2009-2010 DEVELOPMENTS IN THE SUPREME COURT, LOWER COURTS AND NLRB

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Introduction

As everyone in the labor movement knows, the United States Supreme Court in *New Process Steel, LP v.* NLRB, 130 S. Ct. 2635 (2010) held the two-member Board did not have authority under the National Labor Relations Act to issue decisions in unfair labor practice and representation cases during the last two years. The fate of over six hundred rulings the Board rendered between January 2008 and March 2010 obviously will be worked out in the months to come. Many of the decisions by now are probably history with their practical effects already played-out. More recent decisions, which are on review in the United States Courts of Appeal, may simply be returned to the agency for action by the now fully constituted Board.

The potential catastrophic practical ramifications of the Supreme Court's actions gave the *New Process Steel* case a sense of urgency. The case seemingly presented a stark conflict: putting the NLRB out of business for two years versus allowing the agency to do its work. Indeed, last year's Legal Report suggested cases challenging the authority of the two-member Board to act reflected Corporate America's triumph in completely neutering the single federal agency dedicated to promoting collective bargaining and protecting workers' rights in the workplace. To the extent such a characterization of the dispute was correct, business interests won; workers lost. The result is not surprising, especially given the current composition of the United States Supreme Court.

What was surprising about the decision was that retiring Justice Stevens joined the majority in ruling against the Board. Before the Clinton and Obama appointments to the Court, Justice Stevens, along with the late Justice Brennan, was viewed by some as a member of the more "liberal" wing of the Court. In turn, it makes one wonder what the case really involved – other than the battling interpretations of the words used by Congress in Section 3 of the NLRB and the underlying practical effects of the decision.

From that perspective, the decision at core may have involved a more fundamental issue: constitutional powers of the branches of government. And, the result may well have been an object lesson by the Court in responsible exercise of constitutional powers aimed at the Congress and sitting Presidents.

Both the majority and dissenters in their opinions deplored the fact the Board had been at two-member strength for two years. The writers described the situation as "exceptional" and "less than optimal" and noted the loss of efficiency resulting from turnover and vacancies in the Board over its seventy-five year existence. Despite these concerns, Justice Stevens made it clear that in the view of the majority, Congress had written the NLRA to require that there be three members on the Board at all times, if the agency is to fully function.

Justice Stevens' object lesson for Congress and sitting Presidents seems pretty clear, since under the constitution the sitting President has the authority to appoint the members of the NLRB, subject only to the approval of the Senate. The lesson is simple: if the

will of the people as expressed in acts of Congress, such as the NLRA, is to be fulfilled, both the President and the Congress have constitutional duties to act responsibly in the appointment process. Political "game playing" with constitutional responsibilities eliminates effective governing. The Congress, the Founders, and the people never intended or desired that result.

In short, *New Process Steel* reaffirmed the basic truth that worker rights in the United States are legal rights – not natural or inherent human rights. Legal rights are political. The existence, protection and expansion of those rights, then, **require** worker political education, worker voter participation and direct worker involvement in seeking office and governing. The evident alternative is that workers remain victims of political "game playing."

Federal Statutes and Regulations[1]

Before analyzing the cases brought before the courts and the Board, it is important to recognize that President Obama and the Democrats in Congress finally passed the *Patient Protection and Affordable Care Act*, which was signed into law by President Obama on March 23, 2010. At the outset, it is important to recognize a couple of items. Foremost, the reform legislation is large and complex, and it results from an unusual legislative process due to the Democrats' loss of Senator Ted Kennedy's seat in Massachusetts. As a result, the bill itself contains drafting errors, including conflicting provisions. Additionally, as a consequence of the way in which the bill was passed, it may take several years and additional corrective legislation for the law to be fully implemented. Finally, at this point, without further regulatory guidance, it is unclear as to how effective the law will be in terms of decreasing cost and expanding coverage. And, it is also unclear what the overall effect of the law will be at the bargaining table. Nonetheless, below are highlights of the new health care statute.

The health care statute makes a distinction between "new plans" and "grandfathered plans." A "grandfathered plan" is an employer-sponsored plan that was in existence on the date of enactment of the legislation. "Grandfathered plans" are exempt from many, but not all, of the coverage reform provisions of the bill. And, it is not clear at this point how a "grandfathered plan" loses its status. It is clear, however, that a plan's "grandfathered" status will not be affected by the renewal of an individual's coverage, the enrollment of family members, or the enrollment of new employees.

The following provisions apply to all employer-sponsored health plans, including grandfathered plans, as of the latter of either the first plan year beginning after September 23, 2010 (i.e. January 1, 2011 for a calendar year plan), or if the plan is maintained pursuant to one or more collective bargaining agreements ratified before March 23, 2010, the first plan year following the date on which the last agreement terminates:

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[1] The materials contained in this year's legal report regarding the *Patient Protection and Affordable Care Act* were gathered from the materials presented at this past year's AFL-CIO's Lawyer's Coordinating Committee Attorneys' conference in Washington, D.C., June 2-4, 2010. We thank our fellow LCC members who helped compile this material.

- Prohibition on lifetime dollar limits on "essential benefits" of any covered individual.
- Restriction on the annual dollar limits on the "essential benefits" of any covered individual. (The Department of Health and Human Services (HHS) will set the restrictions.)
- Requirement that plans provide dependent care coverage of children of participants until the children reach age twenty-six (26), even if the child is married and not a dependent, unless the child may be covered by another employer-sponsored plan (i.e. the child's employer's plan).
- Adult children, who are currently without coverage due to age, must be permitted to rejoin coverage until age twenty-six (26).
- Prohibition on pre-existing condition exclusions for individuals under the age of nineteen (19). This provision applies to adults beginning in 2014.
- Limitations on the right of insurance companies to rescind coverage of individuals and requires advance notice of cancellation due to non-payment of premiums or termination of the plan.

There are also several provisions relating to all group health plans, including grandfathered plans which are effective at later dates. The provisions include the following:

- All group health plans must comply with HHS regulations regarding uniform plan summaries and explanations of plan terms and conditions. This provision becomes effective March 2012.
- All plans will be prohibited from placing annual dollar limits on "essential benefits" for plan years beginning on or after January 1, 2014.
- Beginning on January 1, 2014, there will be no waiting periods in excess of ninety (90) days for coverage.
- On January 1, 2014, health plans will no longer be able to discriminate against individuals based on pre-existing conditions.
- Insurers of group health plans will be required to report to HHS on how premium income is expended and pay rebates to premium-payors if the insurers spend more than twenty (20) percent of premium revenue on non-claim costs.

In addition to the provisions relating to all group health plans, there are several provisions that apply generally to all group health plans, but are not applicable to grandfathered plans. These provisions include the following:

- A prohibition on plans imposing cost-sharing requirements in excess of certain maximum amounts (HSA limits, which are $5,950/$11,900 for 2010). This provision becomes effective in 2014.
- Mandatory internal and external appeals processes for denied claims that meet HHS standards, including a provision for hearings and independent review.

This provision becomes effective after September 23, 2010, with the start of the new plan year or after the end of the collectively bargained plan.

- Coverage of certain preventative health services without any deductible or other cost sharing. This provision becomes effective after September 23, 2010, with the start of the new plan year, or after the end of the collectively bargained plan.
- Patient protections regarding preferred provider network operations and coverage of emergency services. This provision becomes effective after September 23, 2010, with the start of the new plan yea,r or after the end of the collectively bargained plan.
- Reporting and disclosure requirements regarding, for example, claims payment policies and practices, financial condition, enrollment data, claims denials, provider networks, participant rights, and any other information per HHS. This provision becomes effective after September 23, 2010, with the start of the new plan year, or after the end of the collectively bargained plan.
- Reporting to HHS on plan activities regarding health outcomes, prevention of hospital readmissions, patient safety, reduction of medical errors, and wellness programs. This provision becomes effective by March 2012.
- Restrictions based on discrimination based on health status. The provision becomes effective in 2014.
- Coverage of individuals in approved clinical trials. This provision becomes effective in 2014.
- No discrimination against providers' participation in preferred networks. This provision becomes effective after September 23, 2010, with the start of the new plan year or after the end of the collectively bargained plan.

In November 1945, after only seven months in office, President Truman sent a message to Congress proposing a new national health care plan. Every President since President Truman attempted to enact comprehensive national health care reform. It took nearly sixty-five years for national health care reform to be passed by Congress. The reform that was finally enacted is vast and complicated, but it is a much needed step in the right direction.

The United States Supreme Court

The United States Supreme Court handed down three rulings of interest to the labor movement. *New Process Steel v. NLRB*, 130 S.Ct. 2635 (2010), dealt with the issue of the power of the two-person NLRB to issue decisions. The second case, *Citizens United v. FEC*, 130 S.Ct. 876 (2010), involved the ability of Congress to implement and control campaign spending. Finally, in *Ricci v. DeStefano*, 129 S.Ct. 2658 (2009), the Court evaluated the decision of the City of New Haven, Connecticut to invalidate results of a test administered to its firefighters.

As noted in the Introduction, the United States Supreme Court issued a potentially devastating decision to the NLRB in *New Process Steel v. NLRB*, 130 S.Ct. 2635

(2010). The central issue before the Court was whether, following a delegation of the Board's powers to a three-member group, two members may continue to exercise that delegated authority once the Board's membership fell to two members. In a 5-4 decision, written by Justice Stevens, the Court held that the Board could not exercise such power. The majority's decision rests largely on a textual analysis of the statute.

The dissent, authored by Justice Kennedy, took issue with the majority's textual analysis of the statute. In doing so, Justice Kennedy noted that the majority's decision could leave the Board ineffective for substantial periods of time. Specifically, Justice Kennedy stated, "The Court's revisions leave the Board defunct for extended periods of time, a result that Congress surely did not intend. The Court's assurance that its interpretation is designed to give practical effect to the statute should bring it to the opposite result from the one it reaches." Indeed, it is not hard for one to image a Republican President failing to appoint members to the Board in order to ensure that the Board is unable to act.

In another decision with potential far-reaching ramifications, the Supreme Court in *Citizens United v. FEC*, 130 S.Ct. 876 (2010), held that the First Amendment prevents governmental restrictions on corporations, non-profit groups, and labor unions spending their regular treasury funds for independent public communications that "expressly advocate" (i.e. "vote for" or "vote against" messages) the election or defeat of particular federal candidates.[2]

Prior to the Supreme Court's decision, corporations, non-profit groups, and unions could spend their treasury funds for independent public communications that said anything, except express advocacy, including hard-hitting election-related messages. Additionally, prior to the decision, corporations, non-profit groups, and unions could not use either express advocacy or any other message that could be interpreted as advocating the election or defeat of a specific federal candidate thirty days prior to a federal primary and sixty days prior to a general election. Following the Supreme Court's decision, these restrictions no longer exist.

While the Supreme Court's ruling will have a significant impact, there are several areas of election law that were not disturbed.[3] First, federal and state regulations placed on contributions to candidates and political parties were not affected by the decision. As a result, corporations, unions, and advocacy groups must continue to rely on their federal or other voluntary PACs alone to contribute to candidates and parties. Second, restrictions placed on contributions to and by federal PACs that contribute to candidates and parties are not affected by the decision. The impact, however, on federal PACs that only undertake independent expenditures is not clear. Third, if a group coordinates its public electoral communications with a federal candidate or political party, the coordination is treated as an in-kind contribution to that candidate or party. The Court's ruling does not affect this rule,

2 Contributions to candidates and political parties were not at issue in the case. They continue to be illegal, making them a criminal offense.

3 The list compiled in the Legal Report is not exhaustive, and it is only intended to highlight areas that were not significantly impacted or disturbed.

and therefore, because contribution rules also remain intact, such coordination by unions, corporations, and other groups remains unlawful. Fourth, the Court upheld current federal requirements that anyone who spends for either express-advocacy independent expenditures or broadcast "electioneering communications" must promptly file FEC reports that itemize their spending and list who contributed for that purpose. Finally, the Court's decision also upheld the current federal requirement that identifies the corporation, union, or advocacy group on "electioneering communications," and the law continues to require such groups to state who paid for the communications and state that no candidate authorized the expenditure.

Succinctly put, the rules set out in the Iowa Federation of Labor's Political Action Update continue to be the law. The Supreme Court's ruling ***did not*** authorize local unions (or corporations) to give anything of value from the union's general funds or assets to a candidate for federal office.

The Court's decision in *Citizens United* was an obvious blow to the idea of fair elections in this country. While the Court's decision lifted requirements placed upon the labor movement, the decision also opened the door to significant spending by Corporate America. In a rare public rebuke of the Supreme Court, President Obama stated his open opposition to the Court's finding in his State of the Union Address. Hopefully, with President Obama taking the lead, Congress will soon revisit the issue of election spending and address the Court's decision.

In *Ricci v. DeStefano*, 129 S.Ct. 2658 (2009), the City of New Haven, Connecticut invalidated the results of its fire department promotion test because none of the African-American firefighters, who had passed the exam, scored high enough to be promoted. In turn, eighteen white and Hispanic firefighters sued the City, and in doing so, contended that the City, by denying their promotions, had discriminated against them on the basis of race.

The Supreme Court, in a 5-4 decision, held that the City's refusal to certify the test results violated the prohibition against disparate treatment under Title VII of the Civil Rights Act. In reaching its decision, the Court held that the City's race-based action, which eliminated the entire exam process, was impermissible under Title VII unless the City could demonstrate a strong basis in evidence that had it not taken such action it would have been liable under the disparate-impact statute. As such, the Court found that such actions, such as the City's action, is only constitutional when there is a "strong basis in evidence" that the remedial actions were necessary.

In dissent, Justice Ginsberg, who was joined by Justice Stevens, Justice Souter, and Justice Breyer disagreed with the majority. In doing so, the minority stated that the majority's decision was in essence requiring the City to establish "a provable, actual violation" against itself.

Taken together, a close examination of the rulings by the United States Supreme Court over the course of the past year leave the labor movement with a lot to be desired. In *New Process Steel and Citizens United*, the Court continued with its decisions

aiding Corporate America. And, in *Ricci*, the Court, as it had done in the *Ledbetter* decision, has made it harder to eradicate discrimination in the workplace.

The Lower Courts

Over the course of the last year, the United States Courts of Appeals have issued several decisions regarding a variety of issues of interest to the labor movement. Due to the Court's decision in *New Process Steel*, the cases of interest to the labor movement involve decisions other than those directly related to the Board.

In *Lytes v. D.C. Water & Sewer Authority*, 572 F.3d 936, the United States Court of Appeals for the First Circuit examined the question of whether the ADA Amendments of 2008 applied retroactively. Mr. Lytes was a plant operator for the D.C. Water and Sewer Authority (Authority). In May 2000, Mr. Lytes was diagnosed with chronic degenerative disc disease. By December 2003, the Authority informed Mr. Lytes that he was medically disqualified from returning to the plant as a plant operator, and further, he had sixty days to find a suitable position with the Authority. When Mr. Lytes was unable to find a suitable position, the Authority discharged him from his employment.

In turn, Mr. Lytes filed suit. Mr. Lytes alleged that he was disabled and was not afforded a reasonable accommodation. The district court granted summary motion to the Authority. On appeal, the First Circuit upheld the district court's ruling, and in doing so, the First Circuit held that even the ADA Amendments of 2008 were enacted to "reinstate a broad scope of protection under the ADA," those amendments do not apply retroactively. Under the First Circuit's decision, the ADA Amendments of 2008 apply only to claims arising on or before the effective date of January 1, 2009.

Harrison v. Benchmark Elect. Huntsville, Inc., 593 F.3d 1206 (2010) dealt with the ability of employers to make medical inquiries under the ADA. In November 2005, Aeroteck, a company that places temporary workers at the Company, assigned Mr. Harrison to a position as a "debug tech." Mr. Harrison's responsibilities included identifying problems with, repairing, and testing electronic boards. Mr. Harrison suffers from epilepsy, which is controlled with medication. When Mr. Harrison commenced his employment with the Company, the Company had a practice of screening temporary employees for permanent employment. As part of the screening, the potential employees submit an application and are given a background check and drug screen. Mr. Harrison submitted for permanent employment and was given a drug screen. The drug screen came back positive as a result of the medications used by Mr. Harrison to control his epilepsy. In response, Mr. Harrison revealed to the Company that he had epilepsy and the positive drug test was a result of his medication for his condition. Thereafter, the Company, which prior to the drug test was set to hire Mr. Harrison, told Aeroteck not to return Mr. Harrison to work with the Company.

Mr. Harrison filed suit under the ADA based on the Company's failure to hire him. In his suit, Mr. Harrison claimed that (1) the Company had engaged in an improper medical inquiry; (2) he was not hired due to a perceived disability; and (3) he was terminated

due to a perceived disability. The district court granted the Company's motion that it was entitled to judgment as a matter of law. Mr. Harrison appealed. The Eleventh Circuit reversed the lower court's ruling. In doing so, the Eleventh Circuit held that a job applicant can sue an employer for making prohibited medical inquiries during the "pre-offer" stage, regardless of whether the applicant is disabled under the ADA. Further, in its decision, the Eleventh Circuit specifically recognized that Section 12111(d) of the ADA's medical inquiry section, creates a private right of action for any violation of its restrictions, regardless of the plaintiff's disability status.

In *Kodish v. Oakbrook Terrace Fire Dept. Dist.*, 604 F.3d 490 (2010), the United States Court of Appeals for the Seventh Circuit examined whether a firefighter, who had brought a § 1983 action against a municipal fire department, fire chief, and members of the department's board of trustees had been terminated for engaging in protected activity. Mr. Brian Kodish was a firefighter who worked for the Oakbrook Terrace, Illinois fire department. Mr. Kodish was forced to resign after he expressed his pro-union views to the fire chief. In response, Mr. Kodish filed suit.

The district court ruled for Oakbrook Terrace finding that Mr. Kodish's employment was not protected because he was a probationary employee, and there was a lack of proof that the fire chief exhibited anti-union views or that Mr. Kodish was discharged for expressing his pro-union views. The Seventh Circuit reversed the district court's decision. In doing so, the Seventh Circuit noted the First Amendment protects a wide range of statements advocating for a union. Additionally, the Seventh Circuit found direct evidence that the fire chief had communicated to Mr. Kodish that he did not care for Mr. Kodish's protected pro-union speech and the trustees solely relied on the chief's views when the decision was made to terminate Mr. Kodish.

DeFreitas v. Horizon Investment Management Corp., 577 F.3d 1151 (2009) dealt with the employee rights under the Family and Medical Leave Act (FMLA). Ms. Nydia DeFreitas worked for the Company as a manager of apartments in North Ogden, Utah. During her tenure with the Company, Ms. DeFreitas had been recognized as being a good employee. In November 2005, Ms. DeFreitas informed her employer that she needed a hysterectomy and would have to take six weeks of leave. Ms. DeFreitas' surgery occurred on February 15, 2006, and her physician instructed her to take six weeks of bed rest and not to return to work. During her leave, Ms. DeFreitas spoke with the Company on a frequent basis, but during one conversation, her supervisor indicated concern about the six-week time frame. On March 10, 2006, the Company discharged Ms. DeFreitas.

In response, Ms. DeFreitas filed suit claiming the Company had discharged her in violation of the FMLA after she asked for six weeks to recover from a hysterectomy. The Tenth Circuit Court of Appeals denied the Company's motion for summary judgment. The Tenth Circuit's decision was based in part on its response to the Company's alternative ground for terminating Ms. DeFreitas, namely, missing work. In response, the Tenth Circuit noted, "Indeed, the FMLA was enacted because employers had found it in their economic self-interest to fire employees who missed too much work for medical care or other reasons

now addressed by the FMLA." The Tenth Circuit continued, "It would be eminently reasonable to believe that an employer who was ignorant of the FMLA- as Mr. Terry admitted he was before Ms. DeFreitas complained of her firing-would engage in the very practice that the FMLA was enacted to prevent."

Finally, in *Bamonte v. Mesa*, 598 F.3d 1217 (2010), the Ninth Circuit Court of Appeals examined the issue of whether police officers were entitled to compensation for donning and doffing their uniforms and accompanying gear under the Fair Labor Standards Act (FLSA). The Ninth Circuit affirmed the district court's ruling that municipal police officers were not entitled to such compensation because the time spent donning and doffing their uniforms and protective gear could have been done at home.

The officers had argued that the uniforms and gear promoted officer and public safety in furtherance of law enforcement goals. The officers also contended it was "preferable" to don and doff at the police station due to various considerations, including: (1) the risk of loss or theft of uniforms and gear from their homes; (2) potential access to gear by family members and guests; (3) safety concerns with performing firearm checks at home; and (4) the increased risk of being identified as police officers while off-duty.

The Ninth Circuit analyzed the issue under a three step analysis. The first stage addressed whether the activity constituted "work;" the second stage addressed whether the activity was an "integral and indispensable" duty; and the third stage addressed whether the activity was *de minimis*. With respect to the first stage, the Ninth Circuit found that donning and doffing the gear may be considered "work." The Ninth Circuit, however, after considering the second stage of whether the donning and doffing was an "integral and indispensable" duty, ruled it was not, reasoning that it was beneficial solely for the employees, not for the employer or even their mutual benefit as required under precedent.

National Labor Relations Board

As noted above, the Supreme Court's decision in *New Process Steel* invalidated all of the cases decided by Board Chairperson, Wilma Liebman, and Board Member Peter Schaumber, who had been issuing decisions as a two-person Board for twenty-seven months. During the twenty-seven month period, Chairperson Liebman and Board Member Schaumber decided over 600 cases on which both were in agreement, and the cases, where an agreement could not be reached, were held for additional Board members.

When the Supreme Court issued its decision on June 17, 2010, there were ninety-six of the two-member decisions pending on appeal before the federal court – six before the Supreme Court and ninety before the Courts of Appeal. In response to the Supreme Court's decision, the Board is seeking to have each of the cases remanded to the Board for further consideration. Each of the remanded cases will be considered by a three-member panel of the Board, which will include Chairperson Liebman and Board Member Schaumber, which most likely means that the Board will reaffirm its earlier decisions.

Finally, it is worth noting that for the first time since December 2007 the Board has all five members. In addition to Chairperson Liebman and Board Member Schaumber, President Obama made recess appointments for Board Member Mark Pearce and Board Member Craig Becker. Subsequently, the Senate confirmed Board Member Pearce and also confirmed Board Member Brian Hayes.

Iowa Law

The 2010 Iowa Legislative Session continued a string of disappointments to organized labor as the Iowa Legislature failed to pass any significant legislation aimed at helping the labor movement.

There were, however, several changes made to Chapter 20 of the Iowa Code. Primarily, the first notable change to Chapter 20 was the elimination of factfinding as a step in the statutory impasse procedure. Under the new law, the parties may proceed to arbitration once the parties reach an impasse. Additionally, Chapter 20's requirement that a tripartite arbitration panel hear and rule on impasse items has been eliminated. The revision to the statute now provides for a single arbitrator to conduct hearings and rule on the parties' unresolved issue. The parties, however, with respect to both factfinding and the tripartite arbitration panel, may continue to utilize such resources pursuant to an independent impasse agreement.

Finally, there were three other noteworthy changes made to the statute. First, the requirement that alleged prohibited conduct by either party be willful was eliminated. Second, PERB now has the express authority to interpret the provisions of Chapter 20 and administer the statute. And, third, the statute now contains provisions allowing for the implementation of impasse procedures involving a public employer that is not subject to budget certification requirements.

In addition to the disappointment at the legislative level, the Iowa Supreme Court also issued an adverse decision to the labor movement. In *Clay County, Iowa v. Public Emp. Relations Bd. and IUOE, Local 234*, __ N.W.2d __, 2010 WL 2218608 (2010), the Iowa Supreme Court dealt with the question of whether Iowa's Public Employment Relations Act (PERA) protects a public employee's activity in negotiating wages for himself and others with a nonpublic employer. The Court held that the PERA does not afford such protection.

Mr. James Sikora was a full-time equipment operator for Clay County from October 19, 1984 until October 29, 2004. During his employment, the IUOE, Local 234 (Union) was the collective bargaining representative for a bargaining unit that included Mr. Sikora's classification. In addition to his full-time job, Mr. Sikora also worked for the Clay County Fair Board, a private non-profit corporation, part-time. Clay County and the Clay County Fair Board contracted with each other so that Clay County provided some services to the Clay County Fair Board. In 2003 and 2004, Mr. Sikora began engaging in requests for a raise from the Clay County Fair Board. In doing so, Mr. Sikora made some statements, with respect to his full-time employer, to the Clay County Fair Board. Mr. Sikora's statements

were relayed to Clay County, and based upon these statements, Mr. Sikora was discharged from his employment.

The Union filed a prohibited practice complaint with the Iowa Public Employment Relations Board (PERB) alleging that Mr. Sikora had been discharged for engaging in "union activities and other concerted activities for mutual aid and [protection] not prohibited by law." Based upon the evidence, the administrative law judge concluded that Mr. Sikora had been discharged for engaging in protected concerted activity. PERB, relying on different reasoning, also found that Mr. Sikora had been discharged for engaging in protected concerted activity – e.g. negotiating for higher wages with the Clay County Fair Board. The district court affirmed PERB's decision.

The Iowa Supreme Court reversed. In doing so, the Court looked specifically at Iowa Code Section 20.8(3) and whether the rights contained in that section protected Mr. Sikora in negotiating wages for himself and other employees working for the fair. Despite federal precedent, extending the protection of the NLRA to protected activities outside the direct-employer relationship, the Court held that PERA does not protect a public employee's activities with another nonpublic employer. The Court based its decision on the following: (1) the purposes of the NLRA and PERA are different; (2) PERA's protection is not as expansive as the NLRA's protections; and (3) the Court could not see how allowing a public employee to negotiate a contract for nonpublic employees promotes harmonious and cooperative relationships between the government and its employees.

Conclusion

As in the past, the decisions cited in this report turn upon the particular facts of each case. In turn, if your local union is involved in a matter that seems similar to a case cited in this summary, you should consult legal counsel to determine whether the decision applies to your situation.