Fall 2012

Vol. 29, No. 4

Kenneth G. Dau-Schmidt
Indiana University Maurer School of Law, kdauschm@indiana.edu

ILLINOIS PUBLIC EMPLOYEE RELATIONS

REPORT

VOLUME 29 FALL 2012 ISSUE 4

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

Published quarterly by the University of Illinois School of Labor and Employment Relations at Urbana Champaign and Chicago-Kent College of Law.

(ISSN 1559-9892) 565 West Adams Street, Chicago, Illinois 60661-3691

AN ECONOMIC AND EMPIRICAL ANALYSIS OF THE TWO VIEWS OF PUBLIC SECTOR COLLECTIVE BARGAINING IN AMERICAN PUBLIC POLICY

By Kenneth Dau-Schmidt

Table of Contents

AN ECONOMIC AND EMPIRICAL ANALYSIS OF THE TWO VIEWS OF PUBLIC SECTOR COLLECTIVE BARGAINING IN AMERICAN PUBLIC POLICY

By, Kenneth Dau-Schmidt

Kenneth Dau-Schmidt is a Willard and Margaret Carr Professor of Labor and Employment Law at Indiana University Maurer School of Law. Professor Dau-Schmidt is a nationally recognized teacher and scholar on the subjects of labor and employment law and the economic analysis of legal problems.

Professor Dau-Schmidt is author of seven books and numerous articles on labor and employment law and the economic analysis of law, and he frequently presents papers at academic conferences and law schools across the United States, Canada, Europe and Asia. In 1990 he received the Scholarly Paper Award from the Association of American Law Schools for his work on the economic analysis of the criminal law as a preference-shaping policy. Professor Dau-Schmidt is active in law school administration, most recently serving as Associate Dean of Faculty Research. Involved in several national academic associations, Professor Dau-Schmidt was elected to the National Council of the American Association of University Professors and appointed to serve on the executive and litigation committees of that organization.

Professor Dau-Schmidt has been invited to teach at various European and Asian universities, including Christian-Albrechts-Universität in Kiel, Germany; Friedrich-Alexander-Universität in Erlangen, Germany; and Universität Panthéon-Assas (Paris II) in Paris.

Professor Dau-Schmidt holds a Ph.D. in economics, J.D. and M.A. in economics from the University of Michigan, and a B.A. in economics and political science from the University of Wisconsin.

I. INTRODUCTION

There are two divergent views on the role of public sector collective bargaining in American law. The first is that public sector collective bargaining undermines democratic government, allowing organized employees to interfere with the administration of the law for their own personal benefit at the expense of the general population and taxpayer.[1] Under this view, courts have characterized public sector collective bargaining as an unconstitutional interference with freedom of contract or an unconstitutional delegation of legislative power.[2] In legislative and policy debates the detractors argue that unions are merely "labor cartels" that are both inefficient and inequitable, raising wages and benefits at the expense of consumers and taxpayers and imposing inefficient and inflexible work rules.[3]

The second view is that public sector collective bargaining is an essential part of democratic government. Under this view, collective bargaining is a fundamental

human right[4] included in our cherished constitutional rights of free speech and association,[5] and an essential counterbalance to corporate interests in a pluralistic society.[6] Supporters would argue that, on the whole, public sector collective bargaining improves democratic outcomes and government administration by giving workers a voice in the outcome[7] which improves the provision of government services and the administration of the law.[8] Public sector unions represent important public policy interests in collective bargaining and legislative lobbying and act as a check on government monopsony power in employment.[9] Moreover, unions, in both the private and the public sectors, foster a healthy middle class, promote greater equality in the distribution of income, and promote the representation of the views of workers in legislative debates.[10]

Many of the broader claims of these two views are subject to empirical analysis. One of the points of public sector unions is to raise employee wages and benefits over what they would have been in the absence of a union; but are they raised above comparable levels in the private sector at the expense of taxpayers, or do they promote comparable wages that attract good public servants and long-run administrative interests rather than short-term budget cutting interests? Do public sector unions impose work rules and restrictions that interfere with the provision of government services, or do they provide an employee voice that improves government services and the administration of the law? In this essay, I will present an outline of the economic arguments both for and against public sector unions, and the empirical evidence supporting or refuting those arguments. My intent is to provide an empirical context for the larger debate regarding public policy with respect to public sector collective bargaining and the larger constitutional debate over this institution.

II. PRIMER ON THE STATE AS AN ECONOMICALLY RATIONAL EMPLOYER: DIFFERENT IS GOOD, AND EXPECTED!

Regardless of whether public employees are organized or not, economic theory suggests that there should be some predictable differences between the terms and conditions of employment between the typical public sector employee and the typical private sector employee, given the requirements of most government jobs and various characteristics of the government as an employer.

First, there are important demographic differences between public and private employees that have to be taken into account in accurately comparing their relative compensation. As shown in Table 1, on average, public employees have more years of education, more years of experience (age), work fewer hours and are more likely

to be female or Black (but not Hispanic) than private sector employees. It is vital to take account of the educational differences between public and private sector workers in comparing their wages and benefits. Many government jobs require a bachelor's degree or an advanced or professional degree in order to competently do the job.[11] As a result, while only 25 to 30 percent of private sector employees have at least a bachelor's degree, over half of public employees have at least a bachelor's degree.[12] In order to recruit educated people into public sector jobs, these employees have to be compensated for their investment in education,[13] and thus one would expect that, because government workers are more educated, on average, than private sector employees, they should be paid more, on average, than private sector employees.[14] Similarly, one should also take account of the fact that, on average, public employees work fewer hours and currently have more years of work experience than private sector employees. Finally, although theoretically there should be no difference in compensation based on gender, race or ethnicity, historically women and minority groups have done better in public employment. It is at least interesting to control for systematic differences between private and public compensation based on these factors, although in this case lower wages in the private sector may be an indicia of discrimination based on gender or race.

TABLE 1: Characteristics of Private, State and Local Employees (2008 and 2009)

	Private	State	Local	State & Local
Number (Millions)	**103.2**	**6.0**	**10.7**	**16.7**
Education (%)				
Less Than HS	**8.5**	**1.9**	**2.8**	**2.5**
High School	**31.1**	**17.9**	**21.1**	**19.9**
Some College	**30.6**	**27.1**	**26.5**	**26.7**
College Degree	**20.9**	**27.5**	**27.4**	**27.4**
Adv Degree	**8.9**	**25.6**	**22.3**	**23.5**
Annual Hours Worked*	**2197**	—	—	**2156**
Median Age (Years)	**40**	**43**	**44**	**44**
Women (%)	**46.2**	**59.1**	**60.8**	**60.2**
Black (%)**	**9.6**	**13.4**	**11.5**	**12.2 (est)**
Hispanic (%)**	**17.1**	**8.3**	**10.8**	**9.8 (est)**

Sources: John Schmitt, The Wage Penalty for State and Local Government Employees, Center for Policy Research, 3, tbl. 1 (May 2010) (Analysis of CEPR extract (version 1.5) of 2009 CPS ORG; *Jeffrey Keefe, Debunking the Myth of the Overcompensated Public Employee, Economic Policy Institute, Briefing Paper #276, at 10, tbl. 5 (Sept 15, 2010) (analysis of 2009 CPS data for private and public employees); ** Keith A. Bender & John S. Heywood, Out of Balance? Comparing Public and Private Sector Compensation over 20 Years, Ctr. for State & Local Gov't Excellence, Nat'l Inst. on Ret. Sec. 7, tbl. 1 (Apr. 2010) (2008 CPS data).

Second, the state is a relatively large employer, and large employers are good at bearing risk because they have a large number of employees over which risk can be pooled and they enjoy economies of scale in the coverage of risk.[15] As a result, large employers can more efficiently offer benefits such as health insurance and pensions that insulate employees from risk, and it is predictable that benefits would constitute a larger percent of the employees' compensation package for large employers like the state.[16] Because of its relative insulation from market fluctuations and its high degree of credit-worthiness, the state is a particularly good risk-bearer, even among large employers. Thus it is predictable that, even in comparison with other large employers, the state would offer to bear or insure employee risk through the provision of various benefits in exchange for relatively lower wages. Accordingly, one would expect that the typical public employee compensation package would include a higher percentage of compensation in benefits such as healthcare and pensions, and a lower percent in up front wages, in comparison with the compensation packages of typical private employees.[17]

Third, the demand for government services is more predictable than the demand for most private businesses and thus, as an employer, the state probably does not place as high a premium on having flexibility to lay off employees as do private businesses. A rational state would want to maintain public employment in hard economic times as a counter-cyclical check against recession.[18] Indeed, the demand for many government services *increases* in hard economic times so a state might actually want to employ *more* workers rather than fewer when the economy goes bad. As a result, one would expect that, rationally, the state would want to offer job stability to employees in exchange for lower wages, and one would expect that state employees would enjoy greater job security than comparable private sector employees.[19] Indeed, historically, the necessity of protecting valuable state employees and their positions from political cronyism or patronage has required strict protection under civil service laws.[20]

Thus, even in a competitive labor market, without unions or political advocacy, one would expect that public employee compensation, including the value of both

wages and benefits, would on average be higher than that for all private employees (because of the greater average educational requirements of public employment jobs), but that the compensation package for public employees would include relatively lower wages and higher benefits, including job security, than that for private sector employees. Simple analyses that assume that any difference between the compensation packages of public and private employees in either amount or wage and benefit mix is a sign of government waste and inefficiency and political favoritism are simply wrong.[21]

III. PUBLIC EMPLOYEES AND THE TWO VIEWS OF UNIONS AND COLLECTIVE BARGAINING IN ECONOMICS

A. Public Employee Unions as Labor Cartels and Special Interest Groups

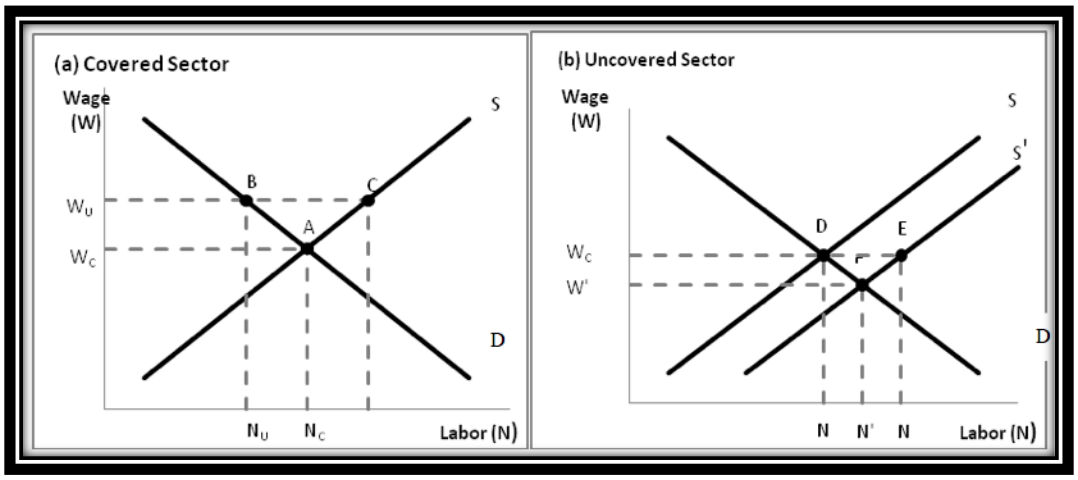
The simple economic analysis of unions, in either the private or public sector, is that they are labor cartels that impose on employers wage demands and other terms and conditions of employment that are both inefficient and inequitable.[22] Under the simple neo-classical analysis, such labor cartels cause inefficient production and consumption, unemployment and a displacement of workers from organized work to unorganized work, depressing wages there. They are also inequitable because employee wage increases come at the expense of consumers or taxpayers who are not necessarily any wealthier than public employees.

This simple analysis is presented in Figure 1. Figure 1(a) represents the organized labor market where the vertical axis measures the employees' wages, the horizontal axis measures the number of full-time employees employed, the solid downward sloping curve labeled D represents the employers' labor demand curve, and the solid upward sloping curve labeled S represents the employees' labor supply curve. Figure 1(b) represents the unorganized labor market, with analogous demand and supply curves. Prior to the entry of the union, both the organized and the unorganized markets are in equilibrium with a competitive wage Wc, a competitive level of employment Nc, and supply equals demand (S = D).[23] Under the traditional analysis, when the union organizes a sufficient number of employees in the relevant product market, it imposes a monopoly wage on the employers in the organized market Wu. Barriers to entry prevent the organized employers from replacing the employees,[24] and the employer responds by moving up his demand curve, reducing employment from Nc to Nu. The employer accomplishes this decrease in employment by reducing production and substituting capital for labor in the production process, resulting in "production inefficiency."[25] The higher union wage also results in

unemployment because more workers (Ns) would like to work at the union wage than the employers are willing to employ (Nu). As shown in Figure 1, some of these workers (Nc – Nu) seek employment in the unorganized labor market shown in Figure 1(b), pushing out the labor supply curve in that market from S to S′ and depressing wages from Wc to W′c.[26] Moreover, the decrease in production by the organized firms and the increase in the organized employees' wage results in an increase in the product price to the consumer or taxpayer. This results in "consumption inefficiency" because the consumers or taxpayers will now buy too little of the good relative to other goods.[27]

Finally, critics argue that public sector unions use political pressure to maintain the product market monopoly and pressure public employers to accede to union demands. Drawing on public choice theory, they argue that public employees are a narrow interest group that can gain personal benefits at the expense of the larger electorate.[28]

1. FIGURE: The Simple Neoclassical Model of Unions and Collective Bargaining



Based on the above analysis, conservatives argue that public employee unions impose wages and benefits that are higher than those enjoyed by comparable private sector employees who are not organized. These higher wages and benefits raise the cost of government services and cause inefficient production and consumption. These higher wages and benefits are also inequitable because they come at the expense of taxpayers who may not be as wealthy as the public employees. Moreover, public employee collective bargaining undermines our democratic government by establishing a special interest group with an interest in gaining wages and benefits at the expense of ordinary taxpayers. These special interest groups undermine the working of our democratic government because

they have a concentrated interest in rent-seeking at the expense of the larger electorate's interest in the efficient provision of government services. As a solution to these problems conservatives have argued that we should prohibit collective bargaining in the public sector (and in the private sector too).[29]

Even before we get to the empirical question of whether public sector employees, and in particular organized public employees, are over-paid, there are some logical objections that can be raised to the conservative account. It seems a gross exaggeration to say that public sector unions in the United States establish a labor cartel that dictates wage and benefit increases. Even before the recent round of state statutes limiting or doing away with collective bargaining rights, only thirty-four states had comprehensive public sector collective bargaining laws, and only eight had statutes allowing any public employees even a limited right to strike.[30] There is no right to strike among federal employees,[31] and strikes in violation of this stricture have met with wholesale termination of the striking federal employees.[32] For the vast majority of American public sector employees, if there is any right to collectively bargain, it is more a right to consultation with a possible resort to neutral fact-finding or arbitration on disputed topics. The primary benefits to American public employees from collective bargaining are their association with other employees with similar interests, a First Amendment right, and the opportunity to have signed contracts on their terms and conditions of employment that are enforceable for a period of time, generally two to four years—most often two.

B. Employee Voice at Work and in Government

The neoclassical analysis of unions as labor cartels is logically incomplete and far too simple for such a complex phenomenon. The basic neoclassical analysis ignores the benefits of efficient negotiations between the union and the employer and the possibility of employer monopsony power. It would be irrational for the union to dictate wages while the employer sets employment; instead, the parties should rationally bargain over both wages and employment to reach Pareto optimal agreements.[33] In the case of employer monopsony power, collective bargaining can move the parties to a more efficient level of wages and employment. Moreover, it has been persuasively argued that collective bargaining can raise efficiency by providing a role for employee voice in the production process and the negotiation and enforcement of contract terms.[34] Employees, especially skilled professional employees like many public employees, can provide useful input into the production process and act as useful monitors of management performance in the workplace. Unions can also be useful in negotiating efficient contract terms over public goods in the workplace and the enforcement of efficient

deals between the employees and the employer over time. Finally, public employee unions can be useful in the political process, representing the benefits of the programs in which they work and the under-represented perspective of working Americans in general. As a result, far from simply being an exercise in rent-seeking, the participation of public sector unions in the political process makes an important contribution to pluralism in our democracy.[35]

1. Pareto Optimal Bargaining

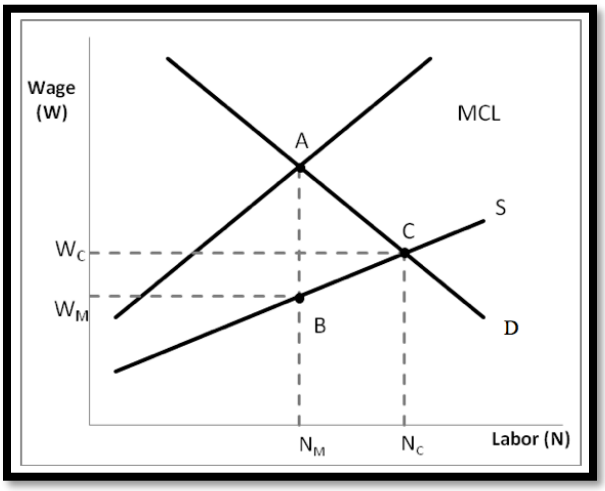
Unless one wants to assume that unions are entirely indifferent to the unemployment of their members, the simple depiction of collective bargaining in the neoclassical model in which the union sets the wage and the employer responds by setting employment will not be Pareto optimal for the parties. Although the employer's labor demand curve gives the profit maximizing response to a market increase in wages, if the wage increase results from the formation of a union that can bargain over both wages and employment, the employer and union can negotiate a wage and employment agreement that specifies a higher level of employment and a lower wage that both the employer and union will prefer to the employer's labor demand response.[36] Indeed, if one assumes that the parties bargain to maximize the monetary value of rents and productivity increases due to unionization, one can demonstrate that the parties will seek to minimize the impact of the union on product price and firm employment levels.[37]

2. Employer Monopsony Power

Moreover, if the employer enjoys monopsony power in the labor market, it can be shown that the formation of a union can actually move the employer to a more efficient wage and level of employment through collective bargaining.[38] An employer exercises monopsony power when it employs such a significant share of the labor in the relevant labor market that it realizes that its wage policies affect the market wage.[39] When an employer monopsony exists, the employer no longer has to accept the market wage as given, but instead realizes that it can drive down the market wage by employing fewer employees. As characterized in Figure 2, which shows the relevant labor supply curve (S) and the employer's labor demand curve (D) and marginal cost of labor curve (MCL), the monopsonistic employer maximizes profits by employing fewer employees (Lm) and driving the wage down from Wc to Wm.[40] The actions of the monopsonist in decreasing employment and wages results in production inefficiency because the monopsonist employs less than the efficient amount of labor in the production process. A union can solve this problem because, by fixing the wage for labor at a given rate, it prevents the monopsonist from driving down wages by employing fewer workers. Because the monopsonist can no longer drive down the wage by cutting

employment, the monopsonist no longer has incentive to employ fewer than the efficient number of employees.[41] The problem of the negotiation of a wage between a monopsony employer and a monopoly union represents an indeterminate bargaining problem, but if one assumes the employer and the union seek to maximize the monetary value of the rents from their endeavors, they will bargain to the competitive wage (Wc) and the competitive level of employment (Lc).[42] Thus, when facing employer monopsony power, monopoly unions can increase employment and economic efficiency.

3. FIGURE 2: A Monopsonistic Labor Market



4. Productivity Enhancing Effects of Unions

There are also a variety of economic theories under which unions and collective bargaining can increase the productivity of the employees and the efficiency of their terms and conditions of employment.[43] First, unions can allow employees to make useful contributions in organizing the production process and monitoring the work of administrators and managers.[44] Employees have an obvious interest in the success of their employer and the productivity of their work. Moreover, employees, and in particular skilled or educated employees, have important knowledge of the production process that is useful in planning production to make the enterprise more successful.[45] Discussions with collective representatives in a union setting are more likely to be productive than individual discussions because employees will have less fear of retaliation for reporting administrative failures.

Second, unions help to promote the negotiation of efficient contract terms. Many terms and conditions of employment are public goods in that they are the same for

all employees and an individual employee cannot negotiate improvements without benefiting others. Examples include: common hours of work, the common method of evaluation, and the general form of medical or pension benefits.[46] Because improvements in these public goods are not exclusive, individual employees have too little incentive to negotiate for them, resulting in a contract for employment that includes too little of these benefits. Unions help to solve this problem by giving the workers a collective voice through which they can more accurately represent their preferences on such matters.[47] There are also terms and conditions of employment for which there are important information costs and asymmetries, for example, health risks on the job and the expected value of health and pension benefits. Individually, it is very costly for employees to collect all of the information necessary to negotiate efficient terms with respect to these conditions of employment.[48] Unions help solve this problem by hiring experts and taking advantage of economies of scale in collecting and maintain the necessary information.[49]

Third, unions help promote the efficient enforcement of express or implicit contracts. It is often efficient for the employer and employees to make agreements that are enforceable over considerable periods of time, for example health and pension benefits. Moreover, in both the private and the public sectors, it is common for employers to pay employees less than their marginal product early in their careers and more than their marginal product later in their careers.[50] This deferred compensation serves important purposes of compensating employees for investments in human capital and minimizing employer monitoring costs.[51] Unfortunately, such deferred compensation creates incentives for employers to act opportunistically and fire employees before they receive their deferred wages. Agreements to defer a portion of compensation often remain implicit because of the costs of negotiation and enforcement.[52] However, they can also be enforced by express terms that discourage the discharge of employees later in their careers, for example, seniority agreements and just cause clauses. Unions facilitate the enforcement of such long-term implicit contracts by protecting employees from employers' opportunistic behavior with collective action, seniority rules, just-cause provisions, and arbitration provisions.[53]

Finally, some argue that unions raise productivity by promoting the adjustment of working conditions through the efficient expression of a collective voice rather than costly exit.[54] In a competitive labor market, a worker's primary mechanism for expressing dissatisfaction with working conditions is to take another job or "exit" the firm. Individual bargaining over conditions of employment is difficult due to the free-rider effect previously discussed and because workers do not want to be identified by their employer as "troublemakers." However, exit is an

inefficient mechanism by which to encourage changes in working condition because it does not communicate what was wrong with the job and because it imposes search and retraining costs on both the employee and the employer. Unions help solve this problem by giving workers a collective voice through which they can express dissatisfaction with working conditions without the problems of free riding or employer retaliation. Besides being a more effective method of expressing dissatisfaction with working conditions, the collective voice also saves money by reducing the number of workers who leave jobs and, thus, the amount of search and retraining costs.

5. Unions as an Important Part of a Pluralist Democracy

Last but not least, many have argued that free labor unions are an important part of democratic pluralism. Not only do free people, including public sector employees, have the right to organize to petition the government, in a society where the interests of capital are so well organized and financed, it is imperative that workers organize to represent their interests in the legislature. The services provided by public employees are in direct competition for public dollars with alternative state purchases and tax breaks for special interests and the public at-large.[55] These competing interests are well organized and funded in their lobbying efforts, including advocates for lower taxes and smaller government in general.[56] To attempt to silence public employees or hinder their collective public representation[57] will bias future debate over the merits of the services public employees provide.

The fact that public employees have particular interests as employees of the state should not disqualify them from collective redress to the government, unless we are also willing to disqualify the other lobbyists with direct interests—almost every single lobbyist in Washington and our state capitals. Indeed, it is probably important that public employees address their particular interests before the government because they have direct experience with the benefits their services provide to society and special expertise and experience on how those services can best be provided and efficiently administered. The fact that these employees also have a personal interest in higher wages and benefits is completely transparent and the compensation they receive is a matter of public record and easily accounted for in the public debate.

Finally, public employees also share interests with private sector employees in the general organization of the employment relationship, and society, and these interests require representation before the government. To disadvantage public employees in the political debate is to further disadvantage worker interests

relative to the interests of management and capital in the formulation of our laws and government policies. Even outside of the legislative process, it is important to have employee organization for the efficient evolution of legal rules and social norms. Organized groups have "repeat player" advantages and can better litigate and lobby to establish precedents and social norms.[58] Employers are certainly organized to represent their interests in the legislature and courts, including the court of public opinion, and unless employee interests are similarly organized in unions, laws, precedents and social norms will evolve in favor of employer interests and against employee interests.[59]

6. The Positive View of Public Sector Unions and Collective Bargaining

Based on the analysis of unions as a collective voice, progressives argue that public employee unions are important in ensuring adequate compensation for public employees, an adequate level of funding for government services, the efficient provision and administration of government services and a voice for employee concerns in the legislative process. Thus they would predict that, although organization would increase public employee wages and benefits, that compensation would be commensurate to the compensation enjoyed by comparable private sector employees, although a larger portion might be received in the form of benefits to take advantage of the government's advantages as an insurer. They would also predict that states with public employee organization would have better funded and administered systems for the provision of government services. Finally, they would argue that the legislative activities of public employee unions help balance the lobbying activities of other groups providing a more balanced perspective on the costs and benefits of government programs and providing particular expertise, all of which would tend to improve the outcomes of the legislative process.

Even in an ad hoc analysis, there would seem to be some force behind these arguments. First, the government would seem to enjoy monopsony power over a broad array of public employees. Empirical work supports the notion that the government enjoys monopsony power over school teachers and pricing power with respect to other professionals it commonly employs.[60] If this is the case, the cost-minimizing strategy for the state in providing public services would be to choke back employment and wages. Even where the government does not enjoy monopsony power in a labor market, it may acquire the ability to act opportunistically with respect to its employees. Any public employee who invests a significant portion of his or her career in acquiring human capital specific to the workings of that state would seem vulnerable to later opportunistic behavior by the employer. No other employer will reward the public employee for that investment.

In light of this economic power over its employees, the political nature of the state takes on a different light. State government can be used as a means for taxpayers or consumers and special interests to take advantage of public employees for short-term gain by reneging on promises that have to be enforced over time. For the efficient enforcement of long-term agreements with the state it is essential that such agreements cannot be undone with every change in political power.

IV. EMPIRICAL EVIDENCE ON PUBLIC SECTOR UNIONS AND COLLECTIVE BARGAINING

A. Wages and Benefits

There have been a number of recent empirical studies comparing wages and benefits in the private and public sector. These studies take two different strategies to account for the differences between private and public employees in education and other demographic factors. One strategy is to compare "similar people" by comparing employees with similar educational levels and other demographic factors through comparing means for select populations or through regression analysis.[61] Alternatively, an analyst might compare "similar positions" by comparing what people get paid in the private and public sector for doing the same job.[62] The first strategy is far more common because there are many occupations that are not well represented in both the private and public sectors and regression analysis allows a fairly sophisticated accounting of compensation differences between private and public employees.[63] Fortunately, the two methods yield similar results.[64]

Historically, the concern among economists and policy analysts has been whether public pay was too low rather than too high. In evaluating the early empirical evidence, Richard Kearney concluded that "[u]ntil the rise of [public sector] unions . . . in the 1960s and 1970s, public employees were consistently underpaid relative to similar workers in the private sector."[65] With the advent of significant public employee representation in the 1970's, economists became very interested in the comparability of private and public wages and benefits and began trying to compare the wages and benefits of workers in similar public and private sector jobs.[66] The results of studies using this methodology varied, depending on the sample used and the examined worker characteristics. Dale Belman and John Heywood examined variation between private and public employees across seven states using Current Population Survey data and found that local government employees earned less than comparable private sector workers in six of the states and state employees earned less than comparable private sector workers in three of the states.[67] George Borjas analyzed private and public sector earnings from

the 1960s to 2000 and found that public sector employees suffered lower pay than comparable private sector employees; In 2000, men earned about 6 percent less in the public sector and women earned about the same in the public sector as the private sector when adjusted for demographic characteristics.[68] In a particularly detailed analysis of different worker characteristics, Sang-Hyop Lee used National Longitudinal Survey data to find that female state employees earned 4 percent less than comparable private employees and male state employees earned 9 percent less than comparable private employees.[69] Greg Lewis and Chester Galloway used detailed census data to examine pay differentials in all fifty states and found that both state and local employees were paid less than private employees in 44 states.[70] They tentatively concluded that "most [state and local governments] pay less than private firms in the same state for similar workers."[71] Finally, in perhaps the most complete study comparing pay between occupations in the private and public sectors, Michael Miller found that private industry paid better for virtually all professional and administrative jobs, but that for technical and clerical job levels and blue-collar workers the findings were mixed.[72] Miller's results suggest that at higher skill levels private employees enjoy higher pay, but that at low skill levels public employees enjoy higher pay.

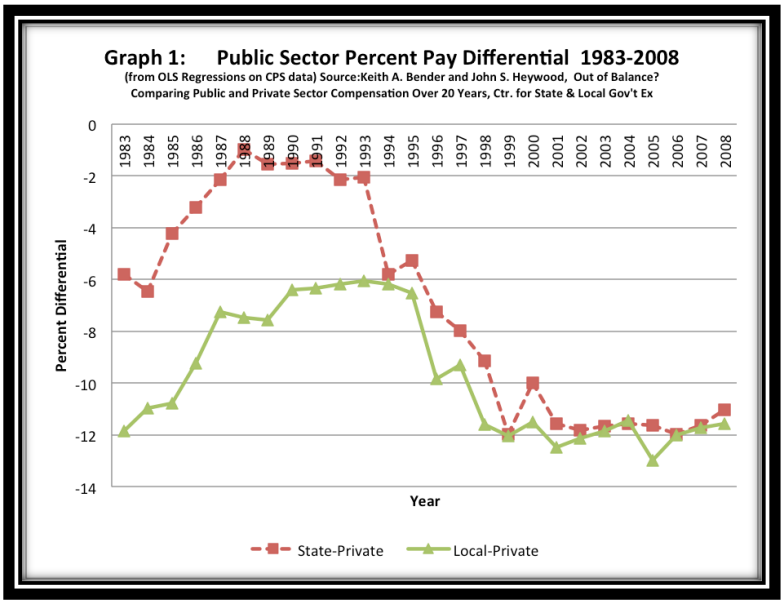
Perhaps the best of the most recent studies on the subject was conducted by Jeffrey Keefe.[73] Keefe used Current Population Survey data (wages) and Employer Costs of Employee Compensation data (benefits) for the year 2009 to compare private and public employee compensation across educational levels and size of firm while controlling for a variety of worker characteristics including hours worked, education, experience, organizational size, gender, race and disability. He found that public employees are paid wages that are 11.47 percent less than those paid comparable private sector employees.[74] Public employees do indeed enjoy benefits that are a larger share of total compensation (34.1 percent) than the average private sector employer, but only marginally larger than private employees with 500 employees or more (33.1 percent).[75] After accounting for public employees' better benefits, Keefe found that they still were paid total compensation packages on average worth 3.74 percent less than comparable private sector employees.[76] Keefe found that the difference between private and public sector compensation varied according to the employee's level of education with public employees with just a high school education or "some college" earning more than their private sector counterparts while public employees with a bachelor's degree or an advanced degree earning considerable less.[77]

Keith Bender and John Heywood have recently confirmed Keefe's general findings on a national basis by examining data from several individual states over a period encompassing almost last three decades.[78] Using Current Population Survey

data from the years 1983 to 2008, Bender and Heywood found that the public/private wage differential for state employees nationally was about -6% in 1983, closed to a little more than -1% in the early 1990's, but has since expanded to a little more than -11% in the 2000s.[79] The public/private wage differential for local employees showed a similar pattern of first narrowing and then widening; however local government employees were consistently paid even less than state employees. Bender and Heywood examined CPS on an individual state basis for the states of California, Texas, New York, Pennsylvania, Illinois, Michigan, and Florida, and found similar patterns, although for some states the public/private wage differential was sometimes positive indicating that the public employees were then paid slightly more than their private sector counterparts.[80] The states where public employees fared better over the examined period than the national public/private wage differential of -11.4 percent were Pennsylvania (-4.5 percent), Florida (-4.8 percent), New York (-7.0 percent), California (-9.8 percent) and Michigan (-10.1 percent). In Illinois (-12.5 percent) and Texas (-16.6 percent), they fared worse than the national average.[81]

Keefe has also done studies using Current Population Survey data and Employer Costs for Employee Compensation data to compare public and private wages and benefits in particular states for the year 2009. After controlling for education, hours worked, experience, organizational size, gender, race and disability, Keefe found that New Jersey public employees received 2.25 percent less in wages and 2.43 percent more in total compensation than comparable private sector employees in that state, with neither figure being statistically significant;[82] California public employees received a statistically significant 6.36 percent less in wages and a statistically insignificant 2.29 percent more in total compensation than comparable private sector employees in that state,[83] and Wisconsin public employees received 4.8 percent less in total compensation than comparable private sector employees in that state.[84]

1. GRAPH 1



Based on the above analyses it seems safe to say that, although union density is much greater in the public sector than in the private sector in the American economy,[85] public employee unions have not raised the average total compensation for public employees to a position of parity with the average total compensation of comparable private sector employees. But what has been the impact of public sector unions on their members' wages and benefits in comparison with organized private employees and unorganized private employees? Although there is not as much recent empirical work on these questions as there is on the public/private pay differential,[86] the work that does exist seems to suggest that public sector unions raise both their members' wages and benefits by a modest amount, but not by as much as private sector unions raise their members' wages and benefits.[87] Also like their private sector counterparts, public sector unions tend to have a leveling impact on wages, reducing income disparities between men and women and majority workers and minority workers, and also reducing differences between high and low paid employees.[88]

Studies have been done on the impact of collective bargaining on particular types of public employees, and public employees in general. Much attention has been paid to the impact of collective bargaining on K-12 teachers' salaries and benefits because teachers are a high percent of government employees and often in the public eye. The available studies seem to indicate that the mean wage effect of teachers' unions was about 5 percent in the 1960s and about 7 percent in the 1970s – 1990s.[89] Despite this, teachers' salaries barely kept pace with inflation and rose less than other full-time employees during the boom years of the

1990s.[90] Less work exists on Police and Firefighters, but the work that does exist suggests that organized police enjoy a salary advantage of 4 percent to 8 percent, which peaked about 1977 and has declined since then.[91] With respect to state employees, early work shows a combined wage and benefits advantage for union workers of 4 percent,[92] while more recent work places the advantage at about 7 percent.[93] After surveying the relevant work, Richard Kearney concluded that, although the union advantage in the public sector has varied over time and among occupations and geographic regions, but "[t]he best estimate of the overall union effect [in the public sector] is probably 5 to 6 percent."[94] This is well less than the usual 10-15 percent compensation advantage attributed to unions in the private sector.[95] Given these findings, it seems that, on average, the most that one could reasonably expect of collective bargaining in the public sector is that it would help public employees reach a rough parity in compensation with private sector employees.

B. Productivity

As previously discussed there are divergent views on the impact of unions on the productivity of public employees and the efficiency of the agencies which employ their members. Detractors argue that unions impose high wages causing inefficient production and consumption.[96] They also argue that unions impose inefficient work rules and interfere with management's flexibility in determining how to undertake production.[97] Supporters of collective bargaining argue that higher wages attract superior workers and decrease turnover costs, increasing productivity. Moreover they argue that public sector unions sometimes counter employer monopsony power and can raise efficiency by raising wages and employment closer to efficient levels.[98] Supporters also argue that unions provide employees with a collective voice so that they can act as an effective monitor of management, make positive contributions to improving productivity, negotiate and enforce efficient contract terms and further reduce turnover.[99] These arguments would seem particularly true where the employees are professional employees well trained in the conduct of their craft, for example teachers. Much less empirical work has been done on these questions, but there are some relevant empirical findings to discuss.

The primary argument that unions promote inefficiency is that unions raise wages to inefficient levels, thus causing inefficient production and consumption. Since public sector unions typically achieve only a rough parity with comparable private sector workers in the total compensation their members receive, it would seem that there is little, if any, inefficiency caused by public sector union wages. Indeed, Richard Kearney has observed that, at least among teachers, public sector unions

have been more concerned with maintaining or increasing employment than increasing wages.[100] This behavior seems more consistent with the argument of proponents of collective bargaining that public sector unions bargain with a monopsonist employer and can increase efficiency by increasing both wages and employment.[101] Increasing the number of teachers lowers the student teacher ratio, a primary determinant of the effectiveness of our schools.[102] Detractors might argue that our schools employ too many teachers, and unions make this problem worse, but this argument is both increasingly difficult to make, and I have yet to see it cogently articulated. Thus, by trying to maintain or increase teacher employment it would seem that teachers' unions seek to improve school efficiency.

On the question of whether public sector unions impose inefficient work rules, the current debate has been replete with numerous anecdotes but very short on hard empirical evidence.[103] Detractors of collective bargaining have argued that unions decrease efficiency: by negotiating seniority and just cause provisions which limit the employer's discretion in discharging or laying off employees; resisting merit pay provisions that could encourage employee productivity; and by resisting technological or other changes that impact employment.[104] For example, in the Indiana debate over teacher collective bargaining, Republicans argued that seniority rules in collective agreements were inefficient because they required schools to lay off meritorious younger teachers and retain less meritorious senior teachers.[105] Furthermore, they argued that merit pay was necessary to encourage increased teacher productivity.[106] As a result, the legislature adopted, and Governor Mitch Daniels signed, a statute prohibiting seniority provisions and requiring merit pay.[107] But these arguments ignore that there are costs, as well and benefits to such provisions. Seniority provisions are common in both the public and private sectors, even among unorganized employers. This is because seniority provisions allow employers to make credible promises to pay deferred wages that promote efficient monitoring and efficient employee investment in human capital.[108] Without seniority provisions, future school administrators will be tempted to meet short-run budgeting constraints by reneging on long term implicit contracts and laying off senior workers, not because they aren't good employees, but merely because their wages are higher because they include deferred compensation. While such opportunism may meet short term budgeting demands, in the long-run it will discourage good teachers from entering the profession. Although some use of merit pay may be useful, the idea of merit pay was rejected by School Boards nation-wide in the 1950s, well before teacher organization, because it was subject to racial and gender discrimination and favoritism.[109] There are costs as well as benefits to administrative discretion and it is not an easy question whether greater administrative control will increase

or decrease public sector productivity. Whether restrictions on administrative discretion decrease or increase public employee productivity and the efficiency of their agencies is an empirical question.

Despite the difficulty of measuring productivity in service industries,[110] several scholars have tried to measure the impact of unions on productivity in the public sector. One of the few straightforward measures of productivity in services is the mortality rate of heart attack patients in hospitals. In a 2004 study Michael Ash and Jean Seago found that unionization in public hospitals led to significantly lower mortality rates.[111] Consistent with this, in an earlier study Charles Register found that unionization lead to increased productivity in public hospitals based on more mundane measures of patient care.[112]

The effect of unionization on teacher productivity has been fairly extensively studied, primarily using student test scores as the indicator of productivity. The results have been mixed. In one of the earliest studies, Randall Eberts and Joe Stone found that, after correcting for various factors, unionized public schools enjoyed student test scores that were 3 percent higher overall, and 7 percent higher for average students.[113] These positive results were first hotly contested by Michael Kurth,[114] but then supported by later rework of the same data by Howard Nelson and Jewell Gould.[115] In her 1996 study, Caroline Hoxby found that teachers' unions increased school budgets and improved the student-teacher ratio, but had no positive impact on student test scores.[116] Both before and after Hoxby, several studies found positive effects on teacher productivity from unionization,[117] while others have found negative effects.[118] If any pattern emerges from this collection of results, it seems to be that the unionization of teachers increases the test scores of average students, but has little effect on the test scores of the highest and lowest performers in schools, and may even hurt the performance of low performing students.[119] It is also quite plausible that, as in the private sector, the impact of unionization on productivity in the public sector depends on the attitude of the parties. If management and the union are recalcitrant and fight, productivity goes down, but if the parties negotiate and work cooperatively, productivity can increase.[120]

V. CONCLUSION

These have been contentious times in the long-running debate over the merits of public sector collective bargaining. After several decades in which the question seemed largely settled in favor of a system of collective consultation with recourse to neutral mediation, fact-finding or arbitration (but largely without a right to strike) at the state and federal level, the question has now been reopened in the

debate over how to respond to the recent decline in private employment prospects and government revenue. Although the detractors of public sector collective bargaining have alleged that this institution has resulted in public sector wages and benefits far out-pacing private sector compensation and significant inefficiencies in government administration, neither of these claims seems warranted by the existing empirical literature. When taking into account important differences between the public and private sectors, including public employees' higher education levels than their private sector counterparts, recent empirical work suggests that collective bargaining has allowed public employees to, at best, keep pace with private sector compensation, although, predictably, public sector employees take a larger share of their compensation in benefits. Similarly, although there is much less good recent work on the subject, the existing empirical research makes it clear that unions typically do not have substantial negative effects on public employee productivity, and may even raise productivity in some cases. Moreover there is evidence that public sector unions can have a beneficial impact on the programs in which their members work in highlighting the benefits of those programs and ensuring more adequate funding. Although the positive view of public sector collective bargaining that previously prevailed in American public policy is not always strictly true, it seems to much more closely track the available empirical work than the older negative view that has since reemerged in American state politics.

---

[1] *See* JOSEPH E. SLATER, PUBLIC WORKERS: GOVERNMENT EMPLOYEE UNIONS, THE LAW, AND THE STATE, 1900-1962 (2004); Martin H. Malin, *The Paradox of Public Sector Labor Law*, 84 IND. L. J. 1369 (2009).

[2] *See, e.g.*, *McNatt v. Lawther*, 223 S.W. 503 (Tex. 1920)(government's freedom of contract allows state to prohibit public employee organization), *superseded by statute as stated in City of Round Rock v. Rodriguez*, 317 S.W.3d 871 (Tex. App. 2010), *review granted* (Aug. 26, 2011); *City of Springfield v. Clouse*, 206 S.W.2d 539 (Miss. 1947)(public sector collective bargaining constitutes an unconstitutional delegation of governmental power), *overruled by Independence-Nat. Educ. Ass'n v. Independence Sch. Dist.*, 223 S.W.3d 131 (Mo. 2007). Although American courts now generally accept that it is not unconstitutional for a state or locality to engage in collective bargaining with its employees, it is also generally accepted that there is no constitutional right on the part of those employees to resort to collective bargaining. *See e.g.*, *Smith v. Ark. St. Highway Employees Local 1315*, 441 U.S. 463 (1979); *Seattle High Sch. Chapter No. 200, Am. Fed'n Teachers v. Sharples*, 293 P. 994(Wash. 1930); *Perez v. Board of Police Com'rs of*

City of Los Angeles, 178 P.2d 537 at 545–46 (Cal. 1947). As a result, in the United States, whether public employees have a right to collectively bargain, and the form of that right, is largely a matter of federal and state legislation. *See* SLATER, *supra* note 1, at 82-95.

[3] *SEE* MILTON FRIEDMAN & ROSE FRIEDMAN, FREE TO CHOOSE: A PERSONAL STATEMENT 228–47 (1980); Richard A. Epstein, *A Common Law for Labor Relations: A Critique of the New Deal Labor Legislation*, 92 YALE L.J. 1357, 1365–67, 1382 (1983); Henry C. Simons, *Some Reflections on Syndicalism*, 52 J. POL. ECON. 1, 12 (1944).

[4] This right is spelled out in Article 23 of the United Nations Universal Declaration of Human Rights, Universal Declaration of Human Rights, *signed* Dec. 10, 1948, G.A. Res. 217A, U.N. Doc A/180, at 71 (1948) and in other international declarations of which the United States is a signatory, (such as the 1998 International Labour Organisation's Declaration on Fundamental Principles and Rights at Work, ILO Declaration on Fundamental Principles and Rights at Work, International Labor Conference, 86th Sess. (June 1998) *available at* http://www.ilo.org/declaration/thedeclaration/textdeclaration/lang–en/index.htm (last visited Oct. 15, 2012).

[5] See Catherine Phillips, Note The Lost Democratic Institution of Petitioning: Public Employee Collective Bargaining as a Constitutional Right, 10 FIRST AMEND. L. REV. 652, 682-84 (2012).

[6] See Clyde W. Summers, Public Employee Bargaining: A Political Perspective, 83 YALE L.J. 1156, 1159–61 (1974); Matthew Finkin, Address at the University of Athens, Greece: Unions and Future of Democracy in the United States (Mar. 2010).

[7] David Lewin, *Public Employment Relations: Confronting the Issues*, 12 INDUS. REL. 309, 318-21 (1973).

[8] "Without union efforts, workers and low-income groups would have little organized political support, and their interests would be more vulnerable to the pressure of other powerful groups." DEREK BOK & JOHN DUNLOP, LABOR AND THE AMERICAN COMMUNITY 424 (1970).

[9] *See* Summers, *supra* note 6, at 1159-60.

[10] *See* Bok & Dunlop, *supra* note 8, at 424; John Burton & Charles Krider, *The Role and Consequences of Strikes by Public Employees*, 79 YALE L. J. 418, 429-32 (1970); Lewin, *supra* note 7, at 318-21.

[11] John Schmitt, *The Wage Penalty for State and Local Government Employees*, Center for Policy Research 4 (May 2010), *available at* http://www.cepr.net/index.php/publications/reports/wage-penalty-state-local-gov-employees/.

[12] Keith A. Bender & John S. Heywood, *Out of Balance? Comparing Public and Private Sector Compensation over 20 Years*, Ctr. for State & Local Gov't Excellence, Nat'l Inst. on Ret. Sec. 6–7 (Apr. 2010), *available at* http://www.slge.org/vertical/Sites/%7BA260E1DF-5AEE-459D-84C4-876EFE1E4032%7D/uploads/%7B03E820E8-F0F9-472F-98E2-F0AE1166D116%7D.PDF (only 22.6 % of private sector workers have at least a bachelor's degree, while 47.9% of public sector workers have at least a bachelor's degree).

[13] Craig Olson, *The Battle Over Public Sector Collective Bargaining in Wisconsin and Elsewhere*, EMP. POL'Y RES. NETWORK, 1 (2011), http://www.employmentpolicy.org/topic/402/op-ed/battle-over-public-sector-collective-bargaining-wisconsin-and-elsewhere.

[14] David Lewin et al., *Getting It Right: Empirical Evidence and Policy Implications from Research on Public Sector Unionism and Collective Bargaining*, EMP. POL'Y RESEARCH. NETWORK, LAB. & EMP. REL. ASS'N 4 (Mar. 16, 2011), *available at* http://www.employmentpolicy.org/sites/www.employmentpolicy.org/files/EPRN%20PS%20draft%203%2016%2011%20PM%20FINALtk-ml4%20edits. pdf. Studies that fail to take account of this fact fall subject to what is known as "Simpson's Paradox:" that although average compensation of all public sector workers is higher than the average compensation of all private sector workers, the public sector workers might be paid less at each level of educational achievement. Bender & Heywood, *supra* note 12, at 5.

[15] William E. Even & David A. Macpherson, *Employer Size and Compensation: The Role of Worker Characteristics*, 26 APPLIED ECON. 897 (1994).

[16] Keith A. Bender and John S. Heywood, *supra* note 12, at 15–16; Lewin et al, *supra* note 14, at 7. Benefits are also generally higher for more educated workers. Since public workers are generally more educated than private sector workers, this would also argue in favor of higher benefits for state employees. Keith A. Bender and John S. Heywood, *supra* note 12, at 15.

[17] Lewin et al, *supra* note 14, at 29-30.

[18] Matissa Hollister, *Employment Stability in the U.S. Labor Market: Rhetoric Versus Reality*, 37 ANN. REV. SOC. 305, 313-14 (2011).

[19] Lewin et al, *supra* note 14, at 4.

[20] For a discussion on state employees and patronage, see Bryan A. Schneider, *Do Not Go Gentle into that Good Night: The Unquiet Death of Political Patronage*, 1992 Wis. L. Rev. 511.

[21] For examples of poor analyses of public employee wages and benefits that are simply wrong, see Dennis Cauchon, *Benefits Widen Public, Private Workers' Pay Gap*, USA TODAY, Apr. 10, 2009, *available at* http://usatoday30.usatoday.com/money/workplace/2009-04-09-compensation_N.htm (failure to account for educational differences); Editorial Board, Squealing About the Income Gap, SUN JOURNAL, Oct. 1, 2009, *available at* http://www.sunjournal.com/node/287310 (failure to account for educational differences).

[22] See Friedman, *supra* note 3, at 228–47; Epstein, *supr*a note 3, at 1365–67, 1382; Simons, *supra* note 3, at 12.

[23] For the standard presentation of this analysis, see RONALD G. EHRENBERG & ROBERT S. SMITH, MODERN LABOR ECONOMICS: THEORY AND PUBLIC POLICY 350–60 (1982).

[24] Critics argue that, in the public sector, there is often a government maintained monopoly on the provision of government services. This monopoly protects union monopoly wages from being bid down by competition. James Sherk, *What Unions Do: How Labor Unions Affect Jobs and the Economy*, THE HERITAGE FOUND.: BACKGROUNDER 1 (May 21, 2009), http://www.heritage.org/research/reports/2009/05/what-unions-do-how-labor-unions-affect-jobs-and-the-economy.

[25] *See*. EHRENBERG & SMITH, *supra* note 23, at 360; BARRY T. HIRSCH & JOHN T. ADDISON, THE ECONOMIC ANALYSIS OF UNIONS: NEW APPROACHES AND EVIDENCE 21–22, 181 (1986).

[26] HAROLD W. DAVEY ET AL., CONTEMPORARY COLLECTIVE BARGAINING 306 (4th ed. 1982); Ehrenberg & Smith, *supra* note 23, at 353-57.

[27] *See* EHRENBERG & SMITH, *supra* note 23, at 360; Hirsch & Addison, s*upra* note 25, at 22, 181.

[28] DENNIS C. MUELLER, PUBLIC CHOICE III 472–96 (3d ed. 2003); NICK ADNETT & PETER DAVIES, MARKETS FOR SCHOOLING: AN ECONOMIC ANALYSIS 7-9 (2002).

[29] *See* Judith Davidoff, *Walker's Plan to End Bargaining Has Deep Roots in GOP*, THE CAP TIMES (February 23, 2011), http://host.madison.com/ct/news/local/govt-and-politics/article_b4b509b4-3ed0-11e0-b97e-001cc4c03286.html.

[30] KENNETH G. DAU-SCHMIDT, et al., LABOR LAW IN THE CONTEMPORARY WORKPLACE 84-85 (West 2009).

[31] See 5 U.S.C. § 7116(b)(7) (2006); Mark D. Roth & Jamison F. Grella, *First Line Defenders as Second Class Citizens: Collective Bargaining Rights for TSA Employees and National Security Make Good Bedfellows*, 1 Nat'l Sec. L. Brief 117, 122 (2010); Joseph A. McCartin, *Re-Framing US Labour's Crisis: Reconsidering Structure, Strategy, and Vision*, 59 Labour/Le Travail 133, 138 (2007), available at http://www.historycooperative.org/journals/llt/59/mccartin.html.

[32] Bernard D. Meltzer & Cass R. Sunstein, *Public Employee Strikes, Executive Discretion, and the Air Traffic Controllers*, 50 U. CHI. L. REV. 731, 762-88 (1983).

[33] An outcome is Pareto optimal, if none of the concerned parties can be made better off without making one worse off. Pareto optimality obtains in a deal between two parties when they have exhausted all efficient exchanges between them. George J. Borjas, Labor Economics, 428 (4TH ED. 2008).

[34] RICHARD B. FREEMAN & JAMES L. MEDOFF, WHAT DO UNIONS DO? 8-9 (1984).

[35] See Jacob S. Hacker & Paul Pierson, *The Wisconsin Union Fight Isn't About Benefits. It's About Labor's Influence*, WASH. POST, Mar. 6, 2011, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2011/03/04/AR2011030406264.html.

[36] See Kenneth G. Dau-Schmidt, *A Bargaining Analysis of American Labor Law and the Search for Bargaining Equity and Industrial Peace*, 91 MICH. L. REV. 419, 435–36 (1992).

[37] *Id.*

[38] *Id.* at 455–56.

[39] *See* DAVEY, *supra* note 26, at 307.

[40] The marginal cost of labor curve for the monopsony (MCL) lies above the labor supply curve. This is because the monopsonist realizes that purchasing additional labor drives up the wage; the marginal cost of additional labor for the monopsonist equals the increased wage it must pay for the additional labor plus

the increase in wages that must be paid to each previously purchased unit of labor. Because the height of the labor supply curve is equal to the wage at every level of employment, the marginal cost of the labor curve must lie above this curve. As depicted in Figure 2, the monopsonist maximizes profits by employing labor until the point where the marginal cost of labor equals the marginal benefit of labor as represented by the labor demand curve (Nm).

[41] When confronted by a union, the monopsonist faces a marginal cost of labor curve that is horizontal at the union wage from the origin until the labor supply curve and then rises above the labor supply curve.

[42] *See* DAVEY, *supra* note 26, at 308–09; *see also* W. Kip Viscusi, *Unions, Labor Market Structure, and the Welfare Implications of the Quality of Work*, 1 J. LAB. RES. 175 (1980).

[43] *See* FREEMAN & MEDOFF, *supra* note 34, at 7–11; HIRSCH & ADDISON, *supra* note 25, at 188; PETER KUHN, *Union Productivity Effects and Economic Efficiency*, 6 J. LAB. RES. 229 (1985); DONALD O. PARSONS, *The Employment Relationship: Job Attachment, Work Effort, and the Nature of Contracts*, *in* 2 HANDBOOK OF LABOR ECONOMICS 789, 799-810 (Orley Ashenfelter & David Card eds., 1986).

[44] *See* HIRSCH & ADDISON, *supra* note 25, at 188; MATTHEW S. GOLDBERG, *Discrimination, Nepotism, and Long-Run Wage Differentials*, 97 Q.J. Econ. 307, 308–14 (1982) (monitoring); PETER KUHN, *Malfeasance in Long Term Employment Contracts: A New General Model with an Application to Unionism,* 28–29 (NAT'L BUREAU OF ECON. RES., WORKING PAPER NO. 1045, 1982), *available at* http://www.nber.org/papers/w1045.

[45] For example, it would be silly to try to plan school policies or curriculum without consulting with the teachers who have been trained to educate children and who are actually involved in the day to day running of the schools.

[46] FREEMAN & MEDOFF, *supra* note 34, at 46–47; RICHARD B. FREEMAN & JAMES L. MEDOFF, *The Two Faces of Unionism*, 57 PUB. INT. 69 (1979).

[47] Freeman & Medoff, *supra* note 46, at 70-74.

[48] For information regarding unions and their ability to effectively communicate workplace protections, see LAWRENCE MISHEL & MATTHEW WALTERS, ECON. POL'Y INST., HOW UNIONS HELP ALL WORKERS 1, 11 (2003), http://www.epi.org/pub lication /briefingpapers_bp143/.

[49] DAVID MADLAND ET AL., CTR. FOR AM. PROGRESS ACTION FUND, UNIONS MAKE THE MIDDLE CLASS WITHOUT UNIONS THE MIDDLE CLASS WITHERS 1, 16 (2011), http://www.americanprogressaction.org/issues/2011/04/unions_middle_class.html.

[50] There is an extensive economic literature on implicit labor market contracts. Recent surveys can be found in Parsons, *supra* note 43, at 799–802; Sherwin Rosen, *Implicit Contracts: A Survey*, 23 J. ECON. LITERATURE 1144 (1985).

[51] Deferred compensation helps minimize monitoring costs because employees who have a portion of their compensation deferred to later years will be less likely to goof-off, fearing loss of the later compensation. *See* Rosen, *supra* note 50, at 1165-75.

[52] Dau-Schmidt, *supra* note 36, at 431–32.

[53] James M. Malcomson, *Trade Unions and Economic Efficiency*, 93 ECON. J. 51 (1983); M.W. Reder, *Unionism, Wages, and Contract Enforcement*, *in* Research in LABOR ECONOMICS: NEW APPROACHES TO LABOR UNIONS 27 (Joseph D. Reid, Jr. ed., Supp. II 1983); Kuhn, *supra* note 44, at 28–29.

[54] FREEMAN & MEDOFF, *supra* note 34, at 7–11, 14–16; Freeman & Medoff, *supra* note 46, at 70–78.

[55] *See* PATRICK MICHELS, *Texas Tax Give-Back to Oil Companies Set to Further Drain School Budget*, COLORADO INDEPENDENT, Sept. 27, 2011, *available at* http://coloradoindependent.com/100681/texas-tax-give-back-to-oil-compan ies-set-to-further-drain-school-budget.

[56] *See* Sherk, *supra* note 24.

[57] *See Ala. Educ. Ass'n v. State Super. of Educ.*, 665 F.3d 1234, 1239 (11th Cir. 2011); Robert Kahn, *State's Teachers Call New Law Unconstitutional Political Attack*, COURTHOUSE NEWS SERV. (Feb. 28, 2011, 10:00 AM), http://www.courthousenews.com/2011/02/28/34492.htm; Susan Martin, *State Initiatives Affecting Public Employees' Collective Bargaining Rights*, 2011 A.B.A. Sec. of Lab. & Emp. L. (2011), http://www.americanbar.org/newsletter/groups/labor_law/ll_flash/1106_aball_flash/1106_aball_flash_state_initiatives.html.

[58] *See* Marc Galanter, *Why the "Haves" Come out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC. REV. 95 (1974); Paul H. Rubin, *Why is the Common Law Efficient?*, 6 J. LEGAL STUD. 51 (1977).

[59] Kenneth G. Dau-Schmidt, *An Alternative Economic Analysis of the Regulation of Unions and Collective Bargaining*, *in* LAW AND ECONOMICS: ALTERNATIVE ECONOMIC APPROACHES TO LEGAL AND REGULATORY ISSUES (Margaret Oppenheimer & Nicholas Mercuro eds., 2005).

[60] ALAN MANNING, MONOPSONY IN MOTION: IMPERFECT COMPETITION IN LABOR MARKETS (2003).

[61] Bender & Heywood, *supra* note 12, at 4-5.

[62] *Id.* at 5.

[63] Dale Belman and John S. Heywood, *Public Sector Wage Comparability: The Role of Earnings Dispersion*, 32 PUB. FIN. REV. 567–587 (2004).

[64] Bender & Heywood, *supra* note 12.

[65] Richard C. Kearney, Labor Relations in the Public Sector 158 (4th ed 2009).

[66] Keith A. Bender, *The Central Government: Private Sector Wage Differential*, 12 J. OF ECON. SURVEYS 177–220 (1998).

[67] Dale Belman & John S. Heywood, *State and Local Government Wage Differentials: An Intrastate Analysis*, 16 J. OF LABOR RES. 187, 189 (1995).

[68] George J. Borjas, *The Wage Structures and Sorting of Workers into the Public and Private Sectors*, *in* For the People: Can We Fix Public Service? 29, 33-34 (John D. Donahue & Joseph S. Nye, eds., 2003).

[69] Sang-Hyop Lee, *A Reexamination of public-sector wage differentials in the United States: Evidence from the NLSY with Geocode*, 43 INDUS. REL. 448, 456 (2004). Female local government employees also earned 4 percent less, while male local government employees earned essentially the same as private workers. *Id.*

[70] Gregory B. Lewis & Chester S. Galloway, *A National Analysis of Public/Private Wage Differentials at the State and Local Levels by Race and Gender*, 33-34 tbl. 5(Ga. St. Univ., Andrew Young Sch. of Pol'y Stud., Working Paper No. 11-10, 2011) *available at* http://citation. allacademic.com/meta/p_ mla_apa_research_citation/3/6/2/8/9/pages362897/p362897-1.php. Although Lewis and Galloway report differentials that range from –15.2 percent (Kansas) to +13.0 percent (Nevada) and most state differentials were negative, suggesting that

public employees are paid less, most of the reported differentials were within a few percentage points of zero suggesting public and private comparability. *Id.*

[71] *Id.* at 24.

[72] Michael A. Miller, The Public-Private Pay Debate: What do the Data Show? 119 MO. LAB. REV., May 1996, at 18, 18.

[73] Jeffrey Keefe, *Debunking the Myth of the Overcompensated Public Employee*, Econ. Pol'y Inst., Briefing Paper #276, (Sept. 15, 2010), http://www.epi.org/page/-/pdf/bp276.pdf.

[74] *Id.* at 10, tbl. 6.

[75] *Id.* at 7, tabl. 3. Keefe found that benefits constituted 26.3% of total compensation for private employers with less than 100 employees, 29.8% of total compensation for private employers with 100 to 499 employees, 33.1% for private employers with 500 or more employees and 34.1% for public employers. *Id.*

[76] *Id.* at 10, tbl. 6. *See a*lso Schmitt, *supra* note 11, at 6 (using CPS data to find that public employees are paid on average 4% less than comparable private sector employees).

[77] Keefe, *supra* note 73, at 6, tbl. 2. Keefe found that the public private pay differential for employees with a high school degree was 6%, some college 9%, an associate's degree 5%, a bachelor's degree -25%, a professional degree -37%, a master's degree -31% and a doctorate -21%. In a departure from this pattern, Keefe found that public employees without a high school degree were paid 6% less than their private sector counterparts. *See also* Schmitt, *supra* note 11, at 6-10 (finding a similar wage leveling in the public sector at the expense of the more highly educated public employees).

[78] Bender & Heywood, *supra* note 12.

[79] *Id.* at 9, fig. 1.

[80] *Id.* at 10-14.

[81] *Id.* at 14.

[82] Jeffrey H. Keefe, *Are New Jersey Public Employees Overpaid?*, Econ. Pol'y Inst. Briefing Paper #270, at 10, tbl.6 (July 30, 2010), http://www.epi.org/publication/bp270/.

[83] Sylvia A. Allegretto & Jeffrey Keefe, *The Truth about Public Employees in California: They are Neither Overpaid nor Overcompensated,* Ctr. on Wage and Employment Dynamics, Univ. of Cal., BERKELEY, POLICY BRIEF, 11, tbl.5 (Oct. 2010), http://www.irle.berkeley.edu/cwed/wp/2010-03.pdf.

[84] Jeffrey H. Keefe, Are *Wisconsin Public Employees Overpaid?*, ECON. POL'Y INST. BRIEFING PAPER #290, at 9, tbl.5 (Feb. 2011), http://www.epi.org/page/-/old/briefingpapers/BriefingPaper290.pdf.

[85] The percent of employees organized in the public sector is currently around 36%, while the percent of employees organized in the private sector is currently around 8%. Dau-Schmidt, et al, *supra* note 30, at 85-86.

[86] The wage and benefit impact of public sector unions is a very complex empirical question, made all the more difficult by inadequate data, measurement error, unexplained variance, challenging problems in research design and the "threat effect" that union organization can increase non-union wages. Kearney, *supra* note 65, at 162-64.

[87] *Id.* at 161.

[88] *Id.* at 161-62.

[89] *Id. at 165.*

[90] *Id.* at 164. Craig Olsen has analyzed data on Wisconsin teachers' salaries and found that they continued to lag behind the private sector over the entire period 1995-2009. Craig Olsen, *The Battle Over Public Sector Collective Bargaining in Wisconsin and Elsewhere*, ECON. POL'Y RES. NETWORK 1 (Mar. 1, 2011), http://www.employmentpolicy.org/topic/402/op-ed/battle-over-public-sector-collective-bar- gaining-wisconsin-and-elsewhere.

[91] *Id.* at 165. Ronald G. Ehrenberg & G. S. Goldstein, *A Model of Public Sector Wage Determination*, 2 J. URB. ECON. 223 (1975) (finding that 1967 earnings for unionized municipal employees was greater than those of non-unionized municipal employees by between 2 and 16%); Peter Feuille & John ThomasDelaney, *Collective Bargaining, Interest Arbitration, and Police Salaries*, 39 INDUS. & LAB. REL, REV. 228 (1986) (finding that collective bargaining and the availability of interest arbitration tend to have a positive effect on police salaries); W. Clayton Hall & Bruce Vanderporten, *Unionization, Monopsony Power, and Police Salaries*, 16 INDUS. REL. 94 (1977) (finding that police salaries are modestly increased by collective negotiations); Richard C. Kearney & David R. Morgan, *The*

Effect of Employee Organization on the Compensation of Police Officers, 9 J. OF COLLECTIVE NEGO. 361 (1980); *but see* Timothy Chandler & Rafael Gely, *Protective Service Unions, Political Activities and Bargaining Outcomes*, 5 J. OF PUBL. ADMIN. RES & THEORY 295(1995) (finding that differences between union and non-union police wages decrease when controlling for union political activity); S. J. Trejo, *Public Sector Unions and Municipal Employment*, 45 INDUS. LAB. REL. REV. 166 (1991) (finding that positive correlation between municipal employment and union formation involves economies of scale and is not totally dependent on union's political clout).

[92] RICHARD C. KEARNEY & DAVID R. MORGAN, *Unions and State Employee Compensation*, 12 St. a& Lo.l Gov't. Rev. 115 (1980).

[93] Dale Belman, J. S. Heywood & J. Lund, *Public Sector Earnings and the Extent of Organization*, 50 INDUS. & LAB. REL. REV. 610 (1997); Richard C. Kearney, *Patterns of Union Decline and Growth; An Organizational Ecology Perspective*, 24 J. LAB. RES. 561 (2003).

[94] Kearney, *supra* note 65, at 166.

[95] *Id. See also* H.Greg Lewis, UNION RELATIVE WAGE EFFECTS: A SURVEY 153 (1986) (reviewing studies and finding average difference between private and public sector union wage effect of 13 percent); David G. Blanchflower & Alex Bryson, *What Effect Do Unions Have on Wages Now and Would Freeman and Medoff Be Surprised?*, *in* WHAT DO UNIONS DO? A TWENTY-YEAR PERSPECTIVE 79, 87 (JAMES T. BENNETT & BRUCE E. KAUFMAN, EDS. 2007) (finding that private sector union wage effect decreased between 1983-88 and 1996-2001 from 21.5% to 17.0% while public sector union wage effect increased from 13.3% to 14.5%).

[96] *See supra* note 23 and accompanying text.

[97] *See* Elise Foley, Mitch *Daniels: Public-Sector Unions Shouldn't Exist*, THE HUFFINGTON POST June 10, 2012, http://www.huffingtonpost.com/2012/06/10/mitch-daniels-unions-public-sector-unions_n_1584396.html (quoting Indiana Governor Mitch Daniels as saying that with unionization, government becomes its own special interest group).

[98] *See supra* note 38 and accompanying text.

[99] *See supra* note 54 and accompanying text.

[100] Kearney, *supra* note 65, at 164.

[101] S*ee supra* note 42 and accompanying text.

[102] David Card & Alan B. Krueger, *School Quality and the Return to Education*, *in* DOES MONEY MATTER?: THE EFFECT OF SCHOOL RESOURCES ON STUDENT ACHIEVEMENT AND ADULT SUCCESS 118, 118-19 (Gary Burtless, ed. 1996); A. Molnar, et al, *Evaluating the SAGE Program: A Pilot Program in Targeted Pupil-Teacher Reduction in Wisconsin*, 21 EDUC. EVAL. & POLICY ANAL. 165 (1999).

[103] *See e.g.*, Deanna Martin, *Indiana Panel Oks Bill Limiting Teacher Bargaining*, BLOOMBERG BUS. WK., Jan. 27, 2011, http://www.businessweek.com/ap/financialnews/D9L0NVH00.htm.

[104] *See* John T. Addison & Barry T. Hirsch, *Union Effects on Productivity, Profits, and Growth: Has the Long Run Arrived*?, 7 J. LAB. ECON. 72 (1989) (concluding that a negative effect on productivity from unions has not definitely been proved, but "the contention that unions, on average, significantly raise productivity cannot be sustained").

[105] *See* Associated Press, *Lawmakers Start Working on Teacher Merit Bill*, INDIANA BUS. J., Feb. 9, 2011, *available at* http://www.ibj.com/lawmakers-start-work-on-teacher-merit-pay-bill/PARAMS/article/25208.

[106] *Id.*

[107] Dan Carden, *Daniels Signs Teacher Merit Pay into Law*, N.W. IND. TIMES, April 30, 2011, *available at* http://www.nwitimes.com/news/local/govt-and-politics/article_7bd64dab-6955-5032-b4ed-b0a9a567d2a1.html.

[108] *See supra* note 50 and accompanying text.

[109] *See* Randall Eberts, et al., *Teacher Performance Incentives and Student Outcomes*, 34 J. HUM. RES. 913, (2002).

[110] *See* Kearney, *supra* note 65, at 208; Lori Taylor, *Economic Approaches to School Efficiency*, *in* ECONOMICS OF EDUCATION 210 (DOMINIC J. BREWER & PATRICK J. MCEWAN, EDS 2010).

[111] Michael Ash & Jean Ann Seago, *The Effect of Registered Nurses on Heart Attack Mortality*, 57 INDUST. & LAB. RELS. REV. 422 (2004).

[112] Charles Register, *Wages, Productivity and Costs in Union and Nonunion Hospitals*, 9 J. LAB. RES. 325 (1988).

[113] Randall W. Eberts & Joe A. Stone, *Teacher Unions and the Productivity of Public Schools*, 40 INDUST. & LAB. RELS. REV. 354 (1987).

[114] Michael M. Kurth, Teachers' *Unions and Excellence in Education: An Analysis of the Decline in SAT Scores*, 7 J. LAB. RES. 351 (1987).

[115] F. Howard Nelson & Jewell C. Gould, *Teachers' Unions and Excellence in Education: Comment*, 9 J. LAB. RES. 379 (1988).

[116] Caroline Hoxby, *How Teachers Unions Affect Production*, 111 Q. J. ECON. 671 (1996).

[117] Laura M. Argys & Daniel I. Ress, *Unionization and School Productivity: A Reexamination*, 14 RES IN LAB. ECON.49-68 (1995); Morris Kleiner & Daniel Petree, Unionism and Licensing of Public School Teachers: *Impact on Wages and Educational Output, in When Public Sector Workers Unionize* 305 (Richard Freeman & Casey Ichniowsky, eds, 1988); F. Howard Nelson & Michael Rosen, *Are Teachers' Unions Hurting American Education? A State-by-State Analysis, in, Conflicting Missions*? Teachers Unions and Educational Reform 47(Tom Loveless, ed. 2000); Charles A. Register & Paul W. Grimes, *Collective Bargaining, Teachers and Student Achievement*, 12 J. Lab. Res. 99 (1991); Harris L. Zwerling & Terry Thomason, *The Effects of Teacher Unions on the Probability of Dropping out of High School*, 23 J. OF COLL. NEGO. 239 (1994).

[118] Randall W. Eberts & Joe A. Stone, *Union Effects on Teacher Productivity*, 37 IND. & LAB. RELS. REV. 346 (1984); Mark Meador & Stephen Walters, *Unions and Productivity: Evidence from Academe*, 15 J. LAB. RES. 373 (1994).

[119] Kearney, *supra* note 65, at 208-210; Morley Gunderson, *The Two Faces of Unionism in the Public Sector*, in WHAT DO UNIONS DO? A TWENTY-YEAR PERSPECTIVE 401, 411-12 (JAMES T. BENNETT AND BRUCE E. KAUFMAN, EDS. 2007); Katharine Strunk, *The Economics of Teachers Unions in the United States*, *in* Economics of Education 288 (DOMINIC J. BREWER & PATRICK J. MCEWAN, EDS 2010).

[120] *See* HIRSCH & ADDISON, *supra* note 25, at 200.

RECENT DEVELOPMENTS

BY, STUDENT EDITORIAL BOARD:

Karina Fruin, Daniel Quist, Ryan Thoma, and Daniel Zapata

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. IERLA DEVELOPMENTS

A. Accretion to an Existing Bargaining Unit

In *Int'l Union of Operating Engineers, Local 399 and Western Illinois University*, Case No. 2011-CA-0106-C (IELRB 2012), the IELRB held that the University did not refuse to bargain in good faith when it failed to apply the terms and conditions of an existing collective bargaining agreements (CBA) to newly-added positions of a bargaining unit.

The Union represented Western Illinois University employees that fall under the title of Maintenance Worker since 1991. In January 2010, six University employees in this classification approached the University and sought placement into the higher-rated classification of Building Heat/Frost Insulator. In October 2010, without notifying the Union, the University reclassified the six employees into this higher-rated classification, and in effect promoted the employees out of the bargaining unit. The University also made changes to the employees' break schedule and hourly wage.

The Union, rather than filing an unfair labor practice charge against the University for unilaterally changing the terms of the six individuals' employment, filed a majority interest petition with the IELRB seeking to add the new Building Heat/Frost Insulator position to the bargaining unit. The Board certified the new classification into the bargaining unit on December 15, 2010.

The Union demanded that the University apply the terms of the existing CBA to the new Building Heat/Frost Insulators. However, the University kept in place the changes it had made to the employees' wages and break schedule. On May 15, 2011, the Union filed an unfair labor practice charge against the University under sections 14(a)(5) and 14(a)(1) of the IELRA, alleging that the University had failed to bargain in good faith.

The Board examined past IELRB decisions and analogous cases under the National Labor Relations Act to conclude that the University had not violated the Act. Citing *NLRB v. Katz*, 369 U.S. 736 (1962), the Board noted that during bargaining negotiations, an employer must maintain the status quo regarding mandatory subjects of bargaining. If an employer fails to maintain the status quo before a contractual agreement is reached, the employer breaches its duty to bargain in good faith.

The IELRB cited *Federal-Mogul Corp.*, 209 N.L.R.B. 343 (1974), for the proposition that applying the terms of an existing CBA to employees newly-accreted to the bargaining unit would be contrary to the Supreme Court's holding in *H.K. Porter Co., v. NLRB*. 397 U.S. 99 (1970). In *H.K. Porter*, the Supreme Court held that the NLRB could not require an employer or union to agree to substantive provisions contained in a collective bargaining agreement. Following this rationale in the instant case, the IELRB reasoned that it could not compel the application of the CBA to the newly-accreted Building Heat/Frost Insulators.

In sum, the IELRB held that "when employees are accreted to an existing bargaining unit which has a collective bargaining agreement already in place, unless that agreement provides otherwise, the employer and the union are obligated to bargain regarding the newly-added employees' terms and conditions of employment."

B. Duty to Provide Information

In *Chicago Board of Education and Service Employees International Union Local 73*, Case No. 2011-CA-0088-C (IELRB 2012), the IELRB held that the Chicago Board of Education violated sections 14(a)5) and (1) of the IELRA when it refused to provide the union with two students' discipline files. The union requested the information for use in processing a grievance on behalf of a bargaining unit member who had been discharged for alleged physical altercations with the students. The union wanted the files to show the students' pattern of violence and inappropriate behavior, and to question the students' credibility.

The Chicago Board of Education claimed the students' records were protected private information under the Illinois School Students' Records Act and the Family Educational Rights and Privacy Act, and it could not release the files without a court order and parental notice. The Chicago Board of Education defended its actions as necessary to maintain student privacy, claiming that this interest outweighed the union's need for the files. It claimed the union should have sought a court order for release of the information, an alternative that would have complied with the statutes.

The IELRA reasoned that the union had an interest is receiving information relevant to its performance of its functions as exclusive bargaining representative. Relevancy was determined under a discovery standard, i.e. whether it was likely to lead to information that might be admitted at an arbitration hearing. An employer may object to disclosure in good faith based on privacy concerns but the privacy exception is construed narrowly.

The IELRB determined that the Chicago board of Education had a legitimate interest in keeping the information confidential, but noted that the union had agreed to receive redacted files showing only the students' first names. The IELRB also noted that the files were only being released to the union, not to the general public and concluded that the Chicago Board of Education failed to prove its confidentiality defense.

II. IPLRA DEVELOPMENTS

C. Discrimination

In *County of Cook v. Ill. Labor Relations Bd.*, 2012 IL App (1st) 111514, 976 N.E.2d 493 (Ill.App. 1 Dist. 2012) the First District Appellate Court reversed the ILRB Local Panel's ruling reinstating two employees with full backpay for an allegedly discriminatory refusal to reinstate. The court held that the admission of testimony regarding a statement made at a settlement conference was error and that the statement, even if properly admitted was insufficient to prove Cook County acted with antiunion animus in refusing to reinstate one of two terminated employees during settlement negotiations.

The incidents giving rise to this case began in 2008, when background checks were ordered on all employees and volunteers at the Cook County Juvenile Temporary Detention Center (JDTC) pursuant to a federal court order. Following this order, two nurses assigned to the JDTC, Beverly Joseph and Leslie Mitchner, were discharged for gross insubordination when they each refused to authorize the required background checks. Joseph and Mitchner grieved their terminations and an arbitrator rendered an award in favor of Cook County, finding that the employer had just cause to discharge the employees for insubordination.

Prior to arbitration, during settlement negotiations, a Cook County human resources (HR) employee met offered to reinstate Joseph, but not Mitchner; the union rejected the settlement offer. The union representative alleged that she asked the HR employee if Cook County would not reinstate Mitchner because she filed 14 or 15 grievances in a single day. The human resources representative responded, "yes."

An ALJ found that Cook County was motivated by antiunion animus when it initially terminated Joseph and Mitchner and when the employer refused to offer reinstatement to both nurses during settlement negotiations. The Local Panel rejected the ALJ's recommended decision that both nurses were initially fired for anti-union animus. However, two members of the Panel concurred with the ALJ that both employees were not reinstated at the settlement conference due to antiunion animus. The third-member of the Panel dissented. The ILRB ruled both employees should be reinstated with full backpay and benefits, contingent on the employees authorizing and passing the required background checks. Cook County appealed the Board's split decision.

The Appellate Court began its analysis by noting that the ILRB's decision to reinstate both employees necessarily voided the arbitrator's decision that the employees were terminated for just cause, which the Board and courts alike are bound to uphold. However, Cook County first raised the argument that the Board lacked the ability to reinstate the employees in its reply brief. As a result, the employer waived this argument and the court refused to consider it.

The court observed that a party alleging a discriminatory discharge before the ILRB has the burden to establish four elements: (1) the employee is engaged in protected union activity; (2) the employer had knowledge of the protected activity; (3) the employer took an adverse employment action against the employee; and (4) the employer's action was motivated by the employer's animus towards the employee's protected union activity. The court noted that there was no dispute between the parties that the employees engaged in union activities or that the employer had knowledge of these actions. While Cook County conceded that the employees' initial terminations were adverse employment actions, but both parties failed to address whether failure to reinstate the nurses during settlement negotiations also constituted an adverse employment action.

The court refused to rule on whether the employer actually committed an adverse employment action in this case because the parties had not argued it. The court proceeded with its analysis of the issues assuming there was an adverse employment action, because there could not be a violation of sections 10(a)(1) or (a)(2) otherwise.

The Court reversed the reinstatement of the two employees for failure of admissible proof that an unfair labor practice had occurred. The Illinois Administrative Code requires that the rules of evidence and privilege as applied in civil cases in circuit courts of Illinois be followed in administrative hearings. However, Section 11(a) of the IPLRA states that in Board hearings all

parties are only bound by the rules of privilege recognized by law. Despite this language, the ILRB's own rules provide that "the Administrative Law Judge will, insofar as practicable, apply the rules of evidence applicable in Illinois Courts." Ill. Adm. Code 1200.130 (2012). The court found the Board's own rules are controlling and, therefore, both the ALJ and the Board should have applied the rules of evidence applicable in Illinois courts but failed to do so.

As a general matter, Illinois courts do not admit matters concerning settlement negotiations because admitting such evidence would have a chilling effect on settlement negotiations and negotiations during settlement do not constitute admissions of guilt. Illinois courts have long applied Federal Rule of Evidence (FRE) 408, which severely limits the admissibility of statements made during settlement negotiations. Further, the ILRB's own policy provided identical protection to statements made during settlement negotiations as provided for in FRE 408 under 80 Ill. Adm. Code 1200.120 (2010).

Under FRE 408, statements made during settlement negotiations are prohibited from being admitted as proof for the validity of the claim. As a result, the HR employee's statement cannot be admitted as proof of the alleged unfair labor practice. The HR employee who allegedly made the statement during negations also did not testify as a witness before the ILRB and therefore could not qualify under any exception embodied in FRE 408(b). The court to conclude that the HR employee's statement during the settlement negotiations was inadmissible under both the Federal Rules of Evidence and the ILRB's own rules.

The court continued that even if the HR employee's statement was admissible, it alone was an insufficient basis for establishing the employer's liability. First, any animus exhibited by the HR employee was irrelevant, because he had no decision-making authority. It was undisputed that the Director was the sole decision-maker regarding the determination to initially discharge the employees and the decision not to offer reinstatement to both nurses. The statement made by the HR employee during settlement negotiations did not relate to whether the Director acted out of anti-union animus. There was no evidence showing that the Director spoke with the HR employee before the negotiations or any evidence that the Director was in any way motivated by animus. Further, both nurses engaged in exactly the same protected activities, the filing of multiple grievances, but no evidence accounted for why Cook County was willing to offer reinstatement only to Joseph.

As a result, the Court concluded even if the statement made during settlement negotiations was admissible, it was an abuse of the Board's discretion to establish

Cook County's liability for the unfair labor practice charge based on this statement alone.

D. School District Peace Officers

In Board of Education of Peoria School District No. 150 v. Peoria Federation of Support Staff, 972 N.E.2d 1254 (Ill. App. 4th Dist. 2012), the Fourth District Appellate Court held that the Peoria School District may proceed in Circuit Court on its complaint that Public Act 96-1257 violated the state constitutional prohibition against special legislation. Public Act 96- 1257 amended the IPLRA to include within its coverage "peace officers employed by a school district in its own police department in existence of the effective date" of the act. Peoria was the only school district that employed its own police force.

The relevant effect of PA No. 96-1257 on labor relations concerns employees' right to strike. Generally, both the IPLRA and IELRA permit employees to strike when collective bargaining breaks down. However, the IPLRA precludes public employees employed as security personnel, peace officers, or firefighters from striking and instead provides for interest arbitration between them and their employers.

The Peoria School District maintained that PA No. 96-1257 violated the state constitutional prohibition against special legislation, which prohibits the legislature from making classifications that arbitrarily discriminate in favor of a select group. The court found no fundamental right or suspect class was affected by PA No. 96-1257 and, thus, applied the "deferential rational basis test." In applying this test, the court found that the complaint alleged facts that, if proved, would show that PA No. 96-1257 arbitrarily discriminates in favor of a select group. Specifically, the court found the following to be relevant distinctions made by PA No. 96-1257: (1) between peace officers employed by plaintiff and any peace officers who may be employed directly by other school districts in the future; and (2) between plaintiff and any school district that, in the future, may employ peace officers directly.

Despite agreeing that the state has a legitimate interest in treating all police officers similarly, with respect to the right to strike, the court held that Peoria raised a legitimate concern that the statutory distinctions are not rationally related to a legitimate state interest. The court found that the act could not rationally account for the identified distinctions between (1) the statute's treatment of officers currently employed by school districts and those who may be employed by other school districts in the future and (2) its corresponding treatment of the school districts employing such officers.

In essence, the understood took the language of PA No. 96-1257 to mean that that any officers directly employed by school districts other than the plaintiff in the future would remain under the purview of the IELRA, not the IPLRA. Thus, those future officers would be allowed to strike but not to go into interest arbitration. The court noted that if the state's legitimate objective was to ensure that police officers, no matter who employs them, are not allowed to strike, then the distinction between police employees of school districts currently employing police officers and those of school districts that may employee police in the future is irrational. Hence, the court found that PA No. 96-1257 did not further a legitimate state interest and that the plaintiff's complaint was sufficient to make out a claim that the amended Public Labor Relations Act constituted special legislation.