

is seeking to fill his budget holes by contracting out county services to private vendors. It is happening in every state and at the federal level. According to Mr. Finland, the spread of the privatization movement is grounded in the fundamental belief that market competition in the private sector is a more efficient way to provide these services. The newly hired contract employees work for less wages, lack health benefits and lack pensions. Mr. Finland's view is that our government leaders are leading the workforce in a downward spiral.

He notes that because of privatization, there have been valid concerns about the quality of public services. The newly hired contract employees who are paid by private contractors frequently lack adequate training, they lack information, and they may need additional supervisory monitoring by highly trained county workers.

In Suffolk County, workers are hired from NYS Civil Service lists that attest to their skill level. Once they are on the job, there are periods of extensive training and lengthy probationary periods and county, state and federal regulations must be fully understood before the employee becomes permanent. If a newly hired worker does not meet the county's requirements, the worker is terminated before she/he concludes probation.

Empirical studies do not provide clear evidence on the costs and benefits of privatizing public services. An untrained work force unfamiliar with the duties and responsibilities of specific job titles ends up costing the county more money.

Mr. Finland states that we need a county that is run efficiently by well-trained workers. He concluded his talk with a description of the many different types of work that county employees do in a selfless manner. His view is that the 1.5 million residents of the county benefit greatly from the dedication of these workers.

You can write. I can edit and publish. Let's get together. Have you had a case or incident in your practice that would provide insight to other practitioners? Have you read a book or article in a professional journal that you believe others might learn from and enjoy reading? Let's get together. Send me your manuscript

ANNOUNCEMENTS, NOTICES

If you have an announcement or job posting that you would like to have published in our newsletter, send it for consideration to the editor at:
 <jerryarb@verizon.net>

<p>The Long Island LERA Newsletter is a quarterly publication of the Long Island chapter of the Labor and Employment Relations Association.</p> <table style="width: 100%; border: none;"> <tr><td style="padding: 2px;">President</td><td style="padding: 2px;">Amanda Barker</td></tr> <tr><td style="padding: 2px;">President Elect</td><td style="padding: 2px;">Thomas B. Wassel</td></tr> <tr><td style="padding: 2px;">Past President</td><td style="padding: 2px;">Ernesto Mattace, Jr.</td></tr> <tr><td style="padding: 2px;">1st Vice President</td><td style="padding: 2px;">Elizabeth Pearsall</td></tr> <tr><td style="padding: 2px;">2nd Vice President</td><td style="padding: 2px;">Paula Clarity</td></tr> <tr><td style="padding: 2px;">Secretary</td><td style="padding: 2px;">Jeffrey Naness</td></tr> <tr><td style="padding: 2px;">Treasurer</td><td style="padding: 2px;">Eugene S. Ginsberg</td></tr> <tr><td style="padding: 2px;">Newsletter Editor</td><td style="padding: 2px;">Gerald H. Grayson</td></tr> </table> <p>Notices of address change should be sent to Membership Chairman, Thomas B. Wassel <twassel@cullenanddykman.com>. Inquiries about this publication, as well as submissions, etc., should be sent to Jerry Grayson at <jerryarb@verizon.net>.</p>	President	Amanda Barker	President Elect	Thomas B. Wassel	Past President	Ernesto Mattace, Jr.	1st Vice President	Elizabeth Pearsall	2nd Vice President	Paula Clarity	Secretary	Jeffrey Naness	Treasurer	Eugene S. Ginsberg	Newsletter Editor	Gerald H. Grayson	<p>LI LERA 43 Northcote Drive Melville, NY 11747-3924</p>
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Long Island Chapter

Labor and Employment Relations Association

Newsletter

ADVANCING WORKPLACE RELATIONS



Fall 2013

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PRESIDENT'S PERSPECTIVE:
Amanda Barker, President

Guest Columnist-Gerald Grayson

Perhaps the most important government agency to the members of LERA is the NLRB. This agency, founded during the New Deal, has been the institution where many practitioners in our field have been trained and worked and where many of the most important decisions regarding the relationship between workers and employers have been handed down and, for better or worse, have affected our members.



This past summer, after many years, the NLRB was reconstituted and now is composed of its full complement of five members. It marks the first time in a decade that all five board seats are filled with members who have been confirmed by the Senate, which eliminates a variety of questions over the past few years about the board's legitimacy and ability to make decisions.

Board Chairman Mark Pearce has said a fully confirmed board "...will revitalize our commitment to protect the rights of American employers and employees under the National Labor Relations Act..." Board members are nominated by the president, and tradition holds that members of the president's party get three of the board's five seats.

For their part, the board's two new Democrats—Nancy Schiffer and Kent Hirozawa— have told lawmakers they'll be neutral when approaching decisions. The board also has two new Republicans: Harry Johnson III and Philip Miscimarra.

Quorum Issues

From December 2007 until June 2010, the five-person Board had only two members, creating a legal controversy. Three members' terms expired in December 2007, leaving the NLRB with just two members—Chair Wilma B. Liebman and Member Peter Schaumber. President George W. Bush refused to make some nominations to the Board and

Upcoming Chapter Meetings

Wed., Sept. 25, 2013
Bonwit Inn, Commack
Speaker: Jeffrey Zaino,
Vice Pres., AAA

Tues., Dec. 3, 2013 (note day and date change)
Nassau County Bar Assoc.
Speaker: Richard Adelman,
Arbitrator

Senate Democrats refused to confirm those he did. On December 28, 2007, just before the Board lost its quorum, the four members agreed to delegate their authority to a three-person panel (as provided for by the National Labor Relations Act.) Only two of the members of the panel (Liebman and Schaumber) would remain on the Board, but the Board concluded that these two members constituted a quorum of the three-person panel and thus could make decisions on behalf of the entire Board. Liebman and Schaumber informally agreed to decide only those cases which were non-controversial (in their view) and on which they could agree, and issued more than 400 decisions between January 2008 and September 2009.

Meanwhile, the U.S. Courts of Appeals for the First, Second and Seventh Circuits upheld the two-member NLRB's authority to decide cases, while the D.C. Circuit Court of Appeals did not. In September 2009, the Justice Department asked the U.S. Supreme Court to immediately hear arguments concerning the dispute, given the high stakes involved. The Supreme Court granted certiorari in October and agreed to decide the issue. In June 2010, the Supreme Court ruled in *New Process Steel, L.P. v. NLRB* that the two-member Board had no authority to issue decisions, invalidating the rulings made by Liebman and Schaumber. The existence of

a legitimate quorum on the NLRB came into question again in January 2013, when the District of Columbia Court of Appeals ruled that President Obama had “violated the Constitution when he bypassed the Senate to fill three board vacancies.”

Board Members

In April 2009, President Obama nominated Craig Becker (Associate General Counsel of the Service Employees International Union), Mark Gaston Pearce (a member of the Industrial Board of Appeals, an agency of the New York State Department of Labor), and Brian Hayes (Republican Labor Policy Director for the Senate Committee on Health, Education, Labor and Pensions) to fill the three empty seats on the NLRB. Becker's nomination appeared to fail on February 8, 2010, after Republican Senators (led by John McCain) threatened to filibuster his nomination. President Obama said he would consider making recess appointments to the NLRB due to the Senate's failure to move on any of the three nominations. On March 27, 2010 Obama recess appointed Becker and Pearce. On June 22, 2010, a voice vote in the Senate confirmed Pearce to a full term, allowing him to serve until August 27, 2013. The same day, the Senate confirmed Republican nominee Brian Hayes of Massachusetts by voice vote. Hayes' term ended on December 16, 2012. Becker's term, as a recess appointee, ended on December 31, 2011. Effective August 28, 2011, Pearce was named chairman to replace Democrat Wilma Liebman, whose term had expired. On January 4, 2012, Obama announced recess appointments to three seats on the board: Sharon Block, Terence F. Flynn, and Richard Griffin. The appointments were criticized by Republicans, including the House Speaker, John Boehner, as unconstitutional and “... a brazen attempt to undercut the role of the Senate to advise and consent the executive branch on appointments.” Although made as recess appointments, critics questioned their legality, arguing that Congress had not officially been in recess as pro forma sessions had been held. Former U.S. attorney general Edwin Meese stated that, in his opinion, since the appointments were made when the Senate was “demonstrably not in recess” they represented “a constitutional abuse of a high order.” On January 12, 2012 the U.S. Justice Department released a memo stating that appointments made during pro forma sessions are supported by the Constitution and precedent. On January 25, 2013, a panel of the U.S. Court of Appeals for the District of Columbia Circuit ruled that President Obama's recess appointments were invalid, as they were not made during an intersession recess of the Senate. It further concluded that the Recess Appointments Clause only permitted the President to fill a vacancy if it arose during an intersession recess of the Senate, and the President moved to fill it during the same recess. At the Obama Administration's request, the U.S. Supreme Court has agreed to hear the case, *National Labor Relations Board v. Noel Canning, No. 12-1281*.

Not once between January 2008 and mid-July 2013 did the agency have five members, and not once did it ever operate with three confirmed members. The agency's ability to operate was in serious jeopardy. On July 14, 2013, Senate Majority Leader Harry Reid threatened to exercise the “nuclear option” and allow a simple majority (rather than a supermajority) of the Senate to end a filibuster. The threat to end the filibuster's privileged position in the Senate was intended to end Republican filibustering of NLRB nominees. But on July 16, President Obama and Senate Republicans reached an agreement to end the impasse over NLRB appointees. Obama consented to withdraw the pending nominations of Sharon Block and Richard Griffin, and submit two new nominees: Nancy Schiffer, associate general counsel at the AFL-CIO, and Kent Hirozawa, chief counsel to NLRB Chairman Mark Gaston Pearce. Republicans also agreed not to oppose a fourth nominee, to be submitted in 2014.

On July 30, 2013, the Senate confirmed all five of Obama's nominees for the NLRB: Kent Hirozawa, Harry Johnson III, Philip Miscimarra, Mark Gaston Pearce, and Nancy Schiffer. Johnson and Miscimarra represent the Republican picks for the board. The vote on Pearce was to renominate him for a second five-year term on the board.

General Counsel

The General Counsel, appointed by the President to a four-year term, is independent from the Board and is responsible for the investigation and prosecution of unfair labor practice cases and for the general supervision of the NLRB field offices in the processing of cases. Lafe Solomon was named Acting General Counsel on June 21, 2010. His nomination to serve as General Counsel was sent to the U.S. Senate on January 5, 2011. Media reports on July 31, 2013, indicated that President Obama intends to withdraw Solomon's nomination in September 2013 and nominate Richard Griffin (whom he had previously nominated for the board, but whose nomination was withdrawn). Senate Republicans, the reports said, have already agreed to allow a confirmation vote on the Griffin appointment after September 1.

Solomon's authority came into question on August 13, 2013 when Judge Benjamin H. Settle for the United States District Court for the Western District of Washington denied a petition for injunctive relief, ruling that Solomon had not been properly appointed under the Federal Vacancies Reform Act of 1998 (FVRA). Even though other district courts have enforced Solomon's requests, Judge Settle's decision calls into question all of Solomon's activity since his appointment on June 21, 2010. However, Judge Settle focused on subsections (a)(1) and (2) of the FVRA while some believe Solomon's appointment is allowed under subsection (a)(3). We obviously hope that these arrangements will allow for the board to operate as it should in the future.



Michael J. Finland, V.P., of Suffolk AME receiving plaque from chapter president Amanda Barker.

Michael J. Finland, Executive Vice President of the Suffolk County AME, spoke at our chapter meeting on June 5, 2013. His topic was “Privatization.” Mr. Finland first discussed some of the legislative history regarding the right of workers to organize for the purpose of collective bargaining. In 1935 when the National Labor Relations Act (Wagner Act) was passed, only workers in the private sector were given the right to organize and bargain.

Public sector workers were not covered by this federal legislation and the prevailing theory, until about fifty years ago, was that of sovereignty. Under this theory, which prevailed for over a century, the government, as government, is sovereign. It cannot vacate or delegate its power. However, in 1954 Wisconsin adopted a public employee labor relations law covering state, county and municipal employees. Once that law was deemed to be constitutional, about 40 states have adopted provisions relating to public sector labor relations. Most of the state statutes authorizing public sector labor relations provide for exclusive bargaining representatives of the employees. The statutes generally create a Public Em-

ployee Relations Board (PERB) to administer the act and to determine representation issues and unfair labor practices. In some jurisdictions, as in Suffolk County, a local PERB was created to provide the same services.

Most public employees have taken advantage of these laws and have organized independent unions or joined existing unions to bargain with their public employer.

In recent years, however, some public officials and business owners seeking new opportunities have begun to work to eliminate public employees and privatize these jobs. In some areas, like defense, education and prisons, they have created for-profit businesses to replace either the services or the goods and services that are provided by government employees. In a period of economic decline, where politicians are seeking to avoid tax increases and still provide the essential services that government provides, they look to these private companies to replace public sector workers.

As Mr. Finland noted, privatization is not just happening in Suffolk County against its county workers and Mr. Finland's AME members, where County Executive Bellone is