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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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It is with sorrow that we inform you of the passing of University of Illinois, School of Labor and Employment Relations Professor Emeritus, Peter Feuille. Professor Feuille was a Faculty Editor of the *Illinois Public Employee Relations Report* for many years. We are grateful to his colleague, Professor Robert A. Bruno for the following Memoriam tribute.

IN MEMORIAM - PETER FEUILLE

Robert A. Bruno Professor & Director, Labor Education Program, University of Illinois School of Labor & Employment Relations

Professor Feuille joined the then-Institute of Labor and Industrial Relations in 1977, providing over 30 years of service to the school and campus. He taught Workplace Dispute Resolution and Collective Bargaining to students in the School and from the College of Law. From 1994-2006, he served as the School's Director. He received his PhD from University of California, Berkeley, in 1973 and his Bachelor of Arts from Claremont McKenna College in 1967.

Beyond guiding and protecting the school through some tumultuous budgetary and structural times on campus, he spearheaded the evolution of the school Master's degree from its historical focus on industrial relations to the current face of modern human resources. As part of this, the degree name changed to the Master of Human Resources and Industrial Relations, and the tutorial was replaced with coursework reflecting the growing knowledge about human resources. The school's Labor Education Program also added faculty and grew into one of the largest, multi-dimensional union studies programs in the country. Without his work, the school would not enjoy the success that it does today.

Peter was also a guiding light and diligent laborer in many professional organizations, including the National Academy of Arbitrators and especially the Labor and Employment Relations Association (LERA). He served as the Secretary-Treasurer of LERA for 14 years, from 2000-2014.

He was well-known for his arbitration work, research and publications, and expertise on collective bargaining. Professor Feuille was a major contributor to the first rigorous research on public employee collective bargaining as it was developing. He helped to form what was called the "collective bargaining group" in the 1990s, which brought together scholars interested in advancing the frontiers of theory.

His list of distinguished contributions to the labor and employment relations field is lengthy. He has received two of the highest honors in our field, both the Susan C. Eaton Scholar-Practitioner Award (2006) for distinction as both a researcher and a practitioner in the field, and the Lifetime Achievement Award (2014) for lifelong contributions to the field of Industrial Relations and Human Resources.

Peter personified the best values of those who worked in the labor and employment relations field. He combined research on the key issues of the time, with his roles as teacher, mentor, and academic leader, and directly engaged in shaping practice and policy. He will be remembered for all these reasons.

Peter is survived by his wife, Susan, and his children, Julie King and Taylor Feuille.

For those who are interested making a gift to honor Professor Feuille, please visit the link below to the LER Scholars Fund that awards the Peter Feuille Scholarship.

POLICE BODY CAMERA: DO ILLINOIS PUBLIC EMPLOYERS HAVE A DUTY TO BARGAIN OVER THEIR USE?

By, James Powers

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By, Student Editorial Board:

Jim Connolly, Ning Ding, Naomi B. Frisch, and Jenna Kim

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.

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POLICE BODY CAMERAS: DO ILLINOIS PUBLIC EMPLOYERS HAVE A DUTY TO BARGAIN OVER THEIR USE?

By, James Powers

JAMES POWERS is a founding partner at the law firm of Clark Baird Smith LLP, where he concentrates his practice in labor and employment law, with an emphasis in public sector labor law. His labor relations experience includes representing employers in proceedings before the National Labor Relations Board, Illinois Educational Labor Relations Board and Illinois Labor Relations Board. He also represents employers in grievance and interest arbitration proceedings, and regularly serves as chief negotiator for employers in collective bargaining negotiations. Jim received his B.A. from Northwestern University and J.D. from Chicago-Kent College of Law, where he was elected to the Order of the Coif, and graduated as valedictorian.

I. INTRODUCTION

Ferguson, Missouri. Cleveland, Ohio. Baltimore, Maryland. Chicago, Illinois. These cities unfortunately have become synonymous with allegations of police brutality, where citizens have died in altercations with sworn police personnel. These incidents have focused the national consciousness on race relations between police and citizens (especially those who belong to protected categories). Rightly or wrongly, the reality is that a large segment of the United States population does not trust police officers to enforce laws impartially for all citizens.

Not surprisingly, calls have come from special interest groups, the media and politicians for greater surveillance of police interactions with the general public. Such monitoring, however, is complicated by the fact that many police officers perform their job duties “in the field” beyond traditional worksites.

To many, the apparent solution involves the use of officer-worn camera devices (i.e., “body cams”). Politicians like Hillary Clinton have called for their use in all police departments.[1] The federal government has offered tens of millions of dollars to cities for the purchase and implementation of body cameras.[2] This effort appears to be working. Whereas more than 75 percent of police departments responding to a government-funded survey in July 2013 reported that they do not use body cams,[3] the Associated Press now reports that major cities such as Chicago, Philadelphia, New York, Los Angeles and Houston have gradually introduced body cams to segments of their police forces.[4]

The adoption of such technological innovations may trigger collective bargaining obligations under state and local labor laws. As seen in the private sector, new surveillance techniques sometimes can constitute mandatory subjects of bargaining.[5] Contrary to popular belief, however, not all surveillance techniques and technology can or should invoke a decisional bargaining obligation. Unlike the private sector, a public employer's motivation for implementing surveillance technology often has more to do with citizen safety and community relations concerns as opposed to identifying workplace misconduct that can hurt a company's "bottom line." As such, the amenability of bargaining over the decision to implement public sector surveillance technology may be greatly reduced, if not totally eliminated.

Such collective bargaining questions are not purely an academic concern. When one considers that the national public sector union density rate was 45 percent for local government employees in 2015, and 38.5 percent for employees in protective service occupations,[6] the odds are good that a collective bargaining question may arise during a police department's implementation of new surveillance technology.

This article provides a brief survey of how labor law treats the negotiability of workplace surveillance devices. Part II addresses Illinois' newly-enacted Law Enforcement Officer-Worn Body Camera Act,[7] and describe the types of issues that the Act addresses (and, perhaps more importantly, what the Act does not address). Part III reviews the historical private sector labor law treatment of workplace surveillance devices. In the process, commentary will be provided on the inherent limitations that such administrative precedent has for public sector employers, where motivations for implementing workplace surveillance technology often differ from private sector companies. Part IV summarizes public sector labor law treatment of the negotiability of workplace surveillance technology. Parts V and VI address alternative defenses and bases for bargaining over issues relating to workplace surveillance technology. Part VII attempts to synthesize the various decisions into a comprehensive model for analyzing the negotiability of public sector workplace surveillance technology, including body cams.

II. THE ILLINOIS LAW ENFORCEMENT OFFICER-WORN BODY CAMERA ACT

On August 12, 2015, Governor Rauner signed into law Public Act 99-0352, which is more commonly referenced as the "Illinois Law Enforcement Officer-Worn Body Camera Act." Besides establishing the Act itself, Public Act 99-0352 amended a variety of other related statutes, including for example, the Freedom of

Information Act (exempting disclosure of body cam recordings),^[8] Use Tax and Service Occupation Tax Acts (requiring the deposit of \$500,000 into the State Crime Laboratory Fund),^[9] the Police Training Act (creating a professional conduct database that requires reporting police officers discharges for certain offenses),^[10] the Law Enforcement Camera Grant Fund (expanding the use of grant money for the use of officer-worn body cams),^[11] and the Illinois Criminal Code (prohibiting the use of “choke holds” by peace officers).^[12]

Most of the Act’s provisions took effect on January 1, 2016. Contrary to popular belief, however, the Act does not mandate the use of body cam technology by Illinois police departments. If a public employer voluntarily chooses to use such technology, however, its program must comply with the Act’s provisions.^[13] In this respect, the Act sets forth a series of stated purposes and advantages of using body cam technology:

- “Officer-worn body cameras will provide state-of-the-art evidence collection and additional opportunities for training and instruction.”^[14]
- “[O]fficer-worn body cameras may provide impartial evidence and documentation to settle disputes and allegations of officer misconduct.”^[15]
- “Ultimately, the uses of officer-worn cameras will help collect evidence while improving transparency and accountability, and strengthening public trust.”^[16]

Based on these legislative findings, the General Assembly determined that it was necessary to create “standardized protocols and procedures for the use of officer-worn body cameras to ensure that this technology is used in furtherance of these goals while protecting individual privacy and providing consistency in its use across this State.”^[17]

Accordingly, the Act delegates to the Illinois Law Enforcement Training Standards Board the task of developing “basic guidelines for the use of officer-worn body cameras by law enforcement agencies.”^[18] These guidelines (which have yet to be established) “shall be the basis for the written policy which must be adopted by each law enforcement agency which employs the use of officer-worn body cameras.”^[19] These departmental written policies must include, among other things, the following:

- “Cameras must be equipped with pre-event recording, capable of recording at least the 30 seconds prior to camera activation, unless the officer-worn body camera was purchased and acquired by the law enforcement agency prior to July 1, 2015.”^[20]

- “Cameras must be capable of recording for a period of 10 hours or more, unless the officer-worn body camera was purchased and acquired by the law enforcement agency prior to July 1, 2015.”[21]
- “Cameras must be turned on at all times when the officer is in uniform and is responding to calls for service or engaged in any law enforcement-related encounter or activity, which occurs while the officer is on duty. . . . [subject to a number of exceptions].”[22]
- “The officer must provide notice of recording to any person if the person has a reasonable expectation of privacy, and proof of notice must be evident in the recording. If exigent circumstances exist which prevent the officer from providing notice, notice must be provided as soon as practicable.”[23]
- “Recordings made on officer-worn cameras must be retained . . . on a recording medium for 90 days.”[24]
- “Following the 90-day retention period, . . . all recordings must be destroyed, unless any encounter captured on the recording has been flagged.” An encounter is deemed to be flagged when:
 - (i) a formal or informal complaint has been filed;
 - (ii) the officer discharged his/her firearm or used force during the encounter;
 - (iii) death or great bodily harm occurred to any person in the recording;
 - (iv) the encounter resulted in a detention or an arrest, excluding minor traffic offenses or business offense;
 - (v) the officer is the subject to an internal or otherwise being investigated for possible misconduct;
 - (vi) the supervisor of the officer, prosecutor, defendant, or a court determines that the encounter has evidentiary value in a criminal prosecution;
 - (vii) the recording officer requests that the recording be flagged for official purposes related to his or her official duties.”[25]

Recordings may also be retained for training purposes.[26]

The Act specified that “[r]ecordings shall not be used to discipline law enforcement officers unless:

- (A) a formal or informal complaint of misconduct has been made;
- (B) a use of force incident has occurred;

(C) the encounter on the recording could result in a formal investigation under the Uniform Peace Officers' Disciplinary Act; or

(D) as corroboration of other evidence of misconduct.”[27]

Departments must insure proper care and maintenance of officer-worn body cameras. Relatedly, officers must as soon as practical document and notify the appropriate supervisor of the technical difficulties, failures, or problems with the officer-worn body camera or associated equipment. Upon providing such notice, “the appropriate supervisor shall make every reasonable effort to correct and repair . . . the officer-worn body camera equipment.”[28]

The Act further provides:

No officer may hinder or prohibit any person, not a law enforcement officer, from recording a law enforcement officer in the performance of his or her duties in a public place or when the officer has no reasonable expectation of privacy. [T]he . . . [Department's] written policy shall indicate the potential criminal penalties, as well as any departmental discipline, which may result from unlawful confiscation or destruction of the recording medium of a person who is not a law enforcement officer.[29]

The Act allows the recording officer and his or her supervisor to access and review recordings prior to completing incident reports or other documentation, provided that the officer or his or her supervisor discloses that fact in the report or documentation.[30]

As the above summary demonstrates, there are a host of operational questions that the Act does not address. Aside from the fact that the Training Standards Board has not yet developed the Act's implementing regulations, local police departments are left with the numerous questions. For example, a recently-filed federal lawsuit against a Chicago suburban police department alleges violations of federal and state constitutional privacy principles resulting from activating body cam footage in bathrooms and locker rooms.[31] The suit raises the question of when and how a Department may activate body cams beyond the minimum time frames required by the Act. Additional questions that police departments face include:

- What limits, if any, are there on a supervisor's discretion to maintain body cam footage beyond 90 days due to the footage having “evidentiary value?”
- What limits, if any, are there on a supervisor's ability to peruse body cam footage at random without a formal complaint relating to the incident and/or independent information indicating that the officer may have engaged in misconduct?
- Should officers subject to an internal non-criminal investigation be allowed to review body cam footage before being subjected to departmental questioning?

- What, if any, discipline should result from an officer's mishandling of body cam footage and equipment?

The Act also raises the question of what, if any, discipline should result from an officer's improper confiscation of a video or audio footage by a private citizen who is recording the officer's performance of his official duties?

While some of these questions arguably might fall within the scope of so-called "impact and effects" bargaining, the primary question still remains: does a Department have to bargain with a union in the first instance over the decision to implement officer-worn body cameras? As will be explained below, private sector precedent does not provide a perfect answer due to the inherent differences between public and private employer motivations.

III. PRIVATE SECTOR NEGOTIABILITY DETERMINATIONS REGARDING SURVEILLANCE TECHNOLOGY

In the private sector, the National Labor Relations Board ("NLRB") consistently has held that the installation and use of hidden surveillance cameras is mandatorily negotiable. In one of its seminal decisions involving surveillance cameras, the NLRB held in *Colgate-Palmolive Co.* [32] that the employer had a statutory obligation to collectively bargain over: (1) the circumstances under which hidden surveillance cameras would be activated; (2) the general areas in which they would be placed; and (3) the cameras' use in the event they recorded improper employee conduct. The NLRB theorized that the video surveillance in *Colgate-Palmolive* was "germane to the working environment," allegedly no different than physical examinations, drug/alcohol testing requirements, and polygraph testing.[33] The NLRB also concluded that monitoring an employer's workforce to ferret out misconduct does not implicate the employer's "entrepreneurial control:"

The installation of and use of surveillance cameras in the workplace are not among that class of managerial decisions that lie at the core of entrepreneurial control. The use of surveillance cameras is not entrepreneurial in character, is not fundamental to the basic direction of the enterprise, and impinges directly on employment security. It is a change in the Respondent's methods used to reduce workplace theft or detect other suspected employee misconduct with serious implications for its employees' job security, which in no way touches on the discretionary "core of entrepreneurial control." [34]

The U.S. Court of Appeals for the Seventh Circuit adopted this approach in *National Steel Corp. v. NLRB*, [35] where it concluded that the installation of workplace surveillance cameras was a mandatory subject of bargaining. The court

reasoned that the cameras focused on the “working environment” as a way to uncover employee misconduct.[36]

The NLRB’s reliance on the “entrepreneurial control” standard highlights the inherent difference between private and public sector employers. In most cases, “for-profit” companies use workplace surveillance as a way to deter employee misconduct or protect their work product and premises from theft and damage. Such decisions usually do not implicate the company’s long-range entrepreneurial direction, such as what products to make, how to price those products, and how to expand its customer base.

By contrast, a public entity often uses surveillance technology to provide for the safety and welfare of its citizens, which arguably goes to the “core” of the public employer’s “entrepreneurial control.” In essence, citizen safety *is* the business of most public employers. By the same token, unions presumably have little (if anything) to offer at the bargaining table to offset the public employer’s safety concerns. As the U.S. Supreme Court has suggested, the lack of power or authority to offer some type of constructive concession is what often renders a bargaining issue a permissive as opposed to a mandatory subject of bargaining.[37]

Applying these principles to the public sector context, unions would be hard pressed to claim that an employer must bargain over the decision to install surveillance coverage in the following contexts:

- Installing surveillance cameras on the Illinois tollway system to identify vehicular accidents and expedite safety vehicles, even though they might capture union-represented tollway workers engaging in misconduct while driving along the highway;
- Installing surveillance cameras in and around the public areas of municipal buildings to deter criminals from targeting citizens and employees, even though they might also capture union-represented workers engaging in misconduct in or around the public building.

In these scenarios, unions presumably would have little to offer an employer across the bargaining table that would address the underlying motivation for implanting surveillance technology in the first instance.

How do these legal principles apply to police-worn body cams? Labor organizations presumably will argue that body cams are intended to do nothing more than identify officer misconduct, which allegedly does not implicate the core of a public employer’s entrepreneurial control. As the General Assembly made clear, however, the primary “purpose” behind the Law Enforcement Officer-Worn

Body Camera Act is to strengthen public trust, while improving evidence collection in the furtherance of criminal law enforcement.[38]

Once one accepts the notion that body cams are primarily intended to further the State's important interest in improving citizen trust in its civil servants, it becomes easy to conclude that unions have little authority or control over the goals behind body cams. Adopting the U.S. Supreme Court's approach, a labor board naturally would question what the union can offer across the bargaining table to convince the employer that body cams should not be implemented. In this respect, wage and benefit concessions presumably would have little effect on the employer's primary interest in improving citizen confidence in its law enforcement representatives. Moreover, union proposals for alternative ways to improve citizen morale and confidence (*e.g.*, community outreach programs) hardly resemble what labor boards traditionally deem to be mandatorily negotiable conditions of employment. In the end, when one balances a union's bargaining interests with the impact that bargaining would have on the employer's inherent managerial right to provide for citizen safety, welfare and service levels,[39] a compelling argument can be made that the decision to install body cams is not a mandatory subject of bargaining.

In short, private sector labor board precedent is not helpful when analyzing the negotiability of body cam and other workplace surveillance technology in the public sector. Due to the inherent differences between public entities and "for profit" private sector employers, public employers and labor organizations should look to public sector labor board precedent when making such negotiability determinations. As will be explained below, a number of public sector labor boards have acknowledged that, depending on the employer's underlying motivation, workplace video surveillance constitutes a non-mandatory subject of bargaining.

IV. PUBLIC SECTOR NEGOTIABILITY DETERMINATIONS REGARDING SURVEILLANCE TECHNOLOGY

The Local Panel of the Illinois Labor Relations Board ("ILRB") recently addressed the negotiability of workplace video surveillance. In *City of Chicago*,[40] the Chicago Public Library sought to catch an intruder after a series of break-ins. The Library did so by installing a series of hidden video cameras without first informing the union. One of the video cameras was directed at an employee-only break area. Relying on NLRB precedent, the ILRB concluded that the decision to install such across-the-board surveillance equipment was a mandatory subject of bargaining, because it affected the terms and conditions of bargaining unit employees. In this respect, the City apparently did not self-limit the video footage

to catching outside intruders; rather, the footage recorded employees after hours when patrons were not allowed in the library. Indeed, the Library relied on the video footage at one point to discipline a bargaining unit employee for intentionally damaging a copy machine.

Based on these facts, the ILRB apparently was persuaded that the installation of video surveillance cameras went beyond the Library's inherent entrepreneurial authority. A slightly different fact pattern, however, arguably would have resulted in a different outcome. Take for example, reports of a patron sexually abusing minors in the library book stacks. Union counsel could not with a straight face claim that protecting the safety of patrons (especially children) is not part of a library's entrepreneurial concern. In turn, if the Library limited video surveillance to public locations that are frequented by children, the employer likely would not incur a "decisional" bargaining obligation, even if bargaining unit members are occasionally caught on tape engaging in misconduct in public areas.

A decision by the Washington Public Employment Relations Commission ("PERC") further highlights the importance of an employer's motivation for workplace surveillance. In *King County*,^[41] the original intent behind video surveillance cameras was changed from ensuring citizen security to enforcing employee compliance with work rules. This emphasis on employee discipline led the Washington PERC to conclude that the employer had an obligation to bargain over the installation of new cameras (and the change in purpose for older cameras).

The emphasis on an employer's primary motivation in the surveillance arena has been adopted by several state labor boards. For example, in *City of Patterson*,^[42] the New Jersey PERC addressed a police department's installation of overt video surveillance cameras in a police department building. It was undisputed that the video cameras were not installed with the goal of observing or disciplining employees. Rather, the video surveillance was part of a larger system installed in public areas of a police department building to enforce the safety and security of the general public. It just so happened that bargaining unit members occasionally were caught on the video footage. Based on these facts, the New Jersey PERC concluded that the public employer did not have to bargain over the decision to install overt video cameras in public areas in the first instance. An administrative law judge with the New York Public Employment Relations Board reached a similar conclusion in connection with the installation of GPS systems in public works and police vehicles.^[43]

Some labor boards have held that public employers need not bargain over workplace surveillance even when the goal of the surveillance involves the

identification of workplace misconduct. This is especially true where the surveillance is part of a discrete and limited investigation into misconduct occurring in non-work areas. For example, in *University of Michigan*,^[44] the Michigan Employment Relations Commission (“MERC”) ruled that an employer did not have to bargain over the installation of a hidden camera to catch employees sleeping in an unauthorized and unassigned “nesting” area. As the MERC explained: “Here, Respondent installed a single camera for the limited and temporary purpose of discovering two specific things: the identity of persons frequenting a room that had been surreptitiously constructed without Respondent’s knowledge or consent; and the nature of the activities occurring in that room.”^[45] With this limited purpose in mind, the MERC concluded that “the Employer’s use of a hidden camera in an area that is not part of the working environment is within management’s right to supervise its employees during work time.”^[46] The Connecticut State Board of Labor Relations reached a similar conclusion in the context of the discrete use of a single camera as part of a limited investigation into the improper copying of materials from a supervisory police commander’s desk.^[47]

The above analysis reflects the general trend among state public sector labor boards to exempt from negotiation those surveillance decisions that are primarily motivated by broader citizen and societal interests or are very limited in their focus to a discrete workplace investigation. This is perfectly consistent with the NLRB’s approach when dealing with “for profit” companies, which admittedly do not have the same obligations toward society at large.

V. DOES NEW TECHNOLOGY REALLY “CHANGE” ANYTHING SO AS TO TRIGGER A BARGAINING OBLIGATION?

Even if a public employer’s adoption of a new type of surveillance technology does not implicate an inherent managerial right to foster the service needs, safety or welfare of its citizens, NLRB guidance suggests that new technology may not trigger a bargaining obligation where it simply provides a more efficient and effective type of workplace monitoring. For example, in *BP Exploration of Alaska, Inc.*,^[48] the employer had an established set of driver safety rules for its Alaska “North Slope” operations, ranging from seat belt requirements to speed limitations under certain weather conditions. The employer decided to implement vehicle data recorders (without bargaining with the union), to help it monitor

compliance with these safety rules, as a supplement to physical observations conducted by two security officers. The data recorders tracked vehicle location through GPS, and collected and transmitted data about how a vehicle was being operated. The Union filed bad faith bargaining charges against the employer.

After an investigation, the NLRB's General Counsel recommended that a complaint issue, based on the theory that the installation of the data recorders was a mandatory subject of bargaining. In doing so, the General Counsel analogized to other investigative techniques that are mandatorily negotiable, such as the use of video cameras, polygraphs, and drug/alcohol testing requirements. At the same time, however, the General Counsel explained that even if a new investigative technique was a mandatory subject of bargaining, an employer might still have no bargaining obligation if it simply substituted one equivalent technological tool for another.

One such example involves substituting undercover video surveillance for personal observations during workers compensation fraud investigations.[49] By contrast, the data recorders in *BP Exploration* constituted a much greater change, due to the limited ability of the two security officers to observe safety violations across 20 oil fields and 700 motor vehicles scattered throughout Alaska's "North Slope."

The NLRB General Counsel had a recent opportunity to apply this principle in *Shore Point Distribution Co.*[50] There, the employer had installed a GPS tracking device in the truck of an employee suspected of "stealing time." The NLRB's General Counsel recommended the dismissal of the bad faith bargaining charge, because the company had not substantially changed its past practice (which the union had never opposed) of assigning a private investigator to "tail" drivers. The GPS device was simply a mechanical way of obtaining the same data that the private investigator could obtain by physically observing drivers. Significantly, the GPS device apparently did not "increase greatly the chance of the Employee being disciplined."

In light of this guidance, bargaining obligations in the employee surveillance context should arise only where the underlying surveillance technology truly constitutes a substantial change from the employer's past surveillance practices. While this principle may not apply to body cam technology, other types of surveillance changes certainly may qualify.

VI. POTENTIAL EFFECTS BARGAINING OBLIGATIONS INVOLVING BODY CAMS

Even if the underlying decision to install surveillance technology is considered a non-negotiable inherent managerial right, the effects of such a decision might still be negotiable. The ILRB has recognized an employer's obligation to bargain over the effects of a decision, even if the decision itself might be considered to be a "permissive" subject of bargaining.[51] The California Public Employment Relations Board ("PERB") applied this principle in the video surveillance context. In Rio Hondo Community College District,[52] the PERB found that the employer had bargained in bad faith by refusing to negotiate over the effects of a decision to install video cameras in a newly constructed learning resource center. The PERB concluded that video surveillance of bargaining unit employees reasonably would have a future impact on those employees' performance evaluations and discipline. As a result, the employer was obligated to bargain over the effects of its decision prior to the installation of the video cameras, even though it did not have to bargain over the decision itself.

A recent decision by the Permanent Umpire under the Montgomery County, Maryland[53] Police Labor Relations Law sheds light on the types of "effects" over which a police union may demand to bargain in connection with body cams.[54] The County and the Fraternal Order of Police ("FOP") disagreed over the negotiability of a number of bargaining proposals related to the County's planned implementation of body cams for County police officers. Significantly, the FOP did not propose that the County refrain from implementing body cams in the first instance. Instead, the FOP proposed various limitations on the use of body cam data. The Permanent Umpire ruled that many of these proposals were not mandatory subjects of bargaining, due to their undue restriction on the employer's inherent management rights under the Police Labor Relations Law. For example:

- **Volunteers for Wearing Body Cams:** The FOP proposed that the County first solicit volunteers for wearing body cams, and then compel remaining officers in inverse order of seniority. This proposal was deemed to be a permissive subject of bargaining, because it would unduly restrict the County from deploying body cams where they were deemed to be most critically needed.[55].

- **Recording of Privileged Communications:** The FOP also proposed that an officer be allowed to deactivate body cams during privileged conversations with spouses, attorneys, labor representatives, ministers and the like. The Permanent Umpire also rejected this proposal as a permissive subject, because the proposal would allow an officer to terminate a recording even when the officer might be in the middle of a law enforcement task that demands continued surveillance. The Umpire suggested, however, that a more narrowly tailored proposal that addresses the inadvertent recording of privileged communications might pass muster.[56]
- **Employer Access to Recordings for Disciplinary/Investigation Purposes:** The Umpire acknowledged that the union’s proposal that would limit the county from “routinely searching through recordings for the express purpose of discovering one or more acts of misconduct” was a mandatory subject of bargaining.[57] By contrast, the Umpire held that the FOP’s proposal that would limit the county’s ability to use recording data for disciplinary purposes if discovered during the normal and accepted course of reviewing data recordings was a non-mandatory subject of bargaining. According to the Umpire, such limitations would “inappropriately impair the Department’s mission and its rights to maintain and improve the efficiency and effectiveness of operations [and] to supervise and direct employees.”[58]
- **Use for Recordings for Training Purposes:** The FOP also proposed that the County refrain from using body cam recordings for training purposes, unless each employee involved in the recording gave written consent, which could be withdrawn at any time and for any reason. The Umpire ruled that this proposal that “vests the individual [officer]. . . with the ability to stymie the Department’s ability to use the recording for training purposes inappropriately impairs the Department’s rights and obligations regarding officer training.”[59]
- **Prohibition on Using Body Cam Recordings for Performance Evaluations:** The Umpire also ruled that the FOP’s proposed ban on using body cam recording for performance evaluation purposes was a permissive subject of bargaining. According to the Umpire, such a complete across-the-board ban on using body cam data would inappropriately impair the Department’s right to maintain and improve the effectiveness of operations.[60]

This ruling of course addresses only a sample of the types of effects bargaining proposals that a union may wish to raise in response to the use of body cams. As explained above, the newly enacted Illinois Law Enforcement Officer-Worn Body Camera Act leaves many questions unanswered, some of which might be ripe for effects bargaining. Time will tell whether some of these effects proposal constitute mandatory or permissive subjects of bargaining.

Of course, effects bargaining can be waived for the term of a contract like any other bargaining right. Such waivers usually are found in entire agreement provisions (sometimes called “zipper clauses”) where a labor organization may have promised to waive its right to bargain over the effects of the employer’s exercise of its inherent rights outlined in a management rights clause. Alternatively, the ILRB has acknowledged that parties may have “pre-bargained” over the effects of a managerial decision, such that no further bargaining during the term of a contract is warranted.[61] Parties obviously should consult their collective bargaining agreements to determine their mid-term bargaining rights before embarking on effects negotiations.

VII. CONCLUSION

As the above discussion demonstrates, the negotiability of public sector surveillance technology largely depends on the unique facts of each case. Several broad principles, however, can be gleaned from these decisions:

- The intent behind the installation of surveillance technology is definitely relevant. For example, broad-based surveillance efforts as a way to ferret out employee misconduct are more likely to be deemed mandatory subjects of bargaining, whereas surveillance technology intended to further a public entity’s statutory public safety role is more likely to be deemed a permissive subject of bargaining.
- The location of surveillance equipment is relevant. For example, installing surveillance equipment in public areas and/or vehicles is more likely to be found a non-mandatory subject of bargaining, whereas installation in non-public work areas that capture only employee conduct is more likely to be found mandatory.
- The limited use of surveillance technology for a discrete investigation into employee misconduct in non-work areas (as opposed to a broad-based, across-the-board employee surveillance) is likely to be found a non-mandatory subject of bargaining.
- Changes in workplace surveillance that do not substantially depart from prior surveillance practices are more likely to be deemed non-mandatory subjects of bargaining.

- Even if the underlying decision to implement surveillance technology is not a mandatory subject of bargaining, the effects of such a decision may well be considered mandatory (absent a bargaining waiver in the collective bargaining agreement).

As for the decision to implement “body cams,” the General Assembly’s stated goal for the use of such technology certainly suggests a topic over which unions have no authority to bargain. If one assumes that the primary goal of body cams is to improve citizen trust in law enforcement personnel and refine evidentiary tools for criminal prosecutions, the ILRB and its ALJs likely would conclude that the decision to implement body cams is a permissive subject of bargaining. Such a decision would parallel several recent ILRB rulings that have reaffirmed an employer’s right to make unilateral staffing decisions that implicate the levels of service and safety offered to the general public.[62]

In the end, however, bargaining over body cams may be deferred for months, if not years, as many smaller Illinois communities presumably will wait for further guidance from the Law Enforcement Standards Training Board before investing the significant time and expense of creating a body cam program. In turn, this delay may allow other jurisdictions and administrative agencies to take the lead in exploring the aforementioned negotiability issues, such that when it finally comes time for Illinois to enter the fray, a body of case law may already have been developed.

[1] See Ken Thomas & Jill Colvin, *Clinton Calls for Nationwide Use of Police Body Cameras*, Chi. Sun Times, (Apr. 29, 2015, 11:38 AM), <http://chicago.suntimes.com/politics/clinton-calls-for-nationwide-use-of-police-body-cameras/>.

[2] Office of Pub. Affairs, *Justice Dep’t Announces \$20 Million in Funding to Support Body-Worn Camera Pilot Program*, US. Dep’t of Justice (May 1, 2015), <https://www.justice.gov/opa/pr/justice-department-announces-20-million-funding-support-body-worn-camera-pilot-program>.

[3] U.S. Dep’t of Justice, Office of Community Oriented Policing Services, *Implementing a Body-Worn Camera Program.” Recommendations and Lessons Learned 2* (2014), <https://www.justice.gov/iso/opa/resources/472014912134715246869.pdf>.

[4] Philip Marcello, *Police Begin Wider Body Camera Use After Months of Testing*, Associated Press, (May 3, 2016, 3:02 PM), <http://bigstory.ap.org/article/3e5f23f1d1df4d75b1d37b42ee4621b6/police-begin-wider-body-camera-use-after-months-testing>.

[5] See *Colgate-Palmolive Co.*, 323 NLRB 515 (1997).

- [6] U.S. Dep’t of Labor, Bureau of Labor Statistics, Economic News Release, Union Members – 2015, Table 3, Union Affiliation of Employed Wage and Salary Workers by Occupation and Industry, 2014-2015 (last modified Jan. 28, 2016), <http://www.bls.gov/news.release/union2.t03.htm>.
- [7] Public Act 99-532, codified at 50 ILCS 706/10-1 to 10-35.
- [8] 5 ILCS 1140/7.5(bb).
- [9] 35 ILCS 105/9, 35 ILCS 110/9, 35 ILCS 115/9.
- [10] 50 ILCS 705/6.2.
- [11] 50 ILCS 707/5 to 707/25.
- [12] 720 ILCS 5/7-5/5.
- [13] 50 ILCS 706/10-15.
- [14] 50 ILCS 706/10-5.
- [15] *Id.*
- [16] *Id.*
- [17] *Id.*
- [18] 50 ILCS 706/10-20(a).
- [19] *Id.*
- [20] 50 ILCS 706/10-20(a)(1).
- [21] 50 ILCS 706/10-20(a)(2).
- [22] 50 ILCS 706/10-20(a)(3).
- [23] 50 ILCS 706/10-20(a)(5).
- [24] 50 ILCS 706/10-20(a)(7).
- [25] 50 ILCS 706/10-20(a)(7)(B).
- [26] 50 ILCS 706/10-20(a)(8).
- [27] 50 ILCS 706/10-20(a)(9).
- [28] 50 ILCS 706/10-20(a)(10).
- [29] 50 ILCS 706/10-20(a)(11).
- [30] 50 ILCS 706/10-20(a)(6).
- [31] *See* Complaint at Law ¶¶ 54, 62, *Lepe v. Vill. of Round Lake Park*, Case No. 16: cv 6516 (N.D. Ill. June 23, 2016), (No. 1:16 cv 6516).
- [32] 323 N.L.R.B. 515, 516 (1997) (holding that employer must bargain over installation of hidden video cameras in employee restrooms and a fitness center).
- [33] *Id.* at 515.
- [34] *Id.* at 515-16.
- [35] 324 F.3d 928 (7th Cir. 2003).
- [36] *Id.* at 933.

[37] *First Nat'l Maint. Corp. v. NLRB*, 452 U.S. 666, 687-88 (1981) (decision to partially close business for non-economic reasons was not amenable to bargaining); *see also Oklahoma Fixture Co.*, 314 N.L.R.B. 958, 960 (1994), *enfd in relevant part*, 79 F.3d 1030 (10th Cir. 1996) (subcontracting decision motivated by concerns over legal liability was a permissive subject, because the union had “no authority or even potential control over the basis for the decision”).

[38] 50 ILCS 706/10-5.

[39] The Illinois Supreme Court adopted a three-part negotiability test in *Central City Educ. Ass'n v. IELRB.*, 149 Ill.2d 496, 523, 599 N.E.2d 892, 905 (1992). Pursuant to that test, a decision-maker must first ask whether a bargaining topic implicates a term and condition of employment. If so, the decision-maker must next ask whether the topic involves an inherent managerial right. If the answer is again “yes,” the decision-maker must then balance how collective bargaining would impact the exercise of the employer’s inherent managerial rights.

[40] 31 PERI ¶ 3 (ILRB 2014).

[41] 2008 WL 5369588 (Wash. PERC 2008).

[42] 33 NJPER ¶ 50 (NJ PERC 2007).

[43] *See County of Nassau*, 41 PERB ¶ 4553 (NY PERB ALJ 2008) (requiring public works employees to carry cell-phones with GPS tracking systems implicated the employer’s right to determine the methods and means by which it would provide services to the community); *see also Vill. of Hempsted*, 41 PERB ¶ 4554 (NY PERB ALJ 2008) (same); *County of Nassau*, 41 PERB ¶ 4552 (NY PERB ALJ 2008) (installing GPS tracking devices in public works vehicles implicated the employer’s right to determine the methods and means by which it would provide services to the community).

[44] 25 MPER ¶ 64 (MERC 2012).

[45] *Id.*

[46] *Id.*

[47] *Int'l Bhd. of Police Officers Local 316 v. State*, 1998 WL 234836 (Ct. Sup. Ct. 1998) (affirming labor board decision that the matter was not a mandatory subject of bargaining).

[48] Case No. 19-CA-29566 (NLRB Advice Mem. July 11, 2005).

[49] *See PPG, Inc.*, Case No. 6-CA-33492 (NLRB Advice Mem. Nov. 3, 2003); *see also Roadway Express*, 13-CA-39940 (NLRB Advice Mem. April 15, 2002) (substituting computer devices on vehicles as a way to track employee locations in lieu of employees themselves initiating radio calls did not significantly change working conditions).

[50] No 22-CA-151053 (NLRB Advice Mem. Oct. 15, 2015), *available at* https://www.nlr.gov/cases-decisions/advice-memos?issuance_date=2015.

[51] *See Chicago Transit Auth. v. Amalgamated Transit Union, Local 241*, 299 Ill. App. 3d 934, 943, 702 N.E.2d 284, 290 (1st Dist. 1998); *AFSCME v. State Labor Relations Bd.*, 190 Ill. App. 3d 259, 268-69, 546 N.E.2d 687, 693-94 (1st Dist. 1989) (labor board properly ordered further effects bargaining, despite the employer’s mid-term contractual right to implement a drug testing policy).

[52] 37 PERC ¶ 197 (Cal. PERB 2013).

[53] Montgomery County borders Washington D.C. and the City of Baltimore. The County had adopted several separate collective bargaining ordinances for its non-sworn personnel, fire personnel, and law enforcement personnel. Those ordinances can be accessed at <https://www.montgomerycountymd.gov/HR/labor/Labor.html>. According to Section 33-77(b) of the Police Labor Relations Law, a “Permanent Umpire” is appointed by the County Executive, subject to confirmation by the County Council. Among other things, the Permanent Umpire is responsible for resolving charges of prohibited practices by the employer or union. *See* Section 33-77(a)(5).

[54] *Montgomery Cty., Md.*, (Ira F. Jaffe, Permanent Umpire, Jan. 29, 2016), *available at* <https://iris.com/wp-content/uploads/2016/06/Montgomery-County-BWC-Arbitration-2.pdf>.

[55] *Id.* at 9-10.

[56] *Id.* at 11-12.

[57] *Id.* at 14.

[58] *Id.* at 13-15.

[59] *Id.* at 18.

[60] *Id.* at 19.

[61] *See, e.g., City of Chicago*, 18 PERI ¶ 3025 (ILRB 2002) (employer had no bargaining obligation over the “effects” of the decision to establish mandatory police officer retirement age, where the CBA already addressed various effects such as medical insurance continuation).

[62] *See City of Danville*, 21 PERI ¶ 187 (ILRB Gen. Counsel 2014) (General Counsel declared that firefighter proposals involving suppression force strength, equipment levels and station manning requirements constituted non-mandatory subjects of bargaining); *Vill. of Glenview*, 31 PERI ¶ 79 (ILRB ALJ 2014) (modifying ambulance staffing levels involved a non-mandatory subject of bargaining).

RECENT DEVELOPMENTS

By, Student Editorial Board:

Jim Connolly, Ning Ding, Naomi B. Frisch, and Jenna Kim

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. Duty to Bargain

In *Board of Trustees of Community College District, #508 d/b/a City Colleges of Chicago. v. IELRB*, 2016 Ill. App. (1st) 152260-U, the First District Appellate Court upheld the IELRB's decision that the City Colleges of Chicago violated Sections 14(a)(1) and (a)(5) of the IELRA by both failing to comply with the terms of a grievance settlement and by failing to bargain the impact of a new employee time reporting system.

The union filed a grievance in 2011 alleging that six full-time positions it sought to include in the bargaining unit were not to be excluded under the collective bargaining agreement's exclusion requirements. The parties settled the grievance, agreeing to include the positions in the bargaining unit. However, two years later, the employer went unilaterally excluded employees holding four of those full-time positions from the bargaining unit on the ground that they had access to confidential information. The court affirmed the IELRB's decision that the employer failed to adhere to the settlement terms requiring the inclusion of the six employees in the bargaining unit.

Additionally, the employer implemented a new time reporting system that used bargaining unit employees' fingerprints to record time. The union demanded impact bargaining over the use of biometrics expressing concerns about identity theft, safety, and privacy, among others. The employer did not respond to the union's demand to bargain, thus causing the union to file an unfair labor practice charge for bad faith bargaining. The court affirmed the IELRB's decision that the employer failed to bargain in good faith with the union on this issue. The employer did not challenge the merits of the IELRB's decision, but argued that the union

waived the issue. The court disagreed with the employer, affirming the Board's decision, as the union repeatedly demanded impact bargaining on the time reporting system issue.

II. IPLRA DEVELOPMENTS

A. Duty to Bargain

In *Wheaton Firefighters Union, Local 3706 v. ILRB*, ___ N.E.3d ___, 2016 IL App (2d) 160105 the Second District Appellate Court held that a party does not commit an unfair labor practice by submitting a proposal on a permissive subject of bargaining for the first time at interest arbitration.. The IPLRA does not prohibit an interest arbitrator from hearing permissive subjects. Further, allowing a permissive proposal at interest arbitration does not prejudice the opposing party, because, under section 1230.90(k) of the ILRB's rules, if one party objects to a permissive subject the arbitrator shall not rule on the issue. Thus, the court concluded, the employer did not engage in bad faith bargaining by making a new proposal on health care for the first time in interest arbitration.

The union argued that the city's proposal, which would have allowed the city to change health care benefits unilaterally, was a permissive subject, because it would have required the union to waive its statutory right to midterm bargaining. Though healthcare is generally considered a mandatory subject, the city's proposal was found to be permissive because it would allow the city to make unilateral changes to the union members' healthcare benefits during the term of the contract. The board agreed that it was permissive, but held that the city did not violate the IPLRA by proposing it, especially given that, pursuant to the ILRB's rules, the arbitrator did not resolve the issue of healthcare in his ruling. The court found the union's argument that the city bargained in bad faith by insisting to impasse on a permissive subject unconvincing; instead, the court considered the question of whether "mere submission of a new proposal for the first time in front of an interest arbitrator can constitute an act of bargaining in bad faith." The ILRB's conclusion that such a proposal on its own is not an act of bad faith was based on clear precedent (*See Village of Bensenville*, 14 PERI ¶ 2042 (ISLRB 1998)) and therefore not clearly erroneous. The court upheld the ILRB's finding. The union pointed out two instances where similar permissive proposals were introduced at interest arbitration and the arbitrator ruled on them, suggesting that the ILRB's holding may lead to a situation where one party is able to force the other to relinquish their statutory midterm bargaining rights. However, since the arbitrator followed the rules in this case, the union had an appropriate remedy,

and the existence of those two other cases were not enough to set aside the ILRB's decision.

B. Supervisors

In *Chicago Joint Board, Local 200, RWDSU, United Food and Commercial Workers International Union v. ILRB*, 2016 IL App (1st) 152770-U, the First District Appellate Court upheld the ILRB's ruling that pharmacy supervisors in the County of Cook Health and Hospitals System (CCHHS) are supervisors as defined in the IPLRA, 5 ILCS 315/3(r)(1). The union petitioned to represent a unit of pharmacy supervisors. The employer filed an objection, claiming that the pharmacy supervisors were "supervisors" under the IPLRA and therefore prohibited from representation by the union. The ILRB Local Panel found that the pharmacy supervisors were statutory supervisors and dismissed the petition. The union appealed the decision claiming that the ILRB erred in finding that the employer had met its burden to prove that they were in fact statutory supervisors.

The ALJ found, and the Board upheld, that the pharmacy supervisors met all of the factors under the four-part test to determine whether an employee is a statutory supervisor. The parties stipulated to the first factor, that the supervisor's work is substantially different from his or her subordinates. The court upheld the ALJ's factual findings on the second prong of the test, that the pharmacy supervisors have the authority to effectively recommend discipline, as not against the manifest weight of the evidence. The court also found that it was not clearly erroneous for the ALJ to find that the pharmacy supervisors use independent judgment in directing their subordinates and that they spend a preponderance of their time on supervisory functions, meeting the third and fourth prongs of the test. There was no reason for the court to overturn the Board's ruling on the pharmacy supervisors' supervisory status. Generally, the ALJ found the union's arguments not to be credible, and the court gave deference to the Local Panel's factual determinations. The union's arguments centered on the premise that the pharmacy supervisors were mostly acting on the direction of their own superiors, and therefore had no statutory "supervisory" duties. Ultimately the board disagreed, and as a result the pharmacy supervisors cannot be represented by a union.

A. Unit Clarification Petitions

In *State of Illinois, Department of Central Management Services v. AFSCME, Council 31*, Case Nos. S-UC-16-032, S-UC-16-033, S-UC-16-034 (ILRB State Panel 2016), the ILRB reversed the Administrative Law Judge's decision to dismiss petitions filed by the State of Illinois, Department of Central Management

Services seeking to exclude certain vacant positions from the bargaining unit. The ILRB acknowledged that while the Board has historically declined to hold hearings on vacant positions as a matter of policy, there was an abundance of evidence provided by the employer that clearly and specifically defined the duties required of the vacant positions.

The employer filed three unit clarifications petitions with the ILRB seeking to exclude three vacant Public Service Administrator (PSA) positions from units represented by AFSCME. The employer sought to exclude the positions from the bargaining units on the ground that they were supervisory or managerial.

The ALJ dismissed the petitions because the ILRB has historically declined to hold hearings regarding vacant titles because the hearings “necessarily result[s] in a lack of evidence as to the actual duties of any employee who may someday hold the disputed title.” *State of Ill. Dep’t of Cent. Mgmt. Serv.*, 20 PERI ¶ 105 (IL LRB-SP 2004). Furthermore, the “lack of evidence makes it virtually impossible to determine whether the position is statutorily excluded as supervisory, confidential or managerial.” *Id.*

Ultimately, the ILRB reversed the ALJ’s decision and held that there was sufficient evidence presented by the employer to determine whether the vacant positions’ anticipated duties would be sufficient to sustain exclusion from units represented by the AFSCME. The ILRB cited authority from the Seventh Circuit Court of Appeals that reliance on position descriptions was appropriate. *See Moss v. Martin*, 473 F.3d 694 (7th Cir. 2007); *Riley v. Blagojevich*, 245 F.3d 357 (7th Cir. 2005). Based on the sufficient evidence presented by the employer, the ILRB remanded the case to the ALJ for hearing.