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Where Do We Go From Here? Martin Luther King, Jr.’s Labor Legacy and the Current Attacks on Public Sector Unions

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RECENT DEVELOPMENTS

By Student Editorial Board:
Nicolas Coronado, Johnny D. Derogene, Miranda L. Huber, Yuting Li, Jeremiah Shavers, Matt Soaper, and Nicholas M. Ustaski

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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Where do We Go From Here? Martin Luther King, Jr.’s Labor Legacy and the Current Attacks on Public Sector Unions

By Stephanie Fortado

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I. INTRODUCTION

As dusk fell on the evening of April 4, 1968, Dr. Martin Luther King, Jr. stood on the balcony outside of room 306 at the Lorraine Motel in Memphis, Tennessee. King had come to the city to support striking black sanitation workers in their effort to secure better wages, safer working conditions, and the recognition of their union, American Federation of State, County and Municipal Employees (AFSCME) Local 1733. King’s presence in Memphis was an extension of his Poor People’s Campaign, an effort to turn the energy and tactics of the Civil Rights Movement to addressing the nation’s entrenched and persistent economic racism. As Dr. King joked and chatted with friends in the parking lot below, a shot rang out. An assassin’s bullet hit the Civil Rights leader through the jaw spinning him unto his back. Martin Luther King was murdered fighting for the right of black public sector workers to unionize.[1] In the weeks after his assassination the sanitation workers won their first contract with the city of Memphis.[2]

Over the fifty years since his death, there have been countless public memorials, articles, and tributes to honor the legacy of Martin Luther King, Jr. Yet all too often these memorials marginalize or leave out altogether
King’s work on economic justice and especially his support of the rights of organized labor. Throughout his leadership as a civil rights activist, and increasingly during the last few years of his life, King organized against economic racism and the devastating impact of unequal access to decent paying jobs on black workers. That King supported a Memphis labor struggle was indicative of his long-held belief that the labor movement could play important role in his vision of achieving racial justice and equality.[3]

In recognition of the fiftieth anniversary of King’s death, AFSCME and other union members from throughout the country gathered in Memphis for a conference and memorial. The gathering, simply called “I AM,” harkens back to the “I AM A MAN” placards carried by the striking Memphis sanitation workers during the 1968 strike. Those iconic picket signs evoked a basic claim to dignity and a call for the acknowledgement of the full humanity of the black men who carried them. Current AFSCME leadership is referencing that legacy, hosting an event website with the message “In 1968, they rallied for justice and equality. 50 years later, it’s our turn.” The posted schedule of events includes “taking a scholarly look at Dr. King’s legacy and how it applies to modern times,” and “showcasing contemporary solutions for issues plaguing low-income communities of color.”[4]

Yet even as AFSCME members from all corners of the country traveled to Memphis to commemorate the death and legacy of King, a storm cloud looms dark on the horizon. Since Dr. King’s murder the rights of public sector workers to form and join unions, the very kind of workers that AFSCME represents, have undergone prolonged assault. Both through the passage of increasingly restrictive laws at the state-level and through legal challenges in the courts, public sector workers have seen their power erode at the bargaining table. This is especially troubling for black workers, because as a 2011 research brief issued by the University of California, Berkeley Center for Labor Research and Education demonstrated, “The public sector is the single most important source of employment for African Americans.”[5] The same study showed that from 2005-2007, “Black men in the public sector earned 23.6 percent more than Black men in the entire workforce; Black women in the public sector earned 25.4 percent more than Black women in the entire workforce.”[6] A 2015 New York Times article echoed these findings, reporting that “Roughly one in five black adults work for the government, teaching school, delivering mail, driving buses, processing criminal justice and managing large staffs. They are about 30
percent more likely to have public sector jobs than non-Hispanic whites, and twice as likely as Hispanics.”[7] So while reduction of bargaining power is concerning for all unionized workers in the public sector, it has the potential to particularly impact African Americans. Most recently a series of Supreme Court cases has threatened to roll back the legal precedent upholding the union rights of public sector workers.[8] It is in this national context of rolling back public sector collective bargaining that King’s labor legacy must be considered.

II. MARTIN LUTHER KING JR., ECONOMIC JUSTICE AND ORGANIZED LABOR

From his earliest civil rights organizing efforts, Martin Luther King, Jr. understood the potential power of connecting the labor movement’s fight for economic justice and the fight for black civil rights. In 1955, it was a local labor leader, E.D. Nixon, of the Brotherhood of Sleeping Car Porters Union in Montgomery, Alabama, who helped propel King’s involvement in the bus boycott in that city, after Rosa Parks refused to give up her seat to a white passenger. [9] The tactic of the boycott, withholding commerce to put pressure on a business to change a practice, had precedent in the African American struggle for equal rights. In the 1930s black activists led a series of successful “Don’t Buy Where You Can’t Work” campaigns in Northern cities such as New York and Cleveland, opening new employment opportunities for black workers.[10] For 381 days black passengers in Montgomery used this tactic and refused to ride the segregated busses, as activists coordinated car rides for black workers and facilitated an effective publicity campaign. In addition to direct action, the organizers of the boycott pursued a successful legal course, and the U.S. Supreme Court affirmed a lower court ruling in Browder v. Gayle that segregation on interstate buses was unconstitutional.[11] His role in the Montgomery Bus Boycott put King into the national spotlight as a civil rights organizer. From the very beginning of his involvement in the movement, King’s civil rights campaigns borrowed well-tested organizing tools sharpened on leveraging the economic pressure of the black consumer and the black worker.[12] In a speech given before the United Auto Workers Convention on May 1, 1961, King compared the civil rights lunch counter sit-ins to the autoworker sit down strikes of the 1930s, declaring “We are proudly borrowing your techniques.”[13] Utilizing direct action tactics tested in earlier labor struggles was common throughout the Civil Rights Movement.
As the desegregation fight spread throughout the South, the progressive left flank of organized labor played a crucial support role. The United Packinghouse Workers of America (UPWA), a union that emphasized an effective inter-racial organizing model in the meatpacking industry, supplied early public support and financial backing for King. UPWA International President Ralph Helstein became a close advisor to the civil rights leader. In 1957 the meatpackers union invited King to give the keynote address at its Third National Anti-Discrimination Conference, and gifted King’s Southern Christian Leadership Conference with eleven-thousand dollars. As the civil rights struggle continued, other unions including the New York hospital workers of Local 1199, the International Ladies’ Garment Workers Union, the National Maritime Workers, the Teamsters, the Transport Workers Union, the United Auto Workers, and the United Steel Workers sent bail money to help free young activists jailed for protesting against discrimination in Birmingham, to support the 1965 civil rights march from Selma to Montgomery, and to provide other financial backing for the cause.[14]

This infusion of cash from organized labor helped sustain Southern civil rights organizing campaigns, especially early on when the movement was just gaining traction. But organized labor’s support for civil rights activism generally, and King specifically, was by no means unanimous. The Civil Rights Movement paralleled a tidal wave of anti-Communist Cold War hysteria, that purged some of the most progressive and radical members from organized labor’s ranks. The Labor Management Relations Act of 1947, more commonly known as Taft-Hartley, aimed at curtailing the power of organized labor and required union leaders to sign affidavits attesting that they were not Communists.[15] In the wake of the law’s passage, unions scrambled to demonstrate their anti-Communist credentials to stave off criticism in the press and in the court of public opinion. At the same time this Red scare took a toll on black activism, as many civil rights organizations likewise separated from their most militant organizers in the 1940s and 1950s, for fear of the Communist label. Red-baiting was also deployed to drive a wedge between labor and civil rights organizing.[16] For many years before King had arrived on the scene, white Southerners invested in maintaining the apartheid Jim Crow regime successfully painted both labor rights activists and civil rights activists with the broad brush of “Communist” in order to delegitimize their causes.[17]

This toxic combination was perhaps most fully achieved in the Orwellian concept known as “right-to-work.” Right-to-work laws allow individuals to
gain the benefits of being in a union without having to pay union dues. The idea behind the seemingly benign term started in the south as a backlash against inter-racial union organizing. It began with a 1941 editorial published by William Ruggles of the *Dallas Morning News*, calling for the end of closed-shop unionism.[18] The idea was picked up on by Vance Muse, whose organization, the Christian American Association, lobbied across the South against President Franklin Roosevelt’s New Deal and organized labor as communist conspiracies. Ruggles suggested the term “right-to-work” to Muse, who ran with the idea, first testing it out with the legislatures of Arkansas and Florida. According to historian Michael Pierce, “During the Arkansas campaign, the Christian Americans insisted that right-to-work was essential for the maintenance of the color line in labor relations. One piece of literature warned that if the amendment failed “white women and white men will be forced into organizations with black Apes . . . whom they will have to call ‘brother’ or lose their jobs.”[19] Both Arkansas and Florida adopted the right-to-work concept. When Congress passed, over President Harry Truman’s veto, the 1947 Taft-Hartley law, it included a provision for states to adopt right-to-work,[20] and legislatures across the South quickly passed versions of the anti-union measure.

The fast tracking of the right-to-work legislation demonstrated the effectiveness of blending racism with anti-Communist rhetoric. This tactic was quickly turned on King. As civil rights activism surged, along southern roadways dozens of billboards appeared emblazoned with the ominous message “Martin Luther King at Communist Training School.” The warning was superimposed over a picture of King as a young man attending a class at the Highlander Folk School, a mountain retreat and educational space for labor and social justice activists in Monteagle, Tennessee. In 1963, virulent segregationist Alabama Governor George Wallace testified before the U.S. Senate Commerce Committee demanding an investigation into King’s alleged communist ties. The hearing garnered widespread newspaper coverage across the nation.[21] The Director of the FBI, J Edgar Hoover became obsessed with King, ordering surveillance on the civil rights leader and hounding King and other civil rights activists.[22]

For those labor leaders already leery of the civil rights movement upsetting the racial order that privileged white workers, King’s alleged ties to radicalism and Communism gave them a ready-made excuse to keep their distance from the black rights leader. This included many skilled trades unions, whose own organizational histories were steeped in discrimination against workers of color. This tension within the labor movement came to a
head in 1963, when Dr. King called for a March on Washington “For Jobs and Freedom” to pressure Congress to act on protecting black civil rights.

To help lead the march King tapped A Philip Randolph. Randolph was a legend of black trade labor. He had taken on the powerful Pullman Company in a twelve-year struggle to win union recognition for the Brotherhood of Sleeping Car Porters, the first black union to affiliate with the American Federation of Labor in 1937. Randolph then helped build a grassroots March on Washington Movement in the 1940s. The March on Washington Movement threatened a massive demonstration in the nation’s capital, unless President Roosevelt desegregated wartime industrial jobs made possible by federal contracts. The idea was to use the March to bring international attention to the problem of racism within the United States, while the U.S. government wanted to be perceived as defending freedom and equality abroad. When the public-pressure tactic finally led Roosevelt to issue an executive order mandating war-industry desegregation, the march was called off. Two-decades later, King’s call for a civil rights march revived the idea. Randolph championed the march within the AFL-CIO, using his considerable labor organizational skills to build for its success. Others within the labor federation cautioned against the tactic as too radical. In the end, the AFL-CIO chose not to endorse the March on Washington For Jobs and Freedom, although some prominent leaders within the organization participated and dozens of union locals sent busloads of members to D.C. On August 28, 1963, Walter Reuther, President of the United Autoworkers and leader of the AFL-CIO’s Industrial Union Department, stood next to King on the speaker’s dais before a crowd of a quarter-of-a-million on the Washington Mall. In his speech, Reuther touched on the theme of the march, as he extolled the crowd, “The job question is crucial, because we will not solve education or housing or public accommodations as long as millions of American Negroes are treated as second-class economic citizens and denied jobs.”[23] A call for better black jobs stood at the heart of the civil rights movement.

Both before and after the March on Washington, despite the inconsistency of the support coming from the labor movement, King remained a fixture at the speaking podiums at some of the nation’s largest labor gatherings. In these remarks King consistently demonstrated an awareness of the particulars of organized labor, touching on a range of union issues. In December 1961, King gave an invited address at the annual national convention of the AFL-CIO. King used the occasion to warn against the growing threat of automation to the livelihood of American workers in the
industrial sector.[24] In 1967 speaking before shop stewards of Local 815, Teamsters in New York City, King talked about the history and importance of collective bargaining in building worker’s benefit packages.[25] King’s adeptness at weaving his message on civil rights with specific labor themes such as automation or collective bargaining was perhaps one of the reasons he was in such high demand for union speaking engagements.

In these speeches, King frequently exhorted his audience to do more to support black civil rights and eradicate discrimination from the labor movement. In his 1961 AFL-CIO speech, King laid out his vision of civil rights and labor rights activists joining forces, “Our needs are identical with labor’s needs: decent wages, fair working conditions, livable housing, old-age security, health and welfare measures, conditions in which families can grow, have education for their children, and respect in the community. That is why Negroes support labor's demands and fight laws which curb labor. That is why the labor-hater and labor-baiter is virtually always a twin-headed creature, spewing anti-Negro epithets from one mouth and anti-labor propaganda from the other mouth.”[26] King emphasized the importance of the black freedom struggle to expanding labor’s power, repeatedly explaining to various labor crowds that expanding the black political franchise would create more pro-labor voters. Talking to the Auto Workers in 1961 King imagined when “[a] new day will dawn which will see militant, steadfast and reliable Congressmen from the south joining those from the northern industrial states to design and enact legislation for the people rather than for the privileged.” Yet to realize that “new day” labor would need to actively support the black struggle for the right to vote. This quote demonstrates that achieving economic justice was part of King’s reason for organizing for black access to the ballot box.

King also counseled labor on the potential cost of not engaging in the civil rights struggle. In 1965, speaking before the Illinois AFL-CIO convention, King warned, “The south is Labor’s other deep menace. Lower wage rates and improved transportation have magnetically attracted industry. The widespread, deeply rooted Negro poverty in the South weakens the wage scale there for the white as well as the Negro. Beyond that, a low wage structure in the South becomes a heavy pressure on higher wages in the North.[27] These speeches, and many more like them, demonstrate how King included organized labor as part of his analysis of the political economy of the United States, that he saw unions as potential allies in the cause of black freedom, and that he recognized that racism within the labor
movement itself would need to be addressed before the full power of the potential alliance could be realized.

While economic justice had always undergirded Martin Luther King Jr.’s organizing campaigns, it came front and center in 1967. As mid-1960s urban rebellions in several northern cities clearly demonstrated, while the successful legislative agenda of the civil rights movement saw the passage of the Civil Rights Act of 1964 and the Voting Rights Act of 1965, the movement had not dismantled the oppressive structures that kept millions of black workers relegated to the lowest rungs of the national economy. These rebellions, and a new wave of activists that ushered in the Black Power Movement, called into question King’s adherence to non-violence and his vision of interracial solutions to systemic racism. Recognizing the movement was at a crossroads, King retreated with his wife and two close confidantes to Jamaica for January and February. There he wrote a book entitled, Where do We Go From Here: Chaos or Community? King began the book by reflecting, “With Selma and the Voting Rights Act, one phase of development in the civil rights revolution came to an end.”[28] He then outlined his vision for the next phase of the movement—a phase that more explicitly sought to address economic inequality by building a broad coalition. Organized labor was one part of King’s vision for this next step in moving toward a more just society, alongside the unemployed and unorganized workers. King took to the road to promote the ideas he outlined in his book, including demands for jobs programs, investments in public housing, a guaranteed national income, and criticism of the War in Vietnam, a position which strained King’s relationship with labor allies. As the long, hot summer of 1967 brought another wave of rebellions, the urgency of the urban crisis spurred King’s call for substantive economic reform.

To draw attention to the need for new, comprehensive economic policies, King began to plan for a Poor People’s March on Washington. Unlike the 1963 March, the Poor People’s March planned to bring people to the capitol with tents and sleeping bags, ready to stay “until the government recognizes the grave problems of poor people and takes firm steps in responding to their needs.”[29] In March 1968, in a press release issued by the Southern Christian Leadership Conference, King announced that the Poor People’s Campaign would begin on April 22. The five-page press release ended by laying out the stakes of the proposed action, “We must guarantee that in this richest society in history, the poor, too, can find comfort and security and decent jobs and respect. It is time to re-order our national priorities. If
we as a society fail, I fear that we will learn very shortly that racism is a sickness unto death.”[30] Many black activists questioned King’s idea of bringing the poor and unemployed to Washington, unsure that politicians there would offer tangible solutions to economic problems, and wondering about the logistics of coordinating the massive protest King envisioned. King doggedly kept organizing for an interracial direct action protest in the capitol. Yet before the Poor People’s Campaign went to Washington, King first answered the call to come to Memphis to support a strike of black public sector workers.[31]

III. MARTIN LUTHER KING JR. SUPPORTS THE STRIKE IN MEMPHIS

As a city, Memphis prided itself on its supposed racial harmony that escaped the violence that marked many other Southern cities during the Civil Rights Movement. Yet that peaceful façade covered an oppressive Jim Crow order. More than any other man, Democratic Mayor E. H. Crump was the architect of the city’s Jim Crow racist regime. Crump was first elected as Mayor of Memphis in 1908 and held the post until his death in 1954. He incorporated black voters into his political machine by averting the worst of the racial violence that plagued much of the South, while at the same time entrenching segregation of municipal services.[32] Those black leaders that openly opposed Crump’s machine faced quick retribution. For three months in 1940 Memphis police terrorized black neighborhoods in response to growing civil rights activity, stopping and searching hundreds of black residents, and beating several local black leaders. The Chicago Defender declared the crackdown a “Reign of Terror.”[33] Crump also became increasingly anti-union after World War II, recognizing the potential for the Congress of Industrial Organizations (CIO) interracial unionism to become a threat to his political strangle-hold on the city. Crump’s Police Commissioner Joe Boyle summed up city officials’ attitudes that “radical labor agitators and subversive agents [had] been working among Southern negroes for a long time.”[34]

After Crump’s death, with the support of an active local NAACP, local grassroots black rights activists in Memphis made strides in desegregating public accommodations.[35] Yet economic racial justice proved much harder to realize. By the late 1960s black family income stagnated at just a third of the white family average, and the majority of the black working class “remained stuck at the bottom of the economic order.”[36] Black sanitation workers were some of those “stuck at the bottom.” The workers
had attempted to win better conditions through a strike in 1966, but city officials were able to break the strike and fired thirty-three strikers. The sanitation workers had formed a union, AFSCME Local 1733, but city officials refused to recognize the local. According to historian Michael Honey, the lone local union staff person T.O. Jones, “had only about forty dues payers, out of nearly 1,300 sanitation workers in the Public Works Department. Getting a dollar a week in union dues from poor people making nonunion wages proved nearly impossible.”[37]

Tennessee had passed no law guaranteeing the rights of public sector workers to collectively bargain. Left out of the protections of the 1935 National Labor Relations Act, public sector unionization and bargaining laws have come piecemeal through state by state legislation, often passed with more restrictions than in the labor laws that govern the private sector. The first state to pass public sector union rights was Wisconsin; the initial law passed in 1959 in response to organizing by AFSCME in that state forbade strikes by public sector workers and excluded public safety workers altogether.[38] In 1962, President John F. Kennedy issued Executive Order 10988, extending the rights of collective bargaining to federal employees, but stopping short of allowing bargaining over pay or benefits, and not granting the right to strike. By 1967 twenty-one states had passed some form of public sector collective bargaining law, but Tennessee was not one of them.

Memphis sanitation workers did not seem poised to organize a long, drawn out strike. Yet, as historian Laurie Green, has noted there was a growing working class black activism in Memphis:

African American workers’ efforts to achieve racial justice surged in the mid-1960s. During the ’1950s, black workers had struggled to organize and maintain labor unions, despite a hostile climate that included union-busting and red-baiting. By 1960, service employees such as hotel maids and the sanitation workers had begun to organize. Over the next several years, such organizing, along with formal complaints to the federal government, skyrocketed.[39]

On February 1, 1968 two black garbage collectors, Echol Cole and Robert Walker, took shelter in the back of garbage truck to escape the torrential rain. The truck malfunctioned, crushing the workers to death. Eleven days later the Memphis Sanitation Strike began. Sanitation workers walked off the job, and demanded a decent wage, safer working conditions, and dues check off for their union. Segregationist Mayor Henry Loeb refused to recognize the legitimacy of the demands, and was supported in his position
by the white, mainstream press that echoed his views on the strike. AFSCME officials from Washington, caught by surprise that the vast majority of 1,300 Memphis Local 1733 members had walked out, worried over the effectiveness of a February strike. AFSCME sent representatives to the city to help support the strikers. Confident the sanitation workers would soon return to work, Loeb dug in to wait out the strike. To the surprise of many, the black sanitation workers remained undeterred and refused to return to their jobs unless their contract demands were met, including dues check off for their union.[40]

An emerging coalition of community organizations and churches mobilized to support the strikers. James Lawson, a black Methodist minister, and veteran of the Student Nonviolent Coordinating Committee and the civil rights student movement helped build the fledgling community coalition, Community on the Move for Equality (COME). In the first volume of the C.O.M.E. Appeal newsletter the organization provided a list of ten ways that the broader black Memphis community could support the strike, from stopping subscriptions to the city’s daily newspapers, to sending telegrams to the Mayor and City Council, to providing monetary support for the strikers.[41]

It was at the invitation of James Lawson and C.O.M.E. that King arrived in Memphis to support the sanitation workers with the goal of bringing national attention to the strike. On March 28, more than a month into the strike, King led a march down the famed Beale Street. The march included thousands of black Memphis students. Some young people participating in the action broke storefront windows. March organizers whisked King away as the police descended on the marchers with teargas and batons. The police shot a black sixteen-year-old youth in the head and killed him. Reporters, spurred on by the FBI, openly questioned whether King’s planned Poor People’s Campaign in Washington would remain peaceful. Martin Luther King, Jr. left Memphis, but was determined to return and lead another march for the AFSCME strikers, in order to demonstrate that a peaceful march was possible.[42]

On the night of Wednesday, April 3, at Mason Temple in Memphis, as a dramatic storm raged outside the church, Martin Luther King, Jr. delivered what would be his last, and eerily prophetic speech. King ended thunderously, “Like anybody, I would like to live a long life. Longevity has its place. But I’m not concerned about that now. I just want to do God’s will. And He's allowed me to go up to the mountain. And I've looked over. And
I've seen the Promised Land. I may not get there with you. But I want you to know tonight, that we, as a people, will get to the promised land!"[43] The next evening King was murdered by James Earl Ray, outside of the motel where he was staying. In the aftermath of King’s death, his widow, Coretta Scott King, and dozens of national civil rights leaders led a solemn march through Memphis. UAW President Walter Reuther and delegations from a dozen other national unions joined the march. Reuther brought with him a check for $50,000 to support the strikers. The federal government intervened in the strike, and with the help of mediation by the Undersecretary of Labor, the striking workers won a contract that included a way for the union to collect dues.[44]

The Memphis Sanitation Strike of 1968 and the murder of Martin Luther King, Jr. must be understood at the nexus of the Black Freedom Movement and a wave of public sector labor organizing and militancy that swept across the nation in the late 1960s and early 1970s. During these years public sector strikes included “hospital workers, teachers, office clerks, social workers, firefighters, police, and others.”[45] In 1970, postal workers in New York City walked off the job in a wild-cat strike for better wages, and soon the strike spread to cities throughout the country, winning postal workers substantial raises. In many of these public sector strikes, black workers played prominent roles, and they demanded not only better pay and working conditions, but also an increased voice and leadership opportunities within their union halls as well.

IV. BACKLASH AGAINST PUBLIC SECTOR LABOR ORGANIZING

Many of the public sector strikes that occurred in the late 1960s and early 1970s were not protected by any labor law recognizing the worker’s right to collectively bargain or to engage in a work action. Collective bargaining rights for public sector workers have long been a matter of contention in the United States. Labor scholars have identified three strands of opposition to unionization by public sector employees stretching back over the past century. The first argument that gained traction in the early twentieth century was that public sector unionism “undercuts the sovereignty of government.”[46] The second argument, which came to the forefront in the national economic crisis of the late 1970s, posited that pay and benefits won by public sector unions inflated the cost of government. And most recently, public sector unions have faced opposition by those politicians seeking to privatize formerly public services ranging from
education to incarceration. Politicians and various anti-union organizations have woven these three rhetorical threads into a complex web of laws and policies aimed at curtailing collective bargaining for public workers.[47]

One of the leading organizations spinning this rhetoric has been the National Right to Work Legal Defense Foundation (NRWLDF), founded in 1968—the same year as King’s assassination.[48] According to the organizational website, its mission is to “eliminate coercive union power and compulsory unionism abuses through strategic litigation, public information, and education programs.”[49] The NRWLDF has backed more than 2,500 anti-union cases.[50] The NRWLDF is the not-for-profit wing of the National Right to Work Committee, which focuses on lobbying and direct political engagement to advance Right to Work legislation. An analysis completed by the Economic Policy Institute used publically available tax filings to determine that recently NRWLDF has received funding from a range of leading right-wing foundations including, “Donors Trust and Donors Capital Fund, the Lynde and Harry Bradley Foundation, the Ed Uihlein Family Foundation, Dunn’s Foundation for the Advancement of Right Thinking, and the Walton Family Foundation.”[51] While the National Right to Work Committee has successfully pushed right-to-work legislation in once strong labor states such as Wisconsin and Michigan, most recently the NRWLDF has backed a series of Supreme Court cases aimed at testing the constitutionality of fair share agreements in the public sector.

The case that set the precedent affirming the constitutionality of public sector fair share agreements was the 1977 Supreme Court decision, Abood v. Detroit Board of Education.[52] For four decades the Abood decision has been “the ground on which all cases dealing with public sector fair share agreements have been built.”[53] In Abood the Court held that public sector unions could collect fair share fees as long as that money went to activities such as “collective bargaining, contract administration and grievance adjustment purposes.”[54] The Court also recognized the importance of not infringing on public sector union workers’ First Amendment rights. The Court stated, “We do not hold that a union cannot constitutionally spend funds for the expression of political views, on behalf of political candidates, or toward the advancement of other ideological causes not germane to its duties as collective-bargaining representative. Rather, the Constitution requires only that such expenditures be financed from charges, dues, or assessments paid by employees who do not object to advancing those ideas and who are not coerced into doing so against their will by the threat of loss
of governmental employment.”[55] In short, the Court put into place a delicate balancing act for public sector unions, requiring them to separate funding for core union functions from overtly ideological or political engagement. This allowed public sector unions to represent all members effectively without having to cover the costs of free-riders, while at the same time assuring that the free-speech of individual members remained unhindered. A recent series of cases has begun the process of upsetting that balance.

The first case to signal that the Supreme Court might substantively reconsider Abood was Knox v. Service Employees International Union, Local 1000.[56] In this case the union had issued a special fee to those in the bargaining unit to fight two California ballot initiatives. The Supreme Court found that non-union members were not given proper notice to opt out of paying this fee.[57] While the case did not directly challenge the constitutionality of fair-share fees, Justice Samuel Alito seemed to crack the door open to future cases testing the issue by referring to the Court’s stance on fair-share fees as “an anomaly.”[58] It did not take long for other cases to swing that door wide open.

The next case to walk through that door was Harris v. Quinn.[59] In this case, Pamela Harris, an Illinois home health care worker supported by NRWLDF, directly challenged the constitutionality of having to pay fair share fees to the Service Employees International Union. The majority opinion side-stepped the core question of fair-share fee constitutionality by finding that as a home health care worker Harris was not in fact a “full-fledged” public employee.[60] Yet again in writing the 5-4 majority opinion, Justice Alito indicated willingness to consider future cases on the matter. An article in the progressive-leaning The Nation, opined that with the decision the “conservative justices lobbed a small grenade into the trenches of the labor movement.”[61]

It seemed likely that grenade would explode in Friedrichs v. California Teachers Association.[62] In a case that was fast tracked to reach the Supreme Court as quickly as possible, nine public school teachers in California argued that paying fair share fees violated their constitutional rights under the First Amendment. Prognosticators warned that the Court was about to overturn Abood.[63] The Court heard the case in January 2016, but the unexpected death of Justice Antonin Scalia a month later resulted in a 4-4 tie decision in the case.[64] With the failure of the Senate to confirm President Obama’s nominee to the Court, the empty seat on the
bench became a significant campaign issue for labor unions in the 2016 presidential election. With the victory of Donald Trump and his subsequent nomination of Neil Gorsuch to the Supreme Court, labor waited anxiously to see if and when the grenade lobbed by *Harris v. Quinn* would finally explode.

It appears that *Janus v. AFSCME*, [65] heard by the Court on February 26, 2018 will be that case. The plaintiff was Mark Janus, a child care worker in Illinois, part of the public sector workforce represented by the state-wide AFSCME Council 31. Janus objected to paying his fair share fees, arguing that mandatory fees infringed on his constitutional right to free speech. In *Janus*, counsel for the plaintiff argued that all public sector union activity is inherently political, since salaries, pensions and other benefits paid to these workers come from taxpayer money. If the precedent of *Abood* is overturned based on this argument, it is likely that public sector unions will still be required to represent non-fee paying workers in grievances and that these free-riders will continue to receive the pay raises, benefits and other wages won at the bargaining table. One grievance case can cost a union tens of thousands of dollars and hundreds of hours of staff labor. If *Abood* is reversed, free riders can receive these services and contract benefits while contributing nothing out of their own pocket. Essentially, the “right to work” laid out by the 1947 Taft Hartley Law will be extended across the entire public sector.

Despite the case going to the Supreme Court under the name of *Janus*, the hearing was a far cry from one man taking on the system. The case was originally brought by the vehemently anti-public sector union Illinois Republican Governor Bruce Rauner, but he was found to have no legal standing to object to the collection of public sector union dues.[66] When Janus was identified as a plaintiff the NRWLDF along with the Illinois-based Liberty Justice Center, the legal branch of a right-wing funded think tank called the Illinois Policy Institute, paid the legal fees for the case. As a *New York Times* article explained the day before the *Janus* case was heard, “The case illustrates the cohesiveness with which conservative philanthropists have taken on unions in recent decades. ‘It’s a mistake to look at the Janus case and earlier litigation as isolated episodes,’ said Alexander Hertel-Fernandez, a Columbia University political scientist who studies conservative groups. It’s part of a multipronged, multitiered strategy.’”[67]
It is a strategy that has the potential to have a chilling impact on workers earnings and on unionization rates. A study completed by the University of Illinois Labor Education Program, in conjunction with the Illinois Economic Policy Institute has found that between January 2010 and December 2016, in Indiana, Michigan and Wisconsin, right-to-work laws have “statistically reduced the unionization rate by 2.1 percentage points on average and lowered real hourly wages by a total of 2.6 percent on average.”[68] An analysis completed in 2016, further evidences the precipitous public sector union decline in Wisconsin since 2011 when Republican Governor Scott Walker signed Act 10, which dismantled the public sector labor law in that State. “Wisconsin’s public sector union have seen their membership drop by almost 42 percent in the past five years, compared to just a 5 percent decline nationally.”[69]

While the impact of the Supreme Court’s decision in Janus will be felt by all public sector workers, the case may most acutely impact black workers, and especially black women, who are overrepresented in public sector work. In a February 2018 “Economic Snapshot” the Economic Policy Institute found that based on 2016 data, “While the outcome of the case will affect about 17 million public-sector workers across the country, black women in particular could be hurt by Janus, as they are disproportionately represented in public sector jobs. They make up 17.7 percent of public-sector workers, or about 1.5 million workers.”[70] This statistic is all the more noteworthy considering that according to the Department of Labor, black women only made up 6.5 percent of the overall labor force in 2016.[71]

V. CONCLUSION

As we commemorate the fiftieth anniversary of the death of Martin Luther King, Jr. we do his memory a disservice not to recognize that concurrent with this anniversary comes the unravelling of forty years of gains in public sector union protections. King died supporting the right of black sanitation workers to form a union. He stood with these workers in their struggle, because he believed that organized labor was a necessary partner in the unfinished work of liberation of African Americans, and in turn that full inclusion of black workers in the union movement was essential for labor to reach its goals of safe conditions and fair wages for all workers. The Janus decision will likely be a setback on the realization of both of these goals. But as the Memphis strikes of 1968 and more recently the 2018 waive of teachers strike in West Virginia, Arizona, Oklahoma, North Carolina, and Colorado all of which occurred without the protection of robust public-
sector labor protections—remind us, history does not always follow an expected course. Just as Dr. King asked in 1967, it will be up to this generation of labor and civil rights activists to determine, “Where Do We Go From Here?”


4. American Federation of State, County and Municipal Employees event site, www.iam2018.org. Note that the quoted material was on the event website prior to the event but has since been changed.


6. Id.


13. Martin Luther King, *United Autoworkers Convention Speech* (May 1, 1961), The

14. *See generally* ROGER HOROWITZ, "NEGRO AND WHITE, UNITE AND FIGHT!": A SOCIAL
HISTORY OF INDUSTRIAL UNIONISM IN MEATPACKING, 1930-90 (1997); Michael K. Honey,
*TO THE PROMISED LAND: MARTIN LUTHER KING AND THE FIGHT FOR ECONOMIC JUSTICE*, 55
(forthcoming 2018).

15. Labor Management Relations Act of 1947, § 9(h), 61 Stat. 146 (1947), repealed by

16. Scholars have written extensively on the toll of the Cold War mentality on civil rights
AMERICAN DEMOCRACY* (2002); MANNING MARABLE, *RACE REFORM AND REBELLION: THE
SECOND RECONSTRUCTION IN BLACK AMERICA, 1945-2006* ch. 2 (3d ed. 2007); JEFF
WOODS, *BLACK STRUGGLE RED SCARE: SEGREGATION AND ANTI-COMMUNISM IN THE SOUTH,
1948-1968* (2004); Sundiata Keita Cha-Jua & Clarence Lang, *The "Long Movement" as
Vampire: Temporal and Spatial Fallacies in Recent Black Freedom Studies*, 92 J. AM.
HIST. 265 (2007); Robert Korstad & Nelson Lichtenstein, *Opportunities Found and
Lost: Labor, Radicals, and the Early Civil Rights Movement*, 75 J. AM. HIST. 786
(1988).

17. *See Michael K. Honey, SOUTHERN LABOR AND BLACK CIVIL RIGHTS: ORGANIZING
MEMPHIS WORKERS* (1993); ROBIN D. G. KELLEY, *HAMMER AND HOE: ALABAMA

THE MAINTENANCE OF JIM CROW LABOR RELATIONS*, LABOR ON LINE, Jan. 12, 2017;

19. Id.


16, 1963; John Averill, *Wallace Asks Kennedy Defeat for Rights Stand: Civil Rights,
L.A. TIMES*, July 16, 1963; Joseph Sterne, *King Target of Alabaman*, BALTIMORE SUN,
July 16, 1963; *Wallace Says He Would Not Enforce Rights Law*, CHI. DAILY DEFENDER,
July 17, 1963.

For more on the importance of Highlander Folk School for the Civil Rights Movement,
see ALDON D. MORRIS, *THE ORIGINS OF THE CIVIL RIGHTS MOVEMENT: BLACK COMMUNITIES

23. JONES, *supra* note 9, at 195.


28. Martin Luther King, Jr., Where Do We Go From Here: Chaos or Community? 3 (hardcover ed. 1968, republished 2010).


34. Jordan, supra 32, at 135.

35. For an excellent synopsis of Civil Rights organizing in Memphis, see Green, supra, note 32, at 252-58.

36. Honey, Going Down Jericho Road, supra note 31, at 43-44.
37. Id. at 99.

38. See Steve Fraser & Joshua B. Freeman, In the Rearview Mirror: A Brief History of Opposition to Public Sector Unionism, 20 NEW LABOR FORUM, Fall 2011, at 93-96.

39. GREENE, supra note 32, at 256.

40. For a comprehensive history of the 1968 Memphis Strike, see HONEY, GOING DOWN JERICHO ROAD, supra note 31.


42. HONEY, GOING DOWN JERICHO ROAD, supra note 31, at 76-82; JACKSON, supra note 30, at 349-50.


44. HONEY, GOING DOWN JERICHO ROAD, supra note 31, at 479.


46. See Fraser & Freeman, supra note 38.

47. NELSON LICHTENSTEIN, A CONTEXT OF IDEAS 197 (2013) See also Fraser & Freeman, supra note 38.


49. Id.


51. CELINE MCNICHOLAS, ZANE MOKHIBER & MARNI VON WILPERT, JANUS AND FAIR SHARE FEES: THE ORGANIZATIONS FINANCING THE ATTACK ON UNIONS’ ABILITY TO REPRESENT WORKERS, (Economic Policy Instit. Feb. 21, 2018), available at www.epi.org/142063. An explanation of the methodology the authors used to determine the funders: “We used information from the Conservative Transparency database as well as data made publically available by the IRS to create a database of financial transactions of organizations involved in the cases involving a challenge to fair share fee collection. After reviewing over a thousand transactions in the database, it remains difficult to develop a clear picture of the complete financial landscape of these cases. What is clear is that a core group of foundations with ties to the largest and most powerful lobbies representing corporate interests have provided consistent financial support for the fair share fee cases.”


55. *Id.* at 235-36.


57. *Id.* at 322.

58 *Id.* at 311.


60. *Id.* at 2638.


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. Managerial Employees

In Board of Trustees of the University of Illinois v. IELRB, 2018 IL App (4th) 170059, the Fourth District Appellate Court held that department chairs at the University of Illinois Springfield are managerial employees. In so holding, it reversed the IELRB.

In February 2015, the IELRB’s Executive Director certified University Professionals of Illinois, Local 4100 IFT-AFT as the exclusive representative of a bargaining unit of tenured and tenure-track faculty employed at the University's Springfield campus. The certification specifically excluded department chairs and all managerial employees, supervisors, and confidential employees as required by the IELRA. In May 2016, the union filed a majority-interest representation petition seeking to add 28 department chairs to the existing bargaining unit. In June 2016, the administrative law judge held a hearing on the matter. The ALJ’s recommended decision had a lengthy discussion about the selection and various responsibilities of the department chairs in order to determine if they were eligible to be a part of the bargaining unit. This large analysis included: the selection and removal of department chairs, the responsibilities of the chairs as provided by University Statutes, and the chairs’ responsibilities as provided in the faculty policy. In September 2016, the ALJ found the department chairs were neither managerial employees, supervisors, nor confidential employees and recommended the IELRB certify the union as the exclusive bargaining representative for the chairs. In December 2016, the IELRB affirmed the ALJ's recommended decision and directed certification of the bargaining unit finding that the department
chairs “do not have the authority and discretion which are necessary to establish managerial status.” The IELRB also found that the department chairs were not supervisors or confidential employees because they did not “spend a preponderance of their employment time supervising adjunct faculty.”

The Fourth District Appellate Court reversed. The court found that the department chairs performed important and influential functions with independent authority and judgement to establish and effectuate departmental policy. This included actions such as hiring, evaluating, and discharging the adjunct faculty and participating in college cabinet meetings, where discussion occurred concerning the college budgets, the direction of the college, faculty resources, and strategic and policy issues. The court found that the chairs also ensured that academic and accreditation reports were completed, ensured courses scheduled were prepared, and handled disputes arising from complaints against faculty by students and support staff. The court found these chair functions to be executive and management functions that have a direct and critical impact on the university, the campus, and the individual colleges and departments. The execution of the department chair duties also had a direct impact on the working conditions of the tenure-system faculty. The court concluded that the department chairs run their departments.

The court further held that the chairs were engaged predominantly in managerial and executive functions. The court opined that the predominance requirement does not incorporate a test of percentage of time spent performing managerial duties. The court held that although the amount of time each chair spent on managerial duties varied, it was clear that the managerial duties were uppermost in importance and influence. The court concluded that department chairs were managerial employees excluded from collective bargaining.

**B. Resignation from Union Membership**

In *Gutka and Homer District 33-C Support Staff Council, Local 604, IFT-AFT*, 34 P.E.R.I. ¶ 141 (IELRB 2018), the IELRB reversed the Executive Director’s dismissal of unfair labor practice charges alleging that the union violated section 14(b)(1) of the IELRA by restricting union members’ rights to resign their membership. The IELRB held that the charges raised issues warranting a hearing and that a complaint should issue.
The Charging Parties had signed union cards, officially accepting membership in the union and allowing their employers to deduct union dues from their paychecks. The membership cards also stated that such authorization would continue from year to year, unless the member either left the employer or “terminated . . . by written notification to the [u]nion.” Three days before the union ratified a collective bargaining agreement, the Charging Parties wrote letters to a field service director for the union asking to resign their membership, citing their rights under the National Labor Relations Act. The field service director responded that the union was not under the NLRA’s jurisdiction and thus could not terminate the Charging Parties’ memberships. Within a week, the Charging Parties tried again to resign through the same field service director, who then said that per the union’s constitution, members wishing to resign would have had to do so prior to September 1 of the year in which they were trying to resign.

After these unsuccessful resignation attempts, the Charging Parties sent letters to the local’s treasurer asking to resign and requesting a copy of their membership cards. The field service director responded that the local treasurer had nothing to do with the Charging Parties’ memberships; they instead should have contacted the council, which oversaw the local and dealt with membership. The field service director also reiterated that membership was continuous from September to September each year and that members could not resign mid-year.

Subsequently, the Charging Parties contacted the council treasurer and stated that they no longer wanted to be part of the union. The council treasurer finally referred the Charging Parties to the council’s constitution for the next steps in leaving the union. All Charging Parties were permitted to sign paperwork revoking permission for the union to deduct dues from their paychecks by August 23, 2016. Over the course of the previous school year, during which Charging Parties had attempted to extricate themselves from the union, Charging Parties had paid approximately $300 in union dues.

Section 14(b)(1) restricts duty of fair representation violations to instances of intentional misconduct, but the IELRB noted that not all Section 14(b)(1) violations involve the duty of fair representation; duty of fair representation claims challenge the way in which unions act as exclusive bargaining representatives. The IELRB reasoned that, where a violation of Section 14(b)(1) is not a duty of fair representation issue, the standard of intentional misconduct does not apply. Instead of looking to whether the
union’s misconduct was intentional, the IELRB considered whether the “conduct would have reasonably tended to coerce employees in the exercise of their rights under the Act.”

The IELRB cited favorably the U.S. Supreme Court’s holding in Pattern Makers’ League v. NLRB, 473 U.S. 95 (1985), that unions’ ability to control their internal affairs did not mean that unions could restrict members’ rights to resign from the union, as well as N.L.R.B. precedent stating the same principle. While the Charging Parties could have waived their right to resign freely, that waiver was not “clear and unmistakable.” Such clarity is necessary if one wishes to waive a statutory right. By contrast, the membership cards Charging Parties signed did not specify anything regarding resignation besides that such requests must be written. Charging Parties were also likely unaware of the language of the constitution stating this timeline; at least one Charging Party did not receive a constitution. As a result, the Board remanded the cases to the Executive Director for issuance of a complaint.

II. IPLRA DEVELOPMENTS

A. Appointment of Counsel

In Theopolis Hoffman and Service Employees Int’l Union, Local 73, 34 PERI ¶ 161 (ILRB Local Panel 2018), the ILRB Local Panel reversed the Executive Director’s denial of Mr. Hoffman’s request for appointment of counsel. The Panel granted a variance from its rules to allow appointment of counsel to represent Mr. Hoffman.

On February 3, 2016, Hoffman filed an unfair labor practice charge against the union and the ILRB issued a complaint for hearing. On October 5, 2017, he filed a request for appointment of counsel. The ILRB’s administrative rules and the IPLRA provide that, under certain circumstances, a charging party may seek appointment of counsel where the charging party shows an “inability to pay or otherwise provide adequate representation.” 5 ILCS 315/5(k); 80 Ill. Adm. Code § 1220.105(a). The Executive Director applied Section 1220.105(c) of the rules and determined that Hoffman’s adjusted annual income for the past year exceeded the rule’s income limit by approximately $76, and thereby precluded the appointment of counsel. The Executive Director stated that she did not have discretion to grant a request for appointment of counsel when it did not comply with the Board’s rules.
The ILRB granted a variance from its rules and reversed the Executive Director’s denial of Hoffman’s request pursuant to Section 1200.160 of the Board’s rules. This section allows the Board to grant a variance when (1) the provision from which the variance is granted is not statutorily mandated; (2) no party will be injured by the granting of the variance; and (3) the rule from which the variance is granted would, in the particular case, be unreasonable or unnecessarily burdensome. 80 Ill. Adm. Code § 1220.160.

First, the Panel held that the rule pertaining to its appointment of counsel is not statutorily mandated because, while the rules defines what it means to “demonstrate an inability to pay,” the Act does not. 5 ILCS 315/5(k). Second, the ILRB held that no party would be injured if it granted a variance from the annual adjusted income rule, since the variance would only require the Respondent to defend its case against Hoffman. Third, the ILRB held that applying its adjusted annual income rule in Hoffman’s case would be unreasonable or unnecessarily burdensome because the rule’s purpose is to allow appointment of counsel to individuals who are unable to pay for representation. The Panel reasoned that Hoffman’s approximately $76 over the limit of the adjusted annual income limit did not mean he could pay for representation. The ILRB held that Hoffman sufficiently demonstrated an inability to pay for representation even though his annual income exceeded the adjusted income limit set forth in the Board’s rules; therefore, his request for appointment of counsel must be approved.

**B. Deferral to Arbitration**

In *Teamsters Local 700 and Village of Midlothian Police Dept.*, 34 PERI ¶ 145 (ILRB State Panel 2018), the ILRB State Panel upheld the Executive Director’s deferral of the union’s unfair labor practice charge to the parties’ grievance and arbitration procedure until the pending grievance proceedings concluded. The Panel applied the National Labor Relations Board’s deferral doctrine established *Dubo Manufacturing Corp.*, 142 NLRB 431 (1963).

Local 700, which represented a unit consisting of full-time peace officers with the rank of either police officer or detective, filed a charge alleging that the village made a unilateral change to productivity standards without notice to or bargaining with the union. The union also filed a grievance.

The State Panel observed that deferral in cases where a related grievance is pending is appropriate where “(1) the dispute has been submitted to the parties’ grievance arbitration process; (2) the process culminates in final
and binding arbitration; and (3) there is reasonable chance that the grievance arbitration process will resolve the dispute.” The third condition was at issue in this case.

The Panel held that there was a reasonable chance that the grievance/arbitration process would resolve the dispute. The Panel reasoned that the issue before the arbitrator would be whether the employer could, in conformity to the contract, make the unilateral change. If the contract allowed the unilateral change, the ILRB reasoned, then the union would have waived its right to bargain over the change. Consequently, the State Panel concluded, resolution of the grievance would likely resolve the dispute.

C. Supervisors

In *International Brotherhood of Teamsters, Local 700 and Sheriff of Cook County*, 34 PERI ¶ 144 (ILRB Local Panel 2018), the ILRB Local Panel held that the commanders of the Cook County Department of Corrections (“DOC”) were supervisors within the meaning of Section 3(r) of the IPLRA. The Panel excluded the commanders from bargaining because of their supervisory authority and dismissed the union’s majority interest petition.

This case began in 2013, when Teamsters, Local 700 filed a majority interest petition seeking to represent employees of the County of Cook and the Cook County Sheriff in the rank of commander at the DOC. The employer filed a motion to dismiss the union’s petition on the basis that the commanders were supervisors and must be excluded from bargaining. The ALJ held that the commanders were public employees and not supervisors as defined by Section 3(r)(1) of the IPLRA.

The ILRB rejected the ALJ’s findings that the commanders failed to satisfy the “authority to direct” and the “preponderance of time” requirements for supervisory status. In regard to the authority to direct element, the Panel found that the commanders possessed sufficient discretionary authority to oversee, review, and instruct their subordinates’ work. The Panel rejected the ALJ’s reasoning that the commanders did not meet the authority to direct element because they were restricted by rules and regulations and the collective bargaining agreements. The Panel observed that it had previously rejected similar reasoning in *Superior Officers Council and Sheriff of Cook County*, 15 PERI ¶ 3022 (ILRB 1999). In that case, the Panel found that shift commanders had the supervisory authority to direct because they possessed discretionary authority to affect the terms and
conditions of their subordinates’ employment through their authority to
discipline and adjust grievances. Similarly, the Panel held that the DOC
commanders possessed authority to direct because they had authority to
effectively recommend discipline and adjust grievances—authorities that
significantly affect the terms and conditions of their subordinates’
employment.

The Panel also found that the commanders satisfied the preponderance of
time element because the employer provided sufficient evidence of the
amount of time the commanders spent directing and participating in the
hiring of subordinate employees and related supervisory functions. The
Panel concluded that the commanders were supervisors within the meaning
of Section 3(r) of the IPLRA and were excluded from bargaining.