. In late December 2004, in this pair of cases, the Appellate Division, First Department, held that undocumented workers are not entitled to recover lost earnings damages for injuries based on wages they might have earned illegally in the United States.[19] Rather than completely precluding undocumented workers from entitlement to back pay, the First Department held that they are limited to lost earnings that they would have been able to earn in their home countries.[20]

In *Sanango*, Arcenio Sanango, an undocumented worker, was employed at a construction site when he fell from a ladder and sustained serious injuries.[21] Sanango commenced a Labor Law § 240 action against the owner of the work site.[22] The owner of the work site then commenced a third-party action for indemnification against Sanango's employer.[23] A jury awarded Sanango substantial damages for pain and suffering and medical bills, and also awarded him $96,000 in lost earnings.[24] Both the owner of the work site and Sanango's employer appealed from the judgment on the jury verdict, arguing that in light of IRCA and *Hoffman*, Sanango's status as an undocumented worker barred or limited his recovery for lost earnings.[25] The First Department (Nardelli, J.P., Saxe, Williams, Friedman, JJ.) agreed and reversed the judgment insofar as it awarded Sanango lost wages and remanded for a new trial on the issue.[26]

The First Department held that "an award of damages . . . based on the United States wages plaintiff might have earned unlawfully, but for his injury, would 'unduly trench upon' IRCA's federal immigration policy in substantially the same manner as . . . the NLRB back pay award in *Hoffman*."[27] The court stated that allowing Sanango to recover earnings he would have received only by remaining in the United States illegally would implicate the concerns expressed in *Hoffman*—namely, encouraging illegal workers to evade immigration authorities, condoning prior violations and encouraging future violations.[28] The court then "noted" that New York state labor and tort laws were preempted by IRCA because "even if a coequal federal statute, such as the NLRA, must, under some circumstances, give way to IRCA . . . it follows that state law . . . must give way to IRCA, as well."[29]

Rather than completely denying Sanango any recovery of lost wages, however, the court held that Sanango could receive damages for lost earnings based on the prevailing wages in his country of origin.[30] The court did not provide any legal authority in support of this conclusion, though it did state that it was unaware of any federal policy that would be offended by the limitation on lost earnings.[31] The court held that this limitation should be applied whether the worker or employer acted in violation of IRCA.[32]

On the same day that it issued the *Sanango* decision, a partly different First Department majority (Nardelli, J.P., Tom, Lerner, Friedman, JJ.) issued a decision in *Balbuena* summarily following *Sanango*.[33] *Balbuena* involved a similar factual scenario and, thus, raised substantially the same legal issue as *Sanango*. Gorgonio Balbuena, an undocumented worker, sought damages, including lost wages, for an injury he suffered at a work site.[34]

Notably, the cases each arrived at the appellate court with different procedural postures. In *Balbuena*, the trial court had denied the employer's motion for partial summary judgment dismissing Balbuena's claim for lost earnings.[35] The First Department majority modified the trial court judgment on the law to the extent it granted the employer's motion for partial summary judgment, and dismissed the lost earnings claim insofar as Balbuena sought damages based on the wages that he might have earned illegally in the United States.[36] However, the *Balbuena* dissent (Ellerin, J.) disagreed with the reasoning of the *Sanango* court. The dissent would have affirmed and allowed a jury to decide whether Balbuena was entitled to lost earnings.[37]

The *Balbuena* Dissent: The Tension of Economic Incentives to Violate IRCA

The *Balbuena* dissent would have held that IRCA does not preempt state labor law and tort remedies. The dissent noted that in passing IRCA, Congress did not demonstrate any intent to preempt state labor and employment remedies.[38] Moreover, the dissent believed that state law did not present an obstacle to the accomplishment of the objectives of IRCA.[39]

The *Balbuena* dissent appeared most troubled by the policy implications of limiting injured workers' rights to lost earnings, which incidentally serves to punish the undocumented worker to the advantage of the employer.[40] The tension between the *Balbuena* dissent and the First Department majority was based largely on a fundamental disagreement as to whether employers are incentivized or encouraged to violate IRCA when workers' rights to back pay are limited.

The dissent argued that the limitation on an employer's liability for an undocumented worker's injuries encourages the employer to hire workers without examining their documentation, in violation of IRCA.[41] On the other hand, according to the dissent, allowing illegal immigrants to receive lost earnings would not have any significant impact on an immigrant's decision to travel to the United States to work illegally.[42] To this point, the dissent noted that most illegal immigrants come to the United States with hopes of

getting a job, at any wage, and often take the jobs in the United States economy with the lowest pay and highest level of danger.[43] Thus, the unavailability of lost earnings in a potential, future lawsuit would not likely factor into an immigrant's decision to come to the United States and obtain work illegally.[44] Instead, the dissent saw a more significant risk that the majority's decision would encourage employers to continue unscrupulous business practices that violate state labor laws and stoke the demand for illegal workers, thereby undermining the efforts of IRCA to deter employment of illegal workers.[45]

The *Sanango* court criticized the dissent's concern as entirely theoretical, stating that "the potential limitation of one item of damages (lost earnings) in a future tort action is such a remote and uncertain benefit that it would not constitute a real incentive to the employment of undocumented aliens."[46] The *Sanango* court stated that any concern that employers were incentivized to violate IRCA was negated by the facts that (1) employers usually carry insurance coverage for tort liability and (2) violations of IRCA carried other criminal and civil penalties.[47] Moreover, the majority noted that any incidental benefit to the employer at the expense of the undocumented worker was a result of *Hoffman*'s stated policy that undocumented workers should not be compensated for wages that could only have been earned illegally in the United States.[48] Thus, the *Sanango* court held that whether or not the First Department agreed with *Hoffman*, *Hoffman* presented a conclusion about federal immigration policy that the New York court was bound to follow.[49]

Rosa v. Partners in Progress, Inc.: Finding a Better Balance of Immigration Policy and Labor Law § 240 Deterrence

The *Sanango* and *Balbuena* cases raise a threshold question whether IRCA preempts New York State Labor Law § 240 remedies. The majority gave this threshold issue only summary treatment, and it appears that the dissent was correct that IRCA does not preempt Labor Law § 240 remedies.

There is a presumption that Congress does not intend to supplant state law.[50] A state law is preempted by a federal law only if there is "such actual conflict between the two schemes of regulation that both cannot stand in the same area"[51] or if Congress has in some other way unambiguously declared its intention to foreclose the state law in question.[52] There is no actual conflict between the enforcement of IRCA and Labor Law § 240 remedies. Moreover, Congress did not indicate any intent that IRCA foreclose remedies under state laws like Labor Law § 240.[53] For these reasons, at least one court has held that IRCA does not preempt state labor law remedies.[54]

Whether or not IRCA preempts state labor and tort remedies, the First Department could have adopted a rule that more appropriately balances the competing policy concerns. Certainly, in allowing injured, undocumented workers some measure of lost earnings, the First Department recognized the unfairness of a total preclusion. However, the court could have enunciated a principled rule that both recognizes *Hoffman*'s concern that the law should not encourage and condone workers' IRCA violations and better weighs the economic realities of the undocumented workforce.[55]

As the *Sanango* majority and *Balbuena* dissent exemplify, there exists a tension of economic incentives to violate IRCA. On the one hand, allowing undocumented workers to recover any measure of lost wages provides a "marginal incentive" for those workers to come to the United States illegally.[56] On the other, every time an undocumented worker is denied a remedy, employers are provided another incentive to hire undocumented workers.[57]

In addition, in cases that involve injured workers, there are additional, competing policy concerns of the Labor Law § 240 scheme. Labor Law § 240 aims to protect workers against work site accidents caused by hazardous conditions.[58] As the *Balbuena* dissent pointed out, undocumented workers are often willing to take the lowest paying and most dangerous jobs in the United States economy,[59] compounding the significance of Labor Law § 240 protections in this context.

The First Department's blanket limitation on injured, undocumented workers' lost earnings to what they would have been able to earn in their home countries does not fairly balance all of these concerns. It is fundamentally unfair to punish an injured worker by limiting her right to lost earnings, especially when this limitation is applicable whether the employer or the employee acted in violation of IRCA.[60] At the same time, removing the lost earnings limitation allows an undocumented worker to recover lost United States wages for work that could not be legally performed in the United States. There is also the additional deterrence function of Labor Law § 240 and common law tort remedies, which impose the threat of liability to encourage employers and others to reduce the risk of injuries to employees.[61]

With this deterrence principle and the competing economic incentives in mind, in *Rosa v. Partners in Progress, Inc.*,[62] the Supreme Court of New Hampshire recently enunciated a rule that holds an employer (or other party) liable for lost wages an undocumented worker could have earned in the United States only when that employer (or other party) knew or should have known of the worker's undocumented status.[63] In *Rosa*, just as in *Balbuena* and *Sanango*, an undocumented worker was injured while working at a construction

site.[64] Recognizing the competing immigration policies, the tension of economic incentives to violate IRCA and the deterrence purposes of state tort law, the New Hampshire court articulated a rule that strikes an even balance between encouraging compliance with federal immigration laws and protecting some of our economy's most vulnerable workers from job site injuries.

The New Hampshire court noted that any other rule would be inconsistent with "tort deterrence principles" because:

> refus[ing] to allow recovery against a person responsible for an illegal alien's employment who knew or should have known of the illegal alien's status would provide an incentive for such persons to target illegal aliens for employment in the most dangerous jobs or to provide illegal aliens with substandard working conditions. It would allow such persons to treat illegal aliens as disposable commodities who may be replaced the moment they are damaged.[65]

Moreover, the "should have known" aspect of the *Rosa* rule builds in a recognition of the economic realities of an undocumented workforce. This portion of the rule might cover the undoubtedly common situation where the labor is so inexpensive that the employer should have known that the worker was not legally entitled to be present or employed in the United States.

Finally, it should be noted that the *Rosa* rule addresses the actions of not only employers, but also contractors or site owners who do not directly employ the undocumented workers.[66] Just as the worker's direct employer, a contractor or site owner would be liable for the undocumented worker's lost earnings only if that contractor or site owner knew or should have known of the worker's immigration status. In this connection, in the *Balbuena* and *Sanango* cases, the *Rosa* rule would apply to the site owners as well as the workers' employers—that is, the owners would be liable for lost earnings only if they knew or should have known of the workers' undocumented immigration status.

In sum, should this issue arise on appeal or in the other appellate departments, the New York courts would be wise to follow the articulate lead of the New Hampshire Supreme Court.

Conclusion

Even assuming that Labor Law § 240 is preempted by IRCA, in light of the competing economic incentives under IRCA and the goals of Labor Law § 240, the New Hampshire Supreme Court appears to have struck a fair balance in *Rosa*. New Hampshire's *Rosa* rule holds an employer (or other party) liable for an undocumented worker's United States lost earnings only when that employer (or other party) knew or should have known of the worker's immigration status. This rule recognizes the economic realities of the undocumented workforce and the deterrence function of Labor Law § 240 and, thus, provides a more appropriate balance of policies than the First Department's blanket limitation.

Endnotes

1. *Balbuena v. IDR Realty LLC*, 13 A.D.3d 285, 787 N.Y.S.2d 35 (1st Dep't 2004); *Sanango v. 200 East 16th Street Housing Corp,* 788 N.Y.S.2d 314 (1st Dep't 2004).
2. 8 U.S.C. §§ 1324a, *et seq.*
3. 8 U.S.C. § 1324a(a)(1) and (h)(3).
4. 8 U.S.C. § 1324a(b).
5. 8 U.S.C. § 1324a(a)(1) and (a)(2).
6. 8 U.S.C. § 1324a(a)(1).
7. 8 U.S.C. § 1324c.
8. 8 U.S.C. § 1324a(e)(4)(A) (employers who violate IRCA are subject to civil fines); 8 U.S.C. § 1324a(f)(1) (employers who violate IRCA may be subject to criminal prosecution); 18 U.S.C. § 1546(b) (immigrant workers who attempt to tender fraudulent documentation are subject to fines and criminal prosecution).
9. 535 U.S. 137 (2002).
10. *Id.* at 140.
11. *Id*. Hoffman violated section 8(a)(3) of the NLRA by terminating Castro to rid itself of known union supporters.
12. *Id.* at 141-142.
13. *Id.* at 141.
14. *Id.* at 149.
15. *Id.* at 151.
16. *Id.*
17. 788 N.Y.S.2d 314 (1st Dep't 2004).
18. 13 A.D.3d 285, 787 N.Y.S.2d 35 (1st Dep't 2004).
19. *Sanango*, 788 N.Y.S.2d at 316; *Balbuena*, 13 A.D.3d at 285.
20. *Id*.
21. *Sanango*, 788 N.Y.S.2d at 316.
22. *Id.* Sanango commenced the action pursuant to Labor Law § 240(1), which provides in pertinent part:

    > All contractors and owners and their agents . . . in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed.

23. *Id.*
24. *Id.*
25. *Id.* The employer and owner of the site did not challenge Sanango's right to damages for pain and suffering and medical bills. The only challenge was to the award of lost earnings.

26. *Id.* at 316-317.
27. *Id.* at 319 (quoting *Hoffman*, 535 U.S. at 149).
28. *Id.* at 319 (citing *Hoffman*, 535 U.S. at 151).
29. *Id.* at 319.
30. *Id.* at 322. Other courts have imposed blanket prohibitions on undocumented workers recovering lost earnings. *See, e.g., Veliz v. Rental Service Corp. U.S.A., Inc.*, 313 F.Supp.2d 1317, 1335-1336 (M.D. Fla. 2003) (where worker tendered false documents in violation of IRCA, worker's undocumented status precluded an award of lost wages); *Majilinger v. Cassino Contracting Corp.*, 1 Misc. 3d 659, 661, 766 N.Y.S.2d 332, 333-334 (Sup. Ct., Richmond Co. 2003) (*Hoffman* decision precluded undocumented worker from receiving lost earnings).
31. *Sanango*, 788 N.Y.S.2d at 322.
32. *Id.* at 320.
33. *Balbuena*, 13 A.D.3d at 285.
34. *Id.* at 286.
35. *Id*.
36. *Id*.
37. *Id.*
38. *Id*. at 287.
39. *Id.*
40. *Id.*
41. *Id.* at 288.
42. *Id.*
43. *Id.*
44. *Id.* (citing Rebecca Smith, Amy Sugimori, Luna Yasui, *Colloquium*: *Low Pay, High Risk: State Models for Advancing Immigrant Workers' Rights*, 29 NYU Rev. L. & Soc. Change 597, 598-600 (2004)).
45. *Id.* (citing Michael J. Wishnie, *Emerging Issues for Undocumented Workers*, 6 U. Pa. J. Lab. & Emp. L. 497, 507 (2004)).
46. *Sanango*, 788 N.Y.S.2d at 320.
47. *Id.*
48. *Id.*
49. *Id.*
50. *Nealy v. U.S. Healthcare HMO*, 93 N.Y.2d 209, 217 (1999).
51. *Florida Avocado Growers v. Paul*, 373 U.S. 132, 141 (1963).
52. *See Ray v. Atlantic Ritchfield Co.*, 435 U.S. 151, 157-158 (1978).
53. *See Balbuena*, 13 A.D.3d at 288 (citing *Montero v. Immigration & Naturalization Serv.*, 124 F.3d 381, 384 (2d Cir. 1997) (quoting HR Rep. No. 99-682(I), 99th Cong., 2d Sess, at 58, reprinted in 1986 U.S. Code Cong. & Admin. News, 5649, 5662) ("'[i]t is not the intention of the Committee that the employer sanction provisions of the bill to be used to undermine or diminish in any way labor protections in existing law, or to limit the powers of federal or state labor relations boards, labor standards agencies, or labor arbitrators to remedy unfair practices committed against undocumented employees. . . '")).
54. *See Jie v. Liang Tai Knitwear Co.*, 89 Cal. App.4th 654, 663, 107 Cal. Rptr. 2d 682, 690 (Cal. App. 2d. Dist. 2001) (holding that IRCA does not preempt California state law that allows employees to sue for wrongful termination based on retaliation).
55. The most significant economic reality being the fact that undocumented workers readily and abundantly obtain work in the United States. *See Madeira v. Affordable Housing Foundation, Inc.*, 315 F.Supp.2d 504, 507 (S.D.N.Y. 2004) (upholding jury verdict of lost earnings to undocumented worker who sustained injuries at work site).
56. *Singh v. Jutla*, 214 F. Supp. 2d 1056, 1062 (N.D. Cal. 2002).
57. *Id.*
58. *See*, *e.g.*, *Zimmer v. Chemung County Perf. Arts*, 65 N.Y.2d 513, 520 (1985); *see also Wise v. McDonald Ave, LLC*, 297 A.D.2d 515, 516, 748 N.Y.S.2d 539, 540 (1st Dep't 2002) ("The purpose of Labor Law § 240 is to protect workers by placing the ultimate responsibility for safety practices at building construction jobs where such responsibility actually belongs, on the owner and general contractor.") (internal quotations and citations omitted)).
59. *Balbuena*, 13 A.D.3d at 288 (citing Smith, et al., 29 NYU Rev. L. & Soc. Change at 598-600).
60. *Sanango*, 788 N.Y.S.2d at 320.
61. *See Partridge v. Waterloo Cent. School Dist.*, 12 A.D.3d 1054, 1055, 784 N.Y.S.2d 767, 768 (4th Dep't 2004) (core objective of Labor Law § 240 is to prevent workers from falling and sustaining injuries); *Tsatsakos v. Citicorp*, 295 A.D.2d 500, 501, 744 N.Y.S.2d 475, 476 (2d Dep't 2002) (accord).
62. __ A.2d ___, No. 2004-232, 2005 WL 497214 (N.H. 2005).
63. *Id.* at *5.
64. *Id.* at *1.
65. *Id.* at *5.
66. *Id.* at *6.

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For Your Information

Marjorie F. Gootnick, former Chair of the Section, is the President of the National Academy of Arbitrators for 2005-2006. She has also been reappointed to the Foreign Service Grievance Board by Secretary of State Condoleeza Rice.

Levy Ratner, P.C. announces that **Kevin Finnegan** has joined the firm as senior counsel and will chair their election law and campaign finance department.

New Regulations on Disposal of Consumer Report Information

By Michael J. Sciotti and Mary C. King

Overview

On December 4, 2003, the Fair and Accurate Credit Transactions Act of 2003, Pub L. 108-159, 117 Stat. 1952 ("FACT Act") was signed into law. The FACT Act amends the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. §§ 1681 *et seq.*, by requiring that "any person that maintains or otherwise possesses consumer information, or any compilation of consumer information, derived from consumer reports for a business purpose to properly dispose of any such information or compilation."[1] Regulations were added, effective June 1, 2005, to assist businesses in complying with the record disposal rule imposed by the FACT Act.

Purpose

As set forth in the regulations, the purpose of § 216 of the FACT Act is to "reduce the risk of consumer fraud and related harms, including identity theft, created by improper disposal of consumer information."[2]

Who Is Affected

Any business, regardless of industry, that obtains a consumer report, or information derived from a consumer report, will be subject to the record disposal rule imposed by the FACT Act.[3] Among the entities that possess or maintain consumer information for a business purpose are consumer reporting agencies, as well as landlords, government agencies, mortgage brokers, automobile dealers, utility companies, telecommunication companies, employers, and other users of consumer reports.[4]

Consumer Information

The FACT Act refers to disposing of information "derived from consumer reports."[5] The phrase "derived from consumer reports" covers all information about a consumer that is derived from any consumer report(s), including information taken from a consumer report, information that results from manipulation of information taken from a consumer report, and information combined with other types of information.[6] The Federal Trade Commission ("FTC") believes that there are various personal identifiers beyond a person's name that would bring information within the scope of § 216 of the FACT Act, "including but not limited to, a social security number, driver's license number, phone number, physical address, and e-mail address."[7]

"[I]nformation that does not identify individuals, such as aggregate information or blind data," is excluded.[8]

Proper Disposal of Consumer Information

The standard for proper disposal is a "reasonable measures" standard. Specifically, any person that maintains or possesses consumer information is required to "take reasonable measures to protect against unauthorized access to or use of the information in connection with its disposal."[9] This is a flexible standard that does not require "covered persons to ensure perfect destruction of consumer information in every instance."[10] The FTC expects that in taking "reasonable measures," entities covered by § 216 of the FACT Act will "consider the sensitivity of the consumer information, the nature and size of the entity's operations, the costs and benefits of different disposal methods, and relevant technological changes."[11] The FTC has also stated that "reasonable measures" are likely to include establishment of policies and procedures for disposal, as well as proper employee training.[12]

In order to provide additional guidance, the regulations also list examples of disposal measures that would be reasonable under § 216 of the FACT Act, including:

1. Implementing and monitoring compliance with policies and procedures that require the burning, pulverizing, or shredding of papers containing consumer information so that the information cannot practically be read or reconstructed.[13]

2. Implementing and monitoring compliance with policies and procedures that require the destruction or erasure of electronic media containing consumer information so that the information cannot practically be read or reconstructed.[14]

3. After due diligence, entering and monitoring compliance with a contract with another party engaged in the business of record destruction to dispose of material, specifically identified as consumer information, in a manner consistent with this rule.[15]

These examples are "illustrative only and are not exclusive or exhaustive," because they cannot take into account the unique circumstances of a particular entity.[16] As the regulations do not mandate specific disposal measures, an entity may determine the most appropriate method of disposal. For instance, a small entity

could purchase a paper shredder to dispose of paper records. Or, if a small entity has consumer information stored on computer discs or hard drives, disposal of such electronic media could be accomplished by smashing the material with a hammer or overwriting or "wiping" the data prior to disposal.[17]

Although the regulations address the methods for disposing of consumer information, they fail to provide guidance on when and how often to dispose of such information.

Penalties

Any person who willfully fails to comply with the FACT Act with respect to any consumer is liable to that consumer for actual damages sustained by the consumer as a result of the failure up to $1,000 per affected consumer.[18] The FTC is authorized to seek up to $2,500 in civil penalties in the event of a knowing violation (a pattern or practice of similar violations).[19]

Relation to Other Laws

A financial institution subject to the FTC's Gramm-Leach-Bliley Safeguard Rule must comply with the information security program required by those regulations, as well as the record disposal regulations imposed by the FACT Act.[20]

The record disposal regulations imposed by the FACT Act do not interfere with the record-keeping requirements imposed by laws, such as Title VII of the Civil Rights Act and the Americans with Disabilities Act.

Practical Impact on Businesses

Based upon the individual characteristics of the business, it will have to choose appropriate methods for disposing of paper records and electronic records containing consumer information. Disposal methods used will vary depending on the nature, size, and financial status of the business.

In order to comply with the law and its regulations, businesses will have to establish policies and procedures for disposal of consumer information. It may also be necessary for businesses to revise their current document retention policies.

Businesses will need to provide employees with training on what types of records constitute consumer information, when to dispose of such information, and the proper methods of disposing of such information.

The FACT Act record disposal regulations became effective June 1, 2005. As such, businesses must begin taking the necessary steps to ensure they are in compliance with the law.

Endnotes

1. FACT Act § 216, 15 U.S.C. § 1681w(a)(1).
2. 16 C.F.R. § 682.2(a).
3. 16 C.F.R. § 682.2(b).
4. Disposal of Consumer Report Information and Records, 69 Fed. Reg. 68690-01 (Nov. 24, 2004) (codified at 16 C.F.R., pt. 682).
5. FACT Act § 216, 15 U.S.C. § 1681w(a)(1).
6. Disposal of Consumer Report Information and Records, 69 Fed. Reg. 68690-01 (Nov. 24, 2004) (codified at 16 C.F.R., pt. 682).
7. *Id.*
8. 16 C.F.R. § 682.1(b).
9. 16 C.F.R. § 682.3(a).
10. Disposal of Consumer Report Information and Records, 69 Fed. Reg. 68690-01 (Nov. 24, 2004) (codified at 16 C.F.R., pt. 682).
11. *Id.*
12. *Id.*
13. 16 C.F.R. § 682.3(b)(1).
14. 16 C.F.R. § 682.3(b)(2).
15. 16 C.F.R. § 682.3(b)(3).
16. 16 C.F.R. § 682.3(b).
17. Disposal of Consumer Report Information and Records, 69 Fed. Reg. 68690-01 (Nov. 24, 2004) (codified at 16 C.F.R., pt. 682).
18. 15 U.S.C. § 1681n(a).
19. 15 U.S.C. § 1681s(a)(2)(A).
20. 16 C.F.R. § 682.3(b)(5).

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Labor Matters

By Frank Flaherty

This article is the third in a series of what I have previously described as classic labor law, e.g. with particular emphasis on the National Labor Relations Act, the National Labor Relations Board, collective bargaining, master labor agreements, grievance procedures and labor arbitration.

With the enactment of Title 7 of the Civil Rights Act of 1965 and all its progeny—including Equal Pay for Equal Work, Age Discrimination in Employment Act, various forms of handicap discrimination, just to name a few—the nature of being a labor lawyer has changed. In many respects, it has been a slow and tortuous transition process. Since all of these civil rights statutes impacted employees and the union movement had reached its zenith (based on membership), in the mid to late 1970s, if any individual thought he or she had been wronged by an employer, who better to approach for assistance than the attorney who represented you in the union? These boutique firms slowly evolved into plaintiffs' firms and when the substantial financial recoveries began to be publicized, the negligence bar viewed this as another form of personal injury and joined the fray. It goes without saying that this financial "RAIN" caused many so-called "white show" firms to either establish a labor and employment group or expand an existing operation.

We are now well into 2005 and the business of labor and employment law appears to be flourishing. Yet, 40 years after the enactment of Title 7 of the Civil Rights Act, the "Classic Labor Movement" still exists. Membership in American labor unions is decreasing; currently less than 10% in the private sector and stagnant in the public sector.[1] Problems in the labor movement were exemplified in last year's presidential election. The candidates all sought labor support, but the support given was somewhat disjointed and uncoordinated. In late 2003, certain large unions jumped in early to support the candidacy of Governor Howard Dean, others continued to rally behind Rep. Dick Gephardt and others held back their support. There appeared to be a lack of true consensus and control by the union hierarchy in Washington.

Following President Bush's election to a second term, labor had its annual meeting and the discord was heavy. New names surfaced, including Stern, Wilhelm and others who urged the current head of the AFL-CIO to step down, change financial practices, encourage mergers of smaller unions and most of all to do something to halt the "free fall" of the decline in union membership.[2]

Now, I didn't write this in attempt to bury the labor movement since, from a personal standpoint, if labor unions disappeared I would be hard-pressed to continue my practice. I truly believe that the existence of labor unions is a safeguard and safety valve for the American worker and we are better off—as a nation—to have such a movement, even if on occasion there are pimples and problems to be handled. Unfortunately, history has shown that unscrupulous management will attempt to take advantage of its employees if there are no safeguards or possible retribution.

That being said, we are faced with some trying times. We have become a service-oriented economy and our "smoke stack" industries (read "unionized") have either disappeared or are faced with huge economic problems. To sharpen this image, I would like to share with you an experience I had several months ago.

Professor David Gregory of St. John's Law School has established a student-operated program, where leading practitioners of labor and employment law are invited to speak to the students, alumni and guests on current matters of interest in that area of law.[3] Last November, Micheline (Mickey) Maynard of *The New York Times*, who has written on transportation issues over the years for a number of national publications, spoke about the continuing viability of the American automobile industry.

She said the American automotive market is no longer dominated by the Big 3 of the past—GM, Ford and Daimler-Chrysler. Ms. Maynard stated that by the second decade of this century, General Motors will be replaced by Toyota as the world's largest automotive company. She said there was no single reason for this decline. "Broken promises on quality," SUVs and the failure to heed what the American consumer desired in their automobiles all led to this happening. The result is that even today, Toyota and Honda have a larger market share than Ford. Toyota's Camry model is the top-selling family car in the U.S. and its Lexus division is the top seller in the luxury class, outselling Cadillac, BMW and Mercedes Benz. Profits of the American companies are vanishing, driven primarily by what Ms. Maynard described as "legacy" costs of $1,300–$1,400 per vehicle, due to health care and pension benefits to the retired UAW work force. By next year, foreign automakers will have 20 plants in the U.S., employing 100,000 workers, mostly non-union. The biggest difference between the foreign-owned U.S. plants and the Big 3 is not wages (both pay about $25 per hour), but rather the absence of "defined benefit" plans. Maynard predicted a very bleak future for Detroit and indicated that the UAW has to participate in negotiating some financial relief for the American automotive companies or they will be history.

This potential disaster was described in greater detail by *The New York Times* on April 20, 2005, describing a conference between executives of General Motors and the financial community on the previous day. The Chief Financial Officer of the corporation advised that GM has losses in excess of $1 billion in the first quarter of 2005 and that because of financial uncertainties, the Company would not offer any earnings forecasts for the balance of 2005.[4]

A principal player in what I described earlier as "classic labor law," has been the National Labor Relations Board (NLRB), whose five members are appointed for fixed terms by the President with the consent of the Senate. The enabling legislation and practice provides that the Chair of the Board will be appointed by the President and the remaining four members will be equally divided between the two major political parties. Therefore, when you have a Republican President, you normally have a Republican-oriented NLRB. This has been true since the creation of the initial Act in the mid-30s, which was significantly amended in 1947. The Board's decisions are expected to provide "bright line" guidance to employers, labor unions and employees as to the proper course to follow in their relationship with each other. Unfortunately, and not surprisingly, that is not always the case. The Board generally acts with three-member panels. If two members are of the same political persuasion it is that point of view that controls and all too often the labor management community is left in a state of bewilderment. This recurring problem, plus the frequent movement of Board members, hampers the positive activities of the Board. There are currently two vacancies on the five-person Board, one whose term expired in December, 2004; the second was an interim appointment whose term ended when the Senate recessed in December. Therefore, I do not expect any significant decisions from the NLRB until it is again at full strength.

During most of 2004, the Board was somewhat blessed with a full complement of five members and many decisions were forthcoming. One of those decisions was *IBM Corp.*, issued in June, 2004.[5] In that case, IBM received a complaint from a former contract employee that involved allegations of harassment by regular employees at a non-union facility in North Carolina. IBM initiated an investigation of the allegations and conducted interviews with three employees on October 15, 2001. Prior to a second round of interviews scheduled for October 23, 2001, each of the three employees asked to have a co-worker or an attorney present at the interview. An IBM Manager denied the requests and the interviews were held as scheduled. About one month later the three regular employees were discharged. These former employees filed unfair labor practices charges with the NLRB and following a hearing, the Administrative Law Judge ruled that IBM had violated section 8(a)(1) of the Act by denying the charging parties' request to have a co-worker present based on a decision entitled *Epilepsy Foundation of Northeast Ohio* issued in 2000.[6] In the *Epilepsy* case, the NLRB had extended to unrepresented employees the *Weingarten* right to have a witness present during an investigative interview that an employee reasonably believed might result in discipline. It should be no surprise that the current NLRB chaired by a Republican trumped the Clinton-controlled Board and overruled the ALJ's decision in *IBM* in a 3-to-2 decision. It is noteworthy that the *Epilepsy* case overruled the principles of a 1988 case where the NLRB refused to apply *Weingarten* in a non-union setting.[7]

The *IBM* decision created a furor, particularly among those representing employees, which can be exemplified by a Position Paper issued in October 2004, by the Association of the Bar of the City of New York's Committee on Labor and Employment Law, chaired by Daniel Silverman, former Regional Director of the NLRB in Manhattan's Region 2. The contents of the Committee's Position Paper can be best expressed by the following excerpt:

> The Committee . . . strongly believes that the events of September 11th and the aftermath should not be used to justify the view adopted by the majority. To rely on such events in determining the rights of employees . . . under the National Labor Relations Act *distorts the legitimate decision making process and injects essentially political considerations into a matter of statutory construction.* (emphasis added)[8]

One wonders where the authors of this paper have been for the past 50 odd years!

Another noteworthy case was *Brown University* issued in July 2004, which was also a 3-to-2 decision and involved the question as to whether teaching assistants, research assistants and proctors at Brown University were employees under the Act and, therefore, an appropriate unit for collective bargaining. The regional director of the NLRB in Boston found for the Union and ordered an election based on a 2000 NLRB decision.[9] Brown appealed to the Board in Washington, claiming the petitioned-for individuals were not statutory employees and not subject to the Act. The issue was whether graduate student assistants, who are admitted into, rather than hired by, a University and for whom supervised teaching or research is an integral component of their academic development, must be treated as employees for purposes of collective bargaining. The current Board reversed the *New York University* decision, finding that the 2000 NYU decision reversed more than 25 years of Board precedent—a precedent that had never

been successfully challenged in the Courts or Congress during that period.[10] It is of interest that this issue continues with teaching assistants at Columbia and Yale Universities seeking to form unions, the former apparently supported by the UAW and the latter by Hotel Workers-UNITE.

An interesting sidebar to the *Brown University* decision occurred in September 2004, when Senator Arlen Specter (R-Pa.), who heads the Senate Appropriations Committee's Subcommittee on Labor, Health and Human Services and Education, conducted a hearing. Testimony was provided by NLRB General Counsel Arthur Rosenfeld and two Board Members, Chairman Robert Battista and one of the Democratic members, Wilma Liebman. Specter noted that the *Brown University* 3-to-2 decision rendered in an election year raised political questions about overruling *New York University* and asked "Did anything change?" in the period between 2000 and 2004. Liebman responded, "The composition of the Board changed." Specter replied in part: " The law should have some predictability. It shouldn't change unless there are some changed circumstances." Chairman Battista denied that *Brown* was a partisan decision and added, "I decided on what I believe is the correct interpretation of the law."

One has to applaud Senator Specter for his comments. However, if his views were to predominate, consider the economic impact on the practitioners of labor law, both labor and management.[11]

A recent article in this publication by the general counsel of the AFL-CIO and the Associate General Counsel of the same organization, described the Bush-appointed members of the NLRB as attacking employee rights and leading "toward the most radical non-legislative contraction of employee rights in the agency's history" (a period of almost 70 years).[12] It was refreshing to read such dire predictions including the statement, ". . . the Bush majority has shown itself to be among the most anti-worker Board in the agency's history."

The authors seek support for their allegations by admitting that only 10% of private sector employees are currently represented by labor unions but alleging survey and other data strongly suggest that workers would embrace union representation but for the anti-union employers and, by inference, the NLRB. The AFL-CIO high water mark for unionization was in the 1970s, when the United States had a significant labor-intensive manufacturing base, including steel, autos, coal, and aluminum. Those industries are a mere shadow of their former size, as are the Unions that represented those employees. We are now working in a service-oriented economy, where the entrepreneurial spirit rules (for better or worse) and seniority no longer reigns supreme in the workplace.

Even the survey data cited by the authors that 53% of current workers would definitely or probably vote for a Union, given the opportunity, is a further indictment of the Unions' argument. Why aren't the unions organizing at a higher level of intensity, rather than spending many millions of dollars organizing campaigns to block changes in Social Security or block the growth of businesses such as WalMart?

In discussing the current Board's approach to the selection of a Union, the authors state that, "the election was never meant to be and has never been the exclusive means of obtaining workplace representation." Yet, the NLRB's secret ballot election has historically been considered the *best* way to determine the employee's true desires and has been supported by all who favor determining the true desires of employees. Personally, I believe recognizing a Union as the bargaining representative of a group of employees *without* an election is fraught with many perils, not the least of which are employers who desire to exclude one union in favor of another for a variety of reasons, not all of which are favorable to employees.

There are other issues in Mr. Hiatt's paper that are worthy of comment but will be considered for future discussions. By that time the composition of the NLRB may change again.

Another case that I would like to bring to your attention is *Verizon*, now arguably the largest communications company in the U.S. and the provider of telephone and computer service to many of us. This case arose in 2001 and I cited the facts as an example of poor labor relations in my 2004 article for the NYSBA's *L&E Newsletter*. Briefly, the Company supported blood drives operated by its unions throughout its system for many years. In the 1980s and 90s, Verizon discontinued this practice, except with respect to Local Union 1103 of the CWA, which represented about 4,000 employees in downstate New York. In that area the practice of conducting the blood drives on Company time and premises continued in much the same way as it had for more than 30 years.

In February 2001, Verizon decided to discontinue the practice of having employees participate on Company time. During March 2001, the Company advised the Union of its decision by telephone and a grievance was filed alleging that this unilateral action was unlawful. During discussions in the grievance procedure, Verizon stated that the blood drives could continue, but only on the employees' own time; they could continue to use Company facilities after working hours or on weekends.

The CWA filed ULP charges with the NLRB, which ruled that the blood drive program was a mandatory subject of bargaining and that Verizon had acted improperly. The Company argued that its managerial decision

was at the core of entrepreneurial control, much like closing part of its business, and appealed to the U.S. Court of Appeals for the D.C. Circuit. The Court easily distinguished Verizon's arguments in defense of its actions, denied the appeal and granted the Board's cross-petition for enforcement.[13] In this day and age, it is difficult to understand and appreciate why a sophisticated employer, like Verizon, with many years of experience in dealing with unions and unionized employees, would engage in conduct of this nature. It almost appears that another agenda was at play!

As stated earlier, with only three members currently on the Board, do not expect much to happen with the current backlog of cases in Washington. The issues are there and include items, such as the duty to bargain about the installation of cameras in the workplace; use of "show of interest cards" rather than NLRB elections to support unionization; employing global positioning satellite units in employer truck fleets and cell phones and the impact on privacy rights; status of supervisors in health care and other industries; and the validity of neutrality agreements in an effort by unions to organize by means of a show of interest cards rather than NLRB elections. It is estimated that at least 50 cases involving this issue alone are pending before the NLRB. Another "tough issue" with political ramifications involves application of the NLRB's ruling in *M.B. Sturgis*, a case decided in 2000 that allowed temporary workers to be combined in a bargaining unit with an employer's permanent workforce and overruling earlier decisions rendered in 1973 and 1990.[14]

Other classic labor law issues on the horizon include:

- challenges to the revised Fair Labor Standards Act, which modified the rules governing "exempt" and "non-exempt" employees from the Act's overtime rules; and
- the fallout from labor's continuing efforts to bar WalMart's growth in the Northeast. One has to appreciate that this attitude is driven by the union's desire to unionize WalMart's employees, which to date has been terribly unsuccessful. Yet, should these efforts bar consumers from enjoying the benefits of convenience and lower prices? Note, as of this writing WalMart does not operate one store in the City of New York.

Finally, on January 1, 2005, the minimum wage in New York State was increased to $6 per hour. It will increase to $6.75 per hour on January 1, 2006, and $7.15 per hour on the same day in 2007.

In concluding these comments, I would like to end on a positive note—initially, by recognizing the esteemed service of Peter Hurtgen, who resigned on December 31, 2004, after two-and-a-half years as Director of the Federal Mediation and Conciliation Service. Prior to his service with FMCS, Hurtgen was Chairman of the NLRB. He received deserved praise for his mediation skills in disputes involving West Coast dockworkers and shipping companies, a long grocery workers' strike against three Southern California supermarket chains and for disputes involving Verizon and its Unions. Hurtgen rejoined the firm of Morgan Lewis and Bockius from whence he came to Washington. He had a distinguished career and, undoubtedly, will be missed.

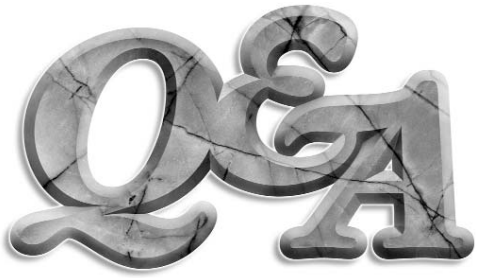
In November 2004, our profession lost a leading star when Elliot Bredhoff left the scene at age 83. He was widely respected by labor, management and government officials. He had been associated with the likes of Arthur Goldberg and David Feller in the practice of labor law and as a consultant to numerous international labor unions. In the 1970s, I was fortunate to meet and negotiate with Elliot during collective bargaining negotiations involving the Can Industry and the United Steelworkers of America—he truly was a gentleman and a scholar.

My final tribute is reserved for the late Max Doner, who was known by many for his humor, intelligence and ability to resolve intricate labor relations issues. He was a mentor of sorts, when I found myself working with him at the Olin Corporation and later as an impartial labor arbitrator. Alas, I was never invited to his kitchen for bagels. Another great loss to our profession was the death of Max Doner.

Endnotes

1. Steven Greenhouse, *N.Y. Times* p. A20 (Jan. 28, 2005).
2. Steven Greenhouse, *N.Y. Times* p. A18 (Nov. 10, 2004).
3. St. John's University School of Law Labor Relations and Employment Law Society.
4. Micheline Maynard, remarks at St. John's University School of Law (Nov. 9, 2004).
5. 341 NLRB No. 148, 174 LRRM 1537 (June 9, 2004).
6. 331 NLRB 676, 164 LRRM 1233 (2000) *enforced in relevant part*, 268 F.3d 1095 (D.C. Cir 2001), *cert. denied*, 536 U.S. 904, 170 LRRM 2224 (2002).
7. *E.I. DuPont*, 289 NLRB 627, 128 LRRM 1233 (1988).
8. Position Paper, Committee on Labor and Employment Law, Association of the Bar of the City of New York (Oct. 13, 2004).
9. *New York University*, 332 NLRB 1205, 165 LRRM 1241 (2000).
10. 342 NLRB No. 42, 175 LRRM 1089 (July 13, 2004).
11. For a further discussion of the subject of graduate students, unions and the Brown University case, *see The Labor Lawyer,* Vol. 20, No. 2 pp 243-256 (Fall 2004).
12. NYSBA *L & E Newsletter*, Vol. 29 No. 1 (Spring 2005) at 24.
13. 360 F.3d 206 (D.C. Cir. 2004).
14. *M.B. Sturgis*, 331 NLRB 1298, 165 LRRM 1017 (Aug. 25, 2000).

Ethics Matters



By John Gaal

Q I was approached by an acquaintance the other day who was looking for counsel to bring an employment claim against her employer. Before learning any of the specifics of this individual's claims, I inquired as to the identity of the employer. I recognized the name as that of a firm client. I, of course, explained that I had a conflict and would not be able to represent this individual. She then asked me if I could refer her to someone else competent in employment law. Knowing that she is interested in suing one of my firm's current clients, am I allowed to give her the name of another lawyer, even though that might be considered "adverse" to the interest of my firm's client?

A Lawyers frequently confront this issue but until recently there has been no specific guidance to assist in resolving this dilemma. In December 2004, however, the Legal Ethics Committee of the D.C. Bar not only tackled this issue, but concluded that it is ethically appropriate for a lawyer to make either a specific referral or provide a list of possible referrals in this situation. (DC Bar Opinion No. 326 (2004).)

The Committee began its consideration of this issue by noting that there were no specific provisions in the DC Rules of Professional Conduct addressing this situation (which is also true of New York's Code of Professional Responsibility) and that it could find no authority on point from other jurisdictions.

From there, it turned to two provisions that it concluded were of some relevance. The first was Rule 4.3 (which is substantively identical to DR 7-104 in the New York Code). That Rule provides that the only advice a lawyer may provide to an individual whose interests are adverse to the lawyer's client is the advice to secure counsel. This provision recognizes that it is permissible for a lawyer to generally advise such an individual that they would be best served if they retained counsel, even if it could be argued that the lawyer's own client might have a tactical advantage if the individual remained unrepresented. Second, the Committee considered Rule 1.3 (the equivalent in New York is DR 7-101 and DR 7-102), which requires a lawyer to provide zealous representation to a client. In connection with that obligation, the Committee noted that zealous representation does not require a lawyer to press for every advantage for a client (e.g., a lawyer may consent to an opponent's extension of time to respond in a matter, even though the client might realize some advantage by requiring the opponent to meet a troublesome deadline). And, as it further noted, even the obligation of zealous representation must be tempered, at times, by a lawyer's obligation to the administration of justice (e.g., a lawyer must reveal controlling authority to a court that is contrary to her client's best interests, even if her opponent misses it).

From these principles the Committee reasoned that providing a referral name to an adverse party does not sufficiently prejudice a client's interests as to be prohibited.

On the practical side, the Committee did note that because an existing client might not understand the propriety of such a referral to an adverse party, a lawyer might decline to make a referral as a matter of client relations. Alternatively, she might provide the adverse party with a list of several possible referrals, rather than any one individual. (That also provides some "cover" to the referring lawyer in the event the attorney chosen by the adverse party does not work out.)

Finally, while it sounds as if you handled your initial contact with this individual appropriately, your inquiry illustrates the importance of receiving as little information as possible from a prospective client prior to determining whether a conflict exists. If instead of learning only the employer's name in this initial conversation you had learned some confidential information about the prospective case from your acquaintance, you might have had to deal not only with this referral issue, but also with the possibility of disqualification from representing the employer in any ensuing matter for both yourself and your firm. See NYSBA Opinion 643.

John Gaal is a member in the firm of Bond, Schoeneck & King, PLLC, in Syracuse, New York, and an active Section member. If there is a topic/ethical issue of interest to all Labor and Employment Law practitioners that you feel would be appropriate for discussion in this column, please contact John at (315) 218-8288.

Evidentiary Rules at Administrative Hearings: Are There Any?

By James M. Rose

Any article about evidentiary rules at administrative hearings will, perforce, be short. Before the State Administrative Procedure Act there were few, if any.[1] Indeed, there are those who claim that the topic of "evidentiary rules at administrative hearings" is an oxymoron.[2] Where there actually are rules, they are usually shorter than the World Wrestling Federation's Referee Handbook.

The State Administrative Procedure Act § 306 (SAPA)[3] provides that agencies need not observe the rules of evidence observed by courts, but shall give effect to the rules of privilege recognized by law. It also permits procedures to be adopted for submission of evidence in written form, adopting the logic of the ancient maxim "The truth will come out, even in an affidavit."

Often a statute will be the starting point to determine what rules of evidence are applicable. Civil Service Law § 75 provides that the technical rules of evidence do not apply.[4] The same is true for Department of Motor Vehicle hearings.[5]

Which rules are technical? The rule of thumb is that if your opponent advocates the rule, it is technical, but if you advocate it the rule is fundamental to the evidentiary process.

Other Rules of Procedure

Many hearing officers at administrative proceedings are not attorneys, and have little insight into the legal process because they do not watch Judge Wapner, *Judge Judy*, or *L.A. Law*. At administrative hearings the CPLR does not apply.[6] What rules do administrative judges apply?[7]

The Marquis of Queensberry Rules is one set employed. They include:

1. No hitting below the belt.
2. Go to neutral corners in the event of a knockdown.
3. The decision of the referee on a question of evidence is final.[8]
4. In the event of conflicting precedents, the brief with the earliest postmark wins.
5. A draw goes to the party paying the hearing officer's fee.

A different set of rules was authored by Robert Fulghum and is entitled *Everything I Need to Know about Evidence I Learned in Kindergarten*. These rules include:

1. Play fair—no hitting.
2. Share evidentiary rulings—sustain about half for each party.
3. Always look both ways before ruling.
4. Always take a nap after lunch during a restful part of the case.
5. Say you're sorry.

Many hearing officers are retired judges who employ pre-CPLR rules ranging from the Civil Practice Act to the Code of Hammurabi. They precede evidence rulings with statements like, "Young man, I've forgotten more evidences rules than you'll ever know."

Some people believe that the only good evidence rule is no rule.[9] They believe in following experience rather than logical rules. They are in good company historically. Justice Holmes,[10] Stanley Baldwin,[11] Commodore Vanderbilt[12] and Judge Roy Bean agree.

The only law some hearing officers recognize is Murphy's Law. With no rules around it is amazing how often things do go wrong.

Rules of Admissibility

There is only one rule for the admissibility of evidence at an administrative hearing. It is inevitably expressed by the hearing officer as follows: "I'll take it for what it's worth." This is also known as "The Rule of Getting Your Two Cents In." That's what it's worth. Small Claims arbitrators follow the same rule.[13]

Conclusion

To paraphrase Mr. Dooley: The rules of evidence are applicable to those administrative proceedings to which they apply on account of their applicability.

Endnotes

1. The State Administrative Procedure Act § 100 provides: "The legislature hereby finds and declares that the administrative rule making, adjudicatory and licensing processes among the agencies of state government are inconsistent, lack uniformity and create misunderstanding by the public."

   To the best of the author's knowledge, a contrary finding *after* the SAPA was enacted has never been made.

   The section then concludes as follows: "Those agencies which will not have to conform to this act have been exempted from the act, either specifically by name or impliedly by definition." Those agencies are thus permitted by grace of the Legislature to be inconsistent, lack uniformity, and create misunderstanding in the public.
2. An oxymoron is a contradiction in terms, such as casual labor, spare change or justice court.
3. Pronounced SAP-A with the accent on the first syllable.
4. At a hearing held by an administrative body, technical rules of evidence and procedure may be disregarded, *Rothkoff v. Ratner*, 104 Misc. 2d 204 (1980).
5. *Ries v. Adduci,* 124 App. Div. 2d 923, *app. dis,* 69 N.Y.2d 822, *reconsid. den.*, 69 N.Y.2d 985 (1986).
6. *Fiedelman v. New York State Dept. of Health*, 58 N.Y.2d 80 (1983).
7. Contrary to popular belief, there is no rule that requires a *pro se* party to be represented by the hearing officer (for example, the police officer at a Department of Motor Vehicle hearing). However it happens, and the party so represented can have no complaint, since he is not entitled to effective assistance of counsel at an administrative hearing, *Walston v. Axelrod,* 103 App Div. 2d 769 (2d Dep't 1984).
8. It has been said that it is useless to dispute the referee's ability to count to ten. That is one definition of the substantial evidence rule.
9. "Rules! Hell, there ain't no rules around here. We're trying to accomplish sump'n," Thomas Edison *quoted in* Fischer, *Historians' Fallacies,* p. xviii (New York, 1970).
10. "The life of the law has not been logic: it has been experience." Holmes, *The Common Law,* (Howe ed. 1963) p.3.
11. "One of the reasons why our people are alive and flourishing and have avoided many troubles that have fallen to less happy nations is that we have never been guided by logic in anything we did," in Stebbing, *Thinking to Some Purpose*, (Baltimore, 1961) p. 17.
12. "What do I care about the law? Hain't I got the power?" quoted in *Nobody Said it Better,* p. 41.
13. The topic of small claims arbitration is beyond the scope of this article. In other words, don't even get me started.

The following remarks were delivered at a conference co-sponsored by the Labor and Employment Law Section called, "The NLRA at Seventy: Where It Is and Where It Should Go," on May 25, 2005. More from the conference will appear in the next issue of this Newsletter.

The Long View of the NLRA at 70 . . . Or, the More Things Change?

By David L. Gregory

I.

Why the NLRA? Most immediately, for fans of cause and effect, the Great Depression plunged the nation into unprecedented economic misery. The National Industrial Recovery Act, enacted in June 1933, had been declared unconstitutional by the United States Supreme Court, as unconstitutionally delegating non-delegable legislative authority to the executive branch of the government.[1] Senator Wagner cured the nondelegation defect in the new NLRA.

What are the fundamental goals of the NLRA? Labor would say: get people employed and, once working, keep them working. Employers would say: keep production processes operating without insurmountable, internal impediments. The declaration of policy, the first section of the NLRA, 29 U.S.C. 151, synopsizes these principles and objectives, fleshed out by the Taft Hartley Act amendments in 1947. Strife and unrest burden commerce; likewise,

> the inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries . . . . It is hereby declared to be the policy of the United States to eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

Have the core policy goals of the NLRA been achieved? It probably depends on who you talk to. For many in labor, the NLRA was mortally wounded by the Taft Hartley amendments. Others, however, would contend that those amendments were congruent with the Golden Age of labor's power, influence, and workforce density for the next quarter century, 1947-1972.

Fast forwarding, Jon Hiatt certainly puts his labor cards on the table in his concise, astute "The Bush NLRB and the Attack on Employee Rights."[2] What is left to say? Well, not much more, if anything, from the left. But, I suspect, from other points on the ideological and political spectrum, there are alternative views about to be presented just as cogently today.

II.

G.K. Chesterton often said that we should be more concerned about achieving eternal relevance, and less so with contemporary relevance. This spins and, it seems to me, trumps, John Maynard Keynes' famous quip that, hey, in 80 years (or so), we are all dead anyway. I promise not to take the really long view past the four final questions: death, judgment, hell (and, being an optimist), heaven.

Many critics of the NLRA, and of the NLRB, have, at various points, suggested that the Act, and the Board, have, in fact, plunged us into the equivalent of secular hell. Notice, by the way, that no one has ever proclaimed the Act, or the Board, heavenly—at least, not lately. Bill Gould certainly suggested that his time as Chairman at the Board, while on the side of the proverbial angels, was equivalent to purgatory. It wasn't hell because, unlike hell, his chairmanship had a finite term and came to a temporal close.[3]

After spending the better part of the 1970s in public (U.S. Postal Service) and private (Ford Motor Company) sector labor relations, since 1982 I have taught all of the labor and employment and constitutional law courses at the St. John's University School of Law in Jamaica, Queens, New York. Law student enrollments, and interest, in the labor law class, featuring the NLRA, continue to be healthy. From 1992-1998, I also adjunct-taught labor courses at the University of Colorado, Brooklyn, New York, and Hofstra Law Schools. Ditto. Law stu-

dents are interested in labor law. Since 1983, I have also arbitrated hundreds of labor grievances. My sense, from both academic and, especially arbitral perspectives, is that daily, street-level labor management relations are about as good as can be expected in often dire (ask United employees, and, for that matter, anyone in the airline and auto industries) present conditions.

I am hardly sanguine, I assure you. Twenty years ago, as we marked the 50th anniversary of the NLRA during the second term of the Reagan administration, I wrote law review articles with snappy titles: e.g., "Significant Decisions of the NLRB, 1984: The Reagan Board's 'Celebration' of the 50th Anniversary of the NLRA";[4] ever the optimist, see also my ditty, "Some Proposals to Harmonize Labor Law Jurisprudence and Reconcile Political Tensions."[5] And, to remind everyone of what else was making labor law news 20 years ago, it was bankruptcy and the abrogation of collective bargaining agreement (sound familiar?—think *NLRB v. Bildisco*[6]).

As I tell constitutional law students, with all due respect, the most important legal development in 1803 was not *Marbury v. Madison*; it was the Louisiana Purchase. Likewise, I submit, the NLRB decisions of the past few years, important as they surely are, are not, either individually or in the aggregate, the most compelling matters for labor lawyers to read and study today. I submit, rather, that the most pressing read may be Tom Friedman's new book, *The World is Flat*, followed closely by his *New York Times* colleague Micheline Maynard's book about the collapse of the auto industry headquartered (GM, Ford, Chrysler) in the United States, *The End of Detroit.*

Lest I be confused for a breathless cheerleader for globalization, à la Friedman, I assure you that I do not own a Lexis (well, a 1995 Camry with 190,000 miles on it).

As one who spent college summers as a UAW member working on the Cadillac assembly line in my hometown of Detroit, and as the son of UMW Kentucky Appalachian parents, I remind everyone of another labor anniversary this year—the centenary of the Wobblies, the Industrial Workers of the World.

If, after digesting NLRB decisions and the Friedman and Maynard books, you are fatalistic and despondent, wait, there's more (or less)—my forthcoming polemic, coming soon to a law review near you, "Why Not a General Strike?"

Growing up a few miles from the Battle of the Overpass (if you have to ask, you have your labor history homework to do!), it seems to me that labor management relations in this country were purchased with workers' blood, not through the Supreme Court pronouncing the Act constitutional in its 5-4 decision in *NLRB v. Jones and Laughlin Steel Co.*[7] If we seek analogous transformative possibilities today, they are not within the decisions of the NLRB, then or now. But, then again, as everyone from St. Thomas Aquinas to Thomas Hobbes to Rev. Dr. Martin Luther King remind us, the law, while it probably won't spur us to love one another, may keep us from killing one another. So, too, the NLRA at 70.

III.

Where is the NLRA today? Completing the circle back to the cosmic references at the opening of my remarks, its many critics would say it is in hell. For the first decade, the Act's many critics from the other side of the ideological spectrum surely suggested that hell is were the Act ought to go. Twenty years ago, I concluded my article, "The NLRB and the Politics of Labor Law"[8] with the tired adage, "this too shall pass, and the Board, the Act, employers, unions, and employees shall progress, however fitfully, into the twenty-first century under the keystone NLRA." Well, we have passed, and it certainly has been fitful.

But, at 70, perhaps the biblical allotment of three score and ten years has been fulfilled. As for what may follow, after the general strike on Labor Day weekend, 2006, I will leave to the many other distinguished speakers. Just remember the Louisiana Purchase, 1803! (And, don't forget *Marbury v. Madison*, which was, after all, about a disappointed job applicant, for all of the employment lawyers in the audience!)

Endnotes

1. *A.L.A. Schecter Poulty Corp. v. U.S.*, 295 U.S. 495 (1935).
2. 30 NYSBA *L&E Newsletter* 6 (Spring/Summer 2005).
3. See my review of Chairman Gould's book, Labored Relations, in 2 *Employee Rights Quarterly* 74-75 (2001).
4. 18 Connecticut L. Rev. 7-80 (1985).
5. 65 Nebraska L. Rev. 75-119 (1986).
6. 465 U.S. 513 (1984). *Bildisco* spawned a cottage industry of law review articles by yours truly. *See*, "Labor Contract Rejection in Bankruptcy: The Supreme Court's Attack on Labor in *NLRB v. Bildisco*," 25 Boston College L. Rev. 539-608 (1984); "Legal Developments Since *NLRB v. Bildisco*: Partial Resolution of Problems Regarding Labor Contract Rejection in Bankruptcy," 62 Denver L. Rev. 615-626 (1985); "The Congressional Response to *NLRB v. Bildisco* and the Constitutional Subtleties of the Nondelegation Doctrine," 62 Detroit L. Rev. 245-273 (1985).
7. 301 U.S. 1 (1937).
8. 27 Boston College Law Review 39-52 (1985).

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PERB Update

By Philip L. Maier

The following is a digest of recent decisions issued by the Public Employment Relations Board from January 2004 to March 16, 2005.

Representation

New York Power Authority, 38 PERB ¶ 3003 (2005)—The Board affirmed in part and reversed in part an ALJ decision which found appropriate a unit of employees that included a secretary position and excluded certain supervisory titles. The Authority excepted to the secretary position being included in the unit, arguing that it was a confidential position, and also excepted to the decision that the supervisory titles should have been excluded from the unit. The Board found that the shift supervisors do not perform any significant supervisory responsibilities which would preclude placement in the unit and reversed the ALJ in the regard. Citing *County of Genesee*, 29 PERB ¶ 3068 (1996), the Board noted that there is no *per se* prohibition against mixed units of supervisors and rank-and-file employees, and the focus of the inquiry is on the nature and level of the supervisory functions. The Board also found that the secretary was properly included in the unit since she did not meet the criteria for being designated as a confidential employee. The case was, therefore, remanded to the director for further processing consistent with the decision.

Newburgh Enlarged City School District, 37 PERB ¶ 3027 (2004)—The Board affirmed an ALJ decision that placed teaching assistants in the teacher Association's unit, as opposed to intervenor CSEA's unit, and denied that aspect of the petition seeking a unit clarification. The Association represents all professional, certified personnel and the CSEA represents non-instructional personnel. The District recognized CSEA as the representative of the teaching assistants, who replaced teacher aides that had been in the CSEA unit. The Board stated that requirements for a teacher aide are not as rigorous as for a teaching assistant, who must obtain, for example, certification from the Education Department. The Board rejected CSEA's argument that the Board's fragmentation standards should be applied to this case since the initial recognition by the District took place in November 2002, and it was not a long-standing unit. Additionally, it did not bar the filing of a representation petition less than 30 days after the recognition. The dismissal of the unit clarification petition was affirmed since the recognition clause, though broad, referred to other titles not including teacher assistants. Additionally, by virtue of the fact that they are instructional personnel they are not already included in CSEA's unit. The Board stated that teaching assistants share a compelling and unique community of interest. Based on a long line of precedent, the teaching assistants were placed in the Association's unit. *Ichabod Crane*, 33 PERB ¶ 3042 (2000) (subsequent history omitted), relied upon by the CSEA, did not require a contrary result. The Board stated that the standard of inadequate representation or conflict of interest normally used in fragmentation should not be used, when, as there, registered nurses were involved since they were never included in non-professional, non-instructional units. Professional status was only one factor relied upon in reaching that conclusion.

Southern Cayuga Central School District, 37 PERB ¶ 3028 (2004)—The Board affirmed an ALJ decision which placed teaching assistants in a teachers unit, and dismissed a petition seeking their inclusion in a non-professional unit. The assistants are certified pursuant to the Education Law; provide instructional service to students under a teacher's supervision; may obtain tenure; are members of the teachers' retirement system; work the same calendar year; are paid on days when the school is closed due to inclement weather, as are the teachers; and have the same health benefits as teachers. The petitioner CSEA represents the teacher aides, who are uncertified and do not have many of the same terms of employment as stated above, though they may perform many of the same instructional duties. The Board stated that it has consistently held that in initial uniting or placement decisions, teaching assistants should be included in units of teachers. See *Newburgh Enlarged City School District*, 37 PERB ¶ 3027 (2004). The Board stated that its decision in *Ichabod Crane School District*, 33 PERB ¶ 3042, *conf'd*, *CSEA v. PERB*, 300 A.D.2d 927, 35 PERB ¶ 7020 (3d Dep't 2002) was misapplied, and that nothing as a matter of law compels a finding that professional employees may never be included in a unit with non-professionals, and that community of interest is still the cornerstone of uniting decisions. Since the record did not contain evidence requiring a deviation from the long-standing standard of placing teaching assistants in teachers units, the decision was affirmed.

Bath Municipal Utility Commission, 37 PERB ¶ 3010 (2004)—The Board reversed an ALJ decision by finding that the in-issue titles had sufficient supervisory responsibilities to make the placement in the unit inappropriate. The supervisors were directly responsible for the decisions that affect the employees' terms and conditions of employment. They can resolve grievances,

award an increment, determine whether an employee's outside employment might be interfering with his duties, receive reports concerning illness, schedule overtime and interview prospective employees. The supervisors were high-level supervisors, not mid-level, as found by the ALJ. The Board found it significant that the supervisors are responsible for the day-to-day operation of the department. The Board stated that any questions under the community of interest criterion concerning the appropriateness of the unit are removed upon application of the "administrative convenience" uniting criterion in 207.1(c) of the Act.

Manhattan and Bronx Surface Transit Operating Authority, 37 PERB ¶ 3009 (2004)—The Board affirmed the dismissal of a unit placement petition since there was no appropriate unit within which to place employees who performed advanced computer skills. The TWU, petitioner, did not have a community of interest with the titles in issue, nor did an intervenor who represents supervisory employees. DC37 also an intervenor, represented employees who perform similar duties, but those employees are employed by NYCTA, a separate legal entity. Finding no appropriate unit, the petition was dismissed.

County of Nassau, 37 PERB ¶ 3005 (2004)—A hearing officer of the Nassau County mini-PERB issued a decision on a unit-placement petition filed by CSEA, and a certification petition filed by PEF, finding that a separate unit of deputy county attorneys constituted an appropriate unit. The parties filed exceptions to the decision. Subsequent to the issuance of the decision, the Office of the County Attorney was reorganized, resulting in an increase in the total number of staff and a decrease in the current staff who were employed when PEF filed its representation petition. Thereafter, on December 12, 2002, this Board issued an order rescinding its prior decision establishing, pursuant to § 212 of the Act, the existence of the Nassau mini-PERB. The case was conferenced by an ALJ, who compiled the record for the Board and directed that the parties file motions in support of their respective positions. The Board reviewed the record established at the mini-PERB as if the decision of the hearing officer was issued by the director or an ALJ. The Board found that there were factual discrepancies in the record before the Nassau PERB, which needed to be resolved prior to issuing a decision on exceptions and motions pending before the Board. The Board granted the county's motion to reopen on the basis that changes subsequent to the issuance of the decision, which are relevant to whether the employees are exempt from representation, may affect the unit configuration. The case was, therefore, remanded to the director for further processing.

Syracuse City School District, 37 PERB ¶ 3003 (2004)—The Board remanded a case to an ALJ in which the petitioner had filed a certification/decertification petition, seeking to take a position out of the intervenor's unit placed there by the district. At the conclusion of the first day of hearing the ALJ adjourned the proceeding, and requested that the parties submit offers of proof. The Board held that even though a petition for certification/decertification had been filed, the apparent purpose was a placement petition. Under the circumstances, a placement petition would have been appropriately filed. A complete inquiry was not conducted based upon the statutory criteria, and incorrect standards were used to adjudicate the petition. Since the parties were not advised as to the standards which were to be utilized, the matter was remanded for further processing.

Town of Southampton, 37 PERB ¶ 3001 (2004)—The Board affirmed the dismissal of a decertification/certification petition seeking to fragment a group of 18 public safety dispatchers from a long-standing unit of approximately 230 employees in various titles throughout the Town. The basis of the petition was that the incumbent union had inadequately represented the dispatchers by excluding them from the negotiating process; by agreeing to give-backs won in arbitration, which only affected the dispatchers; and by ineffectively processing membership applications from dispatchers. The Town insisted on certain concessions, which affected the dispatchers, and maintained that position until impasse was declared. The Town intended to go to legislative imposition if an agreement was not reached that included the concessions sought. Ultimately, the parties reached a compromise, and the union received other benefits for the remainder of the unit. Additionally, the dispatchers were the only group that received retroactive payments as a result of the negotiations. A member of the team was a dispatcher, and dispatchers also held union positions and were able to engage in union affairs. The problem with membership cards was unitwide. The Board did not find any evidence of inadequate representation, and that not all interests could be satisfied in this difficult round of negotiations. Consistent with the Board's precedent to find appropriate the largest unit permitting for effective negotiations, and to fragment units only when a compelling reason is present, the Board affirmed the dismissal of the petition.

Discrimination and Interference

Hartsdale Fire District, 37 PERB ¶ 3030 (2004)—The Board affirmed an ALJ decision finding that the employer violated §§ 209-a.1(a) and (c) of the Act when it issued a counseling memorandum to an employee in retaliation for the exercise of protected activity, and also the dismissal of a specification alleging a violation of § 209-a.1(d). A union official was issued a warning allegedly because he conducted a test late. The test, a

radio test, was conducted three minutes late. The test had been performed late in the past and no warning had been issued. The chief testified that under the same circumstances a warning would not have been issued if he had not been a union representative. The Board found, as did the ALJ, that the asserted reliance on provisions of the CBA was pretextual, and that the only reason he was disciplined was because of his position as a union officer. In affirming the dismissal of the § 209a.1(d) specification, the Board rejected the argument that a past practice existed of performing the test late. The Board held that the employer may revert to the plain language of the CBA, and it was privileged to do so in the case.

State of New York (Division of State Police), 37 PERB ¶ 3020 (2004)—The Board affirmed an ALJ decision that held that the State violated § 209-a.1(a) of the Act when it issued an order prohibiting members from wearing PBA membership pins while assisting the defense in a criminal trial. The Board found persuasive decisions from both the private and public sectors, finding that wearing such pins was protected activity. The State's ban constituted the unilateral implementation of a rule that restricts off-duty conduct and establishes new grounds for discipline, both subjects which are mandatorily negotiable. The State's interest in courtroom procedure does not outweigh the right of employees to participate in their union.

New York City Transit Authority, 37 PERB ¶ 3013 (2004)—The Board affirmed an ALJ decision sustaining a charge which, in part, alleged that the NYCTA violated the Act by disciplining an employee for a uniform violation and by denying his request for union release time. As a procedural matter, the Board affirmed the ALJ's decision, finding as untimely an amendment to the charge seeking to add an untimely cause of action, though based upon similar facts. The Board affirmed the violation related to disciplining an employee for a uniform violation, finding that the employee was engaged in protected activity in the filing of grievances; that following the filing of the grievance a notice of discipline was almost immediately served; and unrebutted statements demonstrating retaliatory intent were made. Similar evidence was sufficient to affirm a finding of a violation regarding the denial of the employee's request for release time. The NYCTA, however, had legitimate business reasons to issue disciplinary charges for the other employee and the dismissal of this portion of the charge was affirmed.

Board of Education of the City School District of the City of New York (Tsui), 37 PERB ¶ 3012 (2004)—The Board affirmed the dismissal of two charges, which alleged that a letter was placed in Tsui's file and she was fired because of the exercise of protected activity under the Act. The Board concurred with the ALJ that there was insufficient evidence to show that the district was improperly motivated in taking action against Tsui. She failed in proving any nexus between her protected activity and her negative evaluations leading to her termination.

Duty of Fair Representation

United Federation of Teachers (Saidin), 38 PERB ¶ 3001 (2005)—The Board affirmed an ALJ decision, which dismissed a charge alleging that the UFT breached its DFR by not properly conducting Saidin's grievance arbitration proceeding. The Board stated that the record clearly established that UFT representatives met with Saidin to discuss the arbitration and contract articles involved. It was undisputed that he was advised that there was only one relevant article upon which the grievance could be processed to arbitration. In a decision involving the same parties, the Board previously stated that dissatisfaction with a union's tactics in handling a grievance, without more, does not establish a violation of the Act. The record in this case was clear that the UFT advised him regarding the merits of the grievance as filed, and as to the merit of what Saidin wanted the UFT to file. Since the Board grants unions a wide range of discretion in this regard, it did not find that the UFT acted in an arbitrary, discriminatory or bad faith manner.

United Federation of Teachers (Fearon), 37 PERB ¶ 3029 (2004)—The Board affirmed a decision of an ALJ dismissing a charge alleging that the UFT violated the DFR by refusing to take a grievance to step three of the grievance process. The ALJ had denied a motion to dismiss the charge at the close of the charging party's case, but reversed the decision after the issuance of the Board's decision in *Transport Workers Union, Local 100*, 37 PERB ¶ 3002 (2004). In that case, the Board held that a charging party must prove a union violated the DFR by showing that it acted in an arbitrary, discriminatory or bad faith manner, and the mere failure or refusal to set forth the reasons for a union's failure to take an action requested by a unit member, does not establish a violation. The Board found that the charging party failed to demonstrate a prima facie case, in that she merely disagreed with the manner by which the union handled the grievance. A union is given wide latitude in determining whether to process a grievance, and it did not breach the DFR in this matter.

Civil Service Technical Guild, Local 375, District Council 37, Afscme (Maltsev), 37 PERB ¶ 3021 (2004)—The Board affirmed a director's decision dismissing a charge alleging a violation of § 209-a.2(c) by failing to take a grievance to arbitration. Maltsev did not properly respond to the deficiency letter from the director. Additionally, Maltsev's allegations that Local 375 was inept and ineffective in the manner in which it handled

the grievance and that he disagrees with counsel's opinion does not show a breach of the duty of fair representation.

United Federation of Teachers, Local 2, AFT, NYSUT, AFL-CIO (Bellamy), 37 PERB ¶ 3019 (2004)—The Board affirmed an ALJ decision dismissing a charge alleging a violation of § 209-a.2(c) because a union representative yelled at him, did not call witnesses he requested, and refused to allow him to be represented by private counsel at an arbitration hearing. The Board found, contrary to Bellamy's assertions, that the ALJ did not err in refusing to issue a subpoena for a witness, in failing to consider his FOIL request, or in failing to consider an arbitration decision. The Board held that the requests were not relevant, and, in relation to the FOIL request, that it was not made in the first instance to the ALJ, and in any event, such requests are not within this Board's jurisdiction.

Transport Workers Union, Local 100 (Brockington), 37 PERB ¶ 3002 (2004)—The Board reversed an ALJ decision finding that the TWU violated §§ 209-a.2(a) and (c) of the Act by not representing him properly in a grievance proceeding. The charging party, the only witness in the proceeding, alleged that the TWU did not allow him to bring witnesses to his arbitration; present photographs containing evidence; and to produce evidence of other employees having committed similar offenses who received lesser penalties. The Board held that the ALJ erroneously concluded that in the absence of the TWU showing any good faith for its actions, it violated the Act. The Board held that the ALJ improperly shifted the burden to the TWU, and that the evidence did not demonstrate that the charging party proved in his case that the TWU acted in an arbitrary, discriminatory or bad faith manner. Though the representation may have been deficient, that does not rise to the requisite level necessary to find a violation of the Act. Accordingly, the charge was dismissed.

United Federation of Teachers and Board of Education of the City School District of the City of New York (Cuavers), 37 PERB ¶ 3035 (2004)—The Board affirmed a director's decision dismissing a charge alleging that the UFT violated the duty of fair representation by failing to provide proper representation through the grievance procedure. The charge was dismissed because it was untimely, the requisite number of copies were not filed, and it was not properly notarized. The Board stated that the four-month period of limitations to file a charge is not tolled due to the pendency of internal proceedings, and the charge should have been filed within four months of the complained-of actions. Not having been so filed, it was untimely. The Board also found that the Director correctly dismissed that charge for failure to file the requisite number of copies of the charge, and that the fact the charging party "truly forgot" was not a valid excuse, since the rules require that four copies be filed without exception. The Director also was correct in dismissing the charge since the notarization requirement applies to charges and amendments, and the amendment was not notarized. Finally, the Board noted that the charge did not establish that UFT's conduct was arbitrary, discriminatory or taken in bad faith.

Good Faith Bargaining

State of New York (Department of Correctional Services), 38 PERB ¶ 3008 (2005)—The Board affirmed an ALJ decision, which held that the state violated § 209-a.1(d) of the Act when it unilaterally imposed restrictions on the size and number of containers that employees are permitted to bring to their workstations in correctional facilities. The Board engaged in a balancing approach, weighing the respective interests of the employees and the employer. The Board found that the policy had a greater impact on employees' interest in comfort and convenience than it did in advancing the employer's mission of ensuring safety in the facilities. Accordingly, the restrictions on the size and number of food containers that may be carried to work stations is mandatorily negotiable.

State of New York (Division of State Police), 38 PERB ¶ 3007 (2005)—The Board rejected a recommended declaratory ruling, finding instead that certain subjects were prohibited subjects of bargaining. Specifically, the issues related to members' rights, disciplinary action, discipline, and providing documents relating to the investigation of administrative charges. The state formally requested that these demands be withdrawn from fact-finding. Initially, the Board rejected the PBA's argument that the declaratory ruling petition was untimely. The Board stated that there are no provisions in the rules which prescribe the time to file a petition for a declaratory ruling. The Board further stated that it would be in the public interest to issue such a ruling, since it would clarify the parties' bargaining obligations and would enable the fact-finder to issue a report based upon the current state of the law. The public interest is also served given the amount of time the parties have invested in these negotiations. The Board stated that discipline of the New York State Police is governed by Executive Law § 215(3), which is a statutory grant of authority to the superintendent of police that is sufficiently clear to indicate that his authority is not to be supplanted by collective bargaining agreements. The broad grant of authority to make rules includes the authority to develop procedures.

Hewlett-Woodmere Union Free School District, 38 PERB ¶ 3006 (2005)—The Board reversed an ALJ decision, which had dismissed a charge alleging that the district unilaterally discontinued the past practice of allowing administrators to privately tutor for compen-

sation students taught by teachers under the supervision of unit members during non-working hours. The Board engaged in a balancing approach to determine whether the work rule constitutes a mandatory subject of bargaining. Finding that the union's interests outweighed the employer's, the Board found that the rule was a mandatory subject of bargaining and held that the employer violated the Act.

County of Nassau, 38 PERB ¶ 3005 (2005) —The Board reversed an ALJ decision, finding that the CSEA had established that a past practice exists regarding the usage of a County-assigned vehicle to certain employees. The Board reiterated that in order to establish the existence of a past practice, it must be proven that the practice was unequivocal and existed for such a period of time that unit employees could reasonably expect the practice to continue unchanged. In order to establish that a practice was unequivocal, the employer's knowledge of the practice must be established either through direct negotiations, or by evidence that the employer condoned, ratified or acquiesced in the practice, and that it was not conditional. The ALJ had concluded, based upon *Sherburne-Earlville CSD*, 36 PERB ¶ 3011 (2003) and *County of Nassau*, 37 PERB ¶ 3014 (2004), *review pending*, that CSEA did not produce sufficient evidence to demonstrate that the Commissioner, Deputy Commissioner, and Superintendent had sufficient authority to assign cars and bind the County. The Board stated that employees in the title of Commissioner or Deputy Commissioner have at least implied, if not actual, authority to bind the parties to a past practice. It was sufficient for CSEA to show that vehicle assignments were made by employees in those titles. The burden would then shift to the County to establish that it never agreed to the practice or that the employees did not have authority to act on behalf of the County. The Superintendent title, however, does not lead to the assumption that actual or implied authority exists.

County of Nassau, 38 PERB ¶ 3004 (2005)—The Board reversed an ALJ decision, and dismissed a charge alleging a violation of § 209-a.1(d) of the Act when the county changed the past practice of assigning a County vehicle to the Supervisor of Fleet Services with the privilege to drive the vehicle to and from work. The Board found that the record does not support the conclusion that an unequivocal practice had been established, and the charge fails because the unit employees could not reasonably expect the practice to continue. The employee assigned the vehicle had once been in the CSEA unit serving as a correction officer. Correction officers were thereafter fragmented from the CSEA unit. The CSEA represented the employee, on whose behalf the charge was filed, performed some of the same duties as the former Fleet Services Supervisor. The CSEA-represented employee was never designated Fleet Services Supervisor and was not assigned a car, as had been the previous employee, to whom a car was assigned by the Sheriff. The Sheriff authorized the officer in charge, among other employees in the sheriff's department, to have a car. The practice was not unequivocal because the title was no longer in the CSEA unit, and CSEA employees could have no reasonable expectation that the practice would continue. The practice, if any, would only inure to the benefit of the correction officer's unit, and members of the CSEA unit could have no reasonable expectation that the practice would continue.

City of New York, 37 PERB ¶ 3033 (2004)—The Board, in the first instance, issued a ruling in a declaratory ruling petition pursuant to R. 204.4 and 210.2(c) seeking a ruling as to the scope of negotiations of certain demands submitted by the PBA. The Board found that a demand to increase contribution to the health and welfare fund for both active and retired members could not be submitted to the interest arbitration panel. The Board held that *Cohoes* was not applicable because the demand relates to a demand on behalf of retirees, persons not covered by the Act. The Board also held that a demand for defibrillator training was not mandatory since training is a management prerogative, and the demand was a unitary demand. The Board also held that the following demands were properly submitted to the panel: the City shall be liable for all health care expenses arising from a line-of-duty injury. The basis of this holding is that the language merely duplicates statutory language and there is no statutory intent to exempt this subject from bargaining. A demand for interest payment on moneys due is properly submitted since it was not vague or ambiguous; as clarified, a demand for a new work schedule was not vague or ambiguous and is properly submitted since it does not interfere with staffing needs; a demand that seniority be a primary factor in the section of shifts is properly submitted since it does not restrict the City in the delivery of services; a demand that arbitrators make available sufficient days to complete an arbitration is properly submitted since it relates to the grievance process; the demand to include certain terms and conditions of employment previously in the arbitration award is properly submitted to the panel. See *City of New York*, 37 PERB ¶ 3034 (2004) (Practice and Procedure).

County of Rockland and Rockland County Sheriff, 37 PERB ¶ 3032 (2004)—The Board affirmed a decision of an ALJ, which dismissed a charge alleging that the duties of locking inmates, who are awaiting legal proceedings, in holding cells within the County Courthouse, adjacent to the several courts or the District Attorney's office, were unilaterally transferred to another unit in violation of the Act. The record established that the duties that had once been performed by correc-

tion officers represented by the Association have also become the duties of the transport officers at the courthouse. The Board held that the giving of keys to the holding cells to the transport offices, the only element at issue, is incidental to the overall responsibility for the care and custody of jail inmates at the courthouse, which is shared by both correction officers and transport officers. When a union does not have exclusivity over the major aspects of the work in issue, exclusivity is not possessed as to incidental tasks to the performance of the core components of that unit work.

East Meadow Union Free School District, 37 PERB ¶ 3031 (2004)—The Board affirmed an ALJ decision, which had dismissed two charges that alleged that the district transferred teaching duties to intervention assistants, and that these duties were not inherent in the job duties of these employees. The Board held that the assigned work was new work, not previously performed by the teaching unit, and, therefore, there was no transfer of these duties. The intervention assistants were not performing teaching duties, and their duties were only supplements to the kindergarten curriculum. The duties they performed were consistent with their job duties, and they were, therefore, assigned duties inherently within the nature of their job. Accordingly, the dismissal of both charges was affirmed.

County of Saratoga and ***Saratoga County Sheriff***, 37 PERB ¶ 3024 (2004)—The Board affirmed an ALJ's decision, on other grounds, holding that the employer violated the Act by unilaterally changing the time and place where a member of the union may make a personal phone call in the correctional facility. Members were allowed to make personal telephone calls during working hours in parts of the facility. A policy was adopted in which they could only make calls in a certain area, only during breaks, and no long distance calls. The policy was changed in response to a report, which cited a lack of supervision as a problem which had led to an inmate's death in a fight. The report did not mention telephone usage. The Board stated that it is a term and condition of employment for an employee to be allowed to use an employer's telephone, since employees may derive an economic benefit from such usage. The Board also stated that a past practice existed, and that the corrections administrator's acknowledgement of the practice, without disputing that the sheriff was aware of the practice, was sufficient to demonstrate that the employer had either condoned, consented or acquiesced to the practice. The Board also stated that the corrections administrator held sufficient authority to condone or acquiesce in the practice. The county's defense that the union waived its rights was not availing since there was a lack of evidence to show that the efficiency of the operation was impaired. In dismissing a defense asserting that the charge should be deferred since there was a past practice clause covering the issue, the Board stated that it would not defer the matter because it did not end in binding arbitration.

State of New York (Department of Correctional Services), 37 PERB ¶ 3023 (2004)—The Board affirmed an ALJ decision, which held that the state violated § 209-a.1(d) of the Act by conditioning the use of less than four hours of sick leave on the presentation of medical documentation. The Board relied upon *State of New York (Department of Correctional Services–Downstate Correctional Facility)*, 31 PERB ¶ 3065 (1998), reiterating that sick leave, and the procedures and policies for granting or terminating sick leave, are mandatory subjects of bargaining. A clause in the parties' contract allowed the state to require medical documentation in "exceptional cases." The one instance the state pointed to defining that clause, however, was insufficient to establish a practice. The Board found that the clause was inapplicable and that there was a change in practice.

Onondaga Cortland Madison Board of Cooperative Educational Services, 37 PERB ¶ 3025 (2004)—The Board reversed an ALJ decision finding a violation of § 209-a.1(d) of the Act when the employer unilaterally changed the work year of employees in a specific title. The stipulated record showed that BOCES received fewer requests for services that equated to fewer work days available for the employees, and a reduction in funding to the BOCES. The BOCES decided to reduce the work year from 12 months to 10 months, and the union contended that the work year is a mandatory subject of bargaining. The Board held that the BOCES changed the level of services provided, and was able to make this unilateral change. The fact that the employees were utilized during the summer does not mean that the level of services was the same, since there was no evidence that they were used to the same extent as in the past. The union did not prove that the level of services provided during the summer had not changed and the charge was, therefore, dismissed.

Town of Evans, 37 PERB ¶ 3016 (2004)—The Board affirmed an ALJ decision finding a violation of §§ 209-a.1(a) and (d) of the Act when the Town refused a request for information by the union in order to prosecute a grievance. Citing *County of Erie and Erie County Sheriff*, 36 PERB ¶ 3021 (2003) (appeal pending) the Board stated that an employer must provide relevant information requested for grievance investigation. The Board rejected the Town's defenses. Specifically, the Board rejected the defense based upon CSL §§ 75 and 76. The Board also found that the requested information was relevant and material, that the Town was under an obligation to provide the information because the demand followed the reasons outlined for the discipline

to the employee involved; there was not a sufficient showing that the information was privileged; and that it was not an abuse of discretion for the ALJ to engage in an *in camera* inspection of the documents. The better practice is for the party asserting the privilege to respond to the demand than articulate the claim of privilege.

County of Nassau, 37 PERB ¶ 3014 (2004)—The Board reversed an ALJ, holding that the county did not discontinue a past practice of assigning vehicles to superior officers. The vehicles had been used on a twenty-four hour basis and could be used for commuting purposes. After the union rested, the county moved to dismiss for failure to state a prima facie case, arguing that the elements of a past practice as discussed in *Sherburne-Earlville CSD*, 36 PERB ¶ 3011 (2003), were not established. The practice in this matter was not unequivocal. In order to find so, it must be demonstrated that an employer has knowledge either through direct negotiations or indirectly through condoning, ratifying or acquiescing in the practice. There was no evidence produced in support of this element. *Sherburne-Earlville CSD*, in which the Board held that a supervisor's authority to bind an employer can not be assumed merely from status as a supervisor, is not distinguishable. Needed is proof, which could lead to the conclusion that the supervisor had implied authority to represent the collective bargaining interests of the county. The evidence does not establish that the county ever agreed to the practice. There was no showing that the practice was either mutually created or accepted.

City University of New York, 37 PERB ¶ 3006 (2004)—The Board affirmed in part and reversed in part an ALJ decision which dismissed that portion of a charge alleging that CUNY violated § 209-a.1(d) of the Act by unilaterally implementing an intellectual property policy, but found a violation of the Act when CUNY refused to bargain concerning the policy itself after the expiration of the parties' CBA. The Board reversed that portion of the decision which had found a violation. The CUNY admittedly refused to bargain concerning the policy, and relied upon a waiver clause in the parties' CBA for the proposition that it did not have an obligation to bargain such a policy. The Board stated that the terms of the expired CBA remain in effect, that the CUNY was entitled to act in accordance with that clause, and held it could, therefore, implement that policy. The Board also held, however, that the CUNY did not violate the Act by refusing to bargain concerning the policy itself because the policy was covered by a waiver clause, and that clause remained in effect after the expiration of the CBA. It was, therefore, not under an obligation to bargain concerning the intellectual property policy. While the union sought to bargain about the waiver clause, it did not plead in its charge that CUNY refused to bargain the waiver clause, and a violation could not be found on this basis.

City of Rochester, 37 PERB ¶ 3015 (2004), *rev'd sub nom. In re City of Rochester v. PERB and Rochester Police Locust Club, Inc.* (4th Dep't, Feb. 7, 2005)—The union alleged a violation of § 209-a.1(a) of the Act when it denied requests by unit members for union representation while they were subject to a criminal investigation. The Board noted that it had recently decided that *Weingarten* rights were applicable to the public sector, and found a violation due to the failure to grant such right. The court, however, held that PERB abused its discretion in light of the state's strong public policy prohibiting interference with criminal investigations.

Impasse Resolution Procedures

Police Benevolent Association of the New York State Troopers, Inc., 37 PERB ¶ 3008 (2004)—The Board affirmed a director's decision, which dismissed a charge alleging that the union violated § 209-a.2(b) of the Act by submitting demands addressing discipline to fact-finding. The Board held that the charge was deficient, since absent an objection to the "negotiability of a demand at the time of filing the petition for fact-finding, it is not an improper practice to submit such a demand for a determination by the neutral." The Board further stated that "improper insistence, if any, occurs with the presentation of the non-mandatory demand to the fact-finder for formal recommendation over objection." The Board noted that the dispute resolution procedures of the Act also provide for the issuance of declaratory rulings, which may determine the prohibited nature of the demands in issue.

State of New York, 37 PERB ¶ 3011 (2004)—The Board confirmed the director of conciliation's appointment of a mediator. The Board noted that 21 bargaining sessions had taken place, and that almost one year had elapsed since the expiration of the parties' agreement.

City of New York, 37 PERB ¶ 3018 (2004)—The Board confirmed the director of conciliation's appointment of a mediator. The Board noted that the interest arbitration award issued for the same parties at the conclusion of the last round of bargaining had been expired for 22 months. While the parties have entered into a tentative agreement on health insurance, the parties are at impasse over wages. The Board found that the director properly appointed a mediator.

Practice and Procedure

United Federation of Teachers (Fearon), 38 PERB ¶ 3009 (2005)—The Board affirmed a director's decision dismissing a charge as untimely. The Board stated that a charge needed to be filed within four months of the

date a party knew, or should have known, that a request to a union had not been granted. Subsequent reiterations of that same request do not extend the time to file a charge. Accordingly, the time to file a charge in this matter was not extended, and the charge was dismissed.

City of New York, 37 PERB ¶ 3034 (2004)—The Board held that the PBA's petition for a declaratory ruling was untimely. The PBA filed its petition for interest arbitration on July 28, 2004, and the city filed its verified response on August 11, 2004. The response set forth the bargaining history, referencing the demands that were annexed to the response as an exhibit, stating that no agreement had been reached, and indicating that the city's demands had been the same throughout their bargaining. The director advised the PBA that the petition was deficient since it only complained that the city's response had not set forth the city's specific demands. The PBA filed an amended petition on October 8, 2004, alleging that the city sought to place a new wage proposal before the panel that was time barred, and referred to the city proposals submitted to the panel, which were the same proposals submitted by the city in its response. The Board disagreed with the PBA's assertion that the city's response to the petition for interest arbitration is not a response as required by the rules, and that the city's demands were not clearly set forth. The Board found that the response complied with the rules, that it was filed on August 11, 2004, and that the declaratory ruling petition should have been filed no more than 10 working days after receipt of the response. The director should not have accepted the amended petition since it contained a new factual allegation, and cannot be added to include an untimely allegation. The amended petition did not concern a petition for interest arbitration or a response to such petition, the only two types of documents subject to complaint. The new wage proposal was solicited by the panel chair, and it was directed to him not the Board. Any issues concerning such document are under the jurisdiction and control of the panel.

United Federation of Teachers (Cauvers), 37 PERB ¶ 3035 (2004)—The Board affirmed a director's decision dismissing a charge as procedurally defective. The charge was untimely; the date from which the four-month period of limitations runs is when the UFT breached it DFR, not when an adverse decision is issued. Four copies and an original must be filed, and the excuse that they forgot to do so is not sufficient. The charge and amendment must be notarized, and the charge was substantively deficient as well.

United Federation of Teachers (Fearon), 37 PERB ¶ 3007 (2004)—The Board refused to entertain an interlocutory appeal to a decision denying a motion to amend the charge. Such appeals cause delay in the processing of charges, and may be reviewed after a final decision is issued.

City of Albany, 37 PERB ¶ 3022 (2004)—An intervenor filed a motion for an interlocutory appeal seeking review of an ALJ decision finding that a petition to represent sergeants and lieutenant represented by the intervenor was timely filed and accompanied by an appropriate declaration of authority. The Board, finding that the exceptions were timely filed, refused to grant review since they do not raise a novel question and will only serve to delay the proceedings. The Board also stated that the issues raised, if considered valid by the intervenor, should have prevented it from having signed a consent election agreement.

New York City Transit Authority (Rosado), 37 PERB ¶ 3036 (2004)—The Board affirmed an ALJ decision on other grounds, which dismissed a charge alleging that Rosado was refused reinstatement to a shift because of the exercise of her union activity. The charge alleged that she would have been reinstated had she not filed a grievance, since, in accordance with the employer's practice, she presented a note demonstrating that a relative was in need of her care. The Board stated that the charge was untimely, and dismissed the charge on that basis. The Board stated that it is the original act or omission that triggers the four-month filing period within which to file a charge. The subsequent iteration of the same denial made earlier does not begin the filing period anew. Accordingly, the charge was untimely and dismissed on that basis.

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Civility and Professionalism

By Louis P. DiLorenzo

In the last few years much has been said and written about the decline of professionalism among lawyers and a corresponding rise in "Rambo-style" tactics as the hallmark of modern litigation. In fact, not long ago *Newsweek* ran a story in its weekly "Justice" section entitled "How's Your Lawyer's Left Jab?" The article described a typical discovery scene involving lawyers from two prominent Manhattan firms, except that the scene managed to erupt into an actual brawl. Similar portrayals of the profession, although generally not quite so extreme, are routinely piped into millions of American homes weekly through the likes of "LA Law" and other television shows.

Just as the interaction between a lawyer and his or her firm or organization has a significant bearing on the quality of professional life, so does the interaction between adversaries. I think everyone recognizes that, for example, the lawyer who must spend every professional hour fending off Rambo-style discovery tactics in case after case, has a very different "quality of life" than the lawyer whose adversary is always civil and professional and, therefore, needs only to be concerned with the merits of his or her case.

I would like to spend some time evaluating this issue: exploring the scope of the problem, what may be its cause and discussing some possible solutions.

It seems to me the starting point in this evaluation must be on defining terms. What exactly do we mean by "Rambo"-style tactics? At what point does conduct become uncivil and unprofessional? Because these are subjective concepts, there really is no clear cut definition we can rely on. Like pornography, though, I suspect most of us feel comfortable that we know it when we see it.

Obviously we are not talking about the lawyer who is merely taking a strong stance in support of his or her clients. Indeed, Canon 7 of the Code of Professional Responsibility, in requiring each of us to "zealously" represent our clients, requires us to do no less. We are talking about extreme conduct which we would all recognize as exceeding the bounds of propriety.

Of course this conduct can take many forms. Most obvious, perhaps, is the failure to extend basic courtesies to opposing counsel, such as the refusal to provide extensions of time when the refusal has no substantive justification. Or opposing every discovery request, no matter how reasonable, just for the sake of causing delay and expense for an opponent.

It can also entail coaching a witness during a deposition or providing deliberately misleading discovery responses.

Even the deliberate failure to return opposing counsel's phone calls has been raised by some to an art form of harassment.

We have probably all experienced what can only be described as simple, open, and unprovoked hostility by opposing counsel that prevents almost all meaningful communication.

No discussion of this topic could be complete without mention of frivolous motions and totally unwarranted discovery requests, all intended to do little more than harass.

But most troubling, and I include it in this general problem of professionalism for lack of a better place to pigeonhole it, is an apparent increase in lawyers' willingness to misrepresent things. It seems that all too often, opposing counsel cannot be relied upon to remember their oral agreements, or to properly reconstruct that last telephone conversation, or to correctly report the holding of a significant case. And all too often, there is that ring of deliberateness to it.

How serious is the problem? Are we talking about a profession-wide problem, or is this really a question of a few isolated instances of unprofessional conduct? Various groups have conducted surveys in an effort to quantify the problem. Among the most notable is the report of the Committee on Civility of the Seventh Federal Judicial Circuit. More than 1,500 practicing attorneys and judges within the Seventh Circuit responded to the survey, providing some interesting, if not always surprising, results.

First, the problem, whether real or not, is definitely perceived as real by many lawyers. Forty-two percent of the responding lawyers expressed the belief that a problem exists. At first blush, you may not think this is too significant, since less than one-half of the bar thinks there is a problem. But when you stop to realize that the 42 percent is not simply saying that at some point in their careers they have encountered an adversary who has been unprofessional or discourteous, but rather that they have encountered so many adversaries who have been unprofessional and discourteous that it's a profession-wide problem, this number becomes strikingly large — and it certainly suggests that we are not dealing with an occasional inconvenience. Interestingly, an almost identical numbers of judges (45 percent) agreed

that the lack of civility and professionalism among members of the bar is a significant problem.

Certainly if the frequency with which this topic has appeared in recent literature is any indication of the scope of the problem, then it is far greater than even these survey results suggest. It seems that hardly a bar association journal or other piece of professional literature is published without some mention of this issue.

A natural question is whether there is any one group of attorneys that, more than the rest, seems to lie at the heart of this problem. Fifty-two percent of the Seventh Circuit respondents indicated that the problem lies primarily with young, inexperienced lawyers. I find this a particularly interesting response because my own experience is very different. I have had very few problems in dealing with truly "young, inexperienced" counsel. For the most part, they act with more courtesy and deference than most other groups. Rather, I have found the problem, where it exists, to be with my contemporaries. While at 41, with 17 or more years of experience we are not "old," we hardly are the young and inexperienced.

The only other group that is routinely singled out as exhibiting incivility at anything close to the same rate as the "young," are the "out of towners." You know — if you practice in upstate, its those New Yorkers; if you practice in southern Indiana, its those sharks from Chicago; and so on. In fact, typical of the comments received in the Seventh Circuit survey are the following:

> The majority of lawyers in the Southern District of Indiana are very civil, but I cannot say the same for many of the firms from the Northern District of Illinois.
>
> My court practice is limited to the Bankruptcy Court in Evansville. There is no problem of civility among local bar members. . . . [W]hen attorneys come down from Indianapolis, Louisville or Chicago we experience the more virulent form of advocacy.
>
> I have found most of my local colleagues to be civil and professional. The problems I have encountered are with counsel from other jurisdictions who are uncivil.

In other words, "it's always the other guy."

Assuming we have a real problem, and the evidence seems to suggest we do, in order to have any hope of addressing it, we need to look at the causes. While every individual asked would probably have their own, differing idea of what causes this conduct, there are some causes that are repeated so frequently that they must be taken seriously.

Perhaps the most frequently cited explanation for this decline in civility is the dramatic increase in the size of the bar. In the last decade, the number of attorneys has almost doubled. What difference does this make? Well, it seriously weakens the "tit for tat" method of self-policing. As the size of the bar increases, the more likely it is that a lawyer will never meet up with any given adversary in a second case. Apparently it is not uncommon in areas like New York City or Chicago to never oppose the same lawyer twice. But without the fear of ever running into the same person twice, the fear of retaliation — of being subjected to the same type of offensive conduct that you are giving out, — is eliminated. And with it, a major incentive for being civil and professional is gone. That's a sad commentary, but there is a certain truth to it.

A number of commentators have pointed to the growth of "regional" and "national" practices, even aside from the growth in numbers of attorneys, as similarly impacting significantly on how attorneys deal with one another. This is an offshoot of the "tit for tat" policing issue. As more and more cases are handled by "out of town" attorneys, there is less and less chance of adversaries running into each other in the future and, thus, the elimination of the retaliation factor.

A third explanation, which really consists of several combined into one, is what I call the decline in socialization among members of the bar. Attorneys no longer spend the social time with one another that they used to. I practice in Syracuse which, by most standards, is a small city (about 160,000 people with a county Bar of about 1,000 attorneys). My practice, on the other hand, is conducted almost everywhere but Syracuse. As a result, despite 17 years of living and practicing there, I do not know very many of the local attorneys who practice outside of the labor and employment area. Based on the stories I remember hearing when I first started with the firm, it would have been unheard of 20 years ago for a lawyer in town not to personally know virtually all the other attorneys. And, of course, a little socialization often goes a long way towards ensuring civil and professional interaction.

Now of course there are several explanations for this loss of socialization. In my case, the principal reason is that my practice takes me to so many other jurisdictions and I have not had the chance to interact with all my local colleagues. To a lesser extent, the size of the bar impedes my getting to know them as well — there are just too many.

But there are other reasons, I believe, that have caused us to lose the social aspects of our profession. For example, the billable hour pressures found in many

larger firms are one reason. The young lawyer who has a family and lives on Long Island, with a one hour commute each way to and from work, and is expected to bill 2,400 hours a year, just does not have the time to socialize with his or her colleagues at other firms, whether it is by going out for a drink after work, attending a bar association dinner/dance or otherwise getting involved in bar association activities. Time pressures force socialization to a low place on the priority scale.

In some of our smaller cities, where even in the larger firms the billable hour demands are not so great, there are other, competitive pressures that impact on this. Many practice in markets with too many lawyers and too few business opportunities. Thus, our colleagues are, first and foremost, our "competitors." As a result, time is spent on ways to compete with colleagues for a limited client base, rather than having a beer with them. While that may not seem too significant, the fact is it keeps us from "knowing" each other. And the less we know about them, and about their families and personal situations, for example, the easier it is to be unreasonable and unprofessional towards them. It simply is easier to be nasty to a stranger than a friend.

Another perceived cause of the current civility problem is client pressures. Clients are people too, and they have expectations about their lawyers and how their lawyers should act. As with other people, their expectations are often shaped by the unrealistic view of life presented on television. Consequently, if enough clients watch cut-throat lawyers in action on "LA Law" every week, they soon come to expect their own attorneys to act the same way.

Compounding this problem is the fairly recent phenomenon of client mobility (also known as client disloyalty). Twenty years ago, the attorney-client relationship was akin to a blood relationship. The attorney was a counselor; an advisor in every sense of the word. Nowadays, the perception at least is that in many instances an attorney is more like a hired gun, retained by a client for a single objective and then dropped or, even in situations where the relationship is intended to be long-term, there is a feeling that at the slightest lack of success, the client will simply pick up stakes and move elsewhere. As the competition for clients grows ever keener (simply because the number of clients seems to be declining and the number of lawyers seems to be multiplying geometrically), and as clients become ever more mobile — both in terms of their ability and their willingness to change lawyers at the drop of a hat — the more willing some members of the profession are to rise — or actually fall — to the client's expectation of appropriate professional behavior. In other words, in many cases it is simply a fear that we will lose our clients if we are not as ruthless and hostile as they expect, that causes us to go to these extremes.

The ironic thing to me about this last cited cause of our current problems is that I think it is based on a false premise. To be sure, I think many lawyers do fear that if they do not live up to these expectations their clients will drop them like a hot potato. And of course they think that. Publications like the *Legal Times* or the *American Lawyer* write about it on a monthly basis. However, I am far from convinced that it is really true. When I look at my own practice, I cannot think of a single client I work for that would expect me to act that way. To the contrary, acting that way is more likely to cost me that client than it will ever cement the bonds between us.

I do not think my practice is all that different from the next lawyer's. I have some very large institutional clients, including some Fortune 500 companies and smaller institutional clients. I also do a lot of work for smaller, local companies, including some family owned businesses. In virtually all cases, and despite what I think has become the "conventional wisdom," I am not a hired gun, I am instead their counselor and confidant. And when I stop to realize that, its gives me the confidence in my relationship with them to be guided by more long term considerations and not just whether I act "tough enough" in a particular deposition.

Consequently, I believe that one of the main reasons often cited for our profession becoming less civil and professional may be more a figment of our collective imaginations than real.

Another explanation often cited for these problems deals with the everyday pressures lawyers face today, pressures they did not face 20 years ago. The most obvious, of course, are the pressures of billable hours and increased competition for a shrinking client base. But advanced technology has also played a role, I believe, in all of this as well. We are constantly bombarded by overnight, express, urgent mail and packages that now demand our immediate attention and response. At the same time, we are constantly chased down the hallways of our offices by secretaries delivering the latest fax that requires even more immediate attention than the federal express package that was delivered first thing this morning. We no longer have the luxury of simply being interrupted by a phone call from opposing counsel when we are trying to get some other work done. Now we must contend with his or her almost instantaneous fax "confirming" the contents of that phone call — and all too often that confirmation is written in such a manner that it makes us wonder if we were on the same telephone line. But of course when that happens, we have to again stop what we are doing and provide an equally instantaneous response, to "set the record straight."

Is it surprising that this frantic pace makes us a little edgy? Perhaps a little more testy in our response than we might otherwise be if the same letter came by regular mail several days later, when we did not feel the pressure to respond with an equivalent immediacy? It's not that hard to understand how things escalate. And of course, once those written words of hostility leave our offices, it is often difficult to get things back on the civil track; a single, unduly harsh or accusatory tone quickly snowballs and becomes the defining standard for the rest of that litigation.

Another explanation often cited for this explosion in incivility is, in some ways, the most interesting: Rule 11. Many, many commentators have concluded that a good deal of the problems in today's litigation can be traced to the advent of sanctions under Rule 11. On the one hand, the prospect for Rule 11 sanctions has become a justification in itself for new levels of aggressiveness. And in order to prevail on a Rule 11 request, opposing counsel's conduct must be painted in a very extreme light. Simple incompetence about the state of the law, for example, is not enough to warrant the award of fees. You must argue that your opponent's incompetence was so great that it could not have been incompetence at all, but rather a deliberate failure on his or her part to advise the court of the true state of the law, or the real facts. Adding to the problem is that some lawyers now consider a Rule 11 request for sanctions to be as standard as including a "wherefore" clause in a complaint.

Of course opposing counsel, having been subjected to a horrendous Rule 11 attack often has little choice but to counterstrike as a purely defensive matter, making equally malicious comments about his adversary along the way. Soon, we have the snowball effect working again.

Needless to say, these attacks are not forgotten at the end of that particular skirmish or motion. Rather they have now set the tone for the rest of the litigation. Is there little wonder that that case will be plagued by incivility and unprofessionalism until it has breathed its last breath? Probably not.

What can be done to eliminate, or at least lessen, this problem?

Several suggestions have been raised by the various commentators and bar committees that have considered this problem, including some that would be appropriate for local bar associations and bar leaders to undertake.

Many commentators seem to feel that the single most effective method of dealing with this problem rests with the judiciary. Based on the responses of most attorneys in these various surveys, judges hold two keys. One is obvious. If an attorney knows a particular judge or arbitrator will not tolerate unprofessional conduct, that conduct is not likely to happen. On the other hand, a judge or arbitrator unwilling or unable to communicate that same message, provides an environment that permits these abuses to thrive, Thus, the feeling is that a big dent in the problem, at least as it exists in litigation cases, can be made by the exercise of a little judicial control and leadership.

Interestingly, it is nearly universally agreed that judges already have sufficient power to enable them to exercise this control and additional rules are not necessary. Consequently no one suggests, for example, that the court's authority under Rule 11 be strengthened or the possible penalties under that Rule stiffened. In fact, as already noted, many believe that the penalty provisions of Rule 11 are cause for much of the problem. Instead, what is needed is simply a willingness on the part of judges and arbitrators to actually exercise the authority they already have by making their own views on civility and professionalism well known to the attorneys appearing before them.

Relatedly, there is a feeling among many lawyers that there is another way in which the bench can lead by example. And that is for judges themselves to refrain from unprofessional conduct in their dealings with the bar. Although it is not perceived to be as great a problem as unprofessionalism among lawyers, there is some concern with the manner in which judges treat the lawyers practicing before them — whether it takes the form of intemperate remarks, impatience, ridicule, or unnecessary criticism. Obviously a judge who exhibits the type of professional conduct we are seeking is far more likely to see it reflected in the lawyers before him or her than the judge who is quick to criticize and respond with sarcasm.

A second suggestion for reversing this trend towards unprofessional conduct is to educate the profession that success does not *require* such conduct. Again if we think in terms of the contributing causes to this problem, one of them seems to be a notion that this is a "successful" style of practice. In other words, lawyers who act this way, win cases. If lawyers, again especially less experienced lawyers who have not yet firmed up their own approach to practice, are exposed to highly respected, and highly successful members of their local bar who represent living proof that civility and professionalism on the one hand, and success on the other, are not mutually exclusive concepts, we might be able to at least protect against the Rambo mentality spreading further.

Given my own pet cause of this problem — the fact that we do not know each other as well as we used to — another way in which we can contribute to the elimination of this problem is by providing a strong social as well as professional organization. By giving our mem-

bers an opportunity to meet and know one another, and providing for a combination of social and professional activities, we are promoting exactly that next level of interaction that can be so important. Especially if this program is established with newer lawyers, the personal interaction and relationships that result will more likely continue throughout their careers.

Another suggestion is for state bars and/or courts to adopt "civility" codes. Unlike Rule 11, these codes would not have any enforcement mechanism. Rather they would represent aspirational standards of conduct for the profession. Our Bar Association is considering the adoption of such a code. It consists of the following:

GUIDELINES ON CIVILITY IN LITIGATION[1]

I. In dealing with other persons involved in the litigation process, a lawyer should be courteous and civil in all communications.

A. Lawyers should act in a professional manner regardless of the ill feelings that their clients may have toward others.

B. Lawyers can disagree without being disagreeable. They should recognize that effective representation does not require antagonistic or acrimonious behavior.

C. Communications should not, as a general rule, disparage the intelligence, motives, ethics, morals, integrity or personal behavior of one's adversaries. Exceptions can be made when an opponent's conduct is a legitimate issue in the litigation as, for example, in an application for sanctions.

D. A lawyer should not, absent good cause, attribute improper conduct to other counsel.

E. Lawyers should not use vulgar language or make demeaning characterizations of other persons, including but not limited to gender or ethnic insults.

F. Lawyers should act and speak civilly to judges, court marshals, clerks, court reporters, secretaries and law clerks.

G. In depositions and other proceedings, and in negotiations, lawyers should conduct themselves with dignity, avoid making groundless objections and refrain from engaging in acts of rudeness and disrespect.

H. Lawyers should advise their clients and witnesses of the proper conduct expected of them in court, at depositions and at conferences; and, to the best of their ability, prevent clients and witnesses from causing disorder or disruption.

II. When consistent with their clients' interests, lawyers should communicate with opposing counsel in an effort to avoid litigation and to resolve litigation that has already commenced,

A. Lawyers should allow themselves sufficient time to resolve any dispute or disagreement by communicating with one another and imposing reasonable and meaningful deadlines in light of the nature and status of the case.

B. Lawyers should seek to avoid unnecessary motion practice or other judicial intervention by negotiating and agreeing with other counsel whenever it is practicable to do so.

III. A lawyer should agree to reasonable requests for extensions of time or for waiver of procedural formalities when the legitimate interests of the client will not be adversely affected.

A. Upon request coupled with a simple representation by counsel that more time is required, the first request for an extension to respond to pleadings should be granted as a matter of courtesy unless time is of the essence.

B. After an extension comparable in length to the original time period, any additional requests for time should be dealt with by balancing the need for expedition against the time actually needed for the task and/or the opponent's scheduled engagements.

IV. A lawyer should not attach unfair and extraneous conditions to extensions of time. A lawyer is entitled to impose conditions appropriate to preserve rights that an extension might otherwise jeopardize or to seek reciprocal scheduling concessions.

V. A lawyer should endeavor to consult with opposing counsel regarding the scheduling of depositions and meetings, and cooperate with opposing counsel when scheduling changes are requested, provided the interests of his or her client will not be jeopardized.

VI. A lawyer should endeavor to accommodate other counsel regarding scheduling matters in a good faith effort to avoid scheduling conflicts.

A. A lawyer should try to accommodate previously scheduled dates for hearings, depositions, meetings, conferences, vacations, seminars, or other personal engagements that produce genuine calendar conflicts on the part of other counsel.

VII. A lawyer should be punctual in communications with others and in honoring scheduled appearances.

A. A lawyer should promptly return telephone calls and answer correspondence.

VIII. A lawyer should notify other counsel and, if appropriate, the court or other persons, at the earliest possible time when hearings, depositions, meetings, or conferences are to be cancelled or postponed.

IX. The timing and manner of service of papers should not be designed to cause disadvantage to the party receiving the papers.

A. Papers should not be served in order to take advantage of an opponent's known absence from the office.

B. Papers should not be served at a time or in a manner designed to inconvenience an adversary, such as late on Friday afternoon or the day preceding a secular or religious holiday.

X. Unless specifically authorized by law or rule, a lawyer should not submit papers to the court without serving copies of all such papers to opposing counsel in such manner that opposing counsel will receive them before or contemporaneously with the submission to the court.

XI. A lawyer should not use any aspect of the litigation process, including discovery and motion practice, as a means of harassment or for the purpose of increasing litigation expenses.

XII. Lawyers should not engage in any conduct during a deposition that would not be appropriate in the presence of a judge.

XIII. A lawyer should adhere to all express promises and agreements with other counsel, whether oral or in writing.

XIV. In preparing written versions of agreements and court orders, a lawyer should attempt to correctly reflect the agreement of the parties or the direction of the court.

A. A lawyer should not include provisions that have not been agreed upon or omit provisions that are necessary to reflect the agreement of the parties.

B. A lawyer should not include in a draft matters as to which there has been no agreement without explicitly advising other counsel of the addition.

C. A lawyer should identify, for other counsel or parties, all changes that the lawyer has made in documents submitted to him or her for review.

XV. Lawyers should be candid with other persons involved in the litigation process.

XVI. A lawyer should require other lawyers under his or her supervision to conduct themselves with courtesy and civility.

XVII. A lawyer should be mindful of the need to protect the image of the legal profession in the eyes of the public.

Endnotes

1. These Guidelines were adopted by the Commercial and Federal Litigation Section of the New York State Bar Association to provide guidance on the subject of civility and professional courtesy in litigation. The Guidelines are not intended to be mandatory, nor are they intended, in and of themselves, to serve as a basis for professional discipline or other sanction. They will be considered by the House of Delegates at their November, 1994 meeting and have been endorsed by the Labor and Employment Law Section.

Mr. DiLorenzo is a partner at Bond, Schoeneck & King in Syracuse and currently serves as Chair of the Labor & Employment Law Section.

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Arbitrator Mentoring Program

By John E. Sands

At the Section's January 25th Annual Meeting, John Sands, who chairs the Arbitrator Mentoring Program, introduced seven arbitrators who had successfully completed the Program: Patricia McM. Bartels, Stephen M. Bluth, Dorothy ("Dot") Fallon, Mona Glanzer, John D. Nagy, Stephen M. O'Beirne, and Susan J. Panepento. Each had met the Program's entry requirements of (a) a strong background of experience in labor-management relations, (b) having issued at least four opinions and awards as the designated arbitrator in real-world cases, and (c) no present involvement as an advocate or representative in labor-management affairs. Each was assigned four arbitrator mentors, attended cases with them, wrote his or her own hypothetical opinions and awards, and endured sometimes scathing and always meticulous critiques of their efforts and participation. All seven received their mentors' unanimous approval.

In accordance with the Program, here are brief resumes of their backgrounds, their contact information, and excerpts from their mentors' comments.

Patricia McM. Bartels

Pat Bartels is a graduate of Wellesley College and New York University Law School. After receiving her law degree, she spent the next seven years as an attorney at the National Labor Relations Board. She then worked as a trial examiner at the NYC Office of Collective Bargaining, the neutral agency that administers public sector labor relations in New York City. Pat also served as an Assistant Commissioner in the NYC Fire Department and as Associate General Counsel at the NYC Office of Labor Relations.

Since late 2002, Pat Bartels has worked as a full-time arbitrator, serving on panels including the Federal Mediation and Conciliation Service, New York State Employment Relations Board, New Jersey State Board of Mediation, and New York City Office of Collective Bargaining. Her mentors in the Program were John Sands, Bonnie Seiber Weinstock, Ralph Berger, and Janet Spencer. Among their comments concerning her participation were these: ". . . She is analytical, insightful and a very good writer. . . . She will be one of the program's success stories." ". . . She has always impressed all concerned with her intelligence and sense of fairness." "She thinks clearly, is balanced and knowledgeable, and writes very well. A credit to the Program."

Contact information: Patricia McM. Bartels, Suite 8D, 50 East 10th Street, New York, NY, 10003. Tel.: (212) 477-3959; Fax: (646) 390-7874; E-mail: PatMcMBartels@nyc.rr.com.

Stephen M. Bluth

Stephen M. Bluth has been active in the labor relations field for over thirty years. He has served as a local teacher union president and benefit fund chair. Steve has also been Director of Field Services for the NYS Public Employees Federation and a Labor Relations Specialist for the NYS United Teachers. He also served as an adjunct instructor for the Cornell University ILR extension program on Long Island for almost twenty years. During that time he taught courses in collective bargaining (both private and public sector), contract administration, dispute resolution and arbitration. He currently serves as an adjunct instructor at New York Institute of Technology Graduate School of Management where he teaches collective bargaining and arbitration.

In 2003 Steve became a full-time arbitrator. He has been appointed to numerous panels including the American Arbitration Association, NYS Employment Relations Board, NYS/CSEA Disciplinary Panel, Suffolk County PERB, Wappinger's Central School District, Long Island University and C.W. Post. Steve is an Executive Board member of the Long Island Chapter of the Labor and Employment Association and is also a member of the NYC chapter of IRRA. He looks forward to expanding his practice in arbitration and dispute resolution in the years ahead. His mentors in the Program were Martin Scheinman, Howard Edelman, Rosemary Townley, and Ralph Berger. Among their comments concerning his participation were these: "He has good judgment, fine instincts and the like as well as an amiable yet judicious manner." "He displays a keen sense of labor relations, and he fully understands the process." "I was impressed with his writing and reasoning skills and his knowledge of statutory law and collective bargaining issues."

Contact information: Stephen M. Bluth, 294 Cedar Lane, East Meadows, NY 11554-2714. Tel.: (516) 481-9778; Cell: (516) 978-7567; E-mail: sblutharb@aol.com.

Dorothy ("Dot") Fallon

Before becoming an arbitrator and mediator, Dot Fallon was a Director of Human Resources and Labor Relations for Supermarkets General's Southern Division, having previously held positions of increasing responsibility within the HR department. Dot's earliest days at SGC were in store operations as a member of both UFCW Local 1500 in New York, and UFCW Local 1349 in the suburban Philadelphia area. More recently

Dot has served as a member and President of the Bedford Central School District Board of Education in Bedford, New York. Over the course of six years Dot actively engaged in collective bargaining with the administrators, teachers, and civil service employees and oversaw District matters of litigation, and arbitration. In that role she was responsible for developing a uniquely supportive relationship between the Board of Education and the District's teachers and administrators. She is a panel arbitrator for Federal Mediation and Conciliation Service, the New Jersey State Board of Mediation, and the New York State Employment Relations Board.

Dot has completed extensive training in arbitration, mediation, labor-management relations/law, and collective bargaining at the Cornell ILR School. She was mentored in the NYSBA Program by John Sands, Rosemary Townley, Dick Adelman and Jaqueline Drucker. Among their comments concerning her participation were these: ". . . She has the best instincts of any person I have ever mentored." "I have been impressed with the quality of Dot's judgment, her approach to the hearing, and, on a broader level, her understanding of labor relations dynamics." "I predict that she is going to be a great arbitrator. . . ."

Contact information: Dot Fallon, 411 Sarles Street, Mount Kisco, NY 10549. Tel.: (914) 666-9286; Fax: (914) 666-5549; E-mail: fallon132@optonline.net.

Mona N. Glanzer

Mona N. Glanzer has extensive experience in all phases of labor and employment law in both the public and private sector. She is past Chair of the Labor and Employment Law Section of the New York State Bar Association. She has been arbitrating pension and employee benefit cases for many years and now includes arbitration and mediation of traditional labor law cases. She is familiar with both large and small businesses, engineering and health professions, education and public sector organizations.

Mona has published several articles on ERISA. She has been a contributor to the ABA *Employee Benefits* book. She has lectured on various topics relating to discrimination law. Mona has also contributed to the NYSBA *Public Sector Labor and Employment Law* book and is a member of the Local Government Law Section of the ABA. She has served on the Advisory Board for the IRRA in both New York City and Long Island. She is a past President of the Nassau-Suffolk Women's Bar Association. She has been listed in *Who's Who in American Law* and *Who's Who Among American Women*. Her mentors in the Program were Harold Edelman, Joan Ilivicky, Arthur Riegel, and Eugene Ginsberg. Among their comments concerning her participation were these: "Mona's background, skills and ability make her eminently qualified to join the arbitration ranks." "I have no reservations whatsoever about her qualifications as a labor arbitrator. She will be a definite asset to the group." "Excellent, of course."

Contact information: Mona N. Glanzer, 17 Weston Place, Lawrence, NY 11559. Tel.: (516) 239-3918; E-mail: MonaNGlanzer@aol.com.

John D. Nagy

John D. Nagy has acted exclusively as a neutral since January 2001, arbitrating labor and employment matters on the panels of the New York State Employment Relations Board, the Federal Mediation and Conciliation Service, New Jersey State Mediation Board and the Suffolk County Public Employment Relations Board. He has also acted as a hearing officer for the Town of Oyster Bay (Long Island) and New York City Off-Track Betting Corporation regarding disciplinary matters and has served as an administrative judge for the Waterfront Commission of New York Harbor. His application for listing on the Labor Panel of the American Arbitration Association is currently pending.

John had been General Counsel for Nassau Regional Off-Track Betting Corporation, handling all that Corporation's legal matters including negotiation, drafting and administration of collective bargaining agreements and arbitration of all grievances. Prior to that, John was employed by the New York State court system, where his duties included service as Law Secretary to a Justice of the Appellate Division. He was a commissioned officer in the U.S. Navy during the Vietnam War. John is a graduate of Columbia College and Hofstra Law School and holds an LLM in Taxation from N.Y.U. He has been admitted to practice in New York since 1976.

John's mentors in the Program were Martin Ellenberg, Howard Edelman, Herbert L. Marx, Jr., and Rosemary A. Townley. Among their comments concerning his participation were these: "I was very impressed with his writing and reasoning skills, comfort level with the parties, and ability to accept and implement constructive criticism. . . . He will be a positive presence within the arbitration community and be well-accepted by the parties." "John has been a seasoned advocate over many years, and his expertise is reflected in the draft awards he prepared. I fully endorse John. . . ." "All John needs . . . is to be selected by the parties. . . . He will do just fine."

Contact information: John D. Nagy, 4 Orchard Lane, Sea Cliff, NY 11579. Tel.: (516) 759-9362; E-mail: johndnagy@aol.com.

Stephen F. O'Beirne

Born and raised in New York City, Stephen F. O'Beirne worked full time while attending college and law school at night. He began his legal career as counsel to a local restaurant union in New York, before joining the labor and employment law departments of Richards & O'Neil and Herrick, Feinstein. He has represented both labor and management in arbitration, administrative, and judicial proceedings. A full-time arbitrator since June 2000, Mr. O'Beirne has issued over 200 decisions in both the public and private sectors. He lives in New Jersey with his wife and daughter.

His mentors in the Program were John Sands, Richard Adelman, Marilyn Levine, and Howard Edelman. Among their comments concerning his participation were these: "I have been privileged to mentor a number of new arbitrators in the Arbitrator Mentoring Program, and Steve is the best I have had so far. . . . I have been enthusiastically recommending Steve to the parties. . . , and I believe he will become a very successful labor arbitrator." "Steve has the keen intellect, personal integrity, people skills, and rare common sense that ensure his eventual leadership of our profession."

Contact Information: Stephen F. O'Beirne, 176 Washington Ave., Clifton, NJ 07011. Tel.: (973) 478-1867; Fax: (973) 478-1867; E-mail: sobeirne@msn.com.

Susan J. Panepento

Susan Panepento is the Deputy Chair for Dispute Resolution for the New York City Office of Collective Bargaining (OCB), where she is the principal mediator of labor disputes between the City of New York and the municipal unions. She also serves as an arbitrator for OCB on cases that qualify for expedited processing, and she maintains a private arbitration practice. She is a member of several arbitration panels including the American Arbitration Association. Prior to becoming Deputy Chair, Ms. Panepento was the agency's Director of Representation. For many years, Ms. Panepento served as a Field Examiner and Attorney with the National Labor Relations Board in Brooklyn, New York. She also practiced with the law firm Cohen, Weiss and Simon in New York City, where she represented national and local unions before arbitrators, administrative agencies, and federal and state courts. She graduated from Cornell University and Brooklyn Law School. Her mentors in the program were Carol Wittenberg, Ralph Berger, Randall Kelly and Bonnie Weinstock.

Contact information: Susan J. Panepento, One Third Place, Brooklyn, NY 11231. Tel.: (718) 757-8061; Fax: (718) 625-4062.

Mona N. Glanzer, Ronald L. Jaros, Joseph J. Steflik, Jr., Jerome Lefkowitz, Michael I. Bernstein, I. Victor Belson, Louis P. DiLorenzo, Margery F. Gootnick, Michael T. Harren, Bruce R. Millman, James R. Sandner, Rosemary A. Townley, David M. Pellow, Linda G. Bartlett, Richard N. Chapman, Jacquelin F. Drucker, and Pearl Zuchlewski.

As the calendar continues towards Winter, our EEO Committee (**Deborah Skanadore Residorph** and **Peter Shapiro**, Co-Chairs) will cosponsor, with the Cornell School of Law and the New York School of Industrial Labor Relations, our Second Annual "Employment Law Seminar for General Practitioners" in Ithaca on November 19, 2005. The program will focus on the subject of administrative processes with the State Division of Human Rights and unemployment insurance administration.

The EEO Committee will also be presenting a program entitled, "Navigating the Land Mines of Workplace Investigations." For more information about this and other Section-sponsored programs, please check the Section's web site at http://www.nysba.org and click the link for sections/committees, and then click on the labor and employment law section. I urge you to attend one or more of these programs as your schedule permits, and to provide us with prompt, comprehensive feedback so that we can continue to try to provide you with the best bang for your Section dues money.

On a final, and much more personal note, I encourage each of you to take a couple of moments today, and then again tomorrow, to remember what's important in life. Yes, work is important, but it is not a be all or end all. Take a few minutes to review and take to heart **Lou DiLorenzo**'s 1994 article, "Civility and Professionalism" which is reprinted in this issue. When you get home, hug or call someone special to you and let them know how much you care about them and what they mean to you. After all, we don't get many second chances in life.

I look forward to seeing you at a Section event coming your way sometime soon. Until then, if you would like to contact me about Section business, please do not hesitate to do so (especially if you have something nice to say!). I can be reached at rkz@lambbarnosky.com or (631) 694-2300. If you would like to contact any of the other members of our Executive Committee, or any of our Committee Chairs, just let the NYSBA or me know and we will put you in touch with the appropriate person(s).

Richard K. Zuckerman

Answers to Trivia Questions (from page 2)

Answer to the first trivia question: Steve Yzerman, Detroit Red Wings center, 21 years (1983-1984 through the present).

Answer to the bonus trivia question: Jason Hanson, Detroit Lions kicker, 13 years (1992 through the present).

Save the Date!

Labor and Employment Law Section

Annual Meeting Program

Friday, January 27, 2006

New Yorker Hotel • New York City

Section Committees and Chairs

You are encouraged to participate in the programs and on the Committees of the Section.
Feel free to contact any of the Committee Chairs for additional information.

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Publication Policy: I would appreciate it if you would call or e-mail me to let me know your idea for an article. You can reach me at (718) 428-8369 or mceneaneyj@aol.com.

After we've discussed it, the article should be submitted by e-mail along with a letter granting permission for publication and a one-paragraph bio. The Association will assume your submission is for the exclusive use of this *Newsletter* unless you tell me otherwise in your letter.

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Deadlines for submission are the 1st of January, April, July and October each year. If I receive your article after that date, it will be considered for the next edition.

Thank you for your cooperation.

Janet McEneaney
Editor

L&E Newsletter

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