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Two Models of the Right to Strike

Martin H. Malin

A very popular former U.S. president who won his office in an Electoral College landslide has stated:

> Militant tactics have no place in the functions of any organization of government employees . . . . [A] strike of public employees manifests nothing less than an intent on their part to prevent or obstruct the operations of government until their demands are satisfied. Such action, looking toward the paralysis of Government by those who have sworn to support it, is unthinkable and intolerable.[1]

That was not Ronald Reagan firing striking air traffic controllers in 1981. It was Franklin Delano Roosevelt, the same president who signed the Wagner Act declaring the federal policy of promoting collective bargaining.

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This article is based on a paper Professor Malin presented to the 39th Annual Meeting of the Association of Labor Relations Agencies.

Most states adhere to FDR's philosophy and prohibit public employee strikes. Illinois and Ohio, however, granted their public employees a right to strike. They have done this in significantly different ways. Analyzing the strike experience under their statutes will provide insight into whether granting public employees the right to strike is good policy and, if so, what is the best way to do it.

A Comparative Overview of the Illinois and Ohio Statutes

Although both Illinois and Ohio allow public employees to strike, they diverge significantly in their treatment of potential strikes. Illinois relies primarily on the threat and use of economic weapons to settle bargaining impasses. It appears to allow employer lockouts.[2] To strike, a union need only engage in mediation,[3] give notice and wait at least five days. The parties control the timing of mediation and whether they will use any other third party assistance.

The IELRA requires parties who have not reached agreement 90 days before the scheduled start of the school year to so notify the IELRB. Within 45 days of the scheduled start of the school year, the IELRB may, upon request by one party or on its own motion, invoke mediation if, after a reasonable period of negotiation, the parties have reached impasse. The IELRB must invoke mediation if the parties have not reached agreement 15 days before the scheduled start of the school year.[4] The IELRB's rules, however, permit the parties to defer selection of the mediator after the IELRB's automatic invocation of mediation by stipulating that they will not resort to economic weapons for at least ten days after a mediator is selected. At anytime, either party may withdraw the stipulation and trigger the mediator selection process.[5]

The IELRA sets five requirements for a legal strike: the employees are represented by an exclusive bargaining representative; mediation has been "used without success"; at least five days have elapsed after the union has given a notice of intent to strike to the employer, the IELRB and, if applicable, the regional school superintendent; the contract has expired; and the parties have not agreed to interest arbitration.[6]

The IPLRA's impasse provisions differ from the IELRA's in several

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significant respects. First, the IPLRA denies the right to strike to security employees, peace officers, firefighters and fire department paramedics, who are granted the right to interest arbitration.[7] The IPLRA contains no timetables or provisions for labor board invoked mediation for employees with the right to strike. It provides five requirements for a lawful strike which are comparable to those found in the IELRA.[8]

The Ohio Public Employee Collective Bargaining Act (OPECBA) also grants employees the right to strike but differs from the Illinois statutes in many significant ways. First, it denies the right to strike to a broader class of employees: police; firefighters; deputy sheriffs; state highway patrol officers; dispatchers of police, firefighters, emergency medical and rescue units; exclusive nurses bargaining units; employees of the state schools for the blind and deaf; public retirement system employees; correctional employees; penal and mental institution guards; psychiatric attendants; and youth leaders at correctional facilities.[9] These employees have a right to interest arbitration.

Ohio places such substantial restraints on the parties' use of economic weapons that one cannot say it relies on the fear of economic warfare as the primary motive to settle bargaining impasses. Rather, it relies primarily on fact-finding and public pressure to bring the parties to agreement.

The OPECBA imposes a statutory time frame on the parties' negotiations regardless of whether the employees have the right to strike. Fifty days before the expiration of a collective bargaining agreement either party may petition the Ohio State Employment Relations Board (OSERB) to intervene. Forty-five days prior to contract expiration OSERB must appoint a mediator. Thirty-one days prior to contract expiration, OSERB must appoint up to three fact finders. The fact finder or panel is required to make findings of fact and recommendations within fourteen days of appointment. The parties then have seven days to reject the recommendations by a three-fifths vote of the union's membership or the employer's legislature.[10]

The union's rejection must be by three-fifths of all its members in the bargaining unit; three-fifths of those voting will not suffice.[11] Moreover, the vote must comply with OSERB rules to constitute a valid rejection.[12] OSERB rules require a secret ballot election, with the ballots to be tallied upon the conclusion of the election.[13] If either the union or employer votes to reject the fact-finding recommendations, it must serve written notice of the vote on the other party and OSERB. Failure to serve timely notice is fatal to the rejection.[14]

OSERB must publicize the fact-finding report for seven days.[15] The union may strike seven days after OSERB publishes the fact-finding recommendations or earlier if the contract has expired,[16] provided it has given the employer and OSERB a 10-day prior written notice of intent to strike.[17] OSERB rules require that the notice specify the date on which the strike will occur.[18] OSERB, by decision, has held that the notice must specify the type of strike action that the union contemplates.[19]

The statute expressly authorizes the parties to opt out of the statutory provisions by adopting a mutually agreed-upon dispute settlement procedure (MAD). However, OSERB has held that a MAD will not be sustained if it is contrary to a compelling public policy.[20]

The Ohio statute prohibits employer lockouts or "otherwise prevent[ing] employees from performing their regularly assigned duties where an object thereof is to bring pressure on the employees or an employee organization to compromise or capitulate to the employer's terms regarding a labor relations dispute."[21] At least one management attorney has cautioned that this statutory language may prohibit employers from hiring permanent replacements and from subcontracting struck work.[22]

Strike Experience Under the Illinois and Ohio Statutes

Ohio's tight control over the right to strike appears to be preventing strikes in most instances. From April 1, 1984, when the statute took effect through May 4, 1990, there have been 82 strikes in Ohio. Table

TABLE I **Ohio Strikes April 1, 1984 - May 4, 1990[23]**

	1984	1985	1986	1987	1988	1989	1990	TOTAL
EDUCATION	3	4	9	14	9	15	4	58
CITY	0	1	1	2	0	0		4
COUNTY	1	4	2	2	3	2	2	16
TOWNSHIP	0	0	0	0	0	0		0
TRANSIT AUTHORITY	0	0	2	0	2	0		4
TOTAL	4	9	14	18	14	17	6	82

I summarizes the number of strikes by year and employer.

The post-act experience compares very favorably with an often cited estimate of 438 employee work stoppages from 1973-1980.[24] Studies and data from OSERB suggest that many potential strikes are headed off in the pre-strike procedures. The OSERB data combines strike eligible and strike prohibited employees. The procedures for strike prohibited employees are identical to those for strike eligible employees except that instead of a strike, these employees may, after rejection of the fact finder's recommendations, proceed to interest arbitration.

Except for the first year of the statute, over 75 percent of the negotiations in which mediators were appointed advanced to the next step with fact finder appointments. (See Table II.) Thus, settlement with third-party assistance is occurring primarily at the fact-finding stage. This is not surprising, in that the statute allows only 15 days for mediation before OSERB appoints a fact finder. Inevitably, the fact finder is forced to mediate.[26]

A study by Professor Calvin Sharpe of Case Western Reserve University Law School found that from 1984 to 1986, 62 percent of all negotiations in which OSERB appointed fact finders settled before hearing.[27] Of the 119 disputes involving strike eligible employees that went to fact-finding hearings, 28 settled before the fact finder's report. Another 37 accepted the fact finder's report and 54 rejected it.[28] Of those responding, 80 percent indicated that the parties used at least one-fourth of the fact finder's recommendations in their final settlement.[29]

Settlements may occur during and after fact-finding in several ways. The parties may have continued negotiations and would have reached settlement even if fact-finding had not been invoked. The pressure of a forthcoming fact-finding hearing and mediation by the fact finder may also induce settlement.[30] The fact-finding hearing itself may clarify the issues and aid in settlement. The parties may agree to accept the fact finder's recommendation or they may use it as a basis for further negotiation leading to settlement. It is apparent that all of these happen under the Ohio procedures.

Settlements occur in one other way under the Ohio fact-finding procedures. One study found that 46 percent of the fact finder recommendations which were accepted were actually "deemed accepted."[31] The strict procedural requirements for rejecting a fact finder's report means that many are deemed accepted even if the parties are not satisfied. This is particularly true for unions. It is more difficult for a union to mobilize a rejection vote by three-fifths of its membership than for an employer to mobilize a three-fifths vote of its legislature. One study reported that employer rejections outnumbered union rejections by more than two to one.[32] During this same period, two labor educators studied the fact-finding reports and concluded that unions were not faring very well.[33] Indeed, a survey of employers by University of Toledo Professor Ron Portaro found that they overwhelmingly supported the three-fifths rule, viewing it as one of the few areas in the impasse procedures where management had an advantage.[34]

The strict control over economic weapons exemplified by the Ohio impasse procedures clearly has resulted in far fewer strikes than occurred prior to the statute. The Ohio experience raises the question: "Is such strict control of the strike weapon necessary?" To examine this question, we turn to the relatively laissez-faire approach to economic weapons found in Illinois.

From 1984 - 1990, there were only five strikes under the IPLRA, one of which was an illegal, but unchallenged, job action by Maywood

TABLE II **OSERB Bargaining Data[25]**

	1984	1985	1986	1987	1988	1989
Notices to Negotiate	994	1,151	1,233	1,254	1,262	1,237
Mediator Appointments	364	573	672	667	733	631
Fact Finder Appointments	63	445	529	577	631	540
Conciliator Appointments	9	43	64	73	39	43
Cases with Fact-Finding Involvement	N/A	N/A	240	204	217	212
Strikes	4	8	14	18	14	17

police officers. Table III, derived from IELRB annual reports, lists strikes under the IELRA.

The available pre-Act data is not completely comparable but does give some basis for assessing the impact of legalization on the incidence of strikes. Pre-Act data comes from the Illinois State Board of Education and covers only teacher strikes in elementary and secondary education.

During the first year of the IELRA, 776 K-12 school districts engaged in teacher bargaining, representing a 53 percent increase over the pre-Act years.[35] The increase does not include the non-teaching staff units and higher education units. During the nine years preceding the statute, K-12 teachers averaged 24.56 strikes per year. This ranged from a high of 40 strikes in 1979-80 to a low of 15 in 1983-84.[36] The 35 strikes experienced in 1984-85 is roughly comparable, given the increase in bargaining.

Since the first year of the IELRA, strike activity has dropped dramatically, hitting a low of six in the 1987-88 and 1988-89 school years, (See Table III.) even though the number of bargaining units has increased substantially.[37] The experience under the Illinois statutes suggests that a relatively unrestrained right to strike, subject only to pre-strike mediation, substantially reduces strike activity. A lawful, credible strike threat is the great incentive for peaceful settlement. This is evident in the ratio of strike notices to actual strikes under the IELRA. Depending on the year, it ranges from 5.73:1 to 3.25:1, demonstrating that the strike notice itself dramatically pressures settlement. (See Table III.)

The Illinois and Ohio experiences suggest that legalizing strikes does not increase and may lead to fewer strikes. The apparent paradox is not too difficult to explain. Prohibitions of public sector strikes establish artificial barriers, which do not prevent strikes. They do, however, divert attention from the substantive issues at the bargaining table and reduce the credibility of the strike threat. Thus, although strike prohibitions do not prevent strikes, they may inhibit bargaining.

The Illinois and Ohio experiences diverge significantly concerning strike duration. Tables IV and V present this data.

Only one out of 87 strikes under the IELRA exceeded 30 days. (See Table IV.) This was the 1986-87 Homer School District strike which consumed most of the school year. In Ohio 12 strikes, representing 14.63 percent of the total and 16 percent of the total authorized strikes, exceeded, 30 days. Almost 60 percent of Illinois strikes settled in ten days or less compared to about 35 percent of authorized Ohio strikes. (See Table V.)

Three features of the Ohio statute appear to contribute to making strikes more difficult to settle: the strict timelines, the fact finding process and the use of publicity.

The evidence indicates that the strict time lines probably undermine the use of mediation. A

TABLE III **Strikes Under the IELRA**

Year	Notices of Intent to Strike	Number of Strikes	Ratio of Notices to Strikes
1984-85	85	35	2.42:1
1985-86	57	13	4.38:1
1986-87	52	16	3.25:1
1987-88	26	6	4.33:1
1988-89	27	6	4.50:1
1989-90	63	11	5.73:1

TABLE IV **Duration of Strikes Under the IELRA**

Year	0-5 Days	6-10 Days	11-15 Days	16-20 Days	21-25 Days	26-30 Days	OVER 30	TOTAL
1984-85	6	16	8	4	1	0	0	35
1985-86	4	5	3	1	0	0	0	13
1986-87	3	2	2	3	3	2	1	16
1987-88	1	2	2	1	0	0	0	6
1988-89	0	3	2	1	0	0	0	6
1989-90	4	6	0	1	0	0	0	11
Totals	18	34	17	11	4	2	1	87
%	20.69	39.08	19.54	12.64	4.60	2.30	1.15	

mediator does not have much time to work with the parties before they proceed to the fact-finding stage. The data shows that fact finders are appointed in over three-fourths of the cases in which a mediator has been appointed. (See Table II.)

The limited time for mediation results in a large number of unresolved issues at the time of fact finder appointment.[38] It is true that the parties narrow some issues before the fact-finding hearing.[39] The appointment of a fact finder, however, signifies that the bargaining differences have escalated to the next step in a process which leads to a strike. That escalation appears to occur prematurely. Indeed, there appears to be a consensus that the timelines are unrealistic and counterproductive.[40]

The fact-finding process has certainly contributed to the settlement of many contracts without a strike. However, it is also likely that when a party rejects a fact finder's report and a strike ensues the fact-finding process adds to the difficulty of settling the strike. Parties are likely to perceive the fact finder's report in terms of whether they have won or lost. Certainly, a party that votes to reject a fact finder's report believes it has lost. The party that has not rejected it is likely to react by saying, "Why should I change anything? A neutral objective fact finder found what is right and fair." Thus, the fact-finding may serve to further polarize the parties making the impasse more difficult to settle. The polarization can be particularly acute if the party who did not reject the fact finder's report views the report as vindicating its position. For example, one commentator who has written extensively on the Ohio statute reported on a management negotiator's feelings of elation when he won the fact-finding followed by his frustration when the union rejected the report and engaged in a 17 day strike.[41] Thus, at a minimum the requirement of fact-finding injects a new issue at the bargaining table - why should we deviate from the fact finder's recommendations - which diverts attention from the settlement issues. The fact-finding also may serve to further polarize the parties and make it more difficult for the party who did not reject the fact finder's recommendation to move off its position.

The polarization and hardening of positions that results from the rejection of a fact finder's report may be exacerbated by the statutory requirement that OSERB publicize the fact finder's report. It is even more difficult for a party to back off a position upheld by the fact finder when the fact finder's report is made public.

Conclusion

The Illinois and Ohio statutes present an opportunity to evaluate the effects of granting public employees a right to strike. They also enable us to compare two models of public sector strikes: Illinois' model which gives primary control of economic weapons to the parties and Ohio which strictly controls economic weapons. Based on the available data, I suggest that granting public employees a legal right to strike does not increase the incidence of

TABLE V **Duration of Strikes in Ohio**

Year	0-5 Days	6-10 Days	11-15 Days	16-20 Days	20-25 Days	25-30 Days	Over 30 Days	Not Known	TOTAL
1984	2*	0	2	0	0	0	0	0	4
1985	2*	2	2	1	1	0	1	1	9
1986	7*	0	0	0	2	0	4	1	14
1987	7**	2	3	3	0	2	1	0	18
1988	1***	4	4	1	1	0	3	0	15
1989	6*	4	3	1	2	0	1	0	17
1990	1	1	1	0	0	0	2	1	6
Total	27	11	15	6	6	2	12	3	82
%	32.93	13.41	18.29	7.32	7.32	3.44	14.63	3.69	
Total Auth.	20	11	15	6	6	2	12	3	75
%	20.67	14.67	20	8	8	2.67	16	4	

* Including one authorized strike.
** Including two authorized strike.
*** Unauthorized strike.

strikes: instead it leads to more sophisticated bargaining and a decrease in strike activity. I also believe that the data suggests that strict procedural control of strikes does not necessarily reduce the number of strikes but does increase the difficulty of settling those strikes that do occur.

I have labelled the results of my analysis of the data as suggestions rather than firm conclusions. Further research is needed. The Illinois and Ohio experiences should be compared to those in other states which grant public employees the right to strike and experience under the statutes should be monitored further in the coming years. ■

Notes

[1]. Letter from Franklin Roosevelt to the president, Nat'l Fed'n of Federal Employees (August 16, 1937) *quoted in* Norwalk Teachers Ass'n v. Bd. of Educ., 138 Conn. 269, 273-74, 83 A.2d 482, 484 (1951).

[2] Section 14 (m) of the IPLRA, Ill. Rev. Stat. ch. 48, ¶ 1614 (m) prohibits police officers and firefighters from striking and employers from locking them out, thereby impliedly recognizing that employers may lockout other employees.

[3] There is considerable controversy over what the IELRA's requirement that mediation be used ''without success'' means. The legislative history shows an intent to rely on mediation to prevent and shorten strikes. *See* Malin, *Implementing the IELRA*, 61 *Chi. [-] Kent L. Rev.*, 101, 127 n. 106 (1985). It is clear that the statute does not require a mediator to give up before the union can strike.

[4] Ill. Rev. Stat. ch. 48, ¶ 1712.

[5] 80 Ill. Adm. Code § 1130.30(b)(2).

[6] Ill. Rev. Stat. ch. 48, ¶ 1713.

[7] Ill. Rev. Stat. ch. 48, ¶ 1614. Paramedics not employed by a fire department do have the right to strike. County of Jackson, 5 Pub. Emp. Rep. Ill. (Lab. Rel. Press) ¶ 2037 (ISLRB 1989).

[8] The IPLRA's strike requirements differ from the IELRA's in the following respects. First, the IPLRA requires that the existing contract have expired or that it not contain a no strike clause. Ill. Rev. Stat. ch. 48, ¶ 1617 (a)(2). Second, the IPLRA requires that the union have requested a mediator and that mediation have been used, but does not add the words, ''without success.'' Ill. Rev. Stat. ch. 48, ¶ 1617(a)(4). Third, the IPLRA requires that the strike notice be served only on the employer, Ill. Rev. Stat. ch. 48, ¶ 1617(a)(5), but ISLRB AND ILLRB rules require that a copy be filed with the appropriate labor board. 80 Ill. Adm. Code § 1230.180(e).

[9] Ohio Rev. Code § 4714(D)(1).

[10] Ohio Rev. Code § 4714(c).

[11] Miami University, 3 Pub. Emp. Rep. Ohio (Lab. Rel. Press) ¶ 3051 (SERB 1986).

[12] *Id.*

[13] OSERB Rules § 4117-9-05(M). The rules do not define secret ballot. It remains to be seen how closely SERB will police the elections. *Cf.* Malin, *Individual Rights Within the Union*, 249-51 (BNA 1988) (discussing secret ballot under the LMRDA).

[14] OSERB Rules §§ 4117-9-05(M), (N).

[15] Ohio Rev. Code § 4117(C)(6).

[16] Ohio Council 8, AFSCME v. Springfield Board of Parks Trustees, 43 Ohio App. 3d 26, 539 N.W.2d 175 (1988). In other units the union may initiate interest arbitration.

[17] Ohio Rev. Code § 4117(D)(2).

[18] OSERB Rules § 4117-13-01(B)(1).

[19] Fort Frye Local School District, 5 Pub. Emp. Rep. Ohio (Lab. Rel. Press) ¶ 5015 (SERB 1987).

[20] Mad River-Green Local Bd. of Educ., 5 Pub. Emp. Rep. Ohio (Lab. Rel. Press) ¶ 5695 (OSERB 1988); Vandalia-Butler City School Dist., 3 Pub. Emp. Rep. Ohio (Lab. Rel. Press) ¶ 3019 (OSERB 1986).

[21] Ohio Rev. Code § *4117.11(A)(7).*

[22] Townsend, *Some Aspects of Ohio Public Sector Collective Bargaining from an Employer's Point of View*, First Annual Labor and Employment Law Institute, University of Louisville School of Law 43, 45-46 (Dolson, ed. 1985); *see also* Wilson, *The Replacement of Lawful Economic Strikers in the Public Sector in Ohio*, 46 Ohio State L.J. 639 (1985).

[23] Data supplied by Tom Worley, OSERB.

[24] Testimony of James Monroe, Counsel to Ohio Civil Service Employees Association before the Ohio House Commerce and Labor Comm'n, June 14, 1983, *cited in* O'Reilly & Gath, *Structure and Conflicts: Ohio's Collective Bargaining Law for Public Employees*, 44 Ohio St. L.J. 891, 894; Douglas, *Introduction to Symposium: Collective Bargaining in the Public Sector with Emphasis on Ohio Public Sector Collective Bargaining*, 18 U. Tol. L. Rev. 255, 257 (1987).

[25] Data supplied by Tom Worley, OSERB.

[26] *See* Sharpe and Tawil, *Fact-Finding in Ohio: Advancing the Role of Rationality in Public Sector Collective Bargaining*, 18 U. Tol. L. Rev. 283, 306-07 (1987).

[27] *Id.* at 299.

[28] *Id.* at 302-03.

[29] *Id.* at 300 n. 111.

[30] For small- and medium-sized bargaining units, the costs of preparing for and presenting a fact-finding case are significant enough to have an impact on the parties' bargaining positions. Gerhart and Drotning, *A Six State Study of Impasse Procedures in the Public Sector, Final Report* 33 (1980).

[31] Herman and Leftwich, *Fact Finding in Ohio Public Sector Bargaining Revisted* 15 (unpublished paper reporting on findings by Public Employment Advisory Counseling Effort Commission.)

[32] *Id.*

[33] Cochrane and Pelley, *Fact-Finding in Ohio: How Are Unions Doing?*, paper presented to the 1987 Midwest-Southern Regional UCLEA Meeting, Louisville, Kentucky, December 1987.

[34] Portaro, *Public Sector Impasse Legislation: Is It Working?*, 12 Empl. Rel. L.J. 111, 124 (1986) (75.3 percent favored the three- fifths requirement); *see also* Portaro, *An Empirical Study of Ohio Impasse Resolution Procedures*, 15 J. Col. Neg. in the Pub. Sec. 153 (1986).

[35] IELRB, *Statement of Operations for the Period of January 1, 1984 through June 30, 1986*, 12.

[36] Malin, *supra* note 3 at 123, n. 95.

[37] The ILERB'S annual reports show 323 certifications through fiscal year 1989 and 39 decertification petitions.

[38] *See, e.g., Discussion: Impasse Resolution* 35 Case W. Res. L. Rev. 385 (1985) (comments of Marvin Feldman); Herman & Leftwich, *Fact-Finding Under the 1983 Ohio Public Employee Collective Bargaining Act*, Proc. 38th Ann. Mtg. Indus. Rel. Res. Ass'n 316, 320 (1985); O'Reilly, *Ohio Begins Public Sector Bargaining: ''The Best of Times'' Lies Ahead*, 35 Case W. Res. L. Rev. 426, 448 (1985). The greater the number of issues, the greater the likelihood that the fact finder's report will be rejected. Sharpe and Tawil, *supra* note 26 at 313.

[39] *See* Sharpe and Tawil, *supra* note 26 at 311.

[40] *See, e.g.*, O'Reilly, *supra* note 38 at 447; Portaro, *supra* note 34 at 122-23 (35.8 percent of surveyed employers strongly disagreed and 35.8 percent disagreed with the timeliness). *But see* Anderson, *The Ohio Bargaining Impasse Procedures: An Outsider's View*, 35 Case W. Res. L. Rev. 374, 379 (1985) (strict deadlines may be beneficial for bargaining).

[41] O'Reilly, *supra* note 38 at 450.

Recent Developments

by the Student Editorial Board

Recent Developments is a regular feature of *The Illinois Public Employee Relations Report*. It highlights recent legal developments of interest to the public employment relations community. This issue focuses on developments under the two collective bargaining statutes.

IPLRA Developments

Coverage

In *Salaried Employees of North America (SENA) v. ILLRB*, Nos. 1-88-2761 and 1- 88-2764 (Ill. App. 1990), the Illinois Appellate Court affirmed a decision of the ILLRB finding that all of the attorneys in the City of Chicago's Department of Law were excluded from IPLRA coverage because they were managers and that certain attorneys were also confidential or supervisory employees.

Relying on its decision in *Board of Regents v. IELRB*, 166 Ill. App. 3d 730, 520 N.E.2d 1150 (1988) and the Supreme Court's decision in *NLRB v. Yeshiva Univ.*, 444 U.S. 672 (1980), the court determined that the Board could reasonably rule that all of the attorneys in question fell within the managerial exclusion of the Act. The court noted that attorneys regularly shifted between tasks and divisions within the Department such that no lines could be drawn designating only certain attorneys as managerial and others as non-managerial. Thus, said the court, it appeared the efficient functioning of the Department would be destroyed by any attempt at division into union and non-union attorneys.

The court further recognized the essential functions performed by the attorneys in the City's governance and stated that the division of loyalty resulting from any unionization among attorneys would destroy their ability to perform those functions. Finally, the court noted that the confidential employee and supervisor exceptions also applied to the city employees as a result of the interchangeable roles filled by the attorneys, where any attorney may, for example, work in labor-related matters at any given time.

In *Village of Downers Grove v. Downers Grove Professional Firefighters Association, IAFF, Local 3234*, 6 PERI 2035 (ISLRB 1990), the ISLRB held that fire captains and the director of medical services (EMS) were not supervisors within the meaning of the Act. The Hearing Officer had found that the two positions were not supervisory, but that decision preceded the Illinois Supreme Court's opinion in *City of Freeport* and *Village of Wheeling v. ISLRB*, 135 Ill. 2d 499 (1990). The Board, affirmed the Hearing Officer, using the *Wheeling* criteria.

Similar to the lieutenants in *Wheeling*, the captains and the director of EMS in *Downers Grove* were responsible for the day-to-day operations at the fire station and had authority to direct and discipline their subordinates. Both evaluated their subordinates for annual pay raises. The Director of EMS was responsible for scheduling raises. The Director of EMS was responsible for scheduling paramedics and monitoring their performance. The board held that these factors could render the "nature and essence" of the captains' and director's principal work substantially different from that of their subordinates.

However, the Board did not conclusively determine the "nature and essence" of the principal work, as it found that neither the captains nor the Director of EMS exercised supervisory authority a preponderance of their work time. The Board noted that, according to *Village of Wheeling*, "an individual exercises supervisory authority a preponderance of his employment time when the most significant allotment of his time is spent exercising the supervisory functions."

The Board found that captains spent less than one hour a week on evaluations and rarely issued reprimands. The Board also noted that the captains' direction of subordinates at fire scenes was not "supervisory." In addition, there was no evidence as to how much time the captains spent observing the work performed by subordinates while on a "walking tour" of the station.

The Director of EMS evaluated paramedics only twice a year. The Director spent between four to five hours each day performing administrative functions with little contact with subordinates. In addition, the Director of EMS was supervised by a captain while performing non-paramedic work.

Duty to Bargain

In *County of Cook v. ILLRB*, No. 1-88-3146 (Ill. App. 1990), the Illinois Appellate Court reversed a Board decision finding that the termination or other change in employment of certain temporary civil service appointees based on the results of a civil service test was a mandatory subject of bargaining. The dispute arose after three individuals received temporary appointments in the newly-created position of Com-

puter Operator I at Cook County Hospital. The appointees had not taken the usual Civil Service examination because the test had not yet been prepared for the new position. The appointees all completed their probationary periods and became members of the bargaining unit.

When the tests were available, the union argued that the incumbent temporary employees should be grandfathered into the positions. The ILLRB held that the union's proposal was a mandatory subject of bargaining. The court disagreed, reasoning that Civil Service testing procedures were specifically mandated by statute. Consequently, subjecting these procedures to mandatory bargaining would violate the provisions of another law within the meaning of § 7 of the IPLRA.

In *Illinois Nurses Association (INA) v. State of Illinois, Department of Central Management Services (Department of Corrections)*, No. S-CA-90-48 (ISLRB 1990), the ISLRB held that the State failed to bargain in good faith by refusing to execute a grievance settlement. The INA and the State's Chief Labor Relations Attorney reached an agreement on a grievance. The INA asked that the Director of the Department of Corrections sign the settlement due to the Department's refusal to implement such settlements in the past. The Director refused to sign and the State suggested a return to the arbitration process.

The Board held that the INA and the State were bound by the agreement reached by the Chief Labor Relations Attorney and the INA, despite INA's request for the Director of Corrections' signature. The Board noted that the State, not the Department of Corrections, was the employer, and that, statutorily and historically, the actual authority to enter into binding agreements is vested in the Chief Labor Relations Attorney. The Board also found that during negotiations, the Chief Labor Relations Attorney was advised by the Corrections Director's agents and that the INA relied on their representations. The Board held that the parties' settlement became binding when they first reached agreement. The INA's request for the Correctional Director's signature was viewed by the Board as ''ministerial'' and that neither the INA nor the State could curtail the actual authority vested in the Chief Labor Relations Attorney.

IELRA Developments

Bargaining Units

In *Golf Elementary School District No. 67*, No. 90-UC-0009 (IELRB 1990), the IELRB held that a health care professional who was not certified could not be placed in a bargaining unit of professional employees without a unit preference vote. Although a health care professional performed many of the duties of a school nurse, she did not replace the school nurse and did not require certification. The position for school nurse remained open and a part of the professional unit. The board stated that the substantial change in job duties is the determinative factor. If at a later date the Illinois State Board of Education rules that the person holding the duties must hold a certificate, then a new unit clarification petition will be entertained.

In *Niles Township High School District 219*, No. 90-UC-0008-C (IELRB 1990), the IELRB reiterated that inclusion in a bargaining unit is not based upon the individual employee's qualifications, but upon the requirements for the position in question and the relationship of that position to the rest of the bargaining unit. Thus, an employee who held a teaching certificate would not be placed in the professional bargaining unit when she held the position of Technical Assistant—Microcomputers, a position which did not require a certificate and which had not undergone substantial changes sufficient to justify granting it professional status. The Board relied on *Thornton Township High School District No. 208*, 2 PERI 1103, (IELRB 1986) which held that where an incumbent's experience exceeds the employer's minimum requirements, the qualifications of the incumbent should not shape the requirements for the position or dictate inclusion in a specific bargaining unit. Although the incumbent held a teaching certificate, she was not considered a teacher unless actually teaching.

Election Objections

In *Decatur Federation of Teachers v. IELRB*, No. 4-89-0772 (Ill. App. 1990), the Illinois Appellate court affirmed the IELRB's order which set aside a representation election and ordered a new election held. Section 8 of the Act discusses two different standards applicable to a claim that an election was affected by improper conduct: 1) before investigating an allegation of improper conduct, the Board must find probable cause that the conduct *could have affected* the outcome of the election; and 2) before ordering a new election, the Board must find that the outcome of the election was affected by improper conduct. (Ill. Rev. Stat. 1987, ch. 48, para. 1708). The court, noting that the board in ordering a new election applied the less stringent standard applicable only to deciding whether to investigate—whether the

conduct could have affected the outcome—rather than the stricter standard applicable to ordering a new election—that the outcome was affected—determined that a correct result was reached despite this error. The court applied the private sector criteria for determining whether an election should be set aside based on the alleged deviation from scheduled voting times. These criteria are 1) whether employees were disenfranchised as a result of the deviation; and 2) whether the disenfranchisement affected the outcome of the election. In this case, where a decision is made to alter the scheduled voting times, and that decision is not precipitated by an emergency or other exigency, there is a potential for voter disenfranchisement. This decision exceeds the authority of a board agent, when there was no notice to the voters or the parties. The fact that this was an extremely close election showed that the unauthorized closure affected the outcome of the election.

Procedure

In *Charleston Community Unit School District No. 1 v. IELRB*, No. 4-89-0884, (Ill. App. 1990), the Illinois Appellate Court held that the IELRB lacked jurisdiction over unfair labor practice charges which were not filed within the six month time limitation. The court reasoned that extenuating circumstances could not create an equitable tolling of the statute of limitations because the charges are unknown to the common law and therefore the time limitation is an inherent element of the right and power of the IELRB to hear the matter. The policy behind viewing the time limitation as jurisdictional follows strong Illinois precedent that requires a uniform approach for all administrative procedures. ■

Announcements

The Report welcomes announcements of upcoming events, services and other matters of interest to the labor relations community.

The annual Kenneth M. Piper Memorial Lecture in Labor and Employment Law will be held on Tuesday, Marth 19, 1991, from 11 a.m. until 1 p.m. at IIT Chicago-Kent College of Law, 77 South Wacker Drive, Chicago. Professor Alan Hyde of Rutgers University Law School will speak on, "In Defense of Employee Ownership." A panel of three commentators will react to Professor Hyde's remarks. They are: Steven Hester of the Washington, D.C., law firm of Arnold & Porter; Professor Jonathan Macey of the University of Chicago Law School and Deborah Olson of the Detroit, Michigan, law firm of Groban, Olson & Buchmann. The program is open to the public, free of charge.

ERRATA

In Volume 7, Number 3 of *The Report* (Summer 1990), an error appeared in Cheryl Blackwell Bryson's article, "Health Care Cost Containment: Legal Guidelines under IERLA and IPLRA." The first sentence should read, "If the spiraling of health care costs persists at its alarming rate, Illinois public sector employers will continue to struggle with the dilemma of how to provide quality health care programs for their employees with scarcer dollars." The staff of *The Report* would like to extend a sincere apology to the author and to our readers for any confusion that our error in production may have caused.

Further References

Prepared by Margaret A. Chaplan, Librarian, Institute of Labor and Industrial Relations Library, University of Illinois at Urbana-Champaign

Briggs, Steven, and Daniel J. Koys. AN EMPIRICAL INVESTIGATION OF PUBLIC SECTOR MEDIATOR EFFECTIVENESS. Journal of Collective Negotiations in the Public Sector, vol. 19, no. 2, 1990, pp. 121-128.

The authors investigate the relationship between the personal characteristics of mediators (such as age, education, extent of experience) and their mediation style, as expressed by their assuming an active role and by their tenacity, to see if these are related to evaluations of mediator effectiveness. The results indicate that mediator experience is the most crucial aspect of effectiveness, but that tenacity and assuming an active role also contribute to effectiveness.

Coleman, Charles J. MANAGING LABOR RELATIONS IN THE PUBLIC SECTOR. San Francisco: Jossey-Bass, 1990. 407 pp.

This book is intended as a textbook aimed at the level of the practitioner synthesizing the literature of the field and analyzing problems and policies. Sections cover the context of public sector labor relations, labor relations processes and strategies, managing public institutions in a union environment, and managing labor relations in special settings. The last section contains case studies and exercises.

Dell'Omo, Gregory G. CAPTURING ARBITRATOR DECISION POLICIES UNDER A PUBLIC SECTOR INTEREST ARBITRATION STATUTE. Review of Public Personnel Administration, vol. 10, no. 2, Spring 1990, pp. 19-38.

The decision making process of interest arbitrators in a state that provides for final offer arbitration is the subject of the research reported in this article. The weight the arbitrators gave to nine criteria in the areas of wage comparability, employer ability to pay, and cost of living was assessed as well as some standards of equity. In general, the arbitrators in this study gave more weight to maintaining internal wage relationships and the financial condition of the employer in their decisions.

Elsea, Stanley W., and David A. Dilts. UNFAIR LABOR PRACTICE CHARGES UNDER STATE BARGAINING LAWS: INDIANA, IOWA, AND KANSAS. Labor Law Journal, vol. 41, no. 6, June 1990, pp. 376-380.

Does the incidence of filing of unfair labor practice charges exhibit a pattern over time? Data from public employers in three Midwestern states appears to support the theory that filings conform to a learning curve.

Frank, Howard A. VOLCKER VERSUS NISKANEN: REFLECTIONS ON THE LIMITED USE OF FINANCIAL INCENTIVES IN THE PUBLIC SECTOR. Public Productivity & Management Review, vol. 13, no. 4, Summer 1990, pp. 353-368.

Private sector acceptance of such incentive practices as pay for performance, gainsharing, bonuses, and piecework plans is spreading, but there is limited use of these mechanisms in the public sector. The author offers thoughts on why this is so and the negative consequences for public productivity improvement and the retention of a motivated and skilled work force that result.

Hutchens, Robert, David Lipsky, and Robert Stern. STRIKERS AND SUBSIDIES; THE INFLUENCE OF GOVERNMENT TRANSFER PROGRAMS ON STRIKE ACTIVITY. Kalamazoo, MI: Upjohn Institute, 1989. 230 pp.

Does the availability of government transfer payments in the form of unemployment compensation, public assistance, and food stamps encourage or prolong strikes? This book attempts to present some hard evidence that can be used in this debate. The first section of the book describes current practices, their origin, and their rationale; the second attempts to assess empirically the effect of the availability of transfer payments on strike activity; and the third offers suggestions as to what an appropriate public policy might be.

Kearney, Richard C. and Kathy S. Morgan. LONGEVITY PAY IN THE STATES; ECHO FROM THE PAST OR SOUND OF THE FUTURE? Public Personnel Management, vol. 19, no. 2, Summer 1990, pp. 191-200.

State governments were surveyed in regard to their policies and practices on longevity pay. The author maintains that longevity pay, although appearing to be out of step with current trends toward pay for performance systems, may actually become more attractive in a future of shortages of skilled labor

as a means to retain valued employees. An appendix presents the results of the survey.

La Van, Helen. ARBITRATION IN THE PUBLIC SECTOR; A CURRENT PERSPECTIVE. Journal of Collective Negotiations in the Public Sector, vol. 19, no. 2, 1990, pp. 153-163.

This article is a literature review of public sector arbitration organized under the following headings: special issues that are unique to the public sector, the issues related to specific public sector occupational groups, and the impact of state law provisions on the arbitration process.

Nelson, Nels E. FACTFINDERS VIEW THE FACTFINDING PROCESS. Journal of Collective Negotiations in the Public Sector, vol. 19, no. 2, 1990, pp. 141-151.

A questionnaire was sent to factfinders to elicit information on their personal background and experience and on their views of the role of the factfinder, the purpose and basis for written recommendations, and on various aspects of mediation by factfinders.

Partridge, Dane M. THE EFFECT OF PUBLIC POLICY ON STRIKE ACTIVITY IN THE PUBLIC SECTOR. Journal of Collective Negotiations in the Public Sector, vol. 19, no. 2, 1990, pp. 87-96.

The author extends the analysis done by Burton and Krider in their seminal study of public sector strikes to include additional years of data and additional public policy measures. The results are consistent with those obtained in the earlier study.

Vieira, Edwin, Jr. COMMUNICATIONS WORKERS OF AMERICA v. BECK: A VICTORY FOR NONUNION EMPLOYEES ALREADY UNDER ATTACK. Government Union Review, vol. 11, no. 2, Spring 1990, pp. 1-29.

After a statement of the issues and findings in the Beck case, the author argues that the Supreme Court's opinion is being subverted by the guidelines of the General Counsel of the National Labor Relations Board and the decisions of national courts necessitating case-by-case review and by the rationalizations of hostile academic commentators. ■

The Report Subscription Form (vol. 7:1-4)

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