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ILLINOIS PUBLIC EMPLOYEE RELATIONS REPORT

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EDUCATION REFORM IN ILLINOIS: MAKING PERFORMANCE COUNT

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EDUCATION REFORM IN ILLINOIS: MAKING PERFORMANCE COUNT

By, James C. Franczek, Jr. and Amy K. Dickerson

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I. INTRODUCTION

During 2010 and 2011, the Illinois General Assembly passed three critical new laws addressing labor and employment in public education: the Performance Evaluation Reform Act (PERA), Pub. Act 96-0861 (effective January 15, 2010); Senate Bill 7, Pub. Act 97-0008 (effective June 13, 2011); and, House Bill 1197, Pub. Act 97-0007, a trailer bill to Senate Bill 7 (effective June 13, 2011).[1] These laws collectively reformed the way Illinois school districts hire, evaluate, reward, and dismiss teachers throughout the state of Illinois. Most of these reforms apply to all Illinois public school districts, including the Chicago Public Schools.[2]

This article provides an analysis of the key changes under Illinois' education reform laws impacting collective bargaining negotiations and labor relations among school districts throughout the State. Part II discusses the framework and background for these new laws. Part III provides an overview of PERA and its major requirements. Part IV provides an overview of the major reforms in Senate Bill 7 and House Bill 1197 affecting collective bargaining in Chicago Public Schools and in school districts throughout the State. Part V briefly discusses the guidance the Illinois State Board of Education (ISBE) has already given to school districts to help navigate these new requirements.

II. EDUCATION REFORM – FROM SENIORITY TO PERFORMANCE

Prior to the enactment of the 2010-2011 education reform laws, teacher retention, dismissals, and layoffs were largely controlled by teacher seniority.[3] For example, teachers were awarded tenure based on years of service, and not on their performance in the classroom or evaluation ratings.[4] Once teachers attained tenure, the process for dismissing such a

teacher based on performance or conduct was long and arduous, especially when compared to the ease of dismissing non-tenured teachers, which involved a simple non-renewal of the non-tenured teacher's contract.[5] In the event of a layoff, tenured teachers with the highest amount of seniority were typically laid off last, and if laid off, recalled into a vacant position first, without regard to any of the teachers' evaluations or performance ratings.[6] Furthermore, when teachers were evaluated there was no requirement that student performance be considered when assessing teacher performance.[7]

With the enactment of PERA, Senate Bill 7, and House Bill 1197, the focus has shifted away from seniority and toward prioritizing student and teacher performance.[8] Under these new education reform laws, student performance must be factored into a teacher's evaluation ratings.[9] In addition, evaluations and performance ratings must be considered when filling vacant positions, awarding tenure, and conducting layoffs.[10] The laws also streamline the tenured teacher dismissal process and require additional steps be taken before allowing teachers to engage in a strike.[11] Senate Bill 7 also significantly impacts Chicago Public Schools (CPS) by permitting CPS to lengthen the school and work day and school and work year, without being subject to mandatory bargaining before doing so.[12]

III. TEACHER EVALUATIONS UNDER PERA

The Performance Evaluation Reform Act (PERA) was enacted January 15, 2010, and transformed the way in which school districts conduct teacher evaluations.[13] PERA sets forth the required components that must be included in teacher evaluation plans, including the requirement that student growth be a significant factor in rating teachers' performance.[14]

PERA currently requires that each school district's plan for evaluating its teachers in contractual continued service ("tenure") include the following components: 1) a description of each teacher's duties and responsibilities and the standards to which the teacher is expected to conform; 2) evaluation of each tenured teacher at least once in the course of any two school years and probationary teachers once every school year; 3) personal observation of the teacher in the classroom by an evaluator, unless the teacher has no classroom duties; 4) consideration of the teacher's attendance, planning, instructional methods, classroom management, where relevant, and competency in the subject matter taught; 5) specification as to the teacher's

strengths and weaknesses, with supporting reasons for the comments made; 6) rating of tenured teachers as either: (a) "excellent," "satisfactory" or "unsatisfactory;" or (b) "excellent," "proficient," "needs improvement" or "unsatisfactory;" 7) inclusion of a copy of the evaluation in the teacher's personnel file and provision of a copy to the teacher; 8) within thirty school days after the completion of an evaluation rating a tenured teacher as "needs improvement," development of a professional development plan for the teacher; and 9) within thirty school days after completion of an evaluation rating a tenured teacher as "unsatisfactory," development of, participation in, and completion of a remediation plan for the teacher, or dismissal if the plan is not completed with a rating that is equal to or better than a satisfactory or proficient rating.[15]

By September 1, 2012 school districts must implement the following provisions of PERA: 1) all teachers can only be rated as "excellent," "proficient," "needs improvement" or "unsatisfactory;" and 2) all tenured teachers must be evaluated at least once in the year after receiving a "needs improvement" or "unsatisfactory" rating.[16] Any evaluator undertaking an evaluation after September 1, 2012, must first successfully complete a pre-qualification program provided or approved by the Illinois State Board of Education (ISBE).[17]

More significantly, by the designated "PERA Implementation Date," each school district's plan for evaluating its tenured teachers must consider student growth as a "significant factor" for rating a teacher's performance.[18] The current PERA implementation date is September 1, 2016 for most school districts throughout Illinois; however for Chicago Public Schools (CPS), the PERA implementation date is September 1, 2012 for at least 300 CPS schools, and September 1, 2013 for the remaining schools.[19]

Before the PERA Implementation Date, a school district must, "in good faith cooperation with its teachers or, where applicable, the exclusive bargaining representatives of its teachers," determine how it will incorporate the use of data and indicators of student growth as a significant factor in rating teacher performance.[20] While the use of data and indicators on student growth are not mandatory subjects of bargaining, as part of this "cooperative process," the school district must use a joint committee composed of equal representatives selected by the school district and its teachers or teachers' union.[21]

For school districts other than CPS, PERA requires the school district to implement the model evaluation plan developed by the Illinois State Board of Education if within 180 calendar days of the committee's first meeting an agreement is not reached on how the evaluation plan will incorporate the use of data and indicators of student growth.[22] PERA requires the Illinois State Board of Education to develop a model evaluation plan for use by school districts in which student growth must comprise 50 percent of the performance rating.[23]

Within ninety calendar days after CPS' joint committee's first meeting, if the committee does not reach agreement on how the evaluation plan will incorporate the use of data and indicators of student growth, the Board of Education of CPS is not required to implement any aspect of the model evaluation plan established under PERA; instead it may implement its last best proposal.[24]

IV. SCHOOL REFORMS UNDER SENATE BILL 7 AND HOUSE BILL 1197

A. Attaining Teacher Tenure

Under Senate Bill 7, a teacher's evaluations and performance ratings must be considered when determining whether a teacher hired after a school district's PERA implementation date is awarded tenure. Currently, a teacher attains tenure after being employed on a full-time basis for four consecutive school terms.[25] For teachers hired prior to the PERA implementation date, there is no requirement that a teacher's evaluation ratings be considered in the tenure decision. There is also no accelerated tenure for exemplary service or portability of tenure between school districts.[26]

A teacher hired on or after the PERA implementation date, however, can attain tenure in one of three ways. First, a teacher may attain tenure by completing four school terms with overall annual evaluation ratings of at least "proficient" in the last term and either the second or third school terms of the four-year probationary period. Second, a teacher may attain tenure through an "accelerated tenure" process by receiving "excellent" ratings during the first three school terms of teaching. Third, a teacher may attain tenure through "tenure portability" if that teacher completes all of the following steps: obtains tenure in another school district; obtains at least "proficient" ratings, after the PERA implementation date in the other school district, on the most recent two evaluations; voluntarily departs or is honorably dismissed from the other school district in the school term immediately preceding the current school term; and receives "excellent"

ratings during the first two school terms of teaching in a new school district.[27]

If a teacher does not attain tenure through tenure portability or accelerated tenure, and if, at the conclusion of four consecutive school terms of service, a teacher's performance does not qualify the teacher for contractual continued service, then the teacher must be dismissed.[28]

B. Teacher Hiring

Like teacher tenure, Senate Bill 7 also requires districts to consider performance when filling vacant positions, rather than basing such decisions solely on seniority. Effective June 13, 2011, or the date of expiration of a conflicting collective bargaining agreement (CBA) in effect as of June 13, 2011, a school district must use a variety of criteria to determine the best person to fill a new or vacant teaching position, including: qualifications, certifications, merit and ability (which includes performance evaluation ratings), and relevant service or experience. District-wide seniority can only be used as a tie-breaker when all other factors are equal. Senate Bill 7 expressly points out that this new requirement makes no changes to collective bargaining rights and obligations.[29]

C. Length of school day and year – Chicago Public Schools

In addition to the above reforms, Senate Bill 7 also significantly impacts bargaining in CPS. One of the more highly publicized reforms now permits CPS to lengthen the school day and school year. Section 4.5 of the Illinois Educational Labor Relations Act (IELRA) designates various topics as "permissive" subjects of bargaining, applicable to CPS only. Unlike mandatory subjects of bargaining, it is within the sole discretion of the Board of Education to decide whether to bargain over permissive topics so long as the Board bargains over the impact of its decisions regarding these topics upon request by the employees' exclusive bargaining representatives.

Under Senate Bill 7, the length of the school and work day and the length of the school and work year in CPS are now permissive subjects of bargaining. Accordingly, just like other permissive subjects of bargaining set forth in Section 4.5 of the IELRA, it is within the sole discretion of the Board to bargain over this topic. The Board must, however, bargain over the impact of its decision regarding the length of the school and work day and the length of the school and work year,[30] upon request by the exclusive representative of its employees. As with all other permissive subjects set

forth in Section 4.5, the Board is not precluded from implementing its decision during this bargaining.

D. Right to strike, impasse resolution and mediation

Senate Bill 7 also requires additional steps be taken before Illinois educational employees are permitted to strike. Certain sections of the IELRA apply exclusively to CPS, while other sections apply to all other Illinois districts.

1. Chicago Public Schools

For CPS, if no agreement is reached after sixty days of bargaining over those subjects set forth in Section 4.5 of the IELRA, the parties must follow the dispute resolution procedure required by Sections 4.5(b) and 12(b) of the IELRA.[31] If no agreement is reached after a period of bargaining over subjects other than those set forth in Section 4.5, the parties may invoke the dispute resolution procedure set forth in Senate Bill 7 and Section 12(a-10) of the IELRA.

Under Section 12(a-10), either party may initiate mediation. The parties are required to engage in mediation for a "reasonable period" before initiating the new fact-finding procedure. If the parties fail to reach an agreement after that reasonable period of mediation, the dispute must be submitted to fact-finding in accordance with the IELRA.[32] Either the Board of Education or the union may initiate fact-finding by submitting a written demand to the other party with a copy of the demand submitted simultaneously to the Illinois Educational Labor Relations Board (IELRB). Within three days following a party's demand for fact-finding, each party appoints one member of the fact-finding panel. The parties then select a third qualified impartial member to serve as the chairperson of the panel. Senate Bill 7 establishes strict qualifications for the qualified impartial individual. The parties may also agree to proceed without a three-person panel. In this case, the parties would simply select a qualified impartial individual to serve as the fact-finder.[33]

After the parties submit a statement of the disputed issues and their positions, the panel (or qualified impartial individual) conducts a hearing on the disputed issues. The panel (or qualified impartial individual) may attempt mediation or remand a disputed issue for further collective bargaining, require the parties to submit final offers for each disputed issue, or employ any other measures deemed appropriate to resolve the impasse. If

the dispute is not settled within seventy-five days of the panel's (or qualified impartial individual's); appointment, the panel (or qualified impartial individual) must release a private report to the parties that includes advisory findings of fact and a recommended settlement, based on particular criteria set forth in 115 ILCS 5/12(a-10). Within fifteen days of the private report's release, the recommendation becomes binding on the parties, unless either party submits a notice of rejection. If the recommendation is rejected, the report and the notice of rejection must be released to the public.[34]

The union then has the right to strike provided that: (1) thirty days have passed since the private report's publication; (2) 75 percent of the union's members have affirmatively voted to engage in a strike; (3) the union has provided the Board with ten day's advance notice of its intent to strike; (4) the CBA has expired or been terminated; and (5) the parties have not mutually submitted the unresolved issue to arbitration.[35]

2. School Districts Outside of Chicago

If an impasse is declared during the mediation process between the employees' exclusive representative and a school district other than CPS, Senate Bill 7 also requires additional steps be taken before such unions are permitted to engage in a strike. Under Senate Bill 7, a party can request mediation after a reasonable period of negotiation and within ninety days of the scheduled start of the forthcoming school year.[36] If either party has not requested mediation before the date marking forty-five days before the beginning of the school year, the IELRB shall invoke mediation.[37] At any time after fifteen days from the commencement of mediation, either party or the mediator may declare an impasse.[38] The parties then have seven days to exchange final offers on unresolved issues and provide them to the mediator and the IELRB.[39] If, within seven additional days, the IELRB is not notified that an agreement has been reached, it will immediately post the final offers on its website.[40]

The union may strike fourteen days after such posting, but only if (1) the union has given the district, the regional superintendent, and the IELRB ten day's advance notice of its intent to strike; (2) the CBA has expired or been terminated; and (3) the parties have not mutually submitted the unresolved issue(s) to arbitration.[41]

E. TENURED TEACHER DISMISSAL HEARINGS

In addition, Senate Bill 7 streamlines the dismissal process for both conduct and performance-based dismissals for school districts throughout the State, including Chicago Public Schools. Included in this process are particular procedures that involve working in cooperation or consultation with the respective teachers' unions.

1. Non-CPS School Districts

Prior to Senate Bill 7, school districts outside of Illinois could avail themselves of only one dismissal process for both conduct and performance-based dismissals. This process has been streamlined, however, by imposing the following specific procedures.

First, the board of education must approve, by a majority vote of all members, a motion containing specific charges for dismissal.[42] The board must give the teacher written notice of the charges, including a bill of particulars and notification of the right to request a hearing, by mail and by certified mail, return receipt requested, or personal delivery with receipt within five days of adoption of the motion.[43] The teacher must then request a hearing, in writing, within seventeen days of being notified of the causes that may result in dismissal (or forego his or her right to a hearing).[44] The hearing must commence within seventy-five days after the date the hearing officer is selected, and must conclude within 120 days after the date the hearing officer is selected. Each party is limited to three days to present its case, unless extended by the hearing officer for good cause or by mutual agreement.[45] On or after July 2, 2012, the notice to a teacher regarding cause for dismissal must indicate that the teacher has a right to request a hearing before either (1) a mutually selected hearing officer, with the cost split equally between the teacher and the board; or (2) a hearing before a board-selected hearing officer, with the cost of the hearing officer paid by the board.[46] On or after September 1, 2012, all hearing officers must receive ISBE-training.[47]

For performance-based dismissals (under Article 24A of the School Code), the hearing officer must issue a final decision within thirty days after the close of the hearing or the close of the record, whichever is later, with extensions only for limited "good cause."[48] If the hearing officer's decision is in favor of the teacher, the hearing officer or the school board must order reinstatement.[49]

For conduct-based dismissals, the hearing officer must, within thirty days after the close of the hearing or the close of the record, whichever is later, with extensions only for limited "good cause," issue findings of fact and a recommendation to the school board as to whether the teacher must be dismissed.[50] Within forty-five days after receipt of the findings and recommendation, the school board must issue a written order.[51]

2. Chicago Public Schools

The new dismissal procedures for CPS differ slightly from those procedures for the rest of the Illinois school districts. For example, instead of selecting a hearing officer from a list maintained by the Illinois State Board of Education, the board of education must maintain a list – developed in good faith consultation with the teachers' exclusive representative – of at least 9 qualified hearing officers.[52] A "qualified hearing officer" is 1) accredited by a national arbitration organization and has had a minimum of five years of experience as an arbitrator in cases involving labor and employment relations matters between employers and employees or their exclusive bargaining representative and 2) beginning September 1, 2012, has participated in training provided or approved by the Illinois State Board of Education for teacher dismissal hearing officers so that he or she is familiar with issues generally involved in evaluative and non-evaluative dismissals.[53] Within five business days after receiving the notice of the hearing request, the general superintendent of CPS and the teacher or his or her legal representative must alternately strike one name from the list of hearing officers until only one name remains. If the teacher fails to participate in the striking process, the general superintendent must either select the hearing officer from the list of nine qualified hearing officers, or select another qualified hearing officer from the master list maintained by the State Board of Education.[54]

F. ALTERNATIVE DISMISSAL PROCESS FOR PERFORMANCE-BASED DISMISSALS

For both CPS and non-CPS school districts, the new law allows school boards to use an "alternative process" for performance-based dismissals where a remediation plan is at issue.[55] The alternative process is even more streamlined, with shorter deadlines than the first process described above. The alternative process may only be used for a teacher who has been subject to a remediation plan resulting from a PERA evaluation,[56] and thus the effective implementation date for this process is not until after the PERA implementation date (as described above).

As part of the alternative process, the school district must create and establish a list of at least two qualified evaluators to serve as a "second evaluator" for the teacher.[57] The school district must provide its teachers' exclusive bargaining representative with an opportunity to submit additional names of qualified individuals to serve as second evaluators.[58] If the teachers' exclusive bargaining representatives does not submit a list of teacher evaluators within twenty-one days after the school district's request, the school district may proceed with its list.[59] In good faith cooperation with its teachers' representative, the school district must then establish a process for the selection of a second evaluator from the list.[60] These steps may be taken prior to the district's implementation of the PERA evaluation system. After the PERA implementation date, when a remediation process is to begin under the alternative process, the school district selects a second evaluator from the list using the chosen selection process.[61]

G. REDUCTIONS IN FORCE FOR SCHOOL DISTRICTS OTHER THAN CPS

Finally, Senate Bill 7 also significantly changed the way in which school districts may lay off teachers. Now, when a district conducts a reduction in force ("RIF"), the order of layoff may no longer be determined strictly by seniority. Beginning in the 2011-2012 school year or the date of expiration of a conflicting CBA (but no later than June 30, 2013), school districts outside of Chicago[62] must comply with new requirements when preparing for and conducting a RIF under the new law.[63] The major requirements under the new RIF procedures involve 1) categorizing teachers into positions; 2) creating groupings within categories; 3) sequencing teachers within groupings; 4) establishing a joint committee to consider alternatives to the statutorily required procedures; and 5) complying with applicable notice and recall procedures.[64]

1. Categorize Teachers Into Positions

First, each teacher must be categorized into one or more positions for which the teacher holds legal qualifications and any other qualifications established in a district job description on or before the May 10 prior to the school year during which the RIF occurs.[65] Notably,Illinois law previously provided that teachers' qualifications were determined by reviewing certifications and legal qualifications only; now school districts may consider certifications, legal qualifications and additional qualifications determined by the district.[66] Moreover, whereas Illinois law previously provided that non-

tenured teachers must be released before tenured teachers, under the new law tenured status has virtually no impact on the RIF sequence.[67]

2. Create Groupings Within Categories

Next, within each category of position, and subject to agreements made by the joint committee on honorable dismissals discussed below, teachers within each category of position must be grouped into four performance groups based on their last two and in some cases three summative ratings. Among teachers qualified to hold a position, teachers must be dismissed in the order of their groupings, with teachers in grouping one dismissed first and those in grouping four dismissed last. Essentially, teachers who have never been evaluated or who have received "needs improvement" or "unsatisfactory" performance evaluation ratings will be in groupings one and two, respectively, and therefore released first, whereas teachers who have received higher ratings will be in the latter two groups and will be released later.[68]

3. Sequence Teachers Within Groupings

The law then outlines rules for sequencing teachers within groups, although these may be somewhat revised through collective bargaining and the joint committee process described below. The sequence of layoffs in group one is at the discretion of the school district.[69] Within group two, the sequence must be based on average performance evaluation ratings based on the previous two performance evaluation ratings, if available, or on the last performance evaluation rating if only one is available.[70] The teacher with the lowest average performance evaluation rating is dismissed first. Sequences are based on seniority for those in group two who have the same average performance evaluation rating and for those in groups three and four.[71]

4. RIF Joint Committee

By December 1, 2011, a joint committee must have convened for its first meeting.[72] The joint committee may consider a definition of ratings to be used to determine the sequence of RIFs as an alternative to the overall rating on the annual or bi-annual evaluations under Article 24A.[73] The joint committee must also address the following issues: 1) criteria for excluding from grouping two and placing into grouping three a teacher whose last two performance evaluations include a "Needs Improvement" and either a "Proficient" or "Excellent"; 2) an alternative definition for grouping four,

which must take into account prior performance evaluation ratings and may take into account other factors that relate to the school district's educational objectives; 3) including within the definition of a performance evaluation rating a rating administered by a school district other than the one determining the sequence of dismissal; and 4) if the school district has an evaluation system other than the two systems required by PERA, a method for assigning a rating that complies with PERA to each performance evaluation to be used in the sequence of dismissal.[74]

In addition, a joint committee member may ask to review data to determine if a disproportionate number of more senior teachers have received a recent performance evaluation rating lower than their prior ratings.[75] If the member has a good faith belief that such disproportionate ratings have occurred, the member can request that the joint committee review the data.[76] After doing so, the joint committee may submit a report to the employing board and the exclusive bargaining representative on the issue.[77]

By February 1, 2012 (and each February 1 thereafter), the joint committee must reach agreement on the above issues in order for the agreement to apply to the sequence of dismissal determined during that school year.[78] If no agreement is reached, the default rules of Senate Bill 7 (described above) or previous agreements by the joint committee apply.[79] Once an agreement is reached, it can only be changed if it is amended or terminated by the joint committee.[80]

5. Notification and Recall

Seventy-five days before the end of the school term, the sequence of the honorable dismissal list categorized by positions and with groupings and sequences described above must be provided to the exclusive bargaining representative, although the school district may move teachers from one grouping to another up to forty-five days before the end of the school term.[81]

Within forty-five days before the end of the school term, written notice of dismissal must be sent to the teacher(s) to be dismissed by regular mail and by certified mail, return receipt requested, or personal delivery with receipt, together with a statement of honorable dismissal and the reasons therefor.[82]

Within one calendar year from the start of the school term following a RIF, those teachers in groupings three and four who are dismissed through the RIF process are eligible for recall, and must be recalled in reverse order of dismissal, unless an alternative order is established in a CBA.[83] Within two calendar years from the start of the school term following a RIF in which more than 15 percent of full-time equivalent positions filled by certified employees (excluding principals and administrative personnel) are subject to a RIF, those teachers in groupings three and four who are dismissed through the RIF process are eligible for recall, and must be recalled in reverse order of dismissal, unless an alternative order is established in a CBA.[84] ISBE certification and endorsement requirements must be taken into account in determining recall rights as well as any district qualifications established in the job description on or before May 10 of the year before the recall positions become available.[85]

V. NAVIGATING THE NEW REQUIREMENTS

The overall intent of most of the provisions of the Illinois education reform laws is simple – make performance count. The requirements under these laws, however, are lengthy and complex. Since the adoption of the laws, ISBE has issued non-regulatory guidance as well as proposed rules to assist school districts in navigating these new laws. Its non-regulatory guidance contains ISBE's interpretations and answers to 141 different questions about all aspects of PERA and Senate Bill 7.[86] ISBE has also issued proposed rules implementing PERA.[87] These proposed rules set forth the minimum requirements for both student growth and professional practice that all school districts must meet when establishing their performance evaluation systems for teachers and principals/assistant principals, and outline how student growth must be considered when rating student performance for teachers.[88] Additional guidance is likely to be issued in the future as time passes and more of the details and requirements of PERA and Senate Bill 7 are carried out.

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[1] 2009 Ill. Laws 8655-8675 P.A. 96-861 (S.B. 315); 2011 Ill. Legis. Serv. 2252-2286 P.A. 97-8 (S.B. 7) (West); 2011 Ill. Legis. Serv. 2247-2252 P.A. 97-7 (H.B. 1197) (West).

[2] *See Id.*

[3] 105 ILCS §5/24-11 (1998), *amended by* 2011 Ill. Legis. Serv. 2252-2286 P.A. 97-8 (S.B. 7) (West); *See* 1998 Ill. Legis. Serv. P.A. 90-653 (H.B. 1640) (West).

[4] *Id.*

[5] *Id.*

[6] 105 ILCS §5/24-12 (1997), *amended by* 2011 Ill. Legis. Serv. 2252-2286 P.A. 97-8 (S.B. 7) (West); *See* 1997 Ill. Legis. Serv. P.A. 90-224 (S.B. 559) (West).

[7] *Id.*

[8] *See* 2009 Ill. Laws 8655-8675 P.A. 96-861 (S.B. 315); 2011 Ill. Legis. Serv. 2252-2286 P.A. 97-8 (S.B. 7) (West); 2011 Ill. Legis. Serv. 2247-2252 P.A. 97-7 (H.B. 1197) (West).

[9] 105 ILCS §5/24A-4(b) (2011).

[10] 105 ILCS §5/24-1.5 (2011); *See* 2011 Ill. Legis. Serv. 2252-2286 P.A. 97-8 (S.B. 7) (West).

[11] 115 ILCS §5/13 *et seq.* (2011); 105 ILCS §5/24-12 *et seq.* (2011).

[12] 2011 Ill. Legis. Serv. 2252-2286 P.A. 97-8 (S.B. 7) (West); *See* 115 ILCS §5/4.5(a)(4) (2011).

[13] 2009 Ill. Laws 8655-8675 P.A. 96-861 (S.B. 315).

[14] *Id*. at 8655; *See* 105 ILCS §5/24A-4 (2011).

[15] 105 ILCS §5/24A-5 (2011).

[16] *Id*.

[17] *Id*.

[18] *Id*.

[19] 105 ILCS §5/24A-2.5 (2011). (For schools receiving School Improvement Grants, the PERA implementation date is the date specified in the grant for implementing an evaluation system for teachers incorporating student growth as a significant factor. For the remaining, lowest performing 20% of school districts throughout the State, the PERA implementation date is September 1, 2015. For any school district that has agreed with its teachers' union in writing to an earlier implementation date (not earlier than September 1, 2013), the PERA implementation date is the agreed-upon date.)

[20] 05 ILCS §5/24A-4 *et seq*. (2011).

[21] *Id*.

[22] 105 ILCS §5/24A-4(b).

[23] 105 ILCS §5/24A-7 (2010).

[24] 105 ILCS §5/24A-4(c).

[25] 105 ILCS 5/24-11. Under Senate Bill 7, a "school term" is that portion of the school year, July 1 to the following June 30, when school is in actual session, and teachers must actually teach or be otherwise present and participating in a school district's educational program for 120 days or more. For purposes of the 120-day requirement, "days of leave under the federal Family Medical Leave Act that the teacher is required to take until the end of the school term shall be considered days of teaching or participation in the district's . . . educational program." *Id*.

[26] *Id*.

[27] 105 ILCS 5/24-11(d).

[28] *Id*.

[29] 105 ILCS 5/24-1.5.

[30] 115 ILCS 5/4.5(a)(4).

[31] 115 ILCS 5/12.

[32] 115 ILCS 5/12(a-10).

[33] *Id.* A person is "qualified" to serve as the chairperson or fact-finder if he or she was not the same individual appointed as the mediator and if he or she satisfies the following requirements: (1) membership in good standing with the National Academy of Arbitrators, Federal Mediation and Conciliation Service, or American Arbitration Association for a minimum of ten years; (2) membership on the mediation roster for the Illinois Labor Relations Board or the IELRB; (3) issuance of at least five interest arbitration awards arising under the Illinois Public Labor Relations Act; and (4) participation in impasse resolution processes arising under private or public sector collective bargaining statutes in other states.115 ILCS 5/12(a-10).

[34] 05 ILCS 5/12(a-10)(3)-(5).

[35] 115 ILCS 5/13(b).

[36] 36. 115 ILCS. 5/12(a) 2011).

[37] *Id.*

[38] 115 LCS 5/12(a-5).

[39] *Id.*

[40] *Id.*

[41] 115 ILCS 5/13(b)(2)(3)(4)(5).

[42] 105 ILCS 5/25-12(d)(1) 2011).

[43] *Id.*

[44] 105 ILCS 5/25-12(d)(2).

[45] 105 ILCS 5/24-12(d)(6).

[46] 105 ILCS 5/24-12(d)(1).

[47] 105 ILCS 5/24-12(d)(3).

[48] 105 ILCS 5/24-12(d)(7).

[49] 105 ILCS. 5/24-12(d)(9).

[50] 105 ILCS 5/24-12(d)(7).

[51] 105 ILCS 5/24-12(d)(8).

[52] 105 ILCS 5/34-85(a)(3) (2011).

[53] *Id.*

[54] *Id.*

[55] 105 ILCS 5/34-85(a)(3) (2011).

[56] 105 ILCS 5/24-16.5(b)(2).

[57] 105 ILCS 5/24-16.5(c)(1).

[58] *Id.*

[59] *Id.*

[60] 105 ILCS 5/24-16.5(c)(2).

[61] 105 ILCS 5/24-16.5. The second evaluator has certain qualifications and duties under the evaluation and remediation process, which are outlined in the statute. *Id.* In addition, school districts must require all board members to receive training on PERA evaluations through a program either administered or approved by ISBE, because only such board members may vote on recommendations of hearing officers under the alternative process. *Id.*

[62] Senate Bill 7 did not affect the reduction in force and recall procedures in CPS. Notably, on February 17, 2012, the Illinois Supreme Court held that tenured teachers in the Chicago Public School System do not have a substantive right, or any procedural rights, to recall resulting from an economic layoff. *Chicago Teachers Union, Local No 1 v. Board of Educ. of City of Chicago*, 2012 IL 112, 566,–N.E.2d—, 2012 WL 525467 (Ill. 2012).

[63] 105 ILCS. 5/24-12(b).

[64] 105 ILCS 5/24-12(b)(c)(d).

[65] 105 ILCS 5/24-12(b).

[66] *Id.*

[67] *Id.*

[68] 105 ILCS .5/24-12(b).

[69] *Id.*

[70] *Id.*

[71] *Id.*

[72] 105 ILCS 5/24 12(c)(5).

[73] 105 ILCS 5/24-12(c)(4).

[74] 105 ILCS 5/24-12(c)(1)-(5).

[75] 105 ILCS 5/24-2(c) (5)(2011).

[76] *Id.*

[77] *Id.*

[78] 105 ILCS 5/24 12(c).

[79] *Id.*

[80] *Id.*

[81] *Id.*

[82] *Id.*

[83] *Id.*

[84] *Id.*

[85] *Id.*

[86] *Education Reform in Illinois: Non-Regulatory Guidance on the Performance Evaluation Reform Act and Senate Bill* 7, <http://www.isbe.net/PERA/pdf/pera_guidance.pdf > (Dec. 5, 2011).

[87] *See* Notice of Proposed Rules, 23 Ill. Admin. Code 50, <http://www.isbe.net/rules/proposed/pdfs/50wf.pdf>. The Illinois State Board of Education adopted the proposed rules on February 21, 2012 and, as of the date of this publication, are pending review by the Illinois Joint Committee on Administrative Rules. *See* http://www.isbe.net/rules/ adopted/part_50.pdf.

[88] Proposed Amendments to Part 50 (Evaluation of Certified Employees under Article s24A and 34 of the School Code), <http://www.isbe.net/rules/proposed/50web sum.htm>; *See* Notice of Proposed Rules, 23 Ill. Adm. Code 50. http://www.isbe. net/rules/proposed/pdfs/50wf.pdf.

RECENT DEVELOPMENTS

By, Student Editorial Board:

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

I. IELRA DEVELOPMENTS

A. Arbitration

In *Griggsville-PerryCommunity Unit School Dist*. v. IELRB, No 4-11-0210, 28 PERI ¶ 82; 192 L.R.R.M. (BNA) 2470; 2011 WL 7063712 (Ill. App. Ct. 4th Dist. 2011), the Fourth District Appellate Court over-ruled an IELRB decision and held that an arbitration award overturning an employee discharge did not draw its essence from the collective bargaining agreement and should not be enforced.

In February 2011, after the school district twice refused to comply with an arbitrator's award ordering reinstatement and back-pay of a terminated paraprofessional employee, the IELRB ordered the school district to comply with the arbitrator's decision. *See Griggsville-Perry Fed'n of Support Personnel IFT-AFT, Local 4141, Complainant & Griggsville-Perry Community Unit School Dist. No. 4,* 28 PERI ¶ 16 (IELRB 2011). The school district appealed the IELRB's decision to the Illinois Appellate Court.

The Appellate Court highlighted the "limited" and "deferential" standards of review that courts give to agency and arbitrator decisions. The court added, however, that while deferential, judicial review is not blind deference. In familiar language, the court wrote that deference does not extend to arbitrators' decisions that seek to dispense their own brand of industrial justice.

The arbitrator found that, although the parties' Collective Bargaining Agreement (CBA) had no express provision requiring good or just cause for employee dismissal, such a requirement was implied. The arbitrator looked to "industrial common law," and observed that it is common for arbitrators to read just cause language into CBAs. The arbitrator reviewed the parties' negotiation history leading up to the CBA's silence on good or just cause. The

arbitrator concluded that bargaining history combined with the CBA's silence was enough to read in a for-cause contractual requirement.

The court decreed, "it is a mistake to ignore the language of a contract and focus on language that was not included." The court noted that Illinois employees are considered at-will unless there exists a "contractual provision to the contrary."

The court relied on a "complete understanding" integration clause in the CBA. The court ruled that the use of extrinsic evidence, such as bargaining history, is precluded by an integration clause, citing *Air Safety, Inc. v. Teachers Realty Corp*., 185 Ill.2d 457, 465; 706 N.E.2d 882, 885-86 (1999). The court also cited a provision of the CBA that prohibited the arbitrator from changing, modifying, or adding to the parties' agreement.

The Court found that the parties' contract regarding dismissals was clear. The contract had procedural elements, but no for-cause standard. The CBA required written notice for any disciplinary proceedings before the District's Board of Education. It also required the notice to list the reasons for the meeting and it allowed the employee to have a personal representative at the meeting.

However, the arbitrator suggested that without implying just cause, the school board meeting would be a "meaningless formalism." The court countered that the District complied with all of the CBA's requirements: the employee was given advance notice (approximately 6 weeks); the employee was allowed to meet with the principal and superintendent before the school board meeting; the employee and union representative were provided documents relating to the District's performance concerns; and the employee and union representative attended the school board meeting where the employee was allowed to testify before the school board's vote on whether or not to renew the employee. The court held that the IELRB's decision that the award drew its essence from the contract was clearly erroneous. As a result, the court vacated the arbitration award and reversed the IELRB.

B. Injunctive Relief

In *Chicago Teachers Union and Chicago Board of Education*, Case No. 2012-CA-009-C (IELRB 2011), the IELRB authorized its General Counsel to seek injunctive relief in Chicago's elongated school day case. In doing so the IELRB reviewed the tests utilized when seeking preliminary injunctive relief under Section 16(d) of the IELRA.

The Chicago Board of Education (CBE) argued that IELRA Section 4.5(b) defines length of the school day as a permissive subject of bargaining and deprived the Board of jurisdiction over a case arising from the CBE's conduct in instituting elongated school days. The IELRB, however, stated that while Section 4.5(b) "applies to bargaining" it does not apply to separate violations, i.e. unfair labor practices, under Section 14(a).

The CBE's alleged conduct in implementing a plan for elongated schools days involved: (1) holding meetings with teachers which were not in compliance with the parties' CBA; (2) offering teachers a lump sum payment in exchange for their support; (3) CBE threats of reprisal to employees; (4) informing teachers they did not have to speak with the Chicago Teachers Union; (5) insisting on observing the teachers' vote; (6) instructing teachers to save communications from the Union, and (7) ordering Union representatives to leave CBE property. The Union's complaint alleged that this conduct violated Sections 14(a)(1), 14(a)(3), and 14(a)(5) of the IELRA.

The IELRB stated that injunctive relief is appropriate "where there is reasonable cause to believe that the Act may have been violated and where injunctive relief in just and proper." In reviewing the likelihood of the Union's 14(a)(1) allegation prevailing on its merits, the IELRB weighed whether the conduct may reasonably have the tendency to interfere with the free exercise of the employees' statutory rights. Important to the determination was the CBE's offer of a lump sum payment. To the IELRB, the offer of an incentive payment, a benefit, for approving the CBE's desire to implement longer school days, despite the provisions of the current collective bargaining agreement (CBA), would reasonably have the tendency to interfere with the exercise of the teachers' collectively bargained rights. This demonstrated a likelihood of success on the merits.

The IELRB also found a likelihood of success for a 14(a)(5) and therefore derivatively a 14(a)(1) violation based on two separate considerations. The first involved a unilateral modification of the CBA's terms. The test for this finding did not involve whether the issue concerned a mandatory or

permissive subject of bargaining. Instead, it involved whether there was a unilateral modification of the CBA's terms, the modification of those terms, being of such importance to the agreement, that their unilateral modification would negate the statutory duty to bargain collectively. The second consideration was the CBE's bargaining directly with employees. The IELRB's essential inquiry was whether the CBE was dealing with the Union through the teachers, rather than dealing with the teachers through the Union.

The CBE cited Section 34-8.1a of the School Code which allows teachers in an attendance center to "waive" any provision of a CBA by a 51 percent vote. 105 ILCS 5/34-8.1a. The IELRB noted that while Section 34-8.1a authorizes CBA waivers, it does not contain an authorization to obtain one via direct dealing. The IELRB called the record before it "undisputed" that the CBE engaged in direct employee dealing over matters and terms of the CBA, namely the length of the school day, and by bypassing the Union in its waiver process, the CBE was attempting to unilaterally modify the CBA. The IELRB found both instances sufficient to demonstrate a likelihood of success on the merits of the Union's 14(a)(5) allegation and its 14(a)(1) derivative.

The second part of the IELRB's analysis was an evaluation of circumstances where seeking preliminary injunctive relief is "just and proper." Here the IELRB cited five factors for consideration: (1) whether an injunction is necessary to prevent frustration of the basic remedial purpose of the Act; (2) to what degree, if any, the public interest is affected by a continuing violation; (3) the need to immediately restore the status quo ante; (4) whether ordinary IELRB remedies were inadequate; and, (5) whether irreparable harm would result absent injunctive relief. The IELRB added that injunctive relief should be limited to cases that are serious and extraordinary. Citing several Illinois Appellate Court decisions, the IELRB repeated that irreparable harm means an injury of a continuing nature and not simply an injury that is beyond repair or compensation from damages. The CBE admitted that it was conducting an ongoing effort to secure elongated school days for each of its elementary schools. In weighing the factors and considering the just and proper prong, the IELRB remarked on the case's time considerations, on the public interests involved, and on the importance of the contract in American law.

Citing its own precedent, the IELRB pointed out that requiring performance of duties an employee does not want to perform involves an element of time deprivation which cannot be given back and which cannot be compensated

for. Therefore, to the IELRB, instituting longer school days, if left unchecked, could not have been remedied with traditional make whole awards. Also important to the IELRB's time considerations was that the parties' CBA at issue was set to expire in June 2012.

The IELRB also found injunctive relief just and proper because the public interest stood to be adversely affected. For the IELRB, allowing the alleged conduct to continue would frustrate the public policy of Section 1 of Act – to promote "orderly and constructive" relationships. 115 ILCS 5/1 (2011).

Finally, the IELRB's decision to authorize just and proper injunctive relief incorporated references to the importance of contract law. The IELRB noted that the parties fairly negotiated their CBA in 2007 and that the only changes since then have been to the "exterior" of their contract. While praising public goals relating to public education, the Board declared those goals must be "pursued within the rule of law."

C. Supervisors

In *AFSCME Council 31 and Board of Trustees of the University of Illinois*, Case No. 2011-RS-0006-S (IELRB 2012), the IELRB affirmed the Administrative Law Judge's Recommended Decision and Order dismissing the union's majority interest petition that sought to add a group of employees in the title of Building Service Foremen (BSF) employed at the University of Illinois' Urbana-Champaign campus in an existing bargaining unit. The ALJ, affirmed by the IELRB, held that the BSFs were supervisors.

The ALJ found that the BSFs hired or effectively recommended hiring building service workers (BSWs), assigned BSWs, changed their assignments as the need arose and spent significant portions of their days walking around the workplace observing how BSWs performed their duties. BSFs had authority to issue minor discipline and to recommend more serious discipline. They also performed BSW performance evaluations and granted or denied requests for time off. The ALJ concluded, and the IELRB agreed, that the BSFs spent a preponderance of their time performing supervisory functions and exercised independent judgment in the performance of those functions.

II. IPLRA DEVELOPMENTS

A. Subjects of Bargaining

In *Fraternal Order of Police, Chicago Lodge No. 7 v. ILRB*, 2011 IL App (1st) 103215, 28 PERI ¶ 72 (Ill. App. 1st Dist. 2011), the First District Appellate Court of the ILRB Local Panel's dismissal of unfair labor practice charges against the City of Chicago (City). The Fraternal Order of Police, Chicago Lodge No. 7 (Lodge), filed unfair labor practice charges against the City on September 9, 2008 claiming the City violated sections 10(a)(1) and 10(a)(4) of the (IPLRA, when it unilaterally consolidated 18 police officer training districts into six districts, and further alleged the City engaged in direct negotiations with two field training officers (FTOs).

FTOs are police officers assigned by the Chicago Police Department to train and evaluate probationary police officers. The FTOs are assigned to different training districts and receive higher compensation for the additional service they perform. The training officers are part of the bargaining unit, but the probationary officers in training are not. During the negotiations for a successor CBA in 2007, the Lodge made various proposals regarding FTOs, including increasing the number of training districts, but the proposals were rejected by the City. In July of 2008, supervisory police officers met with two FTOs and discussed how to improve the field training programs. Following these events, on September 3, 2008 the City announced it would be consolidating the number of field training districts. The announcement outlined a two-level bid process for FTOs not already assigned to one of the consolidated districts to bid on re-assignment and permitted those FTOs who did not want to be re-assigned to resign from their training positions.

After the executive director of the Board determined that the charges involved dispositive issues of law or fact, he issued a complaint to be heard before an ALJ. The ALJ issued a recommended decision finding that the City violated the IPLRA by failing to bargain in good faith with the Lodge over the decision to consolidate the training districts, as well as over the effects of this decision on FTOs. The ALJ further found that the City did not engage in direct dealing when it met the two FTOs in July. The City filed exceptions to the ALJ's recommended decision and the issue was presented to the ILRB.

The ILRB Local Panel rejected the ALJ's recommended decision and dismissed the complaint. The Board applied the three-part test from *Central City Educational Ass'n, IEA/NEA v. Illinois Educational Labor Relations Board*, 149 Ill.2d 496, 599 N.E.2d 892 (1992) to determine whether the

consolidation of the training districts was a mandatory subject of bargaining. The parties stipulated that the consolidation met the first part of the test, agreeing that the decision concerned wages, hours, and terms of employment for FTOs. The Board reached a different conclusion regarding the second prong of test than the ALJ, finding that the means used to improve the quality of training probationary employees receive was a matter of inherent managerial authority. The Board then examined the third prong of the test, finding that the burden on the City's managerial authority in determining how to best train probationary officers outweighs the benefits bargaining would provide during the decision-making process.

The First District affirmed the board's decision. The court agreed that the decision to consolidate the districts involved inherent managerial authority, because the decision was designed to improve the quality of training for probationary employees by ensuring that new police officers are better able to handle all types of policing situations they are likely to encounter. The court saw this determination as falling within the City's right to control its operational needs regarding the most effective and efficient way to enhance and broaden the spectrum of training new recruits. Any effects on the FPOs who were reassigned or resigned after the decision constituted an effect of the consolidation. Therefore, the court held the City's action did not bring the decision within the provisions of the CBA regarding compensation or the seniority-bidding process for FPO positions.

Regarding the benefits analysis of bargaining over such a decision, the court agreed with the Board that any proposals the Lodge could have offered to prevent re-assignment or resignation of FPOs would have only gone to the effects of the decision, not the decision to consolidate itself. The Lodge complained on appeal that the Board did not offer any specific reasons for finding that the burdens on the City's managerial control outweighed the benefits of bargaining over such a decision, but the court held the Board was under no obligation to present such reasons. The Board is not required to "articulate each and every facet of its deliberative process as long as the reasoning underlying the agency's decision may be discerned.