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The Illinois Public Employee Relations Report provides current, nonadversarial information to those involved or interested in employer-employee relations in public employment. The authors of bylined articles are responsible for the contents and for the opinions and conclusions expressed. Readers are encouraged to submit comments on the contents, and to contribute information on developments in public agencies or public-sector labor relations. The Illinois Institute of Technology and the University of Illinois at Urbana-Champaign are affirmative action/equal opportunities institutions.

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LET'S MAKE A DEAL (or Not): DOES THE GENERAL ASSEMBLY'S APPROPRIATIONS POWER LIMIT THE GOVERNOR'S ABILITY TO ENGAGE IN MEANINGFUL COLLECTIVE BARGAINING

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LET'S MAKE A DEAL (OR NOT): DOES THE GENERAL ASSEMBLY'S APPROPRIATIONS POWER LIMIT THE GOVERNOR'S ABILITY TO ENGAGE IN MEANINGFUL COLLECTIVE BARGAINING

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I. INTRODUCTION

Ridicule of the wages, hours and conditions of public employees in the State of Illinois has become a staple of what passes for serious commentary on the fiscal condition of the State.[1] Such ill-informed commentary has been used to attack the very notion of collective bargaining for public employees, despite the common sense observation that public employees have the same skills, the same needs and seek the same advantages as their counterparts in the private sector.[2] A more honest evaluation of public sector collective bargaining would do well to remember the long struggle of public workers and their unions to obtain the same democratic rights at their workplaces as their counterparts in the private sector.

One aspect of this movement is well illustrated by the sanitation workers who struck the City of Memphis in February 1968. They had simple goals. They wanted wages that would lift them out of poverty. They sought safer working conditions. They hoped to end racial discrimination in their workplace. They sought to affirm their right to individual dignity with the simple slogan "I Am a Man." And, they wanted respect for their collective dignity through recognition of their union.

The strike was a last resort. No legal framework existed which compelled the City of Memphis to meet with or bargain with the local union. And no other framework existed for the parties to meet to discuss the issues which caused the strike or for a resolution to occur without resort to "economic warfare." It took the assassination of Dr. Martin Luther King, Jr. to bring the parties to the bargaining table to resolve some of the issues that led to the strike.[3] In the ensuing 45 years, public sector collective bargaining has addressed the issues that caused the strike in Memphis and has helped black and female workers achieve stable and secure employment.[4]

In Illinois, public employment was characterized by patronage, the most famous example being the political machine operated by Richard J. Daley. The patronage guaranteed public employment so long as the employee faithfully supported the appropriate political party. Party leaders made the decisions regarding political and legislative questions and employees were expected to support these leaders. Public employee unions led the challenge to patronage in Illinois state government, arguing that this system violated the First Amendment rights of public employees. The Seventh Circuit Court of Appeals agreed in *Illinois State Employees Union, Council 34, AFSCME v. Lewis,*[5] and other courts eventually followed.[6] The demise of the patronage system opened the way for collective bargaining; a system in which public employees themselves decide what their interests are and the best way to achieve them.

Thus, in 1983, a Democratic General Assembly and a Republican Governor, James Thompson, enacted the Illinois Public Labor Relations Act and the Illinois Educational Labor Relations Act. Together these statutes provided a "'comprehensive regulatory scheme for public sector bargaining in Illinois.'"[7] As set forth in Section 2 of the IPLRA, the purpose of the statute was to grant public employees full freedom to form and join unions and to collectively bargain with their employers, to protect the public health and safety from the disruptions caused by labor disputes and to provide peaceful and orderly procedures to prevent labor strife.[8] The statute thus provided public employees with the right to seek to improve their working conditions and to control their own destinies in the workplace.

The Illinois Supreme Court will soon hear an appeal in a case which implicates some of the fundamental principles involved in the collective bargaining process.[9] The case is an appeal from an arbitrator's award requiring the State of Illinois to pay the wages required by a collective bargaining agreement. The State refused to honor the award claiming that it had "insufficient funds" to do so. It contends that collective bargaining agreements with the State are not enforceable

until legislative appropriations to fund those agreements have been enacted. In support of this argument, the State invokes the "power of the purse" held by the Illinois General Assembly. The Appellate Court rejected this argument, but the Illinois Supreme Court has granted leave to appeal. Acceptance of the principles advanced by the State would seriously undermine the statutory policies of the State's labor relations acts and erode the hard-won progress public employees have made in their fight to democratize their workplaces. This article explains why.

II. FACTUAL BACKGROUND

The following facts are set forth in the Appellate Court opinion and in the stipulations of the parties.[10]

A. The Collective Bargaining Agreement and the Cost Savings Agreements

In 2008 the State and AFSCME negotiated a four year collective bargaining agreement ("CBA"). The agreement provided a series of wage increases at periodic intervals during its term, with the last two scheduled for July 1, 2011 and for January 1, 2012.

In the summer of 2009, Illinois Governor Pat Quinn directed 10 state agencies to lay off 2,500 employees with the layoffs scheduled to take place early in the 2010 fiscal year. AFSCME filed a grievance over the layoffs, and it reached a mediated resolution with the State in January 2010. Pursuant to the mediated resolution, the State reduced the number of layoffs to 1,200, closed 4 state run facilities and deferred some of the wage increases set forth in the contract. The mediated resolution contained a number of other measures designed to reduce the State's personnel expenditures. These measures saved the State more than $300 million, which far exceeded the amount the State would have saved under its original layoff plan.

In 2010, Governor Quinn sought further savings from the union. The parties signed cost savings agreements (CSAs) in the fall of 2010. The first agreement set a goal of finding an additional $100 million in budgetary savings and named arbitrator Ed Benn to resolve any disputes arising under the CBA and CSA. By early November, the parties had identified sufficient savings. The parties then entered into the second CSA. The second CSA provided that there would be no layoffs or facility closures prior to the end of the CBA, e.g. July 1, 2012. The savings encompassed by the CSAs included savings from the deferral of raises, use of unpaid furlough days, reduction of overtime and other measures. The parties

agreed to $27.6 million in savings due to the deferral of ½ of the 4 percent raise scheduled for July 1, 2011 to February 1, 2012.

B. The Evolving Budget for the 2012 Fiscal Year

1. The Budgetary Dance: Act I

In February 2011, the Governor submitted his proposed budget to the General Assembly for Fiscal Year 2012. Fiscal Year 2012 covered the period from July 1, 2011 to June 30, 2012. The budget proposed personal services appropriations in agencies covered by the CBA large enough to maintain the same headcount in each agency (to fullfill the no layoff/ no closing agreement) and to fund the raises as scheduled in the CSAs. In May 2011, the General Assembly approved appropriations bills for all state agencies. After the appropriations bills were approved, the Governor's Office of Management and Budget (GOMB) analyzed the personal services appropriations in the bills and concluded that the appropriations for 14 agencies were insufficient to honor both the no layoff/no closing agreement and the schedule of deferred wage increases for the entire 2012 Fiscal Year. The GOMB concluded that in 12 of the 14 agencies, the funds were insufficient to operate the agency for the entire fiscal year, even without the payment of the wage increases.[11]

On June 30, 2011, the Governor acted on the appropriation bills that had been passed by the General Assembly. He signed them. In addition, he used his amendatory veto power and his line item veto authority to remove $376 million from the budget enacted by the General Assembly.

2. The Pay Freeze and the Arbitration

Consequently, on July 1, 2011, the Illinois Department of Central Management Services ("CMS") issued a memorandum freezing the pay of the employees in 14 state agencies for the 2012 Fiscal Year. This meant that while the employees in 39 agencies subject to the Governor received wage increases, the employees in 14 agencies did not. Approximately 30,00 employees worked in these agencies, which included some of the largest in State government, such as the Illinois Department of Corrections (IDOC), the Department of Human Services (DHS) and the Illinois Department of Revenue (IDOR). The State estimated that it would save approximately $76 million from the implementation of this freeze.

When the State refused to pay the wage increases required by the CBA and the CSAs, the union began proceedings before Arbitrator Benn. Arguing that a "deal is a deal," the union maintained that the arbitrator should enforce the agreements

as written because they contained no contingencies based upon the level of budgetary appropriations.

In response, the State made three basic arguments: (1) that its duty to perform the contracts and to pay the raises did not arise until the appropriation of sufficient funds to do so; (2) that Section 21 of the Illinois Public Labor Relations Act,[12] made the enforceability of the "out-years" of a multi-year collective bargaining agreement dependent upon budgetary appropriations and (3) that enforcing the contract would undermine the authority of the General Assembly under the Illinois Constitution to set the level and direction of State spending.

On July 19, 2011, the arbitrator issued his decision. He rejected the State's arguments and ordered the State to pay the increases scheduled for July 1, 2011, within 30 days.

In his decision, Benn found that the CBA and the CSAs "leave nothing to the imagination" and that the "clear and simple terms" of the agreements required payment of the wage increases pursuant to the schedule negotiated by the parties. He held that any other conclusion would require him to violate the contractual provision that the arbitrator had no power to amend the contract or to subtract from or nullify the provisions of the CBA or CSA's.[13] Responding to the State's contention that the obligation to pay the wage increase was contingent on appropriations, the arbitrator noted: "when parties to collective bargaining agreements agree that wage increases are contingent upon the existence of sufficient appropriations, they say so. There is no language here to that effect."[14] The arbitrator refused, however, to interpret the State's statutory and constitutional arguments because he believed that such statutory interpretations were to be made by the courts and not by an arbitrator.[15]

The arbitrator did analyze the State's contention that the contract expressly provided that it could not "supercede law."[16] He held that this general provision could not override the very specific provision of the contract which denied the arbitrator authority to nullify any provision of the contract. Likewise, he held that Article II of the Agreement, which preserved the statutory obligations of the State, did not require a different result, because the language in question also prohibited State action which violated the obligations of the Agreement.[17]

The arbitrator then commented on the State's argument that honoring the collective bargaining agreement was contingent on "sufficient" legislative appropriations:

> As discussed in the award, under the Agreement and the Cost Savings Agreements and as a matter of contract, the State's position that it is not obligated to pay the reduced negotiated increase is clearly incorrect. . . .
>
> Because I am an arbitrator functioning solely under the terms of the Agreement and the Cost Savings Agreement, I have not considered the States' statutory or Constitutional arguments. However, if the State is correct in its statutory or Constitutional arguments that although it has negotiated multi-year collective bargaining agreements with the Union since 1975 (and I note has also long negotiated multi-year collective bargaining agreements with other unions), it does not now have to pay negotiated and agreed-on wage increases in those multi-year collective bargaining agreements because wage increases agreed to by the State in those agreements are in effect unenforceable or are contingent on sufficient appropriations from the General Assembly and that such positions find support in Section 21 of the IPLRA and the Constitution, then a major foundation of the collective bargaining process – the multi-year collective bargaining agreement – has been upended.[18]

Upon receipt of the decision, the State filed suit to vacate the award and to obtain a stay of its effect.[19] The court granted the stay on July 22, 2011.

3. The Budgetary Dance: Act II

As noted above, the appropriations for 12 of 14 agencies in question were insufficient to even operate the agencies for the entire fiscal year without reductions in force. A new act of the budgetary dance began on September 8, 2011, when the Governor announced the closing of seven State facilities operated by the Departments of Corrections and Human Services. He also announced the layoff of more than 1,900 State employees. The Governor announced that these measures would save approximately $55 million in the 2012 Fiscal Year. In connection with this announcement, the Governor stated that the General Assembly could avert the closings and layoffs by upholding his June 2011 line item vetoes of $376 million and approving supplemental appropriations to fund the facilities and positions of the employees slated to be laid off.

That day, the State filed a lawsuit in the Circuit Court of Cook County seeking a declaration that the closures and the layoffs did not violate the contract, that they were otherwise legal and that it had no obligation to arbitrate its decision to implement the layoffs and the closures.[20] This case was consolidated with the earlier one.

As in the earlier case, AFSCME contested the proposed layoffs and facility closings, arguing that these proposals violated the provision of the Cost Savings Agreements which promised that there would be no facility closings or layoffs through June 30, 2012. This issue was also submitted to Arbitrator Benn. Arbitrator Benn issued a

second award on October 3, 2011, finding these measures to be in violation of the "clear language" of the Cost Savings Agreements as well.[21]

One of the main arguments made by the State to the Arbitrator was that it could not afford to meet its contractual obligations because the General Assembly did not appropriate sufficient funds to fulfill the Governor's requests and to meet the State's contractual obligations. In response to this argument, the arbitrator observed:

> There are no pre-conditions in the Cost Savings Agreements (or any agreements relevant to this case) that make the State's commitments contingent upon the subsequent passing of budgets sufficient to fund the State's obligations under those agreements. If the parties intended that result, they would have said so in the Cost Savings Agreements. Where contractual commitments by public employers are meant to be contingent upon the passing of a budget sufficient to fund a collective bargaining agreement, the parties memorialize that commitment in their contracts.[22]

The arbitrator then listed multiple examples of labor contracts between the State and unions that did just that and concluded that there were "no similar provisions in any of the agreements involved in this case which make an economic contract commitment by the State in any way contingent on the passing of a budget by the General Assembly sufficient to pay for those economic commitments." [23]

As in the first case, the State sought to vacate the arbitrator's award and to stay its effect. After briefing and argument, Judge Billik denied the Motion on October 31, 2011. Judge Billik noted that granting the stay would allow the State to receive the benefit of the relief it was ultimately seeking, despite the very clear language of the Cost Saving Agreement and the holding of the arbitrator. He concluded that the State had "not specifically shown a reasonable likelihood of prevailing on the merits" or that," the balance of equities supports the issuance of the stay being requested."[24] The parties then briefed and argued the petition to vacate the second award on the merits and Judge Billik set a ruling date of December 2, 2011.

While the litigation proceeded, the General Assembly considered a supplemental appropriations bill during its Fall "veto session." On November 29, 2011 the General Assembly passed a supplemental appropriations bill.[25] The personal services appropriations in this bill were sufficient to prevent both the scheduled layoffs and the scheduled facility closures for the duration the 2012 Fiscal Year.

The final legislation passed by the General Assembly had several elements. In total the bill contained almost $475 million in appropriations for personal services, other agency operations and capital projects. This included $165.5 million in appropriations to the 14 agencies subject to the pay freeze. Nine agencies received additional personal service appropriations. Simultaneously, the General Assembly

enacted two pieces of legislation which reduced state taxes. Public Act 97-636 created or extended ten state tax incentives. The General Assembly's legislative findings for these tax reductions included the statement that a tax incentive package that does not exceed $250 million can be approved without negative impact to the State budget in fiscal years 2012 and 2013.

The General Assembly also enacted Senate Bill 400 which increased the Earned Income tax Credit for working families and increased the personal exemption for all Illinois taxpayers by $50 per year. Governor Quinn signed this bill on January 10, 2012. At the time he signed the bill, Governor Quinn stated that "we can't forget the everyday people who are the heart and soul of Illinois." Quinn also stated that "one of the best ways to stimulate the local economy is to put more money into the pockets of working families." In discussing the cost of the legislation, Governor Quinn stated, "we can certainly afford this."[26]

The General Assembly enacted one additional supplemental appropriation bill for the 2012 Fiscal Year. In the Spring, it was reported in the news that state funding for certain day care providers was exhausted, which meant that the program would cease functioning prior to the end of the 2012 Fiscal Year. Soon thereafter, the General Assembly passed, and the Governor signed Senate Bill 2450 which transferred approximately $75 million dollars from an appropriation line in the Department of Health Care and Family Services to the Department of Human Services for use in the day care program.[27]

III. ANALYSIS OF THE STATE'S ARGUMENTS TO VACATE THE ARBITRATOR'S AWARD

As the Appellate Court stated in its opinion, that State's position in this case is that it had no legal obligation to perform the duties contained in the CBA and CSA until the appropriation of "sufficient funds" to do so by the General Assembly. Whether phrased as a matter of contract law, as a matter of statutory construction or as a state constitutional principle, this argument should be rejected.

First, as a matter of contract law, the principle urged by the State in this case has no support in either Illinois case law or statute. Generally, a party must abide by its contractual responsibilities, even when a subsequent contingency renders performance of the contract impossible. This means that when a party takes on an unqualified commitment, it may not later claim that there were implied conditions to that commitment if those conditions could have been anticipated or guarded against in the contract.[28] Since the State could have reasonably foreseen either

an appropriations or a revenue shortfall, it should not be able to claim that it was impossible for it to perform the contract.[29]

The IPLRA explicitly anticipates that employers may enter into binding contracts prior to the appropriations process. Section 7 of the Act defines the process of good faith bargaining as the obligation to meet in good faith prior to the employer's budgetary process and to make agreements based upon those meetings.[30] This means that the agents of the parties who bargain must have the authority to make binding agreements. In Illinois, the Director of CMS bargains on behalf of the Governor and Executive Branch. For bargaining to be meaningful, the Director must have the statutory authority to make contracts that can be enforced. Otherwise, the State would always be able to get a "second bite at the apple" once negotiations were concluded and the wages and benefits of public employees would be a "political football" in the legislative process. This would negate the statutory policy of the IPLRA.

A corollary to this principle is that agents with apparent authority have the power to bind the entities they represent. Under similar provisions in the Illinois Educational Labor Relations Act, the courts have held that a "a designated agent taking part in CBA negotiations is deemed to have apparent authority to bind the principal absent affirmative, clear and timely notice to the contrary."[31] The courts also recognize that collective bargaining grievance settlements made by agents of employers are binding unless there is an explicit reservation of authority by the agent.[32] In the same vein, settlements negotiated to settle unfair labor practices by agents with apparent authority are biding even when they require the expenditure of public funds.[33]

These rules have special force when the union and its members perform the contract and the public employer accepts the benefits of that performance. Acceptance of the benefits from a labor contract by a public employer constitutes ratification of the binding force of that agreement.[34]

These precepts apply well in this case. In consecutive fiscal years, the union met with the State to bargain cost cutting measures designed to alleviate shortfalls in State revenue. The State never conditioned its agreements based upon budgetary appropriations. And, the State accepted the benefits of the cost saving measures the union agreed to. There is no principled reason why the State should be able to walk away from its bargain after its employees and their union have performed theirs.

Public employers may make their performance of a contract contingent upon future events by negotiating appropriate contract language. As the arbitrator noted in this case, however, the parties did not do that. Accordingly, his decision to compel the State to honor the clear terms of the contract was based upon well accepted principles of contract and labor relations law.

Second, as a matter of statutory construction, the provisions of the IPLRA leave no room for a different result. As noted above, the statute explicitly contemplates that bargaining will precede the budgetary process. The statute requires a public employer to reduce to writing and to execute the agreements made in collective bargaining.[35] The statute contains no implied contingencies that contradict these explicit requirements.

Meaningful collective bargaining can only occur with a decision-maker who has the power to make binding commitments. Bargainers must have either the explicit or implied authority to conclude agreements. If any deal can be easily unraveled, bargaining will be prolonged and labor relations issues will fester, leading to economic strife and the disruption of public services. These factors led the drafters of the IPLRA to define the policy of the State as one that gives public employees the "full freedom" to engage in concerted activities, to join and form unions and to collectively bargain with their public employers.[36]

The State has relied heavily on Section 21 of the IPLRA. Section 21 states that "subject to the appropriation power of the employer, employers and exclusive representatives may negotiate multi-year collective bargaining agreements pursuant to the provisions of this Act."[37] The Appellate Court held that this statutory provision did not apply because the General Assembly was not an "employer" under the IPLRA. This conclusion is unquestionably correct because the IPLRA specifically excludes the General Assembly from the definition of "employer."[38] Instead, the courts construe a statute as a whole to determine legislative intent.[39]

This Appellate Court's conclusion is also strongly supported by the legislative history of the IPLRA. The Illinois Senate rejected a formal legislative oversight of State employee collective bargaining when it defeated an amendment requiring legislative approval of collective bargaining agreements during the debate on Senate Bill 536.[40] This legislative history is persuasive evidence that the General Assembly did not contemplate that it would retain some sort of veto power over the actions of the Executive Branch in collective bargaining. The courts have relied on similar legislative history to clarify ambiguities in other portions of the IPLRA.[41]

At the time the IPLRA was enacted, the State and public employee unions had already bargained a series of multi-year contracts pursuant to Governor Walker's Executive Order No. 6. While the initial collective bargaining agreements contained provisions with contingencies based upon appropriations, the later agreements did not. Thus, the State and the public employee unions representing State employees had accepted the principle that the Executive Branch had the authority to make binding contracts well before the enactment of the statute.

Section 21 was added to the IPLRA as part of a manager's amendment when Senate Bill 536 was considered by the House in June 1983. There is no legislative history regarding the reason for its addition. Thus, there is no support for the argument that Section 21 was added to the IPLRA to reduce the right of State employees and their unions to make enforceable collective bargaining agreements.

There is a better explanation for both the language of Section 21 and the timing of its insertion into the IPLRA. That explanation lies in a piece of litigation that arose in early 1983 and which posed the issue of whether a unit of local government had the power to agree to a a schedule of wage increases that covered more than a single fiscal year. In *Ligenza v. Village of Round Lake Beach*, the Appellate Court held that a Village had no obligation to pay the wage increases set forth in a labor agreement because the agreement contract was negotiated prior to an appropriation to support the contract by the Village Council.[42] The Court held that this procedure conflicted with Section 8-1-7 of the Municipal Code.[43]

Significantly, the dispute in *Ligenza* arose in May 1983, as the General Assembly was considering Senate Bill 536. The trial court litigation in Ligenza was in "full swing" by that date, which makes it very likely that Section 21 was added to the IPLRA in response to the claim of the Village in that litigation. This narrative explains both the timing and the language of the amendment. This means that the purpose of Section 21 was to protect the rights of municipal employees, not to shrink the rights of State employees.[44]

Accordingly, the State's defense to its breach of contract must rise or fall based upon its argument that the Illinois Constitution gives the General Assembly the exclusive right to set the level and direction of public spending. Section 2(b) of the Finance Article of the Constitution states that the "General Assembly by law shall make appropriations for expenditures of all public funds by the State."[45] From this constitutional language, the State contends that "all" State money must be expended pursuant to an appropriation and that appropriations did not exist for the expenditure of funds required by the arbitrator.

The Illinois courts, however, have held that State money can be expended "by law" without legislative appropriations. "[W]here a statute categorically commands the performance of an act, so much money as is necessary to pay the command may be disbursed without explicit appropriation."[46] This means that State funds can be expended absent an explicit appropriation when required by statute or by the Constitution.[47] In such circumstances the existence of a court order is sufficient legal authority for the State Comptroller to draw the warrants needed to pay a State obligation.[48]

A second flaw in the State's argument is that the arbitrator's order in this case did not require the State to spend money that had not been appropriated. At the time of the arbitrator's decision, the State budget contained billions of dollars of personal services appropriations which could have been used to fund the pay increases in the contract. The Governor made the decision to impose the pay freeze based upon the prediction that paying the wage increases in the collective bargaining agreement would cause specific agencies to run short of funds before the end of this fiscal year.

But, that was going to happen anyway! Wage increases or no wage increases, the appropriations enacted by the General Assembly were not sufficient to operate some of the largest State agencies. Thus, both the Governor and the General Assembly knew in June 2011 that it would be necessary to enact supplemental appropriations to avoid closing State facilities and laying off thousands of State employees. When the Circuit Court denied the Motion to Stay the enforcement of the layoff arbitration award, the Governor and the General Assembly cooperatively drafted and enacted legislation that appropriated sufficient funds to avoid violation of the award. It is a fair inference that they did not do so with respect to the wage increases because the Motion to Stay had been granted and that a similar binding legal obligation did not exist. Had the Circuit Court denied the Motion to Stay in the pay freeze arbitration the General Assembly could have easily managed to scale back the tax breaks that it enacted with the supplemental appropriations in order to comply with a binding legal obligation.

This review of history is appropriate because the Illinois Constitution requires the Governor and the General Assembly to share responsibility for enacting the State budget. The Finance Article of the Illinois Constitution requires the Executive Branch and the General Assembly to share the responsibility for the annual budgetary process. The Governor must propose the budget and the proposed budget must fit the estimated revenues of the State. The General Assembly is responsible for passing appropriations. Those appropriations must not exceed revenues. The appropriations do not become law unless the Governor signs the

bills. And, the Governor may reduce spending with the reduction veto, subject to a two-thirds override by the General Assembly.

This division of roles in the budgetary process is consistent with the principle that the separation of powers doctrine contemplates a government of separate branches with shared and overlapping powers.[49] The separation of powers does not necessarily prohibit one branch of government from exercising powers which are ordinarily exercised by another.[50] The branches of government often have to work together to ensure that legal obligations are satisfied.[51]

The courts in Illinois have taken a practical approach to the separation of powers in the budgetary process. While some older court decisions treated the appropriations process as exclusively legislative,[52] more recently the courts have acknowledged the right of the executive to control the rate of spending of appropriated funds.[53]

This practical approach to the issues that arise during the budgetary process is the one taken by both the Appellate Court in this case and the Supreme Court of Iowa. It recognizes both the responsibility of the judiciary to say what the law is, and the responsibility of the more political branches of the government to work out solutions to budgetary issues within the constraints of the law. Once the law is clear, the legislative and the executive branches have the opportunity to determine how to follow that law. As the court in *County of Cook v. Oglivie* observed, responding to the claim that benefits had to be reduced if they were to last for the entire fiscal year, "that may be true, but the emergency does not exist now and remedial action may be forthcoming as it has been in the past."[54]

The Supreme Court of Iowa resolved a similar potential political logjam when the executive and legislative branches of that State confronted an interest arbitration decision awarding raises to State employees. Noting that the State "is liable on its contract," the court observed that it "was entirely appropriate" for the governor to seek a judicial declaration regarding the legality of the award. It concluded:

> The considerations, including political considerations that go into the appropriations process, are left to the legislative branch, with the executive participation we have mentioned. The judicial branch will intercede, under its constitutional authority, in that process only when a failure to act, or a deadlock has left an adjudicated state obligation uncollectible. We trust, owing to the goodwill and respect for the rule of law on the part of the governor and the legislators, such a point will not be reached in this dispute.[55]

Such a practical approach would prevent the evisceration of the important statutory rights contained in the IPLRA. By contract, a rule which makes the finality of contracts for State workers dependent on legislative appropriations

would have pernicious consequences for the collective bargaining process. Executive branch officials would be tempted to make promises they could not keep, based upon the knowledge that the General Assembly might get the final "bite at the apple." Legislative leaders might be tempted to use the salaries and benefits of State workers as "bargaining chips" in the annual legislative process. And, union negotiators would never engage in meaningful concessionary bargaining, as they did in this case, for fear of the membership fallout that might occur if the products of hard bargaining are then undone in the legislative process. Such ill consequences will be magnified many times if the "out years" of a multi-year collective bargaining agreement are held to be unenforceable. The General Assembly meant to avoid such evils when it wrote the IPLRA to give public employees and their unions the "full freedom" to form unions and to engage in collective bargaining.

The Illinois courts have regularly acknowledged the very limited power of the judiciary to review arbitration awards.[56] The policy ensures that labor disputes are resolved quickly by agreed upon neutrals who are familiar with labor relations and that they are resolved peacefully without recourse to economic action or the disruption of important public services.[57] This policy in favor of the finality of labor arbitration awards has consistently been applied to limit judicial review of arbitration awards even when it its claimed that enforcement of the award would violate the "public policy" of the State.[58] Thus, the party seeking to vacate an award on "public policy" grounds must show that the policy in question is "well-defined" and "dominant" by reference to laws and legal precedents, not from generalized considerations of "the public interest." Once the "public policy has been identified it must be shown that the award unmistakably violates that policy.[59]

In the instant situation, acceptance of the State's argument would severely compromise the statutory policy favoring collective bargaining by public employees and their unions. As shown in this article, upholding the arbitrator's award would not undermine either the public policy of the IPLRA or any well defined and dominant public policy regarding the power of the General Assembly The Illinois Supreme, therefore, would do well to uphold the Appellate court's opinion in this case.

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[1] In a recent editorial, the Chicago Tribune ridiculed some of the working conditions enjoyed by State employees such as a 37 1/2 hour week, paid holidays

and raises based upon seniority under the contract's step plan. Editorial, *The Other Showdown in Springfield*, CHI. TRIB., May 27 2015.

[2] *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 229-230 (1977).

[3] A good description of the causes of the strike, the working conditions of the men and sequence of events can be found in Michael Honey, *Introductory Essay in* The Memphis Sanitation Worker's Strike I AM A MAN Exhibit Symposium (Walter Ruether Library, Wayne State University) *available at*, http://dlxs.lib.wayne.edu/iamaman/memphis. The on line archive contains a chronicle of the strike and its aftermath, complete with pictures and interviews.

[4] Patricia Cohen, *Public Sector Jobs Vanish and Blacks Take Blow*, N.Y. TIMES, May 25, 2015, at. A-1, B-5.

[5] 473 F.2d 561 (7th Cir. 1972), *cert denied*, 410 U.S. 928 (1973).

[6] *E.g., Rutan v. Republican Party of Ill.*, 497 U.S. 62 (1990); *Shakman v. Democratic Organization of Cook County*, 481 F. Supp. 1315 (N.D. Ill. 1979).

[7] *Bd. of Educ. Community Sch. Dist. No. 1, Coles County v. Compton*, 123 Ill. 2d 216, 221, 526 N.E.2d 149, 152 (1988) (quoting *Chicago Bd. of Educ. v. Chicago Teachers Union*, 142 Ill. App. 3d 527, 530, 491 N.E.2d 1259 (1986).

[8] 5 ILCS 315/2.

[9] *State (Dept. of Cent. Mgmt. Servs.) v. AFSCME*, 2014 IL App (1st) 130262, 19 N.E.3d 1127, (1st Dist. Sep 30, 2014), *appeal allowed* (Mar. 25, 2015).

[10] The parties entered into an extensive stipulation of facts before the trial court. Stipulations of the Parties, *State of Ill. (Dept. of Cent. Mgmt. Servs. v. AFSCME Council 31*, No. 11 CH 25352 (Cir. Ct. Cook Cnty., Mar. 19, 2012). The recitation herein relies on that stipulation as well as the facts set forth in the Appellate Court's opinion.

[11] Summary Payroll Verification Spreadsheets illustrating the math used to justify these conclusions were admitted as part of the trial record in this case. Payroll Verification Spreadsheet 7/15/2011, filed in *State of Ill. (Dept. of Cent. Mgmt. Servs.) v. AFSCME Council 31*, No. 11 CH 25352 (Cir. Ct. Cook Cnty., July 19, 2011).

[12] 5 ILCS 315/21.

[13] *State of Ill. and AFSCME Council 31 (July 1, 2011 Increases)*, Arb Ref. 10.251 at 9 (July 19, 2011) (Benn Arb.).

[14] *Id*. a 9 n.24.

[15] *Id*. at 12-15.

[16] *Id.*

[17] *d.* at 16.

[18] *Id*. at 21-22.

[19] *State of Ill. v. AFSCME Council 31*, Case No. 11 CH 25352 (Cir. Ct. Cook County, filed July 19, 2011).

[20] *State of Ill. v. AFSCME Council 31*, Case No. 11 CH 31591 (Cir. Ct. Cook County filed Sept. 8, 2011).

[21] *State of Ill. And AFSCME Council 31 (2011-2012 Layoffs and Facility Closures)* Arb. Ref. 10.251 (Oct. 3, 2011) (Benn Arb.).

[22] *Id.* at 29-30.

[23] *Id.* at 31.

[24] *State of Ill. v. AFSCME Council* 31, Case No. 11 CH 31591, stip. op at 24 (Oct. 24, 2011).

[25] Public Act, 97-642 (Dec. 9, 2011).

[26] Public Act, 97-652 (Jan. 10, 2012); Stipulation of the Parties, *supra* note 10, at stip 304.

[27] The enactment of two additional appropriation bills during a fiscal year is not unusual. Additional appropriation bills were enacted in each of the three preceding sessions of the General Assembly. In the first session of the 96th General Assembly, three supplementals were enacted which modified personal services appropriations. In the 95th General Assembly, there were also three supplemental appropriations that modified personal services spending. In the 94th General Assembly there were two. *See* Stipulations of the parties, *supra* note 10, at stips. 307-09.

[28] *Leonard v. Autocar Sales and Serv. Co*., 392 Ill. 182 187-89, 64 N.E.2d 477, 579-80 (1945); *see also Phelps v. Sch. Dist. No. 109*, 302 II. 193, 134 N.E. 312 (1922); *Ner Tamid Congregation of North Town v. Krivoruchko*, 638 F. Supp. 913, 928-29 (N. D. Ill. 2009).

[29] *See, e.g., YPI 180 N. LaSalle Owner LLC v. 180 N. LaSalle II, LLC* 403 Ill. App. 3d 1, 7, 935 N.E.2d 860, 865-66 (1st Dist. 2010)(buyer could not claim impossibility despite global credit shortage caused by 2008 recession because real estate buyer should be able to foresee possibility that it might not be able to fund a lender).

[30] ILCS 315/7.

[31] *Board of Education v. Sered,* 366 Ill. App. 3d 330, 337, 850 N.E. 2d 821, 828 (1st Dist. 2006) (citation omitted).

[32] *Dept. of Cent. Mgmt. Servs. v. ISLRB*, 216 Ill. App. 3d 570, 575-77, 575 N.E.2d 962, 966-67 (4th Dist. 1991) (recognizing principle, but holding that evidence showed that both parties understood that the head of the Illinois Department of Correction would have to approve settlement made by CMS).

[33] *City of Burbank v. ILRB*, 185 Ill. App. 3d 997, 1004-05, 541 N.E..2d 1259, 1264-65 (1st Dist. 1991).

[34] *See Will County State's Attorney v. ISLRB*, 229 Ill. App. 3d 895, 899, 594 N.E.2d 770, 773 (3d Dist. 1992) (upholding ISLRB finding of historical recognition by State's Attorney even though State's attorney did not negotiate or sign CBAs but accepted benefits of CBAs negotiated by County and ratified by County Board, holding that State's Attorney impliedly ratified CBAs); *City of Burbank*,185 Ill. App. 3d at 1003, 541 N.E.2d at 1264 ("principal can ratify the actions of his agent by not repudiating such acts once he has knowledge of them or by accepting the benefits of those act").

[35] 37. 5 ILCS 315/7.

[36] 5 ILCS 315/2.

[37] 5 ILCS 315/21.

[38] 5 ILCS 315/3(o).

[39] *See Bettis v. Marsaglia*, 2014 IL 117050, ¶ 13, 23 N.E.3d 351, 356-57.

[40] Ill. Sen. Debate on Ill. SB 536 proposed S. Amend. No.4, 83rd Gen. Assembly, Reg. Sess, Transcript of May 25, 1983, at 59-62, *available at,* http://www.ilga.gov/senate/transcripts/strans83/ST052583.pdf.

[41] *See, e.g*., *County of DuPage v. ILRB*, 231 Ill. 2d 592, 607, 900 N.E.2d 1095, 1103 (2008).

[42] *Ligenza v. Village of Round Lake Beach*, 133 Ill. App. 3d 286, 478 N.E.2d 1187 (2d Dist. 1985).

[43] 65 ILCS 5/8-1-7. The decision in *Ligenza* conflicted with the Appellate Court's prior decision in *Libertyville Education Association v. Board of Education*, 56 Ill. App. 3d 503, 371 N.E.2d 676 (2d Dist. 1977), which upheld a School Board's power to enter into a multi-year collective bargaining agreement.

[44] Governor Thompson used his amendatory veto to remove educational employees from Senate Bill 536 after it passed the General Assembly. The Educational Labor Relations Act does not contain a provision which corresponds to Section 21. No amendment to the Educational Labor Relations Act was necessary because of the decision in the *Libertyville* case.

[45] Ill. Const., Art. VIII, §2(b).

[46] *Antle v. Tuchbreiter*, 414 Ill. 571, 579, 111 N.E. 836, 840 (1953). *Accord*: *City of Springfield v. Allphin*, 74 Ill. 2d 117, 127, 384 N.E.2d 310, 314 (1978) (court had power to direct payment of funds as part of remedial authority); *People ex rel Kirk v. Lindberg*, 59 Ill. 2d 38, 40, 320 N.E.2d 17, 18 (1974) (citing decisions sustaining State expenditures without current appropriations from the General Assembly).

[47] *Jorgensen v. Blagojevich*, 211 Ill.2d 286, 314, 811 N.E.2d 652, 658 (2004).

[48] *Id.* at 315, 811 N.E.2d at 669; *see also Illinois County Treasurers v. Hamer*, 2014 IL App (4th) 130286, 9 N.E.3d 1141; — to append denied, 20 N.E.2d 1254 (Ill. 2014); *Wilson v. Quinn*, 2013 IL App (5th) 120337, 1 N.E.3d 586 (upholding lawsuits by county officers seeking statutory stipends set by Illinois Counties Code and Article VII of the Illinois Constitution).

[49] *People v. Walker*, 119 Ill. 2d 465, 473, 519 N.E.2d 890, 892 (1988).

[50] *Id.* at 473-74, 519 N.E.2d at 892-93; *Illinois County Treasurers v. Hamer*, 2014 IL App (4th) 130286, ¶ 27, 9 N.E.3rd 1141, 1148-49, *leave to appeal denied*, 20 N.E. 3d 1254 (Ill. 2014).

[51] *People ex, rel. Bier v. Scholz*, 77 Ill. 2d 12,19, 394 N.E.2d 1157, 1159 (1977).

[52] *E.g., County of Cook v. Oglivie*, 50 Ill. 2d 379, 280 N.E.2d 224 (1972) (unconstitutional delegation of legislative power to enact appropriations bill which allowed Department of Public Aid to transfer appropriations between five different welfare programs); *Peabody v. Russel*, 302 Ill. 111, 134 N.E. 150 (1922) (unconstitutional delegation of legislature power for legislate to appropriate money to a reserve contingency fund controlled by the Executive Branch) *West Side Health Organization v. Thompson* 73 Ill. App. 3d 179, 391 N.E.2d 392, *rev'd on other grounds*, 79 Ill. 2d 503, 404 N.E.2d 208 (1980) (holding that Governor's refusal to spend appropriations for Dangerous Drug Commission constituted illegal impoundment of funds).

[53] *E.g., Warrior v. Thompson*, 96 Ill. 2d 1, 449 N.E.2d 53 (1983) (upholding constitutionality of Emergency Budget Act, which allowed Governor to create 2% reserves of appropriations for State agencies); *AFSCME v. Ryan*, 332 Ill. App. 3d 965, 773 N.E.2d 1196 (1st Dist. 2002) (allowing Governor to close Youth Correctional facility during middle of fiscal year despite the General Assembly's appropriation for the entire fiscal year and despite availability of revenue to continue to operate the facility).

[54] *County of Cook v. Oglivie,* 50 Ill. 2d at 386, 280 N.E.2d at 227.

[55] *AFSCME/Iowa Council 61 v. State of Iowa*, 484 N.W.2d 390, 395-96 (Iowa 1992).

[56] *See, e.g., Griggsville-Perry Community Unit Sch. Dist. No. 4 v. IELRB*, 2013 Ill. 113721, ¶ 18, 984 N.E.2d 440, 444, *AFSCME v. Dept. of Cent. Mgmt. Servs*., 173 Ill.2d 299, 304 , 671 N.E2d 668, 672 (1996).

[57] *Bd. of Trustees Community College Dist. No. 508 v. Cook County College Teachers Union*, 74 Ill. 2d 412, 419, 386 N.E.2d 47, 50 (1979).

[58] *E.g., United Paperworkers Int'l Union v. Misco*, 484 U.S. 29, 43 (1987); *AFSCME v. State of Ill.*, 124 Ill., 2d 246, 262-65, 529 N.E.2d 534, 541-42 (1988), *Dept. Cent. Mgmt. Servs., v. AFSCME, Council 31,* 401 Ill. App. 3d 1127, 1131, 929 N.E.2d 1249, 1252-53 (5th Dist. 2010).

[59] *E.g., City of Highland Park v. Teamster Local Union No. 714*, 357 Ill. App. 3d 453, 460-62, 828 N.E.2d 311, 316-17 (2d Dist. 2005).

RECENT DEVELOPMENTS

By, Student Editorial Board:

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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 public employee collective bargaining statutes.

I. IELRA DEVELOPMENTS

A. Arbitration

In Chicago Teachers Union, Local No.1 and Chicago Board of Education, 31 PERI ¶ 146 (IELRB 2015), the IELRB enforced an arbitration award despite the employer's contention that the grievance was not arbitrable. In 2012, the union filed a grievance asserting that the Chicago Board of Education violated the collective bargaining agreement when it redefined the counselor position at Clemente High School to require a masters degree in counseling and a high school teaching certificate with endorsement in Social Sciences or English. The purpose of the position change was to allow the counselors to teach a Senior Seminar in addition to their regular scheduled counseling duties, without additional compensation.

The parties submitted the dispute to arbitration. An arbitrator found that the employer violated the contract. The employer refused to comply with the award and the union filed an unfair labor practice charge.

The employer relied on Article 10-6 of the contract which provided that principals were to assign duties to counselors that were consistent with the recommendations of the American School Counselor Association or other recognized organizations and that disagreements were to be resolved by the counselor, the principal and the Professional Problems Committee. The employer argued that this provision withdrew jurisdiction from an arbitrator to resolve the dispute.

Relying on its decision in *Niles Township High School District No. 219,* 29 PERI 159 (IELRB 2013), the IELRB observed that where a question of arbitrability concerns interpretation of the collective bargaining agreement, the question is one for the arbitrator to decide. The IELRB observed that, although the arbitrator did not expressly rule on arbitrability, she did consider the role that Article 10-6 gave

to the Professional Problems Committee. Therefore, the IELRB concluded, the arbitrator impliedly found the grievance arbitrable.

Furthermore, the IELRB observed that the employer never challenged arbitrability before the arbitrator and emphasized that when a party fails to question arbitrability before the arbitrator it waives any arbitrability objections it might later seek to raise. The IELRB thus held that the employer committed an unfair labor practice and ordered the employer to comply with the award.

B. Duty of Fair Representation

In *Brian J. McKenna and University Professionals of Illinois, Local 4100, IFT-AFT*, 31 PERI ¶ 149 (IELRB 2015), the IELRB held that the union did not breach its duty of fair representation when it engaged in bargaining simultaneously on behalf of two different bargaining units with the same employer and traded off interests of employees in one unit for gains for employees in the other unit.

The union represented two bargaining units at the Governors State University. Tenured and tenure-track faculty belonged to Unit A, while other faculty and academic support employees belonged to Unit B. The union negotiated simultaneously for both units.

McKenna, a member of Unit A and a former member of the union's bargaining team alleged that the union illegally traded off interests of Unit A to achieve benefits for Unit B. Although a union must have discretion to balance competing interests of different employees within a bargaining unit, McKenna argued that it may not do so across two different bargaining units.

The IELRB disagreed. It observed that the IELRA expressly authorizes multi-unit bargaining. It reasoned that a union must have the same discretion in balancing competing interests when it engages in multi-unit bargaining as when it bargains for a single unit. The IELRB further found that McKenna did not carry his burden of proving intentional misconduct on the part of the union. Therefore, the IELRB dismissed the duty of fair representation charge.

II. IPLRA DEVELOPMENTS

A. Bargaining Units

In *International Union of Operating Engineers Local 965 v. ILRB*, 2015 IL App (4th) 140352, the Fourth District Appellate Court affirmed the ILRB State Panel's decision which granted the office of comptroller's unit clarification petition and removed public service administrators (PSAs) from the bargaining unit.

On April 4, 2013, the union and the office of comptroller entered into a collective bargaining agreement ("CBA") involving comptrollers who held job classification title of PSA. On April 5, 2013, the general assembly amended section 3(n) of the act which defines "public employee," to exclude any person who is a state employee under the jurisdiction of the office of the comptroller and who holds a PSA position. The office of the comptroller interpreted the language of the amendment to be self-effectuating, meaning that the PSAs employed by the comptroller no longer enjoyed collective bargaining rights. The union interpreted the amendment as not applying until the end of the existing CBA. After the office of the comptroller unilaterally removed PSA employees from the bargaining unit, the union filed a grievance alleging this action violated the CBA.

The court considered whether the amendment to section 3(n) of the act was self-effectuating. In reaching its decision that it was, the court noted that the general assembly did not clearly prescribe the temporal reach of the amendment and because of that the court had to determine whether the amendment was substantive or procedural. If the amendment was substantive it could not be given retroactive effect. The court held that the amendment to section 3(n) was a substantive amendment. However, the court reasoned that applying the amendment from the date it was passed (April 5, 2013) was not applying it retroactively. The court further noted that the statue which created new requirements to be imposed in the present or the future and not in the past did not have a retroactive impact on the parties.

B. Duty of Fair Representation

In *Ziccarelli v. Illinois Labor Relation Board*, 2015 IL App (1st) 141223-U, the First District Appellate Court affirmed the ILRB Local Panel's decision dismissing Ziccarelli's charge that the union failed to represent him fairly in an arbitration in 2012.

Between 2010 and 2012, Ziccarelli filed numerous grievances against his employer and was involved in a federal lawsuit against the employer in which he alleged violation of his civil rights on basis of race, gender, age and retaliation for filing grievances against the employer. While the federal suit was pending, Ziccarelli reached an agreement with his employer regarding some of the grievances. Ziccarelli was unhappy with how the employer followed through on their agreement and decided to go back to arbitration. The union agreed to postpone the arbitration until the federal suit against the employer was resolved. Ziccarelli contended that the union failed to properly represent his interests by agreeing to delay the resolution of his grievance until the federal lawsuit was settled.

The Board sent a notice to Ziccarelli's attorney requiring him to submit information supporting his charge. Ziccarelli failed to comply with this request to provide the information to support the charge and the Local Panel dismissed the charge. In appealing this decision Ziccarelli's attorney argued that he was unable to provide additional information because he was too busy handling other cases. The Local Panel denied Ziccarelli's request for additional time, reasoning that he should have raised the claim immediately after he received the notice and not weeks after the time ran out.

Ziccarelli then argued that the request for additional information in support of his charge was not a sufficiently formal request because it did not include a citation to a specific rule and because it did not provide a warning of consequences of non-compliance. The court rejected this argument, reasoning that any argument or objection which is not raised during the pendency of the administrative proceeding is deemed waived and cannot be asserted during judicial review of the administrative agency's decision.