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IMPLEMENTING THE ILLINOIS EDUCATIONAL LABOR RELATIONS ACT

MARTIN H. MALIN*

On January 1, 1984, the Illinois Educational Labor Relations Act¹ (IELRA) took effect. The IELRA, together with the Illinois Public Labor Relations Act (IPLRA)² which took effect July 1, 1984, is the first comprehensive statutory regulation of public sector collective bargaining in Illinois history. In many respects the IELRA is similar to the National Labor Relations Act (NLRA), which regulates collective bargaining in the private sector, and to statutes in other jurisdictions which regulate collective bargaining in the public sector. The IELRA grants to educational employees the right to engage in concerted activities for purposes of collective bargaining or other mutual aid and protection and the right to refrain from such activities, protects these rights by prohibiting employer and union unfair labor practices, provides for representation elections to determine employee choices concerning exclusive bargaining representatives, and establishes the Illinois Educational Labor Relations Board (IELRB) to administer the Act.

The IELRA is also innovative in several respects. It deliberately does not follow the general private sector definitions of supervisors and managerial employees who are excluded from statutory coverage; it provides procedures for employer voluntary recognition of employee organizations; and, unlike most other jurisdictions in the public sector, it relies primarily on mediation and the parties' abilities to use economic weapons to resolve collective bargaining impasses.

During the Act's first year, the IELRB promulgated extensive rules and regulations implementing it.³ Although these regulations are primarily procedural, they reflect underlying substantive policy determina-

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1. ILL. REV. STAT. ch. 48, §§ 1701-1727 (Supp. 1983) (Public Act 83-1014).

2. ILL. REV. STAT. ch. 48, §§ 1601-1627 (Supp. 1983) (Public Act 83-1012).

3. 80 Ill. Adm. Code §§ 1100-1130 (The provisions of the Illinois Administrative Code, which as cited hereinafter refer to the IELRB rules, are published in final form in 8 Ill. Admin. Reg. 16300, 19413, 22538 & 22548 (1984)).

tions. There are, however, many major issues that, while important for the overall implementation of the Act, are not addressed by the rules.

This article analyzes the IELRB's regulations and focuses on the major issues that they do not address. It discusses the rationale for a separate statute governing labor relations in the education sector and draws on this rationale, comparisons with the IPLRA and the NLRA, and legislative history to suggest approaches to many of the issues that the IELRB, the courts and the parties will face as the new law is developed in the coming years.

THE RATIONALE FOR A SEPARATE EDUCATION LABOR ACT

As initially passed by the legislature, the IPLRA's coverage included public education. The legislature also passed the IELRA at approximately the same time. The governor used his amendatory veto⁴ to delete public education from the IPLRA's coverage and approved the IELRA with certain modifications. Thus, in contrast to most other jurisdictions,⁵ collective bargaining in Illinois public education is covered by a separate statute, administered by a separate agency. This separation of public education from the rest of the public sector "recognizes that substantial differences exist between educational employees and other public employees as a result of the uniqueness of the educational work calendar and educational work duties and the traditional and historical patterns of collective bargaining. . . ."⁶

A comparison of the IELRA with the IPLRA reveals that the two acts differ primarily with respect to the timing of representation proceed-

4. Illinois is one of a few states in which the Governor has amendatory veto power. The Governor may veto an entire bill under his traditional veto powers. See Ill. Const., art. IV, § 9(b). The legislature may override such a veto by a three-fifths vote of each house. The Governor's amendatory veto power, *Id.* § 9(e), requires that he return the bill to the house in which it originated with specific recommendations for change. Each house may accept the recommendations by simple majority vote. The Governor may then certify that the acceptance conforms to the recommendations, thereby allowing the bill to become law.

5. In most other jurisdictions collective bargaining in public education is governed by the general public labor relations statute. See, e.g., MASS. GEN. LAWS ANN. ch. 150E, §§ 1-15 (West 1982 & Supp. 1984-85); MICH. COMP. LAWS ANN. §§ 423.201-423.216 (West 1978 & Supp. 1984-85); MINN. STAT. ANN. §§ 179.01-179.25 (West 1966 & Supp. 1984); N.J. STAT. ANN. §§ 34:13A-1 to 34:13A-21 (West 1984); N.Y. CIV. SERV. LAW §§ 200-215 (McKinney 1983); OHIO REV. CODE ANN. §§ 4117.01 to 4117.23 (Page Supp. 1983). In some jurisdictions, public education is covered by a separate statute which is administered by the same agency that administers the general public labor relations statute. See, e.g., CALIF. GOV'T CODE §§ 3546-3549.3; 3560-3599 (West 1980 & Supp. 1985). In Washington, public school employees are subject to the jurisdictions of the Public Employment Relations Commission, WASH. REV. CODE ANN. §§ 41.59.010-41.59.150 (Supp. 1985), while higher education employees are subject to the jurisdiction of the Higher Education Personnel Board, *Id.* at § 28B.16.100.

6. ILL. REV. STAT. ch. 48, ¶ 1701 (Supp. 1983).

ings, collective bargaining and impasse resolution. With respect to representation proceedings, both statutes establish a contract bar, which provides that whenever a collective bargaining agreement of up to three years duration is in effect, representation petitions must be filed at a designated time prior to the contract's expiration date. However, where the IPLRA permits the filing of a representation petition sixty to ninety days prior to the expiration date of the contract, the IELRA sets this "window period" at January 15th through March 1st of the year in which the contract expires. The IELRA also provides that a representation election "shall be held no later than ninety days after the date the petition was filed." No comparable provision is found in the IPLRA.⁷

With respect to collective bargaining and impasse resolution, the IPLRA in most cases merely requires that a party notify the other party of its desire to terminate or modify the collective bargaining agreement sixty days prior to the agreement's expiration date, and that the parties notify the Illinois State or Local Labor Relations Board of the existence of a dispute within thirty days after the first notice.⁸ The IELRA's notice provisions are more elaborate. The parties must notify the IELRB of the status of negotiations ninety days prior to the scheduled start of the forthcoming school year. Within forty-five days of the scheduled start of the forthcoming school year the IELRB may initiate mediation on its own motion or on petition of a party. The Board must invoke mediation fifteen days before the scheduled start of the school year.⁹

The timetables contained in the IELRA envision the following scenario: A representation petition is filed between January 15th and March 1st, resulting in an election being held no later than May 29th, with certification to follow by the first week in June. The representation procedure is thus concluded in early June, which is approximately ninety days prior to the scheduled start of the next school year. The parties are then in a position to enter the bargaining phase of the relationship and to file their ninety-day notice. Under this scenario, representation proceedings and collective bargaining are to be conducted in such a manner as to maximize the probability that they will be settled by the scheduled start of the upcoming school year.

Unfortunately, the scenario can easily break down in several ways. First, if employees are not currently represented by an employee organization, a representation petition can be filed at anytime because there is

7. Compare ILL. REV. STAT. ch. 48, § 1609(h) (Supp. 1983) with ILL. REV. STAT. ch. 48, § 1707(c)(2) (Supp. 1983).

8. ILL. REV. STAT. ch. 48, § 1607 (Supp. 1983).

9. ILL. REV. STAT. ch. 48, § 1712 (Supp. 1983).

no existing contract to bar it. This can result in an election being held considerably prior to or after late May.

Second, there will be cases in which it will be physically impossible to hold an election within ninety days following the filing of the representation petition. In elementary and secondary education, historical patterns of bargaining have resulted in relatively well defined bargaining units. This is clearly not the case in higher education. Complex issues such as whether a single campus bargaining unit is appropriate, whether tenure track and nontenure track faculty should be included in the same unit, whether nontenured professional employees should be included in a faculty unit, and whether particular schools should be severed out of the unit will likely arise and require considerably longer than ninety days to resolve.¹⁰

Third, the statutory timetable for bargaining will be meaningless in many instances. For example, the hospital operated by the University of Illinois is clearly subject to the IELRA. However, the hospital operates year round and has no scheduled start of the school year. Although the university with which it is affiliated has a school year, the hospital's operations are not timed to the academic calendar. Moreover, agencies subject to the IELRA, such as the Illinois State Board of Education and the Illinois Scholarship Commission, simply have no school year.

Thus, it is clear that the statutory time lines cannot be literally applied. Moreover, in light of the wide variety of employment relationships to which the IELRA applies, the legislature could not have intended a literal application of the statutory time lines. Rather, the statutory time lines provide a model illustrating the basic legislative intent that representation matters be concluded as expeditiously as possible and that every effort be made to conclude collective bargaining by reaching agreement prior to the time when a failure to reach agreement is likely to be most disruptive. This point will often be the scheduled start of the school year, but it may frequently be other points in time.

STATUTORY COVERAGE

The IELRA covers educational employers and educational employees. "Educational employers" is defined by inclusion to mean public school districts, community college districts, state colleges and universi-

10. See IELRB, Proposed Rules and Regulations Dealing with Representation and Unfair Labor Practice Procedures, Hearings on June 20, 1984, Chicago, pp. 75-77, 96-97 (hereafter cited as *Chicago Representation Rules Hearings*); c.f. *New York University*, 205 N.L.R.B. 4, 6 (1973) (issue of excluding law school from general faculty bargaining unit).

ties, and "any State agency whose major function is providing educational services."¹¹ This appears to include such agencies as the Illinois State Board of Education and the Illinois Scholarship Commission.¹²

"Educational employee" is defined by exclusion to mean all employees except "supervisors, managerial, confidential, short-term employees, student, and part-time academic employees of community colleges . . ."¹³ The Act expressly defines "supervisor," "managerial," "confidential" and "part-time academic community college employees" but contains no express definition of "short-term" or "student employees."¹⁴ The IELRB rules simply reiterate the statutory definitions.¹⁵

As originally passed by the legislature, the IELRA's only express exclusion was for supervisors.¹⁶ Its definition of supervisor provided that participation in academic decision making did not render an individual a supervisor.¹⁷ This approach apparently was designed to insure that the Supreme Court's decision in *NLRB v. Yeshiva University*¹⁸ would not be applied to public education in Illinois.

In *Yeshiva*, the Court held that faculty who participated in the academic governance of the university were managers and therefore were excluded from the coverage of the National Labor Relations Act. The

11. ILL. REV. STAT. ch. 48, § 1702(a) (Supp. 1983).

12. See 83rd Gen. Assem., House Committee on Elementary and Secondary Education, Hearings on May 6, 1983 (remarks of Representative Stuffle).

13. ILL. REV. STAT. ch. 48, § 1702(b) (Supp. 1983).

14. "Supervisor" means any individual having authority in the interests of the employer to hire, transfer, suspend, lay off, recall, promote, discharge, reward or discipline other employees within the appropriate bargaining unit and adjust their grievances, or to effectively recommend such action, if the exercise of such authority is not of a merely routine or clerical nature but requires the use of independent judgment. The term "supervisor" includes only those individuals who devote a preponderance of their employment time to such exercising authority.

ILL. REV. STAT. ch. 48, § 1702(g) (Supp. 1983). "Managerial employee means an individual who is engaged predominantly in executive and management functions and is charged with the responsibility of directing the effectuation of such management policies and practices." ILL. REV. STAT. ch. 48, § 1702(o) (Supp. 1983).

"Confidential employee" means an employee, who (i) in the regular course of his or her duties, assists and acts in a confidential capacity to persons who formulate, determine and effectuate management policies with regard to labor relations or who (ii) in the regular course of his or her duties has access to information relating to the effectuation or review of the employer's collective bargaining policies.

ILL. REV. STAT. ch. 48, § 1702(n) (Supp. 1983). "[P]art-time academic employees of community colleges shall be defined as those employees who provide less than 6 credit hours of instruction per academic semester." ILL. REV. STAT. ch. 48, § 1702(b) (Supp. 1983).

15. 80 Ill. Adm. Code § 1100.10.

16. H.B. 1530, as Enrolled, § 2(b).

17. [N]o employee or group of employees shall be deemed to be a "supervisor" because the employee or group of employees participates in decisions with respect to courses, curriculum, personnel, or other matters of educational policy.

H.B. 1530, as Enrolled, § 2(9).

18. 444 U.S. 672 (1980).

NLRB had contended that faculty were not managers because they exercised their authority collectively in the interests of the faculty rather than the interests of the employer. The Court rejected this position because it viewed the interests of the faculty as identical to those of the employer.

The governor's amendatory veto substantially altered the IELRA's definition of supervisor. It deleted the reference to participation in academic decision making and added a provision that defined supervisors to be only those individuals who devote a preponderance of their employment time to supervisory duties.¹⁹ This language was taken from the IPLRA.²⁰ It was inserted into that act on the House floor. The House debates on the IPLRA indicate that the legislature intended to substitute a percentage of employment time test for the *Yeshiva* analysis.²¹ Similar language is used in the definition of managerial employee, thereby indicating that a similar percentage of employment time test applies to that exclusion.²² Typical faculty members spend the preponderance of their

19. Governor's Amendatory Veto Message of House Bill 1530, pp. 2-3 (September 23, 1983).

20. ILL. REV. STAT. ch. 48, § 1603(q) (Supp. 1983).

21. Representative Davis argued against the definition because it was inconsistent with *Yeshiva* and would result in employee status for department heads in high schools and universities. 83rd Gen. Assem., House Debate on S.B. 536, pp. 285-86 (June 24, 1983). Shortly thereafter, Representative Greiman, one of the House sponsors of both the IPLRA and the IELRA, confirmed in a colloquy with Representative Hoffman that a chairman of a high school social studies department who spends 80 percent of his employment time teaching and 20 percent with supervisory duties would be an employee rather than a supervisor. *Id.* at 287-88. The legislative intent that a typical public school or community college department chairman be considered an employee rather than a supervisor was reiterated during the Senate debates on the Governor's amendatory veto. 83rd Gen. Assem., Senate Debate on H.B. 1530, p. 61 (Nov. 2, 1983).

The percentage of time test differs significantly from the private sector approach to supervisory status. Although an employee's infrequent and sporadic assumption of supervisory functions does not result in supervisory status, a person with full-time supervisory authority remains a supervisor even though that authority is exercised only occasionally. *See generally, The Developing Labor Law* 1455 (C. Morris ed. 1983). However, even in the private sector the percentage of time test is not unknown. Professional employees who supervise nonbargaining unit employees are not considered supervisors if their supervisory duties encompass less than 50 percent of their employment time. *See, e.g.,* New York University, 205 N.L.R.B. 4, 8 (1973); Adelphi University, 195 N.L.R.B. 639 (1972).

22. To be a managerial employee one must be engaged *predominantly* in management functions. *See supra* note 14. In contrast, the definition of confidential employee does not require a preponderance or predominance of confidential activities over other job duties, but merely requires that confidential activities occur in the regular course of employment. *See id.*

The managerial exception was viewed by the legislature as a very narrow exception. As explained by Senator Bruce:

On . . . managerial employees . . . I believe the Governor . . . in his definition made it very clear that . . . it is not the title. It is the question of the preponderance of time that the employee will spend in the question (sic) of management, and those people who would be excluded from management are only those people who would be limited to what is known as the central management team.

83rd Gen. Assem., Senate Debate on H.B. 1530, pp. 45-46 (Nov. 2, 1983).

The supervisory, managerial and confidential employee exceptions were intended collectively to place management and labor on a more equal footing. *See* 83rd Gen. Assem., House Debate on S.B. 536, p. 291 (June 23, 1983); Governor's Amendatory Veto of H.B. 1530 at 1 (September 23, 1983).

employment time on teaching, preparing for class, counseling students, and, in the case of higher education faculty, conducting research. The minor percentage of their time spent on academic governance matters should not serve to deny them employee status.

A major issue that surfaced during the NLRB's brief experience with private university faculty bargaining was the supervisory status of department chairmen.²³ The NLRB held that department chairmen were employees if they exercised their power in the interests of the faculty, but were supervisors if they exercised their power in the interests of the administration. This approach required the Board to delve into the "complex threads, and even nuances, of the relationship among the faculty, administration, and department chairmen . . .,"²⁴ and produced seemingly contradictory results.²⁵ The IELRA obviates the need for such inquiry, leaving the supervisory status of department chairmen to be resolved by the objective percentage of employment time test.

The exclusion of student employees is perhaps the most perplexing of the Governor's amendatory additions to the IELRA. Nowhere is there any indication of the definition of "student employee" or of the rationale for excluding such workers from coverage.²⁶ In the private sector the NLRA does not expressly exclude student employees from its coverage. The NLRB, however, has held that students employed by their educational institutions are not employees subject to the Act's coverage.²⁷

(describing changes as necessary "to create a workable and fair system that balances the rights of educational employees with the unique managerial problems that beset educational employers").

23. See *New York University*, 205 N.L.R.B. 4, 9 (1973) ("In virtually every case since we asserted jurisdiction over universities, the status of department chairmen, or heads, has been in issue.").

24. *Id.*

25. Compare *Fairleigh Dickinson University*, 205 N.L.R.B. 673 (1973); *Syracuse University*, 204 N.L.R.B. 641 (1973); *Adelphi University*, 195 N.L.R.B. 639 (1973) and *C.W. Post Center*, 189 N.L.R.B. 904 (1971) (department chairmen held to be supervisors) with *Boston University v. NLRB*, 575 F.2d 301 (1st Cir. 1978), *vacated*, 445 U.S. 912 (1980) (remanded for further consideration in light of *Yeshiva*); *New York University*, 205 N.L.R.B. 4 (1973) and *Fordham University*, 193 N.L.R.B. 134 (1971) (department chairmen held to be employees). The NLRB's inconsistency was criticized as a "disturbing and perhaps unseemly spectacle of a theoretically expert administrative agency issuing alternatively perfunctory and contradictory decisions based wholly on one or another of two differing precedents on the same question." Finkin, *The N.L.R.B. in Higher Education*, 5 *TOLEDO L. REV.* 608, 634-35 (1974).

26. Although "short-term" employee is not defined in the IELRA, it is defined in the IPLRA. *ILL. REV. STAT.* ch. 48, § 1603(p) (Supp. 1983). Part-time academic employees of community colleges is expressly defined and was added by the Governor in response to concerns voiced during the legislative debates that statutory coverage of part-time instructors could have disastrous financial consequences for community colleges. See 83rd Gen. Assem., House Debate on H.B. 1530, pp. 259-60 (May 26, 1983).

27. *St. Clare's Hosp. & Health Center*, 229 N.L.R.B. 1000 (1977) (hospital housestaff); *Kansas City Gen'l Hosp. & Medical Center*, 225 N.L.R.B. 108 (1976) (hospital housestaff); *Cedars-Sinai*

The NLRB's approach focused on students' subjective motivation for working. The NLRB reasoned that students are concerned primarily with their studies and work only to support their studies.²⁸ Although it initially recognized that "students" and "employees" were not mutually exclusive categories,²⁹ the NLRB later concluded that it was not possible for the same individual to be both a student and an employee.³⁰ Consequently, in the NLRB's view, student employment involved academic concerns such as hours of study, program advancement, examinations, grading, course content and materials, program duration and teaching methods. Collective bargaining with regard to such matters was seen as inconsistent with the inherently unequal student-teacher relationship.³¹

The NLRB's approach has been generally rejected in the public sector because it substitutes presumed subjective intention for objective indicia of employment status. Many states interpreting public sector labor acts have relied on objective criteria to find that employees do not lose their collective bargaining rights merely because they are also students at the institutions that employ them.³² Moreover, the NLRB's concern that

Medical Center, 223 N.L.R.B. 251 (1976) (hospital housestaff); San Francisco Art Institute, 226 N.L.R.B. 1251 (1976) (students employed as janitors); Leland Stanford Jr. University, 214 N.L.R.B. 621 (1974) (graduate assistants). For a history and critique of the NLRB's interpretation see Malin, *Student Employees and Collective Bargaining*, 69 KY. L. J. 1 (1980).

28. San Francisco Art Institute, 226 N.L.R.B. 1251 (1976).

29. Cedar-Sinai Medical Center, 223 N.L.R.B. 251, 253 (1976).

30. St. Clare's Hosp. & Health Center, 229 N.L.R.B. 1000, 1003 (1977).

31. *Id.* at 1002-03.

32. Student employees are usually considered employees for federal income tax purposes. *See*; *Parr v. United States*, 469 F.2d 1156 (5th Cir. 1972); *Hembree v. United States*, 464 F.2d 1262 (4th Cir. 1972); *Rundell v. Comm'r*, 455 F.2d 639 (5th Cir. 1972); *Wertzberger v. United States*, 441 F.2d 1166 (8th Cir. 1971); *Woodail v. Comm'r*, 321 F.2d 721 (10th Cir. 1963); Rev. Rul. 75-490, 1975-2 C.B. 50; Rev. Rul. 72-469, 1972-2 C.B. 79; Rev. Rul. 68-520, 1968-2 C.B. 58; Rev. Rul. 65-117, 1965-1 C.B. 67; Rev. Rul. 57-386, 1957-2 C.B. 107; *but see* *Leathers v. United States*, 471 F.2d 856 (8th Cir.), *cert. denied*, 412 U.S. 932 (1972); workers' compensation; *see* *Nordland v. Poor Sisters of St. Francis*, 4 Ill. App. 2d 48, 123 N.E.2d 121 (1954); *Brewer's Case*, 335 Mass. 601, 141 N.E.2d 281 (1957); *Bernstein v. Beth Israel Hosp.*, 236 N.Y. 268, 140 N.E. 694 (1923). Student employees are also employees for purposes of voter residency, *see* *Rathbyn v. Smith*, 175 Misc. 246, 23 N.Y.S.2d 95 (Sup. Ct. 1940); and the re-employment provisions of the selective service statute, *see* *Martin v. Roosevelt Hosp.*, 426 F.2d 155 (2d Cir. 1970). Student employees usually are assigned and paid on the basis of employer need, work regular schedules and a substantial number of hours. Some or all of these factors have been relied on in public sector decisions finding student employees within the statutory definition of "employee". *See, e.g.*, *Long Beach Veterans Admin. Medical Center*, 7 F.L.R.A. 434 (1981); *City of Cambridge*, No. MCR-2163 (Mass. L.R.C. 1976); *University of Mich. v. MERC*, 389 Mich. 96, 204 N.W.2d 218 (1973); *Michigan State Univ.*, 1976 M.E.R.C. 73; *House Officers Ass'n v. University of Neb. Medical Center*, 198 Neb. 697, 255 N.W.2d 258 (1977); *Long Island College Hosp.*, 33 N.Y.S.L.R.B. 161 (1970); *Arrowhead United Teachers Org.*, [1980] Gov't EMPL. REL. REP. (BNA) No. 877, at 14 (Wisc. ERC); *see also* *Cedars-Sinai Medical Center*, 223 N.L.R.B. 251, 254-55 (1976) (Fanning, Member, dissenting); *Wayne State Univ.*, 1969 M.E.R.C. 670, 671 (rejecting employer's contention that union composed entirely of student employees lacks permanence, experience or strength necessary to be a labor organization); *Contra*, *Philadelphia Ass'n of Interns & Residents v. Albert Einstein Medical Center*, 470 Pa. 562, 369 A.2d 711 (1976).

giving student employees collective bargaining rights will result in bargaining over academic matters has been shown to be empirically incorrect.³³

In two states, the legislatures have expressly defined exclusions for students employed by their educational institutions. In Florida, the Public Employment Relations Commission initially held that graduate assistants were employees under that state's Public Employment Relations Act.³⁴ The legislature reacted by amending the Act to expressly exclude "[T]hose persons enrolled as graduate students in the state university system employed as graduate assistants . . . and those persons enrolled as undergraduate students . . . who perform part-time work for the state university system."³⁵ Following this amendment, the Florida PERC revoked the certification of the graduate assistant bargaining units.³⁶

In California, the Higher Education Employer-Employee Relations Act (HEEERA) provides that student employees are covered "only if the services they provide are unrelated to their educational objectives, or . . . those educational objectives are subordinate to the services they perform and . . . coverage . . . would further the [Act's] purposes . . ."³⁷ In *University of California*,³⁸ the California Public Employment Relations Board held that hospital housestaff were covered by HEEERA. The California PERB observed that services performed by housestaff were related to their educational objectives, but found that those objectives were subordinate to the performance of those services. The Board based this finding on evidence in the record that housestaff spent an average of eighty percent of their working time in clinical activities, frequently missed formal teaching sessions because their clinical responsibilities were more important, provided direct patient care with little or no supervision, supervised and guided other hospital employees and medical students, and were clothed with the traditional objective indicia of employment.

The California Court of Appeals reversed PERB. The court reviewed the conflicting decisions of other jurisdictions and observed that at the time HEEERA was enacted, there were two well-defined views

33. See Malin, *Student Employees and Collective Bargaining*, 69 KY. L. J. 1, 27-28 (1980).

34. Board of Regents v. PERC, 368 So. 2d 641 (Fla. App.), review denied, 379 So. 2d 202 (Fla. 1979).

35. FLA. STAT. ANN. § 447.203(3) (West 1981 & Supp. 1984).

36. United Faculty of Florida and Board of Regents, 7 FL. PUBL. EMPL. REP. (LAB. REL. PRESS) ¶ 12409 (1981).

37. CAL. GOV'T CODE § 3562(f) (West 1980 & Supp. 1985).

38. 7 CAL. PUBL. EMPL. REP. (LAB. REL. PRESS) ¶ 14066 (1983), rev'd, 205 Cal. Rptr. 49 (Cal. App. 1984).

concerning the status of hospital housestaff. It further observed that the legislature could have easily specified which view should prevail in California but chose instead to set forth general criteria and leave the application of those criteria to PERB and the courts. The court then rejected PERB's reliance on the objective indicia that housestaff educational objectives were subordinate to the services they provided and assessed the purposes of internship and residency programs subjectively. The court relied primarily on statements contained in the governing document for residency accreditation that declared the primary purpose of a residency to be educational. The court concluded that housestaff did not work primarily for monetary gain but instead were fulfilling educational requirements.

It is remarkable that the IELRA follows neither the Florida model of specifically identifying who is excluded as a student employee or the California model of setting down general guidelines to apply in determining who is excluded. During the House consideration of the IELRA, Representative Nelson apparently drafted an amendment that would have excluded managerial, confidential, part-time and student employees from the IELRA's coverage.³⁹ The amendment would have defined student as "any individual who is enrolled and attending classes by an educational employer and is employed on a temporary basis less than full-time." The amendment was never formally offered.

It is clear that the Nelson amendment was not the model for the Governor's amendatory veto. While the amendatory veto added exclusions of managerial, confidential and student employees, it did not generally exclude part-time employees, and its definitions of managers and supervisors differ substantially from those contained in the Nelson amendment.

It is equally remarkable that the exclusion of student employees was not clarified during the floor debates on the amendatory veto. Both majority and minority staff analyses of the amendatory veto noted the problem of adding an undefined exclusion for student employees.⁴⁰

It could be argued that the exclusion of student employees extends to any employee who is also enrolled for classes with the employer. This extreme position lacks any precedent and has been rejected by the NLRB.⁴¹ Many educational employers allow employees to take courses tuition free or at a reduced tuition. To hold that employees taking ad-

39. See House Majority Amendment Analysis, Amendment 20, for H.B. 1530 (May 24, 1983).

40. House Majority, Veto Analysis for H.B. 1530 (1983); House Minority, Veto Analysis for H.B. 1530 (1983).

41. The NLRB included employees who were working full-time while taking classes part-time

vantage of such benefits lose their employee status could severely disrupt the administration of the Act. Such a result finds no support in the overall statutory scheme or legislative history.

A second possible interpretation of the student employee exclusion is that it follows the NLRB's approach of relying on subjective motivation and excluding all employees who are "primarily students." The only indication of the Illinois legislature's intent regarding this approach is contained in the IPLRA, where the definition of "employee" expressly includes hospital housestaff.⁴² This provision is contrary to the NLRB decisions which exclude housestaff, and other student employees, based upon their subjective motivation for working. Thus, in the IPLRA, the Illinois legislature has expressly rejected the NLRB's approach to student employees.

The NLRB's approach is also inconsistent with the IELRA's general approach to exclusions from coverage. Under the IELRA, exclusion of employees whose job duties involve some supervisory or managerial functions is determined not by their subjective views of their employment, but by an objective percentage of employment time test. Exclusion of part-time community college employees is determined not by their subjective motives for working but by an objective standard; the number of credit hours they teach each semester. The scope of the IELRA's exclusion of student employees should be determined similarly, not by a subjective analysis of whether the individuals are primarily students or primarily employees, but by an objective analysis of the employment relationship.

In many cases the employment relationship and the student relationship are objectively separable, such that it is not difficult to cover the employment relationship in collective bargaining while excluding the student relationship from the Act's coverage. For example, this separability is evident in cases which include hospital housestaff and many students employed in nonacademic positions at their schools. In these cases, the statutory exclusion of students excludes the student relationship but not the employment relationship from the Act's coverage. In some instances, however, employment is inseparably intertwined with student status. For example, it is usually impossible to be a graduate assistant without also being a student. The assistant's work may consist of research to be used in his dissertation. The assistant's stipend is frequently tax exempt

in full-time nonstudent employee bargaining units in *Macke Co.*, 211 N.L.R.B. 90, 91 n.4 (1974), and in *Cornell Univ.*, 202 N.L.R.B. 290, 292 n.10 (1973).

42. ILL. REV. STAT. ch. 48, § 1603(m) (Supp. 1983).

and the assistant's relationship to his "supervisor" is essentially student-teacher.⁴³ Similar inseparability of student and employee status occurs with respect to student teachers. It may also occur where student employment is an inseparable part of a financial aid package.⁴⁴ In these cases, the statutory exclusion of students excludes both the student and the employment relationship from the Act's coverage.

RECOGNITION OF EXCLUSIVE REPRESENTATIVES

The IELRA sets forth two methods by which a union can be certified as exclusive bargaining representative: representation elections and voluntary recognition. Pursuant to section 7(b) of the Act, an employer may voluntarily recognize a union it believes to represent a majority of the employees. Section 7(c) authorizes an employer to file a representation petition if the employer doubts the majority status of a union that has requested recognition. The interplay of sections 7(b) and 7(c) are susceptible to an interpretation that an employer faced with a recognition request has only two statutory alternatives: initiate voluntary recognition proceedings if it agrees with the union's claim of majority status or file an election petition if it doubts the claim. The IELRB regulations reject this interpretation and allow an employer to decline to respond to a recognition request.⁴⁵

In *Linden Lumber Division, Sumner & Co. v. NLRB*,⁴⁶ the Supreme Court held that in the private sector an employer may ignore or refuse a union request for recognition and need not file a representation petition. The Court deferred to the NLRB's expert judgment that placing the burden of filing a representation petition on the union facilitated the administration of the NLRA. The IELRB's similar determination is entitled to similar deference. To provide, as the statute does, that an employer may initiate voluntary recognition proceedings and may file an election petition is not to require that an employer do one or the other.

Representation election petitions may be filed by employees, unions and employers.⁴⁷ Employee and union petitions must be supported by a thirty percent showing of interest in the bargaining unit.⁴⁸ The Act per-

43. See *Leland Stanford Jr. Univ.*, 214 N.L.R.B. 621 (1974); cf. *Fordham Univ.*, 193 N.L.R.B. 134, 135-36 (1971) (faculty are not supervisors even though they supervise graduate assistants because the relationship is teacher-student rather than supervisor-employee).

44. See, e.g., *Cornell Univ.*, 202 N.L.R.B. 290 (1973); Brief for the Employer at 31, 33, *id.*.

45. 80 Ill. Adm. Code § 1110.30.

46. 419 U.S. 301 (1974).

47. ILL. REV. STAT. ch. 48, § 1707(c)(1), (2) (Supp. 1983).

48. ILL. REV. STAT. ch. 48, § 1707(c)(1) (Supp. 1983).

mits rival unions to intervene upon a fifteen percent showing of interest.⁴⁹ The IELRB rules generally take a liberal approach to the showing of interest requirement.⁵⁰ The rules also contain relatively standard procedures for investigating election petitions and conducting elections.⁵¹

The statute creates an election bar of one year and a contract bar of up to three years to the holding of an election.⁵² The IELRB rules add a one year voluntary recognition certification bar.⁵³ The statutory window period for filing representation election petitions is set at January 15th through March 1st of the final year of the contract bar. This window period is designed to promote stability in education labor relations by resolving representation issues prior to the time that negotiations for a new contract would ordinarily begin. It is part of an overall statutory model designed to promote resolution of education labor disputes at the bargaining table, thereby minimizing the potential for strikes.⁵⁴

The IELRB rules interpret the statutory window period as part of a directory model rather than a mandatory filing period. The rules implement the legislative direction that representation issues be resolved prior to the normal bargaining time to maximize stability and minimize disruption. They divide bargaining units into those that contain and those that do not contain professional instructional personnel. With respect to

49. ILL. REV. STAT. ch. 48, § 1708 (Supp. 1983).

50. The rules do not restrict the showing of interest to authorization cards and petitions, but include other evidence which demonstrates employee desire to be represented in collective bargaining by the employee organization. 80 Ill. Adm. Code § 1110.80(a). The sufficiency of evidence other than cards and petitions must be judged on a case by case basis. For example, membership applications are usually evidence of a desire for representation. Certain professional organizations such as the American Association of University Professors, however, serve many functions in addition to collective bargaining representative. Membership in these organizations does not necessarily evidence a desire for collective bargaining representation.

The rules provide that authorization cards are valid for six months from date of signature. 80 Ill. Adm. Code § 1110.80(d). Where an employee signs cards for more than one union, each card is counted toward the showing of interest. 80 Ill. Adm. Code § 1110.80(e). The rules also take a liberal approach to intervention, allowing it at anytime up to 15 days prior to the election. 80 Ill. Adm. Code § 1110.100(d).

51. See generally 80 Ill. Adm. Code §§ 1110.100 to 1110.140. During the rulemaking proceeding, a controversy developed concerning the identity of employer election observers. The Board's proposed rules prohibited managers, supervisors and confidential employees from serving as observers. 8 Ill. Admin. Reg. 7152, 7167 (1984). During the comment period, employers objected that the proposed rule effectively left them without observers. The adopted rules simply provide that the identity of the observers is subject to the control of the Board or its agent, 80 Ill. Adm. Code § 1110.140(c), thereby leaving the issue to a case by case determination.

52. ILL. REV. STAT. ch. 48, § 1707(c) (Supp. 1983). The election bar forbids the Board from holding a representation election within one year following a valid Board election. For a description of the contract bar see *supra* p. 103.

53. 80 Ill. Adm. Code §§ 1110.70(a)(1), (b)(2). The certification bar prohibits the filing of a representation petition within one year following Board certification pursuant to voluntary recognition.

54. See *supra* notes 10-15 and accompanying text.

the former, the rules set the window period at January 15th through March 1st, reflecting the Board's judgment based on existing patterns of bargaining that employees in those units work only during the school year and bargaining aims for agreement by the beginning of the coming school year.⁵⁵ With respect to the latter, the rules set the window period at forty-five to ninety days prior to the expiration of the existing collective bargaining agreement, reflecting the Board's judgment based on existing patterns of bargaining that employees in those units work year round and bargaining aims for agreement by the time the existing agreement expires.⁵⁶

The Act also provides that the election "shall be held no later than ninety days after the date the petition was filed."⁵⁷ An issue that arose early in the Act's history was whether this provision mandates that the Board hold the election within ninety days or merely directs the Board to hold the election expeditiously. The word "shall" is ambiguous and must be construed according to the circumstances in which it is used.⁵⁸ Statutory prescriptions regarding the timing of particular actions are usually held to be directory unless the statute expressly provides that the action is void if not undertaken during the prescribed time or unless failure to act within the prescribed time would seriously injure the rights of interested parties.⁵⁹ Courts also consider the practicalities of complying with the prescribed time period in determining whether the period is mandatory or directory.⁶⁰

The IELRA does not expressly provide that an election held on the ninety-first day is void, nor is it likely that the legislature intended such a result. Practical considerations may necessitate holding an election later than ninety days after the petition is filed. Representation cases involving complex bargaining unit issues may take considerable time to resolve; even in simple cases, when a petition is filed late in the school year, the

55. 80 Ill. Adm. Code § 1110.70(a)(3).

56. *Id.*

57. ILL. REV. STAT. ch. 48, ¶ 1707(c) (Supp. 1983).

58. See, e.g., *Carrigan v. Liquor Control Comm'n*, 19 Ill. 2d 230, 166 N.E.2d 574 (1960); *Carr v. Board of Educ.*, 14 Ill. 2d 40, 150 N.E.2d 583 (1958); *Hester v. Kamykowski*, 13 Ill. 2d 481, 150 N.E.2d 196 (1958); *Walker v. Cronin*, 107 Ill. App. 3d 1053, 438 N.E.2d 582 (1982); *Jones v. Eagle II*, 99 Ill. App. 3d 64, 424 N.E.2d 1253 (1981).

59. Ordinarily a statute which specifies the time for the performance of an official duty will be considered directory only where the rights of the parties cannot be injuriously affected by failure to act within the time indicated. However, where such statute contains negative words, denying the exercise of the power after the time named, or where a disregard of its provisions would injuriously affect public interests or private rights, it is not directory but mandatory.

Carrigan v. Liquor Control Comm'n, 19 Ill. 2d 230, 233, 166 N.E.2d 574, 576 (1960). Compare *Carrigan with Hester v. Kamykowski*, 13 Ill. 2d 481, 150 N.E.2d 196 (1958).

60. Cf. *Watts v. Board of Educ.*, 125 Ill. App. 3d 532, 466 N.E.2d 311 (1984).

election may have to be held later than ninety days after the filing of the petition to avoid holding the election during the summer when, in units containing professional instructional personnel, most employees will be unavailable to vote.⁶¹ Thus, under generally accepted principles of statutory construction, the ninety-day provision could only be considered mandatory if a failure to hold an election within that period would seriously injure the rights of interested parties.

The rights that are most directly affected by the timing of the election are the employees' rights to select their representative for collective bargaining. If the ninety-day provision is directory, the IELRB can postpone an election until after the composition of the bargaining unit and similar issues are resolved. This furthers the employees' rights. The definition of the bargaining unit may determine which unions qualify for the ballot. Even in cases where all unions that have petitioned or intervened will clearly qualify for the ballot, an employee's decision on which union to vote for or even whether to vote for any union may be influenced by the composition of the bargaining unit. The employee's right to vote certainly includes the right to an informed vote.

If the ninety-day provision is mandatory and an election is held before all pre-election issues are settled, many employees will be forced to vote by challenged ballot to preserve the outstanding issues for post election resolution.⁶² Many employees will be voting without knowing what bargaining unit they would be in, whether their choice had qualified for the ballot, or even whether their vote would ultimately be counted. Such large scale uncertainty may render the right to vote meaningless in some cases.

The timing of the election may also affect the employees' rights to engage in collective bargaining. If an employer is required to cease negotiating a new agreement with the incumbent union when a rival union files a representation petition, collective bargaining will not resume until the election is held and the results are certified. Unfortunately, holding the election before all pre-election issues have been resolved will not re-

61. During hearings on the IELRB's proposed representation rules, the Illinois Federation of Teachers (IFT) argued that the 90-day period is mandatory. Even the IFT, however, conceded that an exception would have to be created for teacher elections that would otherwise have to be held during the summer. *Chicago Representation Rules Hearings*, *supra* note 10, at 120; IELRB, Proposed Rules and Regulations Dealing with Representation and Unfair Labor Practice Procedures, Hearings on June 13, 1984, Springfield, pp. 83-84 (hereafter cited as *Springfield Representation Rules Hearings*).

62. The IFT proposed handling unresolved pre-election issues in this manner. See *Chicago Representation Rules Hearings*, *supra* note 10, at 118-120.

sult in a faster certification. The issues will have to be resolved after the election and certification will still be delayed.

An interpretation that the ninety-day period is mandatory, as discussed, would not serve to better protect the rights of the parties or the employees. Moreover, such an interpretation may actually reduce the incentive to stipulate to a consent election. A party who delays the bargaining unit resolution until after the election may be able to determine how to construct the unit to guarantee victory. Parties, therefore, may avoid resolving bargaining unit and similar issues by stipulation for consent election, preferring to litigate them after the election. The result may be increased litigation and increased delay of certification.

Given the impractical and damaging effects of a mandatory ninety-day period for holding an election, the provision in the IELRA is clearly directory. It is an intricate part of the statutory model for resolving representation issues prior to the normal time for bargaining. Indeed, the clearly directory nature of the ninety-day election provision underscores the basic directory nature of the entire statutory model for representation, collective bargaining and impasse resolution procedures.

The statutory alternative to certification through a representation election is voluntary recognition. This procedure, set forth in section 7(b) of the Act, requires an employer to post, for twenty school days, a notice of its intent to recognize a union. During the posting period, any other union may file with the Board a petition supported by a fifteen percent showing of interest in an appropriate unit containing all or some of the employees in the unit that was to have been voluntarily recognized. The petition converts the voluntary recognition proceeding into an election proceeding. If no petitions are filed, the employer, if satisfied of the union's majority status, "shall send written notification of such recognition to the Board for certification."⁶³

The IELRB's rules assert strict Board control over the voluntary recognition procedures. The rules prohibit voluntary recognition whenever the bargaining unit is already represented by an exclusive representative and whenever a representation election petition can not be filed.⁶⁴ The rules require that an employer notify the Board of its intent to use the voluntary recognition procedures⁶⁵ and specify the contents of the

63. ILL. REV. STAT. ch. 48, § 1707(b) (Supp. 1983).

64. See 80 Ill. Adm. Code § 1110.40(a)(1), (2). The rules also forbid use of voluntary recognition in a bargaining unit mixing professional and nonprofessional employees. 80 Ill. Adm. Code § 1110.40(a)(3). This provision implements the statutory requirement of a unit preference vote in such a mixed unit. See ILL. REV. STAT. ch. 48, § 1707 (Supp. 1983).

65. 80 Ill. Adm. Code § 1110.40(b).

twenty-school day notice that must be posted.⁶⁶ The employer's request for certification must be supported by objective evidence of the union's majority status.⁶⁷ Board certification is not automatic but occurs only after the Board's investigation confirms that the union represents a majority of the employees in an appropriate unit.⁶⁸

The IELRB rules obviously protect employees from potential employer-union collusion in the voluntary recognition process. Furthermore, the rules are designed to insure that a voluntary recognition procedure is as reliable an indicator of employee free choice as a representation election. The reliability of the procedure enables the Board to grant, in cases of voluntary recognition, a certification bar to the filing of election petitions comparable to the bar resulting from a representation election. The rules, thus, further stability in labor relations without sacrificing employee free choice.

The IELRA is silent concerning the fate of a voluntary recognition that does not comply with the statutory procedure. The IELRB's rules provide that such recognition or any contract negotiated pursuant to such recognition cannot bar a petition for a representation election.⁶⁹ The rules are silent concerning whether such a recognition is also an unfair labor practice. Resolution of this issue requires a determination of whether the legislature intended, by providing an express statutory voluntary recognition procedure, to outlaw other voluntary recognitions.

As originally introduced, the bill that was to become the IELRA expressly authorized employer voluntary recognition of unions with majority status.⁷⁰ This was replaced by the current section 7(b) procedure.

66. *Id.* at § 1110.40(c), (d).

67. *Id.* at § 1110.40(i). The rules do not specify what is acceptable objective evidence of majority status. They do specify that authorization cards which are not sufficient to establish a showing of interest in support of an election petition and authorization cards from employees who have signed cards for more than one union are not acceptable. *Id.* The rules do not expressly require that authorization cards be submitted to the IELRB to substantiate the voluntary recognition. This is in contrast with the voluntary recognition rules under IPLRA which invite the parties to submit the cards jointly or the union to submit the cards in confidence to the Board. 80 Ill. Adm. Code § 1210.160(i)(1). A traditional method of verifying majority status in private sector voluntary recognition is to have a neutral third party check the authorization cards against the employer's payroll list. If the neutral follows the rules' provisions governing the cards' validity, the neutral's certification of majority status should be sufficient objective evidence to warrant certification.

68. 80 Ill. Adm. Code § 1110.40(j).

69. The rules state that Board-supervised elections and voluntary recognition are the exclusive means by which "the bargaining relationship and any ensuing collective bargaining agreement are to be pursuant to the 'Illinois Educational Labor Relations Act' and subject to the processes of this Board." 80 Ill. Adm. Code § 1110.10. They further provide that a contract cannot serve as a bar if it is negotiated with a union "recognized by the employer after the effective date of these rules without having used the voluntary recognition or representation election procedures specified in the Act and these regulations." *Id.* at § 1110.70(c).

70. H.B. 1530, as Introduced, § 5(b), provided:

This legislative history strongly supports a conclusion that voluntary recognition outside the section 7(b) procedure is prohibited.

Prohibition of nonstatutory voluntary recognition is also implicit within section 7(b). The statute expressly provides that voluntary recognition claims of majority status be tested by election upon a fifteen percent showing of interest by a rival union. A nonstatutory voluntary recognition would circumvent this provision by forcing the rival union to file a representation petition supported by a thirty percent showing of interest to gain an election.

The Board's rules, by denying certification and contract bars to nonstatutory voluntary recognition, provide a substantial incentive to use the statutory procedure, but do not prevent the circumvention. The rules simply leave the recognition open to challenge at any time. The method of challenge, however, remains the filing of a representation or decertification petition which must be supported by a thirty percent showing of interest. The circumvention can only be prevented by holding that nonstatutory voluntary recognitions are illegal, thereby allowing them to be challenged by the filing of unfair labor practice charges.

A comparison of section 7(b) to the private sector further reinforces the conclusion that nonstatutory voluntary recognitions are illegal. The NLRA contains no express provisions governing voluntary recognition. Section 8(a)(2), however, prohibits employer domination, interference or support of a labor organization.⁷¹ An employer violates section 8(a)(2) if it voluntarily recognizes a union that does not have majority status.⁷²

Considerable controversy exists over whether a private sector employer can lawfully voluntarily recognize a union that has majority status. If no other union is seeking to represent the same employees, voluntary recognition clearly is permitted.

Since its decision in *Midwest Piping Co.*, however, the NLRB has attempted to reach a workable rule covering the circumstances under which organizing by a rival union prevents an employer from recognizing a majority union.⁷³ Section 7(b) answers this question by allowing the

Nothing in this or any other Act prohibits recognition of an employee organization as the exclusive representative of an employer on mutual consent of the employer and the employee organization, provided that the employee organization represents a majority of the employees in an appropriate unit.

71. 29 U.S.C. § 158(a)(2) (1982).

72. *International Ladies Garment Workers Union v. NLRB*, 366 U.S. 731 (1961).

73. In *Midwest Piping Co.*, 63 N.L.R.B. 1060 (1945), the NLRB held that an employer violated section 8(a)(2) when it voluntarily recognized a majority union where a rival had raised a "real question concerning recognition." Over the years the Board increasingly broadened its view of what constituted a "real question concerning recognition" to the point where any rival union's claim that was more substantial than a "naked claim" precluded voluntary recognition of the majority union.

rival union to block voluntary recognition with a fifteen percent showing of interest. The rival union must petition the Board and the Board has the burden of stopping the voluntary recognition. In this way an employer is protected from blundering in good faith into an unfair labor practice because it was unaware of the extent of the rival union's support. Voluntary recognition by methods other than the section 7(b) procedure would circumvent this carefully crafted solution to the *Midwest Piping* problem. Such action should be held to be an unfair labor practice.

In the private sector, the issues raised by *Midwest Piping* were not limited to unorganized employers facing organization by two or more rival unions. In *Shea Chemical Corp.*,⁷⁴ the NLRB extended its *Midwest Piping* doctrine and held that an organized employer could not continue to negotiate a new collective bargaining agreement with an incumbent union after a rival had filed a representation petition. Twenty-four years later, in *RCA Del Caribe, Inc.*,⁷⁵ the NLRB reversed itself, holding that an employer's duty to bargain with an incumbent continues despite the filing of a rival's representation petition. The IELRB's proposed rules followed *Shea Chemical*.⁷⁶ The rules ultimately adopted by the IELRB are silent, thus leaving the issue unresolved.⁷⁷

In *RCA Del Caribe*, the NLRB evaluated its experience under *Shea Chemical* and concluded that its "efforts to promote employee free choice have been at a price to the stability of collective-bargaining relationships."⁷⁸ It viewed the concern with employer neutrality expressed in *Midwest Piping* as less substantial where there is an incumbent representative. In the NLRB's view, recognition of one union over a rival where neither is the incumbent changes the status quo and inherently gives the recognized union an unfair advantage. Continued bargaining with an incumbent, however, maintains the status quo. If the parties reach agreement, the incumbent receives a legitimate advantage of incumbency. This approach, the NLRB concluded, "is the better way to approximate employer neutrality."⁷⁹

See *American Can Co.*, 218 N.L.R.B. 102 (1975), *enf'd*, 535 F.2d 180 (2d Cir. 1976); *Playschool, Inc.*, 195 N.L.R.B. 560 (1972), *enf't denied*, 477 F.2d 66 (7th Cir. 1973). However, in *Bruckner Nursing Home*, 262 N.L.R.B. 955 (1982), the NLRB reversed itself, holding that an employer may voluntarily recognize a majority union at any time prior to a rival's filing of a representation petition.

74. 121 N.L.R.B. 1027 (1958).

75. 262 N.L.R.B. 963 (1982).

76. 8 Ill. Admin. Reg. 7152, 7155 (1984).

77. One should not infer from the IELRB's deletion of the *Shea Chemical* provision that the IELRB reversed its view. Deletion only reflects a decision that the issue contains too many complex substantive questions to be resolved by rulemaking. See *Springfield Representation Rule Hearings*, *supra* note 61, at 69-70 (remarks of Board Member Wildman).

78. 262 N.L.R.B. at 965.

79. *Id.*

The NLRB's reasoning should not be adopted under the IELRA. The NLRB gives considerable weight to stability in an inherently unstable situation, *i.e.*, where an incumbent has been challenged to an election. When no question concerning representation is pending, an employer negotiates knowing that an agreement will provide labor peace for its term. However, under *RCA Del Caribe*, an employer cannot rely on the agreement where an election is pending. If the rival wins the election, any agreement negotiated with the incumbent is null and void.⁸⁰ The IELRA requires an employer to bargain with a newly certified union upon demand within sixty days following certification. Thus, under the IELRA, as in the private sector, any agreement reached with the incumbent is superceded by a duty to bargain with the victorious rival.⁸¹

In deciding that continued bargaining with the incumbent is the better way to approximate employer neutrality, *RCA Del Caribe* only considers the effects on the election of an employer-incumbent agreement. It ignores the possibility that an employer might intentionally avoid agreement to aid in the incumbent's defeat. Such action likely would violate the employer's duty to bargain in good faith. However, failure to reach agreement may just as likely result from the incumbent's weakness as from the employer's bad faith. A weak incumbent, unable to reach agreement and afraid that it will lose the election, is likely to block the election⁸² by filing unfair labor practice charges accusing the employer of bad faith bargaining. An incumbent who does not file blocking charges and loses the election will likely file objections and unfair labor practice charges after the election.

On the other hand, an employer does not preserve the status quo if it intentionally assists the incumbent's campaign by agreeing to a more generous contract than it would have agreed to were there no pending election. Such action would likely constitute illegal employer support for the incumbent union. When agreements are reached rivals can be ex-

80. *Id.* at 966; *American Seating Co.*, 106 N.L.R.B. 250 (1953).

81. ILL. REV. STAT. ch. 48, § 1712 (Supp. 1983). The only other alternative would be to require any agreement reached by the incumbent and the employer to remain in effect but require the employer to bargain with the rival within 60 days after certification. If the agreement remains in effect, however, the rival will be unable to strike. ILL. REV. STAT. ch. 48, § 1713(d) (Supp. 1983). Thus, the major incentive for the employer to reach agreement would not be present. Bargaining would precede in the face of an artificial strike prohibition. This would be inconsistent with the process of collective bargaining as envisioned by the legislature. See *infra* notes 95-113 and accompanying text.

82. Generally, in the private sector the pending unfair labor practice charges will delay the holding of an election until the charges are resolved. Even in *RCA Del Caribe*, the NLRB conceded that undue delays in the holding of an election "would make the difficult task of an incumbent almost impossible, and would too often have the further effect of making the filing of a petition during the 'open period' a nullity." 262 N.L.R.B. at 966.

pected to file blocking charges or objections to the election. This will require the Board to intrude deeply into the bargaining process to determine whether the agreement represents legitimate bargaining by the parties or unlawful employer support of the incumbent.

This is not to suggest that it should be presumed that educational employers will deliberately use the negotiations process to manipulate the election outcome. Rather, it demonstrates that an employer attempting to comply with *RCA Del Caribe* faces a no-win situation. If the employer reaches agreement, it faces the likelihood of unfair labor practice charges by the rival; if the employer fails to reach agreement, it faces the likelihood of unfair labor practice charges by the incumbent. Given the uncertainty created by a pending election, in reality, there is no status quo for an employer to maintain.

Shea Chemical established an objective rule that employers could easily follow. Requiring an employer to refrain from negotiations when a representation petition is filed not only protects employee free choice, but also protects employers from blundering into unintended unfair labor practices. In section 7(b), the legislature designed an objective, easily followed answer to the *Midwest Piping* issue for an unorganized employer. *Shea Chemical* provides a comparable answer to the *Midwest Piping* issue for an organized employer where the incumbent union is being challenged by a rival.

COLLECTIVE BARGAINING AND IMPASSE RESOLUTION

Prior to enactment of the IELRA, public education employees in Illinois had a constitutional right to join labor unions,⁸³ but little other legal protection. At common law, employers had the discretion to recognize unions and enter into collective bargaining agreements,⁸⁴ but were not legally compelled to do so.⁸⁵ Employers could rescind previously granted recognition,⁸⁶ and could discriminate between groups of employees, recognizing a union for one group while refusing to recognize a union for another group.⁸⁷ Issues concerning the scope of the bargaining

83. See *McLaughlin v. Tilendis*, 398 F.2d 287 (7th Cir. 1968).

84. See, e.g., *Chicago Principals Ass'n v. Board of Educ.*, 84 Ill. App. 3d 1095, 406 N.E.2d 82 (1980); *Chicago Division, Illinois Education Ass'n v. Board of Educ.*, 76 Ill. App.2d 456, 222 N.E.2d 243 (1966).

85. See, e.g., *Rend Lake College Federation of Teachers v. Board of Community College*, 84 Ill. App. 3d 308, 405 N.E.2d 364 (1980); *Cook County Police Ass'n v. City of Harvey*, 8 Ill. App. 3d 147, 269 N.E.2d 226 (1972).

86. See *Naperville Police Union, Local 2233 v. City of Naperville*, 97 Ill. App. 3d 153, 422 N.E.2d 869 (1981).

87. *Id.*

unit were also left to employer discretion.⁸⁸

A 1981 amendment to the School Code⁸⁹ gave public school employees a right to petition the regional superintendent to conduct representation elections, and charged the regional superintendent with the duty to administer such elections and certify a union which received a majority of the votes cast as the employees' exclusive bargaining representative. However, the statute did not expressly require employers to bargain in good faith and contained no express enforcement procedures.

When collective bargaining did occur, the process was clouded by considerable uncertainty due to overriding concerns of administrative law and local government law. Illinois courts were frequently called upon to determine whether agreements of the parties illegally delegated discretion that had been statutorily vested in the employer.⁹⁰ Stable labor relations were undermined by court decisions holding multiyear collective bargaining agreements to be void because they conflicted with statutory prohibitions on entering into contracts to expend money that had not yet been appropriated.⁹¹ Additionally, strikes by public employ-

88. See, e.g., *Tobin v. Health and Hospitals Governing Comm'n*, 66 Ill. App. 3d 564, 384 N.E.2d 77 (1978); *Chicago High School Assistant Principals Ass'n v. Board of Educ.*, 5 Ill. App. 3d 672, 284 N.E.2d 14 (1972).

89. ILL. REV. STAT. ch. 122, ¶ 3-14.24 (Supp. 1981) (repealed by the IELRA).

90. Compare *Lockport Area Special Education Cooperative v. Lockport Area Special Educ. Cooperative Ass'n*, 33 Ill. App. 3d 789, 338 N.E.2d 463 (1975) and *Board of Education v. Rockford Educ. Ass'n*, 3 Ill. App. 3d 1090, 208 N.E.2d 286 (1972) with *Chicago Principals Ass'n v. Board of Educ.*, 84 Ill. App. 3d 1095, 406 N.E.2d 82 (1980) and *Classroom Teachers Association v. Board of Educ.*, 15 Ill. App. 3d 224, 304 N.E.2d 516 (1973).

91. See *Chicago Patrolmen's Ass'n v. City of Chicago*, 56 Ill. 2d 503, 309 N.E.2d 3 (1974); *Board of Education v. Chicago Teachers Union*, 26 Ill. App. 3d 806, 326 N.E.2d 158 (1975). In *Chicago Teachers Union*, the court criticized the effect of the statute on labor relations, but considered itself bound to void the second year of a two year collective bargaining agreement.:

Admittedly, this affirmance states a rule that deprives the Board of the power to enter into a legally enforceable multiyear contract with its teachers and those of its employees represented by Union without first making an appropriation to pay for the liability incurred under such a contract. Collective-bargaining agreements between school boards and school employees are not against public policy. In fact, evolution of contemporary American law strongly suggests that such agreements are necessary for the sound administration of a modern public school system. And, unquestionably, multiyear contracts can be the source of stability between a public employer and its employees. However, section 34-49 prohibits Board from entering into a contract with Union for more than 1 year, no matter how beneficial such a contract may be to the Chicago school system.

This is not true of other things for which Board must contract in the discharge of its responsibilities. For example, section 34-49 contains exceptions that permit Board to lease real or personal property for any period not exceeding 40 years, contract for more than 1 year to construct buildings, purchase fuel, obtain service for removal of ashes and provide for transportation of pupils. The anomaly of section 34-49 is that while it permits Board to enter into multiyear contracts for mundane matters, it prohibits Board from contracting for more than 1 year with the most important segment of the community with which it deals: its teachers. Nonetheless, as we have said earlier, we cannot disregard a prohibition mandated by the legislature. Therefore, Union's argument urging us to construe section 34-49 so as to validate the 2-year contract with the Board is one that will have to be addressed to the legislature.

ees were illegal and enjoined, notwithstanding the provisions of the Illinois Anti-Injunction Act.⁹² Employers were not required to reinstate returning strikers and could discriminate among strikers with regard to reinstatement.⁹³

Despite this pre-IELRA state of the law that reflected an attitude ranging from indifference to hostility toward public employee collective bargaining, unionization developed rather extensively in Illinois public education. By the time the IELRA was passed, a substantial number of the public school districts in the state engaged in collective bargaining.⁹⁴ Despite their illegality, strikes had become a reality in public education in Illinois.⁹⁵ The IELRA recognizes this reality and is a legislative attempt to bring order to the previously chaotic state of labor relations in public education.

The IELRA has been characterized as a strike driven statute.⁹⁶ Unlike public sector labor relations statutes in most other jurisdictions,⁹⁷ the IELRA does not prohibit strikes. It recognizes that statutory strike prohibitions, like the pre-existing common law prohibitions, would be ineffective. It seeks to minimize strikes by mandating good faith bargain-

26 Ill. App. 3d at 812-13, 326 N.E.2d at 163 (citations omitted). Fortunately, the legislature amended the School Code to permit the Chicago School Board to enter multiyear collective bargaining agreements of up to three years duration. ILL. REV. STAT. ch. 122, § 34-49 (1983).

92. *City of Pana v. Crowe*, 57 Ill. 2d 547, 316 N.E.2d 513 (1974); *Board of Education v. Redding*, 32 Ill. 2d 567, 207 N.E.2d 427 (1965); *but see County of Peoria v. Benedict*, 47 Ill. 2d 166, 265 N.E.2d 141 (1970), *cert. denied*, 402 U.S. 929 (1971).

93. *See, e.g., Battle v. Civil Serv. Comm'n*, 78 Ill. App. 3d 828, 396 N.E.2d 1321 (1979); *Strobeck v. Civ. Serv. Comm'n*, 70 Ill. App. 3d 772, 388 N.E.2d 912 (1979).

94. 83rd Gen. Assem., House Committee on Elementary & Secondary Education, Hearings on May 6, 1983.

95. Data obtained from the IELRB and the Illinois State Board of Education indicates the following experience with teacher strikes in elementary and secondary education for the nine academic years prior to the IELRA:

<u>YEAR</u>	<u>NUMBER OF STRIKES</u>
1975-76	26
1976-77	25
1977-78	16
1978-79	26
1979-80	40
1980-81	36
1981-82	21
1982-83	16
1983-84	15

96. IELRB, Proposed Rules and Regulations Dealing with General Procedures and Impasse Resolution, Hearings on July 12, 1984, Chicago, p. 23 (hereafter cited as Chicago Impasse Hearings) (remarks of IELRB Member Wildman).

97. For an excellent general overview of the treatment of strikes in the public sector, see Hanslowe & Acierno, *The Law and Theory of Strikes by Government Employees*, 67 CORNELL L. REV. 1055 (1982); *see also*, Annot., 22 A.L.R. 4th 1103 (1983); Annot., 37 A.L.R. 3d 1147 (1971).

ing and mediation before resort to economic warfare.⁹⁸ It also sanctions, but does not require the use of, interest arbitration as an alternative to strikes. This section of the article discusses the statutory provisions, the IELRB rules implementing the statute and several major issues not expressly addressed in the statute or the rules.

The IELRA provides for all unions and employers to file a notice with the IELRB, giving the status of their negotiations, ninety days prior to the scheduled start of the upcoming school year. At any time, beginning forty-five days prior to start of the school year, either party may petition the IELRB to invoke mediation. During this period, the IELRB may invoke mediation if it finds that the parties are at impasse. Fifteen days prior to the start of the school year, the IELRB is required to invoke mediation.⁹⁹

98. Representative Stuffle, a sponsor of the IELRA firmly stated this before the House Committee:

Page 17, importantly, limits when a strike can occur in major fashion. I think that's most important because we all know now, whether we like it or not, strikes are already occurring in willy nilly fashion throughout the state. We end up in court. We do battle in 1009 school districts in different fashions and in different courts. This makes uniform the provision when strikes can occur and attempts to limit them as much as possible. . .

83rd Gen. Assem., House Committee on Elementary & Secondary Education, Hearings May 6, 1983.

99. ILL. REV. STAT. ch. 48, § 1712 (Sup. 1983). The term "impasse" does not appear to be used in this context as it is used in the private sector. Under the NLRA, impasse is that point at which the parties, despite the best of faith, are simply deadlocked. It is determined by evaluating the parties' bargaining history, their good faith, the length of negotiations, the importance of the issues, and the understandings of the parties. *Taft Broadcasting Co.*, 163 N.L.R.B. 475, 478 (1967). The ultimate determination is a judgment that, because further negotiations under the existing conditions would be futile, the parties are freed from the constraints of the bargaining process and may act unilaterally with regard to mandatory subject of bargaining. See *NLRB v. Katz*, 369 U.S. 736 (1962); Stewart and Engeman, *Impasse, Collective Bargaining and Action*, 39 CIN. L. REV. 233 (1970); Comment, *Impasse in Collective Bargaining*, 44 TEX. L. REV. 769 (1966).

Under the IELRA, impasse is one of two requirements for a unilateral petition to invoke mediation during the 45-day period. The other is that the parties have engaged in "a reasonable period of negotiation." There is no suggestion that appointment of a mediator indicates the futility of further negotiations and the freedom of the parties to act unilaterally. Indeed, the principal union response to unilateral employer action, a strike, is not permitted until mediation has been used without success. Mediation is a vital stage of the IELRA negotiation process.

A competent mediator can educate unsophisticated negotiators concerning the operation of the bargaining process and reopen severed channels of communication. While recalcitrant parties at or on the verge of an impasse are usually still talking to one another, neither side may be truly listening to what the other side is endeavoring to say. An adroit mediator can re-establish meaningful communications and induce the parties to focus their attention upon their areas of common interest. Emotional issues can be diffused, and direct conflicts can be minimized. This permits the mediator to act as a face-saving catalyst which can often enable parties to achieve a mutually acceptable accord.

Craver, *Public Sector Impasse Resolution Procedures*, 60 Chi-Kent L. Rev. 779, 780 (1984) (footnote omitted).

The IELRB rules recognize the distinction between use of the term "impasse" in the private sector and in the IELRA. The rules provide that unilateral requests for mediation will be granted if bargaining has not resulted in an agreement and the Board concludes that mediation would assist the parties. In determining whether mediation would assist the parties, the Board considers the number

Strikes are lawful if they meet five conditions: the employees must be represented by an exclusive bargaining representative; the existing collective bargaining agreement must have expired; mediation must have been used without success; at least five days notice of intent to strike must have been given to the employer, the regional superintendent and the IELRB; and the parties must not have agreed to resolve their dispute through interest arbitration. If a strike poses a clear and present danger to the public health and safety, an employer may obtain an injunction in circuit court. However, an employer's lack of clean hands, including unfair labor practices, is a defense in injunction actions.¹⁰⁰

The IELRB rules place a significant gloss on the statute in two respects. In so doing, the rules address two problems apparently not considered by the legislature. The first problem was raised during hearings on the IELRB's proposed rules. The statute appears to mandate that the IELRB invoke mediation fifteen days before the start of the school year whenever the parties have not yet reached agreement. However, in many cases, mandating formal mediation at this juncture may be counter-productive. The parties may be making adequate progress on their own, and the bargaining may not yet be ripe for mediation.¹⁰¹

The IELRA views mandated mediation as a major tool for facilitating agreements and thereby preventing strikes. The requirement that the IELRB invoke mediation during this fifteen-day period places on the Board a duty to insure that mediation be used prior to a strike. This duty is independent of the parties' obligations under the Act.¹⁰² Forcing a

of bargaining sessions, the number and significance of issues in dispute, the experience of the negotiators and the bargaining history of the parties. 80 Ill. Adm. Code § 1130.30(e). These factors effectively define the term "impasse" as used in section 12 of the IELRA.

100. ILL. REV. STAT. ch. 48, § 1713 (Supp. 1983).

101. Concerns to this effect were voiced by representatives of both labor and management. See *Chicago Impasse Hearings*, *supra* note 96, at 19-20, 53, 87-92, 115-16, 127.

The mediation process in the public sector can be a meaningful tool in resolving disputes if it is recognized that the major incentive for agreement is the avoidance of strikes, be they legal or illegal. Mediation must be properly timed to maximize its effectiveness. If mediation is ordered mechanically it can degenerate into little more than a procedural hurdle for the parties to clear before resorting to economic weapons. See Zack, *Improving Mediation and Fact Finding in the Public Sector*, 21 LAB. L.J. 259 (1978).

102. The Board's independent duty to ensure that mediation be used prior to a strike is clear in light of the legislative history. During the House debates on the IELRA, the following colloquy ensued between Representatives Vinson and McPike:

Vinson: Well, if the Board is not requested by the parties, may the Board, on its own motion, initiate mediation, fact-finding, etcetera?

McPike: Yes. Yes.

Vinson: So, it is not necessary for either or both of the parties to request the Board to involve itself?

McPike: Correct.

Vinson: What's the philosophy behind that? I mean, if both the union and the School Board don't want the state agency involved, why should the state agency be involved?

mediator on the parties at an inopportune time, however, would not further the statutory purpose of using mediation to facilitate agreement and, in many cases, might inhibit it. The rules solve this problem by allowing the parties to an invoked mediation to stipulate deferral of mediator selection indefinitely. The stipulation must also provide that the parties shall not resort to economic weapons for at least ten days after a mediator is in place. The stipulation may be withdrawn by either party at any time.¹⁰³ Thus, under the rules the IELRB asserts control over the use of economic weapons to ensure that mediation will be used prior to a strike in a good faith effort to resolve the dispute, while affording the parties the flexibility to time the use of the mediator to maximize the likelihood of successful mediation.

The second problem addressed by the rules, yet not considered by the legislature, arises because the IELRA calculates the timing of notices and mediation from the scheduled start of the forthcoming school year. As has already been seen, the IELRA is modelled on teacher bargaining. Its specified time periods for representation proceedings and collective bargaining simply do not apply in any meaningful fashion to a large number of situations. They must be viewed as a directory model for the Board rather than a mandatory limitation on Board action.¹⁰⁴

Although the express statutory time periods for bargaining notices and mediation envision negotiations occurring prior to the scheduled start of the upcoming school year, the statute also expressly envisions negotiations occurring at other times. When a new exclusive representative is certified, the parties are required to begin negotiations upon demand within sixty days following certification.¹⁰⁵ Once negotiations begin, they must continue for at least sixty days. This can occur at any time, depending on the date of the representation election or voluntary recognition proceedings, whether election objections are filed and the complexity of the issues raised by the objections. According to the plain terms of the statute, absent IELRB gloss, if bargaining begins in the late fall or early winter, the parties would be unable to request the Board to invoke mediation until forty-five days prior to the start of the following school year, a considerable period of time after the mandatory sixty-day bargaining period's expiration. Mediation would only be available if the

McPike: Well, we would hope that one of the purposes of this Bill is to provide for labor peace. And if the Board feels that mediation and fact-finding may be helpful, and it will lead to labor peace in a certain area, I think we all should be for that.

83rd Gen. Assem., House Debate on H.B. 1530, p. 36 (May 18, 1983).

103. 80 Ill. Adm. Code § 1130.30(b)(2).

104. See *supra* note 10 and accompanying text.

105. ILL. REV. STAT. ch. 48, § 1712 (Supp. 1983).

parties mutually agreed to mediation under the auspices of an agency other than the IELRB. Either party could avoid mediation by withholding consent. Since mediation must be used without success before a legal strike can occur, an inability to invoke mediation until forty-five days before the start of the following school year would effectively prohibit strikes until the following school year. The timing of the mediation would produce an artificial strike prohibition.

Using mediation to produce an artificial strike prohibition is inconsistent with the function of mediation. It is also contrary to the overall intent of the Illinois legislature. The legislature recognized that artificial strike prohibitions are not effective in preventing strikes. It opted for mediation as part of "a true and systematic method of resolving impasses" and thereby preventing strikes.¹⁰⁶ It underscored the importance of mediation by mandating that, notwithstanding the statutory time periods for invoking mediation, "the services of mediators shall continuously be made available to the employer and to the exclusive bargaining representative for purposes of . . . mediation and arbitration of contract disputes."¹⁰⁷

The IELRB supplied the gloss needed to implement the statutory scheme by providing special rules governing bargaining in units represented by newly certified exclusive representatives.¹⁰⁸ The rules reiterate

106. This rationale was summarized by Representative Stuffle in closing the House Debates on the third reading of H.B. 1530:

We live in the 20th Century, and we need to face 20th Century realities. The Bill is not capitulating to labor, but it's an effort to provide a true and systematic method of resolving impasses, of limiting strikes not promoting them, of eliminating decades of strife in this state. No one wants strikes, no one at all. But they already occur, and we've got to attempt to deal with the situation where there's no real order in the state in community colleges, or colleges [or] for a (sic) 1,009 districts. In my district alone, we would have prevented directly a strike last year with this Bill. There's no doubt about that. We would have shortened others. It's time we settle our differences across the bargaining table. It's time we settle them there, not in the streets, that we realize educational personnel ought to be and are people, are taxpayers and ought to be first-class citizens. It forces no concessions on either party, but it recognizes the need to prevent arbitrary unwillingness to negotiate and compromise by either boards or teachers. . . .

83rd Gen. Assem., House Debate on H.B. 1530, p. 255 (May 26, 1983). Similar intent was expressed by Representative McPike during the House debates on the Governor's amendatory veto:

The real world that we live in has a strike currently going on in the City of Chicago that has been going on for probably two weeks, but someone has now suggested mediation. Had this Bill been law, there would have been mediation two months ago. There would have been fact-finding two months ago. The parties would have been brought together two months ago. The strike, in all probability, would not . . . would never have happened. Our Bill, 1530, that sets forth these step-by-step procedures will, in the future, lead to far fewer strikes, far less labor unrest than what we have today. . . .

83rd Gen. Assem., House Debates on H.B. 1530, p. 104 (Oct. 19, 1983).

107. ILL. REV. STAT. ch. 48, § 1712 (Supp. 1983).

108. 80 Ill. Adm. Code § 1130.20(a). Pursuant to Section 7.07 of the Illinois Administrative Procedure Act, ILL. REV. STAT. ch. 127, § 1007.7 (1983). The Joint Committee on Administrative Rules objected to these rules and to rules governing collective bargaining with existing exclusive

the statutory requirement that once commenced, bargaining must continue for at least sixty days unless agreement is reached. Forty-five days into this period, *i.e.*, fifteen days before its expiration, mediation is automatically invoked.

Underlying this approach is a view that the mandatory sixty-day bargaining period provides a time for negotiation that is insulated from the parties' use of self-help. The provision impliedly prohibits the union from striking for sixty days after negotiations have begun.¹⁰⁹ This interpretation of the required sixty-day bargaining period finds support in the IPLRA. Section 7 of the IPLRA¹¹⁰ requires a party seeking to terminate or modify an existing collective bargaining agreement to give the other party sixty days notice of its intent and to continue to operate under the terms of the existing agreement for sixty days without resort to strike or lockout. This provision is adopted from section 8(d)(4) of the NLRA.¹¹¹ Its purpose is to provide a cooling off period for negotiations to take place free from the economic pressure of a strike or lockout in relation to

representatives in units not containing professional instructional personnel. *See infra* note 115 and accompanying text; 8 Ill. Admin. Reg. 21702-21708 (1984). The Joint Committee's objection interpreted the statutory model to be mandatory and prohibitive. In its view, the statute prohibited the Board from invoking mediation at any time other than within 45 days of the scheduled start of the school year. To support this position, the Joint Committee attributed some very strained purposes to the legislature. It suggested that the legislature intended to prevent mediation and strikes in newly certified units until the beginning of the following school year. The Joint Committee also suggested that the legislature, by prohibiting the Board from invoking mediation at any time other than within 45 days of the scheduled start of the school year even though collective bargaining involving non-teaching personnel frequently occurs without reference to the school year intended to encourage all collective bargaining agreements to run on a school year basis.

The Joint Committee buttressed its claim that the Board's rules were prohibited by the statute by focusing on the Act's provision that mediators "continuously be made available . . . for purposes of arbitration of grievance and mediation or arbitration of contract disputes", ILL. REV. STAT. ch. 48, § 1712 (Supp. 1983), arguing, "Clearly the legislature knew how to mandate that mediation be made available throughout the forthcoming school year, and it did so only for contract disputes resolution, not for negotiation."

The IELRB responded that the Joint Committee's objection required interpreting the Act to create artificial strike prohibitions and to interfere with existing patterns of collective bargaining, two results clearly contrary to the legislature's intent. The IELRB's response further observes that the objection does not address implementation of the Act's mediation provisions for employers who have no school year, and misuses the term "contract disputes." The Act clearly uses the term "contract dispute" in opposition to "grievance." A grievance is generally understood to mean a dispute over contract interpretation. "Contract dispute" as used in the IELRA clearly refers to disputes in contract negotiation. IELRB, Notice of Refusal to Meet Objection of the Joint Committee on Administrative Rules, 8 Ill. Admin. Reg. 22617 (1984). The Joint Committee's objection and the IELRB's response thus reveals that the statutory time lines must be interpreted as a directory model because a contrary interpretation leads to results totally unwarranted within the overall statutory scheme.

109. The only alternative interpretations make no sense. The provision certainly does not require the parties to physically meet and confer every day for 60 days. It also would not make sense to require the parties to continue meeting if further negotiation would be futile.

110. ILL. REV. STAT. ch. 48, § 1607 (Supp. 1983).

111. 29 U.S.C. § 158(d)(4) (1982).

the subjects of negotiation.¹¹² The IELRA's mandatory sixty-day bargaining period provides a similar cooling off period. This cooling off period applies to all negotiations but is particularly appropriate in negotiations involving newly certified unions because certification will frequently be preceded by a hard fought representation election.

The IELRB's rule thus views the expiration of the sixty-day bargaining period as the first date on which the union can be expected to strike. In the statutory model, the scheduled start of the forthcoming school year is the first date on which the union can be expected to strike. The IELRB rule parallels the statutory model by invoking mediation fifteen days before the first potential strike date. If by that point the negotiations have not sufficiently progressed that mediation will be useful, the parties may stipulate to defer selection of the mediator. If they so stipulate, they automatically extend the cooling off period by postponing any strike until at least ten days after the mediator has been selected. Thus, under the rule, the Board again asserts control over the use of economic weapons to ensure that meaningful mediation will be used in an effort to resolve bargaining disputes short of economic warfare. In this way, the rule adapts the statutory model to bargaining in units represented by newly certified representatives to fulfill the statutory purpose of preventing strikes through a systematic approach to bargaining.

In addition to bargaining with newly certified representatives, negotiations are likely to occur at times other than the forty-five day period prior to the start of the school year in units composed of nonteaching personnel. These units include employers, such as the State Board of Education, who have no school year and employers whose operations continue year round. Their collective bargaining agreements and their collective bargaining practices often are not timed to the academic calendar.

When contracts expire in the middle of the academic year, meaningful negotiations will not begin until shortly before their expiration dates, considerably after the start of the academic year. Absent appropriate agency gloss on the statute, neither party would be able to compel mediation until forty-five days before the start of the next academic year. Since successful use of mediation is a requirement for a legal strike, a union would be unable to strike until the start of the new academic year, long after its existing contract had expired. A union seeking to preserve its right to strike upon the expiration of its existing contract might serve a bargaining demand during the summer before the academic year in

112. *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 286 (1956).

which the contract expires. This would enable the union to force mediation during the statutory mediation periods. Such forced mediation would be premature and not likely to facilitate settlement. Its only accomplishment would be to provide the union with claims when the contract expires, that mediation was used without success and that the union is free to strike. Such artificial intrusions into the bargaining process are inconsistent with the statutory model of a systematic procedure to prevent strikes.

Alternatively, the parties might alter their bargaining to have their contracts expire with the academic year. Such forced alterations, however, would conflict with express legislative declarations against disruption of traditional patterns of bargaining.¹¹³

The legislature clearly envisioned bargaining by existing representatives that would not be tied to the school year. The IELRA does not time their duty to bargain to the academic calendar. Instead, it mandates bargaining within sixty days of receipt of a request by the other party to bargain.¹¹⁴ However, the statute provides no express procedures for mediation when the bargaining occurs at times other than immediately prior to the start of the school year. The IELRB rules adapt the express statutory model to units that have no academic year and units for whom the academic year is not related to bargaining. The rules provide that in units that do not contain professional instructional personnel,¹¹⁵ either party may request mediation beginning forty-five days prior to the scheduled expiration date of the existing collective bargaining agreement. Mediation is automatically invoked fifteen days before the scheduled expiration date, with the parties being able to stipulate deferral of the selection of the mediator.

113. For example, Section 4 of the Act, ILL. REV. STAT. ch. 48, § 1704 (Supp. 1983), establishes certain management rights, but further provides:

To preserve the rights of employers and exclusive representatives which have established collective bargaining relationships or negotiated collective bargaining agreements prior to the effective date of this Act, employers shall be required to bargain collectively with regard to any matter concerning wages, hours or conditions of employment about which they have bargained for and agreed to in a collective bargaining agreement prior to the effective date of this Act.

A similar intent not to interfere with existing patterns of bargaining is found in Section 7(a), ILL. REV. STAT. ch. 48, § 1707(a) (Supp. 1983):

Nothing in this Act shall interfere with or negate the current representation rights or patterns or practices of employee organizations which have historically represented employees for the purpose of collective bargaining, including but not limited to the negotiation of wages, hours and working conditions, resolutions of employees' grievances, or resolution of jurisdictional disputes, or the establishment and maintenance of prevailing wage rates, unless a majority of the employees so represented express a contrary desire under the procedures set forth in this Act.

114. ILL. REV. STAT. ch. 48, § 1712 (Supp. 1983).

115. 80 Ill. Adm. Code § 1130.20(c).

The IELRB rules, thus, intricately expand the statutory mediation procedures to bargaining relationships not expressly addressed by the legislature. They premise this expansion on a view that the right to strike plays a major role in the settlement of contract disputes. The rules, however, provide very few details of the role of the strike in the bargaining process and of IELRB control of the strike weapon.

The statute also provides very little express guidance on controlling strikes. The only express statutory control of the strike weapon involves strikes which pose a clear and present danger to the public health or safety.¹¹⁶ In such cases the employer may petition the circuit court to enjoin the strike and the court may grant appropriate relief. Employer unfair labor practices and other evidence of employer lack of clean hands is a defense in the injunction action.

Although the clear and present danger standard is identical to the IPLRA's standard for enjoining strikes, the IPLRA contains two strike provisions not found in the IELRA.¹¹⁷ First, the IPLRA requires an employer to petition the Illinois State or Local Labor Relations Board to investigate a strike, and permits the employer to seek a strike injunction in circuit court only after the appropriate Board has found that a clear and present danger exists. Second, the IPLRA provides that when a strike is enjoined, the dispute must be submitted to interest arbitration for resolution. The IPLRA thus forces an employer to choose between taking the strike and submitting the dispute to arbitration.¹¹⁸ The absence of these provisions from the IELRA is not explained in the legislative history.

The clear and present danger to the public health or safety is a carefully worded and deliberately narrow standard. During the debates on the IPLRA, an amendment was offered that would have expanded the standard for strike injunctions to include clear and present dangers to the public welfare. Representative Davis, the amendment's sponsor, urged its adoption on the ground that an expanded injunction was needed to reach, among others, strikes that are unduly disruptive of public education.¹¹⁹ Representative Grieman urged rejection of the amendment on the ground that it would unduly burden a deliberately narrow standard for injunctions.¹²⁰ With the philosophical debate clearly joined, the

116. ILL. REV. STAT. ch. 48, § 1713 (Supp. 1983).

117. See ILL. REV. STAT. ch. 48, § 1618 (Supp. 1983).

118. See Craver, *Public Sector Impasse Resolution Procedures*, 60 Chi-Kent L. Rev. 779 (1984).

119. 83rd Gen. Assem., House Debate on S.B. 536, pp. 248-50 (June 24, 1983).

120. *Id.* at 249.

amendment was rejected.¹²¹ Thus, it is clear that the forced closure of schools does not pose the type of danger to public health and safety that warrants a strike injunction.

Two examples of strikes that might involve clear and present dangers to the public health or safety were given during the legislative debates: strikes involving municipal sanitation services and strikes in public hospitals.¹²² Educational employers do not provide municipal sanitation services, but some operate public hospitals. However, even in the case of state university hospitals, strikes are not automatically presumed to pose clear and present dangers to the public health or safety. The limited amount of case law available from other jurisdictions with similar standards for strike injunctions requires that the danger be literally clear and present. The possibility of a dangerous situation arising in the future does not provide adequate support for a strike injunction.¹²³ The legislative debates on the IPLRA support this interpretation. For example, the availability of alternative sources of the service usually provided by the striking employees must be considered before concluding that a strike poses a clear and present danger.¹²⁴ Thus, even where a strike disrupts

121. *Id.* at 250. Similarly, during the Senate debates on the Governor's amendatory veto of the IELRA, Senator Bruce reemphasized the narrowness of the clear and present danger to public health and safety standard. He observed that Pennsylvania legalized public employee strikes but allowed injunctions upon a showing of a clear and present danger to public health, safety or welfare and continued:

In Pennsylvania, they put in health, safety and welfare; and I believe within our Illinois Statute, we have acted very wisely in our definition by deleting any reference to welfare and staying only with health and safety . . . Judges too often independently decide what is welfare, and we have decided that problem for them by deleting that question.

In *Bristol Township Educ. Ass'n v. School Dist. of Bristol Township*, 1 Pub. Barg. Cas. (CCH) ¶ 10,161 (Pa. Commonwealth Ct. 1974), the court enjoined a teacher strike on the ground that because 26 student days had been lost due to the strike and only 23 possible make-up days remained before the close of the fiscal year, the school district would lose state funds if the strike continued. This threatened loss of state subsidies constituted a clear and present danger to the public welfare. The legislature's rejection of the danger to the public welfare standard in the IELRA and IPLRA suggests that cases such as *Bristol Township* should not be followed in Illinois.

122. 83rd Gen. Assem., House Debate on S.B. 536, pp. 193-94 (Nov. 2, 1983).

123. See *Bellefonte Area Educ. Ass'n v. Board of Educ.*, 9 Pa. Commw. 210, 304 A.2d 922 (1973); *Armstrong Educ. Ass'n v. Armstrong School Dist.*, 5 Pa. Commw. 378, 291 A.2d 120 (1972); *Hazelton Area School Dist. v. Education Ass'n*, 2 Pub. Barg. Cas. (CCH) ¶ 20,098 (Pa. Ct. of Common Pleas, 1971).

124. In discussing sanitation services, Representative Greiman explained:

In the City of Highland Park, garbage is collected by private scavengers. So they're not even public employees. In my town of Skokie, we have 60,000 people. We have a Department of Public Works. If they went on strike, chances are we could probably—I say probably—substitute that with private scavengers, because we're a small community. Clearly, Lincolnwood, that I represent, could do that. The City of Chicago might not be able to do that, so that some kind of garbage program for 3,000,000 people would be required. In that way, the court . . . the Board could make the distinction as to — these people are essential employees in one situation, these people are not.

83rd Gen. Assem., House Debate on S.B. 536, p. 194 (Nov. 2, 1983).

operations at a state university hospital, a court should consider the ability of supervisors and managers at the struck hospital and of other public hospitals serving the same community to fill the needs created by the strike.

Although the presence of a clear and present danger presents a factual issue to be resolved by the court in each case, it is likely that the issuance of strike injunctions under the IELRA will be rare. This may explain the differences between the IELRA and IPLRA strike injunction provisions. The legislature may have determined that, given the expected rarity of strike injunctions, it was not necessary to have the IELRB screen injunction petitions or to mandate interest arbitration.

Both the IELRA and the IPLRA provide that an employer's unclean hands, including employer unfair labor practices, may be defenses to strike injunctions. The statutory language must be read carefully. The statute refers to "unfair practices and other evidence of unclean hands." Thus, the statute does not envision that every employer unfair labor practice will be a defense to an injunction. Only those unfair practices, primarily failures to bargain in good faith, directly related to the strike will be defenses.¹²⁵ The unfair practices, moreover, are significant in the injunction proceeding only as evidence of unclean hands. The issue for the court to decide is not whether the employer violated the IELRA, but is whether the employer, seeking equitable relief against the strike, has acted equitably in matters leading up to the strike. Prior IELRB adjudication on the unfair labor practice issue is neither required nor determinative of the unclean hands defense.

The IELRA does not expressly address the consequences of a strike that does not comply with the statute. There are three possible consequences of an illegal strike. The strike is not protected and thus the employees are subject to discipline or discharge; the strike is an unfair labor

125. See ILL. REV. STAT. ch. 48, § 1713 (Supp. 1983). This issue was raised during the House debates on the IPLRA. The need for a link between the unfair labor practice and the strike was stated clearly in a colloquy between Representatives Klemn and Greiman:

Klemn: You say an unfair labor practice committed by the employer shall be a defense to such a petition. Would that have to be, on a defense, would that have to be subjected to the unfair labor practice . . . on page twenty-one, where they have to file a notice, you know, ask . . . requesting the board . . .

Greiman: I think it would be an unfair labor practice that relates . . . that relates to the strike in the collective bargaining process. If the contract provides that they have, you know, two stools and a toilet, and one breaks down, that doesn't mean that they . . . that all of the sanitation workers in Chicago can strike. It has to relate to the good faith of the employer in bargaining.

83rd Gen. Assem., House Debate on S.B. 536 (June 23, 1983). A similar result has been reached in Michigan by applying traditional equitable principles of clean hands. See *Holland School District v. Holland Educ. Ass'n*, 380 Mich. 314, 157 N.W.2d 206 (1968).

practice; and the strike is enjoined in circuit court upon petition of the employer. Although this issue arose during the legislative debates, the legislative history provides conflicting interpretations and relatively little guidance.¹²⁶

It is virtually axiomatic that an illegal strike is unprotected and renders the employees subject to discipline and discharge.¹²⁷ In the private sector, most unprotected job actions are not unfair labor practices. In *NLRB v. Insurance Agents International Union*,¹²⁸ the union engaged in various job actions designed to harass the employer while contract negotiations were pending. The Court held that such conduct did not violate the union's duty to bargain in good faith, imposed by section 8(b)(3) of the NLRA.¹²⁹ The Court reviewed the legislative history of the NLRA and concluded that Congress viewed the application of economic pressure as a major part of the collective bargaining process. It concluded that such pressure, even when not protected, did not amount to bad faith bargaining. *Insurance Agents* and its progeny are thus premised on the collective bargaining process envisioned by Congress. They cannot be automatically followed under the IELRA without first inquiring into the legislative vision of collective bargaining in Illinois public education.

The principal express statutory control on strikes in the private sector is the NLRA's requirement that a party seeking to terminate or modify an existing collective bargaining agreement serve a sixty-day notice on the other party, serve a thirty-day notice of the existence of a dispute on the Federal Mediation and Conciliation Service, and refrain from strike or lockout during the sixty-day notice period.¹³⁰ Strikes during the no-

126. The legislative history is a sea of confusion concerning how to deal with illegal strikes. Representative Greiman suggested that such strikes are enjoined. 83rd Gen. Assem., House Debate on S.B. 536, p. 303 (June 23, 1983), while Senator Geo-Karis argued that such strikes are not enjoined. 83rd Gen. Assem., Senate Debate on S.B. 536, p. 305 (May 27, 1983). Senator Bruce incorrectly stated that "the Act very clearly sets forth the authority of any aggrieved party to go request . . . in the circuit court of the county . . . an injunction" against an illegal strike. 83rd Gen. Assem., Senate Debate on H.B. 1530, p. 22 (June 27, 1983). Senator Collins stated on two occasions that illegal strikes are enjoined. 83rd Gen. Assem., Senate Debate on S.B. 536, pp. 302, 315 (May 27, 1983), but on two other occasions indicated that relief from illegal strikes should come through unfair labor practice proceedings. *Id.* at 316; 83rd Gen. Assem., Senate Debate on S.B. 536, p. 111 (June 30, 1983).

Except for Senator Bruce's inaccurate description of the IELRA, none of the statements during the floor debates suggest who is empowered to seek an injunction against an illegal strike. If an illegal strike is an unfair labor practice, preliminary injunctive relief is available upon petition by the Board. ILL. REV. STAT. ch. 48, § 1611(h), 1716(d) (Supp. 1983). The apparently conflicting statements of Representative Greiman and Senator Collins can be reconciled if illegal strikes are unfair labor practices and injunctive relief is available through the unfair labor practice procedures.

127. See, e.g., *NLRB v. Local 1229, Int'l Bhd. of Elec. Workers*, 346 U.S. 464 (1953).

128. 361 U.S. 477 (1960).

129. 29 U.S.C. § 158(b)(3) (1982).

130. 29 U.S.C. § 158(d)(4) (1982).

tice period are breaches of the duty to bargain in good faith.¹³¹ However, unlike the strike provisions of the IELRA, the notice provision of the NLRA is incorporated into the statutory definition of good faith bargaining. Thus, private sector precedent in this area is of limited utility in determining whether illegal strikes are unfair labor practices under the IELRA.

Federal court strike injunctions in the private sector are usually barred by the Norris-LaGuardia Act.¹³² State court strike injunctions are usually barred by comparable state statutes or by preemption of state law by the NLRA.¹³³ The Illinois Anti-Injunction Act,¹³⁴ and the doctrine of primary jurisdiction¹³⁵ may provide comparable authority regarding the enjoining of strikes that do not comply with the IELRA.

The Anti-Injunction Act effectively prohibits an Illinois court from enjoining a strike that is peaceable and is not accompanied by threats or intimidation. In *Fenske Bros., Inc. v. Upholsterers International Union, Local 18*,¹³⁶ the Illinois Supreme Court rejected plaintiffs' arguments that the act was unconstitutional because it deprived them of a remedy for their injuries. The court interpreted the act as legalizing peaceful picketing. Consequently, the court reasoned, the plaintiffs did not suffer a legal injury and could not complain that the act deprived them of a remedy.

In *Board of Education v. Redding*,¹³⁷ the Illinois Supreme Court reversed the trial court's refusal to enjoin a strike by maintenance employees of a public school district. The court did not expressly address the applicability of the Anti-Injunction Act to public sector strikes. Rather, it declared a policy against public employee strikes, grounded on the view that government functions may not be impeded, and on the absence of the profit motive in the public sector. The court relied on a state constitutional provision mandating that the General Assembly "provide a

131. See, e.g., *Local 219, Retail Clerks Int'l Ass'n v. NLRB*, 265 F.2d 814 (D.C. Cir. 1959).

132. 29 U.S.C. §§ 101-115 (1982).

133. For a discussion of preemption, see *The Developing Labor Law* 1521-1524, 1530-1536 (C. Morris ed. 1983).

134. ILL. REV. STAT. ch. 48, § 2a (Supp. 1983).

135. Primary jurisdiction is a common law doctrine that guides courts in determining when they should refrain from or postpone the exercise of their jurisdiction to enable an administrative agency to answer questions within the agency's expertise. Invoking the doctrine frequently postpones judicial intervention. In many such cases, judicial intervention occurs through judicial review of the agency's determination. See generally K. DAVIS, ADMIN. LAW TREATISE, ch. 22 (1979). The doctrine has been applied in the Illinois courts. See, e.g., *Steward v. Allstate Ins. Co.*, 92 Ill. App. 3d 637, 415 N.E.2d 1206 (1980); *Chicago & Eastern R.R. Co. v. Martin Bros. Container & Timber Prod. Corp.*, 87 Ill. App. 3d 327, 408 N.E.2d 1031 (1980); *Valiquet v. First Fed. Savings & Loan Ass'n*, 87 Ill. App. 3d 195, 408 N.E.2d 921 (1980).

136. 358 Ill. 239, 193 N.E. 112 (1934), cert. denied, 295 U.S. 734 (1935).

137. 32 Ill. 2d 567, 207 N.E.2d 427 (1965).

thorough and efficient system of free schools." It reasoned that school district employees were acting as agents of the state government and were themselves under the constitutional mandate to provide public education. The strike conflicted with their constitutional obligation and, thus, could be enjoined.

In *Peters v. South Chicago Community Hospital*,¹³⁸ the court refused to extend *Redding* to enjoin strikes by workers at private, not-for-profit hospitals. The court held that the Anti-Injunction Act prohibited enjoining the strike. It viewed *Redding* as grounded on the state constitutional provisions concerning public education. With respect to private hospitals, the *Peters* court found no constitutional or statutory provision providing or implying an exemption from the Anti-Injunction Act. Given this silence, the injunction was denied.

The *Peters* analysis of strikes at private, not-for-profit hospitals was extended to strikes by employees of a county nursing home in *County of Peoria v. Benedict*.¹³⁹ *Benedict*, however, was severely limited in *City of Pana v. Crowe*.¹⁴⁰ The *Crowe* court interpreted *Fenske Bros.* to mean that the Anti-Injunction Act did not apply to illegal strikes. It also read *Redding* as a case under the Anti-Injunction Act which "rested its opinion flatly upon the unlawfulness of a strike by governmental employees,"¹⁴¹ and reiterated the rationale that governmental functions may not be impeded and that strikes were inappropriate in the public sector because of the absence of the profit motive. Although in *Benedict* the supreme court had refused to enjoin a public sector strike, the court in *Crowe* interpreted *Benedict* as not repudiating the long standing general principle that public sector strikes were illegal. Where collective bargaining in health care institutions had met with legislative silence, collective bargaining by several groups of public employees was covered by statute and in each instance no right to strike had been provided.

The IELRA, after setting forth the clear and present danger standard for strike injunctions declares: "Except as provided for in this subparagraph, the jurisdiction of the court under this Section is limited by" the Anti-Injunction Act.¹⁴² The language is ambiguous. It could be argued that the provision expressly overrules *City of Pana* and limits injunctions to strikes meeting the clear and present danger standard.¹⁴³

138. 44 Ill. 2d 22, 253 N.E.2d 375 (1969).

139. 47 Ill. 2d 166, 265 N.E.2d 141 (1970), *cert. denied*, 407 U.S. 929 (1971).

140. 57 Ill. 2d 547, 316 N.E.2d 513 (1974).

141. *Id.* at 550, 316 N.E.2d at 514.

142. ILL. REV. STAT. ch. 48, § 1713 (Supp. 1983).

143. One commentator has suggested this interpretation of similar language in an Oregon stat-

Such argument ignores the provision's wording which speaks only to court jurisdiction "under this Section." At the other extreme, it can be argued that, under *City of Pana*, the Anti-Injunction Act does not apply to illegal strikes and therefore should not bar injunctions against strikes that do not comply with the IELRA. Such argument, however, ignores the legislature's rejection of both premises underlying the preexisting judicial declarations that public sector strikes are illegal. In place of the judicial declaration that governmental functions may never be impeded by a strike, the legislature has declared that strikes should not impede governmental functions to the extent that they pose clear and present dangers to public health and safety. In place of the judicial declaration that the absence of a profit motive renders public sector strikes inappropriate, the legislature has declared that strikes have a legitimate role to play in public sector bargaining.

It is clear that the IELRA substantially alters the preexisting law under the Anti-Injunction Act. Determining the degree of the alteration necessitates a detailed inquiry into the purposes behind the five requirements for a lawful strike and whether employer actions for injunctions would further or obstruct those purposes. The need for such inquiry is reinforced by the doctrine of primary jurisdiction.

In *San Diego Teachers Association v. Superior Court*,¹⁴⁴ the California Supreme Court held that a school district could not seek to enjoin a teacher strike without first exhausting its administrative remedies under the California Education Employment Relations Act (EERA) before the California Public Employment Relations Board (CPERB). The court first concluded that CPERB could properly find an illegal strike to be an unfair labor practice. The use of an illegal pressure tactic could amount to a refusal to bargain in good faith. A strike prior to completion of the statutory impasse procedures could amount to a refusal to participate in the impasse procedure, a separate unfair labor practice under the EERA.

The court next concluded the CPERB could provide relief equivalent to that which could be provided judicially, because CPERB was authorized to seek preliminary injunctions restraining the commission of unfair labor practices. Finally, the court concluded that CPERB had exclusive initial jurisdiction over remedies against strikes that were

ute. Comment, *Applying Private Sector Law to the Public Sector Strike in Oregon*, 56 OR. L. REV. 263, 267 (1977).

144. 24 Cal. 3d 1, 154 Cal. Rptr. 893, 593 P.2d 838 (1979). *Contra*, *City of Manchester v. Firefighters Ass'n*, 120 N.H. 230, 413 A.2d 577 (1980); *cf.* *United States v. PATCO*, 653 F.2d 1134 (7th Cir.), *cert. denied*, 454 U.S. 1083 (1981) (relying on express statements during floor debates that FLRA jurisdiction over illegal strikes was not exclusive).

unfair labor practices. It found such exclusive jurisdiction both implied in the comprehensiveness of the statutory scheme and expressed in a specific provision of the statute. It found that the EERA established a policy of relying on good faith collective bargaining rather than injunctions to prevent strikes. CPERB provided the expertise that a court lacked to determine whether an injunction would effectively end the strike or would impede the good faith negotiations necessary to resolve the dispute with finality.

San Diego Teachers Association may be contrasted with *In re Hoboken Teachers Association*,¹⁴⁵ where the New Jersey Superior Court held that the New Jersey Public Employment Relations Commission's (NJPERC) jurisdiction over unfair labor practices did not preempt the chancery court's jurisdiction to enjoin an illegal strike. The court observed that the NJPERC had no power to seek or grant preliminary injunctions pending the resolution of unfair labor practice charges. In the court's view, the statute's failure to provide for such powers was deliberate. All public employee strikes were illegal in New Jersey and considered to be inherently harmful to the public. In most instances, immediate relief from the strike would be required. Such relief was more readily available from a court than an administrative agency.

The IELRA authorizes the IELRB to seek preliminary relief in circuit court.¹⁴⁶ The IELRA also rejects the notion that all public employee strikes are so inherently harmful to the public that they require immediate injunctive relief. Thus, where the requirements for a legal strike serve purposes directly related to the duties imposed on a union by the IELRA's unfair labor practice section, primary jurisdiction over the strike, including the availability of preliminary relief, rests with the IELRB. Where, however, the requirements serve a purpose other than reinforcing unfair labor practice duties, immediate and direct employer access to preliminary relief may be necessary to carry out the legislative purpose.

The first requirement for a legal strike is representation of the employees by an exclusive representative. The apparent purpose behind this requirement is the prevention of "wildcat" strikes.¹⁴⁷ The term wildcat strike usually refers to a strike by employees that has not been authorized by their union. Where the strike is not conducted by an employee organization, the IELRB would not have unfair labor practice jurisdiction.

145. 141 N.J. Super. 240 (1977).

146. ILL. REV. STAT. ch. 48, § 1716(d) (Supp. 1983).

147. See 83rd Gen. Assem., House Debate on S.B. 536, p. 303 (June 23, 1983); 83rd Gen. Assem., Senate Debate on S.B. 536, p. 316 (May 27, 1983).

The absence of an employee organization renders the strike uncontrollable and unlikely to be resolved through negotiation. The need for immediate judicial relief is apparent. Such strikes should be enjoined upon employer petition in circuit court.

Strikes also might be brought by employee organizations that are not exclusive bargaining representatives of the employees. Such strikes may raise serious unfair labor practice issues. For example, the IPLRA prohibits certain recognitional or organizational picketing and, by inference, accompanying strikes in a manner identical to the NLRA.¹⁴⁸ No comparable provision is contained in the IELRA because the legislature believed that such strikes and picketing would not occur in public education.¹⁴⁹ If such activity does occur it might still be an unfair labor practice if it is viewed as restraining or coercing employees in the exercise of their statutory rights. The IELRB's expertise is required not only to determine whether the activity is an unfair labor practice, but also to determine the appropriate remedy. While the IELRB could properly conclude that a preliminary injunction was called for, it might also conclude that the strike could be remedied more appropriately by some other action, such as holding an expedited election. Thus, strikes by unions that are not exclusive representatives of the striking employees must lie within the IELRB's primary jurisdiction and not be subject to direct employer actions for injunctions.

The second requirement for a lawful strike is the expiration of any existing collective bargaining agreement. At first glance this requirement would appear to be superfluous. The IELRA also requires that every collective bargaining agreement contain a no strike clause and a grievance and arbitration procedure.¹⁵⁰ A strike prior to the expiration of an existing collective bargaining agreement will be barred by the no strike clause.

In the private sector employers can obtain injunctions to enforce contractual no strike clauses.¹⁵¹ Because the no strike clause is the typical *quid pro quo* for the grievance procedure, the injunction is necessary to protect the integrity and exclusivity of that procedure. The policy favoring arbitration of contract grievances embodied in the Taft-Hartley Act outweighs the policy against labor injunctions embodied in the Norris-LaGuardia Act. Where, however, the dispute underlying the strike is

148. ILL. REV. STAT. ch. 48, § 1610(b)(7) (Supp. 1983).

149. 83rd Gen. Assem., Senate Debate on H.B. 1530, p. 23 (June 27, 1983).

150. ILL. REV. STAT. ch. 48, § 1710(c) (Supp. 1983).

151. *Boys Markets, Inc. v. Retail Clerks' Local 770*, 398 U.S. 235 (1970).

not arbitrable, the injunction cannot issue.¹⁵²

The policy favoring arbitration of grievances and disfavoring strikes which undermine the exclusivity of the grievance procedure is even stronger under the IELRA. The statute mandates the *quid pro quo* exchange of a no strike clause for a grievance and arbitration procedure. Direct employer access to immediate injunctive relief from strikes over arbitrable issues is clearly implicit in the statutory scheme.

Unlike the IELRA, the IPLRA permits the parties, by mutual agreement, to exclude grievance and no strike provisions from their contracts.¹⁵³ This distinction is subtle but significant. It indicates a legislative determination that no strike clauses, while desirable generally in the public sector, are indispensable in public education. There is no specific discussion of this distinction in the legislative history, except for the general policy declaration that a separate regulatory scheme is required by the uniqueness of the educational calendar and educational work duties. The basic educational work duty is teaching students. Regardless of their capacities, all educational employees support this function. The disruption from strikes in education is different from the disruption from strikes in other governmental services. A strike occurring during the middle of a term can disrupt the rapport that had developed between teachers and their classes. When the strike ends, teachers cannot simply pick up where they left off but must reestablish this rapport and reorient their students to the material they had covered prior to the strike. The statutory mandate that all contracts contain no strike clauses protects the integrity of not only the grievance procedure but also the educational process itself. The reaching of agreement provides a guarantee that the educational process can go forward for the life of the agreement without disruption. The requirement that the agreement have expired before a strike will be lawful reinforces this guarantee.¹⁵⁴ Thus, the availability of direct employer access to injunctive relief implicit in the statutory scheme is not limited to strikes over arbitral issues, but encompasses all strikes undertaken while a collective bargaining agreement is in effect.

The third requirement for a legal strike is the unsuccessful use of mediation. It is significant that mediation need not be exhausted. Unlike statutes in other jurisdictions that legalize public employee strikes,¹⁵⁵ the

152. *Buffalo Forge Co. v. United Steelworkers of America*, 428 U.S. 397 (1976).

153. ILL. REV. STAT. ch. 48, § 1608 (Supp. 1983).

154. Under the IPLRA, expiration of the existing agreement is not required if the agreement does not contain a no-strike clause. ILL. REV. STAT. ch. 48, § 1713(d) (Supp. 1983).

155. For example, public employees in Hawaii have a statutory right to strike but may do so only after the Hawaii PERB declares that an impasse exists, mediation is used for 15 days, followed by fact finding. If the dispute remains unresolved five days after the fact finding panel issues its

IELRA imposes no requirement that impasse be declared or fact-finding be used prior to a strike. When a strike occurs, the mediator is expected to have already been on the scene and be in a position to help the parties settle the strike as quickly as possible.¹⁵⁶

The statute envisions good faith efforts to resolve the dispute by mediation before striking. The IELRB has a statutory duty to ensure that these efforts are made. There is no express provision for IELRB enforcement of the mandatory mediation 15 days prior to the start of the school year; none is necessary. Mediation is part of the overall process of collective bargaining under the statute. Refusal to engage in good faith mediation is equivalent to refusal to bargain in good faith. Strikes rendered illegal by inadequate resort to mediation are thus unfair labor practices within the IELRB's jurisdiction.

The determination of whether mediation was used in good faith raises subtle issues of fact that require sensitivity to the bargaining process. Courts are poorly equipped to resolve these issues. The IELRB, however, was created to provide an agency with the expertise to resolve these issues. Similarly, IELRB expertise is essential to assessing the appropriateness of particular relief for the unfair labor practices. Immediate injunctive relief may not, in every case, further the overall statutory goals of stability through collective bargaining. Consequently, claims that strikes occurred without adequate use of mediation must be resolved by the IELRB. Employers cannot, consistent with the overall statutory scheme, have direct access to immediate injunctive relief.

The fourth requirement for a lawful strike is that there be at least five days notice of intent to strike.¹⁵⁷ Notice must be given to the em-

recommendations, the recommendations are publicly released. Sixty days later, the union is free to strike. HAWAII REV. STAT. §§ 89-11(b), 89-12 (1976 & Supp. 1983).

Ohio allows public employees to strike, but requires that the parties first engage in mediation and then fact finding. The fact finder's recommendations are binding unless rejected by a three-fifths vote of the employer's governing body or a three-fifths vote of the union membership. If the recommendations are rejected they are publicly released. The union is free to strike seven days later. OHIO REV. CODE ANN. §§ 4117.14(c), (d) (Page Supp. 1983).

In Oregon, public employees are free to strike only after mediation and fact finding. Mediation must be used for 15 days. If no agreement is reached fact finding is mandated. The parties have five days from receipt of the fact finder's recommendations to accept them. If the recommendations are not accepted, they are publicly released. Thirty days later the union can strike. OR. REV. STAT. §§ 243.712, 243.722, 243.726 (1983).

156. The legislature believed that good faith mediation would not only prevent many strikes, but would shorten those strikes that do occur. *See supra* notes 102-108 and accompanying text. During the House debates on the IELRA, Representative McPike expressed the legislature's frustration with the existing system of unregulated bargaining and illegal strikes, observing that the Chicago teacher strike had gone on for two weeks before mediation was suggested. *See supra* note 106.

157. ILL. REV. STAT. ch. 48, § 1713 (Supp. 1983). The only notice of intent to strike requirement found in the private sector is section 8(g) of the NLRA, 29 U.S.C. § 158(g) (1982), which requires that a union give notice of intent to strike a health care institution "not less than 10 days

ployer, the regional superintendent, and the IELRB. The notice to the employer gives the employer time to seek an injunction before the strike begins if the strike will pose a clear and present danger to the public health or safety.¹⁵⁸ In light of the rarity that an education strike will pose such a danger, failure to give proper notice to the employer does not call for direct employer access to injunctive relief. Notice to the regional superintendent facilitates performance of his duties to exercise supervision and control over the school district.¹⁵⁹ Failure to give proper notice does not create a situation requiring direct employer access to injunctive relief.

Notice to the IELRB enables it to fulfill its statutory mandate to ensure that mediation is used in good faith prior to a strike.¹⁶⁰ The notice is particularly important if the parties have deferred selection of the mediator. Inadequate notice undermines the Board's function. Control over the notice properly rests with the remedial powers of the Board rather than the injunctive powers of a court.

Inadequate notice thus potentially undermines the bargaining process by ignoring safeguards built into that process. These safeguards protect the public by facilitating the enjoining of dangerous strikes, the supervision of public school districts, and the IELRB's supervision of the conduct of bargaining. Inadequate notice is therefore inconsistent with good faith bargaining. As an unfair labor practice that does not require direct employer access to immediate injunctive relief, it rests within the Board's primary jurisdiction.

prior to such action. . . ." It further requires that the notice contain the date and time that the strike is scheduled to begin, and provides that, once given, the notice may only be extended by written agreement of both parties. These provisions do not require the union to strike precisely at the moment specified in the notice. The union, however, must act within a reasonable time after the time specified in the notice. Generally, if the union strikes within 72 hours after the date specified in the notice and gives at least 12 hours notice of the actual strike time it will comply with section 8(g). *Bio-Medical Applications of New Orleans, Inc.*, 240 N.L.R.B. 432 (1979).

The underlying purpose of section 8(g) is to allow hospitals sufficient time to provide for patient care in the event of a strike. *See generally* Kurchko & Fries, *Hospital Strikes: Complying with NLRA Notice Requirements*, 9 EMPLOYEE REL. L.J. 566 (1984); Annot., 43 A.L.R. Fed. 449 (1979). The strict restrictions on the timing of the strike further this purpose.

In contrast to section 8(g), the IELRA does not expressly require the notice to specify the date and time that the strike is scheduled to commence, and is silent concerning extensions of the notice. The purposes of the IELRA's strike notice are different from those of section 8(g). Thus, unlike section 8(g), the IELRA should not be read as controlling the timing of the strike, once five days notice has been given.

158. 83rd Gen. Assem., House debate on S.B. 536, p. 301 (June 23, 1983).

159. See ILL. REV. STAT. ch. 122, § 3-14 (1983).

160. In contrast, the IPLRA requires the strike notice to be given only to the employer. ILL. REV. STAT. ch. 48, § 1617(a)(5) (Supp. 1983). The IPLRA also requires that the union request a mediator, rather than that mediation be used without success before a strike. *Id.* at § 1617(a)(4). Thus, under the IPLRA there is no need to give notice of intent to strike to the Boards as there is no duty of prestrike mediation for the Boards to enforce.

The final requirement for a legal strike is the parties' lack of agreement to submit unresolved issues to interest arbitration. Just as a grievance and arbitration procedure is a statutory *quid pro quo* for a no strike clause in the agreement, submission to interest arbitration is a statutory *quid pro quo* for not striking in the absence of a contract. Employer access to immediate injunctive relief is necessary to prevent the strike from undermining the integrity of the interest arbitration procedure.

Perhaps the most common unprotected strike will be one over demands that do not involve mandatory subjects of bargaining. In such instances the illegality results not from the strike, *per se*, but from the union's insistence to impasse on nonmandatory subjects.¹⁶¹ Such strikes clearly fall within the IELRB's unfair labor practice jurisdiction and should not be the subject of employer initiated injunction actions in court.

Another issue not expressly addressed in the statute or the rules is whether unfair labor practice strikes are entitled to special treatment. In *Mastro Plastics Corp. v. NLRB*,¹⁶² the United States Supreme Court held that a private sector strike to protest unfair labor practices was not barred by a standard no strike clause in the collective bargaining agreement or the sixty-day notice provision of section 8(d) of the NLRA. The Court reasoned that the no strike clause, when viewed in the context of the contract as a whole, was designed to avoid disruptions of production prompted by efforts to change existing economic relationships or by disputes over alleged breaches of the contract. Although the Court did not decide whether express language could waive the right to strike, it concluded that such a waiver could not be implied from the general no strike clause.

The Court held that the sixty-day waiting period of section 8(d) was applicable only to strikes aimed at terminating or modifying an existing agreement. The Court found this holding necessary to avoid an incongruous result that would leave employees free to strike to protest em-

161. *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342 (1958); *Lone Star Steel Co. v. NLRB*, 639 F.2d 545 (10th Cir. 1980), *cert. denied*, 450 U.S. 911 (1981). In *Lone Star Steel*, the administrative law judge made the following observation concerning a strike over a nonmandatory subject:

It is argued that the Union bargained to impasse over the application clause and therefore violated Section 8(b)(3). Impasse is a plastic concept and not really material here. Whether the parties reached an impasse, and if so when, need not be decided. The Union can strike to force its bargaining position, whether or not there has been an impasse. It cannot, however, strike to force the Company to accept a nonmandatory subject of bargaining even if there was no impasse. To the extent it is striking to achieve agreement on a nonmandatory subject, it is refusing to bargain within the meaning of Section 8(b)(3).

United Mine Workers, 231 N.L.R.B. 573, 583 (1977).

162. 350 U.S. 270 (1956).

ployer unfair labor practices prior to the sixty-day notice period but would have to waive their right to strike by filing the notice.

Under the IELRA, the contractual no strike clause is mandated by statute to protect the educational process as well as the bargaining process and grievance procedures. Just as grievances which arise during the term of a collective agreement must be processed through the grievance procedure, unfair labor practices arising midterm must be processed through the unfair labor practice procedures. In light of the broader purpose behind the statutory prohibition of strikes while a collective bargaining agreement is in effect, *Mastro Plastic's* interpretation of the private sector no strike clause cannot apply to the IELRA mandated no strike clause.

Where, however, there is no contract in effect, the statutory scheme suggests that unfair labor practice strikes are not enjoinable. Clearly, the strikes occurring when no contract is in effect that most concerned the legislature were those that posed clear and present dangers to the public health and safety. Even in these strikes, employer unfair labor practice can evidence unclean hands and prevent the issuance of injunctions. The legislature, thus, intended that unions be free to counter employer unfair labor practices with even the most dangerous strikes.

The statutory pre-strike requirements of unsuccessful use of mediation and of at least five days notice of intent to strike should not apply to unfair labor practice strikes. Initial resort to mediation is required in an effort to facilitate a collective bargaining agreement without a strike. Nowhere does the statute suggest that required mediation is intended to resolve unfair labor practices. The notice requirement is intended to safeguard the collective bargaining process. This process, however, will have been undermined by the employer's unfair labor practices. There is no need to notify the employer to facilitate an employer petition for an injunction if the employer's unfair labor practices would bar the injunction. There also is no need to notify the IELRB to ensure mediation if the dispute is not subject to the statutory mediation procedures. The union's need for its strike weapon to counter employer unfair labor practices is greatest when the employees are not protected by an existing contract. The availability of that weapon is implicit in the statutory scheme.¹⁶³

163. *Cf. id.* at 286.

UNFAIR LABOR PRACTICES

The IELRA draws heavily from the NLRA in its unfair labor practice provisions. Unlike the NLRA, however, the IELRA makes it an unfair labor practice to refuse to abide by a binding arbitration award.¹⁶⁴ The IELRA's legislative history is silent concerning the meaning of this provision. The IPLRA contains no comparable provision. The IPLRA expressly provides that arbitration awards are enforceable in accordance with the Illinois Uniform Arbitration Act,¹⁶⁵ a provision not contained in the IELRA. The effect of these varying provisions would appear to make arbitration awards interpreting contracts negotiated under the IPLRA enforceable and reviewable in court, while making arbitration awards interpreting contracts negotiated under the IELRA enforceable and reviewable by the IELRB. Placing initial review of education arbitration awards with the IELRB is consistent with the general legislative concern that the uniqueness of the educational calendar, work duties and patterns of bargaining requires a separate regulatory scheme administered by an agency with particular expertise.

The IELRA's unfair labor practice procedures differ markedly from those of the NLRA.¹⁶⁶ The IELRA expressly authorizes employers and unions to file charges but is silent on whether employees can file. The IELRA is also silent concerning who prosecutes an unfair labor practice complaint. Finally, unlike the NLRA which requires reasonable cause for issuance of a complaint, the IELRA requires that the charge "state an issue of law or fact."

The IELRB rules extend the right to file a charge to employees.¹⁶⁷ The rule properly implements the statute. No express statutory grant of standing is needed for filing a charge.¹⁶⁸ Because protection of employee rights is a principle purpose of the statute, denial of employee standing should not be lightly inferred.

An examination of the state of the law at the time the IELRA was enacted defeats any inference that employees lack standing. The Illinois Office of Collective Bargaining, the only preexisting agency comparable to the IELRB, had held that an employer lacked standing to charge a union with coercing employees in the exercise of their rights.¹⁶⁹ Such

164. ILL. REV. STAT. ch. 48, § 1714(a)(8), (b)(6) (Supp. 1983).

165. ILL. REV. STAT. ch. 48, § 1608 (Supp. 1983).

166. ILL. REV. STAT. ch. 48, § 1715 (Supp. 1983).

167. 80 Ill. Adm. Code § 1120.2(a).

168. The IPLRA does not specify who may file a charge, but speaks only of "Whenever it is charged that any person has engaged in . . . any unfair labor practice. . . ." ILL. REV. STAT. ch. 48, § 1611(a) (Supp. 1983).

169. Illinois Department of Personnel and AFSCME, Case No. ULP-80-158-OCB (Ill. Off. of

charges, according to OCB, could only be filed by employees. By prohibiting in the IELRA union unfair labor practices to protect employee rights, the legislature necessarily conferred on employees standing to file charges. The legislature, however, went further and rejected the OCB approach by expressly providing for charges to be filed by unions and employers. Thus, the statutory provision in question is an expansion of, rather than a limitation on, standing to file charges.

The IELRB's proposed rules asserted a prosecutorial function in unfair labor practice cases.¹⁷⁰ The permanent rules dropped this provision, leaving prosecution to the charging party. In light of its decision not to prosecute, the IELRB cannot equate its "issue of law or fact" standard for issuing a complaint with the NLRB's reasonable cause standard. The purpose of the IELRB's investigation is not to build a prosecutor's case. Rather, it is to determine whether, in light of the evidence proffered, a hearing is required.

In *Lake Zurich School District #95 and AFSCME*,¹⁷¹ the IELRB held that, for a complaint to issue, "the investigation must disclose adequate credible statements, facts, or documents, which, if substantiated and not rebutted in a hearing, would constitute sufficient evidence to support a finding of a violation."¹⁷² In *Lake Zurich*, AFSCME alleged that the School District subcontracted its custodial and maintenance services because of AFSCME's organizing activity. The investigation disclosed that AFSCME notified the District superintendent that it represented a majority of the custodial and maintenance employees and requested recognition on January 9, 1984. Subcontracting these services was first considered by the District School Board's Community Advisory Committee on January 24, 1984. Evidence submitted by the District during the investigation, however, showed that the District superintendent did not advise the School Board of the recognition request until January 26. The evidence also set out the District's economic difficulties and showed that subcontracting custodial and maintenance services was part of a series of actions aimed at economizing. Finally, the evidence showed that the District had subcontracted these services in the past and that the District had also voluntarily recognized and negotiated with a union representing its custodial and maintenance employees in the past.

The IELRB concluded that, in light of the employer's evidence, the

Coll. Barg., Feb. 6, 1981). OCB was created to administer Executive Order 6 which gave collective bargaining rights to employees within the executive branch of state government.

170. 8 Ill. Admin. Reg. 7656, 7661 (1984).

171. Case No. 84-CA-0003 (IELRB, Nov. 30, 1984).

172. *Id.* at 2.

suspicious timing of the decision to subcontract, standing alone, did not raise an issue of law or fact to warrant a complaint. The IELRB appears to consider the issue of law or fact standard analogous to the standards for evaluating motions for summary judgment. In *Lake Zurich*, the uncontradicted evidence explained the suspicious timing of the decision to subcontract. In the absence of a history of anti-union animus, there was no issue of material fact concerning the motivation behind the employer's decision.

This approach is appropriate in light of the nonprosecutorial role of the investigation. The investigation thus serves to screen out those charges that do not warrant a hearing, thereby saving the respondent and the Board from unnecessary expense.

CONCLUSION

The Illinois Educational Labor Relations Act draws many of its provisions from the National Labor Relations Act and public employment relations acts of other states. The IELRA also contains several innovative provisions, including its definitions of supervisors and managers, its voluntary recognition procedures, and its reliance on strikes in resolving collective bargaining impasses. Despite its express innovations, many issues will require a probing beyond the Act's face to find answers implicit in its overall scheme for regulating collective bargaining in public education. This article has suggested some of those answers that will be needed as the IELRB, the courts and the parties implement the Act in the years ahead.

NOTES & COMMENTS

