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ILLINOIS PUBLIC EMPLOYEE RELATIONS REPORT

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

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THE SCOPE OF JUDICIAL REVIEW OF PUBLIC SECTOR ARBITRATION AWARDS

By, Gilbert A. Cornfield

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THE SCOPE OF JUDICIAL REVIEW OF PUBLIC SECTOR ARBITRATION AWARDS

By, Gilbert A. Cornfield

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I. INTRODUCTION

On February 22, 2013 the Supreme Court of Illinois issued a significant decision in *Griggsville-Perry Community Unit School District No. 4* v. *lELRB*.[1] delineating the standards for judicial review of arbitration awards in the public sector. This commentary will review the substance of the decision, the relevant statutes and the decisions of the Illinois Appellate Court which preceded the Illinois Supreme Court's decision.

II. BACKGROUND TO THE ILLINOIS SUPREME COURT'S DECISION IN *GRIGGSVILLE-PERRY*

The litigation leading to the Illinois Supreme Court's decision began when a public school district terminated the employment of a paraprofessional employee who had eleven years of service. The employee was a member of a bargaining unit covered by a collective bargaining agreement between the district and a labor organization.

The union filed a grievance contesting the dismissal. The union argued that the allegations of misconduct that were presented to the school board by the school administration had not been communicated to the employee nor placed in her personnel file. The union also contended that the school board had not fairly followed the procedures for employee discipline set forth in the collective bargaining agreement.[2] In support of the grievance, the union referenced provisions in the collective bargaining agreement which required the maintenance of employee personnel files and gave employees the right to appear before the school board when discipline was considered.

The school board contended that the grievance was not subject to arbitration because the collective bargaining agreement did not restrict its right to dismiss employees and therefore the members of the bargaining unit were "at will" employees.[3] Alternatively, the school board argued that it had complied with the

collective bargaining agreement in that the terminated employee had the right to appear before the school board and advance any arguments or facts which militated against her dismissal.

The grievance went to impartial arbitration. After protracted hearings before the arbitrator and an interim decision by the Illinois Educational Labor Relations Board (IELRB), the arbitrator issued his final decision holding that the discharge violated the collective bargaining agreement because the employee had not been given notice of the alleged misconduct and the allegations were not sufficiently specified to enable her to respond before the school board voted to dismiss her. The board voted to terminate before the employee had been notified of the administration's recommendation to terminate and the board's vote of approval. The arbitrator also held that although the collective bargaining agreement did not set forth any substantive standards for employee discipline, and discharge, the procedural provisions of the agreement required that an employee be provided with advance notice and specific information with respect to the administration's allegations of misconduct in support of the recommended discipline, and an opportunity to respond before the school board acted on the administration's recommendation.[4] The arbitrator ordered that the employee be reinstated to her position and be made whole for losses of income and benefits she had incurred since her dismissal.[5] The arbitrator further held that should the school administration decide to recommend the employee's dismissal after she returned to her employment, the necessary procedures that the arbitrator specified were to be followed.[6]

The school board refused to honor the arbitrator's award, resulting in the union filing an unfair labor practice charge with the IELRB. The IELRB held that the arbitrator's award was enforceable.[7] The school district appealed to the Appellate Court for the Fourth District. The three judge appellate panel, with one dissenter, held that the arbitrator's decision was not enforceable because it went beyond the unambiguous terms of the collective bargaining agreement, imposing on the school board standards for dismissing an employee which were not set forth in the agreement.[8]

III. THE DECISION OF THE ILLINOIS SUPREME COURT

The Illinois Supreme Court reversed the Appellate Court, holding that the IELRB did not err in deciding that the arbitrator's decision drew its "essence" from the terms of the collective bargaining agreement. The agreement provided:

> When a member of the bargaining unit is required to appear before the Board of Education concerning any disciplinary matter, the staff member shall be given reasonable

> prior written notice of the reasons for such meeting and shall be entitled to have a personal representative at said meeting, if so requested by employee.[9]

The Illinois Supreme Court quoted from the arbitrator's opinion and award in applying the aforesaid provision to the evidence before him:

> [Section 2.6 of the] collective bargaining agreement requires 'written notices of the reasons for' the employee being heard before the school board. The District maintains that the written notice it provided was adequate. The Arbitrator disagrees. The notice merely stated that the board proposed to dismiss [Hires] for 'deficiencies' in that she did not 'relate well' to students and 'was not always pleasant.'***[S]uch generalized characterizations are impossible to defend against, which was one of the grounds of the union's initial grievance. It bears repetition that adequate notice is a fundamental element of the hearing process. When what is to be heard are allegations of misconduct or poor or inadequate performance the accused employee must be able to 'marshal evidence and prepare his [or her] case so as to benefit from any hearing that was provided.' Henry J. Friendly, '*Some Kind of Hearing',*[123 U.Pa.L.Rev.1267, 1281 (1975)]. At a minimum, [Hires] was entitled to the specifics of the factual allegations giving rise to the generalized conclusion she was confronted with – the names, dates, and circumstances of the allegations, precisely what *facts* were reported of her and by whom, and, where the facts are contested, to confront her accusers and adduce any evidence in her defense.[10]

The key elements of the Illinois Supreme Court's decision are:

1. The question of whether an arbitrator's award draws its "essence" from the bargaining agreement is a matter of "law."[11] It should be noted that although the matter had come before the Illinois Supreme Court on review from an IELRB decision, the court did not specifically defer to the Labor Board, but reached its own determination that the arbitrator's decision was based upon his interpretation and application of the collective bargaining agreement.

2. The correctness of an arbitrator's decision interpreting and applying the terms of a collective bargaining agreement is not within the scope of appellate review. The Illinois Supreme Court stated that it is insufficient to show that the arbitrator "committed an error or even a serious error" to overturn the award.[12] In this regard, however, the Supreme Court of Illinois noted that an arbitrator's decision, although purporting to be based upon contract terms, may be set aside on review if the arbitrator's interpretation is not "plausible" and cannot be ascribed to mere error but supports an inference that the award has some basis outside the agreement.[13]

The Illinois Supreme Court held that the Appellate Court had exceeded its review authority by imposing its own interpretation and application of the relevant contract provision and rejecting the procedural and informational rights that the arbitrator had determined were inherent in the provision. Although the Supreme Court in this context referenced the Appellate Court's majority decision, it is reasonable that the Supreme Court would require the same standards to be followed for direct review of a Labor Board decision.

IV. THE LEGISLATIVE AND HISTORICAL CONTEXT OF THE ILLINOIS SUPREME COURT'S DECISION

The governing public employee labor legislation in Illinois became effective in 1984. *Griggsville-Perry* was the first and as of this date the only time the Supreme Court of Illinois has addressed the standards to be followed in determining whether arbitration awards interpreting and applying provisions of public sector collective bargaining agreements are to be enforced under the Illinois public sector labor laws. In *Board of Education of Community School District No.1 Coles County v. Compton,*[14] the Illinois Supreme Court held that the an arbitrator's award was subject to exclusive review by the IELRB through the unfair labor practice procedures under the Illinois Educational Labor Relations Act (IELRA),[15] and thereafter subject to direct appeal to the Appellate Court. The *Coles County* decision dealt only with the procedures to be followed for review of arbitration awards, not the substantive standards to be applied in the review. Both the IELRA and the Illinois Public Labor Relations Act (IPLRA),[16] governing public employees other than educational personnel, require collective bargaining agreements to include binding arbitration to resolve disputes over their administration or interpretation. The IPLRA provides that the arbitration provisions are subject to the Illinois Uniform Arbitration Act (IUAA).[17] Thus, the Illinois courts have held that review of arbitration decisions under the IPLRA are within the authority of the Circuit Courts as provided by the IUAA.[18]

Although *Griggsville-Perry* involved an arbitration award under the IELRA, it is fair to conclude that the standards for review of arbitration awards established by the court are equally applicable to awards under collective bargaining agreements governed by the IPLRA. The starting point of the Illinois Supreme Court's "Analysis" in *Griggsville-Perry* was the decisions of the United States Supreme Court in *United Steelworkers of America v. American Manufacturing Co.*[19] and *United Steelworkers of America v. Enterprise Wheel & Car Corp*. in 1960.[20] In those decisions, the United States Supreme Court held that arbitration awards interpreting and applying private sector collective bargaining agreements under the Labor-Management Relations Act are judicially enforceable

if the decision "draws its essence from the collective bargaining agreement"[21] Quoting a decision of the U.S. Court of Appeals for the Seventh Circuit, the *Griggsville-Perry* court stated that an arbitration award can only be set aside when it is "shown that there is no 'interpretive route to the award, so a noncontractual basis can be inferred and the award set aside."[22] There is no reason to conclude that the Illinois Supreme Court would apply different standards for reviewing arbitration awards under collective bargaining agreements under either the IELRA or the IPLRA.

V. THE PRACTICAL IMPLICATIONS OF *GRIGGSVILLE-PERRY*

The Illinois Supreme Court has made it clear that the party seeking to overturn an arbitration award resolving a dispute under the terms of a public sector collective bargaining agreement faces a substantial burden. Although the court has not provided an exact formula for determining whether an arbitration award is to be sustained, there are certain general conclusions which logically follow from the decision:

1. The more detailed and less ambiguous the terms of a collective bargaining agreement, the more likely the arbitration award will be held to involve the interpretation or application of those terms and therefore "draws its essence from the agreement."

2. However, it is more than likely that the parties have resorted to arbitration because the dispute is over ambiguous contract terms or over the application of such terms to specific situations. For example, the collective bargaining agreement in *Griggsville-Perry* provided that an employee subject to discipline had the right to appear before the school board. The issue in dispute was whether the right to appear was limited to a physical appearance or included procedural rights inherent to the right to a hearing before the school board. The Illinois Supreme Court held that the arbitrator acted within the scope of his authority in determining that the right to appear before the school board entitled the right of the employee to be informed of the specific charges against her and the effective opportunity to respond, including the right to submit countervailing evidence.[23] The court therefore held that as a matter of law the Appellate Court had overstepped its limited review authority by determining that the employee's only contract right was to appear and be heard before the school board.[24]

One could conclude that the primary lesson to be learned from the Illinois Supreme Court's decision is that the parties to collective bargaining should make every effort to create a document that is free of ambiguity. However, that is unlikely to

occur. Except for wage rates and benefits and certain very defined working conditions, important governing terms are often expressed as general standards to be followed rather than a litany of specific instances. For example, an employer's right to discipline including discharge is conditioned by a "just cause" standard. Another example might be a provision that conditions an employer's right to lay off employees when "necessary." Another would be a senior employee's right to be promoted if the employee's skills are "substantially equivalent" to junior employees qualified for the job. In all these examples there are a myriad of fact situations to which these general standards are to be applied and which will lend themselves to disputes even if the facts are not controverted. Even if the parties to the collective bargaining agreement were intent on minimizing disputes during the contract term, the ability to identify every specific situation which would come within the purview of the standard is impractical and would render bargaining interminable. It is fair to conclude that the Supreme Court of Illinois recognized the reality of negotiating collective bargaining agreements and the necessary role served by arbitrators in resolving the inherent ambiguity when contract provisions are applied to specific situations which arise during the term of an agreement.

The Court's opinion in *Griggsville-Perry* made special note of the Appellate Court's 1992 decision in *Board of Education of Harrisburg Community Unit School District No. 3 v. IELRB*.[25] The Appellate Court in Harrisburg reversed the decision of the IELRB to enforce part of the arbitrator's remedial order. The arbitrator had found that the school board had violated the due process rights of a teacher in terminating the teacher's extracurricular assignment.[26] The arbitrator further held that the school board was held to a "just cause" standard with respect to the merits of the termination if the proper procedures were followed.[27] The collective bargaining agreement did not set forth a specific standard for terminating an extracurricular assignment addressing only the procedure to be followed. However, the arbitrator employed the "just cause" standard as commonly used in collective bargaining agreements. The IELRB held that the arbitrator's use of the just cause standard was within the scope of the arbitrator' authority.[28]

The *Harrisburg* decision may appear to be contrary to the Illinois Supreme Court's ruling that an arbitrator is to be given broad latitude in applying the provisions of a bargaining agreement. The Illinois Supreme Court apparently recognized the potential conflict between its holding in *Griggsville-Perry* and the Appellate Court's holding in *Harrisburg*. The Illinois Supreme Court relied on the bargaining history of the contract language in *Harrisburg* to create an exception to the deference to be accorded an arbitrator. The Supreme Court stated:

> *Harrisburg* thus stands for the proposition that, in those instances where bargaining history established that a just-cause standard was discussed but not adopted, the arbitrator is precluded from incorporating such a standard into a collective-bargaining agreement. *Harrisburg* does not state, however, that an arbitrator is precluded from finding any standard for dismissal at all.[29]

The Court then noted that "[t]he arbitrator here declined to read a just-cause requirement into the parties' agreement in light of the relevant bargaining history but, instead, concluded that the District's decision to discharge Hires was subject to a standard of arbitrariness. This was entirely consistent with *Harrisburg*.[30] We note, in this regard, that the record before the arbitrator in *Griggsville-Perry* was undisputed that both the school board and the union's proposals with respect to the standards for employee discipline, including termination, had been withdrawn by mutual consent in order to reach agreement on a first bargaining agreement following the union's certification as the bargaining representative. The arbitration record further established that after the negotiations for the first contract the parties did not return to the subject in subsequent negotiations.

Although the Supreme Court relied upon the negotiation history in finding that *Harrisburg* is not inconsistent with its holding in *Griggsville-Perry*, we can only speculate whether the arbitrator's use of the "just cause" standard in applying the terms of the bargaining agreement would have passed judicial review if there had been no record of the negotiating history in the arbitration proceeding. This may be a subject for future litigation over the enforcement of arbitration awards with respect to an arbitrator's authority to establish procedures and/or standards for implementing ambiguous or incomplete contract provisions. Such decisions by arbitrators are often referred to as "gap filling."

VI. CONSIDERATION OF *GRIGGSVILLE-PERRY* AND PRIOR APPELLATE COURT DECISIONS WITH RESPECT TO PUBLIC POLICY ISSUES AND ARBITRATION AWARDS

Consideration of "public policy" was not an issue in *Griggsville-Perry*. The school board had not contended that the arbitration award was unenforceable because the board had the exclusive and unqualified right to hire and terminate paraprofessional employees regardless of the terms of the bargaining agreement. Nevertheless, it is appropriate to the subject matter of this article that we review prior court decisions that have considered public policy in reviewing the enforcement of public sector arbitration awards and the extent to which deferral to the arbitrator has been a factor.

The Supreme Court of Illinois addressed a public policy consideration in reviewing public sector arbitration awards prior to the enactment of the IELRA and IPLRA. In *Board of Trustees of Community College District No. 508 v. Cook County College Teachers Union*,[31] the court held that an arbitrator's decision regarding the priority order for assignment of extra work of community college teachers violated public policy and therefore was not enforceable. The Court did not dispute the arbitrator's interpretation and application of contract provisions but held that teachers who had engaged in a then unlawful strike had unduly benefitted from their illegal conduct. The extra work provisions of the collective bargaining agreement were based upon the relative earnings of the teachers. The teachers who had participated in the strike had earned less in the relevant pay period than those who had not engaged in the strike. Thus, the teachers who had struck had priority for extra work assignments under the terms of the agreement. The court recognized that the arbitrator's award was based upon the terms of the agreement but the court held that the award could not be enforced because "the benefit gained in the wake of the illegal activity is directly at the expense of those who refrained from engaging in the illegal activity."[32]

The Illinois Supreme Court again considered public policy in AFSCME v. State of Illinois.[33] An arbitrator reduced the discharge of two state mental health workers to four month disciplinary suspensions. The employees had been discharged when a mental health patient died during their unscheduled absence on personal affairs for over an hour. The court determined that the discharge of the employees was not mandated by public policy. In so holding, the court relied upon the explicit finding by the arbitrator that there was "no nexus between [the employees'] infraction and the patient's tragic death."[34] The Court also stated that "[t]he arbitrator's order of reinstatement is specifically premised upon his judgment that the grievants would be able to return to the useful employ of the Employer and provide appropriate services to the residents without the likelihood of a repetition of the occurrences of April 28, 1985."[35]

In *AFSCME v. State of Illinois* the Illinois Supreme Court distinguished its decision in *Cook County College Teachers*. The court held that as a matter of law the striking teachers could not benefit from their unlawful conduct.[36] In AFSCME v. State of Illinois although the employees' conduct could be considered as "mistreatment of a service recipient" their conduct did not require discharge under state mental health legislation. Therefore, the court accepted the arbitrator's determination that there is no likelihood that the employees would repeat their actions in the future.[37] Thus, in *AFSCME v. State of Illinois* the Illinois Supreme Court, in addressing the public policy issue, deferred to the arbitrator's factual findings regarding the seriousness of the employees' conduct

and the prospects of their future conduct in determining whether the award reinstating the employees was unenforceable as a matter of law.

The 1990 decision of the Appellate Court in *Department of Central Management Services v. AFSCME*[38] reflects the interplay between public policy considerations and whether the reviewing court is prepared to defer to an arbitrator's findings. In that case, the Appellate Court held that an arbitrator's decision to reinstate a discharged correctional officer who had used drugs in an off duty social situation with a former convict was not enforceable. The arbitrator in reinstating the employee on a "last chance" directive, including random drug testing for two years, had considered that she had voluntarily and successfully completed a drug rehabilitation program.[39] The Appellate Court held that public policy regarding drug use and being a correctional officer trumped the arbitrator's determination that the employee could resume and meet the requirements of her position.[40] In the same decision, the Appellate Court held that public policy prohibited the reinstatement of two other correctional officers who had engaged in battery with a recalcitrant prisoner on the basis that even if the officers' actions had been provoked and unpremeditated, any battery against a prisoner required their discharge.[41] The arbitrator had reduced the discharges to 60 day disciplinary suspensions having found that the "blows were provoked, not premeditated, and resulted from spontaneous anger."[42] The arbitrator also set aside the discharge of two other correctional officers who had witnessed the battery but failed to report the incident to their superiors, reducing the discipline to 15 day suspensions. In upholding the arbitrator's decision to reduce the discharges to suspensions, the court noted that the failure of the correctional officers to report the incident violated public policy but that the policy did not "require" their discharge.[43]

The Appellate Court in *Board of Education of School District U-46 v. IELRB*[44] set aside an arbitrator's award reinstating a discharged school bus driver. The arbitrator had found that the bus driver had driven her bus erratically on three occasions but ordered the driver to be reinstated because the school district had failed to follow the progressive discipline provisions of the bargaining agreement.[45] The agreement required a sequence of disciplinary steps before discharge except in "unusual or severe circumstances."[46] The Appellate Court held that public policy required "reasonable care" in transporting students and therefore the policy overrode the progressive discipline provisions of the agreement. The court concluded that "the grievant's driving habits [were] both severe and unusual."[47] In effect, therefore, the court made an independent determination that the record before the arbitrator substantiated that the bus driver's conduct was "unusual" or within the scope of "severe circumstances" and

therefore justified discharge. However, if that were the basis of the court's decision, one could further conclude that the court assumed responsibility for interpreting and applying the terms of the collective bargaining agreement. The alternative view is that the court reached its decision by independently determining that the bus driver's conduct violated the standards for school bus driving under the School Code. If that is the case, then the court assumed the role of being the initial trier of the facts and the law based upon the record of the arbitration proceeding. The court noted that there are statutory provisions for revocation of a school bus driver's license through the office of the Secretary of State but no action had been taken to revoke. Nonetheless, the court concluded that public policy as expressed in the School Code empowered the Court to set aside the arbitration award.

Similarly, in *County of De Witt v. AFSCME,*[48] the court set aside an arbitrator's award reinstating to a less demanding position a nurse who hit a recalcitrant patient. The court held that although the nurse retained her license and dismissal was not mandated by statute, her conduct contravened public policy and therefore her discharge must stand.

We are not making any judgement whether the arbitrator's decision in *School District U-46* was correct or not. Rather, the Appellate Court's decision reflects the tension between two judicial principles: (1) an arbitrator's award is to be enforced if it is drawn from the "essence" of the terms of the collective bargaining agreement and (2) the reviewing court has the authority to determine whether the arbitrator's award based upon the record in the arbitration proceeding contravenes the court's determination of public policy.

The willingness of the courts to balance public policy considerations with an arbitrator's findings, as reflected in the above cited cases, is to be distinguished from decisions by the Illinois Appellate Courts holding that specific provisions of a collective bargaining agreement are in conflict with statutes other than the Labor Acts and therefore unenforceable. For example, in *City of DeKalb v. International Association of Fire Fighters, Local 1236*,[49] the Appellate Court held that an arbitration award was not enforceable because it violated a statute providing for uniform pension benefits to Illinois fire fighters. In 1994, the Appellate Court, in *Board of Education of Rockford School District No. 205 v. IELRB,*[50] held that the dismissal of tenured public school teachers are solely governed by the procedures of the Illinois School Code, are not permissible subjects for collective bargaining and arbitration decisions implementing such contract provisions are not enforceable. Similarly, in *Midwest Central Education Ass'n v. IELRB*,[51] the court held that an arbitrator had no authority to reinstate a teacher who not been

renewed for employment although the procedural provisions of the collective bargaining agreement had not been followed, and in *Barrington Community School District No. 220 v. Special Education District of Lake County*,[52] the court held that under the School Code a school district alone had authority to fill teacher positions rather than a jointly administered special education cooperative. This line of authority is not within the scope of whether an arbitrator's decision is based upon the language of a collective bargaining agreement but, rather, considers whether the terms themselves are *ultra vires*.[53]

VII. CONCLUSION

The Supreme Court of Illinois in *Griggsville-Perry* intended to send a clear message that public sector arbitration awards are to be enforced and protracted litigation contesting the enforcement of awards is not favored. The decision also, by implication, instructs arbitrators to base their opinions and awards on specific contract language even if the arbitrator is utilizing the arbitrator's own standards in applying the terms of an agreement. The same instruction applies to the parties in submitting the contested issues of contract interpretation and application to the arbitrator.

The court's adoption of the Appellate Court's *Harrisburg* decision is also instructive to those who negotiate public sector collective bargaining agreements. Contract proposals which are advanced but not adopted can affect the application and enforcement of ambiguous and incomplete terms which are incorporated into an agreement.

Although the Supreme Court did not address public policy considerations in *Griggsville-Perry*, it is fair to postulate that the court will defer to an arbitrator's determination based upon the arbitration record that an employee's conduct has not prevented the employee from performing the prescribed duties and responsibilities of the position. We will not predict how and when the Illinois Supreme Court will deal with that type of issue in considering the enforcement of arbitration awards. However, if public policy has been raised or the potential exists, as a challenge to an arbitration award, there is value in an arbitrator explicitly addressing the issue in the opinion and award.

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[1] 2013 IL 113721, 984 N.E.2d 440.

[2] *Id.* at ¶ 10, 984 N.E.2d at 443.

[3] *Id.* at ¶ 24, 984 N.E.2d at 445-46.

[4] *Id.* at ¶¶ 12-14, 984 N.E.2d at 443.

[5] *Griggsville-Perry Community Unit School Dist. No. 4 v. IELRB,* 2011 IL App (4th) 110210 at ¶ 1, 963 N.E.2d 332, 334.

[6] *Id.* at ¶ 17, 963 N.E.2d at 337.

[7] *Griggsville-Perry*, 2013 IL 113721 at ¶ 14, 984 N.E.2d at 443.

[8] *Id.* at ¶ 15, 984 N.E.2d at 443-44.

[9] *Id.* at ¶ 21, 984 N.E.2d at 444-45.

[10] *Id.*

[11] *Id.* at ¶ 20, 984 N.E.2d at 444.

[12] *Id.* (quoting *Stolt-Nielsen S.A. v. Animal Feeds Int'l Corp.*, 130 S. Ct. 1758, 1767 (2010).

[13] *Id.* (citing *Chicago Typographical Union No. 16. v. Chicago Sun-Times, Inc.*, 935 F.2d 1501, 1506 (7th Cir. 1991).

[14]123 Ill.2d 216, 526 N.E.2d 149 (1988).

[15] 115 ILCS 5/1, *et seq.*

[16] 5 ILCS 315/1, *et seq.*

[17] 710 ILCS 5/1, *et seq.*

[18] *See,* e.g., Chicago *Board of Education v. Chicago Teachers Union* 142 Ill. App. 3d 527, 491 N.E.2d 1259, 1261-62 (1986).

[19] 363 U.S. 564 (1960).

[20] 363 U.S. 593 (1960).

[21] *Id.* at 597.

[22] *Griggsville-Perry*, 2013 IL 113721 at ¶ 20, 984 N.E.2d at 444 (quoting *Chicago Typographical Union No. 16. v. Chicago Sun-Times, Inc.*, 935 F.2d 1501, 1506 (7th Cir. 1991).

[23] *Griggseville-Perry*, 2013 IL 113721 at ¶ 23, 984 N.E.2d at 445.

[24] *Id.* at ¶¶ 32-33, 984 N.E.2d at 448.

[25] 227 Ill.App.3d 208, 591 N.E.2d 85 (4th Dist. 1992).

[26] *Id.* at 210, 591 N.E.2d at 86.

[27] *Id.* at 212, 591 N.E.2d at 87.

[28] *Id.*

[29] *Griggseville-Perry*, 2013 IL 113721 at ¶ 31, 984 N.E.2d at 448.

[30] *Id.*

[31] 74 Ill. 2d 412, 386 N.E.2d 47 (1979).

[32] *Id.* at 426 386 N.E.2d at 53.

[33] 124 Ill. 2d 246, 529 N.E.2d 534 (1988).

[34] *Id.* at 263, 529 N.E.2d at 541.

[35] *Id.* at 264, 529 N.E.2d at 542.

[36] *Id.* at 263, 529 N.E.2d at 542.

[37] *Id.* at 264, 529 N.E.2d at 542.

[38] 197 Ill. App. 3d 503, 554 N.E.2d 759 (4th Dist. 1990).

[39] *Id.* at 510-11, 554 N.E.2d 764.

[40] *Id.* at 515, 554 N.E.2d 766.

[41] *Id.* at 514, 554 N.E.2d 766.

[42] *Id.* at 512, 554 N.E.2d 765.

[43] *Id.* at 515, 554 N.E.2d 767.

[44] 216 Ill. App. 3d 990, 576 N.E.2d 471 (4th Dist. 1991).

[45] *Id.* at 994, 576 N.E.2d at 476.

[46] *Id.* at 992-93, 576 N.E.2d at 473.

[47] *Id.* at 1006, 576 N.E.2d at 481.

[48] 298 Ill. App. 3d 634, 699 N.E.2d 163 (4th Dist. 1998).

[49] 182 Ill. App. 3d 367, 538 N.E.2d 867 (2d Dist. 1989).

[50] 258 Ill. App. 3d 859, 629 N.E.2d 797 (4th Dist. 1994).

[51] 277 Ill. App. 3d 440, 660 N.E.2d 161 (1st Dist. 1995).

[52] 245 Ill. App. 3d 242, 615 N.E.2d 1153 (2d Dist. 1993).

[53] *See also Chicago School Reform Board of Trustees v. IELRB*, 218 Ill. App. 3d 293, 741 N.E.2d 989 (1st Dist. 2000), *vacated and remanded on other grounds* 195 Ill. 2d 549, 754 N.E.2d 1281 (2001) (upholding an arbitrator's award reinstating a laid off teacher to active employment in conformity with provisions of the collective bargaining agreement, contrasting that situation with one in which a teacher is dismissed for cause); *Chicago Teachers Union v. IELRB*, 334 Ill. App. 3d 936, 778 N.E.2d 1232 (1st Dist. 2002) (holding that provisions of a collective bargaining agreement establishing the priority for teacher summer school work was enforceable because it did not contravene the school board's statutory authority to assign teachers to specific classes).

RECENT DEVELOPMENTS

By, Student Editorial Board:

Marco Berrios, Kelly Carson, Alec Hausermann and, Stephanie Ridella

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

I. IELRA DEVELOPMENTS

A. Duty of Fair Representation

In *Green v. IFT Local 604*, 2013 WL 3934224 (N.D. Ill. July 14, 2013), the U.S. District Court for the Northern District of Illinois, in the context of a Title VII lawsuit, held that the union did not breach its duty of fair representation when it refused to represent a teacher in a tenured teacher dismissal proceeding under the Illinois School Code. Green, a member of Local 604, was dismissed from his job as a physical education teacher under the Teacher Tenure Act. Green asked the union to represent him in the Tenure Act proceedings before the Illinois State Board of Education.

Counsel for the union advised Green that neither the union nor its legal counsel could represent him, because he had repeatedly instituted litigation against the union and its legal counsel had represented it in those cases. Counsel further noted that Green owned his claim under the Tenure Act, that conflict of interest rules applied, and that the union had no duty of fair representation with respect to his claim.

Green filed an unfair labor practice charge against the union with the IELRB alleging that the union violated Section 14(b)(1) of the Act by refusing to represent him in his proceeding before the ISBE. The IELRB rejected Green's claims because his Tenure Act proceeding did not arise out of the collective bargaining agreement (CBA), and therefore the union had no duty to represent him. Then Green filed a Title VII claim against the union in federal court.

The court ruled that to establish a Title VII claim against a union, a member must show that: (1) the union violated the collective bargaining agreement between the union and the employer; (2) that the union breached its duty of fair representation by letting the breach go unrepaired; and (3) some evidence that indicates that discriminatory animus motivated the union. The court agreed with the union that Green failed to show that it violated the CBA. The court reasoned that Green's allegations arose out of the Union's refusal to represent him in challenging his dismissal under the Tenure Act, not a breach of the CBA. The court also found that the duty of fair representation under section 14(b)(1) of the IELRB did not attach to Green's Tenure Act proceedings because it took place outside of the union's position as Green's exclusive bargaining representative.

II. IPLRA DEVELOPMENTS

A. Protected Concerted Activity

In *Hazel Crest Professional Firefighters Association, IAFF Local 4087 and Village of Hazel Crest*, No. S-CA-13-005 (ILRB State Panel, 2013), the ILRB State Panel held that hanging a banner at a fire station and the placement of decals on fire trucks was concerted activity, but was not protected activity under the IPLRA. Beginning in 2002, the Association hung a banner in one of the fire stations and placed decals on fire trucks. In 2011, a new city manager, after an extensive review of the collective bargaining agreement, village ordinances and codes, and the minutes of the previous five to six years of village trustees meetings, ordered the banner and decals removed because such displays were inappropriate in government workplaces.

The State Panel, balancing the employer's managerial decision-making power and property rights against public employees' right to engage in concerted activity, held in favor of the employer's right to control whether the banner and decals were displayed on its property. The Panel cited a number of NLRB precedents where the Board held in favor of employer property rights when the issue was the use of employer equipment in the exercise of otherwise protected, concerted activity. The Association did not present persuasive evidence that the removal was motivated by discriminatory animus, and absent such evidence could not prevail.

B. Representation Proceedings

In *Auer and Town of Normal (Public Works Department) and Laborers Int'l Union of North America*, Case No. S-RD-12-006, 30 PERI ¶ 32 (ILRB State Panel 2013), the ILRB State Panel, in a 3-2 decision, rejected the ALJ's recommendation

that the incumbent union had prevailed in a decertification election on the basis that two challenged ballots were cast by ineligible voters, and therefore, should not be counted.

Out of the forty ballots already counted, twenty were for the incumbent, nineteen were against, and one was void. Thus, the two challenged ballots could affect the election outcome.

The petitioner, who was one of the employees whose ballots were challenged, and employer argued that although the two ballot casters in question were not on the active roster of employees, they had a reasonable expectation of future employment, and therefore, their ballots should be counted. In contrast, the incumbent union argued that the two ballot casters did not have a reasonable expectation of future employment.

The State Panel noted that to be considered in a bargaining unit, and eligible to vote, a person must only have a reasonable expectation of future employment. The two ballot casters at issue were hired as six month employees whose terms ended a few weeks prior to the election. If the term employees wished to work the next year they had to fill out a new application every cycle, but it was indicated by the employer that if term employees did a good job, term employees' prospects of being rehired were good.

In coming to the conclusion that the two ballot casters did have a reasonable expectation of future employment, the ILRB accepted the four factors identified by the ALJ, which were used in practice by the NLRB, but the ILRB's use of the factors led it to a different conclusion than the ALJ. The four factors identified by the ALJ and adopted by the ILRB for considering whether someone has a reasonable expectation of future employment are: 1) the employer's past experiences; 2) the employer's future plans; 3) the circumstances surrounding the layoff; and 4) what the employee was told about the likelihood of recall.

The ILRB agreed with the ALJ that the employer's future plans were unclear, but disagreed that this made the second factor weigh against a finding of a reasonable expectation, and rather, found the second factor to have neutral weight. The ILRB agreed with the ALJ that the third factor strongly weighed against any reasonable expectation of future employment because the ballot casters were term employees with a definite end date to their employment. However, the ILRB also determined the ALJ had erred in finding the first and fourth factors weighed against a reasonable expectation, and determined that both actually weighed in favor of one. The first weighed in favor of a reasonable expectation because the employer did

have a history of rehiring its term employees, specifically ones who had performed well like the two ballot casters. Finally, the fourth factor favored finding a reasonable expectation of rehire because there was almost certainly going to be work that needed to be performed and the town itself was unlikely to go out of business. In addition, the ballot casters had been told that they had done a good job and the employer would like to have them back.

Weighing these factor, the ILRB found that the two ballot casters did have a reasonable expectation for future employment, and therefore, rejected the ALJ's recommendation and ordered the two ballots to be opened and counted and the results of the decertification petition be retabulated.