

COMMON GROUND

INDUSTRIAL RELATIONS RESEARCH ASSOCIATION

FOR WESTERN NEW YORK



FALL 1997



PRESIDENT'S MESSAGE

by William E. Grande

I am honored to have been selected to serve as President of the IRRA for Western New York for the 1997-1998 program year. As I mentioned at our first meeting on September 23, 1997, I have profited immensely from the knowledge I have gained over the last ten years that I have been attending IRRA meetings and I welcome this opportunity to give something back. I want to thank my fellow officers, President Elect, Ed Ryan, Executive Vice President, Marilyn Zahm and Executive Secretary/Treasurer, Norm Stocker and all the members of the Executive Board for their guidance and assistance in putting together this year's programs. I want to especially thank Marie Siegel, who, as many of you know, serves as Secretary to the Executive Secretary/Treasurer. Without Marie's efforts, this organization simply could not function effectively. A special note of thanks

also goes to last year's President, Ed Schmidt, who continues to contribute the benefit of his wisdom and experience to our efforts.

Our first meeting this year was a great success. I want to thank Stuart Pohl, Esq., who hosted the program and the panel of speakers which included Richard Furlong, Esq., Daniel Boody, Chip Jones and Thomas Gill, Esq. The extensive preparation involved in putting the program together was evident from the quality of the presentations which provoked a lively discussion among the panelists as well as some members of the audience.

I hope to see you all at our meetings this year. The IRRA is your organization and it needs your participation in order to continue to provide a meaningful forum for dialogue on current issues in employment and labor relations.

In this Issue:

President's Message...	1
New Members...	2
Congratulations/Transitions...	2
IRRA Calendar...	3
Community Calendar...	3
Andrea Sammarco: "Give Them This Day Their Daily Bread: The Unpaid Wages Prohibition Act"...	4
Legal Update...	5
WNY IRRA Events...	5
Peter C. Godfrey: "Compulsory Interest Arbitration Awards Should Not Be Involuntarily Continued Beyond The Period To Which They Apply"...	6
From the Editors...	8

WELCOME!

...to our new members

Susan M. Davis

Associate Professor of Economics
State University College at Buffalo
1300 Elmwood Ave.
Buffalo, New York 14222

Roger J. Foore

Vice President of Operations
Taber Industries
455 Bryant St.
North Tonawanda, New York 14120

Richard C. Heffern

Buffalo Office Head
Bond, Schoeneck & King, LLP
Flaherty Cohen Office
135 Delaware Ave., Suite 210
Buffalo, New York 14202

James B. Herman

Director of Personnel Services
Baker Victory Services
780 Ridge Rd.
Lackawana, New York 14218

Lindy Korn Koren, Esq.

Diversity Training-Workplace Solutions
300 International Dr., Suite 100
Williamsville, New York 14221

John N. Lipsitz

Attorney
135 Delaware, Suite 506
Buffalo, New York 14202

Andrea Sammarco

Attorney
Hiscock & Barclay, LLP
50 Fountain Plaza
Buffalo, New York 14202

David J. Steinwald

Employee Relations Supervisor
Nabisco Brands
920 Rainbow Blvd.
Niagara Falls, New York 14303

CONGRATULATIONS/TRANSITIONS

Congratulations to Brian J. Stocker on his promotion to the Director of Labor Relations for the City of Buffalo.

Congratulations to Ginger D. Schroder, Esq., on her position as Chair of the Bar Association of Erie County Labor Law Committee.

Congratulations to Richard C. Heffern, Esq., on his move from the Albany office of Bond, Schoeneck & King, LLP to manage the Buffalo office of Flaherty Cohen Office of Bond, Schoeneck & King, LLP.

Congratulations to Charles J. Donner on his appointment as Assistant to the Regional Director of the Buffalo office for the National Labor Relations Board.

IRRA CALENDAR

Tuesday, October 21, 1997 -

Dinner/Meeting at which the National Labor Relations Board Member, Sarah M. Fox, will be joining us to share her insights on the current issues facing the agency. This meeting will be hosted by Charles J. Donner.

Tuesday, November 18, 1997 -

Dinner/Meeting at which will involve a discussion of some the current issues in Labor Management Cooperation. The program will be hosted by Dr. Jim McDonnell. The speaker will be Hugh Trantum, President of the National Labor Management Association, headquartered in Jamestown, New York and Executive Director of the Jamestown Area Labor Management Committee. Mr. Trantum will be joined by a labor representative and management representative from the Jamestown area who will discuss some of the practical initiatives underway to deal with the challenges presented by the Global Marketplace.

Tuesday, February 24, 1998 -

Annual IRRA Min-Conference

The WNY - IRRA Chapter has again affiliated with Cornell University IRL School to develop a stimulating program featuring the THEATER FOR CHANGE !

Arbitrators, Union, and Management representatives often face the challenge of recreating an incident which they were not present to observe first hand. An altercation on the shop floor, a promise made but not written, an accident, an incident between a male employee and a female employee, a supervisor and an older worker or persons of color are examples of situations which create complaints that might become grievances, perhaps even law suits.

Gaining an accurate understanding of a past event is an important skill for investigators,

arbitrators, judges, and others. Truth telling and credibility determinations are essential to this process.

Our Min-Conference will look at different ways professionals make credibility determinations. As especially exciting part of the conference will be the dramatic reenactment by the THEATER FOR CHANGE of two situations which could happen at the work place. One takes place between co-workers in the mail room of the Rath County Office Building and the other occurs in a conference room of a large and prestigious Western New York law firm.

You'll want to attend this lively min-conference!

Mark the time on your calendar: February 24, 1998 from 3:30 pm until 8:30 pm. Make an early reservation by calling Marie Siegel at 877-8800. The conference shall be held at the Center for Tomorrow on the UB North Campus.

COMMUNITY CALENDAR

MSGR. JAMES A. HEALY FOUNDATION, INC.

The Msgr. James A. Healy Foundation, Inc. Board of Directors is sponsoring a reception to honor James A. Healy and to raise funds for the Foundation's 6th Annual Scholarship Award. The program will be held on Thursday, October 23, 1997, from 5 PM to 7:30 PM, at the Radisson Hotel. Tickets are \$35.00. Contact Jane Kauffman, Director E.D.2 NYS United Teachers Union, or James Voye, Business Manager of Local 41, I.B.E.W.

**CORNELL UNIVERSITY, SCHOOL OF
INDUSTRIAL AND LABOR
RELATIONS**

Fall 1997: mutual gains negotiation, preventing sexual harassment, workers' compensation, progressive discipline, collective bargaining, handbook and policy procedures, affirmative action. Call (716) 852-4191 for more information. Also, Fall courses are located at Maryvale Schools. Contact **Becky Daniels** for more info.

*"Give Them This Day Their Daily Bread:
The Unpaid Wages Prohibition Act"*

by Andrea L. Sammarco, Esq.
HISCOCK & BARCLAY, LLP

Employers would do well to obey the edict or suffer grave consequences, as the result of new, tougher rules for employers who fail to abide by laws governing payment of wages. On September 18, 1997, Governor Pataki signed into law the Unpaid Wages Prohibition Act, amending New York Labor Law Article 6, to provide to stiffer penalties and enhanced enforcement capabilities for both employees and the Department of Labor. The legislation was pushed by the Workplace Project, a nonprofit organization of Hispanic immigrant workers, and was motivated in part by the perception that workers in the garment and service industries, as well as in factories, were being denied wages rightfully owed. The legislature enigmatically evinced its intent that "[e]specially as more and more New Yorkers are called upon to earn their living through work, we must ensure that working people are paid what they earn." No similar protection was included in the new law for New Yorkers who earn their living through leisure activities or insider trading.

The primary changes wrought by the new law are as follows:

* Upon the filing of a complaint by an employee with the Commissioner of Labor, the employer bears the burden of proving that all wages were paid, even in the event that the employee has not kept adequate records. (§196-a).

* Either the employee or the Commissioner may institute an action for payment of wages, and both have six years to institute such an action. (§198(3)).

* Repeat offender employers, including officers and agents of the corporation who knowingly permitted the violation, are subject to felony charges in connection with the failure to pay wages. The fines for criminal violations are increased up to \$500 to \$20,000, from \$100 to \$10,000. (§198-a).

* New notification provisions are included in the law to ensure that employees and their representatives are informed of the anticipated processing of the complaint and any case conference held. While employees are given the opportunity to attend the case conference with their representative, the amount of involvement allowed in the conference is not specified in the new law. Employees will also be notified of any awards obtained and whether criminal penalties will be sought. (§199-a).

* For a repeat or willful/egregious offender, civil penalties are enhanced to twice the amount of the back wages, in addition to the amount of wages found to be due. Civil penalties assessed for reasons other than the employer's failure to pay wages are made mandatory by the new law. (§218).

The new law becomes effective on November 17, 1997.

LEGAL UPDATE

6th Circuit Undercuts Union Shop Clauses

The 6th Circuit Court of Appeals recently struck down a National Labor Relations Board ruling regarding the validity of mandatory union shop clauses. In the decision, which applies only in Ohio, Michigan, and Kentucky, the federal appeals court rejected a provision of the collective bargaining agreement requiring union "membership in good standing". The Court held that absent defining contractual language, the clause is facially invalid.

The case involved the 1993 withdrawal of Roland Buzenius from the United Paperworkers International Union's Local 1033. Buzenius, an employee of the Weyerhaeuser Paper Company in Three Rivers, Michigan, resigned his union membership after objecting to the use of his union dues for non-union activities. Pursuant to the collective bargaining agreement, Weyerhaeuser continued to deduct union dues from the employee's paycheck, prompting the suit.

Recently, the National Right to Work Legal Defense Foundation secured a U.S. Supreme Court decision in Communication Workers v. Beck which held that workers can only be required to make financial contributions to union efforts in collective bargaining, contract negotiation and grievance adjustment. Pursuant to the Beck decision, Buzenius demanded that Local 1033 charge him only for expenses which it could prove were bargaining-related.

Although the 7th District Court of Appeals in Chicago recently ruled that such union-shop clauses are legal, some have expressed that the 6th Circuit ruling invalidating the clauses could become precedent. Both management and labor representatives believe the decision will be appealed to the U.S. Supreme Court, which has upheld such contractual provisions when faced with this question before.

The National Right to Work Legal Defense Foundation has expressed that the ruling in this case is a victory for workers over the National Labor Relations Board, with NRWLDF representatives calling the Board's support of mandatory union-shop clauses, "a union-label NLRB scheme to trick workers into bankrolling union boss politics." The executive director of the Cincinnati AFL-CIO Central Labor Council, Dan Radford, by contrast, said the decision is "obviously an attempt to further restrict what is guaranteed under the National Labor Relations Act."

WNY IRRA EVENTS

The IRRA annually selects a Citizen of the Year to honor an individual who has established a record of contributing to solid labor relations practice, preferably in the local labor relations community. The individual is someone who, over time has commanded the respect of those with whom he or she has worked.

The Award is rotated among representatives of all segments of the labor relations community. Past recipients include:

Chuck Knox	William Grande
Ed Kelly	Leo Hunter
Tom Fricano	Marilyn Zahm
William Donohue	James McDonnell
Joseph Bania	Peter Rybka
Milton Goldberg	Jane Kauffman
Arnold Olena	Donald Rust
Norman Stocker	Richard Lipsitz
Msgr. Healy	Richard Slisz

The Awards Committee invites nominations for this award, which will be made at our May 18, 1998, meeting. Please send nominations to Marilyn Zahm, Chair, at 277 Parker Avenue, Buffalo, NY 14214, by December 1, 1997. Please include a brief statement explaining your reasons for the nomination.

*"Compulsory Interest Arbitration Awards
Should Not Be Involuntarily
Continued Beyond The Period To Which
They Apply"*

by Peter C. Godfrey, Esq.
DAMON & MOREY, LLP

Under the Taylor Law,¹ in the event of a collective bargaining impasse involving police or firefighter bargaining units, the Public Employment Review Board ("PERB") may be petitioned to designate an arbitration panel. The panel issues an "interest arbitration award" and, thus, the impasse is ended.² Under a separate tenet of the Taylor Law, commonly known as the "Triborough Doctrine," as first advanced in 1972³ and subsequently expanded and codified in 1982,⁴ parties to a collective bargaining agreement continue to be bound by the terms of the agreement until a successor agreement is negotiated.

Recently, in connection with a dispute between the City of Buffalo and the Buffalo Professional Firefighters Association, PERB staff attorneys argued that the terms of an interest arbitration award should be continued until a new agreement is negotiated. However, a long line of PERB decisions and the language and purpose of the Taylor Law, indicate that, unlike collectively bargained agreements, interest arbitration awards should only bind the parties during the period to which the award applies.

PERB has repeatedly held that, absent an express agreement to the contrary, neither party to an impasse resolved by an interest arbitration award has any obligation to incorporate the terms of the award into a subsequent agreement.⁵ One PERB Administrative Law Judge held that because an interest arbitration award is not an agreement, "there is no obligation under the Act to extend the terms of an award upon its expiration."⁶ It is simply not possible to reconcile these decisions with any interpretation of the Taylor Law which would mandate the extension of the terms of an interest arbitration award beyond the period to which the award applies. If all terms of an interest arbitration award were to be automatically continued, PERB's recognition that an employer is not required to sign an agreement including those terms would have no legal impact, except to excuse the employer from the ministerial act of signing a piece of paper.

Further, the duration of interest arbitration awards were specifically limited by the legislature to "the period prescribed by the panel, but in no event shall such period exceed two years from the termination date of any previous collective bargaining agreement"⁷ Accordingly, any interpretation that would give interest arbitration awards continuing effect beyond the time stated is clearly inconsistent with the legislative history and plain language of the Taylor Law.

The legislative history and plain language of the Triborough Doctrine, as codified, also make clear that interest arbitration awards were not to be interpreted as modifying the *status quo* which must be

¹ N.Y. Civ. Serv. L. ("CSL") §§ 200-214.

² CSL § 209(4).

³ Triborough Bridge and Tunnel Authority, 5 PERB 3037, *aff'g*, 5 PERB 4505 (1972) (holding that "duty to negotiate in good faith" set forth in CSL § 209-a.1(d), prohibits employers from unilaterally altering mandatory subjects of bargaining during the period when a successor agreement was being negotiated.)

⁴ CSL § 209-a(1)(e) (codifying the Triborough Doctrine and expanding its scope to require continuation of "all the terms of an expired agreement [both mandatory and non-mandatory] until a new agreement is negotiated.")

⁵ Town of Orchard Park, 29 PERB 3080 (Dec. 18, 1996); City of Johnstown, 25 PERB 3085 (1992); City of Buffalo (Fire Department), 29 PERB 4570 (ALJ Fitzgerald, Apr. 19, 1996); City of Niagara Falls, 23 PERB 3039 (A.L.J. Doerr 1990).

⁶ City of Buffalo (Fire Department), 29 PERB 4570 (ALJ Fitzgerald, Apr. 19, 1996) (emphasis added) (*citing City of Johnstown*, 25 PERB 3085 (1992)).

⁷ CSL § 209(4).

maintained. Specifically, the legislature chose not to employ language pursuant to which all terms and conditions of employment would continue. Rather, the legislature carefully stated only that the terms of the "expired agreement" continue.

Giving an interest arbitration award continuing effect beyond its period would also be contrary to the purpose of the Taylor Law. The Taylor Law was intended to promote peaceful labor relationships and orderly and uninterrupted government operations. The Taylor Law recognizes that these policies are best effectuated by policies which encourage public employees and employers to agree upon resolutions of disputes.⁸ If interest arbitration awards are deemed binding subsequent to their termination, there would be a diminished incentive for police and firefighter unions to engage in meaningful collective bargaining because such award would have the same effect as agreements and set a floor for subsequent bargaining. Thus, any interpretation of Taylor Law whereby such compulsory and non-negotiated awards are deemed binding subsequent to their termination, would frustrate the parties' abilities to ever reach a true agreement with respect to any issue covered by the award.

Proponents of continuing the terms of interest arbitration awards after their expiration concede that there are no absolutely reported decisions in which an interest arbitration award was held to apply subsequent to its termination. Rather these proponents point to a 22-year old PERB decision⁹ regarding continuing the terms of "legislative impositions,"¹⁰ the final step of impasse resolution for public employees other than police and firefighters. However, the continued viability of this "legislative imposition" decision is suspect in light of recent PERB decisions and the codification of the Triborough Doctrine. In addition,

even if the sole decision remains good law for legislative impositions, it ought not to be expanded to panel awards. A legislative imposition involves a determination of the "legislative body of the government involved."¹¹ The legislative body is elected and answerable to the taxpayers whose taxes pay the salaries of the bargaining unit employees. By contrast, the appointed three-member public arbitration panel¹², which is frequently comprised of individuals who are not even residents of the municipality that must fund the award, lacks the fiscal accountability and public authorization of a legislative body. Their awards are a form of taxation without representation which ought to be limited in duration, not expanded.

Interest arbitration awards should, therefore, only bind the parties during the period to which they apply.

⁸ CSL § 200.

⁹ Massapequa Union Free School District, 8 PERB 3022 (1975).

¹⁰ CSL § 209(3)(e).

¹¹ CSL § 209(3)(e).

¹² CSL § 209(4) (the three member public arbitration panel consists of "one member appointed by the public employer, one member appointed by the employee organization and one public member appointed jointly by the public employer and employee organization")

FROM THE EDITORS...

We would like to thank Peter C. Godfrey, Esq., and Andrea L. Sammarco, Esq., for their contributions to this issue. Their time and efforts helped make our first issue as Editors. We would also like to thank Bill Grande for the opportunity to contribute to the organization.

The Common Ground is your publication. Please forward all comments, articles, submissions, notices or news items for the Winter 1998 edition of the Common Ground before January 15, 1998, to: Brian J. Stocker, 225 City Hall, Buffalo, New York 14202, or Tracy D. Sammarco, 716 Brisbane Building, Buffalo, New York 14203. For those of you who prefer cyberspace, you may E-mail your submission to bstocker@ci.buffalo.ny.us

COMMON GROUND
FALL 1997 ISSUE

EDITORS

Tracy D. Sammarco Attorney, Office of W. James Schwan (716) 845-5205	Brian J. Stocker Dir., Labor Relations City of Buffalo (716) 851-4270
---	--

Published by Industrial Relations Research Association for Western New York Labor Relations Department
1835 Sheridan Dr.
Buffalo, New York 14223-1211

Industrial Relations Research Association for
Western New York
Labor Relations Department
1835 Sheridan Dr.
Buffalo, New York 14223-1211

